Stakeholder Governance as Governance by Stakeholders

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ABSTRACT

Much debate within corporate governance today centers on the proper role of corporate stakeholders, such as employees, customers, creditors, suppliers, and local communities. Scholars and reformers advocate for greater attention to stakeholder interests under a variety of banners, including ESG, sustainability, corporate social responsibility, and stakeholder governance. So far, that advocacy focuses almost entirely on arguing for an expanded understanding of corporate purpose. It argues that corporate governance should be *for* various stakeholders, not shareholders alone.

This Article examines and approves of that broadened understanding of corporate purpose. However, it argues that we should understand stakeholder governance as extending well beyond purpose to embracing governance *by* stakeholders. Purpose-based governance longingly hopes that either shareholders, or the directors elected by shareholders, will vigorously promote the interests of other stakeholders. But if we truly want companies to promote stakeholder interests, we should empower stakeholders within those companies. Such stakeholder governance would create some costs along with many benefits. However, we can structure stakeholder governance to emphasize the benefits while keeping the costs under control. Employees should be empowered via board representation, works councils, and/or unions. Other stakeholders can be less fully empowered through councils, advisory at first, and potentially given power to nominate or even elect directors.

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INTRODUCTION

Four score and twelve years ago, Adolf Berle and Merrick Dodd debated the fundamental role of corporations within society.[1] We have been engaged in various versions of that debate ever since. There is much din within the corporate governance machine[2] today concerning the proper place of corporate stakeholders such as employees, customers, creditors, suppliers, local communities, the environment, and so on. The discussion proceeds under a variety of labels, such as ESG,[3] sustainability,[4] and corporate social responsibility,[5] among other terms. Advocates for a revised understanding of the corporation have argued that the interests of stakeholders should receive more attention, relative to the interests of shareholders, than has traditionally been the case. Lucian Bebchuk and Roberto Tallarita have attacked this new understanding under the label of "stakeholder governance."[6]

Bebchuk and Tallarita call the promise of stakeholder governance illusory. I call it not yet tried, nor even understood. The term governance is deeply ambiguous. Cribbing from our greatest president,[7] robust

1. *See generally* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A. A. Berle, Jr., *For Whom are Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

2. *See generally* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021).

3. *See generally* Elizabeth Pollman, *The Making and Meaning of ESG* (U. Penn Inst for L. & Econ., Research Paper No. 22-23, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 [https://perma.cc/W9BV-3MGC].

4. CHRISTOPHER M. BRUNER, THE CORPORATION AS TECHNOLOGY: RE-CALIBRATING CORPORATE GOVERNANCE FOR A SUSTAINABLE FUTURE 179–84 (2022).

5. *See generally* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523 (2011).

6. *See generally* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

7. *See, e.g.*, President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

stakeholder governance should entail governance of the stakeholders, by the stakeholders, and for the stakeholders. So far, debate has focused only on the third part of that triad, governance for the stakeholders. Who governs is ignored. We debate corporate purpose at length.[8] Should public corporations be governed only for their shareholders, or should the interests of others matter too? How should that purpose shape the fiduciary duty of corporate directors and officers as they make decisions that affect both shareholders and other stakeholders?

Those are interesting questions, but not the most interesting question.[9] Purpose-based stakeholder governance longingly hopes directors and officers will use their power to protect stakeholders. The stakeholder debate leaves the basic allocation of authority to directors and officers unquestioned. But I question it. Elsewhere, corporate governance scholars have indeed debated the allocation of authority within corporations, but they almost always focus on the divide between directors and officers versus shareholders.[10] How much and what kind of power should shareholders have to hold directors and officers accountable is the question asked. But "stakeholder governance" suggests other possible players. Can and should we give significant decision-making authority to some stakeholder groups (especially employees)? In other words, can stakeholder governance entail governance *by* stakeholders, not merely *for* them?

That is the most interesting question, and the one I address here. I argue the answer is yes, we should give some stakeholders real power within corporate governance. Indeed, there are already glimmerings of involving stakeholders through various common forms of stakeholder engagement such as meetings, surveys, and social media.[11] But, this should be pushed to a new level empowering stakeholders to play a part in making decisions. Such stakeholder governance would create some costs along with many benefits. However, we can structure stakeholder governance to emphasize the benefits while keeping the costs under control. Employees should be empowered via board representation, works councils, and/or unions. Other stakeholders can be less fully empowered through councils, advisory at first, and potentially given power to nominate or even elect directors.

8. *See generally* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., 2021).

9. Brett McDonnell, *Purpose in Business Association Statutes: Much Ado About Something (But Not Much)*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 148 (Elizabeth Pollman & Robert B. Thompson, eds., 2021).

10. *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 836 (2005).

11. *See generally* Brett McDonnell, *Stakeholder Engagement*, FLA. ST. L. REV. (forthcoming).

In Part I, I give some background. I briefly discuss the current ferment within corporate governance, and then I frame that ferment using and expanding Stephen Bainbridge's categorization distinguishing the ends and means of corporate governance.[12] Part II ponders "governance *of* the stakeholders," considering who is actually governed within a corporation (spoiler alert: above all, it is the employees). Part III addresses governance *for* the stakeholders, taking on the dominant framing of the current debate as being about corporate purpose. I argue that purpose is not unimportant, but it is a weak tool in corporate governance. The real work is done through the allocation of power and authority, not purpose and duty.[13] Part IV thus concentrates on that allocation of authority, promoting governance *by* the stakeholders. Part V examines how stakeholders are already engaged by American public companies today. Part VI argues that companies should much more fully empower stakeholders tomorrow, with some suggestions as to how companies could do that.

I. ENGAGED IN A GREAT CIVIL WAR (BACKGROUND)

The current debate over corporate purpose has taken place under a variety of labels and in various contexts. Significant milestones include a statement from the organization representing the CEOs of America's largest corporations[14] and annual letters from the CEO of one of the world's largest institutional investors.[15] Much discussion is occurring under the ESG (environmental, social, and governance) label,[16] particularly concerning shareholder activism and disclosure. Some discussion occurs under the sustainability label,[17] which often (but not always) has a particular focus on environmental matters. An older term is corporate social responsibility.[18] The terms are not synonymous, but they overlap quite a bit.[19]

In terms of policy and action, the current movement for greater emphasis on stakeholders focuses on several main tools. One of these is

12. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 547–48 (2003).

13. *See generally* Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77 (2018).

14. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/MDU3-947C].

15. Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter? [https://perma.cc/F5R9-3FCU].

16. *See generally* Pollman, *supra* note 3.

17. *See generally* BRUNER, *supra* note 4.

18. *See generally* Chaffee, *supra* note 5; Millon, *supra* note 5.

19. See generally Pollman, *supra* note 3, for some more fine-grained disentangling of these terms.

disclosure, which can be either voluntary or mandatory.[20] Another is shareholder activism, either formal through shareholder proposals or informal through meetings with company representatives.[21] A third is through fiduciary duty suits, potentially invoking the *Caremark* duty to oversee.[22]

Note that, though the movement seeks to protect stakeholder interests, none of these tools actually empower stakeholders.[23] A useful way of thinking through the relationship between the debate over corporate purpose and tools of corporate governance comes from Steve Bainbridge.[24] Bainbridge distinguishes between the means and ends of corporate governance, and categorizes approaches to governance on a two-by-two grid based on what they prescribe for means and for ends.[25] The ends of corporate governance are the focus of our current debate within the corporate governance machine. The traditional position sees a focus on shareholder value as the sole proper goal, while those opposing this position believe corporations do and/or should concern themselves with the interests of other stakeholders as well.[26] The means dimension focuses on corporate power and authority. Should corporate directors and officers be given extremely broad discretion to decide as they see fit, or should they be more tightly bound to direction and oversight from those they are acting for?

In Bainbridge, the ultimate source of authority is the shareholders, so on the means dimension, his choice is between a strong board or strong shareholders. But if we want to consider the possibility of empowering other stakeholders (and we do), we need to add a third possibility on the means dimension, namely strong stakeholders. That leads to the three-by-two grid in Table 1. That yields six possible cells, labeled by six "B" scholars who take the position represented by each of the cells. Bainbridge represents a position favoring a strong board, constrained very weakly by any kind of shareholder power, with the end of maximizing shareholder wealth.[27] Margaret Blair, when writing with Lynn Stout, also advocates

20. Brett McDonnell, Hari M. Osofsky, Jacqueline Peel & Anita Foerster, *Green Boardrooms?*, 53 CONN. L. REV. 335, 371–86 (2021).

21. *Id.* at 386–98.

22. *Id.* at 398–408.

23. Although stakeholders can and do use disclosure whether or not the primary intended audience is shareholders. *See, e.g.*, Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499 (2020).

24. *See generally* Bainbridge, *supra* note 122. For additional possible dimensions, see BRUNER, *supra* note 4. I will fold some of those dimensions, particularly "Shareholder Enforcement," which gets at who has standing to bring litigation enforcing duties, into my definitions of Shareholder and Stakeholder Power. However, other dimensions, particularly potential expansion of liability for directors and shareholders, lie outside my discussion here.

25. Bainbridge, *supra* note 122, at 547–48.

26. *Id.*

27. *See generally* Bainbridge, *supra* note 12.

weakly limited board power but with the end goal of advancing the interests of various stakeholders, including but not limited to shareholders.[28] Lucian Bebchuk agrees with Bainbridge on the goal of shareholder wealth maximization but advocates much greater empowerment of shareholders.[29] Matt Bodie (often with co-author Grant Hayden) advocates empowering one specific kind of stakeholder—employees—along with shareholders, with a goal of advancing the interests of those two empowered groups.[30]

The remaining two cells are less intuitive, tying shareholder power to a stakeholder purpose or vice versa. The logic behind them is somewhat weaker, but versions of each of them do make some sense. An advocate of protecting stakeholder interests might still, especially in our current environment, support empowering shareholders. Indeed, to some extent Bebchuk does this, arguing that limiting managerial misbehavior through empowering shareholders will help other stakeholders as well.[31] The many advocates of protecting the environment or advancing DEI through shareholder activism also take a variant of this position.[32] The benefit corporation fits within this cell too (hence the B Labs label, since that organization initiated the form).[33] Benefit corporations somewhat increase shareholder power, in particular through an extension of fiduciary duty (where only shareholders have standing to sue to enforce), while explicitly broadening the purpose of the corporation to include considering stakeholder interests. Insofar as one thinks that the interests of stakeholders better align with those of shareholders than those of managers, and that directly empowering stakeholders is either politically infeasible or causes other problems, then empowering shareholders becomes the best available option to protect stakeholders.

Conversely, one might argue that empowering stakeholders, or at least some of them, may be an effective way to advance shareholder interests. For instance, I have argued that employees are well-positioned to hold

28. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 278 (1999).

29. *See generally* Bebchuk, *supra* note 10.

30. *See generally* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2020). Chris Bruner also fits within this cell, see *supra* note 4, and his name begins with a B as well. And Margaret Blair's solo book, before she co-authored with Lynn Stout, also fits here, *see* MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995). Choices!

31. Bebchuk, *supra* note 29, at 909–12.

32. *See* McDonnell, Osofsky, Peel & Foerster, *supra* note 20, at 371–78.

33. *See generally* WILLIAM H. CLARK, JR. & LARRY VRANKA, WHITE PAPER: THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEED OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC (2013).

managers accountable, thereby increasing the wealth corporations generate in a way that can help many stakeholders, including shareholders.[34] A significant part of the literature on employee participation in control looks to the impact such control has on conventional measures of organizational performance, including productivity and profits. Insofar as that literature finds positive effects of employee control (it often, though not always, does), it provides an argument supporting such control in part because it benefits shareholders. My Minnesota colleague, Avner Ben-Ner, has made substantial contributions to this literature, and his name begins with a "B," and so into that box, his name goes.[35]

Table 1

	Means			
Ends		Board Power	Shareholder Power	Stakeholder Power
	Shareholders	Bainbridge	Bebchuk	Ben-Ner
	Stakeholders	Blair	B Labs	Bodie

II. Governance of the Stakeholders

Lincoln's triad of governance focuses our attention on an important antecedent question: namely *who* is governed within a corporation? Under a strong version of the contractual view of the corporation that came to dominate corporate law academia in the seventies and eighties, the answer is basically "no one." All relationships within the legal fiction of the corporation are governed by explicit or implicit contracts. No one really has the power to boss anyone around; their contributions are set by contract, and if they don't like the arrangements, they can leave the relationship.[36] It is a rather odd position for students of corporate governance to take, since carried to its logical extreme, it makes corporate governance irrelevant.

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34. Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 Stan. J.L. Bus. & Fin. 334, 351 (2008).

35. *See generally* Avner Ben-Ner & Derek C. Jones, *Employee Participation, Ownership, and Productivity: A Theoretical Framework*, 34 Industrial Relations 532 (1995); Avner Ben-Ner, Tzu-Shian Han, & Derek C. Jones, *The Productivity Effects of Employee Participation in Control and in Economic Returns*: *A Review of Empirical Evidence*, *in* Democracy and Efficiency in the Economic Enterprise (Ugo Pagano & Bob Rowthorn, eds., 1994).
It has not escaped my attention that the namesake of the symposium for which this essay was written, Adolf Berle, has a name that begins with "B." In which box he might fit is a rather interesting question, and the answer may vary at different points in his career. *See generally* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. Corp. L. 99 (2008) (another B!).

36. *See generally* Frank Easterbrook & Daniel Fischel, The Economic Structure of Corporate Law 36–38, 285 (1991); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin Econ. 305 (1976).

The pioneering economic theory of the firm gives a different answer. For Ronald Coase[37] and his most important follower, Oliver Williamson,[38] the firm is defined as a zone of discretionary authority for managers over employees. In other words, employees are the governed. Thus, the firm is the domain of managerial hierarchy, and firms are surrounded by the domain of market prices. But this insight is largely ignored within corporate law.

Starting from that insight and focusing on what being governed with such a discretionary hierarchy entails for employees, one can develop strong economic arguments for involving employees in corporate governance.[39] Standard corporate law theory neglects vulnerable employees because of its eagerness to protect vulnerable shareholders.

For reasons (overly) well-developed within the economic theory of corporate law, shareholders do probably count as the group next most subject and vulnerable to managerial discretion. Corporations use the money shareholders give them with few rules as to how that money can be used or what the shareholders will get in return. Shareholders get returns only after all others with more definite contractual rights get paid. As the residual claimants, shareholders are thus both particularly vulnerable, and they also bear the marginal costs and benefits of firm decisions.[40] Also, particularly in smaller companies, and larger ones with controlling shareholders, shareholders will have significant roles acting within the company, and the rules of corporate governance will shape how they can play those roles.

Creditors resemble shareholders; they provide money to corporations. But, the returns on lending are structured by more specific contractual rules, so that relationship looks less like governance. Still, debt contracts are not complete or perfectly enforceable, so creditors are also vulnerable to bad or self-serving decisions made by those running corporations. Thus, it is no surprise that creditors of varying types have developed various tools to intervene in corporate governance.[41]

The relationships between the corporation and its suppliers and customers generally do not look like governance, as they buy from or sell to a company in discrete transactions subject to contracts, well-defined

37. *See generally* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 403–04 (1937).

38. *See generally* OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985).

39. HAYDEN & BODIE, *supra* note 30, at 146–56.

40. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 403 (1983). For some limits to the residual claimants argument, *see* McDonnell, *supra* note 34, at 348–50; HAYDEN & BODIE, *supra* note 30, at 88–102.

41. *See generally* Charles K. Whitehead, *Creditors and Debt Governance*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 68 (Claire A. Hill & Brett H. McDonnell, eds. 2012).

market prices, and often other areas of market regulation. However, they can have governance-like elements in some kinds of relationships. Where suppliers or customers have a long-term relationship with just one corporation, which buys or sells their product, and where they are locked-in to that relationship by firm-specific investments, corporations may have discretionary power to dictate much behavior by their suppliers, or more occasionally their customers.[42] Some businesses recognize this governance element formally by making their suppliers or customers owners, as in supplier or consumer cooperatives.[43]

Corporate managers may also have a kind of discretionary governance power over aspects of the local communities and physical environments in which they are located.

Why does it matter who is governed by a corporation? From an economic approach, those who are governed are the persons most vulnerable to potential mistreatment. The contractual approach implies that markets provide adequate protection for most, if not all, and where that is not so then legal rules outside of corporate law can supplement the market.[44] Therefore, corporate control should be allocated to those who are not well-protected by contract or other legal rules. Jensen and Meckling's key paper assumes that contracts and markets perfectly protect every stakeholder except shareholders.[45] But neither markets nor mandatory legal rules in other areas always work as well as one may hope for many stakeholders.[46] Thus, other stakeholders may have a good claim to a share of power in corporate governance.

Beyond economics, if democratic theory is relevant in thinking about corporate governance, then who governance is of may tell us who it should be by and for. Therefore, in deciding who should govern, we must consider who has the strongest interests in corporate decision-making, as well as whether they can be easily identified and given voting power.[47]

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42. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 120–67 (1996). *See generally* David G. Yosifon, *Consumer Lock-In and the Theory of the Firm*, 35 SEATTLE U. L. REV. 1429 (2012); MASAHIKO AOKI, INFORMATION, INCENTIVES, AND BARGAINING IN THE JAPANESE FIRM ch. 6 (1988).

43. *See generally* CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES (2009).

44. See EASTERBROOK & FISCHEL, *supra* note 36, at 309 n.10, where they explicitly note that though their paper models only the agency relationship between managers and shareholders, agency problems exist at many levels within organizations.

45. *See generally* Jensen & Meckling, *supra* note 36.

46. Bruner, *supra* note 4, at 132–33.

47. Hayden & Bodie, *supra* note 39, at 161–71; *see also* Grant M. Hayden & Matthew T. Bodie, *Democratic Participation as Corporate Governance* (forthcoming) (on file with author).

III. Governance for the Stakeholders

As noted above,[48] stakeholder governance has been treated mainly as a position within the debate over corporate purpose. It takes a position on the question of how corporate directors and officers do and should exercise their discretion when making decisions on behalf of the corporation. This debate has been ongoing for decades.[49] The dominant position within American corporate law has generally been that corporations should be run with an exclusive focus on the financial interests of their shareholders. That is, the proper end of corporations is shareholder wealth maximization.[50] However, a significant minority position (which at points in history may actually have been a majority position)[51] counters that corporations do and should give independent weight to the interests of their major stakeholders as well. Within the minority position, different stakeholder advocates may differently stress the interests of different stakeholders—for instance, one major position within stakeholderism focuses on the interests of employees (I am one who takes that position).[52]

Advocates of shareholder wealth maximization argue that it will better not just shareholders, but society as a whole. They proffer a variety of arguments supporting this claim:

- Having managers focus on one well-defined metric will clarify their decision-making and make them more accountable.[53]

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48. *See supra* notes 14–23 and accompanying text.

49. The locus classicus is the Berle-Dodd debate in the early thirties. *See supra* note 1.

50. Influential scholarly treatments of this position include Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36–38 (1991); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L. J. 2021, 2031 (1993); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 910–12 (2005); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

51. See generally Bratton & Wachter, *supra* note 35, at 135–44 on Berle's concession in the fifties that the managerialist position had prevailed.

52. Brett H. McDonnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887, 892–93 (2022); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J. L. BUS. & FIN. 334, 351 (2008); GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2020); Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L. J. 1217, 1262–66 (2022); CHRISTOPHER M. BRUNER, THE CORPORATION AS TECHNOLOGY: RE-CALIBRATING CORPORATE GOVERNANCE FOR A SUSTAINABLE FUTURE 179–84 (2022). *See generally* Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTIETH-FIRST CENTURY (1995).

53. Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1028–34 (2013); J. William Callison, *Putting New Sheets on a Procrustean Bed: How*

• With well-functioning markets,[54] maximizing profits will maximize social welfare, as economists have been pointing out at least since Adam Smith.[55]

• Where markets do not function well, other areas of the law can be and are used to protect stakeholder interests.[56]

• The role of shareholders as residual claimants who care about the general profitability of a business gives them a diffuse interest that cannot be well-protected by specific contractual provisions.[57]

Stakeholder advocates have the more intuitive argument: If we want corporations to advance social welfare generally, then corporate decision-makers should be encouraged to consider social welfare generally, not simply the interests of one group. Shareholder wealth maximization theorists must justify why that is not true, and all of their arguments have big holes:

• For complex, long-lasting organizations, shareholder wealth maximization is not really such a clearcut measure at all, and a single-minded focus on one measure does not well capture how individuals and collectives actually think and act.[58]

• Markets often don't function well, and externalities are omnipresent, so that we want individuals and organizations to care about things beyond profits, as economists have been pointing out at least since Adam Smith.[59]

• Other areas of law are often rigid, clumsy, and poorly thought out, as the conservative law and economic types who tend to advocate shareholder wealth maximization are fond of pointing out ad nauseum when not casually invoking those laws as reasons to exclude stakeholders from corporate governance.[60]

• Other areas of law may also diverge from the social optimum because corporations devoted to profit maximization aggressively lobby to prevent those laws from constraining them.[61]

Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change, 2 AM. U. BUS. L. REV. 85, 107–09 (2012).

54. The modern locus classicus of the shareholder wealth maximization norm assumes perfect contracts for all stakeholders other than shareholders, so that stakeholders don't need governance power since they can protect themselves through contracts. Jensen & Meckling, *supra* note 36.

55. ADAM SMITH, THE WEALTH OF NATIONS (1776).

56. Friedman, *supra* note 50.

57. *See supra* note 40 and accompanying text.

58. Hayden & Bodie, *supra* note 30, at 68–87.

59. *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759).

60. *Compare* Friedman, *supra* note 50, *with* MILTON & ROSE D. FRIEDMAN, FREEDOM TO CHOOSE: A PERSONAL STATEMENT (1980).

61. *See generally* Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, HARV. BUS. REV., Jan.–Feb. 2022, at 130.

• Other stakeholders, particularly employees, can and should be seen as residual claimants, not just shareholders.[62]

There is a broad and critical middle ground between pure shareholder wealth maximization and pure stakeholderism. I believe that much of the current debate resides within that middle ground, including the Corporate Roundtable statement[63] and Larry Fink's letters.[64] Managers attempting to maximize the risk-adjusted long-run profitability of their companies must inevitably take the interests and concerns of their stakeholders into account.[65] They must maintain a good reputation with their customers, or they will eventually sell less at lower prices.[66] They must maintain a good reputation with current and potential future employees, or they will have to pay more to hire less good workers.[67] Millennial investors,[68] customers, and workers may induce companies to want to be seen as doing good. As the climate warms, companies must consider how future regulation and climate change will affect their operations. Much of what social activists want from companies can be framed as good for the financial bottom line in the long run. This helps explain the widespread acceptance of ESG and social responsibility by corporate and fund managers.[69]

Even though long-run profitability leads to agreement at a high-level of generality, it leaves vast room for debate for how much and what companies actually can and should be doing to address leading social and environmental concerns. Critics from both the left and right, advocating

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62. Hayden & Bodie, *supra* note 30, at 96–102.

63. *See supra* note 14.

64. *See supra* note 15.

65. *See* Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 694 (2018); Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193, 1194, 1204 n.43 & 45 (2019).

66. LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 3 (2009); Debbie Kasper, *Contextualizing Social Practices: Insights into Social Change*, *in* PUTTING SUSTAINABILITY INTO PRACTICE: APPLICATIONS AND ADVANCES IN RESEARCH ON SUSTAINABLE CONSUMPTION 41 (Emily Huddart Kennedy, Maurie J. Cohen & Naomi T. Krogman eds., 2015).

67. *See, e.g.*, Larry Fink, *Purpose & Profit*, HARV. L. SCH. F. ON CORP. GOV. (Jan. 23, 2019), https://corpgov.law.harvard.edu/2019/01/23/purpose-profit/ [https://perma.cc/6B9U-P4EH] ("Attracting and retaining the best talent increasingly requires a clear expression of purpose. With unemployment improving across the globe, workers, not just shareholders, can and will have a greater say in defining a company's purpose, priorities, and even the specifics of its business. Over the past year, we have seen some of the world's most skilled employees stage walkouts and participate in contentious town halls, expressing their perspective on the importance of corporate purpose. This phenomenon will only grow as millennials and even younger generations occupy increasingly senior positions in business. In a recent survey by Deloitte, millennial workers were asked what the primary purpose of businesses should be—63 percent more of them said 'improving society' than said 'generating profit.'").

68. Michael Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1251 (2020).

69. Lund & Pollman, *supra* note 2, at 2614–15.

either a stronger stakeholderism or shareholderism, accuse companies of going either too far or not far enough in considering stakeholder concerns.[70] Existing accountability mechanisms are weak:

- Even great statements of corporate purpose only go so far in guiding specific actions.[71]
- Fiduciary duties derived from a broad understanding of purpose have little bite. The business judgment rule in most circumstances gives managers vast discretion in deciding how to promote the interests of the company and its shareholders.[72]
- Disclosure rules can try to shed some light on greenwashing, but the informational asymmetry between managers and insiders is great, and disclosure rules and metrics are too easily massaged to tell the story managers want to tell.[73]

The debate over the board power in corporate governance reveals the need for empowerment of stakeholders. Scholars who advocate strong boards with weak constraints, like Bainbridge[74] and Blair and Stout,[75] trust directors and officers to normally make decisions in the best interests of the corporation, even though they disagree as to what those best interests are. These scholars believe that markets, other laws, and norms adequately constrain managers and that weakening board power is thus not necessary and will create more problems than it solves. However, those who want to see corporate law and governance weaken board power think that directors and officers are currently less well-incentivized than this approach suggests and that giving more power to others within the corporation will have more benefits and fewer costs than board advocates believe.[76] But those who want to see more countervailing power posed against the board disagree about who should have that countervailing power. The most common position by far, within American corporate law, advocates empowering shareholders (Lucian Bebchuk is the most prominent advocate of this position).[77] But along with a small band of other scholars (within the United States, at least),[78] I would like to explore empowering other stakeholders.

70. McDonnell, Osofsky, Peel & Foerster, *supra* note 20, at 346–47.

71. *See generally* Jill E. Fisch & Steven Davidoff Solomon, *The "Value" of a Public Benefit Corporation*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert E. Thompson eds., 2021).

72. *Id.* at 299–305.

73. *See generally* McDonnell, *supra* note 13.

74. *See supra* note 27 and accompanying text.

75. *See supra* note 28 and accompanying text.

76. *See generally* Bebchuk, *supra* note 29.

77. *See supra* note 29 and accompanying text.

78. *See supra* note 52 and accompanying text.

IV. GOVERNANCE BY THE STAKEHOLDERS

A core criticism of stakeholder governance by Bebchuk and others is that it would reduce the accountability of managers, leading to both more self-dealing and also less well-run companies, and thereby hurting stakeholders themselves.[79] It is a fair criticism of Blair and Stout's team production theory.[80] But that critique assumes that stakeholder governance operates by limiting accountability mechanisms and thus empowering boards and officers. However, stakeholder governance could instead foster a new kind of accountability, to stakeholders other than shareholders. It could actively empower (some) stakeholders.[81]

This seems radical within the context of American public companies; however, it is not radical elsewhere in the rich world. Germany, with its system of codetermination, is the most obvious example, but much of Europe has elements of the German empowerment of employees—even the UK is dabbling.[82] And even within the United States, we see examples if we look outside the public company context. Consumer, producer, and employee cooperatives are fairly common.[83] Less obviously, many partnerships feature ownership by at least some of the providers of services within a company; with law firms an example presumably familiar to readers of this Article.[84]

Governance by stakeholders is obviously most easily justified on an approach in which stakeholders are given independent weight in defining the appropriate end of corporate governance (the Bodie cell in Table 1). If we really want directors and officers to make decisions that help others beyond shareholders, we should not make them ultimately accountable to shareholders only. Under current power arrangements, directors who explicitly favor interests of others at the expense of shareholders face a serious risk of being either sued (the only group with standing to sue being shareholders) or voted out of office (the only group that votes on directors being shareholders). When push comes to shove, persons subject to those

79. Bebchuk & Tallarita, *supra* note 6, at 164–68.

80. *See generally* Blair & Stout, *supra* note 28.

81. Bebchuk and Tallarita do briefly discuss the possibility of empowering stakeholders to elect directors. They identify various problems with doing so. It would be hard to identify who can vote for some types of stakeholders. If stakeholders have only a minority position, they may have little effective control. Where stakeholders do have some power, it may lead to conflict and higher decision costs. *See* Bebchuk & Tallarita, *supra* note 6, at 161–64. These are real concerns, but if we were to get serious about governance by stakeholders, there are ways to address them. On identifying who can vote, see HAYDEN & BODIE, *supra* note 47, at 161–71. I discuss addressing conflict costs below. *See* discussion *infra* note 119 and accompanying text.

82. HAYDEN & BODIE, *supra* note 30, at 172–83; BRUNER, *supra* note 4, at 181–84.

83. *See generally* Autry & Hall, *supra* note 43.

84. *See generally, e.g.*, Brett H. McDonnell, *Lawyers' and Law Professors' Experience with Worker Governance*, CHI.-KENT L. REV. (forthcoming) (on file with author).

rules will naturally favor shareholders.[85] If that's not what we want, we should change those rules.

But, a limited degree of stakeholder empowerment could be justifiable even for some who see shareholder wealth maximization as the proper goal of corporations (the Ben-Ner cell in Table 1). Often, improving performance is not solely about benefiting employees; it involves enhancing overall company efficiency and profitability, potentially leading to greater shareholder wealth. Just as Bebchuk argues that increasing accountability to shareholders may benefit other stakeholders, so can Ben-Ner and I argue that increasing accountability to stakeholders (especially employees) may benefit shareholders.[86]

Whether the ultimate objective is maximizing shareholder wealth or promoting the interests of a variety of stakeholders, how might empowering stakeholders help companies function more effectively? There are several main reasons to think it could:

- Some stakeholders, especially employees, may have useful information about firm operation and governance that shareholders lack.[87]
- Stakeholders may also have the incentive to use their information to make decisions or appoint representatives so as to push managers to do a better job. Employees in particular have a concentrated interest in their jobs, and hence, to at least some extent, in seeing that the company succeed while also protecting their interests.[88]
- Empowering employees specifically may reduce workforce supervision costs.[89]
- If empowered, employees may tend to care more about behaving responsibly than shareholders do (though this is far from a universal tendency),[90] while empowering multiple categories of stakeholders will help ensure that the interests of each empowered group get at least some attention.
- Empowered stakeholders may feel greater loyalty to a company, inducing them to associate with the company on better terms.[91]

Though I have briefly identified a variety of benefits that could accrue from empowering stakeholders, stakeholder empowerment could create new costs as well. Two are particularly noteworthy. First, empowered

85. *See id.*

86. HAYDEN & BODIE, *supra* note 30, at 155–58; McDonnell, *supra* note 34, at 347–57.

87. McDonnell, *supra* note 34, at 355–56; *see generally* Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871 (2007).

88. McDonnell, *supra* note 34, at 347–57.

89. *Id.* at 355.

90. *Id.* at 361–63.

91. *Id.* at 353–57.

stakeholders could push for decisions that help them at the expense of other stakeholders. For instance, in some cases employees may prefer corporate actions that have negative environmental effects. The Volkswagen environmental scandal is an example, given the company's status as a codetermined organization.[92] That said, there is some evidence suggesting that empowering employees will more often tend to help rather than hurt other stakeholders, including the environment.[93] Second, involving stakeholders beyond shareholders may increase the costs of collective action and decision making by increasing the amount of disagreement and conflict. This could entail both conflict between different groups of stakeholders and also conflict within one stakeholder group. Employees, for instance, vary in their interests along a variety of dimensions: job, age, physical location, gender, race, etc.[94] Consumers may differ too, e.g., conservative and progressive consumers may have very different opinions over the ongoing conflict between Disney and the Governor of Florida.[95] Henry Hansmann has powerfully argued for the importance of such decisional costs in understanding the incidence of different forms of ownership.[96] As we consider how to increase stakeholder empowerment, we shall have to think carefully how that might be done in ways that don't increase decision costs so much that those added costs swamp the benefits from empowerment.

Assuming one believes that the benefits of empowering stakeholders beyond the current level exceeds the costs, it could take a wide variety of forms, along several dimensions.[97] A major dimension is which stakeholders are empowered. As I have argued above and elsewhere, employees are uniquely well-positioned to be empowered. They are more vulnerable to mistreatment, as the persons most directly governed within a corporation;[98] they have strong information; and they have incentives to see that the business run well.[99] Different stakeholders could empower themselves in different ways and to a different extent along the other dimensions of variation. Within a particular group of stakeholders, there may be variation as to who within that group is empowered.[100] A group may be empowered

92. JACK EWING, FASTER, HIGHER, FARTHER: THE VOLKSWAGEN SCANDAL 57 (2017).

93. Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 356–57 (2021).

94. *See*, *e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 89–90 (1996).

95. Jennifer S. Fan, *Woke Capital Revisited*, 46 SEATTLE U. L. REV. 421, 449–50 (2023).

96. *See generally* HANSMANN, *supra* note 94.

97. *See* McDonnell, *supra* note 13, at 107–12. For additional dimensions, *see* BRUNER, *supra* note 4, at 93–110.

98. *See supra* notes 37–39 and accompanying text.

99. *See supra* notes 87–88 and accompanying text.

100. E.g., in a law firm, lawyers are empowered, administrative assistants are not. In a university, faculty are empowered, administrative assistants are not. McDonnell, *supra* note 84, at 10, 14.

to consider a broader or narrower range of issues.[101] A group may vote directly on an issue or may elect representatives.[102] A group may have sole authority to make a decision, may share it with others, may only have a veto power, or may have a merely advisory power.[103] A group may or may not be given standing to sue to enforce fiduciary duties.[104]

V. UNFINISHED WORK (STAKEHOLDER ENGAGEMENT TODAY)

Large public corporations already extensively engage with their stakeholders, although there are serious limits to that engagement. In a recent article, I gathered data from public disclosures by the S&P 100 companies about how they engage with their stakeholders and how stakeholder interests are incorporated within corporate governance arrangements.[105]

Companies engage most extensively, in the most varied ways, with their employees. They use formalized meetings, surveys, and social media, and virtually all companies have employee resource groups for employees sharing various affinity characteristics. A significant minority of companies put employees on DEI (diversity, equity, and inclusion) or safety councils, and a fair number still have a decent number of unionized employees. It makes sense that employees are the most-engaged stakeholders—they are easy to identify, are critical to the functioning of a business, and possess crucial information that can help their companies function better.[106]

The next most engaged groups are customers and nonprofits. Surveys, meetings, and social media are also common for customers as with employees (though somewhat less widespread), while collaborations or partnerships are the leading form of engagement with nonprofits. The next most-engaged groups are suppliers and governmental regulators.[107]

As noted for employees and customers, the most-used forms of engagement (meetings, surveys, social media, employee resource groups) consist largely of stakeholders conveying their opinions to companies,

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101. Representation on the board gives a voice on the broadest range of issues; works councils are an example of a more focused set of issues.

102. Electing directors is the leading example of the latter; Matt Bodie's proposal to allow employees to vote on acquisitions is an example of the former. *See generally* Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871 (2007).

103. Shareholders electing directors in American corporations is an example of the first, shareholders and employees electing directors under codetermination is an example of the second, bond covenants for creditors are an example of the third, and Bodie's proposal for an employee advisory vote on acquisitions is an example of the fourth.

104. BRUNER, *supra* note 4, at 105–06.

105. McDonnell, *supra* note 11.

106. *Id.*

107. *Id.*

with some ensuing dialogue. Outside of unionization, employees do not actually make or participate in making any binding decisions.[108] Thus, what we see in large American corporations is stakeholder engagement, but not stakeholder empowerment or governance.

I also look at how stakeholder interests are currently incorporated within corporate decision making by the leading decisionmakers, directors and officers. Some of the secondary level of stakeholders are represented on corporate boards, namely nonprofit officers, former governmental officials, and academics. Almost all companies designate a board committee to oversee stakeholder/sustainability/ESG matters—a majority designate the nominating and governance committee, while a significant minority have created a special ESG committee (and many companies of both sorts have recently designated the compensation committee to oversee workforce matters).[109] At the officer level, a substantial majority of companies now have the equivalent of both a chief sustainability officer and a chief diversity officer. A majority also have officer-level committees dealing with environmental, DEI, and/or sustainability more generally.[110]

As noted above,[111] such engagement with all the useful information it produces can be easily justified on a shareholder wealth maximization objective function for the corporation. Modest current types of engagement get the low-hanging fruit of benefits from stakeholder input without large decision costs that may come with greater empowerment. Justifying those costs of empowerment may (though it may not!) require giving significant weight to the interests of stakeholders. Still, the spread of stakeholder engagement remains unfinished work. Even this lower level of dialogue is not fully spread among all the S&P 100[112] and is probably less widely spread for smaller corporations. More fundamentally, in distinct contrast to Europe, serious empowerment—that is, the power to actually help make decisions themselves, rather than merely giving their opinions—of any stakeholders, even employees, is rare even at the largest U.S. corporations, with the remnants of unionization as the only way in which any stakeholder group is given any binding authority over company decisions.[113] If we want to give serious weight to the interests of stakeholders, we should empower them. Today's stakeholder engagement is something, but it remains far from governance by the stakeholders.

108. *Id.*
109. *Id.*
110. *Id.*
111. *See supra* note 86 and accompanying text.
112. *See generally* McDonnell, *supra* note 11.
113. *Id.*

VI. A NEW BIRTH OF FREEDOM (STAKEHOLDER GOVERNANCE TOMORROW?)

Should U.S. public companies move beyond the stakeholder engagement that already exists to actively empowering some stakeholders, i.e., giving them authority to help make some corporate decisions, and if so, how (if at all) should law promote such empowerment?

As discussed in Part IV,[114] if one accepts a stakeholder perspective on the ends of corporate governance, then empowering at least some stakeholders with active authority over some decisions makes great sense. One should not simply trust directors and officers to make the best decisions for stakeholders, and as argued in Part III,[115] purpose, duty, and disclosure are weak tools for constraining directors and officers. Though one can make a case that empowering shareholders will also help other stakeholders, when push comes to shove and the interests of shareholders and stakeholders conflict, one should expect that managers who are accountable to shareholders only will focus on the interests of shareholders. Indeed, this is one of Bainbridge's and Strine's most powerful arguments for the shareholder wealth maximization norms—it fits with our governance system, in which only shareholders can elect directors or bring duty suits.[116]

As also discussed in Part IV,[117] even on a shareholder wealth maximization understanding of the ends of corporate law, extending limited authority to some stakeholders, especially employees, can with some plausibility be justified as increasing corporate productivity for all. However, that is a weaker and iffier case for empowering stakeholders than an argument based on protecting stakeholder interests as the proper goal of corporations. Perhaps the limited stakeholder engagement of today is nearing as far as one may want to go under a shareholder wealth maximization understanding of corporate purpose. But if we believe in a stakeholder approach to corporate purpose, we should want to move further towards stakeholder empowerment. On a stakeholder understanding of purpose, the benefits of better satisfying stakeholder interests are more likely to justify higher decision-making costs, and we may be fine with possible losses to shareholders if they are outweighed by gains to other stakeholders.

114. *See supra* note 85 and accompanying text.

115. *See supra* notes 75–79 and accompanying text.

116. 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, 784 (2015). Though note that Strine is quite uncomfortable with the effects of this system—he recognizes that the shareholder wealth maximization norm fits within the structure of our current law but suggests many ways that law could and should be changed. *See generally* Brett McDonnell, *Doctor Leo and Justice Strine*, 24 U. PENN. J. BUS. L. 855 (2022).

117. *See supra* note 86 and accompanying text.

One must be cautious though. As noted above,[118] empowering stakeholders comes with costs as well as benefits.[119] Empowered stakeholders may make decisions that benefit themselves at the expense of others. The costs of making decisions will increase with more heterogeneity leading to more disagreement. How far one goes, and how one designs institutions, should take these costs as well as the many benefits of stakeholder empowerment into account.

Costs can be limited in a variety of ways.[120] One might empower only some stakeholder categories, and even within one category of stakeholders only some of the persons within that category. The voting power of a group may be limited so that it cannot do too much to obstruct. A stakeholder group can be given authority over only a limited number of decisions like those where the likely benefits most exceed the likely costs. Managerial leadership, education of stakeholders, and the development of supporting practices and norms can all help to limit the costs of stakeholder empowerment as well.

Sorting across companies may also limit decision costs, though how far one can feasibly and desirably go in that direction is debatable. As more and more of daily life becomes subject to political polarization in values, we might find that employees, consumers, and shareholders sort themselves out among conservative and progressive companies. That would significantly reduce some potential costs of creating political fights within companies. This kind of sorting is an important benefit of the American system of delegating much social activism to private nonprofits rather than governments. However, such sorting is harder to pull off among for-profits, many of which are focused on providing goods and services that inherently have little political valence. It is especially harder for large public companies appealing to a wide base of customers, employees, and shareholders; smaller private companies can more easily focus on homogeneous segments of each category of stakeholder. A concern about such sorting, though, is that too much politicized sorting across companies could further break down the minimum of communal spirit needed to make a society function.

What, then, might a plausible and effective version of stakeholder empowerment look like? The best case for empowering stakeholders focuses on employees, so let us consider them first. Matt Bodie and I have discussed three kinds of employee governance we might want to legally encourage: board representation, works councils, and unions.[121] Board

118. *See* HANSMANN, *supra* 94 and accompanying text.

119. For extensive discussion of this point, see generally *id.*

120. *See id.* at 92–97.

121. *See generally* McDonnell & Bodie, *supra* note 52.

representation would allow employees to elect some fraction of the board of directors. It would thus give employees shared control (with shareholders, who elect the remaining directors) over the widest range of decisions, given the board as the central locus of authority within corporate law. How much of that authority employees would have, vis-à-vis shareholders, would depend upon what fraction of the board they elect. Concern about decision-making costs may dictate keeping the employee share of board positions well short of a majority.[122] A second option is works councils, which are a key element of codetermination in Germany. Works councils are joint employee-management committees with control over designated elements of the workplace.[123] They thus involve authority over a more limited range of decisions than board representation and are more focused on the decisions for which employees have both most concern and most information. Matters which might involve high decision costs given employee involvement (e.g., setting wages) could be left beyond the scope of such councils. A final option is unions, in which an employee-chosen organization contractually bargains with a company over wages and other conditions of employment. Along a related dimension, employees could be given standing to sue to enforce fiduciary duties.[124] A few countries have begun experimenting with this.[125] Indeed, even in the U.S., union pension funds play a significant role as plaintiffs in corporate and securities lawsuits.[126]

The case for empowering other stakeholders is weaker, and hence their empowerment, if attempted at all, should generally go less far. Other stakeholders are typically less vulnerable to opportunism than employees.[127] They do not have the same degree of useful information concerning firm operations.[128] Many other stakeholder groups are more dispersed than employees with lower individual stakes in what a company does, making them harder to organize and involve.[129] However, some degree of empowerment for some other stakeholders may make sense. Customers are a key group with a significant interest in corporate decisions whose loyalty is important to corporate success. Suppliers could also be a target for some

122. *See, e.g.*, HANSMANN, *supra* note 42, at 111. On the other hand, too few employee directors may result in no effective empowerment. Matters like this should and will get more attention should serious stakeholder empowerment ever become a live option in the U.S. Other countries, most notably Germany, already have experience on which we can draw in answering such questions.

123. Hayden & Bodie, *supra* note 52, at 173–74.

124. BRUNER, *supra* note 4, at 105–07.

125. *Id.*

126. C.S. Agnes Cheng, Henry He Huang, Yinghua Li & Gerald Lobo, *Institutional Monitoring Through Shareholder Litigation*, 95 J. FIN. ECON. 356, 358 (2010).

127. *See supra* notes 4741–43, and accompanying text.

128. *See supra* note 87, and accompanying text.

129. HAYDEN & BODIE, *supra* note 30, at 170. *See generally* Hayden & Bodie, *supra* note 8.

degree of empowerment. Nonprofit groups representing important community interests are a third potential group, particularly nonprofits focused on environmental issues.

How could these stakeholders be empowered without having them directly elect director representatives? Companies could form councils composed of one or several of these groups of stakeholders. These councils could at first be simply advisory—indeed, one already does occasionally see such stakeholder councils, though they are less common than employee councils.[130] But the councils could be expanded to be given some degree of authority over issues of particular concern to the represented stakeholders. That could involve, for instance, a power to veto or at least delay certain kinds of decisions. A different way of empowering stakeholder councils would be to allow them to nominate director candidates to the board nominating committee, which would then decide whether to nominate them for shareholders to vote on. More power could be given by allowing stakeholder councils to elect directors themselves.

Would I require any of these forms of employee or other stakeholder empowerment? No. The costs and benefits are uncertain and may well vary significantly between companies, so that forms of representation which work well for one company may fare poorly in another. But because stakeholder representation has social benefits that companies may not fully internalize in their own decision-making, there's a good case for encouraging, though not mandating, the adoption of forms of stakeholder empowering.[131] Companies which adopt preferred forms of empowerment could be given a tax break. Or, they could be given better treatment under a relevant area of regulation. Matt Bodie and I have argued for ways that companies adopting employee governance could gain advantages under employment law.[132] Similar schemes can be imagined for other stakeholders in other areas of law—environmental advocacy groups and environmental law, for instance.

CONCLUSION

In this Berle XIV Symposium, we have come to dedicate a portion of our scholarship to a man who a century ago helped shape our politics and economy and our understanding of corporations within that political economy.[133] In the century since Berle and Dodd fought in the fields of the Harvard Law Review, the terminology has evolved (corporate social responsibility, sustainability, ESG, stakeholder governance, etc., etc.), but

130. McDonnell, *Stakeholder Engagement*, *supra* note 11, at 34–35.
131. McDonnell, *supra* note 11, at 53–54.
132. *See generally* McDonnell & Bodie, *supra* note 52.
133. *See* Bratton & Wachter, *supra* note 35, at 100–01.

the fundamental terms have remained the same.[134] We take as a given that corporate power is allocated between shareholders on one side and the board and the officers it selects and oversees on the other side. We then argue over the best way to allocate that power among them, and what they should strive to do with that power. Although for most of this century of debate, the majority position has been that those with power should seek to maximize long term shareholder wealth, in recent years many have argued that we should broaden our understanding of corporate purpose to include promoting the interests of various corporate stakeholders. But those advocating this position have mostly limited themselves to pleading to whomever is in power, be it directors or shareholders, to please, pretty please, also concern themselves with others besides shareholders.

Stakeholder advocates should move beyond pleading to shareholders or to the directors elected by shareholders. To protect stakeholders and the public interest, we should give real power to at least some other stakeholders beyond shareholders. This already happens in many parts of the world through codetermination's empowerment of employees. I have shown the glimmerings of true stakeholder governance within the various forms of stakeholder engagement commonly used by large U.S. corporations today.[135] However, American stakeholder engagement is limited to soliciting (and on occasion responding to) the opinions of employees, customers, suppliers, and others. True stakeholder governance would involve these groups in actively making corporate decisions. I have suggested various ways we could do this.[136] The focus should be on employees, who could be empowered via board representation, work councils, and unions. Other stakeholders could be less fully empowered through councils—advisory at first but potentially given power to nominate or even elect directors. Through reforms such as these, we can ensure that governance of the stakeholders, by the stakeholders, and for the stakeholders, shall flourish on the earth.

134. *Supra* notes 1–6 and accompanying text.
135. *See supra* Part V.
136. *See supra* Part VI.