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Introduction—Corporate and Securities Law Responses to Climate Change: Law and Political Economy Perspectives

Global warming not only poses an existential problem for humans and the natural world, but also a fundamental challenge for businesses and the laws governing them. While only a few years ago, the climate crisis was considered separate from—even irrelevant to—corporate and securities law, it is now an urgent subject in both fields.[1] In this special issue of the *Journal of Law and Political Economy*, we present new research at the intersection of corporate and securities law and climate change. If, going forward, business and securities law evolves to ignore global warming's risks for businesses and markets, this result will reveal the fields' politicized, ideological parameters, not global warming's irrelevance to them.

And yet everything is in flux. After more than a decade of exciting foment, as we prepare to publish this volume, the second Trump administration is rolling back the nation's climate commitments, including commitments to more sustainable business and financial practices. The United States has abandoned the Paris Agreement, again. The president has unsettled the domestic clean energy industry with a new trade war and threatens to undo the Inflation Reduction Act's green energy provisions. He has created a sovereign wealth fund that will invest heavily in fossil fuels and empowered the Department of Government Efficiency ("DOGE"), along lines outlined in Project 2025, to gut regulatory agencies such as the EPA. The SEC's climate risk disclosure rule, promulgated in 2024, died before it was implemented. The proliferation of anti-ESG bills in red states is redirecting state capital allocation towards fossil fuel investments. In cases brought by ideologically constituted nonprofits (such as the Koch-linked Cause of Action Institute, which represented plaintiffs in *Loper Bright Industries v. Raimondo*), the Supreme Court has diminished the power of the EPA to rein in industrial pollution. All of this is backlash against government's role in spurring collective action to limit greenhouse gas emissions.

This introductory essay has two parts. First, we address differences between the Law and Economics perspective and the Law and Political Economy (LPE) perspective on business and securities law and climate change. For example, an LPE approach—with its concern for discerning winners and losers and how power operates through law—rejects the facile separation of public and private law concerns.

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[1] Additional evidence of this recent salience includes the European Corporate Governance Institute's new working paper series on business, finance, and climate change, as well as Columbia Law School's Millstein Center's first ever conference on the subject, entitled "The New Climate Fiduciaries," held February 21, 2025.

LPE repudiates the common notion that business law is and should solely be about maximizing shareholder wealth, with all else falling to government ex post. Indeed, elsewhere we have written about this as a misleading and harmful "separate spheres" conceit (Stevelman and Haan 2020). To the contrary, businesses and their investors must and do incorporate climate risks into their basic forecasts and strategic analyses, melding public and private concerns. And recent legal changes to board committee service mean that directors are more active in leading this process—no longer content merely to limit agency costs. Hence, environmental matters, once thought of as the province of public law, are now essential features of corporate and securities law, as the scholarship herein demonstrates. Moreover, especially after *Citizens United v. FEC*, it is obvious that businesses themselves do not adhere to a separate spheres approach. Rather, they actively deploy their capital to shape political and legal outcomes to their advantage.

In the second section of this introduction, we survey the eight articles presented herein, addressing them, in pairs, as complementary treatments of core issues in this evolving field.

I. From a Law and Economics to a Law and Political Economy Orientation

From the 1990s up to the global financial crisis, most research in so-called private law in the US reflected the influence of the Law and Economics movement, and especially neoclassical economics. The language of *efficiency*, *private ordering*, *consent,* and *transaction costs* became ubiquitous in private law fields. Legal scholars built on economic theory, particularly the rejection of Keynsianism and embrace of either Adam Smith's or Hayek's school of economics. The endorsement of laissez faire by both schools produced an approach to so-called private law that favored legal minimalism—that is, contract, property, and anti-fraud provisions. While even Law and Economics scholars looked to state power to enforce these laws, they reified bargaining as the key to wealth creation. The goal, including in corporate governance law of this ilk, was to promote economic growth on a "rising tide lifts all boats" or "trickle down" theory, without regard to its distribution. This orientation has compounded wealth inequality and social unrest. Although Law and Economics scholars in corporate law did not enunciate their separate spheres, growth-trumps-everything view, such clarification has been more forthcoming in scholarship emerging after the global financial crisis. Law and Political Economy scholarship has helped illuminate the values and assumptions encoded into corporate law as the result of the Law and Economics conceptualization (McCluskey 2023; Pistor 2019).

The field of LPE also has a long intellectual history and, in its earlier form, focused much of its analysis on the "corporation problem" (Perkins 1912; Cook 1891). Robert L. Hale, an economist and professor at Columbia Law School in the early twentieth century, is considered a progenitor of modern LPE. Hale riffed on Locke in describing property and contract as establishing the accepted *boundaries* of coercion, rather than reducing or eliminating coercion from transacting.[2] For LPE thinkers, all law involves choices about who will gain and who will lose wealth and power. In addition to economics, history is taken seriously by LPE scholars—including its lesson that dangerous pitchforks and destabilizing revolutions are never far off. An awareness of history reveals that legal systems ignore fairness and democracy at their peril.

[2] Hale's core argument, across numerous publications, was that government regulations do not, as a conceptual matter, interject coercion but rather redistribute the coercion unavoidably inhering in any system of private property. For an intellectual history of Hale's pertinent works, see Fried (1998).

The LPE approach asks: Who shapes traditional versus progressive climate policies at corporations, and who will benefit or lose from these choices? How is power expressed through or masked within traditional corporate governance—including structures that omit subjects and voices as illegitimate? How are corporations and industry using political action committees, think tanks, § 501(c)(4) nonprofits, and trade groups to destabilize climate policy via lobbying, campaign finance, and dark money PR campaigns? Corporate and securities law define "materiality" in terms of information a reasonable shareholder would want to know because it alters the total mix of information available. LPE observes that legal arrangements themselves shape who these investors are, and what they understand as reasonable or important for them to know and have purchase on.

We find corporate and financial laws once again at a crossroads. The conservative, "shareholder value" ethos that predominated for the past thirty-five years (Stout 2012) had seemed to be yielding to a more expansive approach. Financial services firms and proxy advisory firms embraced environmental, social, and governance (ESG) risk stewardship. Elite conversations about corporate purpose flourished, as did corporate codes of conduct, mission statements, and voluntary corporate social responsibility (CSR) reports. Stock exchanges embraced board diversity goals. Shareholder voting for directors was changing, becoming more "activist," if not amply democratic. Although the new approach failed to register *stakeholders' voices*—those of employees, customers, and local communities—it enabled more diverse shareholder voices to be heard via shareholder proposals, including proposals that expressed concern about climate change, as well as those stakeholders.

As mentioned, with its exclusive focus on maximizing shareholder wealth (as a proxy for economic growth), traditional corporate law and governance had been oriented solely around *reducing agency costs*. The law of fiduciary duty, the state law of shareholder voting, and the federal law of disclosure (which supports voting and investment decisions) were all constructed to advance this singular goal. Corporate law sought to unleash market forces, including takeovers, in the name of reducing waste and transaction costs. Stock market prices became the signal measure of corporate performance. Boards composed of part-time, independent directors, from outside the firm, became the norm—with their role being minimized mostly to promoting accurate disclosure (to improve market transparency) and responding to stock prices, especially by rewarding or replacing management, as necessary (Gordon 2007). The problem of shareholder passivity was reconfigured as a virtue, as shareholders were encouraged to act rationally by ceding their power to boards and managers (Haan 2025). All of this was organized around the central, silent, assumption that corporate law would drive growth—while separately, government would use public law to reduce externalities and redistribute funds if necessary to prevent the social contract from crumbling.

But climate change, as the product of industry, commerce, and industrial agriculture, is the ultimate externality. As such, even the most conservative of economically informed advocates should support a government response to limit it. In this vein, for the past dozen years, it has looked like business law and market regulation would support greater collective action to limit greenhouse gas emissions and allocate capital away from the fossil fuel economy. ESG investing was attracting extraordinary capital, especially given its risk-mitigation orientation. Shareholder proposals were forcing management to take account of businesses' carbon footprints. Corporate disclosures, even the somewhat feckless voluntary kinds, were shining light on best practices in the corporate climate risk area. Corporate board participation, which has changed considerably, is taking account of these new expectations. Boards no longer are merely monitoring the value-creating work of others; they are creating value by coordinating information-synthesis and strategy formation at the board level—what we call "information governance" (Stevelman and Haan 2020). All this reflects and embodies a more credible democratic

turn in American corporate governance, with shareholders reclaiming some powers of self-government and acting to advance varied preferences through voting and activism.

And yet, since the Securities and Exchange Commission (SEC) was never able to enact a corporate political expenditure disclosure rule, corporations individually retained incentives to resist accommodating to climate change and climate risk—including through aggressive political mobilization. Deepening the corporate dark money-political action problem, the IRS's Exempt Organizations Division abandoned its responsibility to rein in corporate donations to faux charitable think tanks that were actively seeking to derail climate change mitigation efforts (Stevelman 2025). Because *voluntary* corporate political spending disclosures typically omit unflattering expenditures, such disclosures have obscured corporations' contributions to keeping the US out of the Kyoto Treaty and now the Paris Accord, and to killing off not only Clinton's proposed tax on fossil fuel use, but also Obama's Clean Power Plan. We should presume there are substantial corporate contributions behind the climate-unfriendly initiatives of the Heritage Foundation's Project 2025. Thus, the logic of separate spheres, which sustained strict allegiance to shareholder value and market laissez faire, is and has been belied by actions of the very corporate actors who assert its optimality.

As these articles reveal, the old ideas are losing their potency, while newer, exciting approaches, such as LPE, are under tremendous pressure from political backlash.

II. Introduction to the Articles in this Volume

A. Finance, Corporate Governance, and Climate Change

Two of the articles included in this volume analyze the influence of finance on corporations' responses to climate change. The Greenfield and Partnoy article approaches the issue from the perspective of internal financial accommodations—corporations' choice of a discount rate for calculating the present value of (future negative) climate impacts on their business. In contrast, Paul Rose's article looks at corporations' financial dealings with external providers of capital, specifically in the form of green bonds, to discern corporations' possible motivations for such financings. Both articles conclude that government regulation could do more in assuring that these corporate financial practices are optimized to reflect the actual scope and severity of climate risk to corporate and social welfare. Greenfield and Partnoy suggest more room for regulation in addressing firms' endemic incentives to select an excessively favorable (high) discount rate vis à vis future climate costs/risks. Rose suggests more room for government in promulgating clear, comparable disclosure standards for green bonds' issuance. Clearer, comparable standards—for example, those presented by the SEC's climate risk disclosure rule or the International Capital Markets Association—would promote the best interests of green bond investors/purchasers, and potentially, also, climate-concerned employees and shareholders. For example, they would help distinguish genuine green energy transition projects from "greenwashing" PR.

The Greenfield and Partnoy article operates principally at the level of financial theory. Its central insight is that corporations' basic institutional and market incentives will systematically yield underinvestment in preventing climate risks and damages. Given capital costs and alternative uses, companies will select a higher discount rate to value future climate impacts, thus yielding a lower net present valuation of the future damages than is socially optimal. As the authors reveal, systematically skewed incentives produce a gap in corporations' selection of the climate risk discount rate (the higher

corporate one and the lower socially optimal one)—which itself is an externality, and one not previously identified in the legal literature.

The Rose article focuses on green bond issuances, first at the level of concept (as relates to issuers' motivations), and then at the empirical level, through analysis of issuers' SEC disclosures for such bonds. Analyzing corporate motives, Rose considers green bonds' capacity to lower the cost of capital, to finance green transitions (to lower operating costs or avoid litigation), and/or to attract more or superior investors and/or employees, inter alia. Shifting to empirical analysis, Rose scrutinizes SEC disclosures for green bond issuance by 26 corporations over the years 2013 to 2021 in quarterly reports, annual reports, and proxy statements. His article presents the worrisome conclusion that the most polluting firms do not appear to be taking advantage of green bond issuance—with the exception of the highly polluting public utility, the Southern Company. Another key insight from Rose is that green bond issuance (absent a mandatory disclosure regime) appears driven more by branding/marketing motives than ones tied to addressing operational climate costs and risks.

B. Political Polarization, Corporate Governance, and Climate Change

Articles by Lisa Benjamin and Taylor Nchako and by Leo Strine illuminate how external politics is shaping corporations' adaptations to climate change. The two articles demonstrate how the polarization of climate politics has become embedded in developments in corporate and securities law. The political clout of the fossil fuel industry has operated to suppress the rational concerns of corporate investors and managers—instead cultivating a red herring, politicized "culture war." Both articles suggest that rational, beneficial corporate action has been overwhelmed by polarized political forces.

Nchako and Benjamin document the political backlash to the ESG movement, describing a series of proposed ESG-related statutes and three waves of litigation. They survey ERISA, anti-ESG, and anti-anti-ESG lawsuits. Analyzing public comments to two proposed SEC rules—the ESG Fund Disclosure Rule and the ESG Names Rule—they find that political actors, such as state attorneys general, were most opposed to the rules and most one-sided in their comments. Turning to litigation, Nchako and Benjamin show that anti-ESG lawsuits have been driven by non-investors, such as fossil fuel companies and conservative nonprofits. For their part, investors have mostly sued to enjoin *anti-ESG* laws. Finding little evidence that the anti-ESG backlash is driven by authentic investor concerns, Nchako and Benjamin show that external politics has become a primary driver of climate-related legal initiatives.

Leo E. Strine, Jr., who served as the Chief Justice of the Delaware Supreme Court from 2014 to 2019, also investigates the political dimensions of the anti-ESG movement's effect on corporate law. Strine presents a powerful account of climate misinformation. He explores George Orwell's famous concept of "doublethink" to reveal the contradictions of fossil fuel companies and their affiliates when opposing corporate and investor consideration of climate change. "[H]uman-caused climate change is an objectively undeniable economic, not just environmental and social, problem," Strine writes, and it "risks an enormous decline in economic output and . . . harm to many industries." Settled law, he argues, establishes that corporations may take climate risk into account where it is rationally related to profitability and investment return—which Strine maintains, it often is. He writes urgently of the conflict between a free society and the rampant, politically salient, disinformation campaigns influencing corporate governance. Strine's article suggests the limits of corporate and securities law to

address the challenges of climate change in a political climate lacking a robust commitment to truth-telling.

C. *Climate Change, Fiduciary Duty, and Securities Disclosure*

Putting climate change disclosure and risk management in legal context, the articles by Jay Brown and Janis Sarra examine core areas of business law in the US and Canada, respectively. Brown reviews the US securities law system of periodic reporting, using the SEC's climate change disclosure rule as a case study. Brown's article concludes that the US periodic reporting system has failed to advance with new technology, invites management bias, permits overly generic (non-specific) summaries, and is too subjective to support investors making cross-company comparisons. Sarra reviews four basic domains of business law governance in Canada—financial services oversight, competition law, corporate governance law, and securities regulation. She concludes that the first two are more robust, modernized, and attentive to climate change's impacts than are the latter. Both authors find that their securities regulators are stalled in meeting investors' expectations of candor and transparency in relation to climate change risk. Sarra notes the passage of several years since the Canadian Securities Administrators floated National Instrument 51-107, Disclosure of Climate-Related Matters, with no final rule ensuing. Similarly, Brown's overview of the structure of periodic reporting helps readers understand that the SEC's climate change disclosure rule likely was doomed from the outset. In addition, both authors' accounts of the greater demands placed on corporate boards of directors suggest that transaction cost reduction is merely one, and likely not the most compelling, of the governance expectations boards shoulder.

As Brown explores, US periodic reporting emerges from a system of loose, management-friendly principles, not exacting, objective, or comparable *rules*. An outlier, the SEC's climate risk disclosure regime had included mandatory, objective metrics—for example, for greenhouse gas emissions. The disclosure was designed to enable investors to make comparisons across companies and industries, reflecting the modern reality of diversified investing and information technology. The rule also provided for attestation by independent auditors, which was both necessary and largely unprecedented in SEC reporting outside Regulation S-X's financial parameters. As first proposed, not only did it sweep in almost all reporting companies, it also prohibited them from exercising individual, subjective discretion to omit climate risks on grounds they were (according to management) immaterial to the business. Over time, Brown explains, the rule was substantially weakened, with fewer firms being included and a materiality qualifier added—that is, even before the SEC abandoned it. He notes, also, that the Supreme Court's limitation of the scope of administrative agency authority, according to the major questions doctrine, likely drove the final nail in the rule's proverbial coffin.

Sarra charts the uneven growth in Canada's business regulation vis-à-vis climate change's impacts on companies' and investors' interests. For example, the mandates for Canadian financial services firms are formidable. Sarra notes that Canada's was the first financial supervisory authority in North America to issue guidance on climate risk management and disclosure. Canadian financial services firms must make extensive financial, operational, and strategic climate risk disclosure—with Quebec having its own, comparable oversight authority. Although Canadian regulators have yet to adopt a binding taxonomy for green finance, they are presently facilitating enforcement against false "greenwashing" statements. In a glaring comparison to US law, Sarra presents Canada's corporate fiduciary duty of care as having real bite in regard to major failures by directors in climate risk stewardship. Such failures could support derivative claims, including ones brought by non-shareholder

constituencies. In addition to the duty of care, Canadian business law also encompasses a cause of action for "oppression," which according to Sarra, might apply to reasonable expectations of risk management defeated by directors' oversights of climate risk. Yet even in Canada the path to recovery is not straightforward. Costs are a meaningful impediment to derivative actions and lawsuits for oppression. In addition, Sarra notes, no Canadian appellate court has yet affirmed the application of the statutory or common law duty of care to directors' failure to mitigate climate risk.

D. Climate Regulation on the Global Stage

Jeff Schwartz and Peer Zumbansen present work that is both global in scope and deeply critical of US approaches to regulation of corporate environmental and social impacts. Schwartz provides a cautiously optimistic account of recent European Union (EU) regulation and describes the passing of the leadership baton on climate regulation from the United States to the EU. Zumbansen uses EU regulation to explore tensions at the heart of global supply chain regulation, providing a less optimistic account. Both scholars use the EU's 2024 Corporate Sustainability Due Diligence Directive (CSDDD) as a jumping-off point to compare the specifics and values at play in this global regulatory project.

Schwartz examines two key components of the EU's "European Green Deal"—the CSDDD and the Corporate Sustainability Reporting Directive, or CSRD—and argues that their implementation makes the EU the "de facto global ESG standard-setter," pushing the United States to the margin of this important regulatory space. As he shows, the EU's directives go much further than US climate regulation and will apply to US firms, thereby circumventing many of the regulatory hurdles (for example, "moribund debates about financial materiality and shareholder primacy") that have bogged down regulation in the US. Because the EU directives better align with the policy preferences of most Americans, he argues, Americans should welcome this development.

Zumbansen uses the battle over these recent EU regulations to disaggregate and critique the "private law primacy" that has defined our twenty-first-century political economy through market governance, self-regulation, and soft law. He describes formerly public functions being "sucked into the tractor beam of neoliberal state transformation" where, by fusing with markets, they were transformed into a parody of "freedom" that has made us all less free. Zumbansen presents the 2024 CSDDD as a case study on the conflicts afflicting global value chain governance and concludes with the "sobering verdict that much of the potentially transformative character of societal 'self-regulation' appears to have merely resulted in further eroding the grip of democratic control over markets and market actors."

It is hard to disagree with this assessment.

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