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Foreword (The Economic Structure of Corporate Law at Thirty: A Retrospective on the Work of Easterbrook & Fischel)

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Foreword

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One cannot become a professor at the University of Chicago Law School without being told to read Frank Easterbrook's *Cyberspace and the Law of the Horse*.¹ When colleagues ask, "isn't this just the law of the horse?," they are asking if a paper is contributing to our understanding of general and trans-substantive rules, or if it is "shallow" and "miss[es] unifying principles."²

In that article, Easterbrook was making a broad point about the proper domain of legal scholarship. In his opinion, "the best way to learn the law applicable to specialized endeavors is to study general rules"³ and seek to understand "what features of existing law are optimal."⁴ Otherwise, he cautions, we are "at risk of multidisciplinary diletantism."⁵

Easterbrook's anxiety about legal categorization underscores the importance of the contribution he and Dan Fischel made when they published *The Economic Structure of Corporate Law* (ESCL)⁶ thirty years ago. The field of corporate law is emphatically not "just the law of the horse." And that is in no small part a result of Easterbrook and Fischel's scholarship and influence in the area.

ESCL defines the corporation as a nexus of contracts.⁷ Investors, employees, consumers, and really all those who might be involved with the business, choose whether to engage with the firm based on the terms being offered. They invest because the returns are attractive and the terms are favorable, they take the job

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¹ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. L. FORUM 207 (1996).

² *Id.*

³ *Id.*

⁴ *Id.* at 208.

⁵ *Id.* at 207.

⁶ FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1996).

⁷ *Id.* at 12.

because the pay is sufficient and they like the benefits, or they buy the product because it is backed by the right kind of warranty. Corporate law provides the default template or structure for organizing the terms of these varied relationships. The stakeholders contract with each other not one-by-one but rather through their agreements with the corporate entity. This nexus approach to structuring the network of ongoing relationships reduces transaction costs and allows each participant to engage in greater specialization.

On this view, the corporate form can provide useful standardization through default terms that most parties can treat as off-the-rack contracts.⁸ But there is no reason to bind any corporation to these defaults. From Easterbrook and Fischel's perspective, when the needs of a particular firm differ, corporate law should provide flexibility so that managers and directors can establish whatever corporate structure suits their firm's individual needs.⁹

These organizing principles provide the basis for Easterbrook and Fischel's insights across an array of corporate law topics, including voting, appraisal rights, mandatory disclosure, and others. Consider the opening chapter of *ESCL*, which draws from these principles to dispose of one of the most enduring debates in the field of business law:

An approach that emphasizes the contractual nature of a corporation removes from the field of interesting questions one that has plagued many writers: what is the goal of the corporation? Is it profit (and for whom)? Social welfare more broadly defined? Is there anything wrong with corporate charity? Should corporations try to maximize profit over the long run or the short run? Our response to such questions is: "Who Cares?" If the New York Times is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning actually consented, and those who came in later bought stock at a price reflecting the corporation's tempered commitment to a profit objective. If a corporation is started with a promise to pay half of the profits to the employees rather than the equity investors, that too is simply a term of the contract. It will be an experiment. We might not expect the experiment to succeed, but such expectations by strangers to the bargain are no objection. Similarly, if a bank is formed with a

⁸ *Id.* at 34.

⁹ *Id.* at 105.

declared purpose to prefer loans to minority-owned businesses, or to third-world nations, that is a matter for the venturers to settle among themselves. So too if a corporation, on building a plant, undertakes never to leave the community. Corporate ventures may select their preferred “constitencies.”¹⁰

Under Easterbrook and Fischel’s nexus-of-contracts approach, there is no “right” answer to what corporate purpose should be because the relevant parties can and should define for themselves whatever corporate purpose they want. Of course, this approach assumes that we know who the relevant parties are, and the normative value of this freedom of contract assumes that markets can efficiently answer the corporate purpose question by allocating the use of and control over capital.

Many high-profile corporate law debates today occur because one disagrees with one or more of the principles Easterbrook and Fischel put forth or the assumptions underlying them. Do investors really want to maximize shareholder profits, or do they want to pursue additional goals? Is the market for corporate control an effective tool for disciplining corporate agents when managers and shareholders want to pursue goals beyond shareholder profit maximization? If shareholder profit maximization is not the exclusive, or even the primary goal of a corporation, then who gets to decide what is? If the government fails to regulate effectively, should managers be empowered to pursue prosocial goals?

This symposium volume, published as the inaugural issue of *The University of Chicago Business Law Review*, reprises many of the questions Easterbrook and Fischel raised thirty years ago. Some of the contributions consider how Easterbrook and Fischel’s insights would apply to new or different contexts. Saul Levmore suggests that the single-purpose paradigm Easterbrook and Fischel defend in the context of large corporations could produce desirable outcomes for nonprofits. Albert Choi, Stephen Choi, and Adam Pritchard propose reforms to allow a corporation’s shareholders to vote on securities class actions. They defend their proposal with the Easterbrookian and Fischelian insight that the move would “preserve the benefits of the class action system while curtailing its cost.” Ghezzi, Mosca, and Passador consider the relevance of the book’s insights to corporate voting rights in the Italian context. Allen Ferrell suggests that Easterbrook and Fischel’s

¹⁰ *Id.* at 35–36.

attentiveness to sophisticated financial analysis has been borne out in securities class actions.

Some of the more provocative contributions probe disagreements Easterbrook and Fischel had in their earlier writings to shed light on current corporate law debates or suggest conditions that might alter the co-authors' analyses. For example, Jonathan Macey prefers Fischel's approach to insider trading. Caley Petrucci and Guhan Subramanian consider whether the growth of ESG might change both authors' views on the desirability of poison pills. Todd Henderson accepts Easterbrook and Fischel's invitation to consider how the legal system might improve upon the market in regulating corporate governance by exploring the potential for a public cause of action for fiduciary duty breach.

A recurring question in the contributions to this symposium issue is whether ESCL's assumptions hold up today, with Michal Barzuza, Quinn Curtis, and David Webber arguing that although shareholder preferences have changed, the market continues to shape corporate decision-making. Still others look at specific corporate developments—Jill Fisch considers corporate purpose proposals and Jessica S. Jeffers and Anne M. Tucker evaluate side letters—to see if the assumptions that underlie the theory of the corporation as a nexus of contracts remain accurate today. Marcel Kahan and Scott Hemphill develop a model to explore how anticipated effects on firm profits affect equilibrium ownership structure in a contribution to the common ownership debate. Ed Rock underscores the continued relevance of Easterbrook and Fischel's intuitions in the corporate purpose debate.

Even Easterbrook and Fischel's most vocal critics are engaging on the terms established in ESCL. Leo Strine and Aneil Kovvali, for example, argue that "Easterbrook and Fischel failed to contend with the real-world realities that allow investors to profit by shifting distributions and political power to themselves, while shifting costs and risks to workers, creditors, consumers, and taxpayers."¹¹ Oliver Hart and Luigi Zingales challenge the model of shareholder primacy, arguing that "the [shareholder value maximization] paradigm cannot explain what shareholders are actually pressuring companies to do."¹² Strine and Kovvali think that shareholders can exert political power to disadvantage other

¹¹ Aneil Kovvali & Leo E. Strine Jr., *The Win-Win That Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307 (2022).

¹² Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 196 (2022).

corporate stakeholders, and Hart and Zingales think that shareholder preferences turn out to be heterogenous. Both of these critiques disagree with the explanatory power of Easterbrook and Fischel's approach but accept that the central academic questions in corporate law are about the limits of contract in determining corporate activities.

Some of the most touching moments of the symposium occurred when participants credited Easterbrook and Fischel for sparking their interest in corporate law. Lucian Bebchuk, for example, first started writing about corporate law because he disagreed with Easterbrook and Fischel's approach to takeovers. Todd Henderson likewise notes his "great fortune—perhaps the greatest of [his] life—to learn from both Easterbrook and Fischel" and that, as a teacher and researcher, he "live[s] in the world they created." Ed Rock writes that "while . . . ESCL is rarely the last word on any corporate law issue, it often is the first word."¹³

Easterbrook and Fischel may not have resolved conclusively the questions they raised in ESCL—a fact made clear from the contributions to this symposium, many of which are critical. But thirty years after Easterbrook and Fischel published ESCL, it is also clear that corporate law does not have a law of the horse problem. One reason corporate law is a field in and of itself, rather than merely a subfield of law and economics, or contract, or agency law, is that Easterbrook and Fischel managed to identify many of the questions that make corporate law a distinct field of study.

This symposium is the result of a happy coincidence: the thirtieth anniversary of the Economic Structure of Corporate Law coincided with the inaugural issue of *The University of Chicago Business Law Review*. We are enormously grateful for the tireless work by this year's editors, led by Lucy Kirichenko, Megan Ingram, and Rob Clark. Given the influence the University of Chicago has had on corporate law scholarship, we hope that this venue will prove an attractive outlet for business law scholarship. It is only fitting that the first issue commemorates one of the seminal business law achievements in the history of the University of Chicago.

¹³ Edward B. Rock, *Easterbrook and Fischel on Corporate Purpose*, 1 U. CHI. BUS. L. REV. 415 (2022).