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The Power of the Narrative in Corporate Lawmaking

Mark J. Roe and Roy Shapira*

The notion of stock-market-driven short-termism relentlessly whittling away at the American economy's foundations is widely accepted and highly salient. Presidential candidates state as much. Senators introduce bills assuming as much. Corporate interests argue as much to the Securities and Exchange Commission and the corporate law courts. Yet the academic evidence as to the problem's severity is no more than mixed. What explains this gap between widespread belief and weak evidence?

In this Article, we explore the role of narrative power. Some ideas are better at being popular than others. The concept of pernicious stock market short-termism has three strong qualities that make its narrative power formidable: (1) connotation—the words themselves tell us what is good (reliable long-term commitment) and what is not (unreliable short-termism); (2) category confusion—disparate corporate misbehavior, such as environmental degradation and employee mistreatment, are mislabeled as short-term, when they in fact primarily emanate from other misalignments, thereby making us view short-termism as more rampant and pernicious than it is; and (3) confirmation—the idea is regularly repeated, because it is easy to communicate, and often boosted by powerful agenda-setters and interests that benefit from its repetition.

The Article then highlights the real-world implications of narrative power—powerful narratives can make decisionmakers be more certain than the underlying evidence is, thereby leading policymakers astray. For example, a favorite remedy for stock-market-driven short-termism is to insulate executives from stock market pressure. If lawmakers believe that short-termism is a primary cause of environmental degradation, anemic investment that holds back the economy, employee mistreatment, and financial crises—as many state—then they are likely to support insulating corporate executives further from stock market accountability. Doing so may, however, do little to alleviate the underlying problems, which would be better handled by, say, stronger environmental regulation and more astute financial regulation. Powerful narratives can drive out good policymaking.

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INTRODUCTION

The concept of how stock-market-driven short-termism damages the economy is simple and powerful: executives, confronted with a demanding stock market of traders and activists, focus too much on boosting their immediate quarterly financial results, rather than on the business's long-term health. Employee well-being, critical research and development, and long-run capital investment all deteriorate. Because in this view the stock market blocks so many large companies from thinking for the long term, the whole economy suffers.

The main culprits in this popular view are stock traders and shareholder activists, both of whom are looking for a quick profit and bend large public corporations' investments to align with the traders' and activists' short-run time horizons. Among policymakers, the media, and executives, the consensus is that the short-termism problem is widespread and pernicious—and getting worse.[1] Corporate law judges excoriate it.[2] Stock market regulators, responding to political pressure, move combatting short-termism up on their agenda.[3]

Yet the academic evidence for stock-market-driven short-termism as seriously damaging the economy is inconclusive and contested. Surely some companies are, as charged, excessively short-term. But the evidence of grave economy-wide damage is sparse and some of it negative. After all, the largest stock market capitalizations in the United States are accorded Amazon, Apple, Facebook, and Google—all longer-term-oriented companies whose current stock prices cannot be justified by their current earnings.[4]

What explains this wide gap between contested academic evidence and assured perniciousness in the popular view? In this Article we examine the role of narrative power. Because short-termism's negatives are easily stated, easily understood, and regularly repeated, while the positives (although they appear in the data) need a few moments to visualize and articulate, it's easy for the short-termism narrative to be popular. We highlight the psychological, behavioral biases that boost the narrative's believability, as well as the interest-group dynamics that the narrative bolsters and who in turn firmly push it.

Three strong persuasive channels are in play: connotation, category confusion, and confirmation.

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[1] *See infra* notes 3, 31, 60, 125, 127 and accompanying text (reviewing statements by Joseph Biden, Hilary Clinton, Donald Trump, Elizabeth Warren, Joe Donelly, and Jay Clayton); Joe Biden, *How Short-Termism Saps the Economy*, WALL ST. J. (Sept. 27, 2016), https://on.wsj.com/3cNjdS0; *see also* David Brooks, *President Biden's First Day*, N.Y. TIMES (July 16, 2020), https://nyti.ms/3dpgldm ("[A]sked . . . to describe the big forces that have flattened working-class wages over the decades . . . [,] Biden pointed to two institutional failures—[one being the] broken [character of] Washington and [the other being] the way Wall Street forces business leaders to focus obsessively on the short term.").

[2] *See infra* notes 79, 128, 129 and accompanying text.

[3] In July 2019, for example, the Securities and Exchange Commission organized a roundtable on how it could better combat stock-market-driven short-termism. Jay Clayton, Chair, Sec. & Exch. Comm'n, Statement at the SEC Staff Roundtable on Short-Term / Long-Term Management of Public Companies, Our Periodic Reporting System and Regulatory Requirements (July 18, 2019), https://www.sec.gov/news/public-statement/statement-clayton-071819. The event appears to have resulted from a presidential tweet pushing the SEC to examine short-term quarterly reporting's negative impact. *See Trump Backs CEOs, Proposes Easing Corporate Reporting Rules*, REUTERS (Aug. 17, 2018), https://reut.rs/3rMC4RN.

[4] The price to earning ratio of leading technology firms of Facebook, Apple, Amazon, Netflix, Google, and Microsoft vastly outpaces the S&P 500 price to earnings ratio of early 2021.

Connotation and vocabulary matter. Initial connotations condition our thinking before we examine evidence.[5] Short-termism's initial connotations—of instability, unreliability, uncertainty, and a refusal to follow through—make it seem worse than it is. By contrast, long-termism's connotations—of reliability, steadfastness, and stable planning—make it seem more desirable. The words themselves evoke a mental image of stock traders frenetically buying and selling, in contrast to construction workers in hard hats building a durable factory.

Why do we say that the initial connotations make short-termism seem worse that it is? A deeper analysis than most people's initial impression leads to the converse as equally plausible: long-term corporate decisionmakers can be stubborn and self-interested, while short-term decisionmakers can be flexible and innovative.[6] Short-term adaptation to rising demand for a product is good; long-term devotion to a product that will soon be disfavored is unwise. Yet public and political sensibilities often hinge on our immediate connotations.

Narrative power depends not just on the connotations that surround how our minds initially receive the idea, but also on how often our environment reminds us of the idea. This is where category confusion comes in. Salient phenomena not arising primarily from distorted corporate time horizons are regularly but incorrectly labeled as mainly resulting from corporate short-termism. Environmental degradation, for example, is often portrayed as due to stock market short-termism, when it primarily emanates from the corporation's ability to offload costs externally to third parties, *not* from investors' time horizons. The corporation cheapens its operations to save money at the environment's expense, thereby benefiting not just short- *but also* long-term investors. The real policy issue is *who* pays, not *when* they pay.[7] But when disparate problems such as toxic pollution or employee mistreatment or financial externalities are mislabeled and lumped with truly distorted corporate time horizons (of overly favoring the present over the future), policymakers and the public view corporate short-termism as more rampant and pernicious than it is.

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[5] *Cf.* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 59–62 (2011).

[6] For the oft-ignored perils of long-termism, see Michal Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104 (2020).

[7] We see environmental degradation and related climate issues as first order economic issues for the nation and the planet. They are not, however, *corporate* short-termism issues and thinking that they primarily are due to corporate time distortions will produce ineffective policies. We write this Article partly to better direct the environmental debate away from corporate time horizon issues to real (but harder) regulatory solutions.

Confirmation and repetition further bolster the belief that it is a major economy-wide problem. The idea is boosted by both naturally-recurring repetition, and intended, interest-driven repetition. Naturally-recurring confirmation comes not only from the real instances of time distortion but also from the just-mentioned category confusion. Interest-driven repetition comes from influential players—namely executives and directors—who benefit if lawmakers believe financial market short-termism is pernicious enough to justify further executive autonomy from financial markets. Since some firms surely are perniciously too short term, these influential agenda-setters can sincerely and vividly identify, emphasize, and replay discovered instances, which turn into supporting narratives. Negative stories of short-termism transmit well, whereas stories of positive aspects of market feedback to end poor investments are complex and opaque, easily dying before they can be retold.

Connotation, confusion, and confirmation combine to make the short-termism narrative popularly seen as a major cost to the economy. Opinion leaders state an idea and, if it transmits well and if listeners are receptive, the idea spreads widely. Repetition reinforces belief. The idea becomes strongly encoded into our brains (because it's concrete, seems real and deep, with confirming stories) and is frequently cued by our environment (because people's experiences remind them of it).[8] It persists and prospers as we repeat it to ourselves and to others.[9]

Other academic disciplines are moving faster than is law in understanding how narrative power can determine business, economic, and political outcomes. Political scientists and sociologists have long acknowledged the role of narratives that shape public opinion in driving lawmaking[10] and economists have begun recently to grapple with the idea. The recent book by Nobel-Prize-winning Robert Shiller, appropriately entitled *Narrative Economics*,[11] is a case in point. Another comes from another Nobel Laureate, George Akerlof, who argues that "soft" inputs such as powerful "stories" are often more important than

[8] *See* Jonah A. Berger & Chip Heath, *Idea Habitats: How the Prevalence of Environmental Cues Influences the Success of Ideas*, 29 COGNITIVE SCI. 195, 198 (2005).

[9] *Id*. at 196–99; David Hirshleifer & Siew Hong Teoh, *Psychological Influences on Financial Regulation and Policy*, *in* BEHAVIORAL FINANCE: INVESTORS, CORPORATIONS, AND MARKETS 151, 159–60 (H. Kent Baker & John R. Nofsinger eds., 2010).

[10] *See, e.g.*, Jon Agnone, *Amplifying Public Opinions: The Policy Impact of the U.S. Environment*, 85 SOC. FORCES 1593, 1597 (2007); Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RSCH. Q. 29, 29 (2003); EMERY ROE, NARRATIVE POLICY ANALYSIS: THEORY AND PRACTICE 1 (1994); Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175, 175 (1983).

[11] ROBERT J. SHILLER, NARRATIVE ECONOMICS: HOW STORIES GO VIRAL & DRIVE MAJOR ECONOMIC EVENTS (2019).

"hard" and easier-to-measure inputs.[12] Yet another is in David Hirshleifer's 2020 presidential address to the American Finance Association.[13] And while the wider legal literature is not devoid of narrative analysis,[14] corporate legal scholarship has largely ignored it.[15] It is time to adopt the tools now available in adjacent disciplines to analyze narrative power in corporate law.

There's a good explanation why narrative has not been important to corporate law thinking. Historically, the plumbing of corporate and securities law rarely engaged public sentiment,[16] thereby making it understandable that corporate law analysis has traditionally focused on factors such as doctrinal path or corporate performance, and ignored narrative's role. But in our era of increasing populism and burgeoning social media, popular narrative, widespread perception, and notions of how-it-will-play in the media are becoming increasingly important in corporate lawmaking. Corporate purpose, stock market short-termism, stock buybacks, and executive compensation are issues of popular and political discourse, not just of specialists' analysis. Just reently, the Business Roundtable—the elite organization of the CEOs of the 200 largest American firms—reframed how they saw corporate purpose. They put shareholders last on their list of stakeholders that

[12] George A. Akerlof, *Sins of Omissions and the Practice of Economics*, 58 J. ECON. LITERATURE 405, 405, 413–15 (2020).

[13] David Hirshleifer, Presidential Address: Social Transmission Bias in Economics and Finance 7 (Mar. 12, 2020), https://ssrn.com/abstract=3550880; *see also Mastering the Art of the Narrative: Using Stories to Shape Public Policy*, LSE IMPACT BLOG (July 18, 2018), https://blogs.lse.ac.uk/impactofsocialsciences/2018/07/18/mastering-the-art-of-the-narrative-using-stories-to-shape-public-policy/.

[14] *E.g.*, Alex Raskolnikov, *Narratives Versus Facts in Distributional Debates* (Colum. L. Sch. Working paper, 2019) (on file with author); WILLIAM HALTON & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS 153–54 (2004) (noting that tort reform was boosted by the belief in a "litigation crisis," when the on-the-ground evidence was that there was no such crisis); Joseph J. Thorndike, *The Durability of a Dysfunctional Tax: Public Opinion and the Failure of Corporate Tax*, 21 KAN. J.L. & PUB. POL'Y 347, 359–60 (2012).

[15] Two fine legal efforts examine a distant cousin to narrative power, namely the gap between reality and belief in corporate law thinking via symbols and myths. *See* Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997 (2014); Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923 (2020). Our analysis of narrative power does not depend on an underlying falsity to the concept examined. Some narratives, unlike most myths, are true, but are still weak foundations for policymaking.

[16] *See generally* PEPPER D. CULPEPPER, QUIET POLITICS AND BUSINESS POWER: CORPORATE CONTROL IN EUROPE AND JAPAN (2011).

needed CEO loyalty.[17] The statement generated wide media discussion,[18] with general circulation media articles triggering thousands of readers' comments.[19] The kind of narrative analysis we blueprint here will increasingly thus be needed to understand how corporate law is made.

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A few words on methodology and scope are in order to clarify what we can and cannot show about narrative power. Narrative power has been understudied not just because some scholars have thought it to be unimportant but also because it is fuzzy, making it difficult to capture in neat models or statistical proof or hard lawyer-like logic. Narratives often "sit in the background and are rarely expressed when decisions are made. . . ," Robert Shiller said.[20] "Thus it becomes difficult to establish a connection between the narratives and the action."[21] Yet, as he and others have recognized, that challenge should not deter us from trying to better understand narratives' increasing role.[22] Our analysis here is exploratory—a first step toward uncovering narratives' role in corporate lawmaking. We address the challenge in studying narratives by examining not just the sensibility and logic of the situation but also the content of media coverage, dictionary definitions, and professional memos. We synthesize insights from the burgeoning, multidisciplinary literature on why favored ideas proliferate and beat out other ideas,[23]

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17 BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019) , https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-Feburary-2021-compressed.pdf.

18 *See, e.g.*, David Gelles & David Yaffe-Bellany, *Shareholder Value is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://nyti.ms/3rOs2zx; Editorial, *The "Stakeholder" CEOs*, WALL ST. J. (Aug. 19, 2019), https://on.wsj.com/2PXcLin; Jena McGregor, *Group of Top CEOs Says Maximizing Shareholder Profits No Longer Can Be the Primary Goal of Corporations*, WASH. POST (Aug. 19, 2019), https://wapo.st/3cMTTfe.

19 For example, see the comments submitted at the bottom of Gelles & Yaffe-Bellany's New York Times article, *supra* note 18.

20 SHILLER, *supra* note 11, at 93.

21 *Id.*

22 *Id.*

23 *E.g.,* RICHARD DAWKINS, THE SELFISH GENE 189–201 (2d ed., 1989) (developing the concept of a social "meme," analogous to a gene, that evolves and propagates); FRANK I. LUNTZ, WORDS THAT WORK: IT'S NOT WHAT YOU SAY, IT'S WHAT PEOPLE HEAR 215–17 (2007); Aaron Lynch, *Thought Contagions in the Stock Market*, 1 J. PSYCH. & FIN. MKTS. 10, 10 (2000) ("[I]deas [can] propagate in ways that do not depend upon truth, utility, rationality, or even emotional appeal."); Sendhil Mullainathan, Joshua Shwartzstein & Andrei Shleifer, *Coarse Thinking and Persuasion*, 123 Q.J. ECON. 577 (2008) (modelling how persuasive ideas proliferate); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973) (discussing how information availability skews perceptions).

emphasizing especially thinking from cognitive linguistics (on how connotations condition beliefs), communication science (on how the media agenda is set), and behavioral economics (on why managers emphasize the perniciousness of stock market short-termism). Before corporate academics can test the power of narrative in corporate lawmaking quantitatively, we need to understand in gross the mechanisms by which narrative could, and we believe, does, play out. Providing that exploratory overview (for short-termism) is what we seek to accomplish in this article.

We then link narrative power to traditional political economy modes of inquiry, showing how previously puzzling gaps in political economy explanations for laws' passage or failure can be bridged via narrative power. Political economy analysis has persisting puzzles as to why seemingly powerful interest groups can fail and why some proposals that are clearly in the public interest can also often fail. A strong narrative can bolster an idea in the public sphere, or diminish it. An analytically strong argument on the merits can fail if it lacks an underlying persuasive narrative. Raw political power can also fail if not embedded in a convincing, easy to repeat, publicly-oriented narrative.[24] That is often the case because the public can be, and often is, repelled by media discoveries of raw power machinations and behind-the-scenes influence. But powerful interest groups win more readily when wielding a powerful narrative that legitimizes their claims in the court of public opinion and the minds of policymakers. To ignore narrative because its influence is difficult to measure, and difficult to untangle from the merits and raw power alone, would be an analytical mistake.[25]

We focus on the narrative power of the short-termism controversy. As a result, this Article's narrative analysis will resonate most strongly with those who, like us, see the evidence that short-termism causes great economy-wide damage as weak. But it should also interest those persuaded that stock-market-driven short-termism is a major economic problem. After all, major problems are regularly diagnosed incorrectly, and few business problems have entered mainstream media and Washington policymaking circles in the way that the stock-market-driven short-termism idea has. Even a reader who finds the prevailing short-termism narrative accurate should want to account for how and why it became so publicly salient.[26] We do that accounting here.

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[24] *See infra* notes 150–187 and the accompanying text.

[25] *See* Akerlof, *supra* note 13, at 415–16.

[26] *Cf.* WAYNE A. LEIGHTON & EDWARD J. LÓPEZ, MADMEN, INTELLECTUALS, AND ACADEMIC SCRIBBLERS: THE ECONOMIC ENGINE OF POLITICAL CHANGE 127 (2013).

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The Article proceeds in five parts. Part I outlines the gap between the consensus and the evidence about short-termism. Our goal here is not to weigh one view against the other, but rather to show that there is no powerful academic consensus on the issue, while it nevertheless is backed by a powerful political consensus.

Parts II to IV explain the gap between wide belief and mixed evidence, emphasizing the three conduits of narrative power. Part II analyzes connotation and vocabulary. Short-termism connotes negative qualities that condition further thinking. The idea wins without analysis, as the words themselves tell us what is good and what is not.

Part III demonstrates how category confusion leads corporate derelictions only distantly related to short-termism—pollution, employee mistreatment, and financial crises—to be mistakenly labeled as stock-market-driven short-termism. Confusion over the breadth of short-termism leads the media and policymakers to see it as wider, deeper, and more pernicious than it is, inducing them to be more conclusive than is justified.

Part IV emphasizes the role of confirmation and repetition. The short-termism narrative is repeated often and naturally: instances of true short-termism become vivid and seem representative, not examples of derelictions resting on one end of a spectrum.[27] The media favors repeating easy-to-state short-termism stories; and repetition also comes from opinion leaders—such as executives, notable financiers, and politicians. These opinion leaders believe in it and can benefit from stock-market-driven short-termism being widely feared.

Part V shows why the power of narrative matters. First and importantly, we add to political economy analysis by showing (we believe for the first time) how narrative power overcomes classic debilities that corporate interests face in influencing the polity. Classic political economy tells us that even powerful interests will fail to influence lawmakers when free-riding inside the interest group debilitates the interest group's efficacy, because each member wants the favorable law but hopes that the others will pay up and lobby lawmakers. If enough of those in the group think that way, nothing happens. However, a narrative once produced is cheap to repeat and thereby becomes a public good to the interest group, which rallies around it. Second, corporate interests lacking a public interest narrative for their proposed laws can, and often do, face backlash in the media and the polity. Narrative

[27] *See* Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory without Evaluation*, 19 J. CONSUMER RSCH. 212 (1992) (finding that oft-repeated statements are perceived as true, regardless of empirical validity).

analysis also helps explain why some public-oriented merits arguments win: powerful narratives provide a justification that is easy for lawmakers to communicate to one another and to their constituents. Legislators and sometimes judges need to sell their ideas; narratives with power sell better than complex academic data.

Part V also examines how powerful narratives such as short-termism can crowd out good policymaking. We show several likely instances of the stock market short-term narrative crowding out policy alternatives in a way that could induce policy error in issues as important as how best to combat an American R&D shortfall.

* * *

We emphasize that we focus here not on the truth or falsity of the short-termism narrative (although we have a view on how severe it truly is), but on why it is influential and popular. Truth boosts popularity but is only part of the political story. The political process rejects well-known truths and accepts as true highly disputed ideas.

Combining an attractive idea that is grounded enough in reality with plausible even if disputed evidentiary support can propel an idea farther and more successfully than would the actual evidence alone. Influential interests cannot always obtain their goals unless those goals resonate with a narrative rhetoric that persuades lawmakers, voters, and the media. Narrative analysis is needed, and we expect will be needed more in the future, to explain why some corporate issues grip lawmakers and others do not.

I. THE DOMINANT NARRATIVE: STOCK MARKET SHORT-TERMISM CAUSES SERIOUS ECONOMIC-WIDE DEGRADATION

This Part highlights the unresolved, disputed nature of the evidence of short-termism's impact on the American economy and contrasts it with the consensus public and political view that it severely damages the economy. We do not here assess the ultimate truth or falsity of the stock market's impact. Our aim is more modest, namely, to show the gap. Whereas scholars are quite divided, public discourse is quite certain.

A. Public Consensus

In the court of public opinion, the notion goes largely unquestioned and has been gaining saliency: the short-term-focused stock market's vociferous demands on corporate executives damage the whole economy. Major media mentions of short-termism are rising sharply: mentions of financial short-termism in the past five years in the New York Times are five times as frequent as those for the preceding fifteen.[28] And a "widespread consensus among managers, among boards, [and] even among major institutional shareholders, [holds] that . . . short-term pressures . . . are causing boards and managers to manage their companies suboptimally . . . ."[29]

Respected business and political leaders repeat the narrative and reinforce the consensus. Jamie Dimon, the head of JPMorgan Chase, and Warren Buffett, the iconic investor, write in the Wall Street Journal under the headline "Short-Termism is Harming the Economy."[30] National political leaders like Joseph Biden say the same.[31] Democratic and Republican Senators alike attack short-termism for holding America back.[32] Government commissions and blue-ribbon studies backed by high-powered think tanks conclude that "short-termism [is] damaging the economy as a whole."[33] It blocks the jobs and future that we want.

B. Evidentiary Uncertainty

This consensus is not mirrored in academic work, where the issue is contested, with a mixed body of evidence.

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[28] The New York Times data comes from our own Factiva search. We controlled for the number of articles published over the period (by putting the number of mentions in the numerator and the number of articles in the denominator). Others have found a similar increase in Wall Street Journal mentions. KIM M. WILLEY, STOCK MARKET SHORT-TERMISM: LAW, REGULATION, AND REFORM 2 (2019).

[29] Steven Rosenblum, *Corporations: The Short-Termism Debate*, *in Colloquium, 2014 National Lawyers Convention: Millennials, Equity, and the Rule of Law*, 85 MISS. L.J. 697, 708 (2016). Mr. Rosenblum, a prominent attorney, often represents management in contested transactions.

[30] Jamie Dimon & Warren E. Buffett, *Short-Termism Is Harming the Economy*, WALL ST. J. (June 6, 2018), https://on.wsj.com/3uM7FF9.

[31] Biden, *supra* note 1; Brooks, *supra* note 1.

[32] Press Release, Senator Tammy Baldwin, U.S. Senators Tammy Baldwin and Jeff Merkley Introduce Legislation To Strengthen Oversight Of Activist Hedge Funds (Mar. 17, 2016), https://www.baldwin.senate.gov/press-releases/brokaw-act. *See also Examining Short-Termism in Financial Markets: Hearing Before the Subcomm. on Econ. Pol'y of the S. Comm. on Banking, Hous., & Urb. Affairs*, 111th Cong. 2 (2010) (statement of Sen. Sherrod Brown, Chairman, Subcomm. on Econ. Pol'y) ("Short-termism involves a tradeoff between long-term productivity and fast cash"); Press Release, Senator Tammy Baldwin, U.S. Senator Tammy Baldwin Introduces Bipartisan Legislation to Strengthen Oversight of Predatory Hedge Funds (Aug. 31, 2017) [hereinafter Sens. Baldwin & Purdue Press Release], https://www.baldwin.senate.gov/ press-releases/brokaw-act2017 (announcing a bipartisan bill with Senator David Purdue to combat short-termism and hedge funds).

[33] *See, e.g.*, CTR. FOR AM. PROGRESS, REPORT OF THE COMMISSION ON INCLUSIVE PROSPERITY 7, 35 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/01/IPC-PDF-full.pdf?_ga=2.237958016.187643684.1617891243-2041300692.1616873681.

Studies have examined whether a defined category of firms—activist-influenced, quarterly-oriented, or institutional-investor-owned—is more short-term than others.[34] Some researchers find that public firms invest less than privately owned counterparts;[35] others that institutional investor strength in a firm *improves* R&D.[36] Some researchers find that shareholder activists do not sacrifice long-term results,[37] others that they do.[38] There is no consensus and, while a reader might determine one side to have the better of it (and we think the evidence for the problem being intermittent and not severe or systemic is the better view), a sound accounting of the academic work needs a "but see" citation after nearly

[34] For reviews, see Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 986–87, 996–98 (2013); Andrew Bird, Aytekin Ertan, Stephen A. Karoyli & Thomas G. Ruchti, Short-Termism Spillovers from the Financial Industry 6 (July 5, 2019) (unpublished working paper), https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=2859169; Albert W. Sheen, *Do Public and Private Firms Behave Differently? An Examination of Investment in the Chemical Industry*, 55 J. FIN. & QUANTITATIVE ANALYSIS 2530, 2532–34 (2020).

[35] John Asker, Joan Farre-Mensa & Alexander Ljungqvist, *Corporate Investment and Stock Market Listing: A Puzzle?*, 28 REV. FIN. STUD. 342, 342 (2015). *But see* Naomi E. Feldman, Laura Kawano, Elena Patel, Nirupama Rao, Michael Stevens & Jesse Edgarton, *Investment Differences Between Public and Private Firms: Evidence from U.S. Tax Returns*, 196 J. PUB. ECON., art. 104370, 2021, at 1, 1, where Feldman and her co-authors obtain the opposite result with corporate tax data.

[36] Philippe Aghion, John Van Reenen & Luigi Zingales, *Innovation and Institutional Ownership*, 103 AM. ECON. REV. 277, 302 (2013); Sunil Wahal & John J. McConnell, *Do Institutional Investors Exacerbate Managerial Myopia?* 6 J. CORP. FIN. 307, 307 (2000); Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?* 139 J. FIN. ECON. 237, 237 (2018) (finding that firms that activists target cut R&D spending, but their R&D becomes more effective); Alon Brav, Wei Jiang, Frank Partnoy & Randall S. Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1729 (2008) (finding that activist hedge funds improve operations).

[37] Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1085 (2015); *see also* Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1637 (2013); *cf.* Edward P. Swanson & Glen M. Young., Are All Activist Investors Created Equal? The Effect of Interventions by Hedge Funds and Other Private Activists on Long-Term Shareholder Value 2 (Oct. 8, 2020) (unpublished working paper), www.ssrn.com/abstract=2823067 (finding that activist investor announcements are followed by steady improvement in a firm's average analyst recommendation);.

[38] Martijn Cremers, Erasmo Giambona, Simone M. Sepe & Ye Wang, Hedge Fund Activism and Long-Term Firm Value 1, 41–42 (May 29, 2020), www.ssrn.com/abstract=2693231 (finding that activists hurt the growth of firms). *Contra* Lucian Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, The Long-Term Effects of Hedge Fund Activism: A Reply to Cremers, Giambona, Sepe & Wang, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2015), https://corpgov.law.harvard.edu/2015/12/10/the-long-term-effects-of-hedge-fund-activism-a-reply-to-cremers-giambona-sepe-and-wang/.

every major article cited. In finance, about half of the inquiries into short-termism find it and half do not.

Further, even when some firms are excessively focused on the short-term (as some surely are), other firms have the incentive to pick up the shortfall. The shortfall need not be a major *economy-wide* problem as long as enough other public firms (or private firms or venture capital) do enough of the long-term business that short-term firms shirk.[39] And besides, public stock markets could still promote long-termism overall, if they provide better access to long-term financing than private firms have.[40]

* * *

Whether short-termism is wide and deep is thus an empirical issue, and the empirical evidence is contested. Yet once a narrative grips both the public and opinion-leaders, divided empirical work in academic journals is not going to persuade believers in the contrary. There is more public talk of stock market short-termism's detrimental impact than data supporting a broad, pernicious economic impact. Why is that?

II. CONNOTATION

Again, we focus on why the short-termism narrative is popular, not on its truth. Truth can support a narrative's popularity, but, more so now than before, an idea's popularity does not hinge on its truth.[41]

One channel that affects popular belief is the narrative's name and its connotations, which imprint an initial picture on our minds. Initial connotations condition further thinking, creating presumptions of validity and power, or of invalidity and irrelevance. The "short-termism" words come with strongly negative connotations, rooted in deep-seated cultural and cognitive predispositions. Connotation and initial impression are important because "[a]lthough most public policy issues are fundamentally complex, public discussions of them are generally simple . . . . [C]omplex issues get whittled down to simplified choices amenable to public discussion . . . ."[42]

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[39] Roe, *supra* note 34, at 993.

[40] *See* Feldman et al., *supra* note 35.

[41] *E.g.*, Hamid Foroughi, Yiannis Gabriel & Marianna Fotaki, *Leadership in a Post-Truth Era: A New Narrative Disorder?* 15 LEADERSHIP 135, 137–39 (2019).

[42] BRYAN D. JONES & FRANK R. BAUMGARTNER, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS 31 (2005).

A. The Vocabulary of Short-Termism

Some basics: short-termism need not be bad, nor must long-termism be good. Short-term abandonment of a failed technology is good. Long-term investment in a factory whose product has no future is not.

But the connotations of short- and long-termism do not bring that indeterminacy to the fore of the speaker's or listener's consciousness. Most of us want to be seen as long-term (and, hence, reliable and steadfast), not short-term (and, hence, disloyal, unreliable, and capricious).

Dictionary definitions embed these differences, with short-termism but not long-termism defined pejoratively—as having a cost but no intrinsic value.[43] Even the *Financial Times*—the highly-respected newspaper that is hardly antagonistic to stock markets and finance—embeds negatives when it refers to short-termism, by associating it with "destructive[ness]," comes at the expense of the long-term, and undermines market credibility.[44]

Both the short- and long-term have near-synonyms with contrary connotations. Consider: do we prefer adaptable (and, hence, short-term) players to inflexible (long-term) players? Do we prefer supple minds, whose conclusions adapt as they observe changing facts,[45] to bullheaded players who persist with old, outmoded plans?

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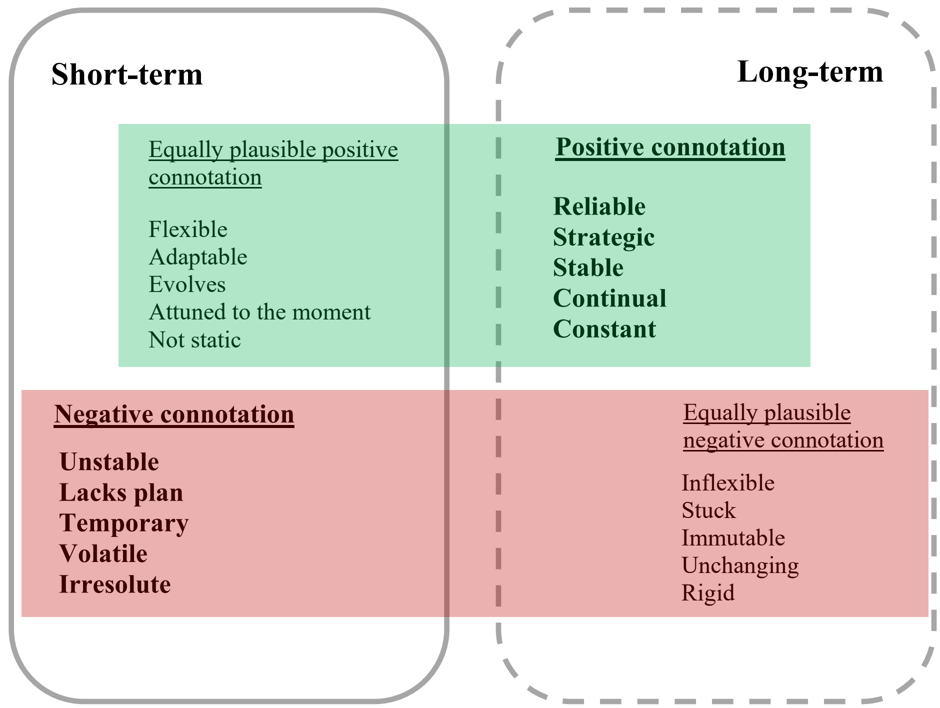
[43] *Compare* the definitions of "short-termism" in COLLINS ENGLISH DICTIONARY (12th ed. 2014) ("The tendency to focus attention on short-term gains, often at the expense of long-term success or stability"), *and* OXFORD ENGLISH DICTIONARY (Additions Series, 1993) ("Concentration on short-term . . . projects for immediate profit, at the expense of long-term security or development"), *with* "long-termism" in COLLINS ENGLISH DICTIONARY, *supra* ("The tendency to focus attention on long-term gains"), and OXFORD ENGLISH DICTIONARY (3d ed. 2003) ("[M]aking decisions with a view to long-term aims or consequences").

[44] *E.g.*, John Plender, *Shareholder Short-Termism is Damaging the Economy*, FIN. TIMES (Nov. 7, 2015), https://on.ft.com/3tsu2PH. For another example, see the definition of "short-termism" in OXFORD DICTIONARY OF BUSINESS AND MANAGEMENT (5th ed. 2009) ("Any policy that aims to maximize current profits rather than long-term development and wealth . . . . [I]nstitutional and individual shareholders often overreact to a company's short-term results and policies, causing the company to lose the longer-term focus that is ultimately in the interests of all stakeholders."). The definitions themselves (and not just what the words evoke) embed the pejorative for short-termism and neutrality for long-termism.

[45] An idea captured in an aphorism usually attributed to John Maynard Keynes: "When the facts change, I change my mind. What do you do, sir?" John Kay, *Keynes Was Half Right About the Facts*, FIN. TIMES (Aug. 4, 2015), https://on.ft.com/325gBc1.

Figure 1. Short-Termism's Negative and Long-Termism's Positive Connotations—and Their Plausible Opposites



The upper-right bold-faced, green connotations in Figure 1 are the usual positive qualities of long-term management. The lower-left bold-faced red connotations are the usual negative qualities of short-term management. The other sides' list *indicates* the logically plausible alternatives for each, which reverses their connotative qualities.

The bottom-line here: short-term theorists have captured the rhetorical high ground. Language and its "overtones, connotations, and implications" can shape our substantive thoughts.[46] Connotations of morality, intentionality, and seriousness attach to differing words whose meanings are substantially similar, with the word chosen shaping action and attitude.[47]

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[46] Cognitive linguistics is the relevant academic field here, studying the relationship between language and psychology. Hao Liang, Christopher Marquis, Luc Renneboog & Sunny Li Sun, *Future-Time Framing: The Effect of Language on Corporate Future Orientation*, 29 ORG. SCI. 1093, 1095 (2018); Job Y. Jindo, *Toward a Poetics of the Biblical Mind: Language, Culture, and Cognition*, 59 VETUS TESTAMENTUM 222, 231 n.29 (2009).

[47] Dilin Liu & Shouman Zhong, *L2 vs. L1 Use of Synonymy: An Empirical Study of Synonym Use/Acquisition*, 37 APPLIED LINGUISTICS 239 (2016); Philip Edmonds &

Short-termism's negative overtones are rooted in deep-seated cultural norms. Religious norms extol long-term incentives to resist short-term temptations.[48] Heaven awaits those who resist short-term temptations.[49] More secularly, the long-term latches onto strong moral hooks, "exploit[ing] our high regard for self-discipline and foresight,"[50] as David Hirshleifer states, and tapping into concepts as simple as the fable of the ant and the grasshopper.[51] Indeed, civilization plausibly depended on humans shifting from immediate hunter-gatherer norms to longer-term agricultural norms: planting seeds today for harvesting in the longer-term.[52]

Famous research bolsters this idea. Patience is a key to success, we are told; children's futures can be predicted based on whether they can resist eating one marshmallow now in return for two later.[53] Successful personalities can absorb current pain for later gain.[54] Stock-

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Graeme Hirst, *Near-Synonymy and Lexical Choice*, 28 COMPUTATIONAL LINGUISTICS 105, 110 (2002) (discussing the guilt, blame, and seriousness embedded in choice among slip, mistake, and error); *cf*. SHILLER, *supra* note 11, at 94–95.

[48] *See, e.g.*, Lisa A. Keister, *Religion and Wealth: The Role of Religious Affiliation and Participation in Early Adult Asset Accumulation*, 82 SOC. FORCES 175 (2003).

[49] MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 155–84 (Talcott Parsons trans., Charles Scribner's Sons 1958) (1905). Skeptics note that European capitalism began in Catholic northern Italy and that Protestantism's investment in human capital—children needed to read the Bible and, hence, could read—was more important than its psychological value structure. The persistent dominance of Weberian thinking, despite the countercurrents, could be an instance of our cultural preference for discipline and the long run. Weber's narrative is strong.

[50] David Hirshleifer, *Psychological Bias as a Driver of Financial Regulation*, 14 EUR. FIN. MGMT. 856, 868 (2008). As far as we can tell, Hirshleifer is the first to have made this point.

[51] *See id.*; *see also* David Hirshleifer, *Investor Psychology and Asset Pricing*, 56 J. FIN. 1533 (2001).

[52] Along the same line, ancient myths celebrated Promethean foresight (in mastering fire) against short-term temptations. HESIOD, THEOGONY AND WORK AND DAYS 17–20 (M. L. West trans., 1988).

[53] Walter Mischel, Yuichi Shoda & Monica I. Rodriguez, *Cognitive and Attentional Mechanisms in Delay of Gratification*, 21 J. PERSONALITY & SOC. PSYCHOL. 204 (1972) (the famous marshmallow experiment). Later replications diminished its power. *E.g.*, Tyler W. Watts, Greg J. Duncan & Haonan Quan, *Revisiting the Marshmallow Test: A Conceptual Replication Investigating Links Between Early Delay of Gratification and Later Outcomes*, 29 PSYCH. SCI. 1159 (2018). But the narrative lives on. A parallel with the short-termism narrative's resilience could be made.

[54] Brock Bastian et al., *The Positive Consequences of Pain: A Biopsychosocial Approach*, 18 PERSONALITY & SOC. PSYCH. REV. 256 (2014).

trading markets are seen as chaotic and undisciplined;[55] corporate executives must, in this imagery, impose order on a tumultuous market for us to achieve economic welfare.[56]

To make sense of our world, we use precooked thought structures.[57] For politics and public opinion, metaphors can be as vital as analysis and data.

B. The Vocabulary of Legitimate Political Rhetoric: Capitalism, Socialism, and Anti-Americanism

The vocabulary of short-termism is a rhetorically acceptable way to reject the basic economic arrangements in American society that cannot otherwise readily be legitimately rejected.

Even with the increasing acceptance in some political circles of democratic socialism—viz. Senator Bernie Sanders and Representative Alexandria Ocasio-Cortez[58]—rejecting capitalism in the United States is typically politically unpersuasive.[59] But condemning the stock market as too short-term allows the speaker to reject current arrangements, without rejecting capitalism. Critics of Wall Street can say "we respect the judgment of long-term, steadfast capitalist investors on the proper direction for this company and the economy.[60] But we reject overnight

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[55] James Gleick, *When Chaos Rules the Market*, N.Y. TIMES (Nov. 22, 1987), https://nyti.ms/3mv 3gTO.

[56] *Cf.* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 6–11 (1977) (arguing that modern corporations have "take[n] over from the market the coordination and integration of the flow of goods and services" under the leadership of their managers and executives). And in contrast, market-favoring dogma extols the market's natural selection as itself an orderly process—"market ordering" or "private ordering" are the favored phrases. They conceive of markets invisibly aggregating decentralized information better than any top-down process. *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 528–30 (1945).

[57] *Cf.* ORIN HARGRAVES, IT'S BEEN SAID BEFORE: A GUIDE TO THE USE AND ABUSE OF CLICHÉS 3–46 (2014) (discussing how we use clichés to "express a common idea that requires frequent expression.").

[58] Meagan Day, *Democratic Socialism, Explained by a Democratic Socialist*, VOX (Aug. 1, 2018), www.vox.com/first-person/2018/8/1/17637028/bernie-sanders-alexandria-ocasio-cortez-cynthia-nixon-democratic-socialism-jacobin-dsa.

[59] As Nate Silver quipped when analyzing recent public opinion polls: "'Socialist' goals . . . are often quite popular. But 'socialism' as a brand or label is really unpopular." Nate Silver (@NateSilver538), TWITTER (Mar. 3, 2019, 7:06 AM), https://twitter.com/natesilver538/status/1102223619885883393?lang= en.

[60] *See* Elizabeth Warren, *End Wall Street's Stranglehold on Our Economy*, MEDIUM (July 18, 2019), https://medium.com/@teamwarren/end-wall-streets-stranglehold-on-our-economy-70cf038bac76 ("My Accountable Capitalism Act includes provisions that would *fundamentally change* that dynamic by legally requiring big

traders and activists, who lack commitment and are looking to make a quick buck. We reject what they do to their companies, to their managers, to their factories, and to their employees. They are unreliable. They are short-term. They are not true long-term capitalists."

Short-termism thus becomes a means of criticizing, say, corporate America's *stockholder* orientation, despite the fact that shareholder primacy is *in a different conceptual category* than the corporate time horizon: shareholder or nonshareholder orientation tells us *who* is served, not *when* they're served. The next Part elaborates.

III. CATEGORY CONFUSION

Phenomena not arising from distorted time horizons are widely but incorrectly labeled as corporate short-termism. Degrading the environment,[61] taking dangerous financial risks, skirting sound regulation, and mistreating employees[62] and stakeholders[63] are all seen as primarily caused by stock market short-termism. When they are mislabeled and lumped with truly short-term phenomena, we see short-termism as more rampant and pernicious than it is.

Corporate critics should be wary of blaming such bad behavior on short-termism because doing so makes them more likely to misidentify the true causes and the best treatments. Even with no stock market

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American corporations to focus on the long-term interests of all of their stakeholders—including workers—rather than on the short-term financial interests of Wall Street investors") (emphasis in original).

[61] *Cf.* Johan J. Graafland, *Price Competition, Short-termism and Environmental Performance*, 116 J. CLEANER PROD. 125 (2016); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 181 (2019).

[62] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304–05 (1999) (asserting that director mediation is needed to cure the conflict between shareholder short-termism and employee interests); Review Note, *Avoiding the Perils of Short-Termism: Sustainable Approach to Performance Management*, 30 STRATEGIC DIRECTION 19, 20 (2014) (noting that short-term financial aims often ignore employee needs); Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 324, 349–50 (2011).

[63] *See, e.g.*, Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 57–58, 83 (2008); Kent Greenfield, *Progressive Visions of the Corporation: Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 10, 12 (2008); Caroline Flammer & Pratima Bansal, *Does a Long-Term Orientation Create Value? Evidence from a Regression Discontinuity*, 38 STRATEGIC MGMT. J. 1817, 1844 (2017); David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U.L. REV. 911, 911–12, 939 (2013); COLIN MAYER, FIRM COMMITMENT 262 (2013); Ctr. for Am. Progress, supra note 33.

short-termism, this bad behavior would, absent correctives, persist. The next three Sections illustrate how.

A. Environmental Degradation and Global Warming

The long-term-oriented corporation willingly incurs short-term costs that protect the environment over the long-run, or so conventional wisdom has it.[64] One report says: "The short-term payback periods of financial markets take precedence over the long-term time horizons of ecological and social systems."[65] Another states that a prime reason "why . . . markets [do] not . . . promot[e] a sustainable economy . . . [is financial market] short-termism—for which the capital markets can be fairly criticised . . . ."[66]

This thinking mistakenly categorizes the problem: It is not that long-term shareholders incur the costs of environmental degradation while short-term shareholders benefit. Rather, bad corporate citizens (and *both* their long- and short-term shareholders) profit from cheaper production that pollutes, since it's others and not the corporation that suffer from the pollution. Even executives and firms that think solely of the long-term will pollute if they prioritize their selfish benefits over the external social costs. This is a problem of *externalities*, not short-termism.

Corporate pollution burns up *societal* resources in the short-term at the expense of *societal* well-being in the longer-term. The firm that over-consumes hydrocarbons for today's profit at the expense of future civilization-threatening global warming benefits itself while society suffers in the long-term. But the operative mechanism is that the polluter does not pay most of the pollution's cost while it profits from overusing hydrocarbons.[67] The proper remedy is *not* to alter the firms' time

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[64] *E.g.*, Natalie Slawinski & Pratima Bansal, *Short on Time: Intertemporal Tensions in Business Sustainability*, 26 ORG. SCI. 531, 545 (2015).

[65] Andrew J. Hoffman & Max H. Bazerman, *Changing Practice on Sustainability: Understanding and Overcoming the Organizational and Psychological Barriers*, *in* ORGANIZATIONS AND THE SUSTAINABILITY MOSAIC: CRAFTING LONG-TERM ECOLOGICAL AND SOCIETAL SOLUTIONS 84, 96 (Sanjay Sharma, Mark Starik & Bryan Husted eds., 2007).

[66] FORUM FOR THE FUTURE, ACTION FOR A SUSTAINABLE WORLD: SUSTAINABLE ECONOMY IN 2040: A ROADMAP FOR CAPITAL MARKETS 4 (2011), http://www.foresightfordevelopment.org/sobipro/55/741-sustainable-economy-in-2040-a-roadmap-for-capital-markets. The report does cite market failure, as a reason second to financial market short-termism. *Id*. at 4.

[67] *Cf.* Slawinski & Bansal, *supra* note 64, at 533 (discussing the intertemporal tensions between short-term private interests and long-term public interests).

horizons, but to alter their (and our individual) incentives to internalize the externalities, via, say, a carbon tax.

A DuPont episode illustrates. Long seen as "one of the most distinguished of . . . U.S. corporation[s]"[68] and a dedicated long-term organization,[69] it was embroiled in one of the major environmental debacles of our time. For six decades, DuPont discharged a highly toxic chemical into the environment when it made Teflon.[70] The company knew of both the danger and the human body's inability to rid itself of the toxin.[71] Yet it refused inexpensive abatement.[72] Executives seemingly counted on keeping inculpating information from the public and the government, which they did for decades.[73] DuPont's long-term horizon did not stop it from polluting.

True, there's a lag between a polluter's act and the polluter getting caught; for most polluters the profits are immediate and the cost of getting caught comes later, as it was for DuPont. But this time horizon consideration should not obscure that the problem was primarily an "externality": DuPont captured the benefits while others suffered the costs. Even *without* a time lag, the temptation to externalize the costs is great. A shareholder who held DuPont's stock for the sixty-year long-term *profited* from its sixty years of Teflon pollution.[74] DuPont did not pollute because it was pressured by hedge-fund activists or was fixated with quarterly reporting; it polluted because its internal organizational

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[68] Bill George, *The DuPont Proxy Contest is a Battle for the Soul of American Capitalism*, HUFFINGTON POST (May 11, 2015), http://www.huffingtonpost.com/bill-george/the-dupont-proxy-contest_b_ 7256490.html.

[69] Delaware's former Chief Justice Strine lauded DuPont's "track record of long-term investment and better-than-typical treatment of constituencies other than stockholders." Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176 (2017). Perhaps Delaware pride explains.

[70] DuPont's contaminated "wastes from the Washington Works [were] discharged into the air, the Ohio River, various landfills, and soils and groundwater at the Washington Works," starting in 1951. Leach v. E.I. Du Pont de Nemours & Co., No. 01-C-608, 2002 WL 1270121, at *3 (Cir. Ct. W. Va. Apr. 10, 2002).

[71] *See id.* at *4.

[72] *Cf.* Nathaniel Rich, *The Lawyer Who Became DuPont's Worst Nightmare*, N.Y. TIMES (Jan. 6, 2016), https://nyti.ms/31JC1eY.

[73] Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case* 30–31 (Nat'l Bureau of Econ. Rsch., Working Paper 23866, 2017); Rich, *supra* note 72. DuPont's long-term transgressions are portrayed in a popular film, Dark Waters—named for where the toxins were buried. DARK WATERS (Participant & Killer Films 2019).

[74] *Cf.* Shapira & Zingales, *supra* note 73, at 36–37.

conscience broke down and DuPont's long-term pollution paid off for *long-term* shareholders.[75]

Similar analysis applies at the individual decision-maker level. If the company pollutes, because the decisionmaking executive anticipates no negative consequence until the executive is gone from the enterprise, then time horizon issues could be in play. But if the executive judges that the pollution is unlikely to be discovered or that, even if discovered, its full costs will not be tagged to the firm, then time horizon distortion is not the critical debility.

We do not regularly observe executives secretly damaging the environment *and* the corporation later paying up in the long-run; getting caught in the long-term makes for a good story but, as far as we can tell, it is too rare. The DuPont scenario had the firm polluting for the long-term while not expecting to be discovered. Even though eventually caught, DuPont seems to have profited. Rewarding whistleblowing and facilitating liability are plausible cures; aligning the executives' time horizons with those of long-term shareholders would not have been a cure: DuPont's pollution was profitable in both the long- and the short-run.

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Again, our purpose here is not to prove that stock-market-driven short-term proclivities have never exacerbated pollution or fraud, only that they are unlikely to fundamentally cause global warming, excess methane, and spoliation of aquifers, and that reversing any such proclivities are unlikely to prevent corporate fraud. The social problem often emanates from a misdirected, selfish shareholder orientation. One does not cure such problems with a longer time horizon.

B. Employees and Stakeholders

Critics decry executives and corporations for not being attentive to employees and local communities, to the spirit of government regulation, or to societal value in general,[76] and characterize these

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[75] *Cf*. Pat Akey & Ian Appel, Environmental Externalities of Activism (Jan. 13, 2020), https://ssrn.com/abstract=3508808 (arguing that hedge fund activism has a salutary effect on a target firm's emissions, via better management and reduced activity from a substandard organization).

[76] RALPH NADER, MARK GREEN & JOEL SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS 1–25 (1976); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 745 (2005).

problems as induced by stock market short-termism.[77] Firms fail to train workers for the long haul because executives focus on this quarter's profits and not on what trained, more satisfied employees can produce over the long-haul.

For example, then British Prime Minister Theresa May contrasted the goals of "transient shareholders" with the well-being of "[w]orkers [who] have a stake, local communities [which] have a stake, and often the whole country [which] has a stake."[78] And Chief Justice Strine of the Delaware Supreme Court—Delaware's courts are the most important for U.S. corporate law—was an acerbic critic of stock market short-termism who moved seamlessly from short-termism to stakeholders when examining the modern corporation's problems.[79]

A phrase widely used—sustainability—captures this idea. Sustainable activities are to be encouraged; short-term unsustainable actions are to be discouraged.[80] Sustainability, like long-termism, yields its own powerful narrative that increasingly influences policymakers.[81] Critics say that companies once saw but no longer see "that investing in workers, communities and other stakeholders [i]s key to sustainable

[77] Martin Lipton, *Corporate Governance in Crisis Times*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2009), https://corpgov.law.harvard.edu/2009/07/20/corporate-governance-in-crisis-times/; Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 62 (2010); Directive 2017/828 of the European Parliament and of the Council of 17 May 2017, amending Directive 2017/36/EC as regards the encouragement of long-term shareholder engagement, 2017 O.J. (L 132) 1, 7, 12.

[78] *Unilever is Safe, But We Need Better Defences Against Short-term Capitalism*, GUARDIAN (Mar. 19, 2017), www.theguardian.com/business/2017/mar/18/unilever-is-safe-but-we-need-better-defences-against-short-term-capitalism.

[79] Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1871 (2017) ("In the back and forth about short-term effects on stock price . . . the flesh-and-blood human beings our corporate governance system is supposed to serve get lost.").

[80] Slawinski & Bansal, *supra* note 64, at 532 ("[T]he tension between the short term and long term is connected intimately to the tension between business and society."); Allen L. White, *Transforming the Corporation*, *in* GREAT TRANSITION INITIATIVE PAPER SERIES, at 1, 2 (Tellus Inst., GTI Paper Series No. 5, 2006), www.greattransition.org/archives/papers/Transforming_the_Corporation.pdf.

[81] *See, e.g.*, Aliette K. Frank, *What is the Story with Sustainability? A Narrative Analysis of Diverse and Contested Understandings*, 7 J. ENV'T STUD. & SCI. 310 (2017).

profits."[82] "[B]usiness tends to fall victim to short-term financial markets, whereas society tends to embody longer-term challenges[.]"[83]

This criticism reprises a common 1970s and 1980s accolade for the Japanese firm.[84] The Japanese firm invested heavily in employee training because, it was said, it had a long-run focus.[85] It's now understood that the timing issue was spurious. Instead, robust American labor markets impeded corporate training because the trained employee could leave the first firm—thereby encumbering the training firm with expenses that the new firm would not incur.[86] Japanese firms' training was bolstered by Japan's rigid labor market. Employees could not jump from one firm to another, so the training firm could readily recover training expenses. Whether the Japanese package (more training, but low mobility) was better for employees than the American package (less training, but more mobility) was questioned.[87] Bottom-line: the employee training problem was *not* a time horizon issue. Couching a shortfall in employee training as short-termism had critics, media, voters, and policymakers seeing more short-termism than there is.[88]

C. The Financial Crisis

A housing bubble grew during the first decade of the 21st century until it burst at the decade's end, causing a worldwide financial crisis and

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[82] Paul Roberts, *Op-Ed: Why Have U.S. Companies Become Such Skinflints?*, L.A. TIMES (Aug. 27, 2014), https://lat.ms/2Q7niIb.

[83] Slawinski & Bansal, *supra* note 64, at 531.

[84] *E.g.*, Peter F. Drucker, *Behind Japan's Success*, Harv. Bus. Rev., Jan.–Feb. 1981, at 83; J. Bernard Keys & Thomas R. Miller, *The Japanse Management Theory Jungle*, 9 ACAD. MGMT. REV. 342, 344–45 (1984).

[85] *E.g.*, Nina Hatvany & Vladimir Pucik, *Japanese Management Practices and Productivity*, 9 ORGANIZATIONAL DYNAMICS 5, 12 (1981); Leonard Cantor, *Vocational Education and Training: The Japanese Approach*, 21 COMPAR. EDUC. 67, 74–75 (1985).

[86] *See* Daron Acemoglu & Jörn-Steffen Pischke, *Why Do Firms Train? Theory and Evidence*, 113 Q.J. ECON. 79 (1998); Chun Chang & Yijang Wang, *A Framework for Understanding Differences in Labor Turnover and Human Capital Investment*, 28 J. ECON. BEHAV. & ORG 91 (1995); Yukio Abe, *Specific Capital, Adverse Selection, and Turnover: A Comparison of the United States and Japan*, 8 J. JAPANESE & INT'L ECON. 272 (1994).

[87] *See* Andrew Gordon, *Contests for the Workplace*, *in* POSTWAR JAPAN AS HISTORY 373, 374 (Andrew Gordon ed., 1983); Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508 (1999).

[88] As with pollution, time horizons are secondary. Here, the firm creates a positive externality of trained workers but cannot, in a fluid labor market, capture that value. For the environment, the firm creates a negative externality that it often does not pay for.

unleashing political forces that disturb the polity and the economy to this day.

Analysts saw short-termism as a core cause. The Financial Crisis Inquiry Commission—the government's official inquiry—castigated short-term executive compensation in banks as causing the crisis.[89] Treasury Secretary Timothy Geithner said the same: "[i]ncentives for short-term gains [from executive compensation] overwhelmed the checks and balances meant to mitigate the risk of excess leverage."[90] Empirical work, however, is divided: some conclude that the timing of compensation had no impact on a financial firm's vulnerability in the crisis,[91] while others detect a correlation.[92]

But this idea is widely believed. Even opinion pieces in the *Financial Times*—again, not a publication that's an anti-finance skeptic—say that the 2009 global economic downturn was partly driven by banks' and lenders' short-termism.[93] These pieces do not highlight the contrary—and, to many other analysts, more persuasive—explanation: namely that banks transferred the huge risks of losses from themselves to taxpayers and the economy.[94]

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[89] NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., THE FINANCIAL CRISIS INQUIRY REPORT xxvi (Official Government ed. 2011).

[90] Press Release, U.S. Dep't of Treasury, Statement by Treasury SecretaryTim Geithner on Compensation (June 10, 2009), www.treasury.gov/press-center/press-releases/Pages/tg163.aspx; *cf*. Nicholas Rummel, *Donaldson: Short-term Earnings Led to Woes*, INV. NEWS (Sept. 18, 2008), www.investmentnews.com/article/20080918/REG/809189995/donaldson-short-term-earnings-led-to-woes.

[91] *See* Andrea Beltratti & René M. Stulz, *The Credit Crisis Around the Globe: Why Did Some Banks Perform Better?,* 105 J. FIN. ECON. 1, 16 (2012).

[92] *See* Adam C. Kolasinski & Nan Yang, Managerial Myopia and the Mortgage Meltdown 32–33 (Aug. 22, 2016), www.ssrn.com/abstract=2815013; *cf*. Lucian A. Bebchuk, Alma Cohen & Holger Spamann, *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman, 2000–2008*, 27 YALE J. ON REG. 257, 261 (2010); *see also* Radhakrishnan Gopalan et al., *Duration of Executive Compensation*, 69 J. FIN. 2777 (2014) (concluding that executives manipulate short-term financial performance if compensation has a short duration); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 319, 357 (2012).

[93] *See, e.g.*, Jordi Gual, *When the Problem is Short-Termism, Foundations are a Solution*, FIN. TIMES (Feb. 2, 2020), https://on.ft.com/39WicoT; Al Gore & David Blood, *Time is up for Short-Term Thinking in Capitalism*, FIN. TIMES (Nov. 26, 2009), https://on.ft.com/3wHlOF7.

[94] *E.g.*, Gara Afonso, Joao A. C. Santos & James Traina, *Do "Too-Big-To-Fail" Banks Take on More Risk?*, 20 FED. RSRV. BANK N.Y. ECON. POL'Y REV. 41, 42 (2014). This is not to say that there is no possible sliver of an impact from the executives' time horizon. It's possible that long-term-oriented bankers would see that even with the transfer of risks to the public, the banks would be damaged. However, (1) the wisest analysis would focus first on the core failure to internalize externalities, which will not be resolved by

That is, the costs of the crisis and of bank failures were borne not just by the banks' shareholders and executives, but by the government (via its deposit insurance fund and government-funded bailouts), and by the rest of us, as workers lost jobs and economic activity declined. Short- versus long-term time horizons were less important than that much of the risk and cost of financial failure was not absorbed by the banking institutions taking the risks.

* * *

One might reply to our analysis of pollution, employees, and finance that although the critics' words are wrong—the problems do not primarily arise from distorted time horizons—they are still identifying corporate maladies that need remedy. Political actors simplify the discussion and mislabel categories, the critic could concede, but their goals are sound. That's enough.

Our purpose here is not just clarity of thought. Misperceiving *social* problems as time horizon distortions brings forward poor policy responses. An example: a common purported cure for stock market short-termism is to give executives more discretion to ignore shareholders.[95] But if senior executives profit from environmental degradation or financial risk-taking (because their firms' profits rise over both the long- and short-run by pushing corporate costs out and onto society), then the environment will not improve, and the financial system will remain too risky even with more executive discretion. Category confusion confuses policymakers. If policymakers, the media, and the politically aware consider environmental degradation, employee mistreatment, and financial firm risk-taking as short-termism problems, then they will misidentify remedies for the problems. And *they will perceive much more stock-market-driven short-termism than there is*. We address this feature next.

IV. CONFIRMATION AND REPETITION

Repetition reinforces belief.[96] If an idea is easy to state believably, then it is easily repeated. Repetition reinforces belief because most

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manipulating the bank's time horizon and (2) even if the bankers were satisfactorily long-term oriented, their self-interest in externalizing the risks in both the short- and the long-run would persist: the banks were, after all, bailed out in the long-run.

[95] *See infra* notes 101–105 and accompanying text; Xia Chen et al., *CEO Contractual Protection and Managerial Short-Termism*, 90 ACCT. REV. 1871, 1871 (2015).

[96] RICHARD D. YOUNG, PERSUASIVE COMMUNICATION: HOW AUDIENCES DECIDE 214 (2d ed. 2017) (compiling references). For the classic study, see Robert B. Zajonc, *Attitudinal Effects of Mere Exposure,* 9 J. PERSONALITY & SOC. PSYCH. MONOGRAPH SUPP., no. 2, pt. 2, at 1 (1968). For concrete applications, see Joseph C. Nunes, Andrea Ordanini

people are not scientists seeking disconfirming evidence of prior views; people typically seek, retain, and believe *confirming* evidence.[97]

The short-termism idea is easy to state and understand. It therefore repeats easily, enabling it to become popular on its own. And it also enjoys interest-driven repetition from those who benefit from it and spread it more widely, boosting its popularity.[98]

A. Confirmation via Category Confusion

An initial confirming source is the real short-termism that executives, the media, and policymakers see. But there is more to confirm the view. In Part III, we saw that much corporate misbehavior is miscategorized as short-term but has little to do with time horizons. As a result, citizens, executives, journalists, and policymakers constantly see corporate actions that they (1) view as pernicious and (2) label as short-term. Consequently, the idea is reinforced whenever we read of an oil pipeline leak, a corporate fraud, or a financial failure. Social psychologists call this phenomenon "a broad idea habitat:" if our environment regularly reminds us of a belief, it then persists, prospers, and spreads.[99]

B. Confirmation Inside Professional Silos

Repetition also comes from those who benefit from wide belief. They sincerely believe the narrative to be true and promote it. The media give business leaders an audience. The narrative makes for a good story with emotional hooks that satisfy listeners, viewers, and readers. Indeed, mentions of stock market short-termism in major newspapers have substantially increased.[100]

& Francesca Valsesia, *The Power of Repetition: Repetitive Lyrics in a Song Increase Processing Fluency and Drive Market Success*, 25 J. CONSUMER PSYCH. 187 (2015); Donna R. Leff, David L. Protess & Stephen C. Brooks, *Crusading Journalism: Changing Public Attitudes and Policy-Making Agendas*, 50 PUB. OP. Q. 300 (1986) (repeated media coverage makes readers rate an issue as more important); Floyd H. Allport & Milton Lepkin, *Wartime Rumors of Waste and Special Privilege: Why Some People Believe Them*, 40 J. ABNORMAL SOC. PSYCH. 3, 7–8 (1945) (repeated rumors are more believable).

[97] *See* Hillel J. Einhorn & Robin M. Hogarth, *Confidence in Judgement: Persistence of the Illusion of Validity*, 85 PSYCH. REV. 395 (1978); KAHNEMAN, *supra* note 5, at 81, 324; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998).

[98] More on the interests behind the short-termism narrative is outlined in Part V.

[99] *See* Berger & Heath, *supra* note 8, at 196–97; Hirshleifer & Teoh, *supra* note 8, at 162.

[100] *See supra* note 28 and accompanying text.

Another megaphone for those with an interest is professional memoranda and newsletters, which regularly repeat that short-termism is a problem. Real instances of short-termism are documented and repeated. Contrary instances are explained otherwise and left aside, unrepeated.

Prestigious law firms retained by executives and boards to fight stockholder influence promote the narrative in their memos, which are distributed to clients and the media, and published in leading corporate governance blogs.[101] The memos bolster executives' resolve to fight off shareholders. Executive consultants do the same. McKinsey, a major management consulting company, writes regularly on how boards and executives should handle stock market short-termism.[102] It sponsors the Focusing Capital on the Long Term ("FCLT") think tank, which promotes "concrete steps [that executives] and their powerful organizations can take to give executives breathing room."[103] FCLT produces white papers on short-termism and pushes its members to fight it.[104]

A major journal for executives—the Harvard Business Review—also regularly writes on short-termism in general and stock-market-driven short-termism in particular.[105] It provides a respected forum

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101 *See infra* notes 131, 135–137 and Appendix 1.

102 *E.g.,* JONATHAN BAILEY ET AL., FCLT GLOB., SHORT-TERMISM: INSIGHTS FROM BUSINESS LEADERS (2014), https://www.fcltglobal.org/wp-content/uploads/20140123-mck-quarterly-survey-results-for-fclt-org_final.pdf; DOMINIC BARTON, JONATHAN BAILEY & JOSHUA ZOFFER*,* FCLT GLOB., RISING TO THE CHALLENGE OF SHORT-TERMISM (2016) (Barton was McKinsey's managing director—its CEO); Rebecca Darr & Tim Koller, *How to Build an Alliance Against Corporate Short-Termism*, MCKINSEY INSIGHTS (Jan. 30, 2017), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-to-build-an-alliance-against-corporate-short-termism. *But see* Lawrence H. Summers, *Is Corporate Short Termism Really a Problem? The Jury's Still Out*, HARV. BUS. REV. (Feb. 16, 2017) (questioning the short-term interpretation in McKinsey's report).

103 David Benoit, *BlackRock's Fink, McKinsey Lead Group Fighting Wall Street Myopia*, WALL ST. J.: MONEYBEAT BLOG (Mar. 11, 2015), https://on.wsj.com/3mzsdh5.

104 *E.g.*, DOMINIC BARTON ET AL., FCLT Glob., SHORT-TERMISM ON BOARDS: INSIGHTS FROM CANADIAN DIRECTORS AND EXECUTIVES (2015), https://www.fcltglobal.org/wp-content/uploads/20150623-2015-icd-survey-article_final-st-on-boards.pdf; ARIEL FROMER BABCOCK & SARAH KEOHANE WILLIAMSON, FCLT GLOB., MOVING BEYOND QUARTERLY GUIDANCE: A RELIC OF THE PAST (2017), https://www.fcltglobal.org/wp-content/uploads/Moving-Beyond-Quarterly-Guidance-A-Relic-of-the-Past.pdf. For the corporate "who's who" list of its members, see *Members*, FCLT GLOB., www.fcltglobal.org/our-members/members (last visited Apr. 1, 2021).

105 *E.g.*, Dennis Carey et al., *Why CEOs Should Push Back Against Short-Termism*, HARV. BUS. REV. (May 31, 2018), https://hbr.org/2018/05/why-ceos-should-push-back-against-short-termism; Sarah Cliffe, *The Board View: Directors Must Balance All Interests*, HARV. BUS. REV., May–Jun. 2017, at 64; Roger L. Martin, *Yes, Short-Termism Really is a Problem*, HARV. BUS. REV. (Oct. 9, 2015), https://hbr.org/2015 /10/yes-short-

validating its executive readers' wariness of stock-market-driven short-termism.

This produces an echo chamber, with those inside it hearing the view constantly confirmed and rarely questioned that short-termism is a pervasive economy-wide problem.

C. Confirmation via Managerial Biases

Executives' well-documented biases—over-confidence and over-optimism, for example—can lead them to perceive short-termism as even more pervasive than it is.

Executives' over-optimism[106] is "the effect that is best studied in managers."[107] It breeds executives' belief that corporate expansion will make money.[108] When shareholders, activists, and hedge funds oppose expansion, executives see the opposition as rooted in short-termism, rather than in legitimate disagreement on corporate strategy. They complain (to the media, to their lawyers, and to one another), thereby reinforcing their own and others' beliefs in its pernicious pervasiveness.

This is not to say that the executives are always wrong; surely they often face misguided pressures from uninformed stockholders. The point is that the executives, according to this psychological literature, interpret recurring disagreements with shareholders as driven by the stock market's short-termism when only some are.

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termism-really-is-a-problem; Dominic Barton, *Capitalism for the Long Term*, HARV. BUS. REV., Mar. 2011, at 84; Dominic Barton & Mark Wiseman, *Where Boards Fall Short*, HARV. BUS. REV., Jan.–Feb. 2015, at 98; Dominic Barton & Mark Wiseman, *Focusing Capital on The Long Term*, HARV. BUS. REV., Jan.–Feb. 2014, at 44; Robert H. Hayes & William J. Abernathy, *Managing Our Way to Economic Decline*, HARV. BUS. REV., July–Aug. 1980, at 67, *reprinted in* HARV. BUS. REV., July–Aug. 2007, at 138. It's not all one-sided. *E.g.*, Alex Edmans, *The Answer to Short-Termism Isn't Asking Investors to Be Patient*, HARV. BUS. REV., (July 18, 2017), https://hbr.org/2017/07/the-answer-to-short-termism-isnt-asking-inves tors-to-be-patient; Summers, *supra* note 102; Jesse Fried & Charles Y. Wang, *Are Buybacks Really Shortchanging Investments? What the Argument Against Stock Repurchases Gets Wrong*, HARV. BUS. REV., Mar.–Apr. 2018, at 88.

106 *E.g.*, J.B. Heaton, *Managerial Optimism and Corporate Finance*, 31 FIN. MGMT. 33 (2002).

107 Christoph Engel, *The Behaviour of Corporate Actors: How Much Can We Learn from the Experimental Literature?*, 6 J. INST. ECON. 445, 452 (2010).

108 J.B. Heaton, *Corporate Governance and the Cult of Agency* 64 VILL. L. REV. 201, 219 (2019); Winifred Huang-Meier, Neophytos Lambertides & James M. Steeley, *Motives for Cash Holdings: The CEO Optimism Effect*, 47 REV. Q. FIN. & ACCT. 699 (2016).

V. THE INTERESTS AND THE LAWMAKERS: HOW NARRATIVE POWER AFFECTS CORPORATE LAWMAKING

The psychology of stock-market-driven short-termism strengthens two major political conduits that emphasize stock-market-driven short-termism.

The first conduit is the public's anti-Wall Street predilection. Politicians can win over voters with anti-short-termism messaging (and when they do so, they repeat and confirm the idea). The second conduit runs from executives to politicians: the narrative helps executives persuade policymakers to insulate the executives from Wall Street pressures.[109] The anti-short-termism narrative reduces the visibility of policymakers' favoritism toward corporate managers. With the short-term narrative dominating the discourse, policymakers do not appear to voters to be favoring managers; the politicians are instead fighting stock-market-driven short-termism's destructiveness, which is seen as hurting all of us. Sections A–C analyze how the short-termism narrative affects corporate lawmaking, while Section D shows how a powerful narrative can crowd out good policymaking. Section E extrapolates the analysis to core public choice issues to demonstrate how strong narratives can shore up weaknesses in explaining how interest groups can win.

A. How the Narrative Affects Political Leaders

To the extent that lawmakers view stock market short-termism as seriously damaging the economy, they presume that Wall Street is in the wrong and that steadfast, long-term executives are in the right. The narrative's persuasive power thereby lowers the cost to executives of getting their preferred policies from judges, legislators, and regulators.

The stock market short-termism narrative resonates with an anti-Wall-Street view.[110] The closing of a business, with machinery grinding to a halt and workers leaving the factory gates for the last time, is vivid, whereas a market signal that a business has no future is not.[111] When businesses close, political leaders can and do characterize their fight to

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[109] Andrew Verstein, *Wrong-Termism, Right-Termism, and the Liability Structure of Investor Time Horizons*, 41 SEATTLE U. L. REV. 577, 580 ("Long-termism can also be code for managerialism.").

[110] BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 30–36 (2007) (presenting evidence for voters' anti-market bias); LUNTZ, *supra* note 23, at 215–17 (arguing that the how-to-manual for political consultants and public-opinion manipulators describes how politicians tap into the American anti-Wall-Street sentiment).

[111] SHILLER, *supra* note 11, at 100 (arguing that narratives spread when based on human-interest stories). *See also* KAHNEMAN, *supra* note 5, at 129–35; Tversky & Kahneman, *supra* note 23, at 207.

save a local business and constituents' jobs as seeking to rescue innocent, loyal employees from pernicious Wall Street short-termism.

The closing of the Wausau Paper company's major Wisconsin mill and senatorial reaction illustrates this phenomenon. Political leaders said that the hedge fund activists forced the mill's closure—throwing lifetime employees out of work and devastating the mill's town.[112] The closing motivated Wisconsin's Democratic senator, Tammy Baldwin, joined by Georgia's Republican senator, David Perdue (paper factories employ many in Georgia) to seek to reduce hedge funds' sway.[113] They described their bill as "bipartisan legislation [to] protect Main St from Wall St hedge funds" so as to "fight against increasing short-termism in our economy."[114] Predatory activists, they said, "demand[] short-term returns like buybacks at the expense of investments in workers, R&D and the company's long-term future."

The senators succinctly stated the short-termism reasons why:

> [A] growing chorus . . . believe[s] short-termism is holding America back . . . . [S]hort-termism . . . is the focus on short time horizons by both corporate managers and financial markets. It results in corporate funds being used for payouts to shareholders in the form of dividends and buybacks rather than investment in workers, R&D, infrastructure, and long-term success.[115]

But paper manufacturing was in a *long-term* decline in the United States when Wausau closed its Wisconsin mill.[116] Stock analysts had long criticized Wausau for persisting *too long* with fine-quality paper, whose profitability was devastated by digital documents and email replacing paper reports and mailed letters, while not expanding its household paper products, which sold well.[117] Incumbent management closed the

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[112] *See* Leslie Picker, *How a Small Wisconsin Town is Making Some Hedge Funds Very Nervous*, CNBC (Aug. 31, 2017), https://cnb.cx/3uJKStv; Haley BeMiller, *Law to Rein in Hedge Funds Uses Brokaw's Wausau Paper Mill as Cautionary Tale*, WAUSAU DAILY HERALD (Sept. 7, 2017), https://www.wausaudaily herald.com/story/news/2017/09/07/tammy-baldwin-brokaw-act-hedge-funds-wausau-paper/632862001/.

[113] *See* Brokaw Act, S. 1744, 115th Cong. (2017).

[114] Sens. Baldwin & Purdue Press Release*, supra* note 32.

[115] Press Release, Sens. Tammy Baldwin (Wisconsin) and Jeff Merkley (Oregon), The Problem of Short-Termism & Activist Hedge Funds (Mar. 17, 2016), www.baldwin.senate.gov/imo/media/doc/3.7.16 %20-%20Brokaw%20Act%201.pdf.

[116] JEFFREY P. PRESTEMON, DAVID N. WEAR & MICHAELA O. FOSTER, U.S. DEP'T OF AGRIC., E-GEN. TECH. REP. SRS-204, THE GLOBAL POSITION OF THE U.S. FOREST PRODUCTS INDUSTRY 3 Fig.2 (2015).

[117] Glenn Kessler, *Did a Hedge Fund 'Bankrupt' a Wisconsin Town?,* WASH. POST (Apr. 11, 2018), https://wapo.st/3d5J0Fw.

mill[118] when much of its machinery was already technologically obsolete. "It would have been the eventual [i.e., long-run] outcome regardless," said one company executive.[119] "It was a market dynamic as opposed to a [short-term] hedge fund strategy."[120] But the political impact differed from the business analysis: a mill closes, so senators blame Wall Street short-termism, promote vivid imagery of Wall Street "wolf packs" hunting down companies to close and jobs to eliminate, and propose legislation to limit Wall Street's influence.[121]

* * *

For policymakers, the stock market short-termism concept is salient and believable. Politicians, legislators, and judges tap into the idea. It's a broad-spectrum, politically diverse set, including: Secretary and 2016 presidential candidate Hillary Clinton,[122] President Joseph Biden (when vice president and when a presidential candidate),[123] SEC Commissioner Daniel Gallagher,[124] President Donald Trump,[125] Senators Baldwin, Merkley and Perdue,[126] Senator and 2020 presidential

[118] Alon Brav, J.B. Heaton & Jonathan Zandberg, *Failed Anti-Activist Legislation: The Curious Case of the Brokaw Act*, 11 J. BUS. ENTREPRENEURSHIP & L. 229 (2018). The hedge fund had not obtained board seats and its business strategy was unclear—whether to shift products or close facilities was not announced. Kessler, *supra* note 117. But the possibility that pressure without power was in play is clearly possible.

[119] Kessler, *supra* note 117.

[120] *Id.*

[121] The proposed law was not enacted. It's speculative to consider whether corporate lawmakers, like those at the SEC or in Delaware, are affected by such senatorial efforts. But Baldwin "put a hold on two nominees for the [SEC]" to pressure the nominees on share buybacks and pay. Brav, Heaton & Zandberg, *supra* note 118, at 322–33; *U.S. Senate OKs Two U.S. Securities and Exchange Commission Nominees*, REUTERS (Dec. 22, 2017), https://reut.rs/321XWhA. This indicates political players sent a message on short-termism to corporate lawmakers and that message presumably is heard.

[122] *E.g.*, William A. Galston, *Clinton Gets It Right on Short Termism*, WALL ST. J. (Jul. 29, 2015), https://on.wsj.com/2PGZhYF.

[123] Biden, *supra* note 31.

[124] Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n, Remarks at the 21st Annual Stanford Directors' College: Activism, Short-Termism, and the SEC (June 23, 2015), www.sec.gov/news/speech/activism-short-termism-and-the-sec.html.

[125] Chris Isidore & Christina Alesci, *President Trump Asks SEC to Study Abolishing Quarterly Earnings Report*, CNN BUS. (Aug. 17, 2018), https://money.cnn.com/2018/08/17/news/companies/trump-drop-quarterly-reports/index.html.

[126] *See supra* note 32.

candidate Elizabeth Warren,[127] and corporate law judges, such as Delaware's former Chief Justice Leo Strine[128] and former Justice Jacobs.[129]

The broad range of policymakers in the prior paragraph shows loose coalitions of unlikely allies: left and right politics (think of Biden and Clinton seeking employee well-being allying with executives seeking autonomy); left politics and corporate America (note Vice President Biden's careful words in the Wall Street Journal: "I'm not blaming CEOs"[130]). Within corporate America, the short-termism banner unites segments of Wall Street and Main Street: executives and their representatives envision coalescing with activists for a better America—one with more security and autonomy for top executives.[131] Financiers with a public, nearly political, profile (think of Blackrock's Larry Fink and JPMorgan Chase's Jamie Dimon) join the anti-short-termism rhetoric.[132]

Acoustic separation[133] facilitates the rhetorical alliances: one channel has management saying short-termism means managers need autonomy; a second channel has liberal politicians saying short-termism means the corporation must do more for employees. They each reject the stock market's short-termism, but emphasize differing rationales.

To corroborate the link between short-termism and managerial insulation—the first deep short-termism policy channel—we coded the well-followed short-termism posts of a prominent management lawyer on Harvard's corporate governance blog.[134] The posts not only lament stock

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[127] Elizabeth Warren & Joe Donnelly, *Trump's SEC Chairman Must Look Out for American Families—Not Big Corporations*, WASH. POST (Mar. 22, 2017), https://wapo.st/3wAFA58 ("our markets [suffer from] 'corporate short-termism,' shifting focus from innovation and capital reinvestment to short-term strategies designed to turn quick profits before chief executives and shareholders tag out.").

[128] Leo E. Strine, Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in the United States*, 71 BUS. LAW. 1081, 1082 (2016).

[129] Justice Jack B. Jacobs, *"Patient Capital": Can Delaware Corporate Law Help Revive It?*, 68 WASH. & LEE L. REV. 1645, 1649 (2011).

[130] Biden, *supra* note 31.

[131] *See* Martin Lipton, *A Synthesized Paradigm for Corporate Governance, Investor Stewardship, and Engagement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 17, 2017), https://corpgov.law.harvard.edu/2017/04/17/a-synthesized-paradigm-for-corporate-governance-investor-stewardship-and-engagement/.

[132] *See* Dimon & Buffett, *supra* note 30.

[133] Meir Dan-Cohen, *Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1983).

[134] *See infra* Appendix 1.

market short-termism or state that it's seriously damaging the American economy, but also recommend curing it by insulating executives from stock market pressure. We identified thirty-three managerial-originated posts decrying short termism, with thirty-one of them calling for legislation,[135] judicial interpretation,[136] or private ordering[137] *to give executives more leeway*.

We also confirmed the second deep short-termism policy channel: that of liberal politics, which links stock market short-termism to employee maltreatment and seeks reversal. We searched LexisNexis for every instance where a senator or a presidential candidate alluded to stock market short-termism.[138] In eighteen of the thirty instances in our sample, the politician emphasized that employees and other nonshareholder groups pay a price for stock market short-termism.[139] In ten, the politician said short-termism hurts both long-term shareholders and other stakeholders.[140] Only twice did the politician emphasize the negative impact of stock market short-termism on a company's growth.[141]

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[135] *E.g.*, Martin Lipton, *State Law Implementation of* the New Paradigm, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 11, 2018), https://corpgov.law.harvard.edu/2018/09/11/state-law-implementation-of-the-new-paradigm/. Appendix 1 outlines the posts, drawn from the Harvard Corporate Governance Forum.

[136] *E.g.*, Lipton, *supra* note 77.

[137] *E.g.*, Lipton, *supra* note 131; Martin Lipton, *Corporate Governance: The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 11, 2017), https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/ (warning investors not side with activists even once, or else managers will be deterred from thinking long-term).

[138] *See infra* Appendix 2. The search was in LexisNexis' All News category, filtered for the U.S.: "short-termism AND [senator OR sen. OR candidate]." The timeframe was 2009–2018.

[139] *See, e.g.*, Ben White & Annie Karni, *Clinton's Wall Street Hedge*, POLITICO (Jul. 23, 2015), https://politi.co/2PNs7X2 (reporting Secretary Hillary Clinton attacks on short-termism that was "hurting workers and slowing the U.S. economy").

[140] For example, Sen. Warren criticized short-termism and its pernicious impact on share buybacks as "nothing more than a sugar high for those companies in the short-term. Helps the top executives, but doesn't help the company long-term and sure doesn't help the employees and sure doesn't help the communities they're in" in an interview with CNBC. *Sen. Warren Tells Cramer About Her Plan to Make Companies and CEOs More Accountable to Employees*, CNBC: MAD MONEY WITH JIM CRAMER (Aug. 15, 2018), https://cnb.cx/2Oz30GW (transcript available at *CNBC Transcript: Senator Elizabeth Warren Speaks with CNBC's Jim Cramer on CNBC's Mad Money Today*, CNBC (Aug. 15, 2018), https://cnb.cx/3d4ozIN).

[141] *See, e.g.*, Ben Jacobs, *Hillary Clinton Decries Wall Street's Quarterly Capitalism in Tax Reform Pitch*, THE GUARDIAN (July 24, 2015), https://www.theguardian.com/us-news/2015/jul/24/hillary-clinton-capital-gains-tax-reform-wall-street (reporting Secretary Clinton's position that her plan "would encourage

The upshot is that when these politicians raise the stock market short-termism banner, they seek more power for, better treatment of, and more investment in, workers.

Hence, denouncing short-termism means saving jobs for some, insulating managers for others, and reducing pollution to yet others. These rhetorical coalitions make it easier for lawmakers to buy into one short-termism story or another. The narratives overlap. Short-termism is a rhetorical big tent.

B. How Executives and Their Allies Benefit

Confirmation and transmission come *also* from the resources devoted to repeating it. Powerful groups with resources and a simple but compelling narrative can succeed more easily than weak groups lacking resources and ready access to media, and with only a complex story to sell. These dynamics become evident when we examine (1) who flies the short-termism flag, (2) how those who fly it benefit if it is widely believed, and (3) how a powerful narrative can overcome basic debilities of interest group organization.

As Part IV showed, those who fly the banner are often executives and their professional allies. "Message ringmasters"[142] are high-end leaders whom policymakers and the media respect: leaders of the bar can qualify, as can business leaders, like Dominic Barton, the long-time managing director of McKinsey, the powerhouse management consulting

investors to focus on 'long-term growth'"). Secretary Clinton has also criticized short-termism as harming workers. White & Karni, *supra* note 139. However, when she spoke to a NYU Stern Business School audience, she emphasized long-term investments and values. *Hillary Clinton Seeks End to "Quarterly Capitalism"*, BLOOMBERG TV (July 24, 2015), https://bloom.bg/3uxgOAY. This illustrates the acoustic separation effects with the short-termism narrative: a speaker can cater to different audiences using one broad narrative.

[142] *Cf.* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 238–40 (1986) (emphasizing the role of such "ringmasters" for cartels).

firm.[143] There are other short-term notables,[144] think tanks,[145] and industry associations of the executives themselves, such as the Business Roundtable.[146]

These business leaders are formidable agenda-setters.[147] They enjoy credibility and ready access to business journalists, who depend on executives for information and analysis.[148]

To reiterate: Our point is not that executives and their allies picked a transparently false concept up off the ground, and then contorted it into a widely-believed idea. Rather, there was an intermittent and real problem that could be vividly visualized via real, concrete instances (our point in previous sections). Its academic truth or

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143 *See, e.g.*, Barton & Wiseman, *supra* note 105; Barton, *supra* note 105, at 86–88; Martin Lipton, *Empiricism and Experience; Activism and Short-Termism; the Real World of Business,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct 28, 2013), https://corpgov.law.harvard.edu/2013/10/28/empiricism-and-experience-activism-and-short-termism-the-real-world-of-business/. Or the ringmaster is the McKinsey firm itself.

144 Adi Ignatius, *"I'm Not Talking About This to Win a Popularity Contest": An Interview with Larry Fink*, HARV. BUS. REV., Nov. 2015, at 2; Larry Fink, *Larry Fink's 2017 Letter to CEOs*, BLACKROCK, INC., https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter; Letter from F. William McNabb, III, Chairman & CEO, Vanguard Grp., to the Independent Leaders of the Boards of Directors of the Vanguard Funds' Largest Portfolio Holdings (Feb. 27, 2015), *reprinted in* CHIEF EXECUTIVES FOR CORP. PURPOSE (Dec. 2016), https://cecp.co/wp-content/uploads/2016/12/CEO_Letter_03_02_ext.01.pdf?redirect =no. Larry Fink chairs BlackRock, the huge manager of pension savings.

145 William A. Galston & Elaine Kamarck, *More Builders and Fewer Traders: A Growth Strategy for The American Economy*, BROOKINGS: FIXGOV (July 1, 2015), https://www.brookings.edu/blog/fixgov/2015/07/01/more-builders-and-fewer-traders-a-growth-strategy-for-the-american-economy/; James Pethokoukis, *Hillary Clinton Has a Smart Idea to Fix the Economy. Republicans Should Steal It*, THE WEEK (July 15, 2015), https://theweek.com/articles/566326/hillary-clinton-smart-idea-fix-economy-republicans-should-steal. James Pethokoukis is a fellow at the American Enterprise Institute.

146 Dimon & Buffett, *supra* note 30 (writing a Wall Street Journal op-ed on behalf of the Business Roundtable, which simultaneously rejected short-termism). The Business Roundtable is an organization of 200 CEOs of the leading American companies. *See also* DEAN KREHMEYER, MATT ORSAGH & KURT SCHACHT, CFA INST., BREAKING THE SHORT-TERM CYCLE: DISCUSSION AND RECOMMENDATION ON HOW CORPORATE LEADERS, ASSET MANAGERS, INVESTORS, AND ANALYSTS CAN REFOCUS ON LONG-TERM VALUE 1 (2006), https://www.cfainstitute.org/-/media/documents/article/position-paper/breaking-the-short-term-cycle.ashx.

147 *E.g.*, PAMELA J. SHOEMAKER & STEPHEN D. REESE, MEDIATING THE MESSAGES: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT 171 (2d ed. 1996).

148 *Cf.* Maria Grafström & Karolina Windell, *The Role of Infomediaries: CSR in the Business Press During 2000–2009*, 103 J. BUS. ETHICS 221, 232 (2011) (arguing that executives and consultants strongly affect how the media treats corporate social responsibility issues). In theory, muckraking journalism, were it more widespread, could counter this.

falsity as strongly hurting the economy was inconclusive, yet the concept mapped onto popular goals and popular concepts. On top of that, well-positioned interests promoted the narrative (our point in this section) because they sincerely believed it, and it was in their interest to do so.

The narrative conditions lawmakers to accord executives more autonomy from stock markets. And it flatters executives' self-image by allowing them to view themselves not as pursuing their self-interest but as heroically overcoming the shortsightedness of financial markets for the good of all.

More subtly, the powerful narrative can help executives co-opt public anger—diverting the backlash against Corporate America and turning it into an animus against Wall Street.[149] Recall the persistent connection in pro-managerial publications between the diagnosis (stock markets are plagued by short termism) and the proposed cure (insulate boards and managers from stock market pressure and accountability).[150] A naked narrative of "let's free up executives and eliminate executive and board oversight" would not persuade most lawmakers, the media, and that part of the public that is concerned with executive accountability.

Corporate executives are not intrinsically popular in America[151] and if they sought autonomy directly, that might not be popular. But the anti-short-termism stance supports their autonomy. The anti-short-termism "ask" is more legitimate than a direct "ask." The price tag for autonomy would be higher if executives asked lawmakers directly than if sought for the purpose of fighting stock-market short-termism. Legislators and judges might not, and we believe would not, as willingly heed executives' direct call for autonomy.

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[149] Costly regulation is raised as a consequence if short-termism is mishandled. Martin Lipton, *Corporate Purpose: ESG, CSR, PRI and Sustainable Long-Term Investment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 4, 2018), https://corpgov.law.harvard.edu/2018/05/04/corporate-purpose-esg-csr-pri-and-sustainable-long-term-investment.

[150] *E.g.*, *infra* Appendix 1; Benoit, *supra* note 105 ("A group of executives and investors . . . calling itself 'Focusing Capital on the Long Term,' batted around ideas on what concrete steps they and their powerful organizations can take to give executives breathing room . . . ."); *see also* J.B. Heaton, *The "Long Term" in Corporate Law*, 72 BUS. LAW. 353, 365 (2017) (detailing how BlackRock's Larry Fink raised in the group meeting the possibility of relaxing institutional investors' fiduciary duties).

[151] Only about 25% of Americans rate the honesty and ethical standards of corporate executives as high. David N. Moore, *Firefighters Top Gallup's "Honesty and Ethics" List*, GALLUP (Dec. 5, 2001), https://news.gallup.com/poll/5095/firefighters-top-gallups-honesty-ethics-list.aspx. *See also* Jonathan Schienberg, *Firefighters, Doctors and Nurses Considered Most Prestigious Jobs*, CNN MONEY (July 31, 2006), https://cnn.it/3d4FD1f.

This is not to challenge the sincerity of the idea's promoters. Some have surely experienced the short-termism problem and truly believe it to be a broad, costly economy-wide issue. But it is hardly unusual for people to believe in the reality of contested propositions that favor their interests.

C. How the Narrative Affects Corporate Lawmakers

We can see how the narrative affects public opinion. Can we detect it affecting corporate lawmakers directly?

In Delaware. Consider that the most influential corporate judicial player of the last two decades adopted the short-termism narrative in his off-the-bench writings, acerbically, powerfully, and persistently.[152] And consider further, more generally, the trend over the decades in the approach of Delaware's corporate law courts: the courts were moderate in the mid-1980s on takeovers, permitting takeovers but not making them easy—a result that incurred management's and their representatives' ire.[153] Delaware by the end of that decade became more protective of board and executive autonomy from shareholders and, later, activists.[154] We cannot prove that the rise of the short-termism narrative was the sine qua non (nor do we think it was the sole causal input) for this shift. But we can observe the narrative boost clearly at work in the case-law even though it is hard to measure its exact strength relative to the merits and direct political influence.

Consider the Polaroid litigation in the Delaware courts. When shareholder activists pressured the camera and filmmaker, management resisted, using the rhetoric of resisting short-termism for a more privileged long-term.[155] The Delaware corporate courts supported management *and* its long-term practices.[156] Yet Polaroid was failing to face up to digital photography's threat to traditional film photography, and its resistant management kept their long-term strategic emphasis

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[152] *See supra* notes 79 and 128.

[153] Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 29, 31–33 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019).

[154] *Id.* at 32–36; James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 349–74 (2018).

[155] Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 268 (Del. Ch. 1989). Defending the long-term would not, however, said the defenders, harm short-term shareholders. *Id.* at 283.

[156] *Id.*, at 260; J.B. Heaton, *The Unfulfilled Promise of Hedge Fund Activism*, 13 VA. L. & BUS. REV. 317, 330 (2020); Heaton, *supra* note 150, at 356, 366 n.55.

on photo-chemistry.[157] The company went bankrupt a few years later and shut down.[158]

Delaware decided the iconic *Time-Warner*[159] takeover case roughly contemporaneously. The decision—interpreted by some as giving boards carte blanche to "just say no" to a takeover offer[160]—used the rhetoric of investor short-termism to justify its holding. It's the board's duty, said the court, to "select[] a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders. . . . Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit . . . ."[161] Delaware's broad mandate to boards "includes [the power to choose the corporation's] time frame [for action]."[162] The court approvingly recited the Time board's view that institutional investors failed to appreciate the long-term benefits of preserving Time's culture.[163]

The concept persists in Delaware's judicial rhetoric: "[S]tockholders of corporations, especially given the short-term nature of [their] holding periods[,] . . . put strong pressures on corporate management to produce immediate profits."[164]

Overall, the Delaware judiciary generally accords wide discretion to the board of directors.[165] The short-termism perspective fits well in justifying this core aspect of Delaware corporate lawmaking. In an uncertain and difficult-to-interpret corporate world, the short-termism

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157 PETER BUSE, THE CAMERA DOES THE REST: HOW POLAROID CHANGED PHOTOGRAPHY 79 (2016) (showing that Polaroid saw the digital future but failed to adapt); Andrea Nagy Smith, *What Was Polaroid Thinking?*, YALE INSIGHTS (Nov. 4, 2009), www.insights.som.yale.edu/insights/what-was-polaroid-thinking (arguing that Polaroid executives believed through the 1990s that in the long-run "customers would always want a hard-copy print" and not just an image on a screen).

158 *See In re* Polaroid Corp., 420 B.R. 484, 486 n.1 (Bankr. D. Minn. 2009).

159 Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).

160 *See, e.g.*, Marcel Kahan, Paramount *or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. CORP. L. 583, 604 (1994); Leo E. Strine, Jr., *The Professional Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic "Just Say No" Question*, 55 STAN. L. REV. 863 (2002).

161 *Time Inc.*, 571 A.2d at 1154.

162 *Id.* at 1150.

163 *Id.* at 1148–50, 1154.

164 *In re* Massey Energy Co., C.A. No. 5430-VCS, 2011 WL 2176479, at *29 n.185 (Strine, V.C.).

165 Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2002).

view gives Delaware players even more confidence in the fitness of board centrality.[166]

At the SEC. We saw earlier how Washington, D.C. politicians state the narrative. In addition, advocates to the SEC regularly justify their preferences with arguments derived from stock market short-termism being something to diminish and corporate long-termism as something to bolster.[167] When the SEC opens up rulemaking efforts on the allocation of authority between shareholders and executives, the public submissions to the SEC regularly invoke short-termism rationales.[168] How much they affect the ultimate decision is difficult to gauge; but in our view it is quite telling that those who seek to persuade the SEC to adopt or withdraw a proposal think that the short-termism narrative could be central to their persuasive effort. They put the short-termism narrative front and center.

One recent example: when Silicon Valley interests sought SEC approval of a new corporate structure enhancing the voting rights of some stockholders (via a variant on dual-class stock, which accords some stockholders more votes than others), they promoted the effort as creating a *Long-Term* Stock Exchange.[169] For the most part, the structure would benefit company founders, who would get enhanced control. As academic work has shown, whether this control would foster the long-term or the short-term is uncertain.[170] The static control could induce longer-term sclerosis (and therefore be detrimental to the long-run) because the founder's extra votes could enable him or her to stay in control even after becoming ineffective. The structure's benefit would be

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[166] Some of these thoughts are drawn from MARK J. ROE, MISSING THE TARGET (forthcoming 2021) (on file with author).

[167] The Business Roundtable (the association of large public firm executives) lobbied the SEC for executive autonomy because activists "demand changes that may not be in the long-term interests of other stockholders. . . ." Letter from Bus. Roundtable to the Sec. & Exch. Comm'n on Statement Announcing SEC Staff Roundtable on the Proxy Process 23 (Nov. 9, 2018), www.sec.gov/comments/4-725/4725-4635930-176425.pdf. See also the anti-hedge-funds bills cited *supra* notes 32 & 114–115; Request for Comment on Earning Releases and Quarterly Reports, 83 Fed. Reg. 65601, 65604 (Dec. 21, 2018).

[168] See the unpublished Appendix (on file with authors) cataloging many instances short-termism being raised in SEC submissions, usually seeking greater executive autonomy.

[169] Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX", 83 Fed. Reg. 14074 (Apr. 2, 2018).

[170] Mark J. Roe & Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism?* 76 BUS. LAW. 467 (2021). Similar anti-short-term thinking is advanced to justify dual class stock. Lucian Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 610–11 (2017) (criticizing such thinking).

in motivating entrepreneurs to start up more firms, because, ex ante, founders are thought to be likely to balk at opening their company up to more stockholders—doing so often leads them to lose control of the company.[171] Enhanced votes allow them to keep control even when the company sells more stock to raise money and so they are more likely to start up a new venture and scale-up rapidly.[172] Which effect—sclerosis vs. more start-ups—is stronger is hard to evaluate in the abstract, but has very little to do with the promoters' marketing effort to the SEC.[173]

That marketing effort for loyalty shares tied itself to the long-termism narrative, starting right with its title—a *Long Term* Stock Exchange—and continuing through the proposals' recitations of short-termism sapping the economy, quoting from the commentators we have called "message ringmasters" (the corporate law firms, management consultants, and business think tanks that excoriate short-termism).[174] Others might dispute whether "long-term" branding sells an idea; but we point out that the *proponents* of the Long-Term Exchange effort (sophisticated players in dealing with the SEC) highlighted it to the SEC. When seeking support from the SEC and the public, they thought the long-term branding of the Exchange (and its purportedly anti-short-term quality) would sell well to corporate lawmakers.

D. How Powerful Narratives Crowd Out Good Policymaking

The prior Section indicated how a dominant narrative can affect corporate lawmaking. But its relevance is wider and more general. Powerful narratives can crowd out good policies that suffer from weaker narratives even if they have stronger evidentiary foundations. Even if

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[171] Roe & Venezze, *supra* note 170; *cf.* NOAM WASSERMAN, THE FOUNDER'S DILEMMAS 284–88 (2012); Ronald J. Gilson & Bernard S. Black, *Venture Capital and the Structure of Capital Markets: Banks Versus Stock Markets*, 47 J. FIN. ECON. 243, 258–59 (1998). *But cf.* Brian Broughman & Jesse M. Fried, *Do Founders Control Start-Up Firms that Go Public?*, 10 HARV. BUS. L. REV. 49, 49 (2020) .

[172] *Cf.* Gilson & Black, *supra* note 171, at 259–61 (discussing the role of dual-class shares in incentivizing entrepreneurs).

[173] *Cf*. Macey, *supra* note 15, at 8 ("[S]ometimes perfectly good rules are propped up by myths because the actual . . . justifications . . . are too complex or too politically incorrect.").

[174] Self-Regulatory Organizations, 83 Fed. Reg. at 14075 ("Many academics, commentators, market participants, as well as certain current and former members of the Commission have voiced concerns regarding so-called 'short-termism' . . . . "). This SEC publication cites some of the sources we discussed in *supra* notes 102–103, 124, 135–137. *E.g.*, Self-Regulatory Organizations, 83 Fed. Reg. at 14075 nn. 8–10.

the merits underlying the narrative are sound, a strong narrative "buys" the idea a higher priority on lawmakers' crowded policy agenda.

A likely example: Stock market short-termism is blamed for weakened R&D in the United States. Yet corporate R&D has not been falling in the United States. In fact, it's rising faster than the economy is growing.[175] Perhaps it should be rising even more. But *government* R&D for basic technologies—which has been a mainstay of American prosperity since World War II—has fallen precipitously.[176] Excessively attending to stock market short-termism may well take policymakers, the media, and the public's eyes from more substantial shortfalls and the better ways to remedy the R&D decline.[177]

E. How Narratives Can Boost Merits' Persuasiveness and Reduce the Interests' Political Vulnerabilities

A critic of our analysis might object that if the interests' power is strong enough, or if policymakers' view on the merits is clear enough, then the result is foreordained. The narrative does not make a difference.

The criticism cannot be fully countered, as we cannot test what the policy results would be with and without the vivid narrative. But the critic would have the same problem: how do we know that the interests or the merits would have prevailed without a powerfully persuasive narrative? The interests might have lost.

We can, however, demonstrate (1) abstractly, how a powerful narrative bolsters the interests and the merits, potentially curing long-standing basic impediments to their success and (2) concretely, that the interests do bring forward the narrative, presumably because *they* think it makes a difference.

Traditional political economy. In traditional political economy analysis, the "public interest approach" emphasizes the merits'

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[175] *Compare Table 5.6.5. Private Fixed Investment in Intellectual Property Products by Type*, BUREAU OF ECON. ANALYSIS (July 31, 2020), https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey (summarizing annual R&D investment in line 6)*, with Table 1.1.5. Gross Domestic Product*, BUREAU OF ECON. ANALYSIS (Mar. 25, 2021), https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey (summarizing annual GDP in line 1).

[176] Federal R&D expenditure peaked at about 1.8% of GDP in 1964 at the height the Space Race with Soviet Union. It has fallen to about 0.6% of GDP since then. *Federal R&D Budget Dashboard*, AM. ASS'N FOR THE ADVANCEMENT OF SCIENCE, https://www.aaas.org/programs/r-d-budget-and-policy/federal-rd-budget-dashboard (last visited Apr. 4, 2021). In contrast, private R&D has grown from 0.9% to 1.9% of GDP during the same period. *Id.*

[177] For more on this diversion from best policy, see Roe, *supra* note 166.

importance and sees policymakers choosing the policy that they think would be best for the American people.[178] In contrast, the "public choice approach" emphasizes the interests of the policymakers themselves and the groups that influence them.[179] Sometimes the interests' goals align with the merits, sometimes they do not. Campaign contributions, votes, or officials' future job opportunities can secure favorable policies, even if they are not in the public interest.

Yet much theory and empirics now show that neither the merits nor the interests regularly succeed alone.[180] They both matter but their strength ebbs and flows across issues and times.

A good narrative can make an interest-group's story persuasive; and a good one can make public-regarding policymakers perceive a need for action.[181] Power and perception are affected by the persuasiveness of the supporting narrative.[182] Explanation follows.

Public-regarding backlash that weakens the interests. Two debilitating features can stymie even rich and powerful interests from winning in the political arena. One, their very actions create an opposite, often equal and sometimes greater, political force when politicians recoil because of fear that the interests' visible influence will be "radioactive." That "radioactivity" would burn the politicians when the media broadcast the interests' raw influence and deride the politicians' acquiescence. The public could readily be appalled by the politicians succumbing. The interests must avoid this backlash.[183]

This debility and the resultant backlash can be overcome with a powerful, persuasive narrative that adds a public interest quality to the group's political pressure.[184] Indeed, when powerful, narrow interest groups win, it's because they managed to couch their favored policy as

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[178] For a concise overview, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State,* 106 COLUM. L. REV. 1260, 1284–85 (2006).

[179] *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE III 475–98 (2003).

[180] *See generally* PREVENTING REGULATORY CAPTURE (Daniel Carpenter & David A. Moss eds., 2014).

[181] *E.g.*, JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 95–96 (1989) (seeing policymakers as mainly guided by their mission as they perceive it).

[182] Edward Balleisen & David Moss, *Introduction*, *in* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 1, 5 (Edward J. Balleisen & David A. Moss eds., 2009).

[183] GUNNAR TRUMBULL, STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS 19 (2012).

[184] *Id.*; *Bruce Yandle, Bootleggers and Baptists: The Education of a Regulatory Economist*, 7 REGULATION 12 (1983).

one that is in the public interest. Wal-Mart has fought organized labor with the narrative that their low prices serve the American consumer.[185] Executives have sought autonomy by using the short-termism narrative to bolster the case that Wall Street is hurting the economy and hardworking middle-class Americans.

When politicians can package a policy as being in the public interest (i.e., as better for the economy, for the average American, for taxpayers, for America itself), they will be more successful than if pushing it as benefiting a powerful interest group or a select cohort of voters.[186] Ideas have power.[187]

Applied here, these dynamics operate forcefully, since the short-termism narrative unites two important interests: executives seeking autonomy with employees seeking stability. Politicians can decry short-termism without alienating either. The two—management and employees—typically are not united in either the diagnosis of what ails America or in what policies they want to fix it.

The rhetoric of stock market short-termism lowers the costs to policymakers of favoring managerial interests for lawmakers, such as the Delaware legislature, its judiciary, the Securities and Exchange Commission, and Congress. It lowers the visibility of their favoritism: "We're not doing management's bidding," they can say (and sincerely believe, retaining a self-image of their own public-spirited courage). Instead, they can say "we are fighting to make the economy better, to make investment for the long-term more likely, to make a better, stronger country for us all."

Narratives reduce the interest groups' debilitating free-riding problem. The second classic political economy weakness of interest groups is that they can fail because they must coordinate actions and costs; free rider problems afflict them, as they afflict so many other groups. An ostensibly powerful group can readily fail if its members cannot coordinate, as Mancur Olson's famous analysis emphasized.[188]

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[185] TRUMBULL, *supra* note 183, at 206.

[186] Special interests are better poised to win when their interests fit a moral story, even if the moral story is at odds with the underlying interest. Yandle, *supra* note 184, at 14; Hirshleifer, *supra* note 50, at 869.

[187] *E.g.*, Dani Rodrik, *When Ideas Trump Interests: Preferences, Worldviews, and Policy Innovations*, 28 J. ECON. PERS. 189, 194 (2014) (analyzing why vested interests rarely gain much traction without the support of good ideas and narratives); James Kwak, *Incentives and Ideology,* 127 HARV. L. REV. F. 253, 257–58 (2014) (showing how special interest groups win because they are better at flexing their ideological muscles).

[188] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971)

To expand, a public choice critic of our narrative view might (mistakenly) say: "If the short-term narrative were unavailable to support executive autonomy, the interests would simply spend more. They still would win. They would make larger campaign contributions. They would lobby harder. No narrative, no problem."

But this criticism is inapt for two reasons: the interest's power is externally capped because, first, as seen above, naked spending with only their private interest as a justification risks public backlash. And second, the interest groups' ability to spend is "internally" capped, by its inability to coordinate and get its members to contribute.

Securing a favorable policy is a public good for the interest group, because one executive benefiting from laws conferring greater autonomy cannot exclude other executives from gaining that autonomy too, even if those other executives did not lobby or contribute to procuring it.[189] The interest group—namely, American executives in public companies owned by the stock market—is very large. It's the kind of group, Mancur Olson showed, that free-rider debilities often weaken.

Enter the narrative. A powerful narrative, once created, is cheap to repeat. Traditional interest group efforts, in contrast, require constant investment: policymakers change via election, reelection, and promotion, so the interests must constantly refresh their campaign contributions and other influence. With narratives, by contrast, once someone—a law firm, a business reporter, by happenstance—creates a compelling narrative, it becomes a public good for those who benefit from it.[190]

Once a narrative latches on, it requires less maintenance and is less easily debilitated by free-rider problems. If there is a public consensus regarding issue X, a new politician replacing the defeated incumbent need not be wooed, lobbied, and supported by the interest group as assiduously with campaign contributions since the new player is often already part of the belief system. A latently powerful interest group does not need to perfectly organize and constantly "tax" its

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[189] *See id.* at 14–15.

[190] A strong narrative gathers strength from dynamics similar to "network effects": an individual's or politician's "consumption" of the narrative (by listening, believing, and repeating) not only does not reduce the quantity of narrative available, but increases its power, persuasiveness, and value. Recall the discussion in Part IV of the power of an easy-to-repeat narrative: the more people use it, the more each of us is likely to believe it, and thus the narrative becomes more valuable for the interest group. Strong narratives can cascade.

members to achieve political influence, if it has a strong narrative backing its influence efforts.[191]

Adding the narrative power vector clarifies why public salience can be quite important in corporate lawmaking. Salience in public opinion is often seen as impeding corporate interests, as incumbent powerful interests lose their advantage if policymakers cater to public preferences.[192] Our analysis here explains why salience can help purportedly merit-based lawmaking, by providing an easy-to-communicate explanation.

But salience can instead help the interest group, *if* that group can package its message in a public-regarding narrative that becomes widespread and generally believed. If a narrative is (1) salient and (2) wraps what would otherwise be executive self-interest (such as obtaining more autonomy) inside a public-regarding narrative (such as fighting stock market short-termism, which is killing the economy), salience then *helps* the interests. Powerful narratives can help narrow interest groups get the policies they want even on issues of high salience. And in our era of increasing populism, salience in corporate lawmaking may become more continuous and less intermittent than in the past, as corporate law is now not as often only made in hidden political corridors—a change that makes mastery of narratives all the more important to the interest groups.

CONCLUSION

Lawmakers do not regularly and scientifically investigate in depth the pluses and minuses of policy. Narratives, impressions, and interests often drive policymakers. Evidence is only part of the picture. Popular narratives, perceptions, and opinions have traditionally not been in play for much corporate lawmaking, however, because corporate law is technical and does not typically attract public scrutiny.[193] But in our era of burgeoning populism, popular narrative and its concomitant how-it-will-play in the media obsession are each destined to play increasingly important roles in corporate lawmaking.

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[191] Trumbell, *supra* note 183, at 124 ("A single common narrative can focus the attention of the group, while coordinating the activities of activists, groups, businesses, politicians, and regulators around a single set of policies.").

[192] Lucian A. Bebchuk & Zvika Neeman, *Investor Protection and Interest Group Politics*, 23 REV. FIN. STUD. 1089, 1109 (2010).

[193] One exception is the structure of financial institutions, which historically attracted populist scrutiny. *See generally* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

To better understand the channels through which popular narratives can influence corporate law, we analyze a specific, ongoing issue: the wide perception of stock market short-termism as hammering capital investment, employee well-being, and the American economy's R&D prowess. The narrative is simple: stock traders and shareholder activists, looking for a quick profit, systematically induce large public corporations to manage for the short-run. Among policymakers, the media, and executives, the view is one-sided that the problem is a pernicious and worsening economy-wide scourge.

Yet a wide gap separates this broadly-held belief—which is being discussed more frequently than ever in the media and has been endorsed by multiple political leaders, including Joseph Biden[194]—from the disputed academic evidence as to its importance. While there is surely some such short-termism, the evidence of deep economy-wide damage is sparse, and much of the evidence points to it not being a deeply debilitating problem. We have in this Article provided psychological and behavioral analysis for why public belief, media attention, and policymakers' statements outrun the mixed academic evidence.

This exploratory analysis of the short-term narrative will resonate most strongly with those who see the evidence for severe stock-market-driven short-termism as weak, because for them our analysis explains why a weak idea prospers. But even those who see deleterious short-termism as well-supported should want to know why what they see as a good idea prospers, when so many other good ideas do not.

The answer in our analysis is the power of the stock market short-termism narrative, with much of the idea's popular strength lying in its connotation, in category confusion, and in its wide confirmation.

Short-termism's *connotations*—of instability and unreliability—make it seem more pernicious than it is. The long-term's connotations—of dependability and steadfast loyalty—make it seem more desirable than it really is. A long-term corporate decisionmaker could be stubborn and unimaginative, while short-term decisionmakers could be flexible and adaptable. Vocabulary matters. Connotation matters. Were the vocabulary and connotations different, the presumptions would be

[194] Brooks, *supra* note 1 (discussing President Biden's view that Wall Street short-termism and broken Washington institutions hold worker prosperity down). The remedy regularly proposed for stock market short-termism to corporate and securities lawmakers is to increase executives' and boards' autonomy from stockholders. Anti-short-termism is a policy proposal readily captured by executives for their own benefit without bolstering worker prosperity. Alternative means to bolster worker prosperity are more likely to actually benefit them and the American economy—such as Biden's parallel proposal to boost manufacturing with heavy government support for new research and development. *See* Shane Goldmacher & Jim Tankersley, *In "Buy American" Speech, Biden Challenges Trump on the Economy*, N.Y. TIMES (July 9, 2020), https://nyti.ms/3dQBnll.

different. Although only one extra level of thinking makes short-termism's connotation ambivalent, much that we conclude in life comes from our initial reaction, not further analysis. The deleterious immediate connotation conditions what comes afterward.

Category confusion strengthens the immediate perception of perniciousness. Too many common, undesirable corporate qualities are mistakenly thought to emanate from distorted, short-term thinking, when they in fact emanate from other corporate distortions. This confusion leads people to think that there's more pernicious short-termism than there is, when there are instead added categories of corporate problems. Corporate environmental degradation is seen as emanating from stockholders' short-term orientation. But this is largely incorrect; it emanates primarily from third-party effects: neither the corporation, nor its shareholders, nor its executives suffer the full consequences of environmental degradation. Others do.

Confirmation deepens the belief that stock market short-termism is a major economy-wide problem. The idea is easy for the media to state and repeat. Confirmation comes partly from the confusion described in the prior paragraph—observers see environmental degradation, financial crises, and employee mistreatment, all of which they mistakenly label as short-termism; and they then conclude that the American corporation is distressingly short-term focused. Confirmation also comes from intended repetition; executives and directors benefit if financial market short-termism justifies yet more autonomy for executives from financial markets. They and their professional allies repeat the short-termism charge and vividly identify, emphasize, and replay discovered actual instances and supporting narratives. Narratives allow lawmakers to tap into popular sentiments—such as hostility toward Wall Street. They allow interest groups, if they can harness the popular narrative, the capacity to crowd out policies that lack an easy-to-communicate message, with policies that favor the interest group. And narratives can reduce the free-rider, coordination problem that plagues large, diverse interest groups. They facilitate members coalescing around the same simple message.

* * *

A few specifics to be clear on the scope of our project here: By narrative power, we do not mean simple persuasiveness in affecting the decisionmaker—be it the judge, the administrator, or the legislator. Our concept of narrative is rather that some notions, conclusions, and preferences in corporate lawmaking affect *public* views of the issue. Lawmakers respond to the voters. Once voters have a strong opinion on one side of a corporate issue, then that public preference enters the mix of inputs into lawmakers' decisionmaking. As an example, if lawmakers are conceptualizing the appraisal remedy, the lawyers' persuasiveness skills reach the lawmaker but go no farther, as the public and voters have no interest in, and generally no knowledge of, the appraisal remedy. But if the issue implicates stock market time horizons—e.g., should directors be shielded from activist shareholders and takeovers?—then public opinion is one of the lawmaking inputs.

Short-termism is not the only corporate narrative that, through general opinion, goes beyond direct persuasion of lawmakers. Other narratives have public saliency today—buybacks, corporate purpose, and executive compensation—and we can discern one or two in corporate lawmaking decades ago that affected lawmakers through their effect on public opinion. Furthermore, not every powerful corporate narrative *benefits* executives and boards (as the short-term narrative generally does, by justifying their autonomy from stock markets) at the expense of stock markets. Some *hurt* executives and boards. The takeover wave of the 1980s had an *anti*-managerial narrative. Takeovers—hostile and otherwise—were justified back then, first in narrow legal circles and then more broadly in the media and political circles, in an anti-managerial narrative. This public narrative had lazy executives protecting their fiefdoms with "poison pills" and "greenmail" (a cousin, presumably, of blackmail) to unjustly enrich themselves (sometimes with "golden parachutes") and run down corporate America at workers' and the economy's expense. Little depicts this popular narrative better than the 1987 popular movie, *Wall Street*,[195] in which the title character, played by Michael Douglas, tells the audience that his kind of "greed . . . is good" because it disciplines management of a failing enterprise. The Douglas character then invoked the public interest, asserting that shareholder activism of his sort is needed to revive that "other malfunctioning corporation, called the USA." The greed-is-good, anti-managerial narrative quite plausibly contributed to takeovers persisting unblocked in corporate lawmaking world for much of the 1980s.

* * *

Academic corporate work typically analyzes lawmaking for its expected impact on corporate well-being, for its fidelity to doctrinal tradition, and for its responsiveness to interest group pressure. We explore here another analytical mode—namely, how an idea's narrative power can strengthen a merits-based idea in a way that the merits alone could not, or empower an interest group in a way that the interest group's latent power could not.

Given the fuzzy and highly context-specific nature of narratives, narrative analytics should focus on one narrative at a time, and so we

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[195] WALL STREET (American Entertainment Partners & Amercent Films 1987).

limited our inquiry to one timely and impactful narrative, namely, stock market-induced short-termism. Yet much of the blueprint we provide here can also be applied to other influential corporate and business law narratives. Historical examples include applying narrative analytics to understand why corporate lawmaking in the 1980s shifted first to disciplining greedy, underperforming executives and then to blocking their opponents, the greedy raiders.[196]

Indeed, juxtaposing the short-termism narrative's impact with that of other possible narratives that did not take off or persist is a promising avenue for future research. In the 1980s example just mentioned, a perhaps equally compelling narrative was then in play of executives at public companies entrenching themselves for power, prestige, and pay at the expense of shareholders, employees, and society overall. For a time, corporate lawmakers in Washington and in Delaware were sympathetic with that narrative and were less pro-management than they became.[197] Some financiers promoted that narrative with trenchant language;[198] in popular culture it was embedded, as just mentioned, in the movie *Wall Street*. However, that narrative faded because the media no longer bought in, or because wealthy and aggressive raiders and hedge fund activists could not credibly promote a narrative of their fighting greedy executives for the benefit of the American people, or because the idea was felled by narrative entrepreneurs who promoted a more powerful narrative, namely that stock-market-driven short-termism was causing American economic decay.

Study of narrative power is developing apace in adjacent disciplines, like economics and finance, in exploratory analyses by two Nobel Prize winners and the president of the American Financial

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[196] *See, e.g.*, Andrew G.T. II Moore, *The Birth of* UNOCAL*—A Brief History*, 31 DEL. J. CORP. L. 865, 866–69 (2006) (highlighting how connotations of terminology are used to condition opinion in the hostile takeovers debate); SHILLER, *supra* note 11, at 47 (using terms like "hostile" and "raiders" in the takeover debate set up the takeover narrative in the 1980s); Sandy E. Green, Jr., *A Rhetorical Theory of Diffusion*, 29 ACAD. MGMT. REV. 653, 661 (2004) (analyzing the rhetoric behind the takeover wave battles).

[197] *See* Mark J. Roe, *Takeover Politics, in* THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE 321, 322–23, 332–33 (Margaret Blair ed., 1993); Roberta Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 U. CINCINNATI L. REV. 457, 497–99 (1988) (describing public opinion as being "congenial for regulation" because voters favored government regulation of hostile takeovers).

[198] Carl Icahn, a prominent "raider," was particularly effective with the media. He still is today. *See, e.g.*, Matthew W. Ragas, Jinsoo Kim & Spiro Kiousis, *Agenda-Building in the Corporate Sphere: Analyzing Influence in the 2008 Yahoo!-Icahn Proxy Contest*, 37 PUB. RELS. REV. 257 (2011).

Association.[199] This kind of analysis is largely missing, however, from corporate law. It is time to start bridging this gap in corporate legal scholarship, as the power of popular ideas is likely to become more important in shaping corporate lawmaking in upcoming years. We have here shown how narrative analysis can be incorporated. For example, content analysis can show how broad the "idea habitat" for a certain narrative is. With short-termism, we saw that the corporate and media environment regularly propagates the idea in ways that make it easy for people to retrieve it from memory, helping it to persist and prosper as it is repeated. Information cascades can convince many that there's a problem as they rely on the opinions of others.[200] A groupthink then evolves, seeing short-termism as a deep and widespread problem, not an intermittent and occasional one.

Advocates to policymakers can obtain a more favorable hearing by categorizing their targeted problem as short-termism. Interest groups can fail if their influence is too visible and creates a backlash; a public-regarding narrative can shield them from that backlash.

And public-regarding public servants need a narrative to communicate what they believe to other lawmakers. Policymakers can justify their decisions by aiming them at short-termism. Critics of American capitalism can shrug off being labelled as outcasts by rhetorically supporting capitalism in general, but rejecting the bent results attributed to stock market short-termism. And executives seeking autonomy can persuade SEC policymakers, senators, judges, and themselves that they are not simply self-interested when they seek more autonomy but are fundamentally fostering the American economy's long-term health.

Ideas have power. Simple ideas with easily visualized imagery can be attractive and credible even before evidence is weighed. Combine an attractive idea having some genuine evidentiary support with influential interests that want the idea believed, and one can see why some corporate policies, laws, and rules succeed, while others do not.

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[199] *See* SHILLER, *supra* note 11, at 47; Hirshleifer, *supra* note 13, at 1; Akerlof, *supra* note 12, at 414.

[200] Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 994 (1992).

APPENDIX 1

Table 1: Content Analysis of Managerial-Focused Short-Termism Posts: Insulate Managers[201]

Title	Decrying Short Termism	Calling to Insulate Managers
The Proposed "Shareholder Bill of Rights Acts of 2009" 5/12/09	"Short-termism . . . distorts management and boardroom judgment . . . bred in the trading rooms of . . . hedge funds and . . . institutional investment managers"	Calling for a shift to "Quinquennial rather than annual or triennial elections of corporate board. . . "
Corporate Governance in Crisis Times 7/20/09	Short-termism was a prime factor in causing the financial crisis. "The engine of true economic growth will always be the profits"	"[C]ourts should continue to recognize the prerogative of directors [and] protect [them] against short-termist pressure," by limiting proxy access, or establishing directors' right to "Just Say No" to a takeover bid
Bite the Apple 2/26/13	"I believe that academics' self-selected stock market statistics are meaningless in evaluating the effects of short-termism"	Alludes to the need to impose fiduciary duties on institutional investors to prevent them from giving in to short-term pressures
A Reply to Professor Bebchuk 4/9/13	A shareholder-centric model promotes short-termism, which "has led to the decline of the American economy and greater unemployment"	Against companies declassifying their boards
Current Thoughts about Activism 8/9/13	Short-termism makes companies sacrifice long-term value, which hurts economic growth, national competitiveness, real innovation and sustained employment	Calling for limiting shareholder access to proxy; regulating proxy advisors; and imposing stricter disclosure requirements on hedge fund activists
The Threat to the Economy 1/22/15	Spotlighting a report indicating that the effects of short-termism are damaging to the economy as a whole	Reduce quarterly reporting, reduce the ease with which hostile takeovers can take place
Will a New Paradigm for Corporate Governance Bring Peace? 10/5/15	"Much of what is wrong with America today—slow growth, widespread corporate scandals, inadequate investment in long-term projects, low wages . . . rising inequality—is attributable to short-termism"	Private ordering: calling on big institutional investors to recognize that they are the last hope in taming short-termism
Jeopardizing . . . Future Prosperity . . . 10/30/15	Short-termism is due to activist hedge funds; fixation with quarterly reporting; executive compensation design; and stock market trading	Calling on companies to "abandon quarterly bottom-line earnings guidance"
Thoughts for Boards of Directors in 2017 12/8/16	"[P]ervasive short-termism is eroding the overall economy and putting our nation at a major competitive disadvantage"	"[T]ax reforms to . . . discourage short-term trading; . . . regulating executive compensation to discourage . . . short-term objectives . . . [;] fiduciary duties [for] . . . asset managers to take into account the long-term . . ."
State Law Implementa-tion 9/11/18	Empirical evidence justifying hedge funds activism has been discredited.	A constituency statute and a mandatory, retroactive, staggered-board statute would assist boards in resisting short-termism

[201] This truncated Appendix 1 has a sample of 10 entries of managerial lawyer statements on short-termism. The full analysis is on file with authors. All listed entries are obtained from Harvard Law School Forum on Corporate Governance. *See generally* https://corpgov.law.harvard.edu/ (last visited Apr. 1, 2021).

APPENDIX 2

Table 2: Content Analysis of Politicians' Attacks on Short-Termism: Damage to Employees[202]

Title	Date	Senator/ Candidate	View on 'Short-termism'
Schumer-Sanders vs. Stock Buybacks	2/4/2019	Bernie Sanders, Chuck Schumer	Restricting share buybacks will promote higher wages, retirement benefits, retention, *and* investments in R&D and equipment
Here's Why Share Buybacks Do Not Deserve the Frosty Response	12/24/2018	Marco Rubio	Share buybacks come at the expense of consumers and workers
Trump Sees Win with Push to Reform Quarterly Earnings Reports	8/26/2018	Donald Trump	Contemplating reducing the frequency of companies' reporting, in the context of how to generate more jobs
U.S. Senators Challenge the SEC on Share Buyback	7/8/2018	Tammy Baldwin, Chris Van Hollen, Chuck Schumer	Calling on the SEC to reform rules that currently enable executives to ignore the needs of workers
The American Dream Deferred	6/1/2018	Cory Booker	A pervasive short-termism culture means boosting immediate value for shareholders at the expense of investing in workers
Congress Takes Aim at "Predatory" Activist Hedge Funds	9/1/2017	Tammy Baldwin, David Perdue	The "Brokaw Act" is meant to combat short-termism that comes "at the expense of workers, taxpayers, and local communities"
Hillary Clinton's right on smashing "quarterly capitalism"	9/11/2015	Hillary Clinton	Praising specific companies that rejected short-termism by paying higher wages and providing extensive training
Hillary Clinton calls out CEOs for short-term thinking. Is she right?	7/23/2015	Hillary Clinton	Short-termism prevents the creation of new jobs
Warren Decries Stock Buybacks, High CEO Pay	6/4/2015	Elizabeth Warren	Share buybacks may temporarily boost stock price, but at the expense of workers
"We will rebuild, we will recover"	2/24/2009	Barack Obama	We need to jettison the short-termism mindset to save the jobs it lost us

[202] This truncated Appendix 2 uses a sample of 10 entries. The full appendix, with links to the sources, is on file with authors.