Securities Regulation and Big Business

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Securities law is an underappreciated part of a regulatory system that checks the power of big business. Corporate power has three essential elements: market power, managerial power, and allocative power. Antitrust addresses abuses of market power, corporate law limits managerial power, and securities regulation strives to ensure that only worthy companies gain the power to allocate societal resources. This Article shows how the problem of big business has consistently been a concern of federal securities law. In the early part of the twentieth century, both social reformers and economists viewed disclosure as a way of revealing the inefficiency of the trusts. In the modern era, securities law has become an important way of regulating large companies as market valuation has become the primary measure of corporate size. Unlike populist antitrust law, securities regulation accepts bigness and, in some ways, even encourages it. Viewing securities law through the lens of corporate power suggests that the very largest public companies should be subject to heightened disclosure requirements.

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INTRODUCTION

Towards the start of the twentieth century, big businesses were primarily created through mergers engineered by Wall Street financiers. The federal government enacted antitrust statutes to check the power of trusts that put numerous competitors under the control of one entity to stifle competition.[1] Corporate bigness has never been precisely defined,[2] and for a period was judged by a variety of metrics such as a corporation's assets or the number of its employees.[3] A century later, the size of a corporation is now mainly measured by its market valuation. Even a company with billions of dollars in assets will have a low market value if it does not persuade investors that it will continue to generate profits.[4] Without the ability to access capital, a corporation

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1 *See, e.g.*, Sherman Act, 15 U.S.C. §§ 1–7 (2022) (establishing antitrust regulation).

2 For an extensive discussion on the question of "What Is Big Business?", see GLENN PORTER, THE RISE OF BIG BUSINESS, 1860-1910, at 1-30 (1971). The author concludes that big business is characterized by "its capital requirements; its cost structure; its market power; the nature of its ownership; the geographic scale on which it operated; its performance of a variety of economic functions embodied in a range of goods and services; its managerial and administrative requirements; its anonymity and impersonality; and its great wealth, power, and influence in American society." *Id.* at 28.

3 *See, e.g.*, GEORGE J. STIGLER, *The Case Against Big Business*, FORTUNE MAG., May 1952, at 123 (defining bigness "in terms of the company's share of the industry in which it operates" or "assets, sales, or employment"); *see also* RICHARD J. BARBER, THE AMERICAN CORPORATION: ITS POWER, ITS MONEY, ITS POLITICS 7 (1970) (linking size of General Motors to the number of its shareholders, employees, suppliers, and plants); ELWOOD N. CHAPMAN, BIG BUSINESS: A POSITIVE VIEW 9 (1972) (defining a "big company" as having "a minimum of 1,000 full-time employees and a maximum of 10,000"); CORWIN D. EDWARDS, *Conglomerate Bigness as a Source of Power*, *in* BUSINESS CONCENTRATION AND PRICE POLICY 331, 334 (National Bureau Committee for Economic Research ed., 1955) (noting that a company's size is measured by "assets, its income, its expenditures, its sales, or its employment"); J.D. GLOVER, THE ATTACK ON BIG BUSINESS 3-6 (1954) (listing various ways of defining the size of a business); TWENTIETH CENTURY FUND CORP. SURVEY COMM., BIG BUSINESS, ITS GROWTH AND ITS PLACE 2 (Alfred L. Bernheim & M.J. Fields eds., 1937) (describing "giants" at the end of the 1930s as companies "with total assets of at least $50 million or total net income of at least $5 million").

4 A number of scholars have noted the significance of future performance in valuing public companies. *See, e.g.*, MARK J. ROE, MISSING THE TARGET: WHY STOCK-MARKET SHORT-TERMISM IS NOT THE PROBLEM 89 (2022) (observing with respect to the largest public firms, "[t]heir current earnings cannot justify their persistently high stock price; only a belief that they will grow over the long-term can"); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 748-53, 787-88 (2017) (noting that Amazon's stock

will not have the economic power that characterizes a big business.[5] Because it regulates the disclosure of information that is the basis for a company's stock price, federal securities law is now an essential part of the legal framework governing the conduct of big business.

There is renewed interest in checking the power of big business.[6] Antitrust law is the main arena in which ongoing debates about

price is based on the perception that its market power will generate profits into the future).

[5] An essential feature of a big business is that it exercises a certain level of power. *See, e.g.*, CORWIN D. EDWARDS, BIG BUSINESS AND THE POLICY OF COMPETITION 28 (1956) (noting that "[t]he distinctive power of big business is derived from its bigness").

[6] *See, e.g.*, Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1223 (2022) (noting that "[b]usiness entities are among the world's most significant economic actors, growing in number at an extraordinary rate" with "operations" that "significantly impact all dimensions of sustainability"); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 501 (2020) (explaining that "one of the great corporate law challenges has been to develop regulatory systems that enable the productive use of the form while ensuring that corporate wealth and power are channeled in a prosocial direction"); Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203, 206 (2022) (considering claim that "the biggest corporations are actually the least governable, unfazed by the prospects of legal liability and market discipline"); *see also* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 98-99 (2023) (acknowledging problem of corporate power but noting that duties to stakeholders would not address it); PETER DAUVERGNE, WILL BIG BUSINESS DESTROY OUR PLANET? 20-22 (2018) (describing power of big business); AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 227 (2021) (asserting that "[a] surge of corporate power has swept across the American landscape over the past few decades").

Concerns about corporate power have emerged periodically over the decades. *See, e.g.*, Mark J. Roe, *From Antitrust to Corporate Governance? The Corporation and the Law: 1959-1994*, *in* THE AMERICAN CORPORATION TODAY 102, 121 (Carl Kaysen ed., 1996) (writing in the 1990s that "[c]orporate power was the central consideration in 1959; today it would be competitiveness"). An important volume published in 1960 on "The Corporation in Modern Society" had several chapters on the problem of corporate power. One essay had the title: "The Corporation: How Much Power? What Scope?". Carl Kaysen, *The Corporation: How Much Power? What Scope?*, *in* THE CORPORATION IN MODERN SOCIETY 72, 73 (Edward S. Mason ed., 1960). Generally, the rhetoric of corporate power is associated with proposals for reform. *See, e.g.*, Oliver E. Williamson & Janet Bercovitz, *The Modern Corporation as an Efficiency Instrument: The Comparative Contracting Perspective*, *in* THE AMERICAN CORPORATION TODAY 327, 327 (Carl Kaysen ed., 1996) (observing that "those who view the modern corporation from a power perspective regard it as a deeply problematic form of organization").

corporate power occur.[7] Populist reformers have challenged the assumption that antitrust should be limited to the narrow goal of consumer protection.[8] In contrast, securities regulation has not been conventionally viewed as a way of regulating the power of large corporations. Many corporate reformers view investor disclosure mandates as ineffectual in affecting corporate behavior and instead focus on developing substantive reforms to corporate governance.[9]

For Louis Brandeis, who made important contributions to both antitrust and securities law, disclosure was an important mechanism for regulating the problem of big business.[10] Brandeis thought that trusts were only possible because financiers duped investors into funding their formation. He believed that with sufficient disclosure, the inefficiency of the trusts would be revealed. The argument that disclosure would regulate corporate power was not only advanced by social reformers. Economists such as William Ripley and John Bates Clark made similar arguments as Brandeis prior to the passage of the federal securities laws.[11] While the belief that large companies are inherently inefficient is

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7 *See, e.g.*, ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 12 (2020) (proposing that "we should be stopping mergers, breaking up big corporations, regulating aspects of big tech as a public utility" and "demanding that states and the federal government use their existing power to regulate and investigate the corporate usurpers"); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 15 (2018) (making case for reviving antitrust law to address "the rule of concentrated oligopolies and monopolies, in industries like finance, media, airlines, and telecommunications, just to name the most obvious — firms whose size allows them to treat customers and competitors with impunity"); *see also* Saule T. Omarova & Graham S. Steele, *Banking and Antitrust*, 133 YALE L.J. 1162 (2024) (arguing that banking law should be understood in part as antitrust law).

8 *See, e.g.*, TEACHOUT, *supra* note 7, at 9 (arguing that "consumer welfare standard" is part of a "false narrative").

9 *See, e.g.*, RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION: HOW THE LARGEST CORPORATIONS CONTROL OUR LIVES 106 (1976) ("The basic reason the securities laws will neither 'take over the universe' nor seriously 'imperil outside directors' is that they are restricted to a discrete set of securities transactions."); Bruner, *supra* note 6, at 1255 (concluding that "it is unsurprising that public-disclosure regimes have largely remained weak and ineffective").

10 *See* Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 21.

11 *See* JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 71-78 (1912); William Z. Ripley, *Introduction, in* TRUSTS, POOLS AND CORPORATIONS xxiii-xxix (William J. Ripley ed., 2d. ed. 1916).

outdated, it is worth noting that one of the original goals of securities regulation was to prevent unchecked growth of corporate power.

This Article situates securities law within a regulatory framework that is meant to limit the power of big business. It begins by arguing that the amorphous concept of corporate economic power can be understood as reflecting three types of power. *Market power* permits a corporation to charge prices sufficient to generate profits that justify a high market valuation. *Managerial power* is necessary to ensure expert decision-making within a large organization and to sustain market power and profits. *Allocative power* reflects the ability of companies to allocate societal resources by raising capital and is typically reflected by the company's stock market value. These three types of power are necessary for a corporation to exercise significant economic power. A separate regulatory framework governs each category of power. Antitrust law addresses abuse of market power, corporate law circumscribes managerial power, and securities law ensures that allocative power is deserved.

Federal securities law primarily seeks to ensure that only companies with sufficient market power and competent managers are trusted to allocate substantial amounts of public investor funds. This is a goal with broad support because it can be understood as not only regulating corporate power but ensuring the efficient allocation of resources.[12] By the 1970s, securities law had shifted from its corporate power roots to mainly supporting efficient markets by protecting investors from fraudulently inflated stock prices.

Over time, securities law has circled back towards regulating big businesses. Efforts to ensure allocative efficiency, such as the Sarbanes-

[12] The allocative function of stock markets has been widely recognized by legal scholars. *See, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984) (basing defense of mandatory disclosure on allocative efficiency); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and The Protection of Investors*, 70 VA. L. REV. 669, 673 (1984) (observing that "fraud reduces allocative efficiency"); Merritt B. Fox, Randall Morck, Bernard Yeung & Artyom Durney, *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331, 339-40 (2003) (noting role of IPOs and secondary markets in allocating capital). Stock prices affect the ability of companies to raise debt. *See* Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 1008-09 (1992) (noting role of stock prices in affecting ability to raise debt).

Oxley Act of 2002, have resulted in a regulatory regime that effectively presumes that public companies are large.[13] Only sizeable companies can easily afford the burdens of securities law. As public companies have grown larger and more powerful, arguments that social responsibility concerns are relevant in allocating investor capital to such corporate giants have gained traction.[14] Ironically, regulation responsive to such concerns could further encourage bigness in public companies.

An interesting implication of conceptualizing securities law as a regulator of corporate power is that uniform securities disclosure requirements may not always be appropriate. The federal securities laws generally treat most public companies the same without making substantial distinctions based on corporate size. Instead, this Article contends that the largest public companies should be subject to more stringent disclosure requirements than the typical public company. Federal securities regulation should require public companies with market valuations of $100 billion or more to comply with heightened Environmental, Social, and Governance ("ESG") disclosure. In doing so, securities law will help ensure that investors can monitor whether the most powerful public companies are using their power to allocate capital ethically.

In analyzing the problem of economic corporate power, this Article develops a law and political economy reading of the federal securities laws.[15] Allocative *efficiency* is the primary rationale for mandatory disclosure regulation, but disclosure can also serve to check the

[13] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

[14] Cynthia Williams has argued that the federal securities laws were meant to enable investor monitoring of corporate responsibility. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1227 (1999) (noting that the legislative history of the securities laws was "quite explicit about the use of disclosure (supported by broad liability provisions for inaccurate and incomplete disclosure) as a regulatory means to foster greater public accountability in the corporate enterprise").

[15] *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1818-23 (2020) (contrasting efficiency and power). Some of my earlier work also argued that securities regulation cannot be understood solely in terms of efficiency. James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 662-74 (2007).

allocative *power* of the very largest public companies. Viewing securities law through the lens of corporate power reveals new possibilities for approaching the regulation of public companies.

This Article proceeds in six parts. Part II develops a typology for understanding corporate power. It distinguishes between market power, managerial power, and allocative power. It shows how corporate size is contingent on establishing all three types of power. Part III discusses how these categories of power are regulated by antitrust, corporate, and securities law. Part IV shows how even as the justification for securities law shifted to efficiently allocating resources, concerns about big business have persisted. Part V argues that the SEC should condition access to capital markets by the largest public companies on ESG disclosure that will permit investors to monitor whether such companies are ethically allocating capital. Part VI concludes.

I. CORPORATE POWER

This Part sets forth an account of how corporations become large enough to assert substantial economic power.[16] There are three major types of power that are necessary for a corporation to develop significant size and economic influence. The first is *market power*, the ability to charge prices sufficient to generate profits. The second is *managerial power*, the concentration of decision-making authority in competent managers. The third is *allocative power*, the ability to access and allocate funds to projects that maintain and grow a corporation's

[16] This Article focuses on economic power rather than the broader issue of political power. Economic power can translate into political power. *See, e.g.*, Kaysen, *supra* note 6, at 99 (observing that "[t]he market power which large absolute and relative size gives to the great corporation is the basis not only of economic power but also of considerable political and social power of a broader sort"); Jens Dammann & Horst Eidenmuller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963, 967 (noting the "risk that large corporations may use their enormous financial and technological resources to undermine the functioning of democratic institutions"); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) (describing how antitrust addresses "a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all").

economic influence. Market power and managerial power are necessary for a corporation to develop allocative power.

A. Market Power

The foundation of corporate size is market power. In an article from the 1950s on the subject of corporate power, the legal scholar Abram Chayes defined market power as "the ability to control, within relatively broad limits, the price and quality of products made and offered for sale."[17] Adolf Berle observed that "[t]he first great power of corporate management is its capacity to determine the price for the products or services sold by it."[18] The economist Gardiner Means observed that "the power over price" is "central" to a corporation's "economic and political powers."[19] Without the ability to set prices, a corporation cannot generate consistent profits.[20] Without predictable profits, a corporation will not have the resources to grow. Without expansion or the prospect of expansion, a corporation will find it difficult to access capital markets that fund continued growth.

A firm with market power has escaped, to some extent, the hypothetical force of perfect competition. Antitrust scholars Carl Kaysen and Donald Turner observed that "[a] firm possesses market

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[17] Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 6, at 25; *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984) (observing that "as an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market"); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (explaining that "[m]onopoly power is the power to control prices or exclude competition"); Roe, *supra* note 6, at 108 (noting "power to set prices, to raise them, to lower them; power to increase quantity of production; power to innovate or not"); Benjamin Klein & John Shephard Wiley Jr., *Market Power in Economics and in Antitrust: Reply to Baker*, 70 ANTITRUST L.J. 655, 656 (2003) ("The economic definition of market power is the degree to which a firm's demand deviates from this perfect competition assumption of flat demand."). It is important to acknowledge that definitions of market power can differ. *See* Alan J. Daskin & Lawrence Wu, *Observations on the Multiple Dimensions of Market Power*, ANTITRUST, Summer 2005, at 53.

[18] ADOLF A. BERLE, POWER 199 (1967).

[19] GARDINER C. MEANS, PRICING POWER & THE PUBLIC INTEREST xix (1962).

[20] *See, e.g.*, MICHAEL D. REAGAN, THE MANAGED ECONOMY 76 (1963) ("The possession of market power means that within very broad limits a firm can manage its prices and therefore its profits, too.").

power when it can behave persistently in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions."[21] If a firm can only charge the competitive market price, its profits will be small or nonexistent. Without profits, a corporation will have little ability to expand, much less survive.

A positive view of market power is that corporations earn it by developing superior products or managing a business efficiently.[22] By doing so, they win the loyalty of consumers who purchase their products and services. By consistently outworking and outsmarting the competition, a corporation can eventually establish itself and generate profits. Along the way, it creates wealth for its investors, stakeholders, and society.

Market power is also often viewed with suspicion.[23] Rather than winning the competition for consumers fairly, a corporation can resort to questionable tactics to eliminate competitors. A company may conspire with others in the industry to divide up a market and elbow out smaller firms.[24] Instead of beating the competition, a company with resources may simply acquire other firms to grow to a size where it has market power. At the end of the process, society is left with an inefficient monopoly that can exploit consumers with little threat of competition.

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[21] CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 75 (1959). It can be difficult to determine when a market is competitive. *See, e.g.*, John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. REV. 1169, 1170 (2018) (noting that "no consensus exists on how to determine the competitive level"); Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 SUP. CT. ECON. REV. 43, 75 n.60 (1993) (stating that defining market power in terms of "'deviations' from the perfectly competitive model . . . [has] no useful predictive content").

[22] *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 502 (5th ed. 2023) (noting that society can benefit from market power through "rent-seeking investments in research and development, product improvements, and innovations generally").

[23] *See, e.g.*, Chayes, *supra* note 17, at 25 (noting association of market power with the "ancient complaint of monopoly").

[24] *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 22, at 502 (noting wasteful investments in market power such as "bribing government officials, suing rivals frivolously, or pricing predatorily").

There are also differing views of whether corporations will abuse market power or use it to benefit society. Because it is not subject to the discipline of a competitive market, a corporation with market power has greater ability to set the terms of its interactions with consumers and workers.[25] A negative view of market power is that corporations will use it to charge excessive prices to consumers for an inferior product. A profit-maximizing entity will exploit any advantage to increase revenue while skimping on quality. A positive view of market power is that corporations will use the freedom provided by such power to invest in long-term growth and balance the interests of various stakeholders.[26] Instead of focusing on generating profits in the short-term to satisfy shareholders, a corporation with market power can more judiciously chart a long-term strategy that respects the interests of consumers and workers while also gradually creating shareholder value.

One recent study found evidence that the market power of companies in the U.S. has increased since 1980.[27] It measured market power by examining markups, the difference between the price a company charges for its products and its marginal costs, for all publicly traded companies in the U.S.[28] The study found that aggregate markups rose from twenty-one percent above cost in 1980 to sixty-one percent above cost in 2016.[29] It also found that the average profit rate of these companies rose from one percent in 1980 to eight percent in 2016.[30] Such profits were reflected in higher stock market valuations.[31] The

[25] *See, e.g.*, BERLE, *supra* note 18, at 143 (observing that market power "brings with it the power to impose conditions and prices on those who desire to employ labor, buy goods, or receive services, or to sell or work"); JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 6 (1967) (asserting that corporations with market power will "bend the customer to its needs").

[26] *See, e.g.*, Kaysen, *supra* note 6, at 90-91 ("In the absence of the constraints of a competitive market, the firm may seek a variety of goals: 'satisfactory' profits, an 'adequate' rate of growth, a 'safe' share of the market, 'good' labor relations, 'good' public relations, and so forth, and no particular combination need adequately describe the behavior of all large firms with significant market power.").

[27] *See* Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020).

[28] *Id.*

[29] *Id.* at 575.

[30] *Id.* at 595.

[31] *Id.* at 598.

authors of the study conclude that "[t]hese facts confirm that firms increasingly exert market power: they charge higher prices not just to compensate for higher overhead costs; they also obtain higher profits."[32]

Regardless of whether market power is abused or used to benefit society, a corporation's economic power will be limited without it. Any corporation with ambition will seek to win market power. Even if it starts in a competitive industry, the corporation's goal is to find a way to put itself in a position where it can achieve stable and consistent profits that will permit it to define its own future.

B. Managerial Power

Companies that achieve market power tend to be or become larger and more stable than companies that do not. Larger organizations are more complex and require more sophisticated management than smaller organizations. Professional managers are thus granted significant power to chart the course of a large corporation.[33] Their position of control over influential private institutions gives them disproportionate decision-making power that can significantly impact society.[34]

Size is associated with managerial power partly because the power of shareholders to influence corporate decisions lessens as organizations grow bigger. As Berle and Means, who famously described the separation

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[32] *Id.* at 565.

[33] *See, e.g.*, DAVID E. LILIENTHAL, BIG BUSINESS: A NEW ERA 22 (1953) (observing that "[t]he term 'economic power' as applied to the directors and officers of a corporation" includes "matters as wages and working conditions and hours of labor, and pensions and vacations, all of which expenditures so largely determine the cost of the products; what products the company shall make, the quality of those products and the prices to be charged for them; by what means and how much capital should be raised . . . and so on down the list of the many important decisions which must be made in the operation of a large corporate business").

[34] Commentators have often noted the link between the size of a corporation and managerial power. *See, e.g.*, Kaysen, *supra* note 6, at 102 ("Part of the power of the business leaders comes from the size of the enterprises they operate and the number of people they influence directly as employees, suppliers, customers; absolute size, in turn, is highly correlated with relative size and market power."); *see also* GALBRAITH, *supra* note 25, at 29 ("Business prestige, as a moment's reflection will suggest, is overwhelmingly associated with the size of the concern which the individual heads.").

of ownership and control in the first half of the twentieth century, wrote, "as the size of the company increases the tendency to dispersion increases."[35] Dispersed shareholders have less incentive and ability to challenge the professional managers who are running the corporation on a day-to-day basis.[36]

The Harvard economist Edward Mason once noted that "[m]arket power and managerial power reinforce each other in complex ways."[37] A strong group of managers can grow a business so that it achieves market power, giving the managers the legitimacy to control the organization. Managerial power is earned by those managers who have shown that they have mastered the business and are likely to be the best decision-makers going forward.[38] A more negative view of managerial power is that large organizations that are assembled to achieve market power are controlled by small groups of insiders who perpetuate control to benefit themselves. Rather than being appointed because of their merit, they are appointed because of cronyism.

Because shareholders are unable or unwilling to monitor corporate managers, there is a concern that managers who mismanage the corporation will not be held accountable. Instead of working ambitiously to seek new opportunities, they will be content with maintaining the status quo.[39] They will award themselves high pay packages for personal enrichment and elevated social status rather than working to increase value for shareholders. Managers may also

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[35] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 52 (1932).

[36] As Berle and Means explained, "[t]he separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear." *Id.* at 7.

[37] Edward S. Mason, *Introduction*, *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 6, at 1, 9.

[38] *See, e.g.*, James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 442-45 (2022) (describing emergence of professional managers).

[39] *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.").

inefficiently grow their corporations through acquisition so that they will be running a larger and more powerful institution.[40] The tendency of managers to expand their organizations has been viewed by commentators over the decades as a reason for substandard corporate performance.[41]

The control of large corporate organizations by a small group of managers reinforces the perception that corporate power is elitist. As Ralph Nader, Mark Green, and Joel Seligman described the issue during a period of economic stagnation during the 1970s, "[o]ur giant firms, on the other hand, have both size *and* power. A couple of hundred corporate managers, who could fit comfortably into a small auditorium, can make decisions controlling most of our industrial economy."[42] Rather than chosen by a diverse group of shareholders, managers are chosen by an insular group of directors that is essentially controlled by management.[43] The fact that the managers "selected themselves" results in a "problem of legitimacy."[44]

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[40] *See, e.g.*, ROBIN MARRIS, THE ECONOMIC THEORY OF 'MANAGERIAL' CAPITALISM 47, 53 (1964) (describing incentives to increase size of organization).

[41] *See* NADER ET AL., *supra* note 9, at 219 (noting that it is "not implausible that our largest firms may grow so large as to risk falling of their own weight").

[42] *Id.* at 16; *see also* WALTER ADAMS & JAMES W. BROCK, DANGEROUS PURSUITS: MERGERS & ACQUISITIONS IN THE AGE OF WALL STREET 59 (1989) (noting towards the end of the 1980s, "[t]he top managements of America's 200 largest industrial firms — a group any moderately sized auditorium could comfortably accommodate — collectively preside over 43 percent of the nation's value added in manufacturing, and 61 percent of its total corporate manufacturing assets"); BERLE & MEANS, *supra* note 35, at 116 ("The concentration of economic power separate from ownership has, in fact, created economic empires, and has delivered those empires into the hands of a new form of absolutism, relegating 'owners' to the position of those who supply the means whereby the new princes may exercise their power."); Phillip I. Blumberg, *The Politicization of the Corporation*, 51 B.U. L. REV. 425, 430 (1971) (noting that "[i]ncreased public concern with the activities and objectives of business also arises from the fundamental organic problem of the large public corporation – the essential lack of accountability of corporate management resulting from the widespread distribution of stock ownership and the effective separation of ownership from control").

[43] *See, e.g.*, GALBRAITH, *supra* note 25, at 2 ("They are selected not by the shareholders, but, in the common case, by a Board of Directors which narcissistically they selected themselves.").

[44] Mason, *supra* note 37, at 5.

A more positive story of managerial power is that the rise of professional managers reflects the development of management as a science. Large organizations need elite experts who can make complex decisions. Shareholders defer to managers because they trust their expertise. As one commentator described this shift, "we have passed from a corporate order whose managerial style derived from the so-called 'robber barons,' the divine-right Bayers, and the public-be-damned Vanderbilts, to the business-school-trained, public-relations-conscious professional of the highly specialized complex corporate bureaucracy of today."[45] Under this view, managers of large corporations are aware of the power they wield and seek to legitimize such power by exercising it responsibly.[46] The fact that some corporate managers do not maximize profits may be explained by their desire to balance the interests of a wide array of stakeholders rather than a desire to expand personal influence.[47]

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[45] Norton E. Long, *The Corporation, Its Satellites, and the Local Community*, *in* THE CORPORATION IN MODERN SOCIETY *supra* note 6, at 202, 205; *see also* Lilienthal, *supra* note 33, at 26 (noting "the virtual disappearance of the tycoon and the capitalist, of the newspaper cartoons so familiar in the years prior to the Great Depression"). The prowess of American managers was viewed warily in Europe, which saw U.S. corporations deploy their wealth and management skills to outcompete local European companies. *See* J.-J. SERVAN-SCHREIBER, THE AMERICAN CHALLENGE 6 (1968).

[46] *See, e.g.*, Robert L. Heilbroner, *The View from the Top: Reflections on a Changing Business Ideology*, *in* THE BUSINESS ESTABLISHMENT 1, 9 (Earl F. Cheit ed., 1964) ("[T]he emerging ideology, although continuing to pay its respects to competition, recognizes the accretion of economic power in the hands of the large corporation and then justifies this power by its responsible use."); *see also* Kingman Brewster, Jr., *The Corporation and Economic Federalism*, *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 6, at 72, 73 ("Since corporate power seems to defy traditional external check and balance, it is not surprising that the holders of the power and its victims alike should increasingly be tempted to find comfort in the discovery that even corporations have a 'conscience' — they may even have a 'soul'!").

[47] *See, e.g.*, Mason, *supra* note 37, at 11 ("Now managerial voices are raised to deny this exclusive preoccupation with profits and to assert that corporate managements are really concerned with equitable sharing of corporate gains among owners, workers, suppliers, and customers."); *see also* RALPH J. CORDINER, NEW FRONTIERS FOR PROFESSIONAL MANAGERS 23 (1956) ("A business must be managed in the balanced best interests of all groups who contribute to its success, but the efforts of all must be focused on the customer. If the customer is well served, share owners, employees, suppliers, dealers, and communities will all prosper.").

C. Allocative Power

A corporation with significant market power and strong managers will find that it has greater ability to allocate resources to various projects. It can use the profits it has generated through its market power to grow its business internally, start new businesses, or acquire its rivals. If investors believe that its managers will continue to make profits, the company can sell securities to raise substantial funds that can be directed to new investments. The power to allocate profits and investor capital enables a corporation to create value that results in a higher market valuation, giving it even more access to resources. In making allocative decisions, large corporations exercise substantial power with respect to the nation's economy.[48]

Once a company has market power, it can generate substantial profits that can be reinvested to expand its business to create more profits.[49] Granting managerial power to a small group of insiders is justified in part by the hope that they will allocate these profits wisely to promising projects within the firm. The economist Oliver Williamson described the importance of internal capital markets within large corporations where various projects compete for funding.[50] Competent managers will effectively evaluate different internal investment opportunities and direct funds to their best use. In addition to investing in projects that are developed internally, corporate managers can also invest externally.

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[48] *See, e.g.*, REAGAN, *supra* note 20, at 124 (concluding that with market power, "managers will, in accordance with some unmentioned standard, determine the distribution of income between executives, workers, and stockholders, the appropriate price level, and the amount of internally-generated investment; and by means of all these other decisions they will largely shape the social-economic structure of the society"); Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584, 1587 (2024) (reviewing BAINBRIDGE, *supra* note 6) (observing that "[m]anagers of public companies direct and coordinate staggering amounts of capital provided by a dispersed and fluid set of investors").

[49] *See, e.g.*, REAGAN, *supra* note 20, at 81 ("For the individual firm in a position of market power, the ability to set its desired rate of return enables management to finance expansion internally, whether it is plant construction or purchase of existing plants through mergers.").

[50] OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 29-30 (1975).

They can acquire companies within the same industry, seek vertical integration, or expand their businesses to other industries.

A sufficiently large corporation will not only have access to internally generated funds, it can also leverage its ability to generate profits to raise external funds from investors. The ability to sell securities essentially gives a corporation the power to allocate investor capital. Commentators over the decades have noted the advantage of size in accessing securities markets.[51] Companies with established businesses and respected managers have been able to sell securities to investors on more favorable terms than companies with little history and uncertain prospects for success. Stock markets will assign high valuations to companies that are expected to generate significant profits.[52] The fact that a corporation has market power indicates that there is a reasonable expectation that it can set prices and that its profits will not be competed away. Part of the impetus for size is the desire to create entities that "offer[] a better means of reducing uncertainty and securing more stable profits."[53] If corporate managers are effective, stock markets will trust them to take measures to maintain and expand a company's market power. A combination of market power and strong managers will typically result in a higher stock price for a corporation,[54] which gives it the ability to sell securities on favorable terms.

[51] *See, e.g.*, BERLE & MEANS, *supra* note 35, at 43 ("From 1922 to 1927 inclusive, a sample study indicated that two-thirds of all public offerings of new securities . . . were made by the two hundred largest companies or their subsidiaries."); Brewster, *supra* note 46, at 81 ("The large corporation has great advantages in tapping not only the funds but the promise of high leverage which fixed interest financing affords."); GEORGE W. EDWARD, THE EVOLUTION OF FINANCE CAPITALISM 243 (1967) (observing that only large corporations are able to sell securities and reduce reliance on bank financing); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 72 (1970) (noting that the "investment banker's approach put first priority on a corporate structure which allowed creation of large aggregations of capital and centralized inside control of corporation finances — both to take advantage of the investment market and to determine the conditions of change and stability").

[52] For some basics on valuation, see ASWATH DAMODARAN, INVESTMENT VALUATION: TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF ANY ASSET (3d ed. 2012).

[53] PORTER, *supra* note 2, at 100.

[54] For a critical account of this dynamic, see TEACHOUT, *supra* note 7, at 165-66 (describing investment strategy of identifying companies with monopoly power).

A high market valuation is not only the result of successful growth, it enables a company to create growth. Consider the electric carmaker Tesla. Initially, there were substantial doubts about its ability to mass-produce electric cars. After its market valuation multiplied ten-fold and approached $1 trillion, there were questions about whether that valuation was rational because the company had not yet succeeded in generating significant profits. One commentator noted that even if Tesla's valuation was not warranted, its high stock price made it more likely the company would become extremely profitable. With a high market valuation, Tesla could raise funds to build the manufacturing plants necessary to become an automotive giant.[55] In modern stock markets, even companies with only the *prospect* of market power can raise funds to become large.

With the power to allocate internal funds and investor capital, a corporation can expand its economic reach.[56] Access to such resources can result in even more growth.[57] New competitors will have trouble finding a foothold in a market dominated by a corporate giant. To the extent that a promising upstart gains momentum, a more established firm will have the resources to acquire the upstart before it can become a threat.[58] A corporation with substantial power to allocate resources will be able to make the important decisions that will shape its industry.

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[55] *See, e.g.*, James Mackintosh, *Missed Tesla's 12,551% Rise? Don't Feel So Bad*, WALL ST. J., Dec. 10, 2020 ("Overvalued stocks can turn into genuine businesses by exploiting their high prices, a type of self-fulfilling prophecy.").

[56] Observing that "the built-in bias in favor of inherited corporate success is very great." Brewster, *supra* note 46, at 81.

[57] *See, e.g.*, BERLE & MEANS, *supra* note 35, at 63 (reporting that "over half of the recent phenomenal growth of the great corporations was achieved through the raising of new capital in the public markets"); Eugene V. Rostow, *To Whom and For What Ends is Corporate Management Responsible*, *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 6, at 46, 65 ("Big firms having great advantages in any event in their access both to long- and short-term capital, may be able to finance expansion without subsidy, despite their relatively low profits during such periods.").

[58] *See, e.g.*, *In re* The Hain Celestial Group Inc. Sec. Litig., 2:16-CV-04581 (JS) (LGD), 2022 WL 18859055, at *27 (E.D.N.Y. Nov. 4, 2022) (noting that "inflation of stock value" enables companies to more easily acquire other firms); C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020) (raising concerns about acquisitions of competitors); Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1 (2021) (arguing that acquisitions are often motivated by desire to shut down

II. THE REGULATION OF BIG BUSINESS

The importance of market power, managerial power, and allocative power is evidenced by the fact that each is regulated by a separate body of law. *Antitrust law* is concerned with the abuse of market power. *Corporate law* sets forth fiduciary duties that govern managerial power. *Securities law* ensures that only worthy companies are given substantial power to allocate investor capital. This Part describes how antitrust, corporate law, and securities regulation have all been motivated to some extent by concerns about corporate size.[59] It discusses how each of these areas has shifted both towards and away from the regulation of corporate power.

A. *Antitrust and Market Power*

Federal antitrust law is frequently associated with the problem of big business. Because corporate size requires market power, it is natural to regulate abuses of market power to limit the economic power of large corporations. By encouraging competition, antitrust law can support an economy where smaller firms are able to undermine the disproportionate influence of corporate giants. Even though it appears to naturally address the abuse of corporate power, the role of antitrust in regulating corporate power has ebbed and flowed over time.

The case for using antitrust to regulate the exercise of market power is strongest when such power is not earned through superior performance. The original federal antitrust legislation was largely a response to the emergence of trusts, where smaller companies were

competition). On the other hand, it is possible that an acquired start-up company would not have had an opportunity to raise funds itself and an acquisition by a larger company would be an efficient outcome. *See, e.g.*, D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357 (2018) (arguing that mergers serve as essential exit avenue for startups).

[59] These three areas of law have generally been viewed separately. For an argument that these regulatory subjects should be broadened to protect a wide variety of stakeholders, see Aneil Kovvali, *Stakeholderism Silo Busting*, 90 U. CHI. L. REV. 203 (2022). This Article takes a different approach in arguing that specific categories of regulation should be primarily directed at specific problems. *Cf.* James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 137-55 (2017) (describing framework for distinguishing corporate and securities law).

combined into a larger entity to create a monopoly.[60] As Louis Brandeis described the Steel Trust, it "acquired control not through greater efficiency, but by buying up existing plants and ore supplies at fabulous prices."[61] A boom in mergers from 1897 to 1904 supported the view that consolidation — not efficiency — was driving the creation of large companies.[62] Because they were formed primarily to reduce competition and create market power, the suspicion was that such trusts were likely to abuse their market power.

For critics of big business throughout the twentieth century, large corporations harmed the economy because they were inefficient. They were too enormous to manage.[63] If they could not succeed based on

[60] One mechanism for consolidation at the turn of the century was the trust. A group of smaller companies first "turned their stock over to a board of trustees, receiving in return trust certificates of equivalent value." ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 319 (1977). The board of the trust effectively controlled the decision-making for the group of companies. *Id.* Over time, simpler ways to consolidate control over a group of companies emerged. The holding company permitted a parent corporation to own the stock of subsidiary corporations. Such holding companies emerged first in New Jersey and then in Delaware. *See* George David Smith & Davis Dyer, *Rise and Transformation of the American Corporation*, *in* THE AMERICAN CORPORATION TODAY, *supra* note 6, at 28, 39; *see also* THORSTEIN VEBLEN, ABSENTEE OWNERSHIP: BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA 332 (Transaction 1997) (1923) (noting in early twentieth century that "[t]he holding-company is no longer viewed with apprehension, as it once was; nor does it hold that dominant place in the business of credit and capitalisation which it held about the turn of the century").

[61] LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 105 (Osmond K. Fraenkel ed., 1934).

[62] During that wave, 4,227 companies were combined into 257. Smith & Dyer, *supra* note 60, at 41; *see also* KAYSEN & TURNER, *supra* note 21, at xii (concluding that "[t]he struggle against size was largely lost in the merger movement of 1897-1901").

[63] *See, e.g.*, GLOVER, *supra* note 3, at 17 (noting that "[f]rom the days of the Trusts, the proponents of big business have rested their case on the argument that it is inefficient"); GARY JOHN PREVITS & BARBARA DUBIS MERINO, A HISTORY OF ACCOUNTING IN AMERICA: AN HISTORICAL INTERPRETATION OF THE CULTURAL SIGNIFICANCE OF ACCOUNTING 85 (1979) (noting view expressed by "popular writers and prominent authorities" that "no one person or board of directors could successfully master such large organizations in a competitive environment"); *see also* Louis Brandeis, *Trusts, Efficiency, and the New Party*, *in* BRANDEIS ON DEMOCRACY 127, 132 (Philippa Strum ed., 1995) (observing that "a unit too large to be efficient is no uncommon incident of monopoly" and that "[n]ature sets a limit" on the ability to manage organizations); WILLIAM O. DOUGLAS, DEMOCRACY

merit, large corporations could only prosper through abusive tactics that destroyed competition. They undermined the competitive pressure that drove down prices and encouraged innovation. While it was possible for large organizations to emerge through superior efficiency, opponents of corporate bigness believed that market power tended to be created through questionable tactics rather than earned.[64]

The perception that consolidation created inefficient corporate giants that abuse market power supported scrutiny of the combinations that resulted in market power. During the 1950s, proponents of a structural approach to antitrust analysis thus emphasized mergers. Harvard professors Carl Kaysen and Donald Turner observed that because "[t]he history of merger movements shows clearly that mergers have been one of the major routes by which large firms achieved dominant positions in their markets," it is important for a "procompetitive program" to "prevent[]" or "[l]imit" mergers.[65] For Kaysen and Turner, an effective antitrust policy "represents (or reflects) some limitation on the general social and political power of big business."[66] For a time, the structuralist framework provided support for vigorous antitrust enforcement.[67]

A more extreme way of checking excessive corporate power would be to order breakups of corporate monopolists. To the extent that a market-dominating corporation is a collection of disparate parts that were pieced together to eliminate competition, requiring divestiture of various subsidiaries could restore competition without hampering efficiency. The structuralist approach to antitrust regulation envisioned that "remedy proposals involving structural reorganization of firms —

AND FINANCE 14 (1940) (contending that "bigness taxes the ability to manage intelligently").

[64] *See, e.g.*, BRANDEIS, *supra* note 61, at 110 ("[W]hile trusts are sometimes efficient, it is not their efficiency but the fact that they control the market, that accounts for the huge profits of trusts."); Stigler, *supra* note 3, at 162 (claiming that "most giant firms arose out of mergers of many competing firms, and were created to eliminate competition" rather than through efficiency).

[65] KAYSEN & TURNER, *supra* note 21, at 127.

[66] *Id.* at 49; *see also* Roe, *supra* note 6, at 107 ("Antitrust's concern, particularly in the 1950s, was with concentrations of economic power.").

[67] *See, e.g.*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 51-52 (2000) (describing the 1960s as a period of significant antitrust enforcement).

dissolution, divestiture, and divorcement — would occupy a much larger place in antitrust policy than they do now."[68] Some break-ups in major industries have been pursued and implemented, but the remedy has been used sparingly because its implementation is difficult.[69] There have been calls to revive antitrust breakups,[70] but it is not yet clear that federal antitrust enforcers will be able to frequently win such a remedy.

Courts have made it clear that antitrust is limited in its ability to regulate market power. Federal antitrust law does not prohibit companies from growing and acquiring market power.[71] It only intervenes when such power is abused to thwart competition.[72] To the extent that market power is developed through superior efficiency and innovation, it is less likely that a monopolist is engaging in practices that unfairly reduce competition.[73] Many of the earliest corporate giants

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[68] KAYSEN & TURNER, *supra* note 21, at 93.

[69] For an argument that divestiture would not be so difficult given the routineness of corporate spin-offs, see Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955 (2020).

[70] *See, e.g.*, TEACHOUT, *supra* note 7, at 216 (proposing that "Congress should also pass laws to break up companies by function"); WU, *supra* note 7, at 18 (concluding that antitrust "needs stronger remedies, including a return to breakups, that are designed with the broader goals of antitrust in mind"); *but see* Hiba Hafiz, *Rethinking Breakups*, 71 DUKE L.J. 1491 (2022) (observing that breakups have mixed impact on workers).

[71] *See, e.g.*, United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) (observing that "the law does not make mere size an offence or the existence of unexerted power an offence"); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 126 (1988) (stating that "[m]onopoly of manufacture or production, or dominance therein, or predominant market power, as such, whether achieved by a corporation's stock ownership in other corporations or by other means lawful in themselves, was never considered by the Supreme Court as sufficient to constitute a violation of the Sherman Act").

[72] Size and market power can create the opportunity for abuse. *See, e.g.*, United States v. Swift & Co., 286 U.S. 106, 116 (1932) (observing that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past"); *see also* United States v. Columbia Steel Co., 334 U.S. 495, 535 (1948) (Douglas, J., dissenting) (asserting that "[t]he Curse of Bigness shows how size can become a menace — both industrial and social").

[73] A wide variety of commentators agree on this point. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 168, 449 (1978) (observing that "[l]arge market shares attained by horizontal merger have always been more vulnerable to legal attack than large shares achieved by internal growth . . . ."); KAYSEN & TURNER, *supra* note 21, at 22 ("[T]he Sherman Act has been interpreted – and properly, we think

were formed through merger, but others were formed through internal growth funded by earlier success.[74] Even many of the dominant corporations that were initially formed through combination used efficient organization to grow and maintain their position. Several commentators documented how managerial skill became more sophisticated out of necessity as corporations grew larger.[75] As a result, it became more difficult to argue that market power inherently reflects inefficient forces that necessarily harm society.[76]

Over time, corporate giants became viewed as a necessity in modern markets. For example, Joseph Schumpeter argued that only large organizations could survive the waves of creative destruction unleashed by technological innovation.[77] While he was incorrect that entrepreneurs would eventually be completely supplanted by corporate

— to leave room for legal monopolies, that is, for monopolies acquired solely by competitive merit . . . ."). Even Brandeis did not view federal antitrust law as prohibiting size. *See, e.g.*, Brandeis, *supra* note 63, at 128 (observing that "neither the Sherman law nor any of the proposed perfecting amendments . . . contain any prohibition of mere size. Under them a business may grow as large as it will or can — without any restriction or without any presumption arising against it").

[74] *See* CHANDLER, *supra* note 60, at 315 (observing that "American manufacturing firms became large, multiunit enterprises in two ways, by adding marketing and purchasing offices or by merger").

[75] *See, e.g.*, *id.* at 415 (noting growth of organization in large corporations formed through merger); KENNETH E. BOULDING, THE ORGANIZATIONAL REVOLUTION: A STUDY IN THE ETHICS OF ECONOMIC ORGANIZATION 17 (1953) (describing impact of technology on firm size).

[76] In documenting the decline of the antitrust movement, the historian Richard Hofstadter noted: "Whatever else may be said against bigness, the conception of monopolistic industry as a kind of gigantic, sweeping leech on the body of an increasingly deprived and impoverished society has largely disappeared." Richard Hofstadter, *What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed*, *in* THE BUSINESS ESTABLISHMENT, *supra* note 46, at 113, 131; *see also* Earl F. Cheit, *The New Place of Business: Why Managers Cultivate Social Responsibility*, *in* THE BUSINESS ESTABLISHMENT, *supra* note 46, at 152, 182 ("Americans have accepted the big corporation, and they expect more of it."); Mason, *supra* note 37, at 1110 ("The largest corporations have grown mightily, but so has the economy."). For a more critical view of the link between bigness and efficiency, see Walter Adams & James Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1515, 1546-48 (1986).

[77] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 106 (1942).

giants,[78] the point was that size could be an advantage in navigating changing markets. As product markets became international and foreign competitors emerged, concerns about the size of domestic firms subsided.[79] There was an argument that U.S. corporate giants were necessary to counter foreign corporate giants.

Until recently, an ambitious vision of antitrust law as a check on corporate power has largely been subservient to the more focused goal of protecting consumers from excessive prices. Legal scholars and economists associated with the University of Chicago argued that goals other than efficiency were too vague to guide antitrust policy.[80] The dominant view, which is now being challenged,[81] has been that there is little need to worry about corporate size so long as companies are charging reasonable prices.[82]

Antitrust law was the first federal response to the emergence of corporations that achieved significant market power. One concern was that monopoly was created by eliminating competition rather than efficiency. Such undeserving monopolists were more likely to abuse their economic power in ways that would harm society. As corporate

[78] Schumpeter predicted that "[t]he perfectly bureaucratized giant industrialized unit not only ousts the small or medium-sized firm and 'expropriates' its owners, but in the end it also ousts the entrepreneur . . . ." *Id.* at 134. Adolf Berle expressed a similar view, concluding that an unchecked "free market" with "the advent of the large corporation . . . would have produced sheer monopoly — destroying itself in the process." BERLE, *supra* note 18, at 208.

[79] *See, e.g.*, BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 143-45 (2019) ("A common assumption during the 1970s was that competitors had only a modest impact on companies with market power. . . . *Newsweek* said in 1978 'even zealous trust- busters acknowledge that virtues do exist in the trend toward size. Bigger companies may be necessary if the US is to compete in world markets.'").

[80] *See, e.g.*, BORK, *supra* note 73, at 54 ("[S]ocial and political purposes of antitrust" are "a jumble of half-digested notions and mythologies.").

[81] *See, e.g.*, WU, *supra* note 7 (challenging dominant antitrust paradigm); Khan, *supra* note 4 (arguing that antitrust should go beyond consumer welfare).

[82] *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979) ("The Chicago school has largely prevailed with respect to its basic point: that the proper lens for viewing antitrust problems is price theory."); *see also* Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 716 (2023) ("[S]tating the antitrust threat as 'bigness' frequently reduces to an attack on low prices, the well-being of consumers and labor, and promotion of innovation as antitrust goals.").

size was viewed as reflecting merit, the role of antitrust law was narrowed to the specific goal of protecting consumers. As greater concern about big business has re-emerged, there is an argument that antitrust law should again be directed at corporate giants.

B. Corporate Law and Managerial Power

The abuse of power by managers of big businesses has primarily been addressed through corporate law. After an initial phase when corporate law substantially restricted corporate power, the state law governing most U.S. public corporations became more permissive. There have been proposals over the years to reformulate corporate governance to explicitly regulate corporate power, but such proposals have not yet gained lasting traction.

Corporate charters evolved from specific legislative acts to documents that could be filed under general laws that freely permitted the formation of corporations. The transition from limited to widely available corporate charters was slowed by state incorporation laws that set substantive limits on the power of corporations. The historian James Willard Hurst noted that these restrictions were motivated by "active concern that the corporate instrument would allow a dangerous scale of private power."[83] Thus, incorporation laws from "1780 to 1890 . . . often set limits on corporate life, purposes, and capitalization."[84] Corporate

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[83] HURST, *supra* note 51, at 152.

[84] *Id. See, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 243 (1991) ("Historically, state corporate law had been quite solicitous about corporate structure and regulated it closely."); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1486-87 (1989) ("To keep managers under control, the doctrine confined corporate activities within the parameters of a stated purpose. To keep corporations small, the doctrine limited their capital."); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2163 (2016) ("American general incorporation statutes bristled with mandatory rules that were absent in their English counterparts."); *see also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 82 (1965) (reporting that "[b]etween 1887 and 1890 the attorneys general of five states more or less enthusiastically initiated suits to dissolve corporations that exceeded their chartered powers or to destroy associations that exercised corporate powers without having charters").

law in effect could regulate the size and influence of corporations and, in doing so, prevent them from accumulating excessive power.

This initial approach unraveled and states increasingly liberalized their laws so that they were largely enabling, permitting corporations to define their governance structures with few substantive limitations.[85] According to Herbert Hovenkamp, this partly reflected the inability of corporate law to effectively regulate corporate size.[86] In discussing the move towards enabling rules, he observed that "[a]n important weakness in the corporate law model was its inability to make the distinctions necessary to permit firms to grow to a more efficient size, while prohibiting monopoly."[87] Moreover, some states encouraged corporations to form within their jurisdictions. New Jersey famously relaxed restrictions on purchasing shares in other corporations, permitting the formation of large holding companies that held stakes in multiple companies.[88] In doing so, it attracted organizers of large corporate groups, until it reversed its decision and Delaware became the main destination for the formation of big businesses.[89]

For the most part, corporate law is now more tightly focused on the narrow but important problem of managerial power rather than the broader issue of corporate power. The corporation has a board that makes major corporate decisions, including hiring officers who manage the corporation's affairs on a day-to-day basis.[90] The board's directors and officers have fiduciary duties of care and loyalty to the corporation and its shareholders.[91] When directors or officers breach such duties,

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[85] *See, e.g.*, HURST, *supra* note 51, at 84 ("Other developments in corporation law encouraged the trend toward bigness by strengthening or consolidating the relative autonomy of those holding both formal and informal central control of corporate policy.").

[86] *See* HOVENKAMP, *supra* note 84, at 257-58.

[87] *Id.* at 247; *see* HURST, *supra* note 51, at 108 (observing that federal antitrust law emerged as state corporate law became liberalized).

[88] HOVENKAMP, *supra* note 84, at 258.

[89] *See, e.g.*, Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 270-71 (1976) (outlining how the evolution of New Jersey's corporate law set the stage for Delaware to become the hub of corporate formation).

[90] *See* DEL. CODE ANN. tit. 8, § 141 (2022).

[91] *See, e.g.*, Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 368 (Del. 2006) (discussing duties of care and loyalty).

shareholders have the right to bring a derivative suit on behalf of the corporation to recover damages.[92] This basic framework helps ensure that managers are monitored so that they do not abuse their position.

Even the limited role of corporate law in regulating managerial power is complicated by the reality that law is a blunt tool for regulating complex decision-making. The business judgment rule thus instructs that courts give significant deference to the board,[93] making it difficult for plaintiffs to successfully challenge decisions based on the duty of care. As Stephen Bainbridge has explained, even when courts have a case for disagreeing with a board's decisions, they apply an abstention doctrine that recognizes the board's authority to make decisions for the corporation.[94] The duty of loyalty has more bite, but its scope also recognizes that conflicts of interest are prevalent in the business world. So long as interested transactions are fair or approved by disinterested parties such as independent directors or independent shareholders with sufficient disclosure, they are permissible.[95]

Over the twentieth century, there have periodically been attempts to broaden corporate law so that it better checks managerial and corporate power. Brandeis proposed that some of the large trusts "should be dissolved" and the "creation of new ones should be prevented."[96] State corporate law has been consistently criticized as doing too little to check managers. Federal regulation of corporations has been periodically proposed as a way of implementing stricter rules to govern managerial power.[97] William Douglas, for example, pointed to the possibility of

[92] *See, e.g.*, DEL. CODE ANN. tit. 8, § 327 (2023) (describing qualifications for filing derivative action).

[93] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[94] *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 99 (2004) ("[W]hat the abstention conception [of the BJR] contemplates is that, if the requisite conditions are satisfied, there is no remaining scope for judicial review of the substantive merits of the board's decisions.").

[95] *See* DEL. CODE ANN. tit. 8, § 144 (2010).

[96] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 160 (1914); *see also* Charles P. Howland, *Monopolies: The Cause and the Remedy*, 10 COLUM. L. REV. 91, 106 (1910) (proposing that "we should altogether forbid intercorporate stockholdings, and should impose carefully chosen limitations upon the amount of capitalization and the holding of corporate assets").

[97] MARC STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 25-111 (2018).

"federal incorporation of the giants of industry" as a way of remedying the lack of effective oversight by corporate boards.[98]

Proposals to federalize corporate governance proliferated during the 1970s.[99] Economic stagnation, the perceived slowness of corporate giants, and a variety of corporate scandals gave ammunition to reformers. The most developed proposal came from Ralph Nader, Mark Green, and Joel Seligman in their important book, *Taming the Giant Corporation*.[100] They argued that states had not been effective in checking corporate power and offered federal incorporation as the solution.[101] Their new regime would have revamped the corporate board, adding professional directors who would be more engaged and effective than the assortment of part-time directors who were passively ignorant.[102] The point of the proposal was to do more than ensure competent economic decision-making. Federal corporate law would help ensure socially responsible decisions by managers. It would require more extensive procedures to ensure corporate compliance with the law.[103] Directors would not only look after the maximization of shareholder wealth but take care of stakeholder interests in monitoring employee welfare, consumer protection, and environmental protection.[104]

The Nader, Green, and Seligman proposal was mostly forgotten during the deregulatory shift of the 1980s. The possibility of federal incorporation lay dormant for decades. It is only recently that proposals

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[98] William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1307 (1934).

[99] *See, e.g.*, MORTON MINTZ & JERRY S. COHEN, AMERICA, INC.: WHO OWNS AND OPERATES THE UNITED STATES 437 (1971) (proposing "that federal chartering replace state chartering of corporations" in order to "check and balance tyrannical power"); *see also* Victor Brudney, *The Independent Director – Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 597 (1982) (observing that during the 1970s, "[i]n response to the increasing criticism during the last decade of the evils attributed to the exercise of unbridled corporate power in the United States has come a range of suggestions for bridling such power through changes in corporate structure").

[100] NADER ET AL., *supra* note 9, at 62-71.

[101] *Id.* at 252.

[102] *Id.* at 121.

[103] *Id.* at 119-20.

[104] *Id.* at 125; *see also* Brudney, *supra* note 99, at 602 (proposing that independent directors monitor social concerns).

have re-emerged to restructure corporate law so that it plays a greater role in checking the power of large corporations. In 2018, Senator Elizabeth Warren floated an Accountable Capitalism Act where corporations with $1 billion or more in gross receipts would be required to have forty percent of their board elected by employees.[105] More recently, Matthew Bodie and Grant Hayden authored a book-length argument for *Reconstructing the Corporation*. They challenged the exclusive right of shareholders to vote on corporate matters and proposed codetermination, where workers have a greater formal role in corporate governance.[106] Scholars such as Jens Dammann and Horst Eidenmuller looked to Europe in concluding that "codetermination works effectively toward the goal of curbing corporate power."[107] Christopher Bruner has highlighted proposals to expand the potential for shareholder liability for damages caused by corporate risk-taking.[108] Chris Brummer and Leo Strine have argued that corporate law should be deployed to address the fact that corporate managers wield "concentrated power" but are "markedly unrepresentative of our nation's diversity."[109] Stavros Gadinis and Christopher Havasy proposed that corporate law should deploy a wider range of administrative tools to ensure the legitimacy of corporate governance.[110]

In addition to proposals to change corporate law, there have been proposals relating to broader corporate governance issues. For example, as just a few institutions (Vanguard, Fidelity, and State Street – the "Big Three") have achieved extraordinary market power in the investment management industry, there is a concern that they have excessive

[105] Accountable Capitalism Act, S. 3348, 115th Cong. §§ 2(2)(A), 6(b)(1) (2018).

[106] GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 172-83 (2021); *see also* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 478-79 (2022) (proposing codetermination as a way of checking concentration of economic power).

[107] Dammann & Eidenmuller, *supra* note 16, at 968.

[108] Bruner, *supra* note 6, at 1272.

[109] Chris Brummer & Leo E. Strine Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 9 (2022).

[110] Stavros Gadinis & Christopher Havasy, *The Quest for Legitimacy: A Public Law Blueprint for Corporate Governance*, 57 U.C. DAVIS L. REV. 1581, 1648 (2024).

power.[111] Because they manage trillions of dollars in investor funds, they control a substantial proportion of the shares voted at shareholder meetings.[112] Some commentators are concerned about the power of these Big Three investors. One problem is that they will do too little to monitor corporate managers because they are diversified and have little incentive to focus on the performance of particular companies.[113] Indeed, if companies in their portfolio are in the same industry, it could be in the interest of diversified investors for those companies not to compete vigorously.[114] One article argues that breaking up the Big Three would encourage competition in various industries.[115] This proposal would effectively use antitrust to break up the market power of the largest investment companies to enable the levers of corporate governance to spur managers to compete.

Other commentators believe that institutional investors can check managerial power and spur companies to adopt more socially responsible policies.[116] When investors were predominantly dispersed individuals and the costs of coordination were high, it was difficult for such investors to convey their preferences about corporate behavior. With concentration, institutional investors have fewer coordination

[111] *See, e.g.*, JOHN COATES, THE PROBLEM OF 12: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING 27-50 (2023) (describing rise of index funds).

[112] *See, e.g.*, Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why it Matters*, 102 B.U. L. REV. 1547, 1557 (2022) (estimating that Big Three institutions held a median of 27.6 percent of votes cast at shareholder meetings of S&P 500 companies in 2021).

[113] *See, e.g.*, Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy*, 119 COLUM. L. REV. 2029, 2095 (2019) (describing failure of index funds to monitor business performance and participate in corporate governance).

[114] *See, e.g.*, Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1273-78 (2016) (summarizing economic studies finding correlation between common ownership in industry competitors and higher prices).

[115] *See* Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 57-62 (2022); *but see* Coates, *supra* note 111, at 143 (noting that breaking up index funds would shift power back to managers).

[116] *See, e.g.*, Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1482 (2021) ("[I]nvestment concentration is leading investors to finally perceive themselves as 'universal owners,'" who will "put pressure on companies to reduce their negative externalities (harmful behavior).").

costs and can speak with a more unified voice. Because they are diversified, they might pursue efforts to reduce risk broadly rather than focusing on the performance of individual firms.[117]

It is worth noting that the state of Delaware, where most of the largest U.S. public companies are incorporated, has recently imposed greater demands on corporate boards to monitor corporate risk. The Delaware Supreme Court in a notable series of decisions has made it clear that boards must have systems in place for monitoring "mission critical" risks.[118] Such risks have included the safety of consumers, a key corporate stakeholder.[119] Those who exercise managerial power do not have the discretion to turn a blind eye to corporate misconduct that could harm the corporation. This evolution of Delaware law reflects growing pressure on regulators to ensure that large corporations are managed responsibly.

C. Securities Regulation and Allocative Power

Securities regulation governs the allocative power of corporations. Through mandatory disclosure and anti-fraud provisions, federal securities law helps ensure that the valuation of a company's stock fairly reflects its economic prospects. Companies with significant market power and strong managers should be able to sell securities on more favorable terms than companies without market power and with incompetent managers. The ability to raise funds in capital markets gives giant corporations significant power to put society's resources to work.

Relative to antitrust and corporate law, securities regulation is a latecomer to the regulation of corporate power. Corporations did not

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[117] *See, e.g.*, John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 615-22 (2021) (predicting that institutional investors will attempt to reduce systematic risk); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1452-58 (2020) (arguing that diversified asset managers are concerned about ESG risk).

[118] *See* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019); *see also* Roy Shapira, *Conceptualizing Caremark*, 100 IND. L.J. (forthcoming) (summarizing cases).

[119] *See, e.g.*, *Marchand*, 212 A.3d at 824 (concluding that "food safety" was mission critical); *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 Del. Ch. LEXIS 197, at *38 (Sept. 7, 2021) (faulting board for prioritizing profits over customer safety).

broadly sell securities to public investors in the United States until the early twentieth century.[120] The concern that they would misallocate investor funds was thus not as significant a policy issue. At least initially, the sale of securities was viewed as a matter for states to regulate through what became known as blue-sky laws.[121]

Federal securities regulation emerged in part as a response to the problem of concentrated power in finance. The rise of corporate trusts was associated with a small group of elite financiers. Investment bankers helped orchestrate the consolidation of smaller businesses into a single entity. They directed bank deposits and investor funds to support such large concerns.[122] They often sat on the boards of the trusts and helped manage their affairs.[123] Brandeis famously called this system of financial capitalism the "Money Trust." He explicitly linked this system to the problem of corporate size, explaining that "Bigness has been an important factor in the rise of the Money Trust: Big railroad

[120] Charles W. Calomiris & Carlos D. Ramirez, *Financing the American Corporation: The Changing Menu of Financial Relationships*, *in* THE AMERICAN CORPORATION TODAY, *supra* note 6, at 128, 151 (noting that public equity sales were not common prior to World War I); HURST, *supra* note 51, at 86 ("Investment in corporate debt and equity securities was still relatively uncommon into the late nineteenth century . . . .").

[121] *See, e.g.*, Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 10 J. CORP. L. 1, 20-22 (1983) (describing blue sky laws).

[122] *See, e.g.*, Ervin Miller, *Background and Structure of the Industry*, *in* INVESTMENT BANKING AND THE NEW ISSUES MARKET 80, 89 (Irwin Friend ed., 1967) (describing flotation of securities by investment bankers to fund consolidation).

In contrast, they did not provide funds for small businesses. *See* BRANDEIS, *supra* note 96, at 93.

[123] *See, e.g.*, U.S. v. Morgan, 118 F. Supp. 621, 639 (S.D.N.Y. 1953) (noting that "[i]nvestment bankers sometimes asked to be put on the boards of directors of issuers in order to know how they were managed and to protect the interests of the investors to whom they had sold the issuer's securities"); Calomiris & Ramirez, *supra* note 120, at 148 (describing how financial capitalism was characterized by "the presence of a powerful financier on the board of directors of a corporation seeking funding through an investment banking syndicate"); *see also* BRANDEIS, *supra* note 96, at 13-15 (observing how investment bankers were directors of both securities issuers and major investors such as life insurance companies); FERDINAND PECORA, WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS 35 (1939) (noting that once J.P. Morgan serviced a corporation, "it was soon represented by one of its members on the corporation's board of directors, intimately leagued with the ruling stockholders, and certain of an influential voice in the corporation's management").

systems, Big industrial trusts, big public service companies; and as instruments of these Big banks and Big trust companies. J.P. Morgan & Co. . . . urge the needs of Big Business as the justification for financial concentration."[124]

The criticism of the Money Trust was motivated in part by the concern that centralizing financing power would result in the inefficient allocation of resources. Recall that Brandeis was concerned that large trusts were inherently too complicated to effectively manage. He viewed the "large security issues made wholly or mainly to effect combinations" as often "dictated by the desire to suppress active or potential competition; or by personal ambition or greed; or by the mistaken belief that efficiency grows with size."[125] The Money Trust ensured that the nation's economy would reflect the interests of Wall Street rather than smaller businesses in local communities.[126] Brandeis was also concerned that investment bankers as directors would have a tendency to sacrifice long-term investment in order to please investors.[127] They would

[124] BRANDEIS, *supra* note 96, at 162; *see also* WILLARD E. ATKINS, GEORGE W. EDWARDS & HAROLD G. MOULTON, THE REGULATION OF THE SECURITY MARKETS 44 (1946) (linking objections to the "big corporation . . . because of the power inherent in its bigness" and the investment banker "because of the magnitude of his operations and his alleged control of credit resources"); David Cushman Coyle, *The Big Cannot Be Free*, ATL. MONTHLY, June 1947, at 76 (asserting that "[t]he men who organize business mergers . . . are more interested in power than in production"); Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J.L. & BUS. 63, 92 (2009) (describing alarm during the 1930s "by the concentration of corporate control in the hands of a few investment bankers and controlling shareholders (and, to a more limited extent, management)").

[125] Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 21; *see also* FRANK ALBERT FETTER, THE MASQUERADE OF MONOPOLY 377-78 (1931) (asserting that consolidation was motivated by higher banking fees and the securities sold to "the trusting public" to finance such mergers were based on "speculative" and "exaggerated" profits); TWENTIETH CENTURY FUND, *supra* note 3, at 30 (noting that creation of trusts required funds from securities sales to investors); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 307, 318 (2009).

[126] *See* BRANDEIS, *supra* note 96, at 153-54.

[127] *See, e.g.*, BRANDEIS, *supra* note 96, at 203-04 (observing that "expenditures necessary for maintenance, or for the ultimate good of a property are often deferred by banker-directors because of the belief that the making of them *now*, would (by showing smaller net earnings), create a bad, and even false, impression on the market").

discourage corporations from developing high-quality products and would instead urge them to focus on immediately generating earnings.

Brandeis was not the only commentator who believed that trusts were inefficient and that disclosure was necessary to protect investors in those entities.[128] Two prominent economists made a similar argument. In the introduction to a volume on *Trusts, Pools and Corporations* published in 1905,[129] the economist William Ripley observed that the "trust movement had brought to light a number of peculiar evils in corporate finance" such as "fraudulent promotion and speculative management."[130] He concluded that disclosure would be a more effective way of addressing the problem of trusts than antitrust law. He argued that "publicity as to the conduct of large businesses [would] speedily reveal the existence of abnormal sources of income" and "afford some guarantee of security for the investing public against internal financial rottenness."[131] For the economist John Bates Clark, "[t]he investor" was "in some danger of being the most conspicuous of all the trust's victims . . . ."[132] He also concluded that the solution was that "[t]he trusts must stand the turning of light on their internal affairs" and that the "public must know . . . the substantial basis of the stocks and bonds that the companies place on the market."[133]

For Brandeis, disclosure mandates were not only necessary to reveal inefficiency, they also checked the power of the Money Trust. Brandeis's famous passage that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman" was part of a discussion on the excessiveness of banker commissions.[134] For Brandeis, part of the problem with concentration in the finance industry was that a small number of elites were able to extract substantial wealth from the

[128] In a speech on January 3, 1900, Theodore Roosevelt stated that one of the abuses of trusts was their "misrepresentation of financial data in order to deceive buyers of stocks." Letwin, *supra* note 84, at 199. He concluded that "[p]ublicity would protect the public in its role of investors" as well as "the public in its role as consumers." *Id.*

[129] Ripley, *supra* note 11, at ix.

[130] *Id.* at xix.

[131] *Id.* at xxix.

[132] CLARK & CLARK, *supra* note 11, at 73.

[133] *Id.* at 80.

[134] BRANDEIS, *supra* note 96, at 92.

corporate system and enhance their own power.[135] He thus proposed that the government "[c]ompel bankers when issuing securities to make public the commissions or profits they [were] receiving."[136]

Notably, Brandeis did not view disclosure as a way of permitting ordinary investors to evaluate the soundness of stock prices.[137] He believed that "few investors [had] the time, the facilities, or the ability to investigate properly the value of corporate securities."[138] Put another way, for Brandeis, investor protection was not the primary rationale for securities regulation. There were a significant number of commentators around the time that the federal securities laws were initially passed who also believed that corporate disclosures of financial performance were too complex for the ordinary investor to understand.[139] On the

135 In Brandeis's words: "The operations of so comprehensive a system of concentration necessarily developed in the bankers overweening power. And the bankers' power grows by what it feeds on. Power begets wealth; and added wealth opens ever new opportunities for the acquisition of wealth and power." BRANDEIS, *supra* note 96, at 22-23.

136 *Id.* at 101.

137 He did believe that disclosure of underwriter commissions might help investors better ascertain the real value of the security by identifying what portion of the offering proceeds were going to the underwriter. *See, e.g.*, BRANDEIS, *supra* note 96, at 103 (noting that "[a]mong the most important facts to be learned for determining the real value of a security is the amount of water it contains. And any excessive amount paid to the banker for marketing a security is water").

138 BRANDEIS, *supra* note 96, at 113. Sarah Haan has argued that prejudice concerning women, who were a substantial percentage of individual shareholders around the first half of the twentieth century, shaped the perception that individual investors were unsophisticated. *See* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 590-91 (2022). While Brandeis in some of his writing echoed this view, *id.* at 537, some of his testimony before Congress appeared to not exhibit this prejudice. *See* COMM. ON INT'ST. COM., 62D CONG., REP. ON CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE 1177 (1911). Brandeis was asked why "the stock of the Sugar Trust drifted into the hands of the women of New England?" He replied that he thought "the women of New England, like other investors, desire a large return and a larger return than they could get upon the absolute safe investments." *Id.*

139 *See, e.g.*, ATKINS ET AL., *supra* note 124, at 65 ("[T]he registration statement itself and the accompanying documents — although of great help to trained analysts — are of little practical value to the individual investor."); DOUGLAS, *supra* note 63, at 77 (noting that the "individual investor is not the well-informed, highly skilled security buyer that the big institutional investor is"); BERNARD J. REIS, FALSE SECURITY 17-18, 224 (1937) (noting that periodic disclosures were not routinely sent to investors but filed with the

other hand, there were commentators such as William Ripley who viewed securities law in terms of the more standard rationale of providing investors with information they could use to value public companies.[140]

The drafters of the federal securities laws were influenced by Brandeis and wary of big business.[141] They viewed government as a way of controlling corporate power. The Great Depression had shaken faith in financial capitalism and opened the door to reforms.[142] At the same time,

SEC and that "the great body of our investing public is naturally not equipped to cope with the complexities of financial reports, balance sheets, and prospectuses"); EMANUEL STEIN, GOVERNMENT AND THE INVESTOR 29 (1941) ("The average investor is not equipped by training or ability to cope with investment problems."); *see also* GEORGE W. EDWARDS, THE EVOLUTION OF FINANCE CAPITALISM 315 (1967) (observing that "[t]he Securities Act relies on publicity as the sole protection against loss, but the previous cases show that, even when the truth regarding an investment is given, the investor is unable to understand the significance of this information").

[140] *See, e.g.*, PECORA, *supra* note 123, at 120-21, 171 (noting lack of financial statement disclosure); William Z. Ripley, *Stop, Look, Listen! The Shareholder's Right to Adequate Information*, THE ATL., Sept. 1926, at 380 (arguing for disclosure of financial information). It is notable that even accounts that emphasized the role of disclosure in valuation noted the problem of the trusts. *See, e.g.*, *id.* at 384 (arguing that disclosure would reveal excessive profits by trusts that would spur competition). William Ripley used similar language as Brandeis in noting that "[n]othing kills bacteria like sunlight" in making the case for financial disclosure. *See* WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 109 (1927).

[141] MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 45-46, 61 (1970); *see also* Williams, *supra* note 14, at 1216 (noting that Berle and Means "discussed the concept of disclosure predominantly in the context of corporate power and a lack of accountability to shareholders and the public"). On the other hand, it is not clear that President Franklin D. Roosevelt agreed with Brandeis's preference for smallness in institutions. *See* UROFSKY, *supra* note 125, at 323. Indeed, Brandeis was wary of big government and thus did not support aspects of the New Deal. *Id.* at 691. Moreover, by the 1930s, there was skepticism about the existence of a "Money Trust." *See, e.g.*, VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA: A HISTORY 350 (1970) (asserting that by the 1930s, "[f]ew people still accepted seriously the existence of a 'money trust'"). The securities laws evolved from the initial vision of their drafters and were shaped immediately by the mid-level bureaucrats tasked with implementing them. *See* Alexander Platt, *The Administrative Origins of Mandatory Disclosure*, J. CORP. L. 2 (forthcoming), https://ssrn.com/abstract=4562276 [https://perma.cc/MB34-4DVV].

[142] One commentator has noted that the Great Depression "brought a new and acute awareness of the monopoly problem" and "a growing belief that the misuse of business power was responsible for the economic breakdown and the persistence of depression

they were also concerned with the more mundane issue of reducing fraud with respect to the sale of securities. As one treatise published a little more than a decade after the passage of the federal securities laws observed, those laws were passed both because of: (1) the "hardy perennial of fraud in the sale of securities" and (2) "an underlying distrust and fear of bigness in economic matters."[143]

Elements of the first of the two federal securities law statutes, the Securities Act of 1933, were directed at the investment banking industry.[144] The most controversial provision made underwriters of securities sold to the public potentially liable for investor losses.[145] Section 11 of the Securities Act provides that an underwriter can be liable for a material misstatement in the company's registration statement, which contains disclosures relating to the seller of securities.[146] A significant difference between dueling drafts of the law was that an early version only extended liability to the corporation issuing securities and its directors. The drafters representing the Brandeisian point of view insisted on including as potential defendants the investment bankers who would underwrite the securities.[147] An

conditions." ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 12 (1966). A solution to the problem was to "liberate the credit system from Wall Street control." *Id.* at 7.

[143] ATKINS ET AL., *supra* note 124, at 44; *see also* ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 441-42 (1959) (noting that Frankfurter believed that public companies had special obligations of transparency that required disclosure).

[144] It is notable that Ferdinand Pecora, who headed the investigation of Wall Street and the stock market crash of 1929 highlighted the power of J.P. Morgan to assemble large organizations. *See* PECORA, *supra* note 123, at 18, 26 (observing that "this small group of highly placed financiers, controlling the very springs of economic activity, holds more real power than any similar group in the United States"); *see also* CAROSSO, *supra* note 141, at 340 (observing that "[t]o progressives like Pecora the 'money trust' seemed just as entrenched as it had been in Pujo's day, and not a whit less powerful"); MICHAEL PERINO, THE HELLHOUND OF WALL STREET 149 (2010) (observing that Pecora adhered "closely to the progressive playbook" and highlighted investment banker fees).

[145] The potential liability imposed by the Securities Act was described as "terrifying" and there was fear that it would deter securities offerings. *See* A.S.J. BASTER, THE TWILIGHT OF AMERICAN CAPITALISM: AN ECONOMIC INTERPRETATION OF THE NEW DEAL 83, 92-93 (1937).

[146] *See* Securities Act of 1933 § 11, 15 U.S.C. § 77k.

[147] PARRISH, *supra* note 141, at 63. The imposition of underwriter liability distinguished the Securities Act of 1933 from the English Companies Act, which did not

effect of this provision is that it reduced the ability of investment bankers to arbitrarily value securities simply because they controlled the mechanisms of financing. They would have to vouch for a corporate issuer and would have an additional economic incentive to limit their underwritings to companies with sound prospects. The Securities Act of 1933 also addressed Brandeis's concern of unjust enrichment by financiers by mandating disclosure of underwriter compensation.[148]

The second statute, the Securities Exchange Act of 1934, primarily addressed market manipulation and excessive speculation,[149] which were linked to the concentration of power within the financial industry. The law targeted a wide array of practices that distorted stock prices such as manipulative pools, excessive leverage, and wash trades. The prohibition of such tactics was a way of reducing self-dealing by financiers and corporate insiders who exploited mispricing to benefit themselves. Some commentators also viewed such manipulation as facilitating the marketing of the securities that formed the monopolist trusts.[150] Investment banks allegedly inflated the price of stocks to encourage investors to provide the funds these giant corporations needed to dominate their markets. Provisions regulating stock exchanges and proxy voting were also directed at financial capitalism.

provide for such liability. *See* Arthur H. Dean, *The Federal Securities Act: I*, 8 FORTUNE 50, 101 (1933).

[148] *See* Securities Act of 1933, Schedule A (17), 15 U.S.C. § 77AA. These provisions are not a central part of the mandatory disclosure system today, but during the 1930s, "[n]ondisclosure of underwriters' commissions lay at the very heart of the progressives' attack on Wall Street." Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1072 (1995). Paul Mahoney has argued that mandatory disclosure rules were primarily meant to reduce agency costs between managers and shareholders. *Id.* at 1048-52.

[149] JOHN T. FLYNN, SECURITY SPECULATION 277-300 (1934); Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 460 (1990) ("[T]he purpose of the Act was to control speculation, an objective to which virtually everyone agreed in 1934."); *see also* SCHLESINGER, *supra* note 143, at 457 (noting that the Securities Exchange Act of 1934 was directed at manipulation); Williams, *supra* note 14, at 1240 (noting that 1934 Act addressed broad range of concerns such as speculation, market manipulation, proxy disclosure, and insider abuse).

[150] *See, e.g.*, HAWLEY, *supra* note 142, at 287, 305-06 (asserting that financiers built "bigness for speculative purposes"; that "financial manipulation" supported large companies; and "if such devices and practices were eliminated, huge corporations would not be created, or if created, they would not be successful").

Financial elites controlled the exchanges, which were lax in regulating manipulation.[151] They also dominated corporate governance by sitting on the boards of the trusts they had put together.[152]

The federal securities laws essentially attempted to restore integrity to the process by which investor capital was allocated to corporations. In an early defense of the Securities Act of 1933, Felix Frankfurter argued that the law "[would] be a brake on schemes fraudulently or carelessly conceived, it [would] serve only to strengthen the constancy and volume of the flow of investment funds into productive channels."[153] As William Douglas noted while serving as SEC Chair, "the problem is to direct the capital flow to those industries which can make the best use, both economically and socially, of the available capital supply . . . ."[154] Rather than simply rely on the word of a small group of financiers, mandatory disclosure and the potential that investment banks could be liable for misleading investors about an offering would help ensure that investment decisions were based on close scrutiny of a company's financial condition. Stock markets would not be casinos but would be a mechanism for continually assessing a company's valuation.

Despite the original intent of some of its authors, for its first few decades, federal securities regulation did not play a large role in regulating public corporations. The power of the Money Trust that motivated Brandeis to call for reform was short-lived.[155] Moreover, for a variety of reasons, there were relatively few public offerings of securities

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[151] *See, e.g.*, *id.* at 311 (describing view that "exchanges had failed to provide a free market" and needed to be "freed of riggers and insiders").

[152] ATKINS ET AL., *supra* note 124, at 45 (describing how variety of methods used by financial capitalists such as "the proxy machinery all operated to keep stockholders from exercising any power in the corporation").

[153] Felix Frankfurter, *The Federal Securities Act: II*, 8 FORTUNE 53, 108 (1933).

[154] WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 38-39 (1940).

[155] *See, e.g.*, CHANDLER, *supra* note 60, at 492 ("Financial capitalism in the United States was a narrowly located, short-lived phenomenon."). A number of laws such as the Clayton Antitrust Act of 1914, 15 U.S.C. § 19, which limited interlocking directorships, reduced the power of financiers. *See, e.g.*, THOMAS C. COCHRAN, THE AMERICAN BUSINESS SYSTEM: A HISTORICAL PERSPECTIVE 1900-1955, at 87-89 (1957) (noting that the creation of the Federal Reserve Board reduced the influence of financiers); Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1063-64 (2015) (discussing laws that reduced the power of the Money Trust).

after the passage of the federal securities laws in the 1930s.[156] The first couple of decades after World War II saw large corporations rely primarily on internal financing through their substantial profits rather than through securities sales.[157] The SEC was more focused on the regulation of offerings by smaller companies that were not traded on exchanges than disclosure by large companies.[158]

Securities regulation became more concerned with the problem of big business during the 1970s. A variety of corporate scandals involving large public companies prompted reform. For example, the discovery that many corporations were paying bribes to win business overseas raised concerns because it involved "some of the largest and most widely held public companies in the United States; over 117 of them rank[ed] in the top Fortune 500 industries."[159] According to a report by the SEC, the fact that such payments were made by managers without board knowledge raised "questions regarding improper exercise of corporate authority and may also be a circumstance relevant to the 'quality of management' that should be disclosed to shareholders."[160] Disclosure should help investors assess "management's stewardship over corporate assets," requiring investors to evaluate "the quality and integrity of management."[161] Congress thus linked the regulation of managerial power with the power of the public company to allocate investor

[156] *See* ATKINS ET AL., *supra* note 124, at 3; A.A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 639 (1952) (observing that "large corporations have found it possible to generate their own capital by withholding part of their earnings from distribution to their shareholders" and "were thus freed from the necessity of gathering capital from the savings of a great number of private individuals").

[157] *See, e.g.*, Carl Kaysen, *Introduction and Overview*, *in* THE AMERICAN CORPORATION TODAY, *supra* note 6, at 3, 11 ("In the late forties and fifties, large corporations financed themselves primarily through retained earnings. In the sixties, there was a shift to private placements of debt, and in the seventies and eighties increasingly to the public offerings of securities.").

[158] *See* SEC. & EXCH. COMM'N, DISCLOSURE TO INVESTORS: A REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS 62 (1969).

[159] H.R. REP. NO. 95-640, at 4 (1977).

[160] SEC. & EXCH. COMM'N, 94TH CONG., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 15 (Comm. Print 1976).

[161] *Id.* at 19-20; *see also* Mahoney, *supra* note 148, at 1048 ("Disclosure can help reduce the cost of monitoring promoters' and managers' use of corporate assets for self-interested purposes.").

resources. The fact that managers were using corporate funds for improper purposes was an abuse of their managerial and allocative power. To prevent such abuses, Congress required companies to establish and maintain internal controls over their financial reporting to help ensure responsible managerial use of corporate resources.[162]

Congress returned to the challenge of regulating corporate power in passing the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"),[163] which strengthened the internal control requirements established during the 1970s. As will be discussed further in the next Part, a series of accounting frauds by public companies showed how companies could obtain allocative power through deception. Donald Langevoort and Robert Thompson have argued that Sarbanes-Oxley was an effort to regulate corporate power. They explained that the law helped "create more accountability of large, economically powerful business institutions."[164]

The regulatory goals of securities regulation have slowly evolved over the decades. As the modern public corporation replaced the monopolistic trust, the problem of corporate power became more complicated. The competence of managers rather than the fiat of a small group of financiers became determinative of a large corporation's success. As management became viewed as a science, it became more difficult to contend that bigness was a result of financial manipulation. Securities law eventually shifted from abuses by market participants and financiers to focus more squarely on assessing managerial power. As the ability of corporations with market and managerial power to allocate resources has increased, there has been pressure to ensure that such allocation is consistent with societal norms.

[162] S. REP. NO. 95-114, at 8 (1977) (observing that "[t]he establishment and maintenance of a system of internal controls is an important management/obligation. A fundamental aspect of management's stewardship responsibility is to provide shareholders with reasonable assurances that the business is adequately controlled").

[163] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

[164] Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 340 (2013).

III. ALLOCATIVE EFFICIENCY, CORPORATE SIZE, AND INVESTOR ETHICS

The primary objection to the claim that securities regulation should be viewed as a regulator of corporate power is that disclosure and anti-fraud requirements are best understood as facilitating the efficient allocation of resources. Investors allocate capital based on the potential of companies to generate profits. Under the conventional view, securities law does no more than ensure that resources are put to their best use. But as demands for accurate disclosure have increased, only large public companies have the resources and credibility to easily comply with federal disclosure mandates. The pursuit of allocative efficiency has resulted in regulatory burdens that encourage corporate size. As public companies have grown larger for a variety of reasons, it is natural for reformers to increase demands for more ethical disclosure to regulate corporate power. Implementing such disclosure will further encourage corporate bigness.

A. Efficiency

1. Market Efficiency and Allocative Efficiency

By the end of the 1970s, the SEC recognized that one role of mandatory disclosure is to facilitate the ability of markets to efficiently price securities.[165] This conclusion followed from the work of financial economists establishing that relevant information about a company's financial performance and prospects is incorporated into stock prices.[166]

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[165] Proposed Revision to Registration of Securities Offerings, Securities Act Release No. 33-6235, 45 Fed. Reg. 63,693, 63,698 (Sept. 25, 1980) (observing that "investors are protected by the market's analysis of information about certain companies which is widely available, both from the Commission's files and other sources, and that such analysis is reflected in the price of the securities offered"); *see also* STAFF OF H. COMM. ON INTERSTATE & FOREIGN COM., 95TH CONG., REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION, at XXXI-XL, 560 (Comm. Print 1977) (noting that "[t]he system of corporate disclosure that emerged under the Securities Act and the Exchange Act can best be understood as one aspect of an essentially two-pronged regulatory approach that was designed to promote more efficient securities markets").

[166] *See, e.g.*, Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970) (summarizing literature).

The Money Trust had been replaced by a large financial community that allocates investor funds efficiently.

In an efficient market, capital is allocated to companies that are most likely to use such capital to generate higher returns for investors.[167] Companies with stronger financial performance and prospects can sell securities on more favorable terms than companies with weak financial performance and declining prospects.[168] Thus, stock markets essentially determine which organizations have significant allocative power. One consideration is whether a company will continue to maintain and grow its market power, permitting it to generate profits. The competence of a company's managers is another essential variable in evaluating the terms on which it can sell securities.

Securities disclosure helps investors set corporate valuations that determine corporate size.[169] Mandatory disclosure requirements make

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[167] *See, e.g.*, Irwin Friend, *The Economic Consequences of the Stock Market*, 62 AM. ECON. REV. 212, 212 (1972) (observing that stock markets can facilitate "more or less efficient allocation of investment funds"); Henry G. Manne, *Insider Trading and the Law Professors*, 23 VAND. L. REV. 547, 566 (1970) (observing that "[a]n efficient market is one in which capital will be allocated to its highest-return uses, thus ensuring that capital goes into those uses with the greatest individual and social utility"); Hsiu-Kwang Wu, *An Economist Looks at Section 16 of the Securities Exchange Act of 1934*, 68 COLUM. L. REV. 260, 264 (1968) (explaining that "a well-performing capital market will allocate the greatest part of a given volume of savings to those industries with the highest prospective rates of return"); *see also* Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 10 ("[S]ecurities law – focuses primarily on the goal of economic efficiency in lieu of distributional objectives.").

[168] *See, e.g.*, Irwin Friend, *Over-All View of Investment Banking and the New Issues Market*, *in* INVESTMENT BANKING AND THE NEW ISSUES MARKET 1, 7 (Irwin Friend, ed., 1967) (defining allocational efficiency as the ability of "markets to maintain equivalent rates of return or costs of financing on comparable investments"); *see also* Coffee, *supra* note 12, at 734 (noting that "[d]epending on a firm's share price, its cost for obtaining capital will be either too high or low as compared to the cost that would prevail in a perfectly efficient market"); Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 95 (2007) (observing that studies show that firms can raise funds on more favorable terms if they comply with a "demanding disclosure regime").

[169] *See, e.g.*, Coffee, *supra* note 12, at 751-52 (concluding that "the strongest arguments for a mandatory disclosure system may be efficiency-based" and that "the adoption of a mandatory disclosure system reduced price dispersion and thereby enhanced the allocative efficiency of our capital markets"); Friend, *supra* note 167, at 217 (observing that "changes in securities regulation may have improved efficiency in the market for

it more likely that information about financial performance is accurately reflected by stock prices. Strong anti-fraud provisions deter fraud so investors can trust reports of positive financial performance.[170] If a company is outperforming expectations, its stock price will increase,[171] giving it more allocative power. Securities law also helps ensure that adverse financial performance is promptly disclosed to investors. If a company reports a substantial decline in corporate earnings that reflects the erosion of its market power or managerial incompetence, it can see its market valuation evaporate rapidly. At first glance, disclosure seems like a mild regulatory tool compared to the possibility of an antitrust injunction. But the requirement that poor performance be disclosed in a timely manner to stock markets can lessen the economic power of a public corporation more quickly and ruthlessly than a court order to divest a business.

The role of antitrust in regulating abuses of corporate power has become less important with the rise of more efficient stock markets. Even if a company has market power, if it uses that power unwisely, markets can anticipate that it will eventually lose its ability to generate profits. If signs of its deterioration are adequately disclosed, a company's market valuation will go down, reducing its access to resources and making it more challenging to keep its power. Effective securities law can help ensure that companies that do not deserve their market power will find it more difficult to maintain their position.

outstanding stock"); *see also* Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1369-80 (1999) (concluding that studies support the view that mandatory disclosure improved accuracy of stock prices).

[170] *See, e.g.*, Easterbrook & Fischel, *supra* note 12, at 673 (explaining that "[a]ccurate information is necessary to ensure that money moves to those who can use it most effectively and that investors make optimal choices about the contents of their portfolios"); *see also* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 720 (2006) (observing that "[a]ccurate pricing is essential for achieving efficient allocation of resources in the economy").

[171] *See, e.g.*, James J. Park, *Do the Securities Laws Promote Short-Termism?*, 10 U.C. IRVINE L. REV. 991, 1012-21 (2020) (discussing incentive of public companies to meet short-term projections).

Efficient markets also monitor corporate managers, arguably lessening the need for strong corporate law.[172] If investors do not trust a public company's managers, they will discount its stock, reducing its market capitalization and allocative power. This adjustment typically occurs much more quickly than the resolution of a derivative action alleging a breach of fiduciary duty.

Securities disclosure is not perfect in its ability to ensure that markets allocate resources efficiently. Investors often make mistakes in assessing a company's earnings power.[173] They can irrationally give some companies too much allocative power and give others too little. For example, in the midst of the Covid-19 pandemic, retail investors mobilized to increase the stock price of companies such as AMC and GameStop, which subsequently raised funds on favorable terms.[174] The performance of these companies later faltered and their stock prices declined substantially.[175] Stock markets may also not accurately value

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[172] *See, e.g.*, Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263 (2019) (arguing that protection of corporate law is less necessary because investors have become more informed); *see also* Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 265-66 (1967) (describing disciplining effect of market for corporate control).

[173] *See* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 135-47 (2000) (describing behavioral biases affecting investor decisions); *see also* James J. Park, *Investor Protection in an Age of Entrepreneurship*, 12 HARV. BUS. L. REV. 107, 116-22 (2022) (discussing difficulty of valuing companies with uncertain cash flows).

[174] *See* Jonathan Ponciano, *AMC Extends Massive Meme Stock Rally After CEO Touts $230 Million Raise And 'Aggressive' Growth Strategy*, FORBES (June 1, 2021, 10:41 AM), https://www.forbes.com/sites/jonathanponciano/2021/06/01/amc-extends-massive-meme-stock-rally-after-ceo-touts-230-million-raise-and-aggressive-growth-strategy/ [https://perma.cc/PJ7F-ZFCM]; *GameStop Raises More Than $1 Bln in Latest Share Offer*, REUTERS (June 22, 2021, 10:02 AM), https://reuters.com/business/gamestop-raises-about-1-bln-latest-equity-offering-2021-06-22/; *see also* Dhruv Aggarwal, Albert H. Choi & Yoon-Ho Alex Lee, *Meme Corporate Governance*, S. CAL. L. REV. (forthcoming) (U. Mich. L. & Econ. Working Paper 258, 2023).

[175] *See* Williams Skipworth, *AMC Stock Plunges Over 20% As It Announces 40 Million New Shares To Raise Funds*, FORBES (Sept. 6 2023, 12:20 PM), https://www.forbes.com/sites/willskipworth/2023/09/06/amc-stock-plunges-over-20-as-it-announces-40-million-new-shares-to-raise-funds/?sh=7e1be209213a [https://perma.cc/PF3Q-YW85]; David Marino-Nachison, *GameStop Stock Drops to Lowest Close Since February 2021*, WALL ST. J. (Oct. 19, 2023, 6:05 PM), https://www.wsj.com/livecoverage/stock-market-news-today-10-19-2023/card/gamestop-stock-drops-poised-for-lowest-close-since-august-2022-Qjol6aOy7IoZ25mL1ZqS.

large companies. As a corporation grows in size, it becomes more difficult for investors to evaluate its economic condition.[176] Markets can be slow to recognize that a large company's market power is in decline and that its market valuation should shrink. Corporate managers can become entrenched and remain in place even when they destroy corporate value.

Even if markets are at times inefficient, securities regulation helps ensure there is a rational foundation for corporate valuations. Companies generally do not grow large and stay large without evidence that their financial performance warrants a high market value. Securities regulation helps ensure the integrity of the information that markets use in determining which companies should have the power to allocate resources.

2. Allocative Efficiency and Corporate Size

Securities regulation has shifted from wariness of bigness to the belief that larger corporations are safer investments. Initially, one of the concerns motivating the federal securities laws was that the Money Trust was allocating capital to inefficiently large monopolists. By the 1960s, the perception of large corporations was that they were better investments because of their dominant market power and skilled managers.[177] As it became more acceptable for pension funds to take on

[176] *See, e.g.*, George S. Georgiev, *Too Big to Disclose: Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 625-26 (2017) (arguing that corporate giants can hide more information on the grounds that it is not material in relation to their sizeable operations). There have been some efforts to use disclosure to address the issue of corporate size. There were early attempts to increase disclosure by corporate conglomerates that were a cause of concern during the 1960s. The size of such conglomerates made it difficult to evaluate the various businesses that they operated. The SEC adopted segment reporting rules that require more detailed information of a public company's business lines. *See* Adoption of Amendments to Forms S-1, S-7 and 10, Securities Act Release No. 33-4988, 1969 WL 96588 (July 14, 1969).

[177] *See, e.g.*, Brewster, *supra* note 46, at 81 (noting view that large organizations were less risky investments); GALBRAITH, *supra* note 25, at 27 (describing advantages of large organizations).

the risk of investing in stocks, they tended to invest in larger "blue chip" companies that had stable earnings and dividends.[178]

The previously discussed accounting frauds around the turn of the 2000s vividly demonstrated how securities fraud can affect even large public companies.[179] One of the more notorious examples of such fraud involved the telecommunications company WorldCom, which improperly underreported its expenses for maintaining communications lines by billions of dollars.[180] It did so in violation of Generally Accepted Accounting Principles, which help ensure that financial reporting by public companies is comparable. The fraud permitted the company to sell approximately $17 billion in bonds to investors on favorable terms.[181] Its deception thus gave it the opportunity to allocate substantial amounts of capital.

The power to allocate resources in the WorldCom case came at the expense of other public companies that were not committing fraud.[182] WorldCom was able to create the appearance that it was a superior company and more deserving of capital. With a high stock price, it could acquire numerous competitors, enabling it to expand its market power and set the terms for the development of its industry.[183] As one report explained, "[i]ts position as a fast-growing provider of integrated telecommunications services led to a very high market valuation, which

[178] *See, e.g.*, DANIEL JAY BAUM & NED B. STILES, THE SILENT PARTNERS: INSTITUTIONAL INVESTORS AND CORPORATE CONTROL 53 (1965) (noting preference of pension funds to invest in large stocks trading on New York Stock Exchange to meet "prudent man" standard).

[179] *See* JAMES J. PARK, THE VALUATION TREADMILL: HOW SECURITIES FRAUD THREATENS THE INTEGRITY OF PUBLIC COMPANIES 72-94 (2022).

[180] United States v. Ebbers, 458 F.3d 110, 126 (2d Cir. 2006).

[181] First Amended Complaint at *5, 6, 15, 20, *In re* WorldCom Sec. Litig., 2004 WL 4909452 (S.D.N.Y. Aug. 1, 2003) (No. 02-CV-3288).

[182] *See, e.g.*, J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REGUL. 207, 242 (2003) (describing impact of WorldCom fraud on competitors).

[183] *See, e.g.*, *id.* at 240-41 tbl.4 (listing eight acquisitions by WorldCom from 1996 to 2001). Another example of an acquisition that was arguably made possible by a stock inflated by securities fraud was AOL's acquisition of Time. *See* ALEC KLEIN, STEALING TIME: STEVE CASE, JERRY LEVIN, AND THE COLLAPSE OF AOL TIME WARNER 181-96 (2003).

in turn made its stock a powerful currency for further acquisitions."[184] Its peers were forced to cut jobs and downsize because WorldCom's deception gave it disproportionate allocative power.[185]

As noted earlier, WorldCom was just one of a number of accounting frauds that resulted in the inefficient allocation of capital towards the end of the 1990s and early 2000s. The primary response to this issue was the passage of Sarbanes-Oxley,[186] which requires public companies to expend significant resources to ensure that their financial statements do not contain material errors. Such efforts increase the efficiency of stock markets, but they also increase the costs associated with accessing capital from public investors.[187] When the expense of selling securities increases,[188] larger companies have an advantage over smaller companies because they can more easily afford compliance. Smaller companies will find it more difficult to go public and will remain private. While some private companies can raise substantial funds from private investors,[189] many private companies do not have such ability. A legitimate concern with conditioning access to public capital on meeting

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[184] Dennis R. Beresford, Nicholas deB. Katzenbach & C.B. Rogers, Jr., Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. 44 (2003); *see also* First Interim Report of Dick Thornburgh, Bankruptcy Court Examiner at 58, *In re* WorldCom, Inc., et al. (Bankr. S.D.N.Y. Nov. 4, 2002) (No. 02-15533) (observing that "[t]he story of WorldCom's rise and fall into bankruptcy can be written in terms of its transactions").

[185] *See* Geoffrey Colvin, *The Other Victims of Bernie Ebbers Fraud*, Fortune, Aug. 8, 2005, at 32.

[186] For a discussion of the events that prompted the passage of Sarbanes-Oxley, see James J. Park, *The Need for Sarbanes-Oxley*, 78 Bus. Law. 633, 635-38 (2023).

[187] *See, e.g.*, IPO Task Force, Rebuilding the IPO On-Ramp: Putting Emerging Growth Companies and the Job Market Back on the Road to Growth 6-10 (2011) (linking decline in IPOs to regulatory burdens); Edward F. Greene, Evan S. Gabor, Sonia Katharani-Khan & Jacqueline Mijin Kang, *The Need for a Comprehensive Approach to Capital Markets Regulation*, 2021 Colum. Bus. L. Rev. 714, 754-55 (2022) (observing that "structural issues" such as the "high costs incurred by public companies" may keep them from going public).

[188] Congress has passed legislation that attempts to lessen these costs to encourage IPOs. *See* Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106, 126 Stat. 306 (2012).

[189] *See, e.g.*, Nat'l Venture Cap. Ass'n, 2023 Yearbook 12-15, https://nvca.org/wp-content/uploads/2023/03/NVCA-2023-Yearbook_FINALFINAL.pdf [https://perma.cc/AZ4U-HNTA] (listing fundraising amounts).

demanding regulation is that such an approach will reinforce the advantage of corporate size.

In some ways, securities regulation now favors larger companies in raising public funds. The SEC has built on earlier reforms that give established public companies easier access to capital markets based on the assumption that efficient markets accurately price their stocks.[190] In 2005, the SEC passed various rules facilitating stock offerings by the largest thirty percent of public companies listed on a stock exchange, which represented "95% of U.S. equity market capitalization" and "accounted for more than 96% of the total debt raised" in registered offerings by listed companies.[191] The SEC reasoned that there was less need to scrutinize securities offerings by such companies because large companies are closely followed by analysts and institutional investors.[192] It also noted that because large companies must comply with Sarbanes-Oxley, their financial statements are more likely to be reliable.

Even as the number of public companies has declined, the valuations of established public companies have increased significantly. Mark Roe and Charles Wang have shown that over the last couple of decades, the economic clout of public companies measured by capitalization, revenue, and profits have all increased faster than the rate of economic

[190] For example, integrated disclosure, which permits established public companies to rely on streamlined disclosures when selling securities, was justified by the efficient markets hypothesis. *See* Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380, 11,382 (Mar. 16, 1982) (codified at 17 C.F.R. pts. 200, 201, 229, 230, 239, 240, 249, 250, 260, 274).

[191] Securities Offering Reform, 70 Fed. Reg. 44,722, 44,727 (Aug. 3, 2005) (codified at 17 CFR pts. 200, 228, 229, 230, 239, 240, 243, 249, 274). It classified such companies as Well-Known Seasoned Issuers ("WKSI"). To be a WKSI, a company must have a public float of $700 million or have sold $1 billion in bond offerings over the past three years. The reduction in public offering costs helped offset some of the regulatory costs of Sarbanes-Oxley. *See* James J. Park, *Two Trends in the Regulation of the Public Corporation*, 7 OHIO ST. ENTREP. BUS. L.J. 429, 436-40 (2012).

[192] Securities Offering Reform, *supra* note 191, at 44,791 (explaining that "[t]he largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media").

growth, even as the number of public companies has halved.[193] These developments are mainly attributable to causes other than the burden of securities regulation requirements,[194] but the structure of public company regulation certainly reinforces them.

To fully access capital markets, a public company must grow large enough so that it can comply with SEC regulation that is meant to ensure that capital is allocated efficiently. The process of becoming a public company now requires a company to strive for bigness so that it can easily meet federal securities law requirements.

B. Social Responsibility and Corporate Size

Because compliance with securities regulation is necessary for the largest and most influential companies to access capital, it is unsurprising that reformers have sought to use disclosure requirements to regulate big business. Investors are demanding additional disclosure relating to ESG matters from public companies.[195] Such regulation effectively attempts to condition allocative power on a commitment to social responsibility.

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[193] *See* Mark J. Roe & Charles C. Y. Wang, *Half the Firms, Double the Profits: Public Firms' Transformation, 1996-2022*, J.L. FIN. & ACCT. (forthcoming) (manuscript at 8, 13-17), https://ssrn.com/abstract=4372070.

[194] One group of commentators noted that there is a significant gap in R&D spending between large and small companies, which could reflect differential access to capital. *See* Vijay Govindarajan, Baruch Lev, Anup Srivastava & Luminita Enache, *The Gap Between Large and Small Companies is Growing Why?*, HARV. BUS. REV. (Aug. 16, 2019) https://hbr.org/2019/08/the-gap-between-large-and-small-companies-is-growing-why [https://perma.cc/F9JP-TUNR] (finding substantial gap between large and small companies in R&D investment).

[195] *See, e.g.*, Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 276-77 (2022) (describing voluntary ESG disclosure); *see also* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1482 (2021) ("[I]nvestment concentration is leading investors to finally perceive themselves as 'universal owners,' as Hawley and Williams (not this author) theorized they should twenty years ago: if investors own the whole market (world), it is the social, political, and economic health of the whole market (world) that matters. Thus, we see investors collaborating to put pressure on companies to reduce their negative externalities (harmful behavior).").

Efforts to acknowledge social considerations in allocating capital have been longstanding and controversial. The birth of the environmental movement around the 1960s and the 1970s resulted in efforts to require public companies to disclose information on environmental compliance and other matters relating to social responsibility.[196] Such disclosure would have been based on the belief that investors had ethical reasons to not allocate capital to projects that cause environmental damage. The SEC was skeptical of the claim that there were sufficient numbers of investors who valued ethical considerations in investing.[197] It viewed the requirement that mandatory disclosure be limited to material information narrowly.[198] In evaluating the scope of the securities laws, it concluded that "a prime expectation of the Congress was that the Commission's disclosure authority would be used to require the dissemination of information which is or may be economically significant."[199] Securities disclosure was thus largely limited to information that would facilitate capital allocation based on economic rather than social considerations.

As public companies have grown larger over time, their public impact has become more significant. Corporate behavior is held to higher standards by the public. Corporate scandals can thus quickly impact a company's reputation and market value. Hillary Sale contends that it is essential for managers of large corporations to understand that they no longer operate primarily in a private sphere.[200] Their actions are heavily scrutinized by both Wall Street and Main Street.

It is now evident that information relating to social considerations can impact a large public company's ability to access capital markets. Consider the SEC's case against the German automaker Volkswagen

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[196] *See, e.g.*, NADER ET AL., *supra* note 9, at 144, 158 (proposing environmental and legal compliance disclosure).

[197] *See, e.g.*, Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, SEC Release No. 5627, 1975 WL 160503, at *15 (Oct. 14, 1975) (noting that only four small funds focused on socially responsible investing).

[198] *See, e.g.*, Russell B. Stevenson Jr., *SEC and the New Disclosure*, 62 CORNELL L. REV. 50, 53-66 (1976) (describing SEC proceedings on environmental disclosure).

[199] SEC Release No. 5627, *supra* note 197, at *5.

[200] *See* Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 137, 141-48 (2011).

("VW") that arose out of its intentional evasion of U.S. emissions standards, which resulted in its payment of $20 billion in criminal and civil penalties.[201] Years before the misconduct was revealed, the CEO of the company had "announced a bold and aggressive plan to make VW the biggest, most profitable, and most environmentally-friendly car company in the world by 2018."[202] VW "needed money" to fund this plan and "relied on the U.S. capital markets to get it."[203] The company raised over $12 billion through the sale of bonds to U.S. investors.[204] The SEC alleged that the company defrauded investors by misrepresenting its compliance with U.S. environmental regulation when, in fact, it deliberately evaded such regulation.[205]

Presumably, VW would not have been able to raise capital on the same terms had investors known about its brazen scheme to violate U.S. law. The SEC noted that after VW's misconduct was revealed, rating agencies downgraded its bonds and the company did not raise funds from U.S. investors for another three years.[206] The deliberate evasion of law would not only be of concern because of the risk of regulatory sanction, but it also raised broader questions about the judgment of the company's managers in taking on and hiding an unethical and risky strategy. Investors, particularly risk-averse bondholders,[207] would have been less likely to trust a company like VW to allocate resources had they known of this ESG risk.

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[201] *See* Complaint, SEC v. Volkswagen, 19-cv-01391 (N.D. Cal. Mar. 14, 2019); Roger Parloff, *How VW Paid $25 Billion for Dieselgate – And Got Off Easy*, PROPUBLICA (Feb. 6, 2018, 5:00 AM), https://www.propublica.org/article/how-vw-paid-25-billion-for-dieselgate-and-got-off-easy [https://perma.cc/V7T5-JZYA].

[202] Complaint ¶ 5, Sec. & Exch. Comm'n v. Volkswagen, 19-cv-01391 (N.D. Cal. Mar. 14, 2019).

[203] *Id.* at ¶ 9.

[204] Bondholders are in a more conservative position with respect to risk than shareholders. *See, e.g.*, James J. Park, *Bondholders and Securities Class Actions*, 99 MINN. L. REV. 585, 602 (2015).

[205] Complaint ¶¶ 151-152, Sec. & Exch. Comm'n v. Volkswagen, 19-cv-01391 (N.D. Cal. Mar. 14, 2019).

[206] *Id.* at ¶ 21.

[207] *VW* is not the only case involving an allegation of ESG securities fraud where the SEC has highlighted a bond offering made during the period of a material misstatement. *See, e.g.*, Cease-and-Desist Order, Boeing Co., No. 3-21140, ¶¶ 71-72 (Sept. 22, 2022) (noting offerings of $3.5 and $5.5 billion in debt securities).

In addition to concerns about monetary losses, some investors would view VW's deception through an ethical lens. They would object to the use of their capital to fund an unethical scheme to win market share by cheating and selling products that pollute the environment.[208] ESG disclosure can help investors direct their investments to companies that will use their capital ethically.[209] Under one view, federal securities law was passed "to force corporations and investment firms seeking funds from the public to adopt higher standards of social responsibility."[210] As Cynthia Williams observed in an extensive analysis of federal securities regulation, "[s]ocial disclosure would provide additional information bearing on *how* profits are being generated, in addition to financial information stating *that* profits are being generated."[211]

Securities law disclosure relating to the ethics of managers is an area where concerns about managerial and allocative power intersect. During the 1970s, there was skepticism that information about managerial integrity was economically material.[212] The SEC was criticized for its

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[208] There is a substantial history of investor interest in ethical investing. *See, e.g.*, JOHN G. SIMON, CHARLES W. POWERS & JON P. GUNNEMANN, THE ETHICAL INVESTOR: UNIVERSITIES AND CORPORATE RESPONSIBILITY 1-5 (1972) (describing movement during the 1970s to encourage responsible investing by universities).

[209] *See, e.g.*, Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1978 (2020) (noting that ESG information is useful for investors who wish to "align one's investments with one's values"); Max M. Schanzenbach & Robert J. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 398 (2020) (contrasting use of ESG "as a screen on investment activity, with the investor eschewing firms or industries identified as unethical or falling below a certain ESG threshold" with risk-return investing); *see also* U.S. GOV'T ACCTBLTY. OFF. ("GAO"), PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 11 (July 2020) (describing use of ESG information in creating investment funds that will "attract investors focused on social goals").

[210] CAROSSO, *supra* note 141, at 368; *see also* Frankfurter, *supra* note 153, at 111 (observing that "when a corporation seeks funds from the public it becomes in every true sense a public corporation" whose "affairs cease to be the private perquisite of its bankers and managers . . . .").

[211] Williams, *supra* note 14, at 1201.

[212] *See, e.g.*, Stevenson, *supra* note 198, at 69 (describing "howls of outrage" in response to SEC management fraud cases); *see also* John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1259 (1977) (noting that "shareholders appear to show little

efforts to require disclosure relating to managerial ethics.[213] Now, because a company's valuation depends significantly on the competence of its managers, managerial integrity is clearly relevant to investor decision-making. Investors are less willing to tolerate giving unethical managers authority to allocate their capital.

In addition to bearing on market valuations, managerial misconduct can also offend investor ethics. A Chief Executive Officer ("CEO") who engages in sexual harassment is not just a potential economic liability. Many investors would also have moral objections to egregious behavior by a corporation's top executive.[214] Indeed, the SEC recently brought an enforcement action relating to workplace misconduct by the CEO of McDonald's, a large corporation, that could be viewed as a case raising ethical considerations.[215] The SEC claimed that the CEO violated Rule 10b-5, which prohibits securities fraud, by failing to disclose improper relationships with subordinates in the course of an investigation that resulted in his firing.[216]

It is not a far step to go from concern about managerial ethics to concern about broader issues of ethical concern. Many investors view sustainability as an issue of ethics. If a large public corporation is contributing disproportionately to climate change, disclosure of its emissions could encourage such investors to invest in cleaner companies. Disclosure relating to a company's treatment of workers could also impact investing decisions. Some investors would have ethical objections to allocating capital to companies that abuse their employees.

To the extent that securities regulation is concerned with the ethical allocation of capital, there is a question of whether such regulation

concern about the moral peccadillos of management, or at least those adventures intended to benefit the corporation").

[213] *See, e.g.*, ROBERTA KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VERSUS CORPORATE AMERICA 230-45 (1981) (criticizing broad definition of materiality).

[214] For a discussion of how corporate and securities law regulate sexual harassment, see Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018).

[215] *See* Cease-and-Desist Order ¶¶ 5-8, *In re* Stephen J. Easterbrook and McDonald's Corp., No. 3-21269 (Jan. 9, 2023).

[216] *Id.*

should be limited to public companies. The most promising private companies now have substantial access to capital. Their valuations can rival those of large public companies. If private companies have substantial corporate power, there is an argument that such power should also be regulated. Scholars such as Jennifer Fan and Ann Lipton have argued that large private companies should be subject to mandatory disclosure.[217] Such a disclosure regime might look more like the ESG disclosure regime in the European Union, which is triggered by the size of a company rather than its status as public or private.[218]

An argument against extending disclosure mandates to private companies is that freedom from securities law enables private companies to develop so that they can compete with large public companies that have easier access to capital. Entrepreneurship helps ensure that companies with market power do not become complacent and inefficient. While there are some corporate giants that remain private indefinitely, many private companies that achieve high market valuations eventually go public. The benefits of access to public capital, such as liquidity, help ensure that private companies have an incentive to go public and agree to more stringent disclosure requirements.

As efforts are made to mandate ESG disclosure, the responsibilities and burdens of public company status will continue to grow. Such regulation could further encourage corporate size by limiting access to public capital markets to companies that can afford to comply with extensive ESG disclosure requirements. On its current trajectory, securities regulation seeks to regulate bigness rather than prevent it.

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[217] *See* Jennifer Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 585 (2016); Elad Roisman, Former Chairman, Sec. & Exch. Comm'n, Speech: Putting the Electric Cart before the Horse: Addressing Inevitable Costs of a New ESG Disclosure Regime (June 3, 2021) ("[S]ome have suggested that, in enacting new ESG disclosure requirements, we take the unprecedented step of imposing the requirements on public and non-public companies alike . . . ."); Lipton, *supra* note 6, at 563. *But see* Alexander I. Platt, *Unicorniphobia*, 13 HARV. BUS. L. REV. 115 (2022) (questioning need for private company disclosure mandates).

[218] The EU directive on ESG disclosure exempts "small and medium-sized enterprises" from its requirements and provides that "the new disclosure requirements should apply only to certain large undertakings and groups." Council Directive 2014/95/EU, 2014 O.J. (L330) 1 (EC).

IV. Regulating the Allocative Power of Big Business

Securities regulation now has a distinctive and essential role in controlling the power of big business. It helps mediate the process by which companies become and stay large. It seeks to ensure that corporate size is earned through strong financial performance. It potentially provides a mechanism for monitoring whether large public companies are using investor capital responsibly. Acknowledging the role of federal securities law as a regulator of corporate power will better equip securities regulators to address the challenges of a world in which economic power is increasingly consolidated in the largest corporations, and they are asked to respond. This Part concludes with a concrete proposal. The SEC should condition access of the very largest public companies to capital markets on compliance with heightened disclosure requirements that enable investors to monitor whether their capital is ethically allocated.

Modern securities regulation does not explicitly acknowledge its role in regulating corporate power. It does not impose greater obligations on the very largest public companies. It mainly recognizes corporate size in identifying smaller public companies that should be relieved from the most demanding regulatory burdens.[219] Federal securities law does identify large public companies in two contexts. The first such category, the Well Known Seasoned Issuer, is able to sell securities to the public with more freedom.[220] The second category, the Large Accelerated Filer, is subject to more stringent requirements with respect to the timing of its SEC periodic disclosure filings.[221] These classifications, however, only require a public float of $700 million, and thus include a wide range of companies.[222] A public corporation with a trillion-dollar market

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[219] *See, e.g.*, Dodd-Frank Wall Street Reform and Protection Act, § 989G, Pub. L. No. 111-213, 124 Stat. 1376, 1948 (2010) (exempting companies with public float under $75 million from some requirements of Sarbanes-Oxley).

[220] *See* Securities Offering Reform, Securities Act Release No. 8591, 70 Fed. Reg. 44721, 44729 (Aug. 3, 2005).

[221] *See* SEC Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934.

[222] 17 C.F.R. § 240.12b-2 (2) (2024); Securities Offering Reform, 70 Fed. Reg. at 44,727.

capitalization is put in the same group as a public company with a market capitalization of just a few billion dollars.

Another example of a context where securities regulation could do more to take account of size is the materiality standard, which determines whether information is sufficiently important to disclose.[223] George Georgiev has argued that this standard has been applied without adequate consideration of corporate size.[224] Large companies can have weaker disclosure obligations than small companies because even large transactions may not represent a significant percentage of their revenue or costs.

There is good reason for the current system, which mainly focuses on protecting investors from economic loss when they transact in securities. This Article does not take the position that securities law should completely move away from this approach. A singular reliance on investor protection, though, can obscure imaginative ways that disclosure requirements could be adjusted to address the potential abuse of allocative power by big business.

The failure of modern securities law to address the problem of corporate power is evidenced by the assumption that securities disclosure mandates should uniformly govern all public companies. Under the conventional approach, which emphasizes allocative efficiency, disclosure mandates should generally apply to all or most public companies. Standardized disclosure enables investors to easily compare companies. Proponents of ESG disclosure thus typically argue for a uniform mandate.[225] They argue that ESG information will enable

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[223] *See generally* James J. Park, *Assessing the Materiality of Financial Misstatements*, 34 J. CORP. L. 513 (2009) (describing materiality standard).

[224] *See* Georgiev, *supra* note 176, at 605-06.

[225] *See, e.g.*, SEC. & EXCH. COMM'N, RECOMMENDATION FROM THE INVESTOR-AS-OWNER SUBCOMMITTEE OF THE SEC INVESTOR ADVISORY COMMITTEE RELATING TO ESG DISCLOSURE (May 14, 2020) (arguing for a "single standard of material, decision-useful information" that would "level the playing field between large and small, well financed, and capital constrained issuers"); Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 324 ("This Article therefore recommends that any new ESG disclosure rules adopted by the SEC apply to all registrants . . . ."); *see also* Cynthia A. Williams & Jill E. Fisch, Request for Rulemaking on Environmental, Social, and Governance ("ESG") Disclosure, No. 4-730, at *8 (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/RNU2-GUS4] (requesting that the SEC "engage in

investors to identify those companies that have relatively weak ESG practices.[226] In doing so, ESG mandates will help ensure that investors pay a fair price for a company's stock. This view was evident in the SEC's proposal for extensive new climate disclosure rules, which cited concern "that the existing disclosures of climate-related risks do not adequately protect investors."[227] Because voluntary disclosure on climate was not uniform, the SEC argued that investors could not use it to adequately compare different companies.

Viewed through the lens of corporate power, uniform disclosure mandates may not always be appropriate. First, not all public companies exercise the same amount of allocative power. Public companies with valuations approaching a trillion dollars will have much more allocative power than a public company with a valuation of just a billion dollars or less. If one of the goals of securities law is to check abuses of allocative power, there may be times when it should be targeted at public companies with the highest market valuations. Second, uniform disclosure mandates can create barriers to smaller companies that want to access capital markets. Increasing disclosure requirements will raise the cost of public company status, making such status attainable only by companies that can afford to comply with costly regulation.

Both of these arguments are particularly applicable to ESG disclosure. First, not all public companies are large enough to have a significant social impact. To the extent that ESG disclosure is motivated by the desire to ensure that capital is used ethically rather than allocative efficiency,[228] there is a case that there is a stronger reason to monitor

a rulemaking process to develop a framework for public reporting companies to use to disclose specific, much higher-quality ESG information than is currently being produced").

[226] *See, e.g.*, GAO, *supra* note 209, at 5 (concluding that ESG disclosure will help investors "protect their investments."); H.R. REP. NO. 117-54, at 4-5 (June 8, 2021) (describing how "[i]nvestors have been demanding more — and better — disclosure of ESG information from public companies").

[227] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Mar. 21, 2022).

[228] It has been difficult to tie ESG metrics clearly to corporate valuations. *See, e.g.*, Dan Esty & Todd Cort, *Corporate Sustainability Metrics: What Investors Need and Don't Get*, 8 J. ENV. INVEST. 11, 15 (2017) ("We survey a wide range of studies and analyses — and find the data and conclusions about the correlation between sustainability and

entities that have the greatest allocative power. Second, the cost of ESG disclosure mandates will increase the cost of public company status. Smaller and mid-size companies will be less able to afford the additional cost of such disclosure, which comes on top of regulatory mandates that seek to ensure the accuracy of financial reporting.

Rather than require ESG disclosure uniformly for all public companies, the federal securities laws should impose the strictest mandates on the very largest public companies with a valuation of $100 billion or more.[229] The SEC could designate such companies as

marketplace success to be divergent."); Gerhard Halbritter & Gregor Dorfleitner, *The Wages of Social Responsibility – Where are They? A Critical Review of ESG Investing*, 26 REV. FIN. ECON. 25, 35 (2015) (concluding that "ESG portfolios do not show significant return differences between companies featuring high and low ESG rating levels"); Schanzenbach & Sitkoff, *supra* note 209, at 436 ("The theoretical relationship between firm value and environmental and social factors has some empirical support, though not as strong as that in favor of governance factors."); *see also* Aneil Kovvali & Yair Listokin, *Valuing ESG*, 29 BYU L. REV. 705 (2024) (proposing that companies choose public valuations for ESG goals). Even companies with poor ESG practices can have high market valuations so long as investors believe they have strong fundamental businesses. A company with weak ESG compliance may be worth somewhat less than an identical company with strong ESG compliance, but even if there is such a difference, it is not clear that the difference would be substantial. There will be some cases where a company engages in conduct so egregiously bad that it will substantially threaten its market valuation when revealed. However, such cases are hopefully infrequent.

Investors are increasingly demanding that their capital be used ethically. *See, e.g.*, Michal Barzuza, Quinn Curtis & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020) (presenting evidence that millennial investors prioritize investments consistent with social values over investment returns); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/4KRE-KDKQ] (concluding that even sophisticated investors have nonfinancial concerns); *see also* Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility?*, 2023 WIS. L. REV. 977, 1007-1025 (2023) (reporting survey results suggesting that investors are willing to forgo some financial gains for social reasons); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017) (acknowledging that investors have "ethical and social concerns").

[229] The precise threshold for heightened ESG disclosure is subject to debate. There is a case that it could be $200 billion or $50 billion rather than $100 billion.

There is an argument that rather than market valuation, revenue could be the standard. Federal securities law now uses a revenue test for identifying Emerging Growth Companies. A company with revenue below a threshold of around $1 billion

Heightened Disclosure Companies ("HDCs"). HDCs are the companies with the greatest allocative power. They can easily afford the cost of ESG mandates. The economic power they exercise justifies a higher degree of ethical scrutiny of their actions.

The strictest ESG requirements would apply when HDCs are selling securities. Under the current approach, more established public companies have easier access to capital markets, but given their allocative power, there is a case that their fundraising should be subject to greater scrutiny. Because their power depends substantially on their ability to easily raise funds, it is essential to condition such access on compliance with stringent disclosure. Securities regulation should help ensure that the largest companies exercise their power to allocate investor funds ethically.

Rather than just protecting investors from losses, securities law also addresses abuses of allocative power by the largest corporations. For example, VW's deception about its supposed compliance with U.S. environmental standards gave it the opportunity to dominate the market for clean energy vehicles. The deception not only caused investors to pay too much for the company's securities, it also enabled VW to unjustly enrich itself through its misallocation of billions of dollars of investor capital.[230] It is telling that the SEC asked the court to

qualifies for less stringent regulation when it does an initial public offering. *See* Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.). The Dodd-Frank Act also provides relief for smaller companies with public floats of less than $75 million from some of the burdens of regulation relating to internal controls. *See* Dodd-Frank Wall Street Reform and Protection Act, § 989G, Pub. L. No. 111-213, 124 Stat. 1376, 1948 (2010). One might use a much higher revenue threshold to identify the largest public companies. A company with substantial revenue but a low market valuation may still have substantial economic impact on consumers and workers. On the other hand, such a company would not have substantial allocative power because it would not be able to raise capital on favorable terms.

[230] The principle that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution" is well-established. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011); *see also* Kokesh v. Sec. & Exch. Comm'n, 581 U.S. 455, 458-59 (2017) (describing disgorgement as "restitution measured by the defendant's wrongful gain"); *The Future of Restitution and Equity in the Distribution of Funds Recovered From Ponzi Schemes and Other Multi-Victim Frauds*, 133 HARV. L. REV. 2101, 2103 (2020) (observing that "[t]he fundamental distinction between unjust enrichment and other areas of private law, such as torts, is that claims sounding

order VW "to disgorge all ill-gotten gains from" its material misrepresentations.[231]

Under the current system, we assume that companies with stock trading in efficient markets should be able to easily access public markets. There is less concern that the largest public companies will sell worthless securities. But under a corporate power approach, there is also a legitimate argument that investors have a compelling interest in monitoring how such public companies use public capital. Before a company with substantial economic power accesses investor funds, it should make commitments that it will use such capital ethically.

There will be disagreement about how high that commitment should be. At the very least, there is a strong case that VW wrongfully used investor capital when it built cars that it intentionally rigged to cheat on emissions tests so that it could dominate the clean energy market. Regardless of the precise level of ethical monitoring that this proposal would require, there is a case that some level of truthful disclosure concerning ethics is appropriate for companies when they raise funds by selling securities.

Concerns about the cost of ESG requirements would not be as great for HDCs. Some of the more controversial proposals for ESG disclosure mandates, such as carbon emissions disclosure,[232] have been questioned based on the costs of such disclosure relative to the benefits. There is a stronger case that HDCs can afford such costs and that such regulation should be the price for their disproportionate privilege of allocating capital.

In addition to heightened disclosure when raising capital, one could argue that HDCs should disclose more information than smaller companies on an ongoing basis. Stringent ESG disclosure would help investors monitor such large companies and hold them to higher

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in unjust enrichment aim at restitutionary remedies, which turn on the evaluation of gains, not harms"); James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 346, 399-402 (2010).

[231] Complaint, Sec. & Exch. Comm'n v. Volkswagen, 19-cv-01391, at 69 (N.D. Cal. Mar. 14, 2019).

[232] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Mar. 21, 2022).

standards.[233] Such monitoring may be the only way to continually keep watch on the exercise of economic power by the largest corporations.

Aside from more stringent disclosure, enforcement concerning misrepresentations relating to ESG matters should be especially vigorous for HDCs.[234] Even when a misstatement is not clearly economically material for a large public company, it may relate to a matter of significant ethical concern for investors. Scrutiny of the ESG disclosure of HDCs may be more warranted than for less powerful companies, which have less societal impact.

Under this proposal, there would still be some ESG disclosure requirements that would apply to all public companies. A basic level of ESG information mandates is appropriate even for smaller public companies. There may be evidence that some ESG matters are especially important to allocative efficiency and should be disclosed by all companies. Moreover, any public company could also opt into a more stringent regime and voluntarily provide more ESG disclosure than required by federal securities law.[235] Because such companies do not exercise as much allocative power, there is less concern that abuses of power in this setting will have as substantial of an impact. Indeed, the fact that they do not need to comply with heightened disclosure requirements would give smaller public companies a competitive advantage over HDCs.

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[233] *See, e.g.*, Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 U.C. DAVIS L. REV. 1445, 1448 (2022) (arguing that ESG disclosure would enable stakeholders to move corporations to focus on social responsibility).

[234] For an argument that ESG misrepresentations are actionable in certain circumstances, see James J. Park, *ESG Securities Fraud*, 58 WAKE FOREST L. REV. 1149, 1154-55 (2023).

[235] For a recent argument for such an approach, see Scott Hirst, *Saving Climate Disclosure*, 28 STAN. J.L. BUS. & FIN. 91, 128-41 (2023). For arguments that securities law should offer more issuer choice, see Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 907 (1998) (proposing regime where "issuers may select the law of any participating country regardless of the physical location of the securities transaction"); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2388-92 (1998) (proposing regime where issuers could choose the state law that governs securities regulation issues). These proposals have not discussed the possibility of distinguishing between large and small companies.

HDC regulation could be used to experiment with new disclosure requirements. When the costs and benefits of a disclosure mandate are unclear,[236] the SEC could initially limit the mandate to HDCs. After studying the impact of the disclosure rule on HDCs, the SEC could consider whether it should be applied to a broader range of public companies.

It is possible that under a corporate power approach, there would be a case for also mandating disclosure for the very largest private companies. But most private companies, even those with valuations well above $1 billion, the threshold for unicorn status, would not have enough allocative power to warrant substantial regulation. Even when private companies are able to claim high valuations based on private sales of securities, such valuations are less reliable indicators of allocative power than a valuation set in a public market. There is also a case, as noted earlier, that maintaining a separation between private and public companies enables entrepreneurial companies to grow and compete with big business. There should be a very strong presumption that even the largest private companies would not qualify as HDCs.

CONCLUSION

There is now substantial interest in regulating the power of large corporations. This Article shows that corporate power is best understood as reflecting three types of power: market power, managerial power, and allocative power. Securities regulation is taking on a more important role as the allocative power of large public companies continues to grow. For the most part, securities regulation accepts bigness and seeks to regulate it. At first glance, its disclosure requirements seem like a weak way to address corporate power compared to antitrust breakups or wide-ranging substantive corporate governance reforms. But in a world where corporate size is determined by market valuations, securities law can play a significant role in ensuring that only worthy companies have the power to allocate public investor funds. Moreover, as regulation encourages corporate size,

[236] For an overview of some of the challenges faced by the SEC in doing cost-benefit analysis, see Yoon-Ho Alex Lee, *Sarbanes-Oxley Section 404 and Its Administrative Legacy*, 78 BUS. LAW. 741, 747-51 (2023).

there is a stronger case that disclosure requirements should also enable investors to monitor whether their capital is allocated ethically.

This Article leaves many interesting questions unaddressed. There is tension between a regulatory approach that accepts or even encourages corporate size with one that seeks to reduce corporate size. To the extent that securities law encourages bigness to fully access capital markets, is this policy consistent with a populist antitrust that seeks to prevent or even dismantle bigness in corporations? To what extent would a focus on regulating corporate size affect how we view the important securities law doctrine of materiality?

These are issues that become evident when viewing securities law in part as a way of regulating big business. While there is an argument that securities regulation should continue to focus narrowly on achieving efficiency and addressing investor losses, this Article makes the case that securities regulation is an important part of a regulatory system that checks corporate power.