ISSN 1936-5349 (print)
ISSN 1936-5357 (online)

HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS

THE ILLUSORY PROMISE OF STAKEHOLDER GOVERNANCE

Lucian A. Bebchuk
Roberto Tallarita

Discussion Paper No. 1052

12/2020

Forthcoming, *Cornell Law Review*, December 2020

Harvard Law School
Cambridge, MA 02138

This paper is also Discussion Paper No. 2020-1 of the
Harvard Law School Program on Corporate Governance.

THE ILLUSORY PROMISE OF STAKEHOLDER GOVERNANCE

Lucian A. Bebchuk† & Roberto Tallarita††

---

†James Barr Ames Professor of Law, Economics, and Finance and Director of the Program on Corporate Governance, Harvard Law School. Professor Bebchuk is serving as an advisor to the American Law Institute's *Restatement of the Law*, *Corporate Governance* project, which is examining the subjects of corporate purpose and social responsibility.

††Terence M. Considine Senior Fellow in Law and Economics, and Associate Director of the Program on Corporate Governance, Harvard Law School.

This Article is part of the Project on Stakeholder Capitalism of the Harvard Law School Program on Corporate Governance. Responses to this Article by Einer Elhauge (Harvard Law School), Colin Mayer (Oxford University), and Aneil Kovvali and William Savitt (University of Chicago and Wachtell Lipton, respectively), are expected to be published in issue 7 of the *Cornell Law Review*, Volume 106, 2021. Presentation slides summarizing this Article's analysis are available at https://papers.ssrn.com/abstract=3581299.

We are grateful for conversations with and suggestions from many individuals, including Bob Eccles, Alex Edmans, Allen Ferrell, Jesse Fried, Rebecca Henderson, Jeff Gordon, Assaf Hamdani, Scott Hirst, Louis Kaplow, Kobi Kastiel, Colin Mayer, Josh Mitts, Alan Murray, Guy Rolnik, Leo Strine, and Andrew Tuch. We also benefitted from the helpful comments and questions of participants in workshops at Harvard University, Columbia University, and the Corporate Law Academic Webinar Series; debates on stakeholder capitalism at Oxford (with Colin Mayer) and London Business School (with Alex Edmans); and conferences at Columbia University, the Stigler Center at the University of Chicago, Toulouse Business School in Barcelona, Northeastern University, the Milken Institute, and the ICGN Global Summit.

In addition, we gratefully acknowledge the excellent research assistance of Aaron Haefner, Kevin Li, Tamar Groswald Ozery, Zoe Piel, Aisha Saad, Matthew Stadnicki, and Wanling Su. The Harvard Law School Program on Corporate Governance and the John M. Olin Center for Law, Economics, and Business provided financial support.

ABSTRACT

To address growing concerns about the negative effects of corporations on their stakeholders, supporters of stakeholder governance ("stakeholderism") advocate a governance model that encourages and relies on corporate leaders to serve the interests of stakeholders and not only those of shareholders. We conduct a conceptual, economic, and empirical analysis of stakeholderism and its expected consequences. Stakeholderism, we conclude, is an inadequate and substantially counterproductive approach to addressing stakeholder concerns. To assess the promise of stakeholderism to protect stakeholders, we analyze the full array of incentives facing corporate leaders; empirically investigate whether they have in the past used discretion to protect stakeholders; and show that recent commitments to stakeholderism were mostly for show rather than a reflection of plans to improve the treatment of stakeholders. Our analysis indicates that, because corporate leaders have strong incentives not to protect stakeholders beyond what would serve shareholder value, acceptance of stakeholderism should not be expected to produce material benefits for stakeholders.

Furthermore, we show that acceptance of stakeholderism could well impose major costs. By making corporate leaders less accountable and more insulated from shareholder oversight, acceptance of stakeholderism would increase slack and hurt performance, reducing the economic pie available to shareholders and stakeholders. In addition, and importantly, by raising illusory hopes that corporate leaders would on their own protect stakeholders, acceptance of stakeholderism would impede or delay reforms that could bring real, meaningful protection to stakeholders.

The illusory promise of stakeholderism should not be allowed to advance a managerial agenda and to obscure the critical need for external interventions to protect stakeholders via legislation, regulation, and policy design. Stakeholderism should be rejected, including and especially by those who take stakeholder interests seriously.

Keywords: Corporate purpose, corporate social responsibility, stakeholders, stakeholder governance, stakeholder capitalism, enlightened shareholder value, corporate governance, Business Roundtable, constituency statutes, entrenchment, accountability, managerialism.

JEL Classification: D21, G32, G34, G38, K22

TABLE OF CONTENTS

> *[W]e share a fundamental commitment to all of our stakeholders. We commit to. . . deliver value to all of them, for the future success of our companies, our communities and our country.*
> —Business Roundtable, Statement on the Purpose of a Corporation[1]

INTRODUCTION

There are growing concerns about the adverse effects that corporations impose on stakeholders. By stakeholders we refer throughout this Article to all non-shareholder constituencies of the corporation—including employees, customers, suppliers, communities, and the environment. With growing inequality, large-scale losses of jobs and dislocations in the labor markets, rising climate change risks, and increasingly concentrated markets, capitalism is operating, as one prominent observer recently put it, in "a world on fire."[2]

Those who are deeply concerned about how corporations affect stakeholders, and we count ourselves among them, should support efforts to ensure that capitalism works well for all corporate stakeholders. In our view, the most effective way to do so is by adopting laws, regulations and government policies—such as labor-protecting laws, consumer-protecting regulations, and carbon-reducing taxes—aimed at protecting stakeholder groups. Such "external" interventions would constrain and incentivize companies to act in ways that would improve the welfare of stakeholders.

By contrast, supporters of "stakeholder governance" or "stakeholder capitalism" put forward an alternative approach that relies on and encourages corporate leaders to make choices that would on their own protect stakeholders. In this Article, we warn against the flaws and dangers of this increasingly influential approach. Throughout this Article, we use the shorthand "stakeholderism" to refer to this approach, and we use "corporate leaders" to refer to those individuals, both directors and top executives, who make important corporate decisions.

Stakeholderism naturally appeals to many because it relies on private ordering and seemingly makes external intervention unnecessary. However, as we show in this Article, stakeholderism is an ineffective and indeed counterproductive approach to protecting stakeholders; its acceptance is likely to be detrimental to stakeholders and society.

Recognizing the shortcomings and perils of stakeholderism is especially important due to the increasing support for it among corporate leaders, management advisors, and many others. In the summer of 2019, with much fanfare and massive publicity, the Business Roundtable (BRT)—the

---

[1] Business Roundtable, Statement on the Purpose of Corporation (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf [https://perma.cc/CMR8-WMXE].

[2] REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD OF FIRE 8-9 (2020).

influential association of corporate chief executive officers (CEOs)[3]—announced a revision of its conception of corporate purpose.[4] The BRT CEOs committed to "lead their companies for the benefit of all stakeholders."[5] Moving away from a long-standing statement that explicitly embraced shareholder primacy,[6] the new BRT statement committed to "deliver value" not just to shareholders but also to employees, customers, suppliers, and communities.[7] The BRT statement was presented by its authors, and characterized by many commentators, as a major milestone in the evolution of the modern corporation.[8]

Following the issuance of the BRT statement, the World Economic Forum published in December 2019 a manifesto that urged companies to move from the traditional model of "shareholder capitalism" to the model of "stakeholder capitalism."[9] Also, the Reporter and advisors for the ongoing project of the *Restatement of the Law*, *Corporate Governance* (hereinafter *Restatement of Corporate Governance Law*") are considering the introduction of stakeholderist elements into the restatement.[10] And a memorandum by the law firm Wachtell, Lipton declared 2019 to be a "watershed year" in corporate governance due to "the advent of stakeholder

---

[3] Since the BRT was formed in 1972–73, it has evolved into a "singular political powerhouse that would make an indelible imprint on the history of business and politics in the United States." BENJAMIN C. WATERHOUSE, LOBBYING AMERICA 76–78 (2014) (citing an anonymous executive quote found in LEONARD SILK & DAVID VOGEL, ETHICS AND PROFITS: THE CRISIS OF CONFIDENCE IN AMERICAN BUSINESS 70 (1976)).

[4] Business Roundtable, Statement on the Purpose of Corporation, *supra* note 1.

[5] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/A6PD-UFKJ] [hereinafter *Business Roundtable Redefines the Purpose*].

[6] BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997), http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf [https://perma.cc/5VQQ-6YME].

[7] Business Roundtable, Statement on the Purpose of Corporation, *supra* note 1.

[8] *See* sources cited *infra* notes 85–102.

[9] *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, World Econ. F. (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ [https://perma.cc/3NAK-SCDQ] [hereinafter *Davos Manifesto 2020*] ("The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders."). One observer described stakeholders as the "winner of the 2020 World Economic Forum." Jason Karaian, *And the Winner of the 2020 World Economic Forum Is . . . Stakeholders*, Quartz (Jan. 25, 2020), https://qz.com/1791153/winner-of-2020-world-economic-forum-in-davos-stakeholders [https://perma.cc/BJ6L-TPLA].

[10] The Reporter discussed this possibility in an NYU roundtable on December 6, 2019.

governance."[11]

To assess the merits of stakeholderism, we conduct in this Article an economic, empirical, and conceptual analysis of stakeholderism, its expected consequences, and the claims made by its supporters. Our analysis indicates that stakeholderism should be expected to produce only illusory benefits as well as seriously detrimental effects.

Some might view the ongoing debate on stakeholderism as being waged between those who side with stakeholders and those who side with shareholders, and might therefore view us, given our opposition to stakeholderism, as siding with shareholder interests over stakeholder interests. But such portrayal of our position would be seriously mistaken. To be sure, the position of some opponents of stakeholderism is grounded in their belief that stakeholder protection does not raise serious policy concerns and it is best left entirely to market forces and private contracts.[12] We believe, however, that the effects of corporations on stakeholders do raise serious policy concerns and that addressing these concerns should be a first-order and high-priority goal.

We are friends, not foes, of stakeholder interests, and we suspect that we take stakeholder concerns more seriously than many supporters of stakeholderism. If corporate law reforms could be an effective instrument for addressing such concerns, we would support such reforms. Our opposition to stakeholderism comes precisely because stakeholderism should not be expected to offer such a useful instrument. As the analysis of this Article shows, stakeholderism should be expected to be an ineffective and indeed counterproductive way for addressing stakeholder concerns. While stakeholderism would not produce material benefits for stakeholders, it would introduce illusory hopes, misperceptions, and distractions that would have significant adverse effects on stakeholders. Rejection of stakeholderism, we explain, is thus especially important for those who care deeply about stakeholder interests.[13]

---

[11] Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, Harv. L. Sch. F. on Corp. Governance (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020/ [https://perma.cc/Y22J-YN2R].

[12] For a well-known early work taking this view, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 37 (1991).

[13] In a response to this Article, Colin Mayer criticizes us for asking the "wrong question" of what arrangement would be "most profitable" whereas his stakeholderist work asks what arrangement would produce "the best solution" for society. Colin Mayer, *Shareholderism versus Stakeholderism – A Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita* 10 (European Corp. Governance Inst., Law Working Paper No. 522/2020, 2020), https://ecgi.global/sites/default/files/working_papers/documents/mayerfinal.pdf [https://perma.cc/SY4S-N7HL] [hereinafter, *Mayer Response*]. As the above paragraph

Whereas many supporters of stakeholderism are motivated solely by concerns for stakeholder welfare, the support by some corporate leaders and management advisors might be at least partly motivated by other considerations. In particular, some of the corporate support for stakeholderism might be partly motivated by the prospects that acceptance of stakeholderism would advance a managerial agenda and/or deflect the demand for stakeholder-protecting external interventions. Our analysis highlights these expected consequences of the acceptance of stakeholderism. Moreover, we show that, although these expected consequences might drive some of the management support for stakeholderism, they should lead others, especially those who are focused on stakeholder concerns, to oppose stakeholderism rather than support it.

The remainder of this Article proceeds as follows. Part I describes the evolution of stakeholderism and the broad support it has received among academics, practitioners, business leaders, and policymakers. We then discuss how stakeholderism provided the basis for antitakeover legislation adopted in the 1980s and 1990s by a majority of U.S. states. Finally, we discuss how and why support for stakeholderism has been rising substantially in recent years. The long-standing debate on stakeholderism is now at a critical juncture, and its influence and acceptance could well grow in the coming years.

Part II discusses two different versions of stakeholderism. Although we show that the promise of each of them (including the version that is "more ambitious") is illusory, it is useful to distinguish between them for a discussion of their internal conceptual problems. According to the "enlightened shareholder value" version, corporate leaders should take into account stakeholder interests as a means to maximize shareholder value. Such an instrumental version of stakeholderism, we show, is not conceptually or operationally different from the traditional shareholder value principle, and there seem to be no good reasons for restating this principle in the language of enlightened shareholder value.

According to the second version, by contrast, corporate leaders can and should regard stakeholder interests as ends in themselves. This view, which we call "pluralistic," posits that the welfare of each stakeholder group has independent value, and consideration for stakeholders might entail providing them with some benefits at the expense of shareholders. This version is the one that in theory—though, as we shall show, not in practice—could lead to decisions that would benefit stakeholders beyond what would be useful for shareholder value maximization.

---

clarifies, we are actually asking the same question as Mayer, and we agree that corporate law rules should be set in the way that would best serve society's interests. The reason why we reject stakeholderism is our conclusion that it would utterly fail to provide "the best solution," or even move us in a direction helpful to addressing, the stakeholder concerns that trouble both Mayer and us.

We also discuss in Part II some conceptual problems and difficulties with pluralistic stakeholderism and its implementation. In particular, stakeholderists have commonly avoided the difficult issue of determining which groups should be considered stakeholders, leaving this decision to the discretion of corporate leaders; have tended to overlook the ubiquity of situations that present trade-offs between the interests of some stakeholders and long-term shareholder value; and have generally not provided a method to aggregate or balance the interests of different constituencies in the face of such trade-offs, leaving this matter again to the discretion of corporate leaders. Thus, the effects of pluralistic stakeholderism would critically depend on how corporate leaders choose to exercise discretion, and thus an evaluation of pluralistic stakeholderism must be grounded in an analysis of how corporate leaders should be expected to do so.

Before examining the effects of stakeholderism in general, Part III considers the expected effects of the widely celebrated BRT statement. Based on evidence that we collected, and on a close reading of the statement and accompanying materials, we show that the BRT statement was mostly for show, largely representing a rhetorical public relations move, rather than the harbinger of meaningful change.

For example, our survey of corporations joining the BRT statement indicates that CEOs chose to sign the statement largely without seeking either advance board approval or subsequent board ratification: this behavior is consistent with CEOs perceiving the BRT statement as not requiring any meaningful changes to their company's treatment of stakeholders. Similarly, our review of all the corporate governance guidelines of public companies joining the BRT statement, including the many companies that revised their guidelines in the year since the issuance of the statement, indicates that the guidelines mostly continue to reflect a shareholder primacy approach.

The view that the BRT statement was mostly for show, and was not expected by signatories to bring about significant changes, is also supported by our examination of the statement and accompanying documents. In particular, this view is supported by (i) the ambiguity of the statement and accompanying documents regarding the critical question of whether companies should provide stakeholders with any benefits beyond what would be useful for shareholder value; (ii) the disregard of the ubiquity of trade-offs between stakeholder and shareholder interests; and (iii) the lack of attention to legal constraints that preclude many companies from approaching stakeholder interests as an independent end.

Putting aside the effects of the BRT statement, Part IV turns to examine the potential effects of stakeholderism in general. We present an economic and empirical analysis of how corporate leaders should be expected to use discretion to protect stakeholder interests. We show and empirically document that corporate leaders (both directors and CEOs) have strong incentives to enhance shareholder value but little incentive to treat stakeholder interests as an independent end. Therefore, we argue, corporate leaders have significant incentives *not* to benefit stakeholders beyond what would serve shareholder value, and they should therefore not be expected to use their discretion to do so.[14]

We then discuss the findings of empirical work that we have conducted together with Kobi Kastiel to examine what we can learn from the past behavior of corporate leaders.[15] In particular, we examine the choices that corporate leaders made in connections with transactions governed by constituency statutes that, adopting a stakeholderist regime, authorize corporate leaders to give weight to stakeholder interests in negotiating a sale of their company.[16] Our empirical work analyzes the terms of over one hundred such acquisitions to identify for whom corporate leaders bargained and for whom they did not bargain.

This empirical investigation finds that corporate leaders negotiated to obtain gains for shareholders as well as for themselves. However, corporate leaders generally did not use their negotiating power to benefit employees, suppliers, communities, the environment or any other stakeholders. This evidence reinforces the conclusion of our incentive analysis that, even when encouraged to do so by stakeholderism, corporate leaders should not be expected to use discretion to benefit stakeholders beyond what would serve shareholders.

The business corporation has proven itself to be a powerful and adaptive mechanism for producing economic growth and prosperity. For this reason, some might be attracted to stakeholderism in the hope that, by harnessing corporate power, stakeholderism can lead corporations to serve as a similarly effective engine for protecting stakeholder interests. However, the past success of corporations has been based on the presence of effective incentives for corporate decision makers. By contrast, with corporate leaders having incentives not to benefit stakeholders at shareholders' expense, an attempt to benefit stakeholders by delegating the guardianship of their interests to corporate leaders would not be supported, but rather impeded, by the force of

---

[14] Our analysis in Part IV builds on, but goes substantially beyond, earlier discussions by one of us as well as others that expressed skepticism as to whether corporate leaders can be expected to protect stakeholders. For discussions expressing such skepticism, see, for example, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 729–32 (2007); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 908–13 (2005); Robert C. Clark, *Harmony or Dissonance - The Good Governance Ideas of Academics and Worldly Players*, 70 BUS. LAW. 321, 338 (2015); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015).

[15] Fuller details about the empirical work we discuss in Part IV are provided in Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 93 S. CALIF. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155.

[16] *See infra* notes 35–36 and accompanying text.

economic incentives.

Finally, whereas stakeholderists have generally advocated relying on corporate leaders to protect stakeholders without a major overhaul of existing systems of incentives, including those resulting from shareholders' exclusive voting power, Part IV concludes by discussing the possibility of supplementing stakeholderism with reforms aimed at substantially changing the incentives of corporate leaders. We examine changes both to executive pay arrangements and to the rules governing the election of directors. Designing reforms that would provide leaders with adequate incentives to attach independent weight to the interests of all stakeholders, we show, would be quite challenging as well as very costly.

In Part V we turn to discussing the perils of stakeholderism. It might be argued that stakeholderism, even if it does not provide significant benefits to stakeholders, cannot hurt and might only move things on the margin in the right direction. As Part V shows, however, accepting stakeholderism would be substantially detrimental to shareholders, stakeholders, and society.

We first explain that acceptance of stakeholderism would make corporate leaders less accountable and more insulated from investor oversight. Indeed, in supporting stakeholderism, some corporate leaders and advisors might be partly motivated by the desire to obtain such insulation. Stakeholderism has been used to urge institutional investors to be more deferential to corporate leaders and more willing to side with them in any engagement with hedge fund activists. In addition, stakeholderism has been used as a basis for justifying corporate and legal arrangements that insulate corporate leaders and for urging institutional investors and public officials to support such arrangements.

The increased insulation from shareholders, and the reduced accountability to them, would serve the private interests of corporate leaders, but not those of others. Increased insulation and reduced accountability would increase managerial slack and agency costs, thus undermining economic performance and thereby damaging both shareholders and stakeholders. The danger is that, by cloaking it in stakeholder clothing, stakeholderism would advance a managerialist agenda, thus facilitating a new managerial era.

We then discuss the danger that acceptance of stakeholderism would have a chilling effect on the prospects of legal, regulatory and policy reforms that could provide real, meaningful protection for stakeholders. By raising illusory hopes regarding its positive effects for stakeholders, stakeholderism could well weaken pressures and demands for such reforms and the openness of policymakers to them. Thus, for those interested in addressing corporate externalities and protecting corporate stakeholders, embracing stakeholderism would be substantially counterproductive.

Before proceeding, we should note two subjects that lie outside the scope of our analysis but for which this analysis has significant implications. First, because our focus is on the use of stakeholder factors in decisions made by corporate leaders, we do not directly address the extent to which institutional investors should take such factors into account in their investment and stewardship decisions.

There is now a substantial literature and a heated debate on the subject of socially responsible investing and stewardship.[17] Although this subject is related to the issues examined in this Article, it also raises some different questions which go beyond the scope of this Article. However, our conclusions do have significant implications for the debate on investors' use of environmental and social considerations. To the extent that some institutional investors would like to improve how corporations treat stakeholders, our analysis indicates that supporting and relying on stakeholderism would fail to produce such outcomes. If and to the extent that institutional investors wish to secure such outcomes, a different approach would be necessary.

Second, our focus is on standard publicly traded for-profit companies, and we do not devote attention to benefit corporations.[18] However, our analysis does have clear and direct implications for such corporations. By incorporating a stakeholderist purpose into their legal structure, benefit corporations seek to dispel any doubt that their leaders are legally authorized to consider the interests of stakeholders when making business decisions.[19] But in discussing the promise of stakeholderism, we take it as given that it would be acceptable for corporate leaders to have discretion to benefit stakeholders if their having such a discretion were actually beneficial to stakeholders. Examining the consequence of such a discretion, our incentive analysis shows that corporate leaders should not be expected to use it to benefit stakeholders beyond what would serve shareholder value. Thus, our analysis suggests that, by itself, the mere incorporation of a stakeholderist purpose into a corporation's governance documents should not be expected to deliver material benefits to stakeholders.

---

[17] For examples of recent contributions to this debate, see, for example, Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CALIF. L. REV. (forthcoming 2020); Eleonora Broccardo, Oliver Hart, & Luigi Zingales, *Exit vs. Voice* (European Corp. Governance Inst., Finance Working Paper No. 694/2020, 2020), http://ssrn.com/abstract_id=3671918; and Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020).

[18] For a current discussion of the benefit corporation and the challenge of designing a corporate form that produces benefits for stakeholders, see, for example, Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 989–1000 (2020).

[19] *Id.* at 965–66.

I. THE RISE OF STAKEHOLDERISM

A. Origins, Evolution, and Breadth of Support[20]

In the early history of the U.S. corporation, recognition of the corporate form—and of its most important feature: limited liability—was strictly connected with the notion of public benefit.[21] This idea was rooted in English precedent, which drew a distinction between enterprises of direct benefit to public welfare and those aimed at making private profits, and viewed only the former as deserving the privilege of corporate personhood.[22] The argument, as transplanted into American legal thought and practice, was that limited liability was an extraordinary and undemocratic privilege, and only a prevailing public interest could justify it.[23]

This early conception was gradually abandoned with the passing of general incorporation acts, which enabled enterprises to adopt the corporate form without previous authorization by the state.[24] At that point, corporate personhood was no longer a privilege individually received from the state but a form of business organization generally available to all enterprises.[25] By the beginning of the 1920s, the idea that the main purpose of the business corporation was to make profits for shareholders was widely accepted and sanctioned by case law.[26]

As discussed below in this Section, however, a competing conception of stakeholderism has been evolving in subsequent decades. It received support from scholars (in law, management, and finance), practitioners, and thought leaders, and had influence on lawmaking.

---

[20] We do not attempt to provide an exhaustive review of this debate. Our goal is only to illustrate the evolution, breadth, and recent growth of support for stakeholderism. For a recent detailed survey of stakeholderist theories, see Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 44–52 (Jeffrey N. Gordon & Wolf-Georg Ringe eds. 2018).

[21] Before 1800, more than 75 percent of corporate charters had been granted to public services enterprises, such as water supply, turnpike, and canal companies; only 4 percent of the charters belonged to manufacturing, agricultural, or commercial firms. JOSEPH STANCLIFFE DAVIS, 4 ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 26 (1917).

[22] Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS'N BULL. 11, 13–14 (1960).

[23] Shaw Livermore, *Unlimited Liability in Early American Corporations*, 43 J. POL. ECON. 674, 674 (1935).

[24] *Id.* at 675 n.2.

[25] Herbert Hovenkamp, Enterprise and American Law 1836–1937, at 13 (1991).

[26] *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself . . . .").

In legal scholarship, support for stakeholderism goes back to the seminal and influential work of Merrick Dodd.[27] In the modern era, notable supporters of stakeholderism are Margaret Blair and Lynn Stout, who have argued forcefully for abandoning shareholder primacy in a series of well-known works.[28] Other notable works by legal scholars in support of stakeholderism include those by Einer Elhauge, Simon Deakin, and Cynthia Williams.[29]

In the management literature, an important strain has developed a "stakeholder approach" to strategic management. In a highly influential book with a long-lasting impact, R. Edward Freeman introduces this approach, according to which managers of business organizations must take into account the interests and the role of "any group or individual who can affect or is affected by the achievement of an organization's purpose."[30] To help turn this approach into measurable management practices, subsequent studies have proposed various metrics for scoring performance with respect to stakeholder welfare.[31]

Finally, prominent economists and finance scholars have recently advocated reorienting the purpose of the corporation. A recent book by Colin Mayer, for example, argues that the purpose of business should be to "produc[e] profitable solutions to problems of people and planet."[32] Alex Edmans, in another recent book, suggests that the purpose of corporations should be to create value for society—and, by doing so, increase profits as a

---

[27] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). Dodd's paper is one of the most cited law review articles ever. *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1499 (2012) (listing Dodd's paper as the fifth most cited corporate and securities law paper as of November 2011).

[28] *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012) (arguing against "shareholder value maximization" from both a doctrinal and normative standpoint); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (advocating that directors be viewed as "mediating hierarchs" who should balance the interests of shareholders, employees, creditors, and other stakeholders).

[29] Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733 (2005); Simon Deakin, The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise, 37 QUEEN'S L.J. 339 (2012); Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197 (1999).

[30] R. Edward Freeman, Strategic Management: A Stakeholder Approach 53 (1984).

[31] For a discussion of the "triple bottom line" and other ESG-based performance measurements, see, for example, JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF THE 21ST CENTURY BUSINESS 70 (1998); Erik G. Hansen & Stefan Schaltegger, *The Sustainability Balanced Scorecard: A Systematic Review of Architectures*, 133 J. BUS. ETHICS 193, 195-197 (2016).

[32] COLIN MAYER, PROSPERITY 39 (2018).

by-product.[33] And a recent book by Rebecca Henderson advocates reimagining capitalism so that companies "embrac[e] a pro-social purpose beyond profit maximization and tak[e] responsibility for the health of the natural and social systems."[34]

Turning from scholarship to lawmaking, stakeholderism has already had a significant impact. During the hostile takeover era of the 1980s and 1990s, stakeholderism provided the basis for antitakeover legislation: most states adopted statutes that explicitly allowed directors to consider the interests of other constituencies when making a decision on an acquisition of the company or, more generally, on any issue.[35] Importantly, as documented by Mark Roe and Roberta Romano, this legislative development was in part the result of lobbying efforts by management interests seeking to insulate managers from the threat of hostile takeovers.[36]

These statutes—commonly known as stakeholder statutes, constituency statutes, or other constituency statutes—are often presented as a clarification of the "interests of the corporation" that directors have the duty to serve.[37] The interests of the corporation, the statutes make clear, include the interests of employees, customers, suppliers, and sometimes creditors, local communities, or even the whole economy or nation.[38]

While stakeholderist views thus had an actual impact already in prior decades, their impact on rules and behavior is likely to grow substantially in coming years as we now turn to discuss.

B. A Critical Juncture

Despite the academic support for stakeholderism and its impact on

---

[33] ALEX EDMANS, GROW THE PIE: CREATING PROFIT FOR INVESTORS AND VALUE FOR SOCIETY 46–47 (2020).

[34] Henderson, *supra* note 2, at 11.

[35] For an excellent review and analysis of constituency statutes, see Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1995–97 (2009).

[36] *See* Mark J. Roe, *Takeover Politics*, *in* THE DEAL DECADE 338–52 (Margaret M. Blair ed. 1993); Roberta Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 CIN. L. REV. 457, 458–65 (1988). During this period, the BRT contributed to the efforts to obtain takeover protections on stakeholderist grounds by stating that "[c]orporations are chartered to serve both their shareholders and society as a whole." Bus. Roundtable, *Corporate Governance and American Competitiveness,* 46 BUS. LAW. 241, 244 (1990).

[37] *See, e.g.*, Ariz. Rev. Stat. § 10-830 (LexisNexis); Nev. Rev. Stat. Ann. § 78.138 (LexisNexis); Wis. Stat. Ann. § 180.0827 (LexisNexis); 15 Pa. Cons. Stat. Ann. § 1715 (LexisNexis); 7 R.I. Gen. Laws § 5.2-8 (LexisNexis).

[38] *See, e.g.*, CONN. GEN. STAT. § 33-756 (2017) ("[A] director . . . may consider, in determining what the director reasonably believes to be in the best interests of the corporation . . . the interests of the corporation's employees, customers, creditors and suppliers, and . . . community and societal considerations, including those of any community in which any office or other facility of the corporation is located.").

legislation of the 1980s, at the turn of the twenty-first century shareholder primacy was still the dominant view. At that time, both supporters of shareholder primacy and proponents of stakeholderism agreed that the consensus among scholars leaned toward the former.[39] And although management interests played a key role in the adoption of constituency statutes, the BRT's 1997 statement on corporate purpose declared that serving shareholders was "the paramount duty of . . . directors."[40]

In the past decade, however, stakeholderism has been on the rise, especially in terms of its acceptance by corporate executives, management advisors, and policy thought leaders. The 2019 statement of the BRT, which committed to "deliver value to all [stakeholders],"[41] has been widely viewed as a significant milestone in this trend, a break with decades of orthodoxy, and a turning point for corporate America.[42] The significance of the BRT statement was reinforced by the fact that its U.S.-based signatories lead corporations with an aggregate market capitalization exceeding $11 trillion and over one-third of total market capitalization in the U.S. equity markets.[43]

In the following months, other prominent organizations officially backed stakeholderism. The World Economic Forum—an international organization comprising many major global corporations and thought leaders—issued a manifesto urging companies to abandon the traditional model of "shareholder capitalism."[44] The manifesto called instead for a model of stakeholder capitalism, and the executive chairman of the World Economic Forum even likened the session focusing on the subject to "the funeral of shareholder capitalism."[45]

---

[39] *See* STOUT, THE SHAREHOLDER VALUE MYTH, *supra* note 28, at 21 ("[B]y the close of the millennium . . . [m]ost scholars, regulators and business leaders accepted without question that shareholder wealth maximization was the only proper goal of corporate governance."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001) ("[T]here is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.").

[40] BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE, *supra* note 6, at 3.

[41] Business Roundtable, Statement on the Purpose of Corporation, *supra* note 1.

[42] *See* sources cited *infra* notes 85–102.

[43] Market capitalization of the public companies led by the signatories of the BRT statement, as well as all other public companies, is based on data collected from Compustat as of December 1, 2019. We excluded the private companies that signed the BRT statement (for which market capitalization is not available). As of that date, total market capitalization was $11.6 trillion for all U.S.-incorporated signatories and $13.3 trillion for all public companies.

[44] *Davos Manifesto 2020*, *supra* note 9.

[45] Stakeholder Capitalism: What Is Required from Corporate Leadership?, WORLD ECONOMIC FORUM (Jan. 21, 2020), https://www.weforum.org/events/world-economic-forum-annual-meeting-2020/sessions/stakeholder-capitalism-what-is-required-from-corporate-leadership.

The British Academy—the United Kingdom's national body for the humanities and social sciences—issued a report championing a "revisit[ed] . . . contract between business and society."[46] The report promoted accountability to all constituencies and advocated changes in corporate law and governance that would require directors to consider the interests of all stakeholders.[47]

These developments have been accompanied by growing support for stakeholderism among institutional investors as well. For example, Larry Fink, the CEO of BlackRock, the world's largest asset manager, issued a letter to all CEOs exhorting them to be "committed to embracing purpose and serving all stakeholders."[48] Given these developments, it is unsurprising that when the American Law Institute began its project of the *Restatement of Corporate Governance Law* last year, the project started examining the question of corporate purpose and the appropriate role that stakeholder interests should play in director decision making.[49] In short, it seems that, as a post coauthored by Martin Lipton recently stated, 2019 was a "watershed year in the evolution of corporate governance" due to the "advent of stakeholder governance."[50]

***

What is driving the growing support for stakeholderism over the past decade? One driver, we believe, is the increasing concerns about the effects that companies and the corporate economy have on stakeholders, as well as the interest in and demand for, reforms to address them.[51] This makes stakeholderism, which relies on private decision making and avoids regulation, potentially appealing to many. A second driver is the interest among some corporate leaders and their advisors to use stakeholderism "strategically" to insulate corporate leaders from shareholder oversight and to impede or delay stakeholder-protecting reforms that would constrain companies' choices.

We discuss both of these aspects in Part V. In any event, whatever the drivers of the rise of stakeholderism, the debate might well have reached a critical juncture. These developments motivate this Article. As we explain in the following pages, despite its appeal to many, stakeholderism would

---

[46] BRITISH ACAD., PRINCIPLES FOR PURPOSEFUL BUSINESS 11 (2019).

[47] *Id.* at 16–17.

[48] Larry Fink, *A Fundamental Reshaping of Finance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 16, 2020), https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/ [https://perma.cc/33ZV-TE5B]. For evidence on the dominant position of BlackRock, see Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 732-737(2019).

[49] *See supra* note 10.

[50] *See* Lipton, Rosenblum & Cain, *supra* note 11.

[51] For discussions expressing such concerns, see *infra* notes 228–236 and accompanying text.

actually be detrimental for shareholders, stakeholders, and society alike.

II. ALTERNATIVE VERSIONS AND CONCEPTUAL PROBLEMS

This Part distinguishes between two basic versions of stakeholderism and discusses the conceptual problems of each. Although defenses of stakeholderism are often unclear on which version they support,[52] the two approaches are conceptually distinct; a separate discussion of them is thus useful. In subparts II.A and II.B below, we describe "instrumental stakeholderism" and "pluralistic stakeholderism" respectively, and the conceptual problems afflicting them.

A. Instrumental Stakeholderism

1. Enlightened Shareholder Value

The relationship between a corporation and its stakeholders is, to some extent, mutually beneficial. Stakeholders depend on the corporation for jobs, salaries, sale orders, products and services, loan payments, and positive spillover effects.[53] At the same time, the corporation depends on its stakeholders for financial and human capital, institutional infrastructure, and revenues, and it cannot operate and make profit without a certain degree of social and political recognition and trust.

It is thus unsurprising that maximizing long-term value for shareholders requires paying close attention to the effects of the company's operations on stakeholders. For example, how the company treats employees could well affect its ability to attract, retain, and motivate the members of its labor force; how the company deals with customers could affect its ability to attract and retain them; and how the company deals with local communities or the environment could well affect its reputation and standing in ways that could be important for its success. Thus, it is undeniable that, to effectively serve the goal of enhancing long-term shareholder value, corporate leaders should take into account stakeholder effects—as they should consider any other relevant factors.

In light of the relevance of stakeholder effects for shareholder value, the "enlightened shareholder value" approach proposes that corporate leaders follow a decision rule that contains an explicit reference to the interests of stakeholders. A prominent example of this approach is the 2006 United Kingdom Companies Act, which lists factors that directors should consider

---

[52] For a discussion of how the BRT statement is unclear on this matter, see *infra* subpart III.B.

[53] *See, e.g.*, Enrico Moretti, *Local Multipliers*, 100 AM. ECON. REV. 373 (2010) (examining the economic effects that new businesses or new jobs can have on a community).

in seeking to enhance shareholder value.[54] These factors, which include "the interests of the company's employees" and "the impact of the company's operations on the community and the environment," are meant to be non-exhaustive examples of potentially relevant stakeholder effects.[55] Importantly, directors are called to consider such factors in order "to promote the success of the company for the benefit of its [shareholders]."[56] In other words, consideration of these factors is a means to the end of shareholder welfare.[57] Another important development is that the American Law Institute is currently considering an enlightened shareholder value approach for the *Restatement of Corporate Governance Law*.[58]

2. Different from Shareholder Value?

Given the positive connotations of the term "enlightened," enlightened shareholder value sounds better than shareholder value. However, enlightened shareholder value is not conceptually different from the "old-fashioned" shareholder value (i.e., shareholder primacy) view. Whenever treating stakeholders well in a given way would be useful for long-term shareholder value, such treatment would be called for under either enlightened shareholder value or "old-fashioned" shareholder value. And whenever treating stakeholders well would not be useful for long-term shareholder value, such treatment would not be called for under either enlightened shareholder value or old-fashioned shareholder value.

In other words, enlightened shareholder value is only a particular articulation of shareholder value. Maximizing long-term shareholder value would sometimes call for closing plants and other times for improving employment terms. Such stakeholder-favoring decisions, however—exactly like their stakeholder-disfavoring counterparts—would only be as good as their instrumental value to shareholders. Enlightened shareholder value is thus no different from shareholder value tout court.

Even Milton Friedman, the Nobel laureate who famously opposed corporate social responsibility, acknowledged that shareholder value

---

[54] Companies Act 2006, c. 46, § 172(1) (UK).

[55] *Id.*

[56] *Id.*

[57] *See* CO. LAW REVIEW STEERING GRP., DEVELOPING THE FRAMEWORK 14 (2000) (explaining that the directors' duty to take into account stakeholder interests should not be viewed as an independent goal). For an analysis of the U.K. statutory provision of "enlightened shareholder value," see Andrew Keay, *Section 172(1) of the Companies Act 2006: An Interpretation and Assessment*, 28 Company Law. 106, 106-110 (2007).

[58] *See supra* note 10. For a current academic article that seems to support a version of enlightened shareholder value, see Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020).

maximization may sometimes call for stakeholder-friendly decisions.[59] As long as such decisions are taken to increase shareholder value, he did not view them as a deviation from the exclusive focus on shareholder value maximization he strongly advocated. Thus, Friedman would not have a problem with any choices made under enlightened shareholder value, as they would also be choices required by shareholder value.

3. Why Move to Enlightened Shareholder Value?

Having shown that enlightened shareholder value is conceptually equivalent to shareholder value, are there good reasons to restate the latter using the particular language of the former? Below we identify and discuss three potential reasons (not mutually exclusive) for such a move.

First, some supporters of enlightened shareholder value might hold the view that referring explicitly to stakeholder effects would have *informational and educational value* that would improve corporate decision making.[60] According to this view, corporate leaders have tended to systematically underappreciate the significance of stakeholder effects for long-term value. Moving to a principle of enlightened shareholder value could thus potentially highlight and make salient the relevance of stakeholder effects and thereby make corporate leaders more likely to take them fully into account.

But is there a basis for believing that corporate leaders have systematically underestimated the relevance of stakeholder effects for shareholder value maximization? Consider, for example, the language of the British company law provision whose example the *Restatement of Corporate Governance Law* project is considering following.[61] This provision instructs directors to pursue shareholder value, reminds them that stakeholder effects may be relevant for assessing how best to pursue this goal, yet does not explicitly mention any of the other factors that unquestionably may be relevant in many situations. Is there a good reason for holding that corporate leaders need to be reminded that stakeholder effects are a relevant factor for long-term value-maximization but need no reminding of any other relevant factors?

In response to our discussion above, Alex Edmans argued that

---

[59] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM12 (observing that, for example, “providing amenities to [the local] community or to improving its government . . . may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects”).

[60] These values were stressed by Alex Edmans in his discussion of this Article at a conference at the University of Chicago. For his presentation slides, see https://www.chicagobooth.edu/-/media/research/stigler/pef-2020/slides/edmans_chicago-bebchuk-tallarita-discussion-alex-e.pdf.

[61] *See supra* notes 56–57 and accompanying text.

stakeholder effects often involve the assessment of intangibles and significant uncertainties.[62] However, intangibles and significant uncertainties are also involved in assessing other factors such as effects on the value of the company's brands and the company's intellectual property.[63] Yet we doubt that anyone would support a restatement of corporate purpose that would include an explicit listing of effects on the value of brands and intellectual property as relevant factors for long-term value maximization.

Other than for stakeholder effects, stakeholderists are generally reluctant to tell corporate leaders which factors they should consider to maximize shareholder value. For all factors other than stakeholder effects, stakeholderists seem to believe that corporate leaders are likely to be in the best position to assess what is the best way to maximize value, and which factors are relevant to achieve such goal. Supporters of enlightened shareholder value maximization are yet to provide a persuasive reason for why stakeholder effects should be singled out for special attention.

Second, some might reason that enlightened shareholder value, although formally preserving director loyalty to shareholders, would provide moral support and practical coverage for directors who wish to offer some benefits to stakeholders at the expense of shareholders. According to this view, because courts generally avoid second-guessing the decisions of directors,[64] the language of enlightened shareholder value would enable and perhaps encourage directors to protect stakeholders beyond what would be desirable for long-term shareholder value maximization.

This reasoning, however, is flawed. Under both enlightened shareholder value and shareholder value, directors are able to justify a stakeholder-friendly decision on the grounds that it would contribute to long-term shareholder value. Thus, a move to the language of enlightened shareholder value would not expand the justifications available to corporate leaders for favoring stakeholders. Furthermore, given the broad deference that Delaware law—the law governing most public companies[65]—gives to managerial decisions under the business judgment rule, corporate leaders do not practically face a significant risk of not being able to justify their decision

[62] Edmans, *supra* note 60. Edmans stressed this point also in a virtual debate with one of us, available at https://ecgi.global/video/stakeholder-capitalism-case-and-against.

[63] For empirical studies showing that investors seem to underestimate the value of research and development expenditures, marketing expenditures, and other intangible assets, see Louis K. C. Chan, Josef Lakonishok, & Theodore Sougiannis, *The Stock Market Valuation of Research and Development Expenditures*, 56 J. FIN. 2431 (2001); Rajiv D. Banker, Rong Huang, Ram Natarajan, & Sha Zhao, *Market Valuation of Intangible Asset: Evidence on SG&A Expenditure*, 94 ACCT. REV. 61 (2019).

[64] *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW 248 (3d ed. 2015).

[65] Based on our analysis of FactSet data, as of December 6, 2020, 61.3% of S&P 1500 U.S. companies were incorporated in Delaware.

to a reviewing court.[66]

Moreover, it is doubtful that there are many corporate leaders interested in finding ways to justify stakeholder-friendly decisions beyond those that really serve long-term shareholder value. As we will show in Part IV, corporate leaders have incentives not to favor stakeholders at the expense of shareholders.

Third, a move to a principle of enlightened shareholder value might be favored on the grounds that it would yield rhetorical and political gains. Whereas the first two motivations discussed above focus on how the move could potentially affect corporate decisions (despite the conceptual equivalence between enlightened shareholder value and shareholder value), this third motivation focuses on how the move could improve the way companies are perceived by outsiders. The prospect of improved corporate image could motivate the adoption of the enlightened shareholder value principle even if it should not be expected to have a material effect on the substance of corporate decisions.

Business leaders and their advisors have long recognized the importance of how outsiders perceive corporations and their impact on stakeholders and society. About five decades ago, the Committee for Economic Development, a think tank established by business leaders, warned that "the corporation is dependent on the goodwill of society, which can sustain or impair its existence through public pressures on government."[67] Fast forwarding to the present, BlackRock CEO, Larry Fink, recently stated that companies "[w]ithout a sense of purpose" will "lose the license to operate from key stakeholders."[68] Given these concerns, some corporate decision makers might hope that a formal recognition of the enlightened shareholder value view would allay outsiders' concerns for the adverse effects of corporate decisions on stakeholders and society.

However, to those interested in stakeholder protection this should be a reason for opposing this form of stakeholderism, not for supporting it. Our earlier conclusion that the conceptual difference between shareholder value and enlightened shareholder value is trivial could, by itself, lead to a perception that the move from the first to the second would be neutral and inconsequential. But to the extent that it would lead outsiders to be less concerned about the effects of corporations on stakeholders, the move could well have significant adverse effects. As we explain in detail in subpart IV.B,

---

[66] *See, e.g.*, BAINBRIDGE, *supra* note 64 ("The court may hold forth on the primacy of shareholder interests, or may hold forth on the importance of socially responsible conduct, but ultimately it does not matter. Under either approach, directors . . . will be insulated from liability by the business judgment rule.").

[67] Comm. for Econ. Dev., Social Responsibilities of Business Corporations 27 (1971).

[68] Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/ [https://perma.cc/SP22-KMMF].

one of these effects might be a reduced demand for meaningful legal and regulatory reforms that could effectively protect stakeholders. In this case, the adoption of the enlightened shareholder value principle would not only fail to directly improve stakeholder protection but also indirectly deteriorate the overall level of such protection.

B. Pluralistic Stakeholderism

1. Stakeholder Welfare as an End

A conceptually different version of stakeholderism treats stakeholder welfare as an end in itself rather than a mere means. According to this view, the welfare of each group of stakeholders is relevant and valuable independently of its effect on the welfare of shareholders. We call this approach "pluralistic," because it provides directors with a plurality of independent constituencies and requires them to weigh and balance a plurality of autonomous ends.

Some important examples of the pluralistic approach are the constituency statutes adopted by many U.S. states in the late 1980s and early 1990s. As noted in Part I, these statutes allow directors to take into account the interests of stakeholders without limiting the relevance of these interests to their effect on shareholders. Some statutes even explicitly specify that the rule does not require that any particular interests be given priority over others.[69] Similarly, there are academics who advocate that corporate leaders must aggregate and balance the interests of their multiple constituencies. Thus, for example, Blair and Stout argue that directors should play the role of "mediating hierarchs" who decide how to allocate the value created by the corporation between shareholders and stakeholders.[70] Other well-known supporters of the pluralistic approach include Simon Deakin, Einer Elhauge, and Colin Mayer.[71]

A variation within pluralistic theories is whether directors are required or merely allowed to consider the interests of stakeholders and balance them against the interests of shareholders. The states that have adopted constituency statutes permit—but do not obligate—directors to do so.[72] We

---

[69] *See* ARIZ. REV. STAT. § 10-830 (LexisNexis 2020); IOWA CODE ANN. § 490.1108A (LexisNexis 2020); N.Y. BUS. CORP. LAW § 717 (Consol. 2020); 15 PA. CONS. STAT. ANN. § 1715 (LexisNexis 2020).

[70] *See, e.g.*, Blair & Stout, *supra* note 28, at 251, 281 (arguing that the board of directors should "coordinate the activities of the team members [that is, shareholders and various groups of stakeholders], allocate the resulting production, and mediate disputes among team members over that allocation").

[71] *See* Deakin, *supra* note 29; Elhauge, *supra* note 29; Mayer, *supra* note 32.

[72] Originally, Connecticut obligated directors to consider the interests of stakeholders. In 2010, however, the state legislature amended its constituency statute and adopted a

believe, however, that this difference between the two versions is not practically consequential. The business judgment rule prevents courts from second-guessing the decisions of directors, and stakeholderists in any event do not wish to provide stakeholders with the right to sue directors. Therefore, even with a rule mandating directors to give weight to stakeholder interests, the extent to which they would do so would ultimately depend on their own discretion.

This reliance on the role of discretion is significant because the task that stakeholderism assigns to corporate leaders is Herculean.[73] As we explain in the next Section, pluralistic stakeholderism relies on directors to make the hard choices necessary to define the groups of stakeholders whose interests should be taken into account and then to weigh and balance these interests, which are often difficult to measure, in the vast number of situations in which trade-offs arise. This task would be immensely difficult even if corporate leaders were highly motivated to take it on, which, as we shall show in Part IV, is not the case.

2. Conceptual Problems

(a) Who Is a Stakeholder?

The first difficulty in the implementation of pluralistic stakeholderism is the determination of the stakeholder groups whose interests should be taken into account. Without first making such a determination, directors cannot proceed to aggregate and balance the relevant interests.

To highlight the difficulty involved in this task, Table 1 lists all groups of stakeholders specified by the thirty-two constituency statutes in force in the United States as of December 2019.

---

permissive approach as well. H.B. 5530, Gen. Assemb. (Conn. 2010) (amending CONN. GEN. STAT. § 33-756 from "a director . . . shall consider, in determining what the director reasonably believes to be in the best interests of the corporation, [the interests of stakeholders]" to "a director . . . may consider, in determining what the director reasonably believes to be in the best interests of the corporation, [the interests of stakeholders]").

[73] We use this adjective as a reference to Ronald Dworkin's ideal judge, Hercules, a person "of superhuman skill, learning, patience and acumen" who has the difficult task of deciding hard cases based on the correct interpretation of the whole body of the law. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975).

Table 1. Stakeholder Groups in the Constituency Statutes

Group or factor	States	No. of statutes
Employees	AZ, CT, FL, GA, HI, ID, IL, IN, IA, KY, ME, MD, MA, MN, MS, MO, NE, NV, NJ, NM, NY, ND, OH, OR, PA, RI, SD, TN, VT, WI, WY	31
Customers	AZ, CT, FL, GA, HI, ID, IL, IN, IA, KY, ME, MD, MA, MN, MS, MO, NE, NV, NJ, NM, NY, ND, OH, OR, PA, RI, SD, TN, VT, WI, WY	31
Suppliers	CT, FL, GA, HI, ID, IL, IN, IA, KY, ME, MD, MA, MN, MS, NE, NV, NJ, NM, ND, OH, OR, PA, RI, SD, TN, VT, WI, WY	28
Creditors	CT, GA, HI, IA, KY, MD, MA, MN, MS, MO, NE, NV, NJ, NM, NY, ND, OH, PA, RI, SD, VT, WY	22
Local community	CT, FL, GA, HI, ID, IL, IN, ME, MD, MO, NE, NJ, NM, NY, OR, PA, RI, SD, TN, VT, WI, WY	22
Society	AZ, CT, HI, KY, MA, MN, MS, NV, ND, OH, OR, TX, VT	13
Economy of the state or the nation	FL, HI, KY, MA, MN, MS, NV, NM, ND, OH, SD, VT	12
Environment	AZ, TX	2
Other	MO (“similar contractual relations”), NY (retired employees and other benefit recipients)	2
Catch-all	AZ, CT, FL, GA, IL, IN, ME, NV, OR, PA, TN, VT, WI, WY	14

The table summarizes which groups of stakeholders are identified in the constituency statutes in force as of December 2019.

All statutes list employees and customers as stakeholders, and most include suppliers as well. As for other groups, however, the statutes vary significantly. Many states mention creditors and local communities, but many do not. Some states allow directors to consider the effect of their decisions on society in general or on the economy of the state or the nation, but most do not. And some provisions are especially idiosyncratic; the New York statute, for example, allows directors to consider “the corporation’s retired employees and other beneficiaries receiving or entitled to receive” benefits sponsored by the corporation.

Most notably, almost half of the states include an explicit catchall phrase that permits directors to consider any other (unidentified) groups or factors not listed in the statute.[74] The existence of this phrase indicates that the lawmakers were uncertain regarding the appropriate delineation of the set of stakeholder groups.

As commonly understood, the term "stakeholders" refers to individuals who are affected by corporate decisions.[75] But what counts as being affected by corporate decisions? Clearly, for many public companies, the set of individuals who are directly and indirectly affected by the activities of the corporation is very large indeed. Furthermore, as the examples below indicate, any attempt to delineate the set of relevant stakeholders will confront difficult and challenging questions that have no clear answer.

Consider, for example, a plan to relocate a plant to another region. In addition to the negative effects of the plant relocation on the plant's current workers and the community in which the plant is currently located, should the company's leaders also take into account the positive effects on the workers of the new plant and on the community in which the new plant would operate? Would the answer to this question change if the new location were overseas?

To consider another example, suppose that a company is contemplating a plan that would expand its market share and the number of its employees and would result in a decline in a competitor's revenues and number of employees. Should corporate leaders pay attention to the plan's negative effects on the competitor's employees, suppliers, or shareholders? For yet another example, consider the environmental impact of a company's operations. Should the company's leaders take into account the effects on the residents of faraway countries or only on those living in the United States?

Finally, consider the dimension of time. It is common to include a company's current employees, suppliers, and customers among relevant stakeholders. But should former (or at least recent) employees, suppliers, and customers count as well? And what about potential future employees, suppliers, and customers?

Such questions must be resolved for any implementation of pluralistic

---

[74] See, for example, the statutes of Illinois, Maine, and Pennsylvania, allowing directors to consider "all other pertinent factors." 805 ILL. COMP. STAT. ANN. 5/8.85 (LexisNexis 2019); ME. REV. STAT. ANN. tit. 13-C, § 831 (2020); 15 PA. CONS. STAT. ANN. § 1715 (LexisNexis 2020). See also the statute of Vermont, which allows directors to consider "any other factors the director in his or her discretion reasonably considers appropriate in determining what he or she reasonably believes to be in the best interests of the corporation." VT. STAT. ANN. tit. 11A, § 8.30 (LexisNexis 2019).

[75] According to the *Black's Law Dictionary* (11th ed. 2019), a stakeholder is "[s]omeone who has an interest or concern in a business or enterprise, though not necessarily as an owner," or (more generally) "[a] person who has an interest or concern (not necessarily financial) in the success or failure of an organization, system, plan, or strategy, or who is affected by a course of action." In the strategic management literature, a stakeholder is any individual or group "that can affect, or [is] affected by, the accomplishment of organizational purpose." FREEMAN, *supra* note 30, at 25.

stakeholderism. However, they are clearly difficult to answer, and any answers to them would likely be highly contestable. Stakeholderists have largely avoided offering answers for these questions, or even a methodology for reaching such answers. Instead, supporters of pluralistic stakeholderism have largely dealt with these questions by assigning them to corporate leaders to resolve at their discretion. Similarly, state constituency statutes have chosen to delegate to directors a broad discretion to identify the relevant stakeholders.[76] Thus, on this matter, as in others to be presently discussed, stakeholderism critically relies on the discretion of corporate leaders and thus reinforces the importance of assessing (as we do in Part IV) how corporate leaders should be expected to use their discretion.

(b) *The Ubiquity of Trade-Offs*

Once the relevant stakeholders are identified, stakeholderism requires that their interests be weighed and balanced. Such an exercise raises very difficult questions regarding conflicts between groups of stakeholders and between stakeholders and shareholders, which stakeholderists have largely avoided by leaving their solution, again, to the discretion of corporate leaders. We conjecture that the limited attention devoted to this problem is due to an inaccurate perception that conflicts and trade-offs between shareholders and stakeholders are infrequent. The BRT statement, for example, explicitly denies the possibility that the interests of shareholders and stakeholders can clash in the long run.[77]

This view, however, is unsupported. In fact, potential trade-offs between shareholders and stakeholders are ubiquitous. Even after adopting all the stakeholder-friendly policies that are expected to improve long-term shareholder value (that is, after carrying out instrumental stakeholderism to its fullest extent), companies will commonly face many opportunities to provide some stakeholders with benefits that will come at the expense of shareholders.

Consider a company that provides its employees with compensation and benefits at levels that fully enable it to attract and retain talented and productive employees. And suppose that this company has, as many major public companies do, a significant stream of profits that enables it to fund all

---

[76] *See, e.g.*, JAMES D. COX & THOMAS LEE HAZEN, *Treatise on the Law of Corporations* § 4:10 (3d ed. 2019) ("[Constituency statutes] commit complete discretion to the board of directors without any reliable method to adjudge the appropriateness of its exercise.").

[77] Bus. Roundtable, *Redefined Purpose of a Corporation: Welcoming the Debate*, MEDIUM (Aug. 25, 2019), https://medium.com/@BizRoundtable/redefined-purpose-of-a-corporation-welcoming-the-debate-8f03176f7ad8 [https://perma.cc/DD3K-YKHU] [hereinafter Bus. Roundtable, *Redefined Purpose of a Corporation*] ("While we acknowledge that different stakeholders may have competing interests in the short term, it is important to recognize that the interests of all stakeholders are inseparable in the long term.").

necessary investments and to also pay dividends. In this common situation, if the directors were to follow pluralistic stakeholderism, they would face a trade-off. Financing an increase in employee compensation by reducing dividends would make employees somewhat better off and shareholders somewhat worse off. Trade-offs and conflicts of this kind are likely to be very common.

In forming the view that trade-offs are rare and that win-win choices are generally available, stakeholderists might have been influenced by empirical work documenting an association between employee satisfaction and shareholder return,[78] as well as between social responsibility scores and company valuation.[79] However, such associations can simply be explained by the fact that some firms find it value maximizing to take certain stakeholder-friendly actions. This in no way implies, however, that all or even most potential stakeholder-friendly options would be good for shareholders. The empirical evidence is thus fully consistent with the ubiquitous presence of trade-offs.

(c) How to Resolve Trade-Offs?

How should corporate leaders resolve the ubiquitous trade-offs they would face under a pluralistic rule? This is another challenging question that must be addressed by whoever wishes to implement pluralistic stakeholderism.

Consider the following questions. How are directors supposed to assess the effects of their decisions on the various stakeholders? Should all stakeholder effects be converted into a monetary equivalent to enable comparison? If so, how should directors monetarize nonfinancial effects such as employees' psychological well-being, the effects of increased employment on local crime rates, or the expected effects of the company's emissions on global warming?[80] Furthermore, how should directors do the balancing? Should they seek to maximize the aggregate welfare of the different groups regardless of where the gains and losses from decisions fall? Or should they try to ensure that value is distributed among various constituencies in a certain way?

---

[78] See Alex Edmans, Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices, 101 J. FIN. ECON. 621, 622 (2011).

[79] *See* Allen Ferrell, Hao Liang & Luc Renneboog, *Socially Responsible Firms*, 122 J. FIN. ECON. 585, 586 (2016).

[80] For a discussion of the complexity of estimating climate change effects, see Richard L. Revesz et al., *Improve Economic Models of Climate Change*, 508 NATURE 173, 174 (2014); Katharine Ricke Laurent Drouet, Ken Caldeira & Massimo Tavoni, *Country-Level Social Cost of Carbon*, 8 NATURE CLIMATE CHANGE 895, 895 (2018); William D. Nordhaus & Andrew Moffat, *A Survey of Global Impacts of Climate Change: Replication, Survey Methods, and a Statistical Analysis* 18–19 (Nat'l Bureau of Econ. Research, Working Paper No. 23646, 2017).

Rather than devoting much attention to developing a methodology for aggregating and balancing the interests of diverse constituencies, stakeholderists commonly deal with this issue by leaving the resolution of trade-offs to the judgment and discretion of corporate leaders. For example, Blair and Stout expressly oppose the adoption of a rule or a criterion for resolving trade-offs, arguing that directors should be accorded broad discretion on this matter.[81] It is left unsaid, however, how directors should use their discretion to make these decisions and how outsiders should evaluate how well directors perform their role.

(d) Critical Dependence on Director Discretion

As discussed above in this subpart, both the determination of the relevant stakeholder groups and any attempt to balance their interests in the ubiquitous situations in which trade-offs arise involve difficult questions which stakeholderists commonly avoid. Rather than develop methodologies or suggestions as to how corporate leaders should confront such choices, stakeholderists leave them to the discretion of directors without attempting to assist directors in exercising such discretion.

In his response to this Article, Colin Mayer criticizes our analysis of the above difficulties involved in implementing stakeholderism.[82] In his view, decisions-makers in general, and corporate leaders in particular, sometimes have to make difficult choices in the absence of clear answers, and the presence of such difficulties should therefore not be a basis for rejecting stakeholderism.[83] This criticism, however, fails to recognize that our discussion of these difficulties is not at all intended to provide a reason for rejecting stakeholderism. Rather, our discussion is meant to highlight that stakeholderism critically depends on the discretion of corporate leaders.

Once we recognize the critical dependence of stakeholderism on the discretion of corporate leaders, we must conclude that any evaluation of stakeholderism, and any support for it, should be based on a prior analysis of how corporate leaders should be expected to use their discretion. We carry out such an assessment in the subsequent two Parts.[84]

---

[81] Blair & Stout, *supra* note 28, at 325 ("[C]orporate directors as mediating hierarchs enjoy considerable discretion in deciding which members of the corporate coalition receive what portion of the economic surplus resulting from team production. Although the board must meet the minimum demands of each team member to keep the coalition together, beyond that threshold any number of possible allocations among groups is possible.")

[82] Mayer Response, *supra* note 13, at 3-4.

[83] *Id*.

[84] In discussing this Article in a session at the SHoF-ECGI Sustainable Finance Conference, Coin Mayer also argued that he supports requiring corporate leaders, not merely allowing them, to balance the interests of stakeholders with those of shareholders. *See The*

III. THE BRT STATEMENT: A MEANINGFUL CHANGE OR MOSTLY FOR SHOW?

A. A Turning Point?

The BRT statement was widely viewed by many observers as a major milestone and a significant turning point for corporate America. Prominent media outlets described the statement as:

- a "major philosophical shift" (*Wall Street Journal*);[85]
- a "significant shift" and one that broke "with decades of long-held corporate orthodoxy" (*New York Times*);[86]
- "[t]he loudest reform call yet from inside the system" and "a potential sea change," which was "so significant and so welcome" (*Washington Post*);[87]

Illusory Promise of Stakeholder Governance, ECGI, https://ecgi.global/video/illusory-promise-stakeholder-governance. As a practical matter, however, corporate leaders would retain ample discretion over the extent to which they would take stakeholder interests into account as long as courts, under the long-standing principles of the business judgment rule, decline to second-guess and review the business decisions made by corporate leaders. *See supra* notes 64, 66, and accompanying text. Indeed, in our study with Kobi Kastiel, we do not find differences in the choices made by corporate leaders when they are governed by rules allowing them to take into account stakeholder interests and when they are governed by rules requiring them to do so. Bebchuk, Kastiel, & Tallarita, *supra* note 15, Section III.A.2.

Hypothetically, one could consider supplementing pluralistic stakeholderism with a fundamental change in the judicial review of corporate decision-making. This change would require courts to review on the merits any challenged decision by corporate leaders that has an effect on the allocation of costs and benefits between shareholders and stakeholders. Such a fundamental change would involve frequent litigation that would call on courts to make balancing decisions and, in contrast to the spirit of stakeholderism, would make courts (and not only corporate leaders) a key decision-maker in determining the treatment of stakeholders. We doubt that stakeholderists or others would support such a judicial role.

[85] David Benoit, *Top CEOs See a Duty Beyond Shareholders*, WALL ST. J., Aug. 20, 2019, at A1.

[86] David Gelles & David Yaffe-Bellany, *Feeling Heat, C.E.O.s Pledge New Priorities*, N.Y. TIMES, Aug. 19, 2019, at A1; Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html [https://perma.cc/H3WJ-GPJB].

[87] David Ignatius, *Corporate Panic About Capitalism Could Be a Turning Point*, WASH. POST (Aug. 20, 2019), https://www.washingtonpost.com/opinions/even-the-business-moguls-know-its-time-to-reform-capitalism/2019/08/20/95e4de74-c388-11e9-9986-1fb3e4397be4_story.html [https://perma.cc/YB2V-MF3U]; Tory Newmyer, *The Finance 202: Corporate Critics Cautiously Optimistic About New CEO Mission Statement*, WASH. POST (Aug. 20, 2019), https://www.washingtonpost.com/news/powerpost/paloma/the-finance-202/2019/08/20/the-finance-202-corporate-critics-cautiously-optimistic-about-new-ceo-mission-statement/5d5b307d88e0fa7bb93a85a9/ [https://perma.cc/T5J3-SS3K];

- "a major change in thinking" (*Financial Times*);[88]
- a "bombshell . . . announcement" (*Reuters*);[89]
- a "stunning new mission statement" (*USA Today*);[90]
- "something seismic" (*NBC News*);[91]
- "a big change in the way corporate leadership is acting" (*CNBC Television*);[92]
- "toss[ing] the old [corporate purpose] into the dustbin" (*Fortune*);[93] and
- a "revolutionary . . . moment in business" (*Forbes*).[94]

A year later, the BRT statement was still portrayed by media observers as a "historic . . . commitment,"[95] one that "jettison[ed] [the BRT's] prior

---

Steven Pearlstein, *Top CEOs Are Reclaiming Legitimacy by Advancing a Vision of What's Good for America*, WASH. POST (Aug. 19, 2019), https://www.washingtonpost.com/business/2019/08/19/top-ceos-are-reclaiming-legitimacy-by-advancing-vision-whats-good-america/ [https://perma.cc/HR27-WLVF].

88 Editorial Board, *Business Must Act on a New Corporate Purpose*, FIN. TIMES (Aug. 19, 2019), https://www.ft.com/content/3732eb04-c28a-11e9-a8e9-296ca66511c9 [https://perma.cc/MF72-E7SW].

89 Alison Frankel, *If Corporations Don't Put Shareholders First, What Happens to Business Judgment Rule?*, REUTERS (Aug. 22, 2019, 3:16 PM), https://www.reuters.com/article/us-otc-bizroundtable/if-corporations-dont-put-shareholders-first-what-happens-to-business-judgment-rule-idUSKCN1VC2FS [https://perma.cc/24G8-SPMA].

90 Steve H. Hanke, *Business Roundtable Suffers from Economic Illiteracy*, USA TODAY (Aug. 28, 2019, 5:24 PM), https://www.usatoday.com/story/opinion/2019/08/28/business-roundtable-suffers-economic-illiteracy-editorials-debates/2144794001/ [https://perma.cc/EJ96-JBKW].

91 Sally Susman, *'You're Going to Need a Cleanse': How Pfizer's Sally Susman Was Criticized for Choosing a Corporate Career*, NBC NEWS (Aug. 25, 2019, 7:59 PM), https://www.nbcnews.com/know-your-value/feature/you-re-going-need-cleanse-how-pfizer-s-sally-susman-ncna1045551 [https://perma.cc/YJ3U-EYQF].

92 Alan Murray, *Former CEO Alan Murray Discusses the Shift Behind the New Definition of a Corporation*, YOUTUBE: CNBC TELEVISION (Aug. 19, 2019), https://www.youtube.com/watch?v=dhCZuSjiKO8 [https://perma.cc/X9UK-442R].

93 Alan Murray, *America's CEOs Seek a New Purpose for the Corporation*, FORTUNE (Aug. 19, 2019, 3:30 AM), https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/ [https://perma.cc/V3S5-9M5D].

94 Afdhel Aziz, *The Power of Purpose: How Conscious Capitalism Is Helping Shape the New Paradigm For Business*, FORBES (Sep. 5, 2019, 11:05 AM), https://www.forbes.com/sites/afdhelaziz/2019/09/05/the-power-of-purpose-how-conscious-capitalism-is-helping-shape-the-new-paradigm-for-business/#3560595679eb [https://perma.cc/5YQC-AWGY].

95 Richard C. Shadyac Jr., *Why a Year Later, the Business Roundtable's Updated Statement of Purpose Is More Relevant than Ever*, FORTUNE (Aug. 19, 2020, 4:00 AM), https://fortune.com/2020/08/19/business-roundtable-statement-purpose-responsibility/ [https://perma.cc/3AUA-CB8A].

focus on shareholders above all others"[96] and "struck many as potentially revolutionary"[97] or even "an important step toward renewing the social compact of the United States."[98] This widely held view of the BRT commitment as a significant turning point, expressed both immediately following its issuance and after the passage of significant time, was partly a product of statements made by the BRT and its leaders, which described the statement on corporate purpose as a "transformative statement";[99] one that "mov[ed] away from shareholder primacy"[100] and "raise[d] the bar for everyone";[101] and "a bold declaration" with which the BRT "broadened the responsibility of corporate America to all stakeholders."[102]

The CEOs who signed the statement head companies with an aggregate market capitalization exceeding $13 trillion, including such major companies as Apple, Amazon, JPMorgan Chase, Walmart, Procter & Gamble, Exxon-Mobil, and Pfizer.[103] Thus, if the BRT statement reflected a signal of and commitment to significant changes in the treatment of stakeholders, the impact on society would be considerable.

Therefore, before taking up the question of whether stakeholderism in general should be expected to benefit stakeholders, we discuss in this Part the narrower question of whether the BRT statement can be expected to produce such benefits. Below we analyze five dimensions of the BRT statement and accompanying materials and empirical evidence that we collected. We

---

[96] Lauren Weber, *During Coronavirus Crisis, Big Companies Display Largess—But for How Long?*, WALL ST. J. (Mar. 22, 2020, 1:24 PM), https://www.wsj.com/articles/during-coronavirus-crisis-big-companies-display-largessbut-for-how-long-11584893891 [https://perma.cc/EP7J-34YL].

[97] Geoff Colvin, *Revisiting the Business Roundtable's 'Stakeholder Capitalism,' One Year Later*, FORTUNE (Aug. 19, 2020, 5:00 AM), https://fortune.com/2020/08/19/business-roundtable-statement-principles-stakeholder-capitalism-corporate-governance/ [https://perma.cc/WE7Z-6V4J].

[98] Henry Olsen, *U.S. Business Leaders Have Taken a Step to Finally Renew the American Social Compact*, WASH. POST (Aug. 20, 2019, 1:01 PM), https://www.washingtonpost.com/opinions/2019/08/20/us-business-leaders-have-taken-step-finally-renew-american-social-compact/ [https://perma.cc/TDF8-ALDK].

[99] Gary Norcross, *FIS Chairman, President & CEO Gary Norcross on Advancing Business Roundtable's Commitment to Diversity and Inclusion*, MEDIUM (Aug. 14, 2020), https://medium.com/@BizRoundtable/fis-chairman-president-ceo-gary-norcross-on-advancing-business-roundtables-commitment-to-293c2b2995e3 [https://perma.cc/EXX9-W7EL].

[100] *Business Roundtable Redefines the Purpose*, *supra* note 5.

[101] Murray, *America's CEOs Seek a New Purpose for the Corporation*, *supra* note 93 (quoting Ginni Rometty, CEO of IBM).

[102] Ed Bastian, *Delta Air Lines CEO Ed Bastian on Corporate Purpose and Putting People Before Profits*, MEDIUM (Aug. 18, 2020), https://medium.com/@BizRoundtable/delta-air-lines-ceo-ed-bastian-on-corporate-purpose-and-putting-people-before-profits-52a49c6591e9 [https://perma.cc/GRP9-QLCP].

[103] *See supra* note 43 and accompanying text.

conclude that the BRT statement should be viewed largely as a PR move rather than as the harbinger of a major change.[104]

B. Pluralistic or Merely Instrumental?

The statement, and the additional details published by the BRT in an explanatory note a few days later[105] are remarkably vague as to the nature and content of the commitment that is being made. The statement starts with the unobjectionable claim that corporations have effects that are socially beneficial ("creating jobs, fostering innovation and providing essential goods and services") and then famously declares a "fundamental commitment to all of our stakeholders."[106] However, when the statement turns to describe how the signatories will treat several groups of stakeholders, the specifics of these commitments are quite vague and elusive. The statement offers nonspecific and underdefined commitments such as "meeting or exceeding customer expectations," compensating employees "fairly" and treating them with "dignity and respect," fostering "diversity and inclusion," and treating suppliers "fairly and ethically."[107]

It is perhaps excessively demanding to expect detailed guidance from such a short statement. Importantly, however, the statement also fails to provide clarity on a critical question: which basic version of stakeholderism the BRT purports to endorse. Is it the instrumental approach, which supports taking stakeholder interests into account only to the extent that doing so would contribute to shareholder value? Or is it the pluralistic approach, which allows or requires directors to treat stakeholder welfare as an end in itself? The BRT statement remains ambiguous on this critical question.

Some aspects of the statement might encourage readers to infer that the CEOs plan to protect stakeholders beyond what would be called for by shareholder value maximization. In addition to the expression of a

---

[104] Although many of the immediate reactions to the BRT statement commended it as a major milestone, see sources cited *supra* notes 85–102, there were also observers who expressed skepticism. For op-eds and blog posts expressing skepticism with respect to the motivation behind or the expected consequences of the statement, see, for example, Luca Enriques, *The Business Roundtable CEOs' Statement: Same Old, Same Old*, PROMARKET (Sept. 9, 2019), https://promarket.org/2019/09/09/the-business-roundtable-ceos-statement-same-old-same-old/ [https://perma.cc/FZ23-VUL9]; Luigi Zingales, *Don't Trust CEOs Who Say They Don't Care About Shareholder Value Anymore*, WASH. POST (Aug. 20, 2019, 5:54 PM), https://www.washingtonpost.com/opinions/2019/08/20/dont-trust-ceos-who-say-they-dont-care-about-shareholder-value-anymore/ [https://perma.cc/MH42-Q5VW]. In this Part, however, we go beyond such skeptical observations by grounding them in empirical evidence and in a detailed analysis of five dimensions of the statement and the choices made by signatories.

[105] Bus. Roundtable, *Redefined Purpose of a Corporation*, *supra* note 77.

[106] *Business Roundtable Redefines the Purpose*, *supra* note 5.

[107] *Id.*

"fundamental commitment to all of our stakeholders," the statement also describes all stakeholders as "essential," suggesting that the statement does not accord shareholders any priority over other constituencies.[108] Furthermore, the BRT describes the statement as "a call to action to ensure the benefits of capitalism are shared more broadly," thus suggesting that implementing the commitments expressed in the statement will lead to a redistribution among constituencies relative to the current allocation of value.[109]

Furthermore, the BRT statement and the accompanying press release emphatically present the new statement as a radical change from the BRT's prior position: the statement is described as "redefin[ing] the purpose of [the] corporation," "supersed[ing] previous statements," and "mov[ing] away from shareholder primacy."[110] However, the earlier 1997 statement, which proclaimed that "the paramount duty of management and of boards of directors is to the corporation's stockholders," already explicitly endorsed "tak[ing] into account the interests of the corporation's other stakeholders" as an instrument for shareholder value maximization.[111] Thus, if the BRT statement were to be read as a significant move away from the earlier version, then it would be difficult to interpret it as requiring merely instrumental stakeholderism.

The BRT statement, however, does not explicitly endorse benefitting stakeholders beyond what would be useful for shareholder value maximization. In particular, addressing the concern that the BRT statement could be interpreted as "abandoning shareholders," the BRT explanatory note indicates that creating long-term value for shareholders is a clear goal of corporations and that "for corporations to be successful [and] durable and return value to shareholders, they need to consider the interests and meet the fair expectations of a wide range of stakeholders."[112]

Moreover, when the BRT provides examples of how companies will meet the "commitments of this statement," it does not include any case that suggests that directors should put the interests of stakeholders above those of shareholders.[113] Two of the examples call for the government to adopt measures in favor of current and future employees (raising the federal

---

[108] *Id.*

[109] Bus. Roundtable, *Redefined Purpose of a Corporation*, *supra* note 77.

[110] *Business Roundtable Redefines the Purpose*, *supra* note 5.

[111] According to the 1997 Statement, taking stakeholders into account was worthwhile from a shareholder perspective because "[it] is in the long-term interests of stockholders for a corporation to treat its employees well, to serve its customers well, to encourage its suppliers to continue to supply it, to honor its debts, and to have a reputation for civic responsibility." BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE, *supra* note 6, at 3.

[112] Bus. Roundtable, *Redefined Purpose of a Corporation*, *supra* note 77.

[113] *Id.*

minimum wage and facilitating access of part-time students to federal financial aid) rather than for companies to benefit employees directly.[114] The other two examples (apprenticeships and internships programs for students and workers and moving away from quarterly earnings guidance) might be perfectly consistent with shareholder value, and the language used does not suggest that those policies can be pursued beyond what would be desirable for shareholder value maximization.[115]

Thus, despite the change in rhetoric, the BRT's revision of its statement of corporate purpose does not seem to be a move from the shareholder primacy or enlightened shareholder value of its 1997 statement to pluralistic stakeholderism.

C. Denial of Trade-Offs

Another telling sign is that the BRT largely denies the possibility of trade-offs. In fact, it states that "while we acknowledge that different stakeholders may have competing interests in the short term, it is important to recognize that the interests of all stakeholders are inseparable in the long term."[116]

As discussed in section II.B.2, however, trade-offs are inevitable and arise frequently. Companies constantly face choices that might favor one group at the expense of another and must pick winners and losers.

The language used by the BRT, in contrast, suggests that companies will generally face "win-win" outcomes in which a certain choice will be better than all alternative choices from the perspective of each of the company's constituencies. This is at best a naïve misunderstanding or, more realistically, a mischaracterization of economic reality. If companies faced only win-win situations, there would be no practical difference between stakeholderism and shareholder value maximization; in a world of only win-win situations, companies making choices that maximize shareholder value would necessarily pick the options that would be best not only from the perspective of shareholders but also from the perspective of every other constituency.

Insisting on a world of win-win situations is consistent with the expectation that signatories will generally treat stakeholders in whatever way would best serve shareholders. By assuming win-win situations, the BRT creates an inaccurate impression that signatories will treat all stakeholders as well as possible.

D. Lack of Board Approval

In assessing the extent to which the BRT statement is expected to bring

[114] See id.
[115] See id.
[116] *Id.*

about major changes, it is useful to examine whether the decision to join the statement was approved by each company's board of directors. The most important corporate decisions (such as approving a major transaction, amending bylaws, or making a major change in the corporate strategy) require or at least commonly receive approval by a vote at a meeting of the board of directors.[117] Thus, if the commitment expressed by joining the BRT statement had been expected to bring about major changes in a company's choices and practices, it would have been expected to be approved by the board of directors.[118]

Therefore, to examine this issue, we contacted the public relations offices of 173 companies whose CEOs signed the BRT statement.[119] We asked each company to indicate who was the highest-level decision maker who approved the decision to join the BRT statement, either the CEO, the board of directors, or an executive below the CEO. Forty-eight companies responded to our inquiry.[120] Of the responding companies, 47 companies indicated that the decision was approved by the CEO and not by the board of directors.[121] Only one responding company indicated that the decision was approved by the board of directors. Thus, among responding companies, about 98% had no approval by the board of directors.

To be sure, a majority of the companies declined to answer even after a follow up. Still there is no reason to expect that the companies that did not answer were more likely than responding companies to have had the decision approved by the board. Thus, the strong results we obtained for our sample

---

[117] *See* James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 9:1 (3d ed. 2019).

[118] Robert Eccles and Tim Youmans have led an initiative aimed at encouraging boards of directors of public companies to adopt a statement of purpose or "statement of significant audiences and materiality," which should identify the company's significant constituencies and the company's priorities and time frames to deliver value to these constituencies. Robert G. Eccles & Tim Youmans, *Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality*, 28 J. APPLIED CORP. FIN. 39, 39 (2016). These thought leaders believe that the board of directors is the corporate organ that should approve such a statement. It seems equally natural that the board should also be the organ that approves a company's joining a collective statement of purpose such as the BRT statement.

[119] The initial signatories of the BRT statement totaled 181. As of December 17, 2019, we identified three additional companies that publicly joined the BRT statement, for a total of 184. Of these 184 companies, we contacted all the 173 companies for which we found a public relations or media inquiries email address on the corporate website.

[120] We also received two ambiguous responses that we did not include in the total of 48. For example, one company responded that the decision was "a collaborative effort," declining to specify a particular decision maker.

[121] Of these 48 companies, two added that while the decision was taken by the CEO, the CEO consulted (or "usually consults") with the board of directors. However, important corporate decisions are generally approved by the board of directors through a formal vote at a board meeting. We therefore did not classify these two companies as having received board approval for the decision to join the BRT statement.

of 48 are telling.

What can explain the common CEO decision to join the BRT statement without seeking approval by the board of directors? It is implausible that CEOs chose not to seek approval for decisions that they viewed as sufficiently important to merit board consideration. For major decisions, even "imperial" CEOs can typically be expected not to disregard the need for board approval and instead use their power and influence to get the board to approve the choice they favor.

Similarly, it is implausible that CEOs did not seek board approval because they viewed joining the BRT Statement as a matter of personal belief rather than a statement made in their "official" capacity as corporate head. The BRT described the CEO signatories as committing "to lead their companies for the benefit of all stakeholders."[122] Thus, the BRT statement did not seek to express a shared personal belief by a group of individuals but a commitment regarding the goals that the companies led by these individuals will pursue.[123]

In our view, the most plausible explanation for CEOs choosing to join the BRT statement without board approval has to do with their view that the statement would not produce a significant change in the way the company treated its stakeholders. Indeed, two of the companies that responded to our survey stated that joining the BRT statement reflected an affirmation that the company's past practices have been consistent with the principles of the BRT statement rather than an expectation that the company would make major changes in its future treatment of stakeholders.

Furthermore, JPMorgan, the company headed by the chairman of the BRT at the time the statement was issued, also expressed the view that no significant future changes would be necessary to implement the principles of the BRT statement. In fact, in response to the submission of a shareholder proposal asking directors to report on the changes necessary to implement the principles of the BRT statement, JPMorgan stated that the company already "operated in accordance with the principles set forth in the BRT Statement before its publication and continues to do so after its publication."[124]

To the extent that this view was widely shared among other signatories to the statement, it can explain well why the decision to join the statement was commonly not approved by the company's board of directors. In this case, however, the BRT statement merely reflected (i) the CEOs' positive

---

[122] *Business Roundtable Redefines the Purpose*, *supra* note 5.

[123] We note that no CEO would be expected to announce a commitment to lead the CEO's company to acquire another company without approval of the acquisition plan by the board.

[124] M. Hughes Bates, JPMorgan Chase & Co., SEC No-Action Letter, 2020 WL 255796 (Feb. 5, 2020). The SEC concurred with the company's view and decided to recommend no enforcement action in case the company excluded the shareholder proposal from its proxy statement.

assessment of how their companies have been treating stakeholders thus far, as well as, importantly, (ii) the CEOs' expectations that the statement will not lead to substantial changes in how stakeholders are treated.

In a response to our evidence on the lack of board approval that BRT President Joshua Bolten provided to the *Financial Times*, he stated that "[m]ost of the CEOs who signed that statement believe that that's the way they're [already] trying to run their company now, so why would they need to get board approval?"[125] Relatedly, the Society for Corporate Governance, which represents corporate secretaries and business executives in governance, ethics, and compliance functions, published a post seeking to reply to our evidence regarding the lack of board approval in a similar fashion.[126] According to this post, "it's not surprising that the signatory CEOs generally would not have sought board approval" because they "were not intending with this statement to signal a significant shift in how they operate."[127]

Although these two corporate responses explain why the lack of board approval was not a corporate governance failure, they concede the inference we draw from the lack of board approval and our resulting conclusions. Our explanation for the findings is that the lack of board approval reflected the perception of CEOs that their pledge did not represent a commitment to make material changes to the existing treatment of stakeholders by their company.[128] By admitting that the lack of board approval resulted from CEO perception that the BRT statement did not commit them to run their company differently from how they "run their company now" and from the CEO intention not to effect "a significant shift in how they operate," BRT President Bolten and the Society for Corporate Governance concede our explanation and its implications for the BRT statement.[129]

---

[125] Andrew Edgecliffe-Johnson & Billy Nauman, *CEOs' Plans to Reset Capitalism Bump into Reality of Pandemic*, FIN. TIMES (Aug. 20, 2020), https://www.ft.com/content/34e702fe-0ea4-460a-b4fc-b9f3fce4b0ce [https://perma.cc/EJ3W-KARD].

[126] Randi Val Morrison, *BRT Statement of Corporate Purpose: Debate Continues*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 28, 2020), https://corpgov.law.harvard.edu/2020/08/28/brt-statement-of-corporate-purpose-debate-continues/ [https://perma.cc/89K3-RMRE]. For a description of the society and its membership, see *We Are an Association of Corporate Secretaries and Governance*, SOC'Y CORP. GOVERNANCE https://www.societycorpgov.org/about/aboutus [https://perma.cc/G3SJ-HGR7] (last visited Nov. 19, 2020].

[127] Morrison, *supra* note 126.

[128] Edgecliffe-Johnson & Nauman, *supra* note 125.

[129] In the response provided to the *Financial Times*, Bolten added that "[e]ven if many CEOs saw it as an affirmation of their existing priorities," the statement reflected an "aspiration[]" to do more. *Id*. Note, however, that "doing more" was described as an aspiration rather than a commitment and that the stated commitment was merely to continue

Thus, the lack of board approval is consistent with, and reinforces, the conclusion that the BRT statement was not expected by signatories to bring about major changes.

E. Corporate Governance Guidelines

Corporate governance guidelines (also called corporate governance principles or policies) are official governance documents that are typically approved by the board of directors.[130] They are updated with significant frequency and specify at any time the main governance principles and procedures guiding the company' corporate governance.[131] Although governance guidelines mostly deal with governance processes, they also often contain general principles or specific provisions regarding the goals that directors must pursue.[132]

These documents therefore provide a natural place to look for the company's official position on corporate purpose. If companies whose CEOs signed the BRT statement are indeed committed to "mov[ing] away from shareholder primacy,"[133] we should expect this commitment to be reflected in the companies' current governance guidelines.

To examine this aspect, we reviewed the corporate governance guidelines of the companies whose CEO signed the BRT statement. The results of this study indicate that these guidelines largely reflect having shareholder value as the sole goal.[134] Below we illustrate the findings of this broad review by discussing the corporate governance guidelines of the companies in the "BRT Board Sample"—the twenty U.S. public companies whose CEOs sat on the board of the directors of the BRT at the time that the BRT statement was issued.[135] In each case, we examined when the corporate governance guidelines were last amended and how they address the welfare of stakeholders.

---

running the company in the future (in terms of treatment of stakeholders) as it is being run now.

[130] *See* NYSE Listed Company Manual: § 303A.09 Corporate Governance Guidelines (requiring companies listed on the New York Stock Exchange to adopt and disclose corporate governance guidelines). *See also* Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097, 1112–13 (2020) (reporting that 87% of S&P1500 companies disclose their corporate governance guidelines).

[131] *See* Nili & Hwang, *supra* note 130, at 1126.

[132] *Id.* at 1124.

[133] *Business Roundtable Redefines the Purpose*, *supra* note 5.

[134] We report the full details about our findings for each of the companies in Lucian A. Bebchuk & Roberto Tallarita, Do Corporate Leaders Plan to Move Away from Shareholder Primacy? (unpublished manuscript) (on file with authors).

[135] Our review was based on the corporate governance guidelines available on the companies' websites as of September 19, 2020, one year and one month following the issuance of the BRT statement.

Our review indicated that, of the twenty companies in the BRT Board Sample, ten amended their governance guidelines after the issuance of the BRT statement. Nine of them, however, did not make any changes in their formulation of corporate purpose. In particular, some companies left unchanged the text that explicitly reflected a shareholder primacy principle by prescribing that directors must "promote the interests of stockholders" (CVS),[136] "act solely in the best interest of the Corporation's shareholders" (Duke),[137] "maximize stockholder value over the long-term" (Eastman),[138] or "serve the best interests of the Company and its shareholders" (Stryker).[139]

The only company that amended its guidelines with language related to corporate purpose seems to be S&P Global. This company added to its guidelines a paragraph stating that "the interests of the Corporation's shareholders are advanced by also considering and responsibly addressing the concerns of other stakeholders."[140] Even in this case, however, serving shareholder interests remains the purpose of the corporation, while "responsibly addressing" the concerns of other stakeholders is only a means of advancing these interests.[141]

The remaining ten companies in the BRT Board Sample chose not to amend their guidelines after the issuance of the BRT statement, and many of them have guidelines containing a strong endorsement of the shareholder primacy principle. Notably, explicit endorsements of shareholder primacy can be found in the corporate governance guidelines of the two companies whose CEOs played a key leadership role in the BRT's adoption of its statement. JPMorgan Chase, whose CEO Jamie Dimon was the chairman of the BRT when the statement was issued, states that "[t]he Board as a whole is responsible for the oversight of management *on behalf of the Firm's*

---

[136] CVS HEALTH CORP., CORPORATE GOVERNANCE GUIDELINES 1 (Jan. 31, 2020), https://s2.q4cdn.com/447711729/files/doc_downloads/governance/2020/03/Corporate-Governance-Guidelines-2020-01-31-CURRENT-(1).pdf [https://perma.cc/FS8M-WLGA].

[137] *Principles for Corporate Governance*, DUKE ENERGY §1 (Feb. 20, 2020), https://www.duke-energy.com/our-company/investors/corporate-governance/principles-corp-governance [https://perma.cc/BKW7-JZZU].

[138] EASTMAN CHEM. CO., CORPORATE GOVERNANCE GUIDELINES 1 (July 39, 2020), https://www.eastman.com/Company/investors/Corporate_Governance/Documents/CorporateGovernanceGuidelines.pdf [https://perma.cc/Q5NA-LEYM].

[139] Corporate Governance Guidelines, STRYKER (Nov. 6, 2019), https://www.stryker.com/us/en/about/governance/corporate-governance-guidelines.html [https://perma.cc/TX5H-MEYB].

[140] S&P GLOBAL INC., CORPORATE GOVERNANCE GUIDELINES 1 (June 23, 2020), http://investor.spglobal.com/Cache/IRCache/3f27b8d9-4f6a-0340-4ba9-13bdc1183ffb.PDF?O=PDF&T=&Y=&D=&FID=3f27b8d9-4f6a-0340-4ba9-13bdc1183ffb&iid=4023623 [https://perma.cc/CH8W-WM5A].

[141] *Id.*

shareholders."[142] Similarly, Johnson & Johnson, whose CEO Alex Gorsky chaired the BRT's Corporate Governance Committee at the time the BRT statement was issued, states in quite clear terms that "[t]he business judgment of the Board must be exercised . . . in the long-term interests of our shareholders."[143]

Before concluding, we would like to stress the presence of some exceptions. The guidelines of a few companies in the BRT Board Sample contain, and contained also prior to the issuance of the BRT statement, references to stakeholder interests, but they still do so without abandoning the focus on shareholder value as the ultimate goal. Cisco's guidelines, for example, mention "high customer satisfaction and superior employee working environment" as goals the company seeks to achieve, but they do so while requiring that "[n]ominees for the Board should be committed to enhancing long-term shareholder value."[144] Similarly, the guidelines of Boeing, Marriott, and Walmart recognize that treating stakeholders well might enhance shareholder value, but they retain shareholder value as the ultimate goal and refer to the treatment of stakeholders as means of advancing this goal.[145]

---

[142] *Corporate Governance Principles*, JPMORGAN CHASE & CO. § 3.1 (Jan. 2019) (emphasis added), https://www.jpmorganchase.com/about/governance/corporate-governance-principles [https://perma.cc/JR9Q-82R7].

[143] JOHNSON & JOHNSON, INC., PRINCIPLES OF CORPORATE GOVERNANCE (Feb. 13, 2018), https://www.investor.jnj.com/_document/2018-principles-of-corporate-governance?id=00000161-a078-d89d-ad75-befa96510000 [https://perma.cc/MJ7W-7T38]. The company's guidelines include the company's 1943 credo, which notes the corporation's responsibility to customers, employees, and communities, but do make it clear that directors' business judgment must still be exercised in the interests of shareholders.

Other examples of companies whose governance guidelines endorse shareholder primacy include AECOM and Lockheed Martin. AECOM's guideline state that "[t]he primary responsibility of the Board of Directors . . . is to oversee the affairs of the Company for the benefit of stockholders." AECOM, INC., CORPORATE GOVERNANCE GUIDELINES 1 (Nov. 18, 2018), https://investors.aecom.com/static-files/d1206cf2-b313-4502-be58-469b2660a331 [https://perma.cc/Y7BD-BELY]. And Lockheed Martin's governance guidelines state that "[t]he role of the Board is to oversee the management of the Corporation and to represent the interests of all the Corporation's stockholders." LOCKHEED MARTIN CORP., CORPORATE GOVERNANCE GUIDELINES 1 (Apr. 25, 2019), [https://perma.cc/7HS3-6X5T].

[144] CISCO SYSTEMS, INC., CORPORATE GOVERNANCE POLICIES 2 (Aug. 1, 2019), https://s2.q4cdn.com/951347115/files/doc_downloads/governance/2019/08/Corporate-Governance-Policies-August-2019.pdf [https://perma.cc/E7SW-GNQ6].

[145] THE BOEING COMPANY, CORPORATE GOVERNANCE PRINCIPLES 1 (June 22, 2020), https://www.boeing.com/resources/boeingdotcom/company/general_info/pdf/corporate-governance-principles.pdf [https://perma.cc/JTH3-MMTL] ("The Board and the officers recognize that the long-term interests of the Company and its shareholders are advanced when they take into account the concerns of employees, customers, suppliers and communities."); *Corporate Governance*, MARRIOTT (Nov. 7, 2019), https://marriott.gcs-

Finally, among the twenty companies in the BRT Board Sample, two companies, Cummins and International Paper Company, which are incorporated in states with constituency statutes (Indiana and New York, respectively) have (and had had long prior to the BRT statement) guidelines that contain stakeholder-oriented language that echoes the statutory language in the constituency statutes governing them.[146] This language was adopted long ago and is based in part on the language of the governing constituency statute, therefore these guidelines do not reflect any changes prompted by the BRT statement or the development of new stakeholder-oriented attitudes among corporate CEOs in recent years.

The above discussion regarding the governance guidelines of the companies in the BRT Board Sample illustrates the patterns identified by our study of the corporate governance guidelines of all companies whose CEO endorsed the BRT statement. These patterns cast doubt on the commitment of these companies to moving away from a focus on shareholder value. They thus support the conclusion that the BRT statement should not be viewed as a signal of coming changes in how these corporations treat stakeholders.

F. Disregard of Legal Constraints

Finally, we would like to note yet another sign that the BRT signatories do not intend to adopt pluralistic stakeholderism. The BRT statement and accompanying communications do not discuss or even acknowledge the fact that public companies are subject to different state corporate laws, and some of those might well impose constraints on the power of directors and executives to embrace stakeholderism.

Most importantly, our review indicates that about 70% of the U.S. companies that joined the BRT statement are incorporated in Delaware,

---

web.com/corporate-governance [https://perma.cc/3UHG-VWSN] (last visited Nov. 19, 2020) ("To the extent consistent with their primary obligation to Marriott's shareholders, the board of directors and management exercise their responsibilities to enhance the interests of Marriott's associates, customers, suppliers, the communities where Marriott operates, and other stakeholders."); WALMART INC., CORPORATE GOVERNANCE GUIDELINES 3 (Feb. 6, 2020), https://s2.q4cdn.com/056532643/files/doc_downloads/2020/02/Corporate-Governance-Guidelines-Feb-6-2020.pdf [https://perma.cc/NT6G-XEEU] ("[The Board must show] its awareness that the Company's long-term success depends upon its strong relationship with its customers, associates, suppliers and the communities, including the global community, in which it operates.").

[146] CUMMINS, CORPORATE GOVERNANCE PRINCIPLES 1 (May 12, 2020), https://d1io3yog0oux5.cloudfront.net/_24e552486c2b857fc56225fe1c9a6c6f/cummins/db/795/6846/file/Governance+Principles+as+amended+%28Clean%29+05122020.pdf [https://perma.cc/GS3S-J5LX]; INT'L PAPER CO., CORPORATE GOVERNANCE GUIDELINES 1 (Dec. 13, 2016), https://perma.cc/H7YQ-TZXH. Interestingly, even companies incorporated in states with a constituency statute have corporate governance guidelines with strong shareholder-centric principles. *See, e.g.*, LOCKHEED MARTIN CORP., *supra* note 143.

which is widely viewed as a state with strong shareholder-centric corporate law. As then Chancellor William Chandler stated in a notable Delaware opinion:

> Having chosen a for-profit corporate form . . . directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . .[147]

Indeed, a recent article by Leo Strine, who served as the chief justice of the Delaware Supreme Court at the time of the publication of the BRT statement, concludes that "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end,"[148] and that Delaware corporations can consider stakeholder interests "only as a means of promoting stockholder welfare."[149] Similarly, at a recent roundtable on the subject of Delaware law's approach to stakeholders, organized by Columbia Law School and Gibson Dunn & Crutcher LLP, the consensus of the participants was in line with Chief Justice Strine's view.[150]

Given the concerns about the compatibility of stakeholderism with Delaware law, Martin Lipton, one of the most vocal supporters of stakeholderism, coauthored a client memorandum that purports to address "a number of questions [that] have been raised about the legal responsibilities of directors in . . . taking into account . . . [stakeholder] interests."[151] What is most interesting about the memorandum is not what it includes but what it does not. The memorandum cautiously avoids opining that taking into account stakeholder interests beyond what would be useful for shareholder value is permissible under Delaware law, thus eluding a critical legal question.

Therefore, it seems likely that Delaware corporations (and therefore a substantial majority of the companies joining the BRT statement) may not balance the interests of shareholders and stakeholders, or at least would face

---

[147] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

[148] Strine, *supra* note 14.

[149] *Id.*

[150] Brea Hinricks, *Does (and Should) Delaware Law Allow "Long Term Stakeholder Governance"?*, COLUM. L. SCH.: MILLSTEIN CTR. BLOG (June 26, 2019), http://blogs.cuit.columbia.edu/millsteincenter/2019/06/26/does-and-should-delaware-law-allow-long-term-stakeholder-governance/ [https://perma.cc/U6AC-6JDG].

[151] Martin Lipton, *Stakeholder Governance—Some Legal Points*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 20, 2019), https://corpgov.law.harvard.edu/2019/09/20/stakeholder-governance-some-legal-points/ [https://perma.cc/78DT-CGL7].

significant legal issues if they explicitly chose to do so. For present purposes, however, what is most important is that neither the BRT nor the numerous Delaware companies that joined the BRT statement acknowledged or addressed this legal issue. This disregard of the issue is, once again, consistent with the view that the BRT statement was expected to be largely a rhetorical public relations move rather than an actual change in corporate strategy.

***

The evidence and analysis in the preceding five Sections thus clearly indicate that it was a mistake to portray the BRT statement as "jettison[ing] . . . prior focus on shareholders above all others," "a major change in thinking" "toss[ing] the old [corporate purpose] into the dustbin," a "revolutionary . . . moment in business," and a move "away from shareholder primacy."[152] The excitement and fanfare accompanying the statement, and the hopes that it would bring about significant improvements in the treatment of stakeholders, were misplaced.

IV. An Illusory Promise

In Part II we explained that the "enlightened shareholder value" version of stakeholderism (instrumental stakeholderism) is conceptually equivalent to the traditional shareholder primacy view as it would call for providing benefits to stakeholders only when and as long as doing so would serve shareholder value. In Part III, we showed that signatories of the BRT likely intended to continue operating as they have long done and serve stakeholders only instrumentally in pursuit of the shareholder value objective. Still, although pluralistic stakeholderism was not embraced by the BRT statement, it could in theory produce substantially different outcomes if corporate leaders were to use their discretion to protect stakeholders at shareholders' expense in a significant number of cases. In this Part, we examine whether pluralistic stakeholderism should be expected to lead corporate leaders to act in this way. We show that this is not the case.

In subparts IV.A and IV.B, we analyze the incentives of directors and CEOs, respectively, and we demonstrate that they have incentives, and should therefore be expected, to avoid serving stakeholder interests beyond what would be desirable for shareholder value. In subpart IV.C we present empirical evidence suggesting that corporate leaders in fact have not used their discretion to protect stakeholders when state constituency statutes have authorized them to do so. This evidence is consistent with, and reinforces, the conclusions of the incentive analysis in subparts IV.A and IV.B.

Finally, in subpart IV.D we examine whether the identified incentive problems could be addressed by supplementing stakeholderism with

[152] *See* sources cited *supra* notes 85–102.

arrangements aimed at providing corporate leaders with significant incentives to protect stakeholders. Providing such incentives, we show, would require not only changes in executive pay arrangements but also giving stakeholders influence over the election of directors. Although such reforms are commonly not included in the proposals advanced by stakeholderists, we examine them, and we show their limitations and considerable costs.

Before proceeding, we note that it might be argued that, even in the absence of economic incentives, stakeholderism would create internal corporate norms that would effectively lead corporate leaders to give independent weight to stakeholder interests.[153] However, the development of corporate rules and arrangements has long been based on the premise that incentives matter and that norms cannot by themselves be relied upon to ensure that corporate leaders would focus on socially desirable goals.[154]

Were such norms sufficient, it would not have been necessary, for example, to award large executive pay packages designed to produce incentives to serve shareholders, as well as to provide shareholders with rights to vote and sue designed to mitigate the underperformance or opportunism of corporate leaders. Incentives play an important role in shaping the behavior of corporate leaders, and the incentives produced by corporate rules and arrangements have contributed substantially to the success of the business corporation. Thus, it is important to determine whether the incentives of corporate leaders would encourage or discourage managerial discretion to balance shareholder and stakeholder interests.

A. Director Incentives

1. Compensation

An important source of incentives for corporate directors is their compensation. Historically, the largest fraction of compensation for non-employee directors was represented by a fixed-cash payment.[155] In recent times, however, companies have increasingly compensated directors with equity-based compensation to align their interests with those of

---

[153] For a related discussion of whether norms could be relied on to induce investment managers to make stewardship decisions that would serve the interests of their beneficial investors, see Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2071–72 (2019).

[154] *Id.*

[155] For a discussion of the low level of stock ownership of directors in large public companies for most of the twentieth century, see, for example, Sanjai Bhagat, Dennis C. Carey & Charles M. Elson, *Director Ownership, Corporate Performance, and Management Turnover*, 54 BUS. LAW. 885, 886–88 (1999).

shareholders.[156] Under current compensation practices, 99% of S&P 500 companies give directors substantial equity compensation, mainly in the form of restricted or deferred stock.[157] Furthermore, equity pay represents more than half of total director compensation in S&P 500 companies.[158]

This practice is strongly considered a positive development for corporate governance, and it is supported by the two major proxy advisors, ISS and Glass Lewis. ISS's policies on director pay support "reasonable practices that adequately align the interests of directors with those of shareholders" and suggests that director compensation "should incorporate meaningful director stock ownership."[159] Glass Lewis typically "recommend[s] support for compensation plans that include option grants or other equity-based awards."[160] Both proxy firms favor fixed stock grants over performance-based equity plans.

The most conspicuous aspect to notice is that, while director compensation practices are designed to align the interests of directors with shareholder interests, they produce no alignment of director interests with the interests of stakeholders. This aspect of director compensation practices is supported by ISS and Glass Lewis, which do not even mention stakeholder welfare in their compensation guidelines.

To highlight the incentives produced by director compensation practices, we examine below these practices in twenty companies in the BRT Board Sample. We seek to determine whether these practices provide directors with any incentives to balance the interests of shareholders with those of stakeholders.

Table 3 describes the structure of director compensation in the twenty companies in the BRT Board Sample. The data in the table is based on our review of the 2019 proxy statements of these companies. Consistent with

---

[156] *See, e.g.*, General Motors Co., 2019 Proxy Statement (Form 14A) 18 (Apr. 18, 2019) (mentioning as one of the guiding principles for director compensation the "[a]lign[ment of] the interests of directors with our shareholders by providing a significant portion of compensation in equity").

[157] Rebecca Burton & Peter Kim, *Board Pay Under the Microscope*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 17, 2019), https://corpgov.law.harvard.edu/2019/11/17/board-pay-under-the-microscope/ [https://perma.cc/L7WD-XGUV].

[158] *Id.* (presenting evidence that in 2018 median outside director compensation for S&P 500 companies was $105,000 cash and $166,743 equity).

[159] INSTITUTIONAL S'HOLDER SERVS., UNITED STATES COMPENSATION POLICIES: FREQUENTLY ASKED QUESTIONS 23 (Dec. 6, 2019), https://www.issgovernance.com/file/policy/latest/americas/US-Compensation-Policies-FAQ.pdf [https://perma.cc/TA7S-D65Q].

[160] GLASS LEWIS, UNITED STATES GUIDELINES 44 (2019), https://www.glasslewis.com/wp-content/uploads/2018/10/2019_GUIDELINES_UnitedStates.pdf [https://perma.cc/J9LT-NDAJ].

market practice, these companies pay non-executive directors a fixed cash salary, additional fixed cash payments in connection with committee duties, and an equity award.

Importantly, equity compensation accounts for 56% of the average compensation of non-executive directors. These stock holdings are intended to provide directors with incentives to increase stock value. According to the proxy statements we reviewed, the level of both the fixed-cash payments and the equity awards were determined based on the compensation practices at peer firms.

Whereas the above compensation practices align the interests of directors with those of shareholders, they in no way contribute to any alignment of interest between directors and stakeholders. Consistent with this shareholder-centric approach, in no case did the 2019 proxy statements of these companies mention stakeholders or stakeholder interests as criteria taken into consideration to determine or review the amount of cash or stock paid to directors.

Table 2. 2018 Director Compensation in Companies with CEO on the BRT Board of Directors

Company	Cash Retainer and Fees	Equity Comp.	% of Equity Comp.
JP Morgan	$152,947	$250,000	62%
*General Motors**	$168,055	$126,073	43%
AECOM	$133,000	$160,008	55%
Oracle	$88,658	$444,566	82%
Eastman	$119,750	$85,073	42%
Duke Energy	$140,000	$160,000	53%
Johnson & Johnson	$130,556	$184,940	59%
United Technologies	$183,321	$180,000	50%
Lockheed Martin	$170,500	$155,000	48%
Cummins	$137,000	$149,885	52%
Stryker	$127,143	$175,121	58%
Walmart	$140,825	$174,970	55%
CVS Health	$102,918	$209,917	67%
Boeing	$144,167	$180,000	56%
S&P Global	$119,636	$150,000	56%
Cisco Systems	$130,000	$224,960	63%
IBM	$138,338	$195,000	58%
Marriott International	$95,667	$165,032	63%
AT&T	$152,917	$170,000	53%
International Paper	$140,942	$163,000	54%
Average	*$135,817*	*$182,577*	*56%*

This table reports director compensation as disclosed by the company in its annual proxy statement, filed with the SEC in 2019. The amount in each column is the average compensation paid to directors who served for the entire fiscal year. *Some directors chose to receive deferred stock units in lieu of part of their cash compensation.

2. Labor and Control Markets

In addition to pay arrangements, labor and control markets are an important source of incentives for directors. Individuals serving on a board of directors are interested in retaining their position.[161] In addition, they may wish to increase their chances to serve on the boards of other companies.

The effects of the labor and control markets on director decisions have long been studied in the corporate governance literature.[162] This literature has concluded that directors' interest in their current and future board positions provides them with strong incentives to be viewed favorably by, and not displease, both shareholders and the company's CEO.[163] The election of directors is usually dependent on being nominated by the board, which is normally influenced in this matter by the company's CEO.[164] However, shareholders register their preferences by supporting or withholding support from the candidates nominated by the board[165] and may actively propose their own candidates when they are sufficiently displeased.[166]

Labor and control markets provide incentives for shareholder-friendly decisions in four different ways, each of which is supported by the empirical literature. First, building a shareholder-friendly reputation increases the chances for a director to keep their position and acquire other directorships. Jeffrey Coles and Chun-Keung Hoi, for example, have found that following the enactment of certain antitakeover provisions by the Pennsylvania legislature in 1990, non-executive directors who decided to opt out of some or all of these provisions were three times as likely, in the following three years, to acquire at least another external directorship as were directors who decided to keep all the antitakeover provisions.[167] And Yonca Ertimur, Fabrizio Ferri, and Stephen Stubben have found that directors implementing

---

[161] *See infra* note 167 and accompanying text.

[162] For early important contributions on the disciplinary effect of the managerial labor market and the market for corporate control, see, for example, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

[163] For a recent economic analysis demonstrating this point, see Doron Levit & Nadya Malenko, *The Labor Market for Directors and Externalities in Corporate Governance*, 71 J. FIN. 775, 775–76 (2016).

[164] For a well-known review of the literature on the influence of the CEO on the selection of directors, see Renée B. Adams, Benjamin E. Hermalin, & Michael S. Weisbach, *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey*, 48 J. Econ. Literature 58, 66-67 (2010).

[165] For a recent empirical study on the effects of shareholder dissent in director elections, see Reena Aggarwal, Sandeep Dahiya & Nagpurnanand R. Prabhala, *The Power of Shareholder Votes: Evidence from Uncontested Director Elections*, 133 J. Fin. Econ. 134 (2019).

[166] For a discussion of the substantial incidence of proxy fights in recent years, see Melissa Sawyer, *Annual Review and Analysis of 2019 U.S. Shareholder Activism*, Harv. L. Sch. F. on Corp. Governance (Nov. 20, 2019), https://corpgov.law.harvard.edu/2019/11/20/annual-review-and-analysis-of-2019-u-s-shareholder-activism/

[167] Jeffrey L. Coles & Chun-Keung Hoi, New Evidence on the Market for Directors: Board Membership and Pennsylvania Senate Bill 1310, 58 J. FIN. 197, 198 (2003).

precatory proposals voted by a majority of shareholders are one-fifth less likely to lose their seat and other directorships.[168]

Second, a low shareholder value increases the likelihood of a successful proxy fight, resulting in some management-proposed directors losing the election. A recent paper by Alon Brav, Wei Jiang, Tao Li, and James Pinnington, for example, shows that mutual funds' support for dissident candidates in a contested election is higher when certain measures of shareholder value are lower.[169] An empirical study of proxy contests from 1996 to 2010 also shows that following a proxy contest, directors lose seats at targeted companies as well as in other companies. In the aggregate, the authors of the study estimate \$1.3 to \$2.9 million in forgone income for the median incumbent director.[170] Thus, a director who wants to minimize the chances of being targeted in a proxy contest, and possibly lose their position and other profitable job opportunities, has strong reason to pursue high shareholder value.

Third, a low stock price and poor performance for shareholders increase the likelihood of a takeover bid, which would threaten directors' positions. Alex Edmans, Itay Goldstein, and Wei Jiang present evidence that an interquartile decline in valuation leads to a 7% increase in acquisition likelihood, relative to a 6% unconditional takeover probability.[171] In addition, there is empirical evidence that a completed takeover has a negative financial impact on outside directors, who typically lose their seats and are less likely to acquire other directorships in the future.[172]

Finally, low shareholder value increases the chances of intervention by a hedge fund activist and, if the company is targeted, the likelihood that the hedge fund will obtain a settlement. There is considerable empirical evidence that the odds of activist engagement and the threat it poses are higher when stock returns have been lagging and metrics of shareholder value such as Tobin's q are low relative to industry peers.[173] Furthermore, a recent study

---

[168] Yonca Ertimur, Fabrizio Ferri, & Stephen R. Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53, 54 (2010).

[169] Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* 2–3 (European Corp. Governance Inst., Working Paper No. 601/2019, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101473 [https://perma.cc/A2BN-JV4Z].

[170] Vyacheslav Fos & Margarita Tsoutsoura, *Shareholder Democracy in Play: Career Consequences of Proxy Contests*, 114 J. FIN. ECON. 316, 317 (2014).

[171] Alex Edmans, Itay Goldstein & Wei Jiang, *The Real Effects of Financial Markets: The Impact of Prices on Takeovers*, 67 J. FIN. 933, 953–956 (2012).

[172] Jarrad Harford, *Takeover Bids and Target Directors' Incentives: The Impact of a Bid on Directors' Wealth and Board Seats*, 69 J. FIN. ECON. 51, 53 (2003).

[173] *See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1752 (2008).

coauthored by one of us shows that settlements with activists are associated with board turnover (an increase in the number of directors connected with or approved by activists and a decrease in the number of long-tenured directors) and that poor Tobin's q and stock returns increase the likelihood that the activist intervention will result in a settlement.[174]

The labor and control markets therefore provide directors with significant incentives to enhance shareholder value. To be sure, there are studies indicating that directors also face incentives to be on the CEO's good side.[175] Thus, in those situations in which the interests of shareholders and the CEO do not coincide, the labor and control markets would require directors to trade-off and balance the competing goals of pleasing both shareholders and top management.[176]

What is clear, however, is that the labor and control markets do not provide directors with any incentives to protect or benefit stakeholders. Unlike shareholders and management, though, stakeholders play no role in and have no power with respect to the selection or removal of directors. They have no voting rights and no other tool to influence the election of directors. As a consequence, making choices that would benefit stakeholders would not improve directors' chances of retaining their position or obtaining positions on other boards. To the contrary, to the extent that certain stakeholder-friendly decisions would come at the expense of shareholders and managers, making these decisions could hurt directors' chances of retaining their positions.

***

What we have shown in this subpart is not intended to suggest that the interests of directors and shareholders are perfectly aligned. In fact, we believe that agency problems between shareholders and directors are significant, that director incentives are still insufficiently aligned with shareholder interests, and that shareholders' tools to monitor corporate decisions are weaker than are desirable. Specifically, there is substantial literature, including by one of us, on how to strengthen directors' incentives to be attentive to the interests of shareholders.[177]

However, while directors obtain some direct benefits from increases in

---

[174] Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. FIN. ECON. 1, 2, 30 (2020).

[175] For empirical findings consistent with the view that directors have incentives to please the CEO, see, for example, Christa H. S. Bouwman, *Corporate Governance Propagation Through Overlapping Directors*, 24 REV. FIN. STUD. 2358 (2011).

[176] For a theoretical model of this trade-off, see Levit & Malenko, *supra* note 163.

[177] *See, e.g.*, Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) (explaining that arrangements that facilitate hostile takeovers strengthen the incentives of directors to pay attention to shareholder interests); Bhagat, Carey & Elson, *supra* note 155 (discussing how stock ownership by directors strengthens such incentives).

shareholder value, they obtain no or little direct benefits from increases in stakeholder welfare. The literature has identified specific mechanisms that encourage shareholder-friendly decisions, and empirical studies have supported some of these hypotheses. In contrast, no such mechanisms are in place to incentivize directors to benefit stakeholders beyond what would be desirable for shareholder value.

To be sure, it might sometimes be the case that directors prefer a certain outcome that is not in the interests of shareholders but is in the directors' own self-interest and that, coincidentally, this outcome may benefit employees or other stakeholders. But while there are factors that systematically tie the interests of directors and shareholders, there are no such factors with respect to the interests of stakeholders. Thus, an analysis of director incentives does not provide support for the hopes of the advocates of stakeholderism.

B. CEO Incentives

Like directors, CEOs have little or no incentive to ever favor stakeholders at the expense of shareholders. Many observations made above with respect to directors apply to CEOs as well. Furthermore, there are some additional elements that reinforce CEO incentives to avoid treating stakeholders better than what is called for by shareholder value maximization.

1. Compensation

The median CEO of the 500 largest companies in the United States receives nearly $12 million a year in compensation.[178] These large pay packages are intended to have a powerful influence on CEOs' behavior and decision making.[179]

A substantial fraction of this sum (48.5%) is paid in the form of restricted stock or units, whose eventual value is, by definition, fully driven by shareholder value.[180] An additional fraction of compensation (11.8%) is paid through stock options, which have an even greater sensitivity to stock value.[181] Furthermore, equity awards are often conditional on the achievements of performance goals that are based on measures of profit,

[178] EQUILAR, CEO PAY TRENDS 14 (2018). These and the other data points in this paragraph and the next refer to the companies included in the Equilar 500 index for the fiscal year 2017.

[179] *See, e.g.*, General Motors Co., 2019 Proxy Statement, *supra* note 156, at 6 (explaining that the incentives produced by pay arrangements are intended to "focus leaders on absolute stock price appreciation").

[180] EQUILAR, *supra* note 178, at 18.

[181] *Id.*

revenues, cash flow, or shareholder return.[182] Therefore, more than 60% of the average CEO pay in large corporations is directly linked to shareholder value and provides strong incentives to enhance it.[183]

The second largest component of CEO pay for the largest companies is cash bonuses.[184] Most firms grant bonuses on the basis of a performance-based plan that specifies qualitative and quantitative goals.[185] The vast majority of these goals, in turn, are financial metrics that are relevant to performance for shareholders such as profit, revenues, capital efficiency, total shareholder return, and cash flow. According to a recent report by the Conference Board, only 77 Russell 3000 companies (that is, 2.6% of the total) use nonfinancial metrics to award bonuses.[186]

A minority of public companies use discretionary bonuses, which are not based on criteria known in advance but rather determined ex post at the discretion of the board of directors or its compensation committee.[187] As discussed in the preceding subpart, directors have incentives to be favorably viewed by shareholders and top managers. Thus, discretionary bonuses should be expected to incentivize shareholder-friendly decisions or to provide little incentive at all, depending on the weight directors attach to shareholder interests relative to the interests of managers; they should not be expected, however, to give CEOs any incentive to attach independent value to stakeholder benefits.

To examine the effects of CEO pay in more detail, we reviewed the 2019 proxy statements of the companies in the BRT Board Sample. Table 3 presents a summary of CEOs' total compensation, the level of compensation for each main component (salary, bonuses, and equity incentives), and the fraction of total compensation that is linked to the performance of the company.

As the table shows, a very large fraction of CEO compensation—91% on average—is linked to performance. This kind of compensation takes many shapes, including stock-based compensation and bonuses. The realization value of stock compensation is intrinsically linked to shareholder value, and bonuses are based on the achievement of performance goals that

---

182 Meridian Comp. Partners, Trends and Developments in Executive Compensation 21 (2018) (presenting data from a survey of 127 companies).

183 The compensation mix for CEOs of small companies looks quite different, with a much greater use of stock options. In 2018, CEOs of companies with revenues under $100 million, for example, received 43% of their total pay in stock options, 25% in fixed salary, 15.7% in stock awards, and 14% in cash bonuses. THE CONFERENCE BD., CEO AND EXECUTIVE COMPENSATION PRACTICES 18 (2019).

184 In 2017, bonuses represented 23.3% of the average CEO compensation in the Equilar 500 companies. Equilar, *supra* note 178, at 18.

185 *Id.* at 23.

186 THE CONFERENCE BD., *supra* note 183, at 27.

187 Equilar, *supra* note 178, at 20.

are largely related to financial performance.

In only three cases—those of Eastman, Duke Energy, and Marriott International—is the bonus linked to a quantified stakeholder metric, and even then in a rather limited way. In the case of Eastman, the annual bonus is determined on the basis of various corporate and individual performance goals that include three measures of employee safety, but no specific weighting is assigned to the various metrics; therefore, the compensation committee has broad discretion in deciding how each of these aspects affects compensation.[188]

At Marriott, the metrics determining the CEO's annual bonus include satisfaction of employees and guests (as measured by external surveys), but the weights of these stakeholder metrics on the total CEO compensation are negligible: 1% and 2%, respectively.[189] At Duke Energy, the annual bonus is partly linked to three stakeholder metrics, with two of them getting negligible weights of 0.5% (environment) and 1.6% (customer satisfaction) and only the metric related to employee safety getting a meaningful weight of 19%.[190]

[188] In particular, the company established specific goals for (a) days away from work per 200,000 hours worked; (b) number of injuries that must be reported to the Occupational Safety and Health Administration per 200,000 hours worked; and (c) process safety incident rate. EASTMAN CHEM. CO., 2019 PROXY STATEMENT (SCHEDULE 14A) 44 (2019).

[189] The quantitative goals are not explicitly indicated in the proxy materials, but it seems that bonus payments are determined on the basis of quantified objectives. MARRIOTT INT'L, INC., 2019 PROXY STATEMENT (SCHEDULE 14A) 40 (2019).

[190] Specifically, the target goals concern the incident rate for employees and contractors, the number of environmental events reportable to authorities, and the results of internal and external consumer satisfaction surveys. DUKE ENERGY CORP., 2019 PROXY STATEMENT (SCHEDULE 14A) 42–43 (2019).

Table 3. 2018 Compensation of CEOs on the BRT Board

Company (CEO)	Salary	Bonus	Equity	PBC
JPMorgan (Dimon)	$1,500,000	$5,000,000	$23,000,000	95%
General Motors (Barra)	$2,100,000	$4,452,000	$14,506,766	90%
AECOM (Burke)	$1,466,357	$2,475,000	$11,307,440	90%
*Oracle (Catz & Hurd)**	$950,000	-	-	95%
Eastman (Costa)	$1,226,110	$1,540,625	$12,592,479	90%
Duke Energy (Good)	$1,350,000	$2,268,961	$9,873,135	90%
Johnson & Johnson (Gorsky)	$1,642,308	$3,570,497	$14,625,057	91%
United Technologies (Hayes)	$1,575,000	$3,500,000	$12,044,070	91%
Lockheed Martin (Hewson)	$1,769,262	$8,758,727	$9,788,097	90%
Cummins (Linebarger)	$1,442,500	$6,574,400	$4,510,275	87%
Stryker (Lobo)	$1,194,833	$2,709,720	$9,592,795	91%
Walmart (McMillon)	$1,276,892	$5,088,000	$15,592,404	94%
CVS Health (Merlo)	$1,630,000	$2,605,000	$13,499,942	91%
Boeing (Muilenburg)	$1,700,000	$13,076,350	$7,330,916	90%
S&P Global (Peterson)	$1,000,000	$2,047,000	$8,820,000	90%
Cisco Systems (Robbins)	$1,325,000	$5,795,550	$18,576,568	94%
IBM (Rometty)	$1,600,000	$4,050,000	$10,801,392	92%
Marriott Int'l (Sorenson)	$1,300,000	$2,925,000	$8,429,788	90%
AT&T (Stephenson)	$1,800,000	$5,192,000	$17,069,774	93%
International Paper (Sutton)	$1,433,333	$3,364,700	$9,821,775	89%
Average	*$1,464,080*	*$4,473,344*	*$12,199,088*	*91%*

*Performance goals for cash and equity incentives were not achieved.

This table reports CEO compensation as disclosed by the company in its annual proxy statement, filed with the SEC in 2019. Column "PBC" reports the fraction of performance-based compensation over the total compensation.

Note that, even in these three cases, the metrics refer only to some groups of stakeholders and to significant but limited aspects of their welfare. With respect to employees, the metric is limited to safety, which could have implications for financial performance, but does not take into account key aspects of employee welfare such as pay, benefits, or job protection. With respect to the environment, the metric adopted by Duke Energy concerns "reportable events" that require notification to or enforcement action by a regulatory agency—which again could have implications for the company's financial performance—but ignores other kinds of environmental events and the general environmental impact of the firm.[191]

Such a shareholder-centric pattern is unsurprising. In setting executive pay arrangements, directors seek to avoid shareholder disapproval that could result in a relatively low "say-on-pay" vote or even withheld votes in director elections.[192] And shareholders and their proxy advisors are interested in performance for shareholders.

The quantitative model used by the largest proxy adviser, ISS, to assess executive compensation in public companies is based entirely on financial metrics connected with shareholder value.[193] Specifically, ISS uses four different measures, over periods of one, three, or five years, to evaluate the alignment of executive pay with corporate performance Two of the three primary measures are based on total shareholder return, while the third is a measure of compensation relative to the median compensation among comparable firms. The fourth measure is a combination of four metrics based on "economic value added"—that is, net operating profit before taxes, less cost of capital. Importantly, none of these metrics register the effects of corporate decisions on stakeholder welfare.

In sum, actual compensation practices (including those at the companies whose CEOs sit on the board of directors of the BRT), and the evaluation of these practices by shareholders and proxy advisors, are strongly focused on shareholder value.[194] Thus, executive pay arrangements, and their evaluation

---

[191] *Id.* Several companies in the sample mention the welfare of employees or other stakeholders as a generic corporate value or performance goal in the proxy statement's discussion and analysis of the company's executive compensation. *See, e.g.*, *id.* at 25. In all of these cases, however, there is no specification of how stakeholder interests affect the choices that are made at the discretion of the compensation committee. As we discussed in the preceding subpart, independent directors serving on the compensation committee should not be expected to encourage CEOs to provide stakeholders with any benefits that would come at the expense of shareholders.

[192] For empirical studies of the effects of say-on-pay votes and withhold votes on executive pay, see Yonca Ertimur, Fabrizio Ferri, & Volkan Muslu, *Shareholder Activism and CEO Pay*, 24 Rev. Fin. Stud. 535 (2011); Yonca Ertimur, Fabrizio Ferri, & David Oesch, *Shareholder Votes and Proxy Advisors: Evidence from Say on Pay*, 51 J. of Acct. Res. 951 (2013).

[193] For a discussion of all the aspects of the ISS practices noted in this paragraph, see INSTITUTIONAL S'HOLDER SERVS., UNITED STATES PAY-FOR-PERFORMANCE MECHANICS 3–7 (2019).

[194] The current sentiment is described by the law firm of Wachtell, Lipton, Rosen & Katz in a recent memorandum:

> We find that company boards are deeply engaged in [environmental, social, and governance (ESG)] issues and expect that there will be an increased focus on these matters through shareholder proposals and requests for disclosure in the coming years. We do not currently expect to see the use of ESG measures as stand-alone

by shareholders and proxy advisors, provide executives with incentives not to ever sacrifice shareholder value to provide benefits to stakeholders.

2. Labor and Control Markets

As was shown earlier to be the case with respect to directors,[195] labor and control markets tie the interests of CEOs to those of stockholders. As discussed below, good stock price performance increases the likelihood of CEOs keeping their jobs or finding similar jobs with other companies and, by contrast, poor stock price performance increases the likelihood of CEOs being replaced. As a result, CEOs who care about their job and job market prospects have strong incentives not to protect stakeholders beyond what would be useful for shareholder value maximization.

The theoretical reasons underlying these points are similar to those discussed with respect to director incentives. Shareholder discontent with performance may put pressure on the board to replace the CEO or may lead to hedge fund intervention or even a proxy fight.[196] At the same time, providing stakeholders with only what would be useful for shareholder value maximization would not have any such consequences.

The analysis above is consistent with a large body of empirical work. To begin with, the empirical literature on CEO turnover confirms that poor stock performance is associated with CEO turnover. Steven Kaplan and Bernadette Minton, for example, have found that CEO turnover—both internal (decided by the board) and external (resulting from a takeover or bankruptcy) is significantly related to stock performance.[197] A subsequent study by Dirk Jenter and Katharina Lewellen estimates that total turnover probabilities for CEOs increase significantly as industry-adjusted stock returns decrease.[198] The rich literature on this topic presents different estimates of the economic significance of the correlation between firm performance and CEO turnover,

---

> performance goals in incentive programs (other than in a unique circumstance where such a measure is integral to business performance), although ESG-type goals may be used for purposes of the qualitative or individual performance aspect of incentive awards or as a modifier within specified parameters.

Jeannemarie O'Brien, Andrea Wahlquist & Adam Shapiro, *Compensation Season 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 23, 2020), https://corpgov.law.harvard.edu/2020/01/23/compensation-season-2020/ [https://perma.cc/VW8P-ZEAL].

[195] *See supra* note 15, Section IV.A.2.

[196] *Cf. supra* notes 167–170, 173–174 and accompanying text. *Cf. supra* notes 167–170, 173–174 and accompanying text.

[197] Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed?*, 12 INT'L. REV. FIN. 57, 58 (2012).

[198] Dirk Jenter & Katharina Lewellen, *Performance-Induced CEO Turnover*, 1–2 (Working Paper, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570635 [https://perma.cc/J9WJ-RMZE].

as well as different findings regarding the relative importance of the company's industry-adjusted stock performance. There is, however, a solid consensus that CEOs who are successful in increasing shareholder return are more likely to keep their jobs.[199]

Furthermore, the above analysis is consistent with the empirical evidence on hedge fund activism. As pointed out with respect to director incentives, a poor shareholder return increases the chances of an engagement by an activist hedge fund, of the company's being forced to enter into a settlement agreement with the activist, and of the activist's winning a proxy contest.[200]

Finally, a study by C. Edward Fee, Charles Hadlock, and Joshua Pierce shows that losing a CEO position has a negative effect on subsequent employment prospects. The researchers document that, when CEOs find new executive employment in other firms, the new positions "tend to be substantially inferior to prior positions measured along a variety of dimensions."[201] This effect operates to strengthen CEOs' interest in retaining their position, and this interest is served by avoiding any decisions that would benefit stakeholders at the expense of shareholders.[202]

***

To be sure, the analysis above and the evidence supporting it do not indicate that the interests of CEOs and shareholders generally overlap. In fact, the private interests of CEOs introduce agency problems and produce in some situations a significant divergence between the interests of CEOs and

---

[199] For studies contributing to the literature and this consensus, see, for example, Jeff Brookman & Paul D. Thistle, *CEO Tenure, the Risk of Termination and Firm Value*, 15 J. CORP. FIN. 331, 332 (2009) (finding that stock returns are positively correlated with tenure); Andrea L. Eisfeldt & Camelia M. Kuhnen, *CEO Turnover in a Competitive Assignment Framework*, 109 J. FIN. ECON. 351, 352 (2013) (proposing a competitive assignment model and finding that CEO turnover probabilities increase in negative absolute and relative performance, measured as stock returns and return on assets); Dirk Jenter & Fadi Kanaan, *CEO Turnover and Relative Performance Evaluation*, 70 J. FIN. 2155, 2155–56 (2015) (finding that directors fire CEOs for bad stock performance but are not particularly effective in screening out the effects due to industry or market negative shocks).

[200] *See* studies cited *supra* notes 173–174.

[201] C. Edward Fee, Charles J. Hadlock & Joshua R. Pierce, *New Evidence on Managerial Labor Markets: An Analysis of CEO Retreads*, 48 J. CORP. FIN. 428, 429 (2018).

[202] Another empirical study that is worth noting is Taekjin Shin & Jihae You, *Changing Words: How Temporal Consistency in a CEO's Use of Language Toward Shareholders and Stakeholders Affects CEO Dismissal*, 28 CORP. GOVERNANCE INT'L REV. 47, 48 (2020). This study documents that CEO interests are advanced by using shareholder-centric language, rather than stakeholder-oriented language in their annual letters to shareholders. The researchers found that, controlling for CEO characteristics and shareholder return, CEOs who use consistently shareholder-centric rhetoric are less likely to be replaced than those who use stakeholder-oriented language.

shareholders. Notwithstanding these agency problems, there is at least a robust link and substantial alignment between CEO and shareholder interests. As a result, CEOs have strong incentives to take the interests of shareholders very seriously.

In contrast, no such link exists between CEO interests and stakeholder interests. Consequently, CEOs do not have incentives to regard stakeholder interests as an independent end. With strong incentives to care about shareholder value, and little incentive to care about stakeholder interests, CEOs are discouraged from making any decisions that would benefit or protect stakeholders beyond what would be necessary for shareholder value maximization. Thus, once the actual structure of incentives is taken into account, there is no basis for stakeholderist claims and hopes that CEOs would use their discretion in such a stakeholder-friendly way.[203]

C. Learning from the Past

We have thus far shown that directors and executives have incentives not to provide stakeholder benefits that would come at the expense of shareholders. We now turn to discuss whether the past behavior of corporate leaders has been consistent with the conclusions of our incentive analysis. As was discussed in Part I, many states have in place constituency statutes that embrace an approach similar to that advocated by modern stakeholderists. Thus, an examination of the promise of stakeholderism could be informed by an examination of the decisions that corporate leaders made under such statutes.

We therefore conducted an empirical investigation on whether constituency statutes have actually delivered protections for stakeholders as

---

[203] It might be argued that, even if corporate leaders have an interest to give weight to shareholder interests but little incentive to give independent weight to stakeholder interests, to the extent that some shareholders have certain pro-stakeholder preferences, the incentive to attach weight to shareholder interests might also provide corporate leaders with incentives to give weight to these pro-stakeholder preferences. For an analysis that relies on the presence of such pro-stakeholder preferences on the part of some shareholders, see Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248–49 (2017). However, the current incentives of directors and executives, as shown in this subpart, encourage corporate leaders to give independent weight only to the financial interests of shareholders. For example, director and executive pay arrangements tie their payoffs to shareholders' financial return but not to the satisfaction of any pro-stakeholder preferences of shareholders.

We note that even Hart & Zingales doubt that corporate managers have incentives to benefit stakeholders beyond what would maximize share value. They therefore focus on binding shareholder voting on social and environmental proposals as a potential mechanism for implementing pro-stakeholder preferences that shareholders might have. *See id.* at 258–61.

was hoped for.[204] Our study examined the twenty-year period from 2000 through 2019 and reviewed all private equity acquisitions of public companies of significant size that were incorporated in a state with a constituency statute in force. We focused on private equity acquisitions because such acquisitions move assets to the control of managers with powerful incentives to maximize financial returns, and therefore often pose significant risks to stakeholders. For each of the acquisitions in our sample, we hand collected and analyzed detailed information about the process leading to the transaction and the full set of terms negotiated by the parties.

We found that the acquisitions were commonly the product of a long negotiation process that produced substantial benefits for both shareholders and corporate leaders. Shareholders enjoyed sizable premiums over the pre-deal stock price. In addition to the gains made on their own equity holdings, corporate leaders also frequently secured additional payments in connection with the transactions, and often obtained commitments for continued employment after the acquisition.

At the same time, however, corporate leaders generally did not use their negotiating power to secure any constraints on the power of the private equity buyer to make choices that would adversely impact stakeholders. In particular, despite the risk of significant post-sale layoffs and reduction in employment, we found that in almost all cases corporate leaders did not negotiate for any restrictions to the freedom of the private equity buyers to fire employees. Also, in the rare cases in which such restrictions were found, the deal terms denied employees any power to enforce these constraints.

Furthermore, we found that corporate leaders generally did not negotiate any constraints on buyers' post-deal choices that could pose risks to several other notable stakeholder groups—consumers, suppliers, creditors, or the environment. In a few cases, the buyers pledged to retain the location of the company headquarters or to continue some local investments or philanthropy, but our analysis of the legal terms indicates that these rare pledges were rather "soft": unlike commitments to shareholders or corporate leaders, these pledges were vague and underspecified and, importantly, denied potential beneficiaries any enforcement rights.

It might be argued that the shareholder-oriented approach of corporate leaders in these transactions is due to the pro-shareholder norms that have been prevalent in boardrooms and executive suites in the past.[205] However,

---

[204] Our empirical work described below, carried out jointly with Kobi Kastiel, is fully detailed in Bebchuk, Kastiel, & Tallarita, *supra* note 15, Part IV.

[205] This objection to our findings was suggested by Colin Mayer in a debate with one of us organized by the Saïd Business School at Oxford University. *Stakeholder Versus Shareholder Capitalism: The Great Debate*, U. OXFORD: SAÏD BUS. SCH. (June 25, 2020), https://www.sbs.ox.ac.uk/oxford-answers/stakeholder-versus-shareholder-capitalism-great-debate [https://perma.cc/E2RT-NQ9Z]. For empirical work suggesting that cultural norms

even when we focused on the most recent deals from the past several years, we did not find any significant stakeholder protections, despite the widespread stakeholder rhetoric used by corporate leaders and their advisors during this period.[206] To be sure, stakeholderists might respond that such norms could well evolve in the future and that embracing stakeholderism would likely contribute to such evolution. However, the absence of any detectable trend in spite of a growing support for stakeholderism suggests, at a minimum, that much caution is warranted before relying on the future evolution of such norms as a basis for expecting stakeholderism to deliver.[207]

Thus, the evidence on the decisions corporate leaders made in the presence of constituency statutes is consistent with our earlier conclusion that corporate leaders have incentives not to provide stakeholders with any benefits that would come at the expense of shareholders. Accordingly, if stakeholderism is widely accepted, corporate leaders should be expected to choose, as corporate leaders governed by constituency statutes chose, not to use their discretion to provide stakeholders with any such benefits.

D. Fixing Incentives?

Stakeholderists commonly advocate giving corporate leaders discretion to protect stakeholders while otherwise retaining basic corporate law rules.[208] We have therefore examined in the preceding sections how corporate leaders should be expected to use such discretion, and how they have in fact used it in the past, under the existing systems of incentives. However, it might be argued that, even if stakeholderism as commonly proposed would not deliver material benefits for stakeholders, it would be possible to increase stakeholder welfare by supplementing standard stakeholderism with additional arrangements that would substantially alter the incentives of corporate leaders.

According to this possible view, it would be desirable to adopt

---

might have an impact on directors' attitudes towards shareholders and stakeholders, see Renée B. Adams, Amir N. Licht & Lilach Sagiv, *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRATEGIC MGMT. J. 1331 (2011); Amir N. Licht & Renée B. Adams, *Shareholders and Stakeholders Around the World: The Role of Values, Culture, and Law in Directors' Decisions* (European Corp. Governance Inst., Working Paper No. 459/2019, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407873 [https://perma.cc/G6D8-7VRP].

[206] Bebchuk, Kastiel, & Tallarita, *supra* note 15, Section IV.E.

[207] *Id.* at Section V.B discusses other potential objections to our conclusion that our findings are due to the incentives of corporate leaders not to benefit stakeholders beyond what would serve shareholder value. In particular, this discussion concludes that our findings are unlikely to be generally explained by the need to obtain shareholder approval for a sale, uncertainties regarding the interpretation of the constituency statutes, or the expected outcome of a potential judicial review of the transaction.

[208] *See e.g.*, sources cited *supra* note 81.

arrangements that would align the interests of corporate leaders with those of stakeholders and thereby incentivize leaders to deliver value to stakeholders. Although a comprehensive analysis of all the possible designs of such an approach is beyond the scope of this Article, we briefly explain in this section the challenges and difficulties with which any attempt to develop such an approach would have to wrestle. In particular, we discuss below both (i) how difficult it would be to design arrangements that would incentivize corporate leaders to focus on the aggregate interests of all corporate constituencies, and (ii) the substantial costs that such arrangements would likely produce.

1. Redesigning Executive Pay?

It is natural to begin this discussion with the design of executive and director pay. In subparts IV.A and IV.B we discussed how compensation practices commonly tie the payoffs of corporate leaders directly to shareholder value but not to stakeholder welfare. However, stakeholderists have expressed support for redesigning pay arrangements,[209] and compensation consultants have publicly discussed the possibility of substantial incorporation of stakeholder metrics in pay arrangements.[210] As explained below, however, such changes in pay arrangements should not be expected to enable stakeholderism to produce its purported benefits for three reasons.

First, it would be rather difficult to design pay schemes that would serve well the goals of stakeholderism. Designing schemes that tie payoffs to the interests of shareholders is itself far from straightforward even though the interests of shareholders are relatively well-defined and measurable.[211] Because the interests of some stakeholders are difficult to fully define and accurately measure, tying payoffs to the aggregate interests of all the relevant constituencies of a company would likely be orders of magnitude more

---

[209] *See, e.g.*, *Why We Need the 'Davos Manifesto' for a Better Kind of Capitalism*, WORLD ECON. F. (Dec. 1, 2019), https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/ [https://perma.cc/J9AT-JB24] ("Since the 1970s, executive pay has skyrocketed, mostly to "align" management decision-making with shareholder interests. In the new stakeholder paradigm, salaries should instead align with the new measure of long-term shared value creation.").

[210] For recent posts by compensation advisors discussing such redesign of pay arrangements, see, for example, Seymour Burchman, *A New Framework for Executive Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 13, 2020), https://corpgov.law.harvard.edu/2020/03/13/a-new-framework-for-executive-compensation/ [https://perma.cc/63NE-KFRY]; Don Delves & Ryan Resch, *Stakeholder Capitalism and Executive Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 2, 2019), https://corpgov.law.harvard.edu/2019/10/02/stakeholder-capitalism-and-executive-compensation/ [https://perma.cc/4C2F-ZS4X].

[211] For a discussion of the complexities of such design, see Lucian A. Bebchuk & Jesse M. Fried, *Paying for Long-Term Performance*, 158 U. PA. L. REV. 1915, 1919 (2010).

challenging.

For some constituencies, there would be no available metric that could reliably and effectively measure the company's effects on their welfare. For example, even if a company were to focus solely on the effects of its decisions on climate change, it would have to choose among competing metrics that were developed by different organizations and that often lead to considerably different estimates of the company's climate change impact.[212] And climate changes effects might represent only part of the environmental effects of a company.

Similarly, it would be difficult to develop quantitative metrics that would measure with reasonable accuracy a company's effects on all of its suppliers, or its effects on all relevant communities, or its aggregate effects on the company's various types of customers. Note that tying compensation to the interests of one group of stakeholders but not to the interests of a second relevant group of stakeholders might strengthen, not weaken, the incentive of corporate leaders not to give independent weight to the interests of the second group.

Furthermore, even if reliable metrics were available for each of the relevant groups of stakeholders, the formidable challenge of combining them would remain. What weight would be given to each of the metrics? As discussed in subpart II.B, stakeholderists have largely avoided proposing ways for aggregating the interests of all stakeholders, leaving this decision to the discretion of corporate leaders. Any attempt to design pay arrangements that would induce corporate leaders to serve all stakeholders would require the adoption of some methodology for aggregating and balancing the interests of the various constituencies.

Second, corporate leaders might have private interests in setting pay arrangements that would enhance their own pay.[213] For this reason, policymakers have long paid attention to how pay is determined, including by mandating independent compensation committees and say-on-pay votes.[214] Since identifying and incorporating stakeholder metrics into pay arrangements would involve substantial discretionary choices, executives and their advisors would have the opportunity to influence pay setting in ways

---

[212] For an analysis of different metrics used by public companies to measure corporate sustainability and the problem of their comparability, see U.S. GOV'T ACCOUNTABILITY OFFICE, DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM (2020).

[213] For a discussion of the agency problems generally afflicting the setting of executive pay arrangements, see LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE 80–86 (2004).

[214] For a discussion of these two mandates, see Securities Act Release No. 9199, Exchange Act Release No. 64149, 76 Fed. Reg. 18966 (proposed April 6, 2011); Securities Act Release No. 9330, Exchange Act Release No. 67220, 77 Fed. Reg. 38422 (June 27, 2012).

that would favor executives' private interests.

For example, executives might choose stakeholder-related targets that are expected to be reached anyway or are inconsequential, thus increasing executive pay while contributing little to stakeholder welfare and weakening the link of pay with performance. Thus, we have to recognize the risk that the primary effect of the advocated redesign of executive pay would be to increase executive payoffs and weaken performance incentives.

Third, as long as shareholders exclusively have voting rights, effective oversight of how well pay arrangements incentivize maximizing the aggregate welfare of all constituencies would likely be lacking. Independent directors elected by shareholders would have limited incentives to oversee and shape effective executive pay arrangements that provide strong stakeholderist incentives. Similarly, shareholders casting say-on-pay votes could be more interested in how pay arrangements would affect their own interests rather than those of stakeholders. Therefore, shareholders and independent directors elected by them should not be expected to encourage or monitor the adoption of stakeholder-related metrics with the same effectiveness that they have thus far done with respect to shareholder-related metrics.

Finally, as long as shareholders have the exclusive power with respect to director elections, labor and control markets will provide both directors and executives with strong incentives not to benefit stakeholders beyond the point that would best serve shareholder value maximization. Thus, without major changes in how corporate directors are appointed, the incentives of corporate leaders would retain a significant pro-shareholder tilt.

2. Changing Director Election Rules?

Supporters of stakeholderism have thus far largely accepted shareholders' exclusive voting power as a received premise.[215] Below, however, we examine the possibility of advancing the interests of stakeholders by providing them with voting rights with respect to director elections. For example, a widely discussed recent bill would reserve some seats on U.S. corporate boards to labor representatives,[216] similarly to what

---

[215] For discussions by supporters of stakeholderism accepting this premise, see, for example, Martin Lipton & William Savitt, *Stakeholder Governance—Issues and Answers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 25, 2019), https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/ [https://perma.cc/QJ67-ZVAP] ("Insightful commentators accurately emphasize that shareholders alone enjoy the corporate franchise, and with it the power to select directors.").

[216] Accountable Capitalism Act, S. 3348, 115th Cong. (2018). For discussion of this bill, see David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659, 672–73 (2019); Elizabeth Warren, *Companies Shouldn't Be*

some European countries mandate for large corporations.[217] Since stakeholderists view employees as only one group of stakeholders,[218] let us consider the possibility of enabling all corporate constituencies to participate in the election of directors.

One approach would be to have each corporate constituency elect a subset of the company's directors who would then represent its perspective and interests. An alternative approach would be to have all stakeholder groups participate together with shareholders in the election of all directors. To conserve space, we will only discuss below several serious problems that would afflict the latter approach, but the former approach would suffer from similarly severe problems.

First, note that if any significant group of stakeholders does not get its "own" subset of directors, then no director would have an incentive to give independent weight to the interest of this stakeholder group. Assuming that all stakeholder groups will get representation, however, raises the difficult question of how many directors to allocate to each constituency—shareholders, employees, customers, suppliers, and so on. How will the allocation be determined in the case of each company and through what process?

Second, it would be difficult to design an effective method to allow some stakeholder groups to elect their representatives. This would be especially so for those groups that are dispersed, uninformed, or ever-changing. How will customers or suppliers elect their respective representatives to the board of a company that has a broad national and ever-changing customer base and a large number of suppliers of different sizes and types? And how will voting power be distributed among the members of such groups? And who will elect the directors that will represent the interests of local communities or the interests of society in slowing global climate change?

Third, what mechanisms would ensure that a director elected by a certain constituency will focus on the interests of that constituency? As discussed in Subpart IV.A, directors elected by shareholders are in the current system incentivized to be attentive to shareholder interests by the prospect of proxy

---

Accountable Only to Shareholders, WALL ST. J. (Aug. 14, 2018, 7:01 PM), https://www.wsj.com/articles/companies-shouldnt-be-accountable-onlyto-shareholders-1534287687 [https://perma.cc/3VVT-KKTN]; Matthew Yglesias, *Elizabeth Warren Has a Plan to Save Capitalism*, VOX (Aug. 15, 2018, 11:05 AM), https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations [https://perma.cc/L4GK-BVH3].

[217] For a recent discussion of the German model of codetermination and the difficulty of implementing it in the United States, see Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations* (European Corp. Governance Inst., Working Paper No. 509/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565955 [https://perma.cc/U4JR-YQ2Z].

[218] *See, e.g.*, the many stakeholder groups listed in Table 1.

fights, their own equity holdings, and the oversight by institutional investors. But such mechanisms might not be readily available for some other stakeholder groups.

Finally, let us consider a hypothetical case in which shareholders and each stakeholder group elect a subset of directors and in which the elected directors can all be expected to focus on the interests of the corporate constituency that they represent. Given that the board can be controlled by a majority, the directors representing a particular stakeholder group could be marginalized and its interests would enjoy little protection. Furthermore, with the board made of directors that focus on very different and sometimes conflicting objectives, the decision-making process on the board could lead to deadlocks and friction and become highly dysfunctional.

We wish to conclude by noting an alternative approach to addressing the current asymmetry in the power over directors that shareholders and stakeholders have. Instead of seeking to counterbalance the power of shareholders by giving stakeholders the power to participate in director elections, one could support addressing the current imbalance by weakening the power of shareholders to replace directors. This could be done by adopting arrangements that limit shareholder intervention, and thereby insulate directors from shareholder power, or by persuading institutional investors to be more deferential to directors in the event of a challenge to their continued service.

The above approach would not provide any alignment of the interests of corporate leaders with those of stakeholders and would only weaken the existing alignment between the interests of corporate leaders and those of shareholders, thus increasing the opportunities for corporate leaders to pursue their own private interests at the expense of shareholders. We will return to these issues in subpart V.A. As we will explain, acceptance of stakeholderism would likely be used to obtain arrangements and practices that would make corporate leaders less accountable to shareholders and more insulated from their oversight, which would be costly to shareholders, stakeholders, and society.

V. THE PERILS OF STAKEHOLDERISM

The preceding two Parts have shown that the promise of stakeholderism is illusory. At this stage of the discussion, however, some readers might take the view that, even if it does not produce significant benefits for stakeholders, stakeholderism cannot hurt. According to this view, to the extent that protecting stakeholders is considered a valuable goal, stakeholderism cannot move corporate behavior in the wrong direction and could even move it marginally in the right direction. As this Part explains, however, this is not the case: acceptance of stakeholderism could well be substantially counterproductive and harmful to the interests of stakeholders and society.

We show below that acceptance of stakeholderism, and the illusory hopes and mistaken perceptions coming with it, would have substantial and broad detrimental consequences. Subpart V.A discusses how stakeholderism would produce adverse effects on economic performance and society, by increasing the insulation of corporate leaders, their lack of accountability, and managerial slack.

Subpart V.B in turn explains that accepting stakeholderism would adversely affect stakeholder interests by impeding, limiting, or delaying policy reforms that, unlike stakeholderism, would provide real and meaningful benefits to stakeholders. Stakeholderism would thus hurt the stakeholder constituencies that it purports to serve.

A. Increased Insulation and Reduced Accountability

Stakeholderism would increase the insulation of corporate leaders from shareholders and make them less accountable to them. The reduced accountability to shareholders would not be accompanied by the introduction of a novel accountability to stakeholders: stakeholderism does not advocate granting stakeholders the right to vote or to sue unfaithful directors and officers, but rather relies—as explained in Parts II and IV—on well-meaning corporate leaders using their discretion to incorporate stakeholder interests into their objectives.[219]

As a matter of fact, therefore, stakeholderism would make corporate leaders freer in their decision making. Indeed, these expected consequences might at least partly motivate the support for stakeholderism of some corporate leaders and their advisors. For them, support for stakeholderism may well be strategic: an attempt to advance a managerialist agenda dressed in stakeholder clothing to make it more appealing to the general public and to gain support for it from those concerned about corporate externalities.

Stakeholderism can be expected to contribute to increased insulation and reduced accountability in two ways. First, it could induce institutional investors to become more deferential to corporate leaders, less willing to support challenges to the control of these leaders, and more willing to support or accept corporate governance arrangements that shield management from market pressure.

Second, stakeholderism could induce policymakers and groups concerned about stakeholder interests to support or even initiate legal reforms that would have such an effect. Recall that during the era of hostile takeovers, stakeholderism provided a basis for and facilitated the passage of

[219] An earlier work by one of us challenges the use of "short-termism" arguments to support insulation of corporate leaders form market pressures and the claim that such insulation would serve the long-term interests of *shareholders*. *See* generally Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013). Here our concern is different—that stakeholderism is used to support the insulation of corporate leaders in the name of *stakeholders*.

antitakeover constituency statutes that helped management fend off unwanted bidders.[220]

Indeed, for some management advisors, alleged benefits to stakeholders have been, for at least four decades, a standard reason provided for supporting rules that insulate corporate leaders and opposing rules that make them more accountable. For example, Lipton has argued for the right of directors to reject a takeover on the grounds of concern for employees and the local community; for having a longer, five-year term for directors as a system to benefit nonshareholder constituencies; against facilitating shareholder nomination of directors, on the grounds that shareholders are not the only constituency to which directors must be responsible; and against a proposal to strengthen shareholders' ability to replace directors, on the rationale that shareholders are no more entitled to control the corporation than are other stakeholders.[221]

Today, corporate leaders face increased activity by hedge fund activists and larger ownership blocks of institutional investors, as well as a more frequent alliance between these two classes of shareholders.[222] Stakeholderism could be used and is being used by corporate leaders and management advisors to urge institutional investors to avoid cooperating with hedge fund activists and to side with and support corporate leaders. For example, in a Wall Street Journal op-ed on the anniversary of the BRT statement, the BRT's President portrays hedge fund activists (referred to as

---

[220] *See supra* notes 35–36 and accompanying text.

[221] *See, e.g.*, Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 102 (1979); Martin Lipton, *Twenty-Five Years after* Takeover Bids in the Target's Boardroom*: Old Battles, New Attacks and the Continuing War*, 60 BUS. LAW. 1369 (2005) (arguing that directors should have the power to reject a premium takeover because of the effects on the company's employees, communities, and other constituencies); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 227–28 (1991) ("The quinquennial system would benefit the corporation's other constituencies, which prosper if the enterprise's business operations prosper over the long term."); Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 BUS. LAW. 67, 67–68 (2003) (arguing that shareholders are one of many constituencies that invest in the corporation and that their powers should be balanced against the goal of board independence for the benefit of all stakeholders); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV 733, 744–45 (2007) (opposing proposals to strengthen shareholder power to replace directors on the grounds that, among other things, doing so would have an adverse impact on stakeholders).

[222] For evidence on the growth and current high incidence of activist interventions, see, for example, Lucian A. Bebchuk, Alon Brav, & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 Colum. L. Rev. 1085, 1100 (2015); Melissa Sawyer, *Annual Review and Analysis of 2019 U.S. Shareholder Activism, supra* note 166 For a well-known discussion of the "alliance" between hedge fund activists and other institutional investors, see Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Colum. L. Rev. 863 (2013).

"short-term shareholders") as a threat to stakeholder interests and to the ability of corporate leaders to serve such interests.[223]

In addition, stakeholderism could be used, and has been used, for justifying or facilitating the adoption of legal rules that would help management in dealing with these challenges. Consider, for example, the restrictions on hedge fund activists included in the 2017 Brokaw Act proposal by Senators Baldwin and Perdue.[224] The bill would make activist intervention more difficult (and therefore less frequent) by expanding disclosure duties for hedge funds buying stocks or derivatives in a public company. The justification for these restrictions used by the bill's sponsors was precisely that hedge fund activism comes "at the expense of workers, taxpayers, and local communities."[225] It might not be a coincidence that support for stakeholderism among some management advisors and corporate leaders has been growing in recent years in which hedge fund activism has intensified.

Whereas the increased insulation and reduced accountability brought about by acceptance of stakeholderism would serve the private interests of corporate leaders, they would have substantial adverse effects on the interests of other parties. Specifically, enhanced insulation and reduced accountability would increase managerial slack, worsen corporate performance, and reduce economic efficiency and value-creation. Indeed, there is a substantial body of empirical evidence that increased insulation and reduced accountability are associated with worse managerial decisions and worse corporate performance.[226]

These effects would be obviously bad for shareholders. Furthermore, by hurting corporate performance and the economic value produced by corporations, these managerial inefficiencies would also reduce the aggregate wealth available to society as a whole. If the economic pie produced by the corporate sector becomes smaller, all who benefit from slices of it (whether contractually, through tax revenues, or thanks to positive externalities) might end up worse off. These include employees, suppliers, local residents, and other stakeholders.

To be sure, executives and directors who use their greater decisional slack to extract private benefits might happen to benefit stakeholders in the

---

[223] Joshua Bolten, *A Good Year for Stakeholder Capitalism*, WALL ST. J. (Aug. 18, 2020, 7:15 PM), https://www.wsj.com/articles/a-good-year-for-stakeholder-capitalism-11597792536 [https://perma.cc/AX8M-WQK7].

[224] S. 1744, 115th Congress (2017).

[225] *U.S. Senator Tammy Baldwin Introduces Bipartisan Legislation to Strengthen Oversight of Predatory Hedge Funds*, TAMMY BALDWIN (Aug. 31, 2017), https://www.baldwin.senate.gov/press-releases/brokaw-act2017 [https://perma.cc/PC3A-JN67].

[226] For a survey of this empirical evidence, see Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, *supra* note 219.

process. For example, managers working under a lower level of pressure might choose less challenging projects and a lower workload for themselves, and this might entail a looser supervision and quieter life for lower-level employees as well. Similarly, if corporate efficiency requires a painful restructuring, including a reduction of personnel, a CEO able to avoid hard choices for their own benefit (large-scale projects, and restructurings in particular, require considerable effort) would indirectly benefit those employees who would have otherwise lost their jobs.

However, these are just coincidental effects. As explained in the preceding Part, there is little systematic overlap between the private interests of a company's leaders and the interests of the company's stakeholders.[227] Thus, there is no reason to expect that expanding the freedom of corporate leaders to pursue their own preferences would systematically operate to the benefit of the company's stakeholders.

To illustrate, suppose that, with reduced accountability to shareholders, corporate leaders decide to sell the company to the buyer that would retain and reward them, rather than to the competing bidder willing to pay a higher price to shareholders. It might just so happen that management's favored buyer would be good for employees (say, because it would be more likely to retain them); but it might also so happen that the acquisition would hurt the interests of the company's employees (say, because the buyer would be less likely to retain current employees). Thus, in addition to the generally negative effects on shareholders and the performance of the economy, the increased insulation produced by stakeholderism would have effects on stakeholders that should not be expected to be systematically positive.

B. Chilling Stakeholder-Protecting Reforms

Part IV showed that stakeholderism should not be expected to provide material benefits for stakeholders. We now turn to show that acceptance of stakeholderism could well have an additional direct negative effect on stakeholder interests that would likely make them overall worse off. As explained below, by raising illusory expectations about its ability to remedy corporate externalities, stakeholderism would impede, limit, or delay policy reforms that could offer effective protection to stakeholders. We first discuss the array of stakeholder-protecting reforms that could be considered, and we then proceed to explain why the acceptance of stakeholderism would likely impede their adoption.

1. Stakeholder-Protecting Reforms

There is currently a widespread and growing recognition that, although

---

[227] *See supra* note 15, Section IV.D.1.

corporations have been a major engine for growth, their profit-seeking operations contribute to a wide array of society's problems and impose serious negative externalities on employees, communities, consumers, and the environment.[228] Indeed, politicians and policymakers in the United States seem to recognize and respond to what is viewed as a dissatisfaction with some of the results produced by the corporate economy. Below we briefly list some concerns that have been raised and some policy measures that could be considered for addressing them. This brief discussion, of course, does not attempt to provide an exhaustive account of stakeholder-oriented measures that could be adopted or to assess their merits. We only seek to highlight that there are a number of possible reform efforts that advocates of stakeholder welfare could pursue, which might be impaired by the illusory expectations created by stakeholderism.[229]

Consider the impact of corporations on employees and communities.[230] Some commentators decry the slow or even stagnant growth in wages compared with the returns to shareholders (and the effects of this phenomenon on the inequality of wealth and income); the loss of jobs and the transfer of operations to off-shore locations in certain sectors and regions; and the risks and uncertainties imposed on employees by the disruptive forces of globalization and technological progress.[231] Some measures that have been considered to address these issues include changes in corporate and personal income taxes, an increase in the minimum wage, and measures to

---

[228] For recent discussions of such societal problems and negative externalities, see, for example, the papers presented at the conference *A New Deal for this New Century: Making Our Economy Work for All*, NYU LAW (October 3–4, 2019), []https://www.law.nyu.edu/centers/icgf/events/new-deal-new-century [https://perma.cc/A6UF-AFAK]; Jeffrey N. Gordon, *Addressing Economic Insecurity: Why Social Insurance Is Better Than Corporate Governance Reform*, CLS BLUE SKY BLOG (Aug. 21, 2019), https://clsbluesky.law.columbia.edu/2019/08/21/addressing-economic-insecurity-why-social-insurance-isbetter-than-corporate-governance-reform [https://perma.cc/LK7M-GUAN]; Matteo Gatti & Chrystin D. Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera* 46 J. CORP. L. 102 (2020).

[229] Of course, some might oppose the measures discussed in the text and take the view that it would be best to let markets continue operating as they have done thus far. For them, stakeholder protection is not a problem that needs to be addressed through policy measures, and therefore impeding stakeholder-oriented reforms would not represent a cost of stakeholderism. The costs discussed in this section are thus relevant only to those who do view the effects of companies on their stakeholders as an important issue for public policy.

[230] For a discussion of these issues, see Leo E. Strine, Jr., Toward Fair and Sustainable Capitalism (Roosevelt Inst. Working Paper, 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008 .pdf.

[231] *Id.* at 3; Gatti & Ondersma, *supra* note 228, at 131-133.

strengthen the bargaining power of workers.[232]

Next, consider the impact of corporations on their customers. Some experts denounce the increasing concentration and reduced competition in many sectors of the economy and the growing market power of the largest digital platforms.[233] Measures that have been considered for addressing such issues include forcing interoperability among various market players, tightening antitrust policy and enforcement, regulating the portability and accessibility of data, and strengthening the privacy protection of consumers.[234]

Finally, consider the impact of corporations on the environment.[235] Large companies are believed to be responsible for a substantial fraction of greenhouse gas emissions, thereby playing a major role in climate change.[236] Among the policy proposals discussed on this issue are taxes on the use of fossil fuels (carbon tax) and on other polluting activities, subsidies for the production of renewable energies, funding for research in green technologies, and regulatory constraints on some of the technological and operational choices made by companies.[237]

To be sure, it is understandable that those concerned about these problems might find the idea of stakeholderism appealing. Indeed, if stakeholderism could be expected to deliver on its promise, stakeholders' welfare would be enhanced through private ordering and with no need (or at least a reduced need) for government intervention. Furthermore, if shareholders could be expected to deliver, corporate leaders would become an ally rather than an adversary to be overcome to enable the imposition of

---

[232] *See, e.g.*, Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism, supra* note 230 at 24-25, 27, 29.

[233] For a discussion of some of adverse effects that companies have on customers, see, for example, Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (2019); *Stigler Committee on Digital Platforms: Final Report*, CHI. BOOTH: STIGLER CTR. STUDY ECON. & ST. (Sept. 16, 2019), https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report [https://perma.cc/JM7Y-SGLQ] [hereinafter *Stigler Committee Final Report]*.

[234] *Stigler Committee Final Report supra* note 233.

[235] For a comprehensive report on climate risk, see MCKINSEY GLOB. INST., CLIMATE RISK AND RESPONSE (2020), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/Climate%20risk%20and%20response%20Physical%20hazards%20and%20socioeconomic%20impacts/MGI-Climate-risk-and-response-Full-report-vF.pdf [https://perma.cc/HUU7-585D]

[236] CLIMATE ACCOUNTABILITY INST., CARBON MAJORS REPORT 8 (2017) (presenting evidence that 71% of greenhouse gas emissions since 1988 can be traced back to 100 large fossil fuel companies).

[237] For a concise overview of some climate change policy proposals, see University of Michigan Center for Sustainable Systems, Climate Change: Policy and Mitigation Factsheet (October 2020), http://css.umich.edu/factsheets/climate-change-policy-and-mitigation-factsheet.

outside constraints. However, given our conclusion that stakeholderism should not be expected to deliver the hoped-for stakeholder protections, external adoption of laws, rules and policies remains the main avenue through which real protections could be achieved.

2. How Stakeholderism Would Impede Reforms

Given that the adoption of law, regulations, and policies is the main avenue through which corporate externalities on stakeholders could be effectively addressed, it is important to consider the potential effect of embracing the prospects of such reforms is important. As we explain below, embracing stakeholderism should be expected to impede such reforms.[238]

To begin, if those who care about stakeholder effects develop unrealistic expectations and hopes that corporate leaders would on their own deliver substantial protections to stakeholders, they could well devote less efforts and resources to obtaining stakeholder-protecting reforms that would preclude or discourage corporations from imposing externalities on stakeholders. Such unrealistic expectations and hopes might lead defenders of stakeholders to direct efforts to push for acceptance of stakeholderism, might make them more reluctant to seek the imposition of outside constraints and incentives on corporate leaders who resist them and express willingness to serve as corporate guardians and reduce the sense of urgency to obtain such reforms that they would otherwise have.

To illustrate the above concerns regarding the chilling effect of stakeholderism on reforms, let us discuss the case of climate change advocacy. At present, there is a significant number of organizations that devote resources, energy, and passion to try to mitigate the effects of corporate operations on climate change. Major organizations based in the United States include Ceres, WWF, CDP, Conservation International, and the Environmental Defense Fund. Our review of their websites and most recent tax returns (Form 990) indicates that just these five major organizations have, in the aggregate, annual budgets higher than $500 million, more than 2,000 employees, and hundreds of volunteers.[239] And these organizations represent, of course, only a subset of the organizations and resources devoted

[238] For other discussions expressing concerns that support for stakeholderism may impede legal reforms that would impede legal reforms that could protect stakeholders or give them means to more effectively protect themselves, see, for example, Leo E. Strine, Jr., C*orporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON POL'Y 176, 177 (2017).

[239] *See* CDP North America, Inc. (for the tax year ending on Mar. 31, 2019); Ceres, Inc., Form 990 (for the tax year ending on Oct. 31, 2018); Conservation International Foundation, Form 990 (for the tax year ending on Jun. 30, 2019); Environmental Defense Fund, Inc., Form 990 (for the tax year ending on Sept. 30, 2018); World Wildlife Fund, Inc., Form 990 (for the tax year ending Jun. 30, 2019).

to addressing the contribution of corporate operations to climate change.

Consider two types of activities in which such organizations can engage. The first type of activities, which focus on internal corporate decision making, seeks to encourage corporate leaders to make their own choices that would mitigate climate change risks. The second type of activities, which focuses on laws, regulations and policies that would force such choices from the outside, seeks directly or indirectly to encourage lawmakers, regulators, and policymakers to adopt such laws, regulations, and policies, and to enhance public awareness that could contribute to such pressure on public officials. Unrealistic expectations that stakeholderism would contribute substantially to addressing climate change risks can be expected to encourage reliance on and investment in the first type of activities. By contrast, recognizing that corporate leaders should not be expected to address on their own climate change risks in ways that would be costly to shareholders would encourage a focus on and investments in the second type of activities, which are the ones that can most contribute to addressing climate change risks.

Furthermore, raising expectations that corporate leaders would on their own address and mitigate climate change risks might also result in organizations focusing on such risks attracting less resources in the first place. Indeed, potential donors, and potential employees and volunteers, might turn to other causes or projects if they come to believe that stakeholderism would make the work of such organizations less necessary and important.

Finally, these unrealistic expectations about stakeholderism would affect the receptiveness of lawmakers, regulators, and policymakers to advocacy of stakeholder-protecting reforms. To illustrate, let us take up again the example of corporate choices that affect climate change and consider public officials that face calls to impose a carbon tax or other policies that attach a financial cost to carbon emissions. The presence of illusory hopes that corporate leaders would on their own choose to reduce carbon emissions over the coming years might lead these public officials to view legal, regulatory, and policy interventions as not critical or at least give them a good excuse for avoiding such interventions or delaying them to first give stakeholderism time to perform its magic.

Indeed, whereas some corporate leaders and their advisors might genuinely believe that stakeholderism would contribute to stakeholder welfare, others might use this theory strategically to deflect the demand for legal and regulatory reforms.[240] In any event, regardless of the motivations

[240] In a post published in response to an earlier version of this Article, Martin Lipton and coauthors stated that "new laws . . . are . . . unnecessary if companies and investors embrace stakeholder capitalism." Martin Lipton et al., *Professor Bebchuk's Errant Attack on Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2020), https://corpgov.law.harvard.edu/2020/03/04/professor-bebchuks-errant-attack-on-stakeholder-governance/ [https://perma.cc/BM2Y-WBUW].

of supporters, the chilling effect of stakeholderism on regulation is a significant peril and should be recognized as such by those concerned for the effects of corporate externalities on society.

3. Are Stakeholder-Protecting Reforms Attainable?

It might be argued that the analysis of this subpart reflects an unjustified optimism about the prospects of stakeholder-protecting reforms.[241] On this pessimistic view, regardless of whether stakeholderism is accepted, the prospects of overcoming political gridlock and obtaining stakeholder-protecting laws, regulation, and policies are dim.

Indeed, in response to our work, some advocates of stakeholderism stressed "the limitations of regulation" arising from powerful corporate lobbying against any measures that would reduce corporate profits.[242] The use of this argument by stakeholderists is ironical. If corporate leaders elect to resist any stakeholder-protecting policies that would hurt profits, why should stakeholderists expect corporate leaders, acting on their own, to protect stakeholders at the expense of profits? And if advocates of stakeholderism know how to change the behavior of corporate leaders, why don't they first focus on precluding corporate leaders from lobbying against stakeholder-protecting and thereby facilitate the adoption of such rules and policies?

In any event, our view is not based on a rosy assessment of the prospects of stakeholder-protecting reforms; we recognize the substantial impediments such reforms face. Rather, our view is based on a realistic assessment of the hopes that stakeholderism would produce material benefits for stakeholders. Part IV's analysis showed that the hopes that stakeholderism would produce such benefits without the imposition of stakeholder-protecting external rules and policies are illusory; accordingly, such rules and policies provide the only avenue to meaningful stakeholder protection.

To be sure, our analysis is based on the premise that the possibility of stakeholder-protecting reforms is not completely blocked. That is, we believe that, at least in the absence of illusory hopes introduced by stakeholderism, some significant reforms protecting stakeholders—whether employees, customers, or the environment—would be eventually possible even if they would face impediments and would not be adopted to the fullest extent desirable. We note that, after all, there are already in place many laws, regulations, and policies that are aimed at protecting stakeholders even though in our view it would be desirable to substantially augment and strengthen them.

---

[241] For an analysis of the relevance for discussion of corporate social responsibility oof government failure to address corporate externalities, see Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1, 2 (2010).

[242] Mayer Response, *supra* note 13, at 9.

Therefore, given the conclusion of our analysis that stakeholderism should not be expected to deliver significant stakeholder protections and that only governmental laws, regulations, and policies offer the only real prospect of such protections, introducing conditions that chill rather than facilitate such stakeholder-protection reforms would be detrimental to stakeholder welfare. Thus, embracing stakeholderism, and thereby introducing illusory hopes that the corporate leaders would serve as stakeholder guardians, would be costly to stakeholders.

***

A recent joint statement by more than seventy academics in the fields of law, economics, finance, and management announces: "With less than a decade left in which to address the catastrophic threat of climate change, and with investors, companies, accountants, policymakers and academics expressing a shared sense of urgency, now is the time to act to reform corporate governance."[243] However, our analysis indicates that, for all those with such a "shared sense of urgency," it would actually be a serious mistake to focus on reforming corporate governance.

As the analysis of the preceding Part demonstrated, corporate governance reforms in general, as well as stakeholderism in particular, are not an effective tool for addressing "the catastrophic threat of climate change." Furthermore, as the above analysis in this section explained, directing efforts to reforming corporate governance, as the statement urges, could well come at the expense of efforts to adopt laws, regulations, and policies that would preclude or disincentivize corporate choices that could make a real contribution to addressing the catastrophic threat of climate change.

For all those with a shared sense of urgency, we maintain, it is high time to abandon the illusory hope offered by stakeholderism They should devote all efforts and resources to advancing laws, regulations, and policies that would address the catastrophic threat of climate change and to educating the public about the urgency of adopting such measures.

CONCLUSION

In the face of growing concerns about the negative effects of corporations on stakeholders, stakeholderism seeks to make external intervention unnecessary by encouraging and relying on corporate leaders to protect stakeholders on their own. We have conducted a conceptual, economic, and empirical analysis of stakeholderism, the expected consequences of its acceptance, and the claims made by its proponents. Stakeholderism, we have concluded, offers an inadequate and

[243] ANDREW JOHNSTON ET AL., CORPORATE GOVERNANCE FOR SUSTAINABILITY STATEMENT (2019).

counterproductive approach to the goal of stakeholder protection; its illusory promise should not be allowed to distract from the critical needs for external laws, regulations, and policies designed to provide such protection.

There are two versions of stakeholderism, and we have discussed the conceptual problems of each. Enlightened shareholder value turns out to be conceptually the same as shareholder value maximization. By contrast, pluralistic stakeholderism views stakeholder welfare as an independent end, with corporate leaders asked to balance the interests of shareholders and stakeholders. However, even for this more ambitious version of stakeholderism, the actual benefits for stakeholders critically depend on how corporate leaders elect to exercise their discretion.

By retaining basic corporate structures while amending corporate purpose, stakeholderists seek to harness corporate decision-making to protect stakeholders. Our analysis of the full array of incentives produced by basic corporate structures, however, has shown that corporate leaders have significant incentives not to protect stakeholders beyond what would serve shareholder value. This conclusion is reinforced by our empirical analysis of past choices made by corporate leaders operating under stakeholderist rules. The promise of stakeholderism to deliver material value to stakeholders, we have shown, is illusory.

Furthermore, embracing stakeholderism could well impose substantial costs on society. Stakeholderism would make corporate leaders less accountable and increase their insulation from shareholder oversight. These consequences would advance a managerial agenda and serve the private interests of corporate leaders. However, the increased insulation and reduced accountability would increase slack and agency costs, hurting performance and reducing the economic pie available for division among shareholders and stakeholders.

In addition, by raising illusory and distracting hopes that corporate leaders would on their own provide substantial protection to stakeholders, acceptance of stakeholderism would impede or delay legal, regulatory, and policy reforms that could provide real, meaningful protection to stakeholders. In this way, acceptance of stakeholderism would be contrary to the goal of stakeholder protection that stakeholderism purports to serve. Indeed, although many supporters of stakeholderism are genuinely interested in stakeholder welfare, some supporters could be at least partly motivated by the prospect of insulating corporate leaders from shareholder oversight and chilling external interventions aimed at stakeholder protection.

The stakes in this debate are large. We hope that our analysis will enable all those who are concerned about corporate effects on stakeholders to resist the siren song of stakeholderism and to recognize the shortcomings and dangers of this view. Stakeholderism should be rejected, including by those who care deeply about stakeholders.