Article

A Democratic Participation Model for Corporate Governance

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Corporate law is in the grip of a fundamental conundrum: whether corporations should seek only to serve shareholders or instead attend to the interests of all stakeholders. The doctrine of shareholder primacy, which focuses the corporation's attention on the goal of maximizing shareholder wealth, has been startingly successful, capturing the theory and practice of corporate governance for roughly fifty years. But recently the costs of this monomaniacal focus on the financial interests of one set of corporate participants have become clearer. At a time when the original reasons for restricting the corporate franchise to shareholders have been shown to rest on faulty assumptions and the misapplication of standard economic theory, shareholder primacy's fingerprints have been discovered all over potentially catastrophic problems such as dramatically rising income and economic inequality,

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accelerating climate change, and the unleashing of vast sums of money upon politics. Stakeholderism promises a better way—a focus on meeting the needs of all stakeholders in the corporation through a balanced approach to governance. But stakeholder theorists have largely offered only hortatory suggestions for corporate boards, unable to develop concrete reforms to implement their concepts. So we now find ourselves at a stalemate: Shareholder primacy improperly orients the purpose of the corporation around maximizing shareholder wealth and power, while stakeholder theory has failed to develop a workable model of governance that would put its ideas into practice.

This Article breaks the corporate governance stalemate by presenting a new model of corporate governance based on the theory of democratic participation. The model supports the extension of the corporate franchise beyond shareholders to other stakeholders, but only when governance rights can accurately capture the preferences of those with sufficiently strong interests in a manageable way. We explain the principles of the model and apply it to a variety of stakeholders with potential governance claims: shareholders, employees, creditors, consumers, and communities, among others. Assessing their interests, the accuracy of markers for those interests, and the manageability of those markers, we show how a variety of firm participants could be integrated into the governing structure of the corporation. This new model would allow appropriate stakeholders to define and effectuate their own interests through governance and would help ensure that the corporate purpose debate results in something more than empty rhetoric.

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INTRODUCTION

There has been a remarkable change in the culture of corporate governance. For more than half a century, starting in popular culture with the publication of Milton Friedman's paean to shareholder wealth maximization,[1] the idea that the corporation was designed to serve shareholders alone dominated business practices, law, and academia. Signs of the preeminence of shareholder primacy could be seen everywhere, from the Delaware Court of Chancery's rulings[2] to the confident decrees of corporate law eminences.[3] As the editor-in-chief of the *Harvard Business Review* reflected in 2017, "It's pretty much a given in modern capitalism that managers' top priority is maximizing value for shareholders."[4]

But then things shifted, and shifted quickly. In his 2018 annual letter to fellow corporate executives, BlackRock's Larry Fink argued that each company had to "not only deliver financial performance, but also show how it makes a positive contribution to society."[5] He directed companies to "publicly articulate [their] strategic framework for long-term value creation."[6] In 2019, the Business Roundtable followed with its "Statement on the

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1. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (§ SM), at 17 ("That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.").

2. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (invalidating "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").

3. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."); *see also* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 171 (2012) ("[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.").

4. Adi Ignatius, *Are We Giving Shareholders Too Much Power?*, HARV. BUS. REV., May–June 2017, at 8.

5. Larry Fink, *A Sense of Purpose*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose [https://perma.cc/Q7C4-G8Y9].

6. *Id.*

Purpose of a Corporation, which supersedes previous Business Roundtable statements and more accurately reflects our commitment to a free market economy that serves all Americans."[7] Signed by the CEOs of 181 influential American companies, it was essentially a rejection of the shareholder primacy norm in favor of the idea that the corporation should serve broader societal purposes.[8] These highly visible statements sit atop a deeper iceberg of support for the idea that corporate purpose beyond mere profitability is essential to corporate success.[9]

As the conventional wisdom shifts away from a straitjacketed insistence on shareholder primacy, it is important to note what has not changed. Serious changes to the basic governance structure of the corporation are not on the table. The Business Roundtable is not suggesting that shareholders should lose their exclusive voting rights, nor is Larry Fink exploring alternative corporate electorates. Companies are identifying their newfound purposes wholly within existing corporate power structures. To the extent there is any movement towards structural change, it shows up in efforts to require much needed gender or racial diversity on corporate boards—not changes as to who gets to choose those board members.[10]

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7. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment [https://perma.cc/L4UR-7AMR]; *One Year Later: Purpose of a Corporation*, BUS. ROUNDTABLE, https://purpose.businessroundtable.org [https://perma.cc/TJH4-PN9X].

8. *See* sources cited *supra* note 7.

9. *See, e.g.*, Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309 (2021) ("Purpose is the hot topic in corporate governance. Not only are commentators demanding that corporations formally articulate a purpose, they are insisting that corporate purpose encompass the interests of nonshareholder stakeholders or society more generally.").

10. *See, e.g.*, CAL. CORP. CODE § 301.3(b) (West 2024) (requiring one or more female directors for boards with four or fewer directors, two or more female directors for boards with five directors, and three or more female directors for boards with six or more directors). Prior to 2019, women only held 17% of California director positions, and almost 30% of firms headquartered in California had no female directors. *See* Margeaux Bergman, *How the "Exception" Becomes the Standard*, 17 HASTINGS BUS. L.J. 405, 418 (2021) (elaborating further on board statistics pre-2019); *see also* Brian Melley, *Judge Says California Law Requiring Women on Corporate Boards Is Unconstitutional*, PBS.ORG (May 16, 2022), https://www.pbs.org/newshour/politics/judge-says-california-law-requiring-women-on-corporate-boards-is-unconstitutional [https://perma.cc/ZQC4-BR6Z] (same). A federal circuit court held that the act requires shareholders to engage in sex discrimination. Meland v. Weber, 2 F.4th 838, 849 (9th

The advancement of corporate governance as a field of public inquiry has been stymied by the stranglehold of shareholder primacy. But so too have the failures of stakeholderism to develop an alternative model—one that would develop the purposes and principles of stakeholder theory into an alternative model for a corporation's structure. The dependence of stakeholder theorists on the status quo—continuing shareholders' control over the board through their exclusive voting rights—has left the corporate governance community ill-equipped to consider other options. Both sides are stuck in past debates that have never been resolved, and neither side has shown much willingness to push the ball forward in a meaningful way.

In this Article, we develop a new model of corporate governance based on the theory of democratic participation. The theory starts with the idea that firms should take account of the preferences of those constituents with a strong interest in corporate affairs, and that governance rights should be extended to those for whom we have accurate and manageable markers of that interest. In Part I, we assess the current stalemate in the debate between shareholder primacy and stakeholder theory: shareholder primacy improperly orients the corporation around maximizing shareholder wealth, while stakeholder theory has failed to develop a workable model of governance that would put its ideas into practice. In Part II, we develop a novel approach to the structure of corporate governance based on democratic participation, providing stakeholders with tangible governance power. We compare how different sets of stakeholders might be better positioned to participate in governance, looking to shareholders, workers, social media users, and long-term customers, among others. We conclude that there are grounds to support the inclusion of additional stakeholders beyond shareholders within the structure of corporate governance while also recognizing that not all stakeholders meet the criteria.

Cir. 2021) ("Because [plaintiff shareholder] has plausibly alleged that SB 826 requires or encourages him to discriminate based on sex, [he] has adequately alleged an injury in fact, the only Article III standing element at issue, and thus has Article III standing to challenge SB 826."). A state court struck down the law as violating equal protection under the California Constitution. *See generally* Verdict, Crest v. Padilla, No. 19STCV27561 (Cal. Super. Ct. May 13, 2022), https://s.wsj.net/public/resources/documents/Crest-et-al-v-Padilla-05-13-2022.pdf [https://perma.cc/D5T2-DLAM].

I. THE STALEMATE BETWEEN SHAREHOLDER PRIMACY AND STAKEHOLDERISM

A. CORPORATE LAW, CULTURE, AND THEORY

Academics have long debated whether the law compels shareholder primacy as a descriptive matter. Stakeholder advocates, arguing that corporate law does not require shareholder wealth maximization, have pointed to the broad discretion granted to directors and officers in carrying out their duties.[11] To the extent that the fiduciary duty of care might seem to impose a threshold of concern for business success, the business judgment rule counters that by protecting decisions made in good faith with a rational basis against subsequent scrutiny.[12] The duties of loyalty and good faith provide fairly circumscribed restrictions to prevent self-dealing and chicanery—restrictions that would be in place no matter what the corporation's "purpose" might be.[13] As a result, argue stakeholderists, corporate leaders have a fair amount of discretion to make everyday business decisions free of scrutiny as to their ultimate aims.[14]

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11. *See, e.g.*, Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165–66 (2008) (discussing how the case overstates the legal foundations for shareholder primacy).

12. For discussions of Delaware's version of the rule, see Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993), and Aronson v. Lewis, 473 A.2d 805 (Del. 1984). *See also* MODEL BUS. CORP. ACT § 8.31 (AM. BAR ASS'N 2024); LYNN M. LOPUCKI & ANDREW VERSTEIN, BUSINESS ASSOCIATIONS: A SYSTEMS APPROACH 334–38 (2021) (explaining the rule in further detail).

13. *See* Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 488 (2004) ("Good faith based liability, then, moves the bar from negligent behavior to deliberately indifferent, egregious, subversive, or knowing behavior, and thereby raises issues related to the motives of the actors."); *cf.* Julian Velasco, *The Diminishing Duty of Loyalty*, 75 WASH. & LEE L. REV. 1035, 1038 (2018) ("[T]he duty of loyalty is not enforced as rigorously as is commonly believed.").

14. Fisch & Soloman, *supra* note 9, at 1312 ("[U]nder existing law, both the mutability of the corporate charter and the flexibility of the business judgment rule give corporate managers ample discretion to consider stakeholder and societal interests irrespective of a broad reformulation of corporate purpose."). In fact, many commentators believe that the shareholder primacy case of Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919), would have come out differently if Henry Ford had been willing to frame his decisions in terms of long-term shareholder value. *See, e.g.*, STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 51 (2023) ("Henry Ford likely would have won [his] case if he had been willing to embrace profit maximization as the

Despite the relative freedom provided to directors and officers, there is little question that the current structure of corporate governance decisively empowers shareholder primacy.[15] The statutory structure of corporate governance swings the playing field decisively in shareholders' favor. Under state corporate law statutes, shareholders and only shareholders vote to determine the board of directors, which is the ultimate seat of power within the corporation.[16] Although states allow terms of up to three years under a corporation's charter, the default term for corporate directors is one year, and shareholders can call a special meeting to select new directors under some circumstances.[17] Shareholders and only shareholders also have the additional mechanism of holding the board accountable for violating their fiduciary duties through derivative suits.[18] And in the 2010 *eBay Domestic Holdings, Inc. v. Newmark* decision, Chancellor William Chandler reaffirmed that those fiduciary duties require the board "to promote the value of the corporation for the benefit of its stockholders"—echoing the original *Dodge v. Ford Co.* analysis.[19]

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motivation for his decisions."); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 183 (2008) (citing to the role of motive in making Ford's actions improper); *see generally* Stout, *supra* note 11 (arguing that the case is misleading as to the state of the law).

15. Edward B. Rock, *Business Purpose and the Objective of the Corporation* ("While there is no provision of the Delaware corporation law that explicitly states this, there are at least three main arguments for why this 'shareholder primacy' principle is the best description of the characteristics of the corporate form in traditional jurisdictions: the statutory structure; the case law; and the history of reform efforts in and out of Delaware."), *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 27, 33 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

16. *See, e.g.*, DEL. CODE ANN. tit. 8 § 212 (2023–24). State corporate statutes require these meetings to be held at least once a year, but additional meetings can be called under special circumstances that vary by state. STEPHEN M. BAINBRIDGE, CORPORATE LAW 233 (2d ed. 2009) (describing how in Delaware, only the board can call a special meeting, while other states allow a specified percentage of shareholders to call a meeting without board consent).

17. BAINBRIDGE, *supra* note 16, at 238.

18. *See, e.g.*, DEL. CODE ANN. tit. 8 § 327 (2023–24) (specifying that, in a complaint, a plaintiff must aver to having been a stockholder at the time of the transaction at issue).

19. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those

Shareholder governance also extends beyond control of the board of directors. Shareholders have voting rights to amend the corporation's charter as well as its bylaws.[20] Transformative corporate decisions, such as mergers, certain acquisitions, and dissolution, also require shareholder approval. The board proposes these matters, which are then voted upon by shareholders.[21] Under Delaware law, the board has a duty to get shareholders the best price for the corporation when it is being sold.[22] Under federal law, shareholders in publicly-held companies can make nonbinding proposals on the board's proxy ballot that are then voted on by the shareholder electorate.[23] Former Delaware Chief Justice Leo Strine succinctly summarized: "In the corporate republic, no constituency other than stockholders is given any power."[24]

The only real exception to this regime of shareholder primacy is notable for its limited scope and its absence of any real enforcement mechanism. A majority of states (not including Delaware) have provisions that permit directors to take the needs of all corporate constituencies into account when making certain decisions.[25] The purpose of these constituency statutes is to give directors the freedom to consider the impact of board decisions

standards include acting to promote the value of the corporation for the benefit of its stockholders.").

20. Generally, the board of directors must first propose an amendment to the charter, and then the shareholders must approve the amendment. *See, e.g.*, MODEL BUS. CORP. ACT § 10.03 (AM. BAR ASS'N 2016). In Delaware, the amendment must be approved by a majority of all shares outstanding, rather than just a majority of shares voting. DEL. CODE ANN. tit. 8, § 242(b)(1) (2023–24).

21. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 219–25 (9th ed. 2004).

22. *See generally* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184–85 (Del. 1986) (reasoning that boards are to act as auctioneers getting the best price possible in a sale).

23. 17 C.F.R. § 240.14a-8 (2024).

24. 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, 766 (2015); *see also* Strine, *supra* note 3, at 135–36 ("[T]he continued failure of our societies to be clear-eyed about the role of the for-profit corporation endangers the public interest.").

25. BAINBRIDGE, *supra* note 14, at 70 (reporting that thirty states have constituency statutes).

on stakeholders other than shareholders.[26] However, the statutory provisions merely provide authorization to consider these broader sets of needs; they provide no sanction for failing to do so, and directors have no accountability to any of the stakeholders for failure to consider the decision's impact on their group.[27] This lack of accountability has always been a sticking point for stakeholder accounts of corporate law.[28]

The all-encompassing nature of the shareholder primacy norm was captured by Dorothy Lund and Elizabeth Pollman in their influential essay *The Corporate Governance Machine*.[29] Lund and Pollman meticulously explain how the law, institutions, and culture of corporate governance are all centered around shareholders.[30] Initially designed to constrain corporate power on behalf of the public, the "machine" has instead been brought to bear "in one direction—toward advancing shareholder interests."[31] Beyond Delaware corporate law, they describe how federal laws such as Sarbanes-Oxley and Dodd-Frank, the Securities and Exchange Commission, and the Department of Labor's regulatory oversight of retirement benefits promote shareholder wealth maximization.[32] And a wide swath

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26. Some constituency statutes apply only to change-in-control transactions, while others apply more broadly to all board decisions. New York, for example, provides that when considering a change or potential change in the control of the corporation, a director "shall be entitled to consider" the effects that the corporation's actions may have upon the corporation's various stakeholders, including current employees, retired employees, customers, creditors, and the communities in which it does business. N.Y. BUS. CORP. LAW § 717(b) (McKinney 2024).

27. *See, e.g.*, *id.* ("Nothing in this paragraph shall create any duties owed by any director to any person or entity to consider or afford any particular weight to any of the foregoing or abrogate any duty of the directors, either statutory or recognized by common law or court decisions.").

28. *See* David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies* ("However attractive [the constituency] model might be in theory, communitarian scholars have yet to show persuasively that it could function effectively in practice."), *in* PROGRESSIVE CORPORATE LAW 1, 30 (Lawrence E. Mitchell ed., 1995); Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 70 (1991) (noting that constituency statutes provide "very little" actual protection to employees and other constituents).

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

30. *Id.* at 2565–66.

31. *Id.* at 2578.

32. *See id.* at 2578–88.

of institutional players—investors, investor associations, industry associations, proxy advisors, stock exchanges, stock indices, credit ratings agencies, business schools, the media, and even the political culture—all consider corporate governance solely in terms of the benefits to shareholders, setting the terms and the limits of the debate.[33] Even if Delaware courts were to completely upend the holdings of the *Dodge v. Ford* and *eBay* cases, little else would change given the ongoing operations of the rest of the machine.[34] Shareholder primacy has become so "enmeshed in our cultural and institutional understanding of good governance" that it is now "difficult to move to another paradigm—one that gives power to other stakeholders."[35]

The final bolt on the shareholder-empowerment machine—or its grease, perhaps—is shareholder control over political donations. Although corporate directors and officers make the individual choices about donations largely under the protection of the business judgment rule,[36] these corporate officials are immersed in shareholder primacy. And they direct enormous amounts of funds towards federal, state, and local politicians.[37]

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33. *Id.* at 2588–602.

34. Vice Chancellor Laster recently rejected the idea that shareholder wealth maximization should be directed towards portfolios, rather than individual firms. McRitchie v. Zuckerberg, 315 A.3d 518, 564 (Del. Ch. 2024) ("The fiduciary duties owed by directors of a Delaware corporation require the directors to seek to maximize the value of the corporation over the long-term for the benefit of the stockholders as residual claimants to the value created by the specific firm that the directors serve. It does not mean striving to maximize value for diversified investors who own equity investments across all firms.").

35. Lund & Pollman, *supra* note 29, at 2630–31.

36. *See, e.g.*, Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L.J. 361, 368 (2002) (stating that a corporation's board may decide to make a political donation on behalf of the corporation without consulting shareholders); Joseph K. Leahy, *Are Corporate Super PAC Contributions Waste or Self-Dealing? A Closer Look*, 79 MO. L. REV. 283, 286–87 (2014) ("Just as with other ordinary business decisions, corporation law provides no mechanism for shareholders to play a direct role in deciding whether or not a corporation makes political contributions.").

37. *See, e.g.*, Rick Claypool, *Big Crypto, Big Spending: Cryptocurrency Corporations Are Exploiting Citizens United, Spending an Unprecedented $119 Million on Federal Elections*, PUBLIC CITIZEN (Aug. 21, 2024), https://www.citizen.org/article/big-crypto-big-spending-2024 [https://perma.cc/42LX-34AL] (describing donation practices of cryptocurrency corporations). Much of the money donated by individuals comes from corporate-generated wealth. *See* Clara Ence Morse et al., *Meet the Megadonors Pumping over $2.5 Billion into the Election*,

The greater freedom to spend opened up by the Supreme Court in *Citizens United*[38] has coincided with the apex of shareholder power and ideology. This keeps the machine in place and even builds upon it, as corporations have exercised their political might to diminish regulatory regimes to protect workers, communities, and the environment, and to foster the pursuit of profits on behalf of their shareholders.[39] During the last twenty years, even labor had thrown in its lot with shareholder democracy.[40]

While the legal landscape has changed little, however, the economic, social, and cultural tectonic plates have slowly been moving apart. Corporate leaders, institutional investors, and influential agencies have all signaled their support for changing from shareholder wealth maximization to a more balanced stakeholder model. As discussed above, the biggest drivers in the debate have been BlackRock's Larry Fink and the Business Roundtable, whose statements in support of stakeholderism

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WASH. POST (Oct. 28, 2024), https://www.washingtonpost.com/elections/interactive/2024/biggest-campaign-donors-election-2024 [https://perma.cc/NN8Z-74D7] (discussing individual donors); *Who Are the Biggest Organization Donors?*, OPENSECRETS, https://www.opensecrets.org/elections-overview/top-organizations [https://perma.cc/G445-8293] (listing the biggest corporate donors based on donations from employees of the organization).

38. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (permitting greater freedom in political donations to independent groups).

39. *See* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 383 (2015) ("Because *Citizens United* permits the corporation to act directly to influence who is elected to office by using the huge resources in corporate treasuries, it is likely as a general matter to make candidates of all persuasions more beholden to corporate desires."); *see also* Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending is Bad Business: How to Minimize the Risks and Focus on What Counts*, HARV. BUS. REV., Jan.–Feb. 2022, at 130 (discussing the effect of Citizens United on corporate political spending and the contrast between corporations' public statements versus their political donations).

40. *See* SANFORD M. JACOBY, LABOR IN THE AGE OF FINANCE: PENSIONS, POLITICS, AND CORPORATIONS FROM DEINDUSTRIALIZATION TO DODD-FRANK 166 (2021) ("Shareholder democracy was the banner under which union investors, joined by others, had demanded proxy access and say on pay."). *See generally* DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (2018) (discussing the more active role of union pension funds in corporate governance).

shifted the governing norms away from settled assumptions.[41] But many more companies, investment funds, and other financial players have indicated their support for a stakeholder-oriented approach.[42] This push is driven in part by the changing interests of millennial investors, who put more of a premium on concerns beyond share prices and dividends.[43]

This changing climate is reflected in recent scholarship, which has turned its attention towards stakeholderism. Recent work has centered around the stakeholder model of governance and its challenge to stakeholder primacy.[44] The European Corporate Governance Institute, long a stalwart of the shareholder primacy approach, has created a new "Responsible Capitalism" initiative, recognizing that "[t]he issues of sustainability, inequality and exclusion create new challenges for capitalism and

41. *See* Fink, *supra* note 5; *Statement on the Purpose of a Corporation*, *supra* note 7.

42. *See* Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1172–74 (2022) (discussing institutional investors such as State Street and Vanguard, as well as activist investors such as ValueAct Capital, JANA Partners, and Blue Harbor); Mark DesJardine & Wei Shi, *Managing Shareholders in the Age of Stakeholder Capitalism*, HARV. BUS. REV. (Aug. 29, 2022), https://hbr.org/2022/08/managing-shareholders-in-the-age-of-stakeholder-capitalism [https://perma.cc/A5AZ-9K2C] ("Steadily rising societal expectations are pushing companies to put their stakeholders first, and shareholders second . . . .").

43. *See* Michal 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, 1250 (2020) ("The literature and market research unanimously concludes that, compared to prior generations, millennials are less interested in investment returns and more interested in their investments reflecting their social values."); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 53 (2021) ("[W]ireless generations of investors, *wireless investors*, are extending their attention to voting and corporate governance engagement.").

44. For a small sampling, see Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 49 (2021) ("Stakeholder capitalism dominates the public debate about the future of the corporation."); Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction*, 106 CORNELL L. REV. 1859, 1860 (2021) (exploring a critique on stakeholderism); Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535, 537 (2024) ("[C]ore developing jurisdictions such as Brazil, India, and South Africa had embraced novel, and often more aggressive, legal strategies to protect stakeholder interests.").

corporate governance."[45] Past icons of Delaware corporate law jurisprudence now sound more kumbaya than capitalist.[46]

We are thus faced with a conflict between two opposing camps: shareholder primacy, which is still ensconced in corporate law and has a steady set of supporters in the academic, financial, legal, and government sectors, and the burgeoning norms of stakeholderism, largely expressed in the culture of corporate governance and business leadership.[47] Each theory has critical flaws: Shareholder primacy centers itself around a purpose that has been shown to be deeply flawed, while stakeholderism has failed to develop a governance structure for better meeting its stated purpose. As a result, the dialogue within corporate law scholarship has taken on a maddeningly recursive property: a *pas de deux* between partners repeating the same moves to different dances.

B. SHAREHOLDER PRIMACY: A FAILURE OF PURPOSE

Shareholder primacy theorists claim that the corporation is best structured to advance the interests of all stakeholders if it single-mindedly pursues shareholder interests by maximizing profits; shareholders should therefore be given control over the

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45. *Responsible Capitalism*, EUROPEAN CORP. GOVERNANCE INST., https://ecgi.global/content/ecgi-responsible-capitalism-initiative [https://perma.cc/Y2YL-WTVH].

46. *See* Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 399 (2021) ("Isn't it time for all societally important business entities—not just public companies, but large private companies and money management firms as well—to have to use their power in a socially responsible manner?"). Of course, not all are convinced. *See* Richard A. Epstein, *The Excessive Ambitions of Stakeholder Ideology*, 77 BUS. LAW. 755, 757 (2022) ("I see no reason to abandon the traditional shareholder primacy rule, which has been responsible for the accumulation of huge wealth in the United States, to the benefit not only of corporate shareholders but, derivatively, to the other constituencies with whom corporations interact—employees, suppliers, customers, and the larger social fabric."); Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 170 (2021) (discussing how corporations will likely seek to undermine potential shifts); Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model?*, 77 BUS. LAW. 773 (2022) (arguing that the stakeholder model is indeterminate).

47. *See* Fairfax, *supra* note 42, at 1167 (discussing the history of the debate between shareholder primacy and stakeholderism).

firm in order to effectuate this purpose.[48] Shareholder primacy contends that the interests of other stakeholders, such as employees or suppliers or those affected by the corporation's environmental decisions, can best be taken care of by contract or regulation.[49] Because shareholders are the residual claimants—only entitled to dividends after the corporation has taken care of its legal responsibilities to other stakeholders—maximizing the wealth generated for shareholders, under the theory, maximizes the utility for all stakeholders.

The idea that enriching shareholders is the sole proper corporate purpose has always seemed somewhat unsavory.[50] In its earliest classic framing by Adolf Berle, shareholder primacy was less about enriching shareholders and more about making corporate managers accountable.[51] Willing to be more provocative, Milton Friedman popularized the idea that the social responsibility of business is to increase its profits,[52] but Gordon Gekko's

48. The theoretical foundations for this position were most prominently articulated by Frank Easterbrook and Daniel Fischel. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). A more modern defense of the basic position may be found in Stephen Bainbridge's recent book. *See generally* BAINBRIDGE, *supra* note 14.

49. See sources cited, *supra* note 48.

50. *See, e.g.*, JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 5 (2004) (describing corporations as "pathological institutions" with a relentless legal mandate to seek their own self-interest at the expense of society); LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 47 (2001) (outlining how corporations model liberalism's excessive focus on self-interest without the personal moral framework restraining human actors); Ian B. Lee, *Is There a Cure for Corporate "Psychopathy"?*, 42 AM. BUS. L.J. 65, 65 (2005) ("This article explores . . . indictments of corporate law that suggest that the constitutive law of corporations is responsible for a monstrous flaw in the institutional character of the Anglo-American public corporation—specifically, its exclusive focus on profits.").

51. A.A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) (arguing not to "abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else"); *id.* at 1372 ("Unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe; and in any case it hardly affords the soundest base on which to construct the economic commonwealth which industrialism seems to require.").

52. Friedman, *supra* note 1, at 126 (claiming the only social responsibility of businesses is to "increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud").

"greed is good" was punchier and more apt.[53] Although the culture soon moved on from 1980s contrivances such as jazzercise and Cabbage Patch Kids,[54] shareholder wealth maximization became even more ingrained. The preferred framing became the idea that shareholders were the most vulnerable of corporate stakeholders, and therefore needed the most protection,[55] a view that was more palatable when shareholders were more diffuse, disorganized, and subject to the predations of managers. But with corporate law reforms over the last thirty years all geared towards shareholder empowerment,[56] shareholder primacy can hardly be seen as a fight for the underdog. Shareholders are significantly richer, whiter, and older than their nonshareholding counterparts.[57] It seems morally antithetical to our (nominal) societal values to prioritize wealth generation for this group at the expense of the rest of society.[58]

53. WALL STREET (20th Century Fox 1987).

54. *See* Jessica Winter, *The Droll Capitalist Parable of Cabbage Patch Kids*, NEW YORKER (Nov. 20, 2023), https://www.newyorker.com/culture/cultural-comment/the-droll-capitalist-parable-of-cabbage-patch-kids [https://perma.cc/8436-U9EV] (noting how the "Cabbage Patch Kids hysteria" served as a catalyst for the future Black Friday retail crazes).

55. EASTERBROOK & FISCHEL, *supra* note 48, at 68–69; HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 56 (1996) (arguing that shareholders who supply long-term capital to a firm are more vulnerable to opportunism); Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1657 (2002) ("[S]hareholders' entire investments are perpetually locked into the firm, and thus especially vulnerable to opportunism.").

56. Strine, *supra* note 46, at 399 ("[The] corporate governance system . . . has increased the power of stockholders, in the form of institutional investors, and decreased the power of workers and other corporate stakeholders . . . .").

57. Gary Mottola, *A Snapshot of Investor Households in America*, FINRA INV. EDUC. FOUND. 3 fig.4 (Sept. 2015), https://www.sec.gov/spotlight/fixed-income-advisory-committee/finra-investor-education-foundation-investor-households-fimsa-040918.pdf [https://perma.cc/XQ5D-ALPX] ("Forty-two percent of the respondents from households with taxable investment accounts have a college degree compared to 27 percent for households with only retirement accounts, and 12 percent for households with no accounts. And 73 percent of respondents from households that own taxable investments are white, compared to 67 percent for households with only retirement accounts, and 61 percent for households without accounts.").

58. *See* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1872 (2017) ("[F]or all the talk of creating an

Shareholder primacy advocates would respond that, in theory, we all will end up better off—or at least richer—with a shareholder primacy norm for corporate law. But the existing theoretical foundations of shareholder primacy are, at this point, damaged beyond repair.[59] Shareholder primacy rests in part on the notion that the corporation is a nexus of freely bargained contracts among all corporate constituents, and that these constituents have bargained to give shareholders control of corporate governance.[60] This contractarian model of the corporation, however, is an entirely fictitious account of the corporation and its constituents, and it tells us very little about the choices that actual shareholders and other corporate constituents would make in the absence of various legal and economic constraints.[61] Another key aspect of the model argues that shareholders have the appropriate incentives to make the right decisions for the corporation because they are entitled to the corporate "residual."[62] Rights to the residual also provide shareholders with a

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ownership society, close to half of Americans do not have any investments in equity securities, even in the form of 401(k) and individual retirement account (IRA) investments in mutual funds.").

59. *See* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 50–121 (2021) (disputing the common conceptual defenses for shareholder primacy such as the contractarian argument, the homogeneity of shareholders' interests, arguments that shareholders represent a residual claimant, and arguments from Arrow's theorem).

60. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 48, at 17, 37 (explaining how investors and managers may negotiate on terms under the contractarian model of corporate formation, and highlighting risks that may result from certain choices about governance structures); Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory."); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) ("The corporation is a complex set of explicit and implicit contracts, and corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy.").

61. *See* Grant M. Hayden & Matthew T. Bodie, *Shareholder Voting and the Symbolic Politics of Corporation as Contract*, 53 WAKE FOREST L. REV. 511, 515 (2018) ("[T]he nexus of contracts theory is both descriptively wrong and normatively hollow, and, in particular, provides a poor foundation for the exclusive shareholder franchise.").

62. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403 (1983) ("[S]hareholders are the residual claimants to the firm's income. Bondholders have fixed claims, and employees

common interest in maximizing corporate profits, which arguably reduces their tendency to squabble about firm decisions and thus promotes efficiency.[63] But this residual argument is undercut by the growing realization that shareholders do not, in fact, have a common interest in a specific form of wealth maximization, but instead have interests that diverge along a number of dimensions.[64] Moreover, the residual, as conceptualized by the proponents of the argument, does not actually exist, but is instead the fictional artifact of several faulty assumptions about the role of shareholders and other stakeholders.[65] And the argument for shareholder primacy based on the possibility of destructive voting cycles, à la Arrow's theorem,[66] was nonsensical from the very beginning.[67] The intellectual foundations of shareholder primacy are in shambles.

Somewhat surprisingly, there has been almost no attempt in recent decades to shore up the theoretical underpinnings of shareholder primacy by rehabilitating the original arguments or

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generally negotiate compensation schedules in advance of performance. The gains and losses from abnormally good or bad performance are the lot of the shareholders, whose claims stand last in line.").

63. EASTERBROOK & FISCHEL, *supra* note 48, at 67–68.

64. *See* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 791 (2017) ("Scholars have described several sources of conflict among shareholders, including differing investment horizons and needs for cash payouts, empty voting, and competing outside interests." (footnotes omitted)); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 477–98 (2008) (detailing divergent shareholder interests); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 574–92 (2006) (describing rent-seeking and other features that conflict with the shareholder primacy account of shareholder voting).

65. As we have argued elsewhere: "There is, in fact, no such thing as a residual, as the corporation always has other uses for the funds: it can put them in savings, invest them in securities, pay a bonus to workers, make charitable contributions, or put them into research and development." HAYDEN & BODIE, *supra* note 59, at 97–98.

66. *See* EASTERBROOK & FISCHEL, *supra* note 48, at 69–70 (noting potential Arrow's theorem problems in aggregating shareholder's preferences into a consistent system of decision making when voters hold dissimilar preferences).

67. *See* HAYDEN & BODIE, *supra* note 59, at 103–21 (contending that arguments using Arrow's theorem to support shareholder primacy apply the theorem at the wrong level of the decision process, misconstrue its import, and ignore recent work in social choice theory); Grant Hayden & Matthew Bodie, *Arrow's Theorem and the Exclusive Shareholder Franchise*, 62 VAND. L. REV. 1217, 1234–39 (2009) (arguing that cyclical outcomes are unlikely, among other difficulties with the application).

developing new ones.[68] Not even the 2008 financial crisis, which rattled the faith of economists, Alan Greenspan, and an entire cohort of young workers (among many others), was sufficient to displace the notion that primacy was the appropriate theoretical foundation for our corporate law.[69] Instead, the corporate governance machine lumbers on, oblivious to the collapse of the very ideas that helped set it in motion.

We have seen the catastrophic effects of a long-term commitment to shareholder wealth maximization. Although boards arguably held out against the shareholder primacy norm well into the 1990s,[70] the twenty-first century has seen a complete cultural change, with all the corporate governance players toeing

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68. *But cf.* BAINBRIDGE, *supra* note 14, at 125–68. Bainbridge largely repeats the traditional arguments for shareholder primacy without engaging with more recent critiques of those positions. One new argument is that stakeholder theory is actually anti-democratic because it puts political decisions—the balancing of various stakeholder interests—in the hands of corporate managers, and thus allows them to exercise unchecked power of their own and bypass the real, governmental democratic process. *Id.* at 140–51. At the same time, he argues that such unchecked power will invariably prompt additional government intervention to ensure that corporations act in socially responsible ways, crushing economic and social liberty and putting us on the road to serfdom. *Id.* at 151. At a minimum, this argument seems to assume the continuation of shareholder governance mechanisms (accompanied, perhaps, by a command of some sort to consider stakeholder interests?); otherwise, any new system of broader stakeholder representation would ultimately provide the necessary internal check on managerial decision-making, just as it does now with respect to shareholders. The argument also seems blind to the fact that managers making decisions on behalf of shareholders alone are also making "political" decisions, just ones that exclude real input by other corporate stakeholders.

69. *Cf.* Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1038–39 (2012) ("[T]he failures of companies such as Enron and WorldCom, and transactions such as the AOL-Time Warner merger, called the shareholder primacy ethos into doubt. The 2008 financial crisis compounded this doubt. Although shareholder primacy is not dead by any stretch, it has suffered a series of blows that render it open to serious question.").

70. JAY W. LORSCH & ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 37–38 (1989) ("[D]irectors usually don't share a strong consensus about accountabilities to various constituencies and, therefore, about their purposes in serving. Further, the norm in most boardrooms is to avoid discussing such matters."); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 291 (1998) ("[T]he view of the shareholder primacy norm held by modern legal scholars—that it is a major factor considered by boards of directors of publicly traded corporations in making ordinary business decisions—may not accurately reflect reality.").

the primacy line.[71] Changes to tax law and the advice of compensation consultants have made most executives' pay packages aligned with shareholder interests through stock grants, options, or other equity-related instruments.[72] The gap between productivity and wages began in the 1970s and has worsened ever since, as productivity continues to climb and wages remain stagnant.[73] And, as noted earlier, regulatory capture by corporate interests means that the traditional expectation that laws will restrict corporate malfeasance are less and less likely to hold true.[74] One of the casualties has been our planet's climate, as national and international responses to climate change have convinced most scientists that long-term planetary damage is now inevitable.[75] Even traditionally conservative commentators and policymakers have come out against shareholder primacy.[76]

The marked shift towards a more stakeholder-friendly approach to corporate governance signifies a strong sense of

71. Lund & Pollman, *supra* note 29, at 2565–66 ("A vast array of institutional players—proxy advisors, stock exchanges, ratings agencies, institutional investors, and associations—enshrine shareholder primacy in public markets." (footnotes omitted)).

72. *Id.* at 2574; *see also* MICHAEL B. DORFF, INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT (2014) (explaining the raise of equity as performance pay for executives).

73. Lawrence Mishel, *Growing Inequalities, Reflecting Growing Employer Power, Have Generated a Productivity-Pay Gap Since 1979*, ECON. POL'Y INST.: WORKING ECON. BLOG (Sept. 2, 2021), https://www.epi.org/blog/growing-inequalities-reflecting-growing-employer-power-have-generated-a-productivity-pay-gap-since-1979-productivity-has-grown-3-5-times-as-much-as-pay-for-the-typical-worker [https://perma.cc/B9QF-AC27] ("Net productivity grew 59.7% from 1979–2019 while a typical worker's compensation grew by 15.8% . . . .").

74. Strine & Walter, *supra* note 39, at 384–85.

75. *See* Fiona Harvey, *Major Climate Changes Inevitable and Irreversible – IPCC's Starkest Warning Yet*, GUARDIAN (Aug. 9, 2021), https://www.theguardian.com/science/2021/aug/09/humans-have-caused-unprecedented-and-irreversible-change-to-climate-scientists-warn [https://perma.cc/SY7H-NSUX].

76. Oren Cass, *How Corporate Actual Responsibility, Not Social Responsibility, Would Look*, WASH. EXAM'R (Aug. 19, 2020), https://www.washingtonexaminer.com/opinion/how-corporate-actual-responsibility-not-social-responsibility-would-look [https://perma.cc/4BT8-8URJ] (deriding the lack of meaningful corporate reform that moves beyond the shareholder primacy model); Rex Nutting, *Shareholder Primacy Is Ruining America, Says a Conservative Republican*, MARKETWATCH (May 22, 2019), https://www.marketwatch.com/story/capitalism-is-failing-america-says-a-conservative-republican-2019-05-20 [https://perma.cc/QCG5-PG2C] (noting Republican Senator Marco Rubio's critique of shareholder primacy).

dissatisfaction with the existing model. The corporate governance theory behind shareholder primacy is craven, vacuous, and ultimately cynical. We need an alternative.

C. STAKEHOLDER THEORISTS: A FAILURE OF GOVERNANCE

Stakeholderism, or stakeholder theory, is a concept that doesn't admit of a ready definition. In some cases, stakeholderism is little more than a soft-pedaled version of shareholder primacy, simply accounting for the fact that maximizing long-term shareholder value often means attending to the needs of other stakeholders—employees, customers, and suppliers—along the way.[77] This version, sometimes described the pursuit of "enlightened shareholder value,"[78] tries to thread the needle by promoting ways in which care for stakeholders is in the long-term interests of the corporation, including shareholders.[79] Though this version of stakeholderism takes up a lot of space in the recent conversations about corporate purpose, in the end it's just a gloss on shareholder primacy.

There is a stronger version of stakeholderism, one that would require corporations to pursue stakeholder interests as ends in themselves.[80] This version, sometimes called a

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77. This is what Bebchuk and Tallarita call "instrumental stakeholderism." *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 108–14 (2020).

78. *See id*. at 108–09 (explaining how this approach "proposes that corporate leaders follow a decision rule that contains an explicit reference to the interests of stakeholders").

79. The rise of investing based on ESG factors—environmental, social, and governance—provides one example. *See* Lund & Pollman, *supra* note 29, at 2566 ("Today many companies pursue ESG goals, and many investors favor ESG funds, not for moral reasons or a prosocial willingness to sacrifice profits, but because ESG is thought to provide sustainable long-term value or higher risk-adjusted returns for shareholders." (footnotes omitted)).

80. This is what Bebchuk and Tallarita call "pluralistic stakeholderism." *See* Bebchuk & Tallarita, *supra* note 77, at 114–15. Other supporters of this version of stakeholderism include Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 (1999) (arguing that corporate directors owe a duty to the corporation and that the corporation consists of all the stakeholders who are responsible for the business of the enterprise); *see also* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 39 (2018) (advocating for a move away from shareholder primacy to purpose primacy); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 745 (2005) (maintaining that corporate managers can and do have discretion to sacrifice profits to follow social and

communitarian or multi-fiduciary model of the corporation,[81] has been around for a long time, and stands for the proposition that governance should take all stakeholders in the corporate enterprise into account.[82] Unfortunately, this more robust version of stakeholderism never really coalesced around a workable theory of governance.[83] The primary avenue for stakeholder theorists has been to stick with the existing features of corporate governance and try to explain how, properly conceived, it can somehow deliver on behalf of all stakeholders. The best example of this approach is Margaret Blair and Lynn Stout's team production model of corporate law, where various stakeholders contribute their resources to the enterprise with the implicit bargain that the enterprise itself will fairly apportion the responsibilities and rewards.[84] While Blair and Stout focus on shareholders and employees as the primary stakeholders, they also cite to creditors and the local community as potential stakeholders.[85] In their view, corporate boards "exist not to protect

moral norms); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339, 339 (2012) (supporting the view of the corporation as commons or "a shared resource whose sustainability depends on the participation of multiple constituencies in its governance").

81. *See* Simone M. Sepe, *Directors' Duty to Creditors and the Debt Contract*, 1 J. BUS. & TECH. L. 553, 561 (2007) ("[C]ommunitarians . . . . advocate a multifiduciary model where all corporate stakeholders benefit from the attribution of directors' fiduciary duties." (footnotes omitted)); Millon, *supra* note 28, at 11–12 (discussing the use of the multifiduciary model by communitarian corporate law scholars).

82. *See* Millon, *supra* note 28, at 11–12 (discussing efforts to provide protections to nonshareholder constituencies); *see also* Blair & Stout, *supra* note 80, at 293–94 (arguing that directors owe a duty to the corporation and that the corporation consists of all of the stakeholders who are responsible for the business of the enterprise).

83. *See* HAYDEN & BODIE, *supra* note 59, at 7, 159–60 (critiquing stakeholderism theories that attack shareholder primacy but maintain the exclusive shareholder franchise); *see also* Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605, 611 (2009) (arguing that stakeholder theory fails to provide a system of mechanisms for governance, other than "balancing" stakeholder concerns); Joseph Heath, *Business Ethics Without Stakeholders*, 16 BUS. ETHICS Q. 533, 543 (2006) (arguing that stakeholder theory creates "extraordinary agency risks" because of the potential for conflicts).

84. *See* Blair & Stout, *supra* note 80, at 250.

85. *See id.* (stating that along with shareholders, other corporate contributors include "[e]xecutives, rank-and-file employees, and even creditors or the local community"); *id.* at 278 (describing participants in the corporation as

shareholders per se, but to protect the enterprise-specific investments of all the members of the corporate 'team,' including shareholders, managers, rank and file employees, and possibly other groups such as creditors."[86] The board—a "mediating hierarchy"—must be independent from all constituencies in order to be trusted with this uncertain yet crucial responsibility.[87] If the board favored one constituency over others, the unfavored groups would be less willing to participate in the firm's ongoing enterprise.[88]

In theory, the team production model of corporate governance is a fairly radical departure from the shareholder primacy norm. In terms of corporate governance policy, however, Blair and Stout do not argue for extensive reforms. Their theory is instead best characterized as a description of the status quo (circa 2000) that explains, as well as justifies, the existing regime. When it comes to determining the proper board electorate, they take a traditional line and argue that the corporate franchise should remain limited to shareholders.[89] Their main argument for this position is the now-discredited argument from Arrow's theorem,[90] but they also believe shareholders have unique vulnerabilities that may demand extra protection.[91] When it comes to answering the obvious question how a shareholder-elected

"shareholders, employees, and perhaps other stakeholders such as creditors or the local community").

86. *Id*. at 253.

87. *See id*. at 254, 276–87 (suggesting a version of director primacy where an insulated board acts as trustees that advance the interests of all corporate constituents).

88. *See id.* at 305 ("Opportunistically exploiting the firm specific investments of corporate stakeholders . . . may well benefit, in both the short and the long run, those individuals who happen to hold shares in the corporation at the time the decision to move is made. If the firm's employees anticipated this sort of conduct ex ante, however, they might well have demanded higher wages—or been more reluctant to invest in firm-specific human capital—in earlier years.").

89. *See id*. at 309–15 (maintaining that a shareholder electorate will hold a board accountable).

90. *See id.* at 313. For an extensive discussion of this argument and the related argument from politics, see HAYDEN & BODIE, *supra* note 59, at 103–21, 141.

91. *See* Blair & Stout, *supra* note 80, at 314 ("Unlike executives, creditors, and other stakeholders who enter express contracts with the firm or at least interact regularly with its representatives, and who hence have other opportunities to influence the distribution of firm rents, shareholders rarely have the opportunity to negotiate directly with the firm for advantages.").

board can be expected to attend to the needs of other stakeholders, Blair and Stout put great weight on the relative impotence of the shareholder franchise and, more broadly, the importance of insulating board members from immediate pressure from all of the stakeholders under their supervision.[92] The role of the board members, in their view, is thus less one of an agent and more that of a trustee.[93]

The fundamental shortcoming in this model, to our eyes, is that it never explains why board members would be motivated to cater to the independent interests of any stakeholders other than shareholders.[94] It's easy enough to say that the board *should* consider the interests of various members of the corporate team. Blair and Stout argue that existing corporate law gives the board discretion to do so, and much of their argument along these lines is a descriptive one.[95] But, at bottom, there's no reason to think that corporate boards *would* consider the interests of all stakeholders without changing something in the structure of corporate governance. It is difficult to see where team members other that shareholders would have any input into the board's composition or leverage over its decision-making. Without a change in corporate governance at the structural level, there is just little incentive for any firm decisionmaker to attend to the independent interests of other stakeholders.

Moreover, it's difficult to contend any longer that the shareholder primacy norm is meaningless background noise with unimportant effects on corporate governance. The system now revolves around the norm. And it's not just the fact that directors are elected only by shareholders that reinforces the shareholder primacy norm. Corporations generally provide various forms of equity-based compensation for their directors, which necessarily aligns their interests with those of shareholders.[96] The markets for managerial talent—the ability of directors, officers, and managers to retain their current positions and obtain future board

92. *See id.* at 314–15.

93. *See id.* at 290–92.

94. *See* HAYDEN & BODIE, *supra* note 59, at 141 ("[T]o the extent [Blair and Stout] are making a normative case for the team production model, it is difficult to see where team members other than shareholders would have any leverage over the board or input into its composition.").

95. *See* Blair & Stout, *supra* note 80, at 286–87, 298.

96. *See* Bebchuk & Tallarita, *supra* note 77, at 140–43.

positions—are also strongly tied to shareholder value.[97] Share prices are tracked and have become the primary metric for assessing overall firm performance.[98] There are many more moving pieces here, but the entire machine now works together to support continued shareholder wealth maximization.[99]

Despite stakeholderism's growing popular ascendancy, it remains stuck in the rut of a shareholder-oriented system of governance. Corporate stakeholderism has not been accompanied by workable changes in the underlying governance structures. Some very basic questions—such as which constituents should have governance rights and how a firm is supposed to balance competing stakeholder interests—remain unanswered. As a result, we're left with new notions of stakeholder purpose draped over old mechanisms of shareholder governance like an ill-fitting suit.

The stalemate between the failed purpose behind shareholder primacy and the unrealized governance alternatives of stakeholderism should spur us to seriously consider the theoretical and practical possibilities of a corporate governance that might better accomplish its goals rather than, as is often the case, raise the white flag of surrender and continue to assume that we live with the best of all possible systems. This is all the more true with the theoretical arguments for shareholder primacy, and its attendant governance features such as the exclusive shareholder franchise, in tatters. What we need at this point is a theoretical framework and practical methodology to connect stakeholder purpose with corporate governance, one that answers the questions that have long dogged stakeholderists, such as which constituents should be accorded governance rights. In short, we need a new theoretical framework for shared corporate governance.

97. *See id.* at 143–47, 147–55.

98. *See* David H. Webber, *The Humanities Strike Back: (E)ESG and Justice Strine Challenge Gamer Shareholder Primacy*, 24 U. PA. J. BUS. L. 875, 876 (2022) ("[O]ne underappreciated aspect of shareholder primacy's appeal is that it creates a competition with a single endpoint, basically a game . . . .").

99. *See generally* Lund & Pollman, *supra* note 29 (describing how the "corporate governance machine"—a complex governance system composed of law, institutions, and culture—orients corporate decision-making toward shareholders).

II. A DEMOCRATIC PARTICIPATION MODEL FOR CORPORATE GOVERNANCE

A. GOVERNANCE DILEMMAS AND MODEST BEGINNINGS

In order to develop a meaningful alternative to shareholder primacy, stakeholder theorists must develop a way to translate their insights about corporate purpose into structural changes to corporate governance. But their failure to do so has led some commentators to the conclusion that the absence of a workable system of governance reveals some intrinsic flaw in the very idea of stakeholderism. Perhaps. But maybe we just aren't trying very hard to develop such a system.

Recent assessments of stakeholderism by Lucian Bebchuk and Roberto Tallarita are a good example of this phenomenon. Their critique highlights a number of "conceptual" problems with stakeholderism, most of which revolve around issues of governance.[100] The foremost problem—commonly raised—is the question of determining which stakeholder groups should be taken into account.[101] Assuming relevant stakeholder groups can be identified, Bebchuk and Tallarita also raise the issue of metrics: figuring out how corporate directors can assess the effects of their decisions on those groups.[102] Share prices in publicly listed markets provide a convenient quantitative measure for confidence in management at any given moment in time.[103] This clear and salient metric promotes the notion that shareholder primacy is much simpler and more efficient to implement than a messy set of competing interests.[104] Once relevant stakeholders are identified and their interests assessed, Bebchuk and Tallarita see a third conceptual problem: how are firms supposed to balance stakeholder interests when the inevitable conflicts arise?[105] Shareholder primacy's simplicity arguably renders the need for tradeoffs obsolete.

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100. *See* Bebchuk & Tallarita, *supra* note 77, at 116–23.

101. *See id.* at 116–19.

102. *See id.* at 121.

103. *See* Webber, *supra* note 98, at 876 ("[O]ne underappreciated aspect of shareholder primacy's appeal is that it creates a competition with a single endpoint . . . .").

104. *See* BAINBRIDGE, *supra* note 14.

105. *See* Bebchuk & Tallarita, *supra* note 77, at 121 (asking how corporate leaders should resolve the "ubiquitous tradeoffs" they would face under a

The appropriate riposte to this balancing problem is that all governance structures—at least those designed to be responsive to some set of underlying preferences—are designed to translate a diverse set of individual preferences into group decisions.[106] That's their entire reason for existence. To be sure, governance mechanisms can be better or worse at this job, so this conceptual "problem" does point up the need for governance structures that are capable of assessing relevant stakeholder interests and ensuring that they are properly taken into account. But the need to balance competing preferences cannot serve as a decisive conceptual objection to stakeholderism or, for that matter, to any decision-making process.

While Bebchuk and Tallarita's three theoretical objections[107] do not undercut all possible instantiations of stakeholderism, they do generate a useful set of questions to be answered. And they correctly identify a key difficulty with early versions of stakeholderism: the lack of an effective method to identify relevant stakeholders and ensure their interests are reflected in firm decisions. These issues, they note, would be especially problematic "for those groups that are dispersed, uninformed, or ever-changing," such as customers and suppliers.[108] How do you figure out which customers have the kind of relationship with the company that would trigger, say, representation rights? And how do you track those constituents over time?

pluralistic rule). In fairness, firms already confront this kind of issue when it comes to shareholders, whose interests may be difficult to assess and often fracture along a number of dimensions. There are majority shareholders, minority shareholders, hedged shareholders, sovereign wealth funds, pension funds, and employee and manager shareholders—all of whom have distinct interests that may override whatever common interests they have in any particular firm decision. *See* HAYDEN & BODIE, *supra* note 59, at 68–87 (noting that the theory of shareholder homogeneity has come under pressure and that there are many ways in which shareholders fail to have common interests); Anabtawi, *supra* note 64, at 574–92 (describing divergent interests among shareholders).

106. *See* Stephen E. Ellis & Grant M. Hayden, *The Cult of Efficiency in Corporate Law*, 5 VA. L. & BUS. REV. 239, 248–49 (2010) (noting that various accounts of corporate governance highlight a strong basis in efficiency); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 622 (2006) ("[A]ll organizations must have some mechanism for aggregating the preferences of the organization's constituencies and converting them into collective decisions.").

107. *See* Bebchuk & Tallarita, *supra* note 77, at 116–23.

108. *Id.* at 162.

Although these questions must be answered, Bebchuk and Tallarita display remarkably limited imagination in trying to answer them. They start by noting there are two ways to accord other stakeholders voting rights—either by allowing all groups to elect all directors or by having each constituency elect a subset of directors.[109] Initially, "[t]o conserve space," they limit their discussion to the former option—having all groups elect directors *en masse*.[110] But this, of course, is not the way it's done in European countries with nonshareholder voters,[111] nor is it the process set forth in proposed U.S. legislation.[112] When they do get around to considering this more likely path of stakeholder representation, they immediately seem stumped by the allocation of seats among the various groups.[113] This, however, is not an insoluble problem. In Germany, by law, large corporations allocate between a third and half of the seats to employee representatives and the balance to shareholder representatives,[114] while in the United States, one hundred percent of the seats are typically assigned to shareholder representatives.[115] There's nothing necessary about these or any other allocation—they all involve what are essentially political and business judgments. And decisions like this must be made whenever one is building *any* governance system. The remaining problems discussed by the pair—accountability to the electorate, the tyranny of the majority, democratic deadlock[116]—all could be ripped from the pages of an

109. *See id.* ("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.").

110. *See id.*

111. Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 331–33 (2021).

112. *See, e.g.*, Accountable Capitalism Act, S. 3348, 115th Cong. § 6 (2018) (requiring forty percent of boards in large companies to be elected by employees); Reward Work Act, S. 2605, 115th Cong. § 3(c)(2) (2018) (requiring one-third of a listed board to be elected by employees); Reward Work Act, H.R. 6096, 115th Cong. § 3(c)(2) (2018) (same); Hayden & Bodie, *supra* note 111, at 330 (discussing these proposals).

113. *See* Bebchuk & Tallarita, *supra* note 77, at 162 ("How will the allocation be determined in the case of each company and through what process?").

114. *See* Hayden & Bodie, *supra* note 111, at 332 (describing the degree of codetermination on German corporate boards depending on the type of industry, the number of employees, and other factors).

115. *See id.* at 325.

116. *See* Bebchuk & Tallarita, *supra* note 77, at 163.

introductory civics book.[117] All are traditional quandaries of systems of democratic governance, and all must be addressed no matter what kind of system is put in place—including shareholder primacy.

More serious explorations of the possibility of expanding the corporate electorate to include other stakeholders have also begun to appear, though, one way or another, they reach the same conclusion.[118] The absolutist position—that it just can't be done—has become a little harder to swallow in the face of a growing recognition of the success of at least one variant of stakeholderism: codetermination. Many European countries, most notably Germany,[119] have systems where shareholders and employees both elect their own representatives to corporate supervisory

117. The potential tyranny-of-the-majority issue, where "directors representing a particular stakeholder group could be marginalized and its interest would enjoy little protection," *id.*, is especially absurd as an argument in favor of retaining a system where one hundred percent of the directors come from one constituency. There's no worry about tyranny-of-the-majority problems under existing corporate governance mechanisms not because it doesn't exist, but because it's a foregone conclusion.

118. *See, e.g.*, BAINBRIDGE, *supra* note 14, at 142–46 (describing the constituency board solution and codetermination more generally as untenable).

119. *See generally* Hayden & Bodie, *supra* note 111 (describing the German codetermination system); Otto Sandrock & Jean J. du Plessis, *The German System of Supervisory Codetermination by Employees* (describing the German system of codetermination), *in* GERMAN CORPORATE GOVERNANCE IN INTERNATIONAL AND EUROPEAN CONTEXT 167, 169 (Jean J. du Plessis et al. eds., 3d ed. 2017). The Works Constitution Act of 1952 covered companies that employ between 500 and 2,000 workers, while the Codetermination Act of 1976 governs companies with over 2,000 workers. Sandrock & du Plessis at 176–77 (first citing Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act of 1952], Oct. 11, 1952, BUNDESGESETZBLATT, Teil 1 [BGBL I] at 681 (Ger.); and then citing Mitbestimmungsgesetz [MitbestG] [Codetermination Act of 1976], May 4, 1976, BUNDESGESETZBLATT, Teil I [BGBL I] at 1153 (Ger.)). The 1952 Act was supplanted by the One-Third Participation Act of 2004, which requires that German companies that employ between 500 and 2,000 workers must grant employees one-third of the board seats. *See id.* (citing Drittelbeteiligungsgesetz [DrittelbG] [One-Third Participation Act], May 18, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 974, §§ 1,4 (Ger.)).

boards.[120] And those systems, and the economies that rest on them, have been remarkedly successful in recent years.[121]

After dismissing codetermination for decades (and predicting its imminent collapse),[122] American corporate law scholars now take a different tack—that it just won't work here.[123] Jens Dammann and Horst Eidenmüller, for example, work within the traditional law-and-economics framework and characterize codetermination as a fine proposition for Germans, but unavailing here in the United States.[124] But their arguments do not seem particularly compelling, and at times are positively self-defeating. For example, Dammann and Eidenmüller minimize codetermination's potential usefulness to workers by pointing out the ways in which American workers are comparatively powerless; as such, they would not be able to use board representation as effectively as German workers can.[125] The relative

120. For a recent list of countries, see Ewan McGaughey, *Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel*,*'* 47 INDUS. L.J. 76, 79 n.17, 80 fig.1 (2018).

121. *See* Hayden & Bodie, *supra* note 111, at 352–53 (detailing the role that codetermination played in Germany's relatively quick recovery from the Great Recession of 2008).

122. *See id.* at 338–41 (noting scholars' various arguments against codetermination). Michael Jensen and William Meckling, in particular, predicted that German codetermination would soon devolve into a system in which either shareholders or employees had complete control, in which case codetermination would either be replaced by shareholder control or, if employees succeed in controlling firms, destroy the German economy. *See* Michael C. Jensen & William H. Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 52 J. BUS. 469, 473–75, 503–04 (1979). Neither occurred.

123. *See, e.g.*, Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870 (2020); Jeremy A. Trimble, Note, *Codetermination: A Viable Strategy for the United States?*, 29 J. TRANSNAT'L L. & POL'Y 169, 196 (2019–20) ("[I]t appears that codetermination is not a good fit for American corporate governance because it developed under radically different conditions of corporate governance . . . ."); *see also* BAINBRIDGE, *supra* note 14, at 143–46 (describing codetermination as untenable in the United States).

124. *See* Dammann & Eidenmüller, *supra* note 123, at 877 ("While codetermination may offer substantial economic benefits at relatively low costs in Germany, we argue that there are compelling reasons to think that it would be a poor fit for the United States, at least as long as other institutional, legal, and economic differences between the two economies persist.").

125. *See id.* at 902–06 (noting that collective bargaining plays a far smaller role in the U.S. economy and that employment in the United States is generally at-will).

powerlessness of workers, on this view, becomes reason to retain the core feature of the governance structure that disempowers them in the first place.

In the end, the failure to seriously consider expanding governance rights to other stakeholders, and thus connect corporate purpose and governance, is at the heart of the corporate governance stalemate. The proposals for attending to the interest of all stakeholders contain no real shift in the basic mechanisms of governance, and are thus reduced to the level of hortatory statements about the need to deliver for all stakeholders or the need for disclosure. This crabbed view of the potential to connect corporate purpose with governance is especially surprising given that so much of the field purports to be based on economics, which posits that people (including board members and officers) are self-interested actors who respond to incentives.

Despite the naysayers and doubters, there are some recent indications of movement toward thinking about structural questions, with advocates of stakeholderism coming around to the idea of tinkering with core features of corporate governance, especially with respect to worker representation. Building on his earlier work in support of employee participation in governance,[126] Brett McDonnell has argued for extensive governance rights for stakeholders through board representation as well as sub-board level governance councils and structures.[127] Aneil Kovvali has promoted the power of internal corporate governance reforms, along the lines of stakeholderism, in conjunction with a policy of external regulation,[128] and has also considered the potential for worker representation.[129] Kent Greenfield has

126. *See generally* Brett H. McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429 (2011).

127. *See* Brett McDonnell, *Stakeholder Governance as Governance by Stakeholders*, 47 SEATTLE U. L. REV. 511, 513 (2024) (pushing to "give some stakeholders real power within corporate governance" through a variety of governance mechanisms).

128. *See* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 760 (2023) (arguing that internal and external reforms to improve corporate governance can work in tandem).

129. *See* Aneil Kovvali, *Stakeholderism Silo Busting*, 90 U. CHI. L. REV. 203, 258 (2023) (suggesting the possibility of "reform [to] corporate governance to encourage worker representation").

supported worker board representation as well.[130] Writing at times on his own and at times with coauthors (including Kovvali), former Delaware Chief Justice Leo Strine's vision of the corporation is largely in line with a stronger conception of stakeholderism, arguing for mandatory ESG reporting,[131] workforce committees at the board level,[132] and restrictions on corporate political spending.[133] But he is also more cautious, making the case with his coauthors Aneil Kovvali and Oluwatomi Williams that codetermination is not politically feasible without first building up the repositories of worker power that already exist in countries with significant codetermination regimes, such as strong unions, works councils, and an underlying infrastructure of worker representation.[134]

Other scholars have proposed creative and potentially fruitful initiatives to bring stakeholder concerns into corporate governance. Questioning the authenticity of some recent homages to stakeholderism, Lisa Fairfax argues for the use of "credible commitment" devices to ensure that promises made are kept.[135] Such mechanisms go beyond the commonplace contract to embed

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130. KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES 149 (2006) ("The specifics will be difficult but not impossible: employees could elect a proportion of the board; communities in which the company employs a significant percentage of the workforce could be asked to propose a representative for the board; long-term business partners and creditors could be represented as well.").

131. *See* Strine, *supra* note 46, at 432.

132. *See* Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1385 (2022); *cf.* Aneil Kovvali & Leo E. Strine, Jr., *The Win-Win That Wasn't: Managing to the Stock Markets Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307, 338 (2022) ("Although government regulation is an essential part of the solution, giving corporate boards room to tend to groups other than shareholders can also play a useful role.").

133. *See* Strine, *supra* note 46, at 429–31; *see also* Lund & Strine, *supra* note 39, at 133 (discussing the risks of corporate political spending to regulation); Kovvali & Strine, *supra* note 132, at 324–29 (highlighting the role of corporate political influence in diminishing protections for stakeholders other than shareholders).

134. *See* Strine, Kovvali & Oluwatomi, *supra* note 132, at 1380 (describing policy proposals that would facilitate a system of board codetermination in the United States); s*ee also* Strine, *supra* note 46, at 434 (discussing the political conditions that need to change before codetermination can function appropriately).

135. *See* Fairfax, *supra* note 42, at 1168.

incentives to comply and deter against breach.[136] Although Fairfax does not provide a comprehensive list of commitment vehicles, they include "third-party certification, emphasizing shareholder proposals and bylaw changes, tethering stakeholder goals to executive compensation, altering corporate charters, creating new legal entities, and reliance on sustainability indices—to name a few."[137] Fairfax focuses on three—fiduciary duties, mandatory disclosure regimes, and incentive compensation—and finds reasons for skepticism as well as hope.[138] None of the discussed devices involve structural governance changes, despite the recognition that institutions are themselves a device to enforce commitments over time.[139] Kishanthi Parella has advocated for a legal duty requiring companies to account for harms to stakeholders generated by their contracting decisions.[140] Other scholars had advocated for similar reforms based around disclosure, contracting, or regulatory duties.[141] For most, structural governance changes are not on the table.

In the end, there are many corporate law theorists who are at least sympathetic to the notion that corporations should serve stakeholder interests. But most have concluded—for one reason or another—that we should not tinker with the basic features of

136. *See id.* at 1188 ("At its core, credible commitment theory focuses on identifying mechanisms for restricting, conforming, or incentivizing the use of discretionary power in order to render commitments more reliable.").

137. *Id.* at 1204.

138. *Id.* at 1205–27.

139. *See id.* at 1200 ("[Douglass] North has theorized that institutions overcome credible commitment challenges when they provide two critical elements: (1) a set of understandable rules, and (2) a system to impartially enforce those rules." (citing Douglass C. North, *Institutions and Credible Commitment*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 11, 11 (1993))). It is remarkable the extent to which much of the stakeholder theory literature relies on norms. *See id.* at 1237 ("[W]hile there may be credible commitment hurdles with each individual reform, the cumulative effect of the reforms may promote norm internalization and thereby increase the possibility that corporate actions align with stakeholderism.").

140. Kishanthi Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865, 877 (2022) ("[T]his Article proposes the following tort duty: Corporations, as contracting parties, must take into account stakeholders' interests when performance of the contract creates a risk of harm to them." (emphasis omitted)).

141. *See, e.g.*, Cathy Hwang & Emily Winston, *The Limits of Corporate Governance*, 47 SEATTLE U. L. REV. 677, 689 (2024) ("[D]irect regulation is a more efficient and more effective tool . . . ."); Kovvali, *supra* note 129, at 256–60 (arguing for a panoply of potential reforms across the areas of antitrust, bankruptcy, corporate, and securities laws).

corporate governance to effectuate that end. Stakeholder theorists, then, are left with a strong sense that a corporation's purpose should include serving the interests of all stakeholders but find themselves unable or unwilling to commit to the basic changes in corporate governance that would allow them to do so.

B. THE DEMOCRATIC PARTICIPATION MODEL[142]

All institutions that comprise modern market-based societies—from large governments to small businesses—employ decision-making structures designed to take account of the preferences of their constituents.[143] They often start by relying on contracts to capture those preferences, which are thought to ensure the approval of everyone involved.[144] But once institutions reach a certain size, they must shift to some type of voting mechanism to aggregate preferences. This is true of almost all entities, both political and corporate, that claim to serve a particular constituency.[145]

In democratic political systems, participation rights are typically extended to people who have an interest or stake in governmental decision-making.[146] We aggregate the preferences of

142. The discussion in Part II.B was drawn in part from HAYDEN & BODIE, *supra* note 59, at 26–29.

143. *See* HAYDEN & BODIE, *supra* note 59, at 15–49 (discussing preference aggregation in political institutions and corporations).

144. *See, e.g.*, Ellis & Hayden, *supra* note 106, at 248–49 ("A more recent account of corporate governance holds that a corporation is best understood as a set of voluntary, intersecting agreements, i.e., as a nexus of contracts.").

145. Given this shared goal of preference aggregation, examining how voting works in political institutions may help illuminate some of the arguments around corporate governance. For more discussion, see HAYDEN & BODIE, *supra* note 59, at 8, 15–29.

146. *See* Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 251–61 (2003) (noting that the equiproportional standard in voting appears to embody a judgment that everyone has about the same level of interest in the outcome of an election); Melvyn R. Durchslag, Salyer*,* Ball*, and* Holt*: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RSRV. L. REV 1, 38–39 (1982) (noting "interest" as a factor in voter dilution cases). And, when possible, the weight of their vote may be calibrated to the weight of their interest, or the strength of those preferences. *See* Hayden & Bodie, *supra* note 64 at 456–58 (discussing the assignment of numerical weights to individual votes); Hayden, *supra*, at 248 ("To be objective, a quantitative vote dilution standard would need to be tied in some transparent way to the most relevant external object—here the relative strengths of the preferences that an election is intended to reveal and aggregate. The neutral way

interested parties to ensure more thoughtful decision-making and to lend a measure of legitimacy to electoral outcomes. And, indeed, most discussions of governance systems take it for granted that input should be limited to those with an interest in the enterprise.[147] Because we don't have a foolproof way of measuring the strength of people's preferences,[148] we have not generally relied upon first-person reports to assess preference strength and, thus, the right to participate. Instead, our political system has relied upon other proxies, or markers, for the strength of a person's interest in the outcome of an election.[149] Over time, states have relied on a wide variety of such markers—such as property-holding, taxpaying, and residency—to assign voting rights.[150] Ultimately, the decision on the relevant marker is this: whether the person, based on certain factors relative to their person, should have the right to participate in governance through voting.

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to connect the two together would be to calibrate the weight of every person's vote with the strength of her preference . . . .").

147. *See* Hayden & Bodie, *supra* note 64, at 452–60, 463–64 (noting that those with a strong interest in the outcome of an election are seen as prime candidates for the franchise, while those with little or nothing riding on the outcome are rarely extended voting rights).

148. For example, just asking people how strongly they felt about an election outcome might provide an incentive to strategically misrepresent preference strength. And even if we had accurate reports from people about how strong their interests were in an election, we lack a method of neutrally comparing those reports to those of others who report having an interest. There is no universal scale upon which to measure people's preference strength—no way, in other words, to carry out interpersonal utility comparisons in a completely objective manner. For a summary of the problem of making interpersonal utility comparisons, see Hayden, *supra* note 146, at 236–47 (discussing the challenges of evaluating interpersonal utility comparisons); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2129 (1990) (discussing the difficulty of finding existing "democratic voting rules or procedures for collective decision making [that] would be able to aggregate existing individual preference rankings into a single, consistent collective outcome").

149. *See* Hayden & Bodie, *supra* note 64, at 454.

150. *See id.* at 454–56; Hayden, *supra* note 146, at 255–59 (highlighting the logistical challenges and limitations of these metrics for gauging preference strength); *cf.* Paul David Meyer, Comment, *Citizens, Residents, and the Body Politic*, 102 CALIF. L. REV. 465, 468 (2014) (arguing that lawful permanent residents should have voting rights, and that disenfranchisement of such residents is constitutionally suspect).

A good marker for voter interest must be both accurate and manageable.[151] The marker's accuracy measures the extent to which it can identify a distinct group of people who have sufficient interest in the outcome of an election.[152] An overinclusive marker may extend the franchise to those with a weak or nonexistent interest in the election; an underinclusive marker leads to outright disenfranchisement of those with a real stake in the outcome.[153] In the United States, for example, the early freehold requirements were attempts to capture one's stake in an election, and they did match up—that is, those with property did have an interest in elections.[154] But the markers were wildly underinclusive, disenfranchising large numbers of property-less people who were, nonetheless, also greatly affected by the exercise of governmental powers.[155] More contemporary requirements, such as residency and citizenship, seem like better (though still imperfect) markers of voter interest.

Modern residency requirements are a good example of this use of these interest markers. Those who reside within the jurisdiction of a particular governmental authority are subject to its police powers, taxation, and services, and thus have quite a bit at stake in an election.[156] Residency isn't perfect, of course. It's a little underinclusive, in that it fails to capture those who work

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151. For an extended discussion of determining a strong metric for voter interest, see HAYDEN & BODIE, *supra* note 59, at 27; Hayden & Bodie, *supra* note 64, at 460–62.

152. Hayden & Bodie, *supra* note 64, at 460.

153. *See* HAYDEN & BODIE, *supra* note 59, at 26–29; *see also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969) ("The classifications in [the state voting eligibility statute] permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions."). Of course, we could stitch together more than one underinclusive marker and better capture voter interest.

154. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5 (2000).

155. *See id.* at 50, 131.

156. Douglas M. Spencer, *Electoral Maintenance*, 103 B.U. L. REV. 2199, 2212 (2023) ("More effective governance—appropriate funding for roads and schools, inclusive and effective zoning, responsive social policy—depends on representatives who drive on the same roads and attend the same schools as their constituents, as well as understand the economic and social needs of the communities they serve.").

or own property in one place and reside in another.[157] At times, it can also be overinclusive, as when it allows people to vote who plan to move out of town right after election day.[158] But despite debates around the margins, most would agree that residency is a more accurate marker for voter interest than, say, owning property.[159]

Can we do better? Can we, for example, devise an extensive survey of the interests of potential voters to get a better fix on who has a strong interest in the outcome of an election? The problem, here, is that an ongoing process of surveying everyone about their potential interests is simply unworkable, not to mention that it would be subject to strategic manipulation (people might lie in order to maximize their voting power).[160] Which brings us to the second feature of any good marker of interest: its manageability.

Manageability relates to the ability and efficiency of administering the voting rolls.[161] As democracies build out the machinery of the electoral process, they have looked to use markers for voter interest that tied to independently verifiable voter characteristics.[162] The requirements of property-holding and taxpaying were not only useful because they established that voters had a financial stake in election outcomes: They did so with

157. Hayden, *supra* note 146, at 255–57; Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1066 (2017) ("Various jurisdictions, such as vacation towns, allow nonresident property owners to vote.").

158. *Id.*

159. *But see* Edward B. Foley, *Self-Districting: The Ultimate Antidote to Gerrymandering*, 111 KY. L.J. 693, 715 (2023) ("Traditionally, geography has been the basis of dividing citizens for legislative representation, especially in the United States. But geography is by no means the only possible basis, or the only one used historically.").

160. *Id.*

161. *See id.* at 28–29 (outlining characteristics of a manageable marker and defining manageability as "whether [the marker] is realistically workable").

162. *Id.* at 28; *cf.* Michael Morse, *Democracy's Bureaucracy: The Complicated Case of Voter Registration Lists*, 103 B.U. L. REV. 2123, 2133 (2023) (noting the complications caused by voter mobility, including "an inaccurate voter registration list in a voter's former jurisdiction, and an incomplete list in their new one"); Spencer, *supra* note 156, at 2212 ("Geographically-constrained elections can also be easier to administer as ballots are typically shorter and voter rolls are typically smaller, such that there are fewer opportunities for administrative error.").

information that was readily available to the state.[163] In fact, the state and local governments that ran the elections usually had lists of both property holders and taxpayers, which made it simpler to administer the voter rolls.[164] Residency lists are not generally maintained by state and local governments, but one's residency can be confirmed by identification with a name and address on it, such as a utility bill.[165]

Under democratic participation theory, the presence of an accurate and manageable marker establishes a presumption that governance rights should be extended to those identified by that marker. That is, such a marker is a positive argument for extending governance rights—it establishes a default position of representation.[166] That's not to say it's a decisive presumption, but it's one that should be disregarded, in whole or in part, only if there's some compelling reason to do so. To extend the political example, city residents should presumptively be extended the right to vote because residency is an accurate and manageable marker of interest in the decisions of city government.[167] That said, there may be good reason to exclude residents who are children on the theory that they lack the autonomy and capacity to make informed choices. But we start from a position of representation—we don't just end up there when other methods of incorporating constituent preferences into decision-making processes, such as contract or regulation, break down.

In sum, developing a method of aggregating individual preferences demands that we first figure out whose preferences to aggregate. This typically involves finding some way to measure the level of interest that a potential voter has in the outcome of

163. *See* Hayden & Bodie, *supra* note 64, at 462.

164. *See id.*; *cf.* Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 AM. U. L. REV. 1283, 1315 (2005) (noting that it is "generally understood that property ownership and taxpayer requirements for voters violated the Equal Protection Clause").

165. *But see* Morse, *supra* note 162, at 2127 (discussing the difficulties for election administration caused by voter mobility).

166. *Cf.* HAYDEN & BODIE, *supra* note 59, at 29 ("The difficulty in finding manageable markers for more subtle assessments of preference strength may explain why equal weighting is often the default rule in democratic elections.").

167. *Cf.* Hayden, *supra* note 146, at 257 ("[R]esidency requirements, like the equiproportional standard, sometimes find justification in the fact that they are easily managed. In other words, it is too difficult to figure out which nonresidents have a sufficient stake in an election, so we use a residency default as a proxy for such an interest.").

an election. Because we do not have direct, reliable access to that kind of information, we usually depend upon some sort of marker for that interest. We generally divide the electorate into those whose preferences can be expressed through voting, and those who preferences cannot. Until now, corporate governance has allowed only shareholders to express their preferences through votes. But let's reexamine this governance model through the lens of this theory of democratic participation.

C. STAKEHOLDER PARTICIPATION IN CORPORATE GOVERNANCE[168]

Our modern-day corporate structure is designed to capture shareholder preferences through voting—by voting on boards of directors, shareholder proposals, charter amendments, stock issuances, mergers, and dissolutions.[169] All other constituents, from employees to suppliers to customers, have their preferences captured through individual agreements.[170] The shareholders alone have been designated as the body politic whose preferences are collated through these corporate voting processes.

Of course, there is a wide range of stakeholders with at least some interest in firm decision-making. Employees, shareholders, suppliers, customers, contractors, and even the community at large all have interests in the operation of a typical corporation.[171] The nature of their interests may vary tremendously between groups and, as we've seen before, within groups.[172] Ideally, as in political institutions, we should try to figure out which groups have accurate and manageable markers for a strong interest in the enterprise and assign them the right to vote.

168. The discussions in Parts II.C.1–C.2 are based in part on HAYDEN & BODIE, *supra* note 59, at 165–69.

169. *See* ROBERT C. CLARK, CORPORATE LAW 94 (1986) (discussing the variety of topics subject to shareholder vote).

170. HAYDEN & BODIE, *supra* note 59, at 32 ("[Shareholders'] returns are not payable until the other contractual participants—creditors, employees, customers, suppliers—have been fully satisfied."); EASTERBROOK & FISCHEL, *supra* note 48, at 35–39 (delineating a contractual framework for corporate "risk bearers").

171. *See* HAYDEN & BODIE, *supra* note 59, at 30, 36 (outlining various examples of corporate stakeholders).

172. *Id.* at 36 (discussing the spectrum of stakeholders' "quite significant interests in corporate decision-making").

As detailed earlier, the theory of shareholder primacy counsels that shareholders alone should be accorded voting rights.[173] Another model—the longstanding theory of the firm—tells us that two constituent groups—shareholders and employees—have a special relationship to the corporation that militates in favor of assigning voting rights to them.[174] At first glance, our theory of democratic participation seems to point in the same direction as the theory of the firm, since shareholding and employment look like accurate and reliable markers of interest.[175] But our model, in certain situations, may argue in favor of extending governance rights to other stakeholders as well. In any case, the answer will depend upon the application of the model to the relationship between the corporation and stakeholder group in question.

1. Shareholders

Let's start with shareholders. The system of one share, one vote calibrates the level of a shareholder's financial interest in the corporation with their assigned voting rights.[176] For shareholders, the value of their capital contribution and the percentage of the dividend provide fairly quantifiable measures of their interest in the corporation.[177] Putting aside any outside interests of the shareholder, the allocation of one vote for each share accurately correlates to the shareholder's financial interest in the enterprise.[178] Because share ownership represents both an accurate and manageable marker of interest in a corporation, our analysis would indicate a presumption for shareholder voting rights.

The familiarity of this conclusion does, however, mask some complicating factors. Shares originally sold at one price during

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173. *See supra* Part I.B.

174. *See* HAYDEN & BODIE, *supra* note 59, at 155 ("The theory of the firm supports a governance model that includes employees.").

175. *See id.* at 161–71 (discussing shareholders, employees, and other corporate constituents governed by the theory of the firm).

176. *Id.*

177. *Id.* at 165.

178. *See* EASTERBROOK & FISCHEL, *supra* note 48, at 72 ("The most basic statutory rule of voting is the same in every state. It is this: all common shares vote, all votes have the same weights, and no other participant in the venture votes, unless there is some express agreement to the contrary. Such agreements are rare.").

the initial public offering may see their prices change drastically over time.[179] One shareholder may have purchased shares for $30 at a firm's inception, while later shareholders may have paid over $200.[180] Shareholders also have differing interests outside the firm—interests that may overwhelm the shareholder's interest in the corporation's residual.[181] Some of these interests include: countervailing interests in derivatives or short positions;[182] personal interests, such as family ties[183] or religious and political values;[184] and investing strategies and approaches specific to social investing funds,[185] pension funds,[186] sovereign

179. *See* Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711, 713 (2005) ("For every person inside the IPO loop who sold high, a retail investor bought high.").

180. Facebook is one example, soaring to new heights after its IPO but also suffering periodic dips. *See* Matt Phillips, *Belly-Flop by Facebook Puts Investors on Edge*, N.Y. TIMES, July 26, 2018, at B1.

181. Hayden & Bodie*, supra* note 64, at 477–99.

182. *See* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 816 (2006) (describing equity swaps and other strategies for decoupling votes from economic ownership); Shaun Martin & Frank Partnoy, *Encumbered Shares*, U. ILL. L. REV. 775, 780 (2005) (defining "economically encumbered" and "legally encumbered" shares).

183. *See* Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1249 (2013) ("[J]ust as family law scholars have argued that contracts can regulate intimate relationships, corporate law scholars should recognize that the intimacy of family life often substitutes for arm's length bargaining in family businesses.").

184. *See* Elhauge, *supra* note 80, at 868 ("[T]here is no reason to believe that the law and the markets within which corporations operate are able to induce desirable behavior so completely that it would be beneficial to create a corporate law duty that would insulate corporations from the social and moral processes that help regulate non-corporate business activity.").

185. *See* 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, 453 (2020) (describing environmental, social, and governance (ESG) factors which trustees may consider in making investment decisions).

186. *See generally* WEBBER, *supra* note 40.

wealth funds,[187] passive index funds,[188] or even algorithms.[189] And fully diversified shareholders are financially indifferent to the fortunes of any particular corporation.[190]

Shareholder voting also has complicated manageability issues. Shareholder governance is still centered around the idea of the annual shareholders' meeting, which shareholders in theory are expected to attend.[191] Most shareholders, however, designate their voting power to proxies to act on their behalf,[192] and most shareholders own their shares through intermediaries who hold those shares on their behalf.[193] Custodial ownership, short sales, lending shares, and changes in ownership after the record date all create logistical tangles that can be difficult to undo.[194] The

187. *See* Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345, 1369 (2008) (arguing that suspending sovereign wealth funds will mitigate concerns "that the perception of strategic behavior by foreign state-owned entities will result in a protectionist backlash").

188. *See* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 497 (2018) (proposing that lawmakers should restrict truly passive funds from voting at shareholder meetings because of their lack of interests in voting).

189. *See* Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 689–91 (2013).

190. Vladyslav Sushko & Grant Turner, *The Implications of Passive Investing for Securities Markets*, BIS Q. REV., Mar. 2018, at 113, 115.

191. *See* William K. Sjostrom, Jr., *The Case Against Mandatory Annual Director Elections and Shareholders' Meetings*, 74 TENN. L. REV. 199, 201 (2007) (describing the shareholders' meeting and challenging the corporate governance requirements of annual shareholders' meetings and director elections).

192. For a discussion of the establishment and history of the corporate proxy, see Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. CAL. L. REV. 881, 887–904 (2023).

193. See Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 6–7 (2007) (discussing the "separation of ownership from ownership," namely that "the equity of public corporations is often owned, not by the end-user investors, but by another form of agency, a mutual fund, or other institutional investor").

194. *See* Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1231 (2008) ("The inescapable complexity combined with the already well-studied issues of shareholders' rational apathy and free rider problems detract from the case for shareholder voting.").

allocation of particular shares to particular holders has not caught up with technology that allows trading in nanoseconds.[195]

We do not argue that shares lack the accuracy and manageability to serve as adequate markers of shareholder interests for governance purposes. The complications listed above, however, highlight the challenges that any system of voting must undertake, even for voters that have a clear stake in the institution's decision-making and a straightforward way to calibrate the strength of their interest. On top of that, because shareholders provide unencumbered capital to the corporation in exchange for certain rights to the residual profits, they cannot register their preferences meaningfully through agreement alone; they need a governance mechanism.[196] Shareholder voting rights are designed to manage those preferences.

2. Employees

As we have discussed at length elsewhere, employees also fit the electoral presumption of having accurate and manageable markers for their interests in the corporation.[197] In terms of accuracy, workers have strong economic interests in the continuing success of the corporation—generally more than the average shareholder's diversified interest.[198] Like shareholders, employees have sunk investments in the firm that render them long-term investors in the firm's success.[199] Because employees are

195. *See* George S. Geis, *Traceable Shares and Corporate Law*, 113 NW. U. L. REV. 227, 228–29 (2018) (noting the failure to connect particular shares with their owners in the context of electronic trading); *see also* Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 495 (2015) ("[T]he new marketplace operates at much accelerated speeds with much more information, much less transparency, and much greater complexity.").

196. *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

197. HAYDEN & BODIE, *supra* note 59, at 167–69.

198. Margaret Blair has written extensively about the investment of human or employee capital within the firm as a justification for greater participation in governance. *See, e.g.*, MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 233-34, 238 (1995).

199. *Id.* at 257 (employees' investments in the firm make them residual claimants).

participants in the ongoing production process, they should have a voice in the governance of the firm.[200]

In terms of manageability, employees are easy to find—in many ways, much easier than shareholders who can disappear within various financial instruments and flurries of trading. At the same time, the exact assignment of employee voting rights presents some unique complications. First, the legal category of "employee" is subject to more uncertainty than the category of shareholder. The various doctrinal tests for "employment," such as the common-law control test,[201] have uncertain boundaries that can create confusion over whether a particular worker is an employee.[202] This difficulty could be bridged by choosing a particular metric for employee status, such as those designated as employees for certain tax purposes.[203] Corporations would also have to make choices about the specific voting rights to be granted based on employment. Each employee could simply receive equal voting rights—"one employee, one vote"—or rights could be allocated in terms of seniority, wages, or position. Commentators have argued that these potential conflicts over apportionment may create divisiveness and generate internal

200. For an extended discussion of employees' participation in the firm as a basis for the legal definition of employment, see Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 695–706 (2013).

201. RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. L. INST. 1958) (defining a servant/employee as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control").

202. *Id.* § 220 cmt. c (noting that the employment relationship is "one not capable of exact definition"). For a discussion of the distinction between employees and independent contractors in the context of gig workers, see *infra* Part II.C.3.

203. Firms are expected to differentiate between employees and independent contractors over a host of provisions, including whether taxes need to be withheld, 26 U.S.C. §§ 3401(c) note 2, 3402 (2018) (delineating tax withholding policies regarding employees); whether the firm must pay a share of Social Security and Medicare (FICA), *id.* §§ 3101, 3121(d); and unemployment (FUTA) taxes for the worker, *id.* §§ 3301, 3306(g)–(i); and whether the workers count as employees for benefit plan purposes, *id.* § 410(a) (outlining age requirements and service conditions for benefit plans). The IRS defines employees based on the common law control test. *Id.* § 3121(d)(2) (defining an employee as, among other definitions, "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee").

disharmony.[204] But employees are not so dissimilar to shareholders, whose voting rights may depart substantially from "one share, one vote."[205] Many of the largest and most tech-prominent companies have allocated voting rights disproportionately to founders, family members, or insiders.[206] Corporations could likewise design a system of voting rights based on the relative importance of employee voice to the company, choosing a metric that they believe to be the best method of assessment.[207]

Another potential manageability concern is the incommensurability of employee voting rights with shareholder voting rights. As noted earlier, commentators have expressed alarm over a mixed electorate that is dumped into one common pool.[208] But proponents of the employee franchise have generally suggested separate sets of elections where shareholders vote for a

204. *See* HANSMANN, *supra* note 55, at 93 (stating with respect to equal-sharing rules in law firm settings that "[u]sing a political process to decide on a more complex differentiated scheme of division would be time-consuming and divisive for all involved, and there is no reason to believe that a stable outcome could be easily achieved"); Henry Hansmann, *Employee Ownership and Unions: Lessons from the Airline Industry* (concluding that employee ownership (i.e., by pilots) in the airline industry "involves adoption of one inefficient contracting structure to mitigate the inefficiencies of another," and that eliminating such a system may be the best means to advancing efficiency and equity in the industry), *in* EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 573, 579 (Samuel Estreicher ed., 1998).

205. *See supra* Part II.C.1.

206. *See* Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 704–07 (2019) (overviewing shareholder litigation based on stock splits and other alleged forms of concentrating shareholder control). See also Emilie Aguirre, *The Social Benefits of Control*, 74 DUKE L.J. 681, 683 (2024) (arguing that multiclass structures can be designed to support greater attention to social responsibility within business.

207. Recent innovations in employee participatory governance structures include holacracy and other participatory (or "evolutionary") management structures. *See* FREDERIC LALOUX, REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS (2014) (presenting businesses that operate on a more participatory organizational model as consistent with higher stages of human psychological development); BRIAN J. ROBERTSON, HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD 30 (2015) ("When we effectively distribute power to those on the front lines [as part of Holacracy], we dramatically enhance an organization's capacity to harness input and capture learning—thus solving a problem many leaders struggle with as their companies grow.").

208. *See, e.g.*, Bebchuk & Tallarita, *supra* note 77, at 162.

set of shareholder directors, and employees vote for a set of employee directors.[209] The voting rights would not need to be commensurable as they would be participating in different elections.[210] Both the German system of codetermination[211] and bills recently introduced in the U.S. Senate[212] track this approach. At this stage, it's enough to say that the logistical challenges are not insurmountable.[213] More importantly, they do not justify the exclusion of a set of corporate participants from participation in governance.

Democratic participation theory consistently counsels in favor of extending the corporate franchise to shareholders and employees. Those two groups deserve voting rights in most corporations because the two groups have the accurate and manageable markers of interest that allow for the creation of a workable system of corporate governance. They also both participate in a process of joint production as carried on by the firm.[214] Under this model, in most ordinary situations, shareholders and employees should be represented on the board.

The theory of democratic participation, though, is not limited to evaluating the claims of these two primary stakeholders.

209. Isabelle Ferreras has proposed a "two-house" corporate governance system where one has shareholder representatives and the other employee representatives. ISABELLE FERRERAS, FIRMS AS POLITICAL ENTITIES: SAVING DEMOCRACY THROUGH ECONOMIC BICAMERALISM 133–45 (Miranda Richmond Mouillot ed. & trans., 2017).

210. HAYDEN & BODIE, *supra* note 59, at 169.

211. *See* Andreas Rühmkorf, *Stakeholder Value Versus Corporate Sustainability: Company Law and Corporate Governance in Germany* ("[T]he two-tier German board structure has more discretion to pursue interests other than those of the shareholders compared to one-tier boards such as in the United Kingdom."), *in* CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 232, 233 (Beate Sjåfjell & Christopher M. Bruner eds., 2020); Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labor Law*, 23 COLUM. J. EUR. L. 135, 136 (2016) ("German codetermination arose through collective agreements, which only subsequently were codified by the law.").

212. *See* Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Reward Work Act, S. 2605, 115th Cong. (2018).

213. The mixed interests of employees and shareholders come into play in startup companies, where founders and employees generally have equity positions along with wages and benefits. For a discussion of the unique governance challenges in new companies poised for growth, see Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 155 (2019).

214. *See* Blair & Stout, *supra* note 80, at 269 (arguing that "shareholders, executives, and employees are all team members").

Instead, the model may be applied to other constituents—on a sector-by-sector, firm-by-firm basis—to see if they, too, should be accorded governance rights. Doing so reveals that, once we move past shareholders and employees, our analysis is going to be more situational and will depend on the nature of the stakeholder's relationship and contribution to the firm. It may also do so in ways that transcend current legal classifications.

3. Platform Workers

Over the last half century, workplaces have become more fissured as firms moved from traditional models of stable, long-term employment to outsourcing and contracting.[215] One more recent manifestation of this general trend has been the rise of economic activity facilitated by platforms, which are typically online sales frameworks.[216] The platform is a proprietary website or smartphone app that acts as an intermediary, connecting goods or services providers with consumers.[217] In some cases, the

215. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 99–107 (2014) (describing the rise of subcontracting in traditional workplaces); Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power*, 90 U. CHI. L. REV. 437, 441–46 (2023) (tracking the historical role of technological advancement in driving fissuring); David Weil, *Fissured Employment: Implications for Achieving Decent Work* ("[L]ike rocks split by elements, employment has been *fissured* away from these lead organizations and transferred to a complicated network of smaller business units."), *in* CREATIVE LABOUR REGULATION: INDETERMINACY AND PROTECTION IN AN UNCERTAIN WORLD 35, 37 (Deirdre McCann et al. eds., 2014).

216. *See* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (2016) ("[T]he platform economy is easier to explain by way of function: a platform company is launched as an online intermediary between buyers and sellers of goods and services—the ancient role of the middleman—enhanced with the modern power afforded by cloud computing, algorithmic matching, pervasive wireless Internet access, scaled user-networks, and near-universal customer ownership of smartphones and tablets."); *see also* Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMPAR. LAB. L. & POL'Y J. 577, 577 (2016) (describing as "crowdwork" jobs that "rely on technology to deploy workers to perform tasks (such as driving, grocery delivery, or home repair services) for requesters in the real world who pay for these services, with the app or platform keeping a percentage of the exchange").

217. *Compare* ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 26–27 (2016) (outlining five key characteristics of the "sharing economy": (1) it is largely market based, (2) it allows for high-impact capital, (3) it utilizes crowd-based networks rather than centralized institutions, (4) it blurs the lines between personal and

providers are workers who agree to provide on-demand services to a company's clients and are then compensated by the company.[218] The most prominent gig economy companies include rideshare firms like Uber and Lyft, food delivery companies like Instacart and DoorDash, and home services firms like TaskRabbit.[219] The firms are, essentially, matchmaking services between the gig workers and consumers.

The question of whether gig workers are classified as employees or independent contractors is of great legal and practical significance. Classifying gig workers as employees means they are entitled to many of the protections and benefits of labor and employment law, including minimum wage, overtime, workers' compensation, unemployment compensation, protection against employment discrimination, and protection of collective action and union membership. Workers classified as independent contractors, on the other hand, lack these basic income and job security protections.[220] For that reason, the classification of gig workers has been fiercely contested from the start.[221]

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professional labor and services, and (5) it blurs the lines between full-time employment and casual labor), *with* Robert Sprague, *Updating Legal Norms for a Precarious Workforce*, 35 A.B.A. J. LAB. & EMP. L. 85, 89–90 (2020) (defining the "sharing economy" as "a business model which operates less like sharing and more like traditional corporate profit-making that happens to use a smartphone app").

218. *See* Sprague, *supra* note 217, at 86 (describing the difficulty of classifying gig workers due to the "growth of precarious, on-demand work").

219. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker*,*"* HAMILTON PROJECT 28–33 (Dec. 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/QE2Z-7368] (cataloging and describing prominent online platform companies).

220. *See id.* at 6–7 (describing the protections and benefits afforded to traditional employees which are denied to independent contractors); Samantha J. Prince, *The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 U. MEM. L. REV. 627, 629–31 (2022) (detailing the historical exclusion of app-based platform workers from the protection of employment and labor laws due to the workers' classification as independent contractors); Sprague, *supra* note 217, at 98–99 ("No parallel laws protect workers who are not classified as employees, namely independent contractors."); V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 67 (2017) (lamenting the growth of work which is "precarious or risky because it lacks stability and the benefits of regulation").

221. *See, e.g.*, Sprague, *supra* note 217, at 95.

Gig workers are usually treated as independent contractors by the firms they work for and have thus been forced to pursue the protections of employment laws through classification lawsuits.[222] But the law on worker classification is a "hot mess."[223] On the federal level alone, there are at least three different common law tests of employment status, all of which involve the application of a number of factors that are difficult to ascertain and can also be manipulated in the context of gig work.[224] And even when workers win their lawsuits, they are often pyrrhic victories. First, the losing firms, with their mix of structural and political power, have largely been able to escape compliance, which means the workers rarely realize the advantages of employee status.[225] Thus regulation, for one reason or another, has failed to protect them from exploitation. Second, the gig workers themselves are often ambivalent about their status as employees—they like the labor protections, but they also like the structural flexibility of the work that comes with independent contractor status.[226] That said, most platform workers aren't in any position to actually negotiate the terms of their service. Platform companies have nearly complete control over the platform, the pricing, and the participants allowed on the platform. Platforms use opaque algorithms to set prices and assign workers to tasks, robbing them of the kind of information that would allow them to

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222. *See* V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 801–02 (2017) (expressing concern about the effectiveness of employment-related litigation and proposing "multiple strategies for change from the outset—including policy, organizing, and media initiatives").

223. Estlund, *supra* note 215, at 460.

224. *See* Prince, *supra* note 220, at 662–78 (cataloging and examining application of the federal tests, which include the control test, the entrepreneurial opportunity test, and the economic realities test). And there are also a number of state law tests and, more recently, state statutes that add to this complexity. *See id.* at 678–99.

225. *See* Dubal, *supra* note 222, at 793–96. The firms deploy their structural power through waging long-term battles over classification, refusing to bargain, and restructuring their workforce in light of litigation losses in order to escape their potential liabilities. *See id.* at 793–95. They wield their political power to get state legislation passed to codify the status of their workers as independent contractors. *See id.* at 795–96.

226. *See id.* at 796–99.

negotiate.[227] In addition, workers may find themselves trapped within the platform for their opportunities—the larger the network, the less likely a worker is to find work outside of it.

What does the classification of gig workers tell us about their status under the model of democratic participation? Our model can take advantage of the outcome of that dispute, but is not cabined by it. If, for example, gig workers are classified as employees, they probably also have the accurate and manageable markers of interest that come with that status and should be represented in the boardroom. But what if they're classified as independent contractors—are they out of luck? Not at all. We need to look at their relationship to the firm under the model, which means asking whether one's status as a gig worker is an accurate and manageable marker of their interest in the firm. The outcome of that analysis is not dictated by the classification dispute.

Certainly, many gig workers have a strong interest in the decision-making and success of the platform companies for which they work. One recent study of rideshare drivers in New York City, for example, revealed that nearly two thirds of them did so full time and held no other jobs.[228] And around eighty percent of them bought cars for the purpose of making a living by driving them.[229] Full-time drivers clearly have a strong interest in firm decision-making. In contrast, one study of Seattle drivers found that many of them instead treated driving as a side gig, and very few of them approached anything like a full-time work week.[230] This variation among driver preferences and

227. *See, e.g.*, Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1944–46 (2023) (describing how uses algorithmic pricing to manage its workforce).

228. James A. Parrott & Michael Reich, *An Earnings Standard for New York City's App-Based Drivers: Economic Analysis and Policy Assessment*, CTR. FOR N.Y.C. AFFS. 15 (2018), https://www.centernyc.org/an-earnings-standard [https://perma.cc/R27Z-5F4J].

229. *Id.*

230. *See* Louis Hyman et al., *Platform Driving in Seattle*, CORNELL UNIV. ILR SCH. 31–36 (2020), https://s3.iois.me/Platform-Driving-In-Seattle.pdf [https://perma.cc/7PDQ-T8JG] (finding, in a report produced by the Cornell University School of Industrial and Labor Relations Institute for Workplace Studies, that five percent or fewer of drivers drove on a full-time basis). This study has come under criticism for using data provided by Uber and Lyft, and for failing to properly account for drivers' overhead costs. *See* Dubal, *supra* note 227, at 1944–46.

experiences helps point up the fact that merely being a rideshare driver may not indicate a sufficiently strong interest in the firm to merit participation in governance. But these firms have the kind of information that would allow them to distinguish between those with stronger and weaker interests by reference to their driving logs and other data.[231] Just like shareholders with only a few shares purchased transiently, or part-time employees, we should be able to assess gig workers' level of interest in the firm fairly accurately and could set some kind of minimum hours requirement over time as a lower threshold for participation in governance.

Gig worker status, especially in the platform economy, is also an easily manageable marker of interest. Platform firms like rideshare service providers can readily identify and communicate with their drivers.[232] They also possess information on the precise degree of engagement—down to the minute and the penny—those drivers have with the company.[233] The kind of data that internet platform companies have about their labor and consumer markets is precisely the kind of information that makes gig-worker status a manageable marker of interest in the fortunes of those companies. Thus, gig worker status, at sufficiently high levels of participation, may be an accurate and manageable marker of interest that counsels in favor of governance rights. And this is true regardless of their status otherwise as independent contractors or employees.

4. Customers

Other corporate stakeholders may deserve governance rights as well, depending on the exact circumstances of the relationship. Customers, for example, may or may not meet the conditions of the model of democratic participation such that it

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231. *See, e.g.*, Ryan Woo & Sameer Kapoor, *How Uber Accomplishes Job Counting at Scale*, UBER BLOG (May 22, 2024), https://www.uber.com/blog/job-counting-at-scale [https://perma.cc/YA82-4JQW] (describing how Uber organizes the data it collects on its drivers' rides).

232. *See* Ibrahim Ayoade, *How Uber Tracks Drivers Before They Accept a Request*, MEDIUM (Sept. 18, 2024), https://medium.com/@maiwega/how-uber-tracks-drivers-before-they-accept-a-request-7140fcc8f88c [https://perma.cc/L3L5-A628].

233. *Cf.* Zebing Zong, *Building a Real-Time Earnings Tracker into Uber's New Driver App*, UBER BLOG (Mar. 25, 2019), https://www.uber.com/blog/real-time-earnings-tracker [https://perma.cc/B3HS-AU7F] (describing a feature Uber developed for drivers to see their real-time earnings).

makes sense to extend them governance rights. Take, for example, someone who buys a corn dog from a vendor at the state fair.[234] People who buy corn dogs certainly have some relationship with the company that sells them. But their interest in the continued success of that company is pretty weak: they're quite unlikely to have the kind of contact that gives them a significant interest in the company's long-term success.[235] After all, how often does one buy a corn dog at the state fair?[236] And the corn dog vendor, at the point of sale, is probably not taking down contact information on all their customers. The same may be true of many types of customers whose relationship with companies—even assuming the planned obsolescence of their products—is likely to be relatively sporadic. Their status as customers is not an accurate marker for a strong interest in the future success of the firm, nor is it a particularly manageable one.[237] Thus, one might well conclude that merely being a customer should not give rise to governance rights.

These types of concerns have long driven scholars to reject the idea of consumer participation in board elections. Oliver Williamson, for example, thought that consumer interests were best captured by their decision to contract (or refrain from contracting) with a company.[238] "The main protection for customers," he

234. *See Missouri Lawmaker Wants to Make the Corn Dog the Official Food of the State Fair*, FIRST ALERT 4 (Feb. 6, 2023), https://www.kmov.com/2023/02/06/missouri-lawmaker-wants-make-corn-dog-official-food-state-fair [https://perma.cc/4YWT-4PAK].

235. Customers do, of course, have an interest in certain factors that contribute to the firm's long-term success, including its commitment to health and safety protocols. *See, e.g.*, *Corn Dog Batter and Scampi Seasoning Recalled over Metal in Products*, FOOD SAFETY NEWS (Nov. 18, 2021), https://www.foodsafetynews.com/2021/11/corn-dog-batter-and-scampi-seasoning-recalled-over-metal-in-products [https://perma.cc/7S92-LWMF].

236. *But see World Record Corndog-Eating Attempt in Iowa*, KXLY (Aug. 7, 2008), https://www.kxly.com/news/world-record-corndog-eating-attempt-in-iowa [https://perma.cc/LR3B-C2T6] (describing an event in Iowa where state fairgoers set a new world record with 8,400 people eating corn dogs at once).

237. Whether customer status is a workable marker for interest in the firm may change with the increased online interaction between consumers and producers, particularly on social media. *See* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 135–37 (2019) (outlining how corporations use technology to track consumer data and target ads).

238. *See* Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1213–14 (1984).

argued, "is generally the option to take their trade elsewhere."[239] When consumer markets fail, as might be the case with harmful products, then a regulatory approach is to be preferred.[240] Why not governance rights? Williamson's objections mostly come down to accuracy and manageability: "Who are representative consumers? How do they communicate with their constituency?"[241] Other scholars have reached the same conclusion for similar reasons.[242]

This isn't, however, the end of the story. As David G. Yosifon has argued, these kinds of concerns about consumers appear weaker in light of the growth of technology that allows firms to track and communicate with their customers.[243] Yosifon noted: "Firms track [purchase and contact information] through 'consumer loyalty' programs that provide consumers with magnetized cards and identifying numbers that consumers or retail clerks swipe at the register, or type into an online interface, each time a consumer makes a purchase."[244] Tracking has become even more advanced since Yosifon was writing in 2009, with in-app purchasing, multiple social media platforms, and sophisticated data analytics.[245] These systems could be readily leveraged into a workable means to elect customer representatives to the board of directors.[246] Thus, the early concerns with the

239. *Id.* at 1213.

240. *See id.* (arguing that regulatory bodies are best equipped to protect consumers from hazardous products because consumers cannot easily organize).

241. *Id.*

242. *See, e.g.*, Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 955–56 (1977); David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote*,*"* 56 CORNELL L. REV. 1, 32–33 (1970).

243. David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 UC DAVIS L. REV. 253, 302–11 (2009); *see also* ZUBOFF, *supra* note 237, at 135–37 (identifying technologies corporations use to track consumer data).

244. Yosifon, *supra* note 243, at 306.

245. *See* ZUBOFF, *supra* note 237, at 136 (describing the precision and ubiquity with which apps track user data); *see also* Jai Rawat, *Building a Customer Loyalty Program in 2023? Here's What You'll Need*, FORBES (Feb. 27, 2023), https://www.forbes.com/sites/forbesbusinesscouncil/2023/02/27/building-a-customer-loyalty-program-in-2023-heres-what-youll-need [https://perma.cc/HH9B-QWG2] (highlighting how, with the right combination of modern analytics tools, organizations can use loyalty programs to track and "reward customer behavior across any channel, device or point of sale").

246. *See* Yosifon, *supra* note 243, at 306 (proposing several means for corporations to include consumers in governance and decision-making).

manageability of such a system were "logistical, not conceptual," and "these scholars' reckoning of the logistical limitations of consumer suffrage is dated."[247] Moreover, the customers of many types of products—like certain durable goods—may have an ongoing interest in the company's ability to provide repairs, replacement parts, and, more recently, software updates.[248]

These technological changes, along with changes in the nature of the goods being sold in the market today, certainly raise new possibilities with respect to customer participation in corporate governance. But there have always been some types of business enterprises where it made sense.[249] Utility customers have the kind of relationship with their providers that their status is an accurate mark of an ongoing interest in the companies.[250] It's also a readily manageable marker given the relatively constant nature of the consumption of the product—be it electricity, gas, water, or telecommunications—and the regular billing cycles. Utility companies know who their customers are and how to contact them. In addition, ratepayers have a much stronger interests in governance than most consumers: they have no real consumer choice as to service provider (since most utilities operate

247. *Id.*

248. *See* David G. Yosifon, *Consumer Lock-In and the Theory of the Firm*, 35 SEATTLE U. L. REV. 1429, 1454–56 (2012). Even Williamson acknowledged that consumer durables can "pose special problems." *See* Williamson, *supra* note 238, at 1213.

249. Take, for instance, local merchants and farmers in the nineteenth century, who often purchased shares in the companies they relied on for vital infrastructure services such as transportation, banking, and insurance. *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 951 (2014). Restricted voting schemes protected these low-stakes shareholders and gave their shares more power within the governance structure. *See id.* at 952–53. Scholars have debated whether these protections were more a form of investor protection or consumer protection. *Compare* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354–56 (2006) (investor protection), *with* Hansmann & Pargendler, *supra*, at 953–54 (consumer protection).

250. *See* HANSMANN, *supra* note 55, at 168–73 (discussing customers' ownership interests in rural electrical cooperatives); Yosifon, *supra* note 248, at 1449–59 (arguing that consumers may have ongoing interests through lock-in purchases, purchases that a consumer uses habitually and into which they have already sunk costs); Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REGUL. 569, 573–74 (2023) (arguing that because ratepayers, not shareholders, are the firm's residual claimants, they should have governance rights akin to shareholders in private firms).

as monopolies); their demand for utilities is often inelastic; rate regulation reduces the risks and rewards available to utility shareholders; and ratepayers end up absorbing much of that risk.[251] Their interests, then, are not going to be well captured by contract, providing an additional reason that democratic participation theory may counsel in favor of extending them voting rights.[252]

This argument may also extend to certain consumer products that are now being structured more like traditional utilities, at least when it comes to customer contact. Many consumer products are now "tethered"—tied by contract and internet connection to an ongoing licensing and servicing relationship that keeps buyer and seller together.[253] Books, music, and software used to be purchased in one-off transactions; there was no real ongoing relationship between publisher and consumer. Such a relationship would probably not give rise to governance rights under the model of democratic participation. Now, however, when you purchase a book on Amazon for your Kindle, you're actually purchasing a license to access the digital content rather than owning the book itself.[254] The same is true of many music and software purchases.[255] These new kinds of relationships between firms and customers might very well give rise to the kind

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251. Kovvali & Macey, *supra* note 250, at 585–91.

252. *See id.* at 600–06 (discussing the potential for board representation for utility ratepayers).

253. *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 106 (2008) (discussing the concept of tethered devices—complicated appliances that are "easy for their vendors to change them from afar, long after the devices have left warehouses and showrooms"); Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 785 (2019) (defining "tethering" as "the strategy of maintaining an ongoing connection between a consumer good and its seller that often renders that good in some way dependent on the seller for its ordinary operation" and providing examples such as "Google Home, Amazon Alexa, smart kitchen appliances, new cars," and devices more broadly described as the "Internet of Things").

254. *See* Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 318 (2017) ("The terms of use and end user license agreements . . . associated with digital media goods typically restrict not only bequeathing those goods by will, but all manner of transfers. According to those provisions, purchasers cannot lend media goods; they cannot give them away as gifts; and they certainly cannot resell them.").

255. *See, e.g.*, Hoofnagle et al., *supra* note 253, at 839 ("Indeed, the degree of control this form of tethering generated for Apple was the primary motivation for the music industry to abandon [digital rights management] for digital downloads.").

of accurate and manageable markers of ongoing interest that militate in favor of governance rights. Such rights would also help overcome the well-documented breakdown in the ability of contract or regulation to protect consumer interests.[256]

5. Social Media Users

Social media and technology account users are a special form of stakeholder in the new economy. Someone who creates an account on Facebook or Google might imagine themselves customers of these companies, as they choose to sign up for the services provided and receive their benefits. But many of the big tech companies charge nothing, or just a nominal fee, for using these extensive and expensive-to-operate electronic platforms.[257] Users are, instead, the targets of digital advertising sold by the social media companies.[258] Commentators have persuasively argued that the true consumers of these companies are the advertisers who pay large sums to sell their goods and services through these platforms.[259] Meta has annual revenues of over $100 billion despite the fact that its billions of users pay nothing to the company.[260]

The dynamic established by this tripartite relationship between users, social media companies, and advertisers facilitates user exploitation. The companies profit by gathering user information and generating user engagement, which often leads the platforms (or their algorithms) to promote emotional, divisive

256. *Id.* at 850–55, 858–73 (discussing existing shortcomings in contract, antitrust, and consumer protection law when it comes to tethered products and providing some suggestions for improvement).

257. *See, e.g.*, *Does It Cost Money to Use Facebook?*, FACEBOOK, https://www.facebook.com/help/186556401394793 [https://perma.cc/CM8P-XGR3] (explaining that Facebook is available free for users).

258. *See id.* (explaining that Facebook generates income by running advertisements on its platform).

259. *See, e.g.*, ZUBOFF, *supra* note 237, at 94 (describing users as "no longer the *subjects* of value realization" but instead "the *objects* from which raw materials are extracted and expropriated").

260. *See* Press Release, Meta Investor Relations, Meta Reports Fourth Quarter and Full Year 2022 Results (Feb. 1, 2023), https://investor.atmeta.com/investor-news/press-release-details/2023/Meta-Reports-Fourth-Quarter-and-Full-Year-2022-Results/default.aspx [https://perma.cc/QT8J-6LSV] (listing Meta's 2022 revenue at over $116 billion).

content.[261] The digital privacy concerns and costs associated with careless content moderation (foreign influence campaigns, intentional dissemination of misinformation, and incitements to violence) are significant externalities largely born by the users or society at large.[262] Users can, of course, move with their feet: exit or diminished interaction can send a signal to companies to change their practices.[263] But given the stickiness of social media use, the sunk costs of past posts and pictures, and the limited array of options for reaching a sufficient set of other users, users have only limited abilities to change companies and remain part of the online dialogue.[264]

The potential for opportunistic policies towards engagement, content moderation, and data management have led to widespread calls for legal reforms. Some proposals call for internal improvements to company policies, such as oversight boards or less restrictive moderation, while others seek to regulate the companies—ranging from imposing common-carrier obligations or breaking up the companies to provide less power and more competition.[265] Jack Balkin, for example, has argued that Big

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261. *See* Huo Jingnan & Shannon Bond, *New Study Shows Just How Facebook's Algorithm Shapes Conservative and Liberal Bubbles*, NPR (July 27, 2023), https://www.npr.org/2023/07/27/1190383104/new-study-shows-just-how-facebooks-algorithm-shapes-conservative-and-liberal-bub [https://perma.cc/BTV8-K2A6] (describing how social media algorithms have a polarizing effect by showing users more extreme content).

262. *See* Abby Lemert, *Facebook's Corporate Law Paradox*, 17 VA. L. & BUS. REV. 43, 43 (2022) (explaining that Delaware corporate law's "unflinching commitment to shareholder primacy" prevents Facebook from acting in the public interest to redress the harms its platform causes).

263. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1602 (2018) (asserting that social media companies "reflect[] the democratic culture and norms of their users").

264. *See id.* at 1666 ("[T]he central difficulty in simply allowing these systems to self-regulate in a way that takes into account the values and rights of their users is that it leaves users essentially powerless.").

265. *See* Charlotte Garden, *Platform Unions*, 108 MINN. L. REV. 2013, 2013 (2024) (proposing that social media users organize platform "unions" and collectively bargain with social media companies to decide platform policies); Brenda Dvoskin, *The Illusion of Inclusion: The False Promise of the New Governance Project for Content Moderation*, 93 FORDHAM L. REV. 1315 (2025) (arguing against self-governance and in favor of greater regulation); Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 914 (2021) (suggesting that social media

Data companies with large data repositories should be considered "information fiduciaries" with respect to that data.[266] Balkin's proposal has met with some criticism, including the notion that corporations will find inexorable conflict as between the duty to maximize shareholder wealth and the duty to protect data providers.[267]

A number of proposals for social media reform envision the creation of stronger individual rights for users. The European Union's General Data Protection Regulation (GDPR) perhaps epitomizes this approach, as it provides all data subjects with rights such as data processing disclosure, data portability, data rectification, and the controversial "right to erasure."[268] Privacy protections in the United States offer more limited versions of these protections, with a variety of common-law and statutory protections for health data, financial data, and other forms of

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companies adopt a "model framework for nonpartisan content moderation"); Sari Mazzurco, *Democratizing Platform Privacy*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 792, 793 (2021) (taking tools from labor disputes of the early twentieth century and applying them to platform governance); Dawn Carla Nunziato, *The Old and the New Governors: Efforts to Regulate and to Influence Platform Content Moderation*, 22 FIRST AMEND. L. REV. 348, 350 (2024) (advising courts on how to rule on first amendment challenges to state and federal laws regulating social media content); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1622 (2018) (applying concepts from public utility regulation to internet platform regulation); Haochen Sun, *Regulating Algorithmic Disinformation*, 46 COLUM. J.L. & ARTS 367, 367 (2023) ("[T]he United States should take the lead in creating and piloting an algorithmic disinformation review system.").

266. *See* Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKIN (Mar. 5, 2014), http://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html [https://perma.cc/J8DA-ELG4] (developing the idea of an "information fiduciary" and discussing how the concept is reflected in existing fiduciary law).

267. *See* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 508 (2019) (noting that imposing fiduciary duties on social media companies as to user data "runs counter to the prevailing understanding of Delaware doctrine" that corporations are obligated to pursue the shareholders' best interests at all times). *But see* Andrew F. Tuch, *A General Defense of Information Fiduciaries*, 98 WASH. U. L. REV. 1897, 1902 (2021) (arguing that Khan and Pozen "significantly overstate the threat that corporate and fiduciary law poses for the information fiduciary model").

268. Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119) (EU). An easily accessible version of the GDPR can be found at: *General Data Protection Regulation*, INTERSOFT CONSULTING, https://gdpr-info.eu [https://perma.cc/7KPU-X5G5].

private information.[269] Individual rights are the traditional way for legal systems to provide redress for injuries.[270] But there have been struggles with creating regulations that balance speech protections against individual interests in data privacy.[271] To date most data protection regulation in the United States is based on a "notice and consent" system—a state of affairs that fewer and fewer believe to be suitable.[272]

In a recent article, Salomé Viljoen argues that regulating through individually-oriented privacy rights is insufficient to address the population-level effects of Big Data collection and use.[273] She describes how much of our data privacy legal infrastructure is oriented around data as an individual medium, where the "legally relevant" aspect of datafication is "data's

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269. For a taxonomy of privacy protections, see Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006). For a recent discussion of privacy harms, see Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 793–94 (2022).

270. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS (1992).

271. *See* Daniel J. Solove, *The Limitations of Privacy Rights*, 98 NOTRE DAME L. REV. 975, 978 (2023) ("[A]lthough rights are an important component of privacy regulation, rights are often asked to do far more work than they are capable of doing."). For example, some commentators have proposed a property interest in individual data. *See, e.g.*, Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2058 (2004). However, issues immediately arise over what aspects of property law would apply, and how those rights would impact others' use of the information. *See* Pamela Samuelson, *Privacy as Intellectual Property*?, 52 STAN. L. REV. 1125, 1149 (2000) ("Property law, in contrast, generally allows the owner of the right to exclude other people from engaging in certain activities, and injunctive relief is consequently generally available . . . . A property right in her personal data could provide grounds for injunctive remedy.").

272. *See, e.g.*, Daniel J. Solove, Symposium Introduction, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1879, 1881 (2013) ("[E]ven well-informed and rational individuals cannot appropriately self-manage their privacy due to several structural problems."); Fredric D. Bellamy, *U.S. Data Privacy Laws to Enter New Era in 2023*, REUTERS (Jan. 12, 2023), https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12 [https://perma.cc/9PEH-VR68] ("The year 2023 will go down in history as marking the beginning of a profound shift in the philosophy underlying data privacy laws in the United States.").

273. *See* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 578 (2021) ("[B]oth the status quo and reform proposals suffer from a common conceptual flaw: they attempt to reduce legal interests in information to individualist claims subject to individualist remedies, which are structurally incapable of representing the interests and effects of data production's population-level aims.").

capacity to cause individual harm."[274] While acknowledging the importance of individual interests, Viljoen believes that we also must approach data as a democratic medium.[275] Much of the usefulness of data in the informational economy, she says, is relational: "[A] basic purpose of data production as a commercial enterprise is to relate people to one another based on relevant shared population features."[276] The accumulation of massive data holdings pulls economic and social power into centralized tech companies, exacerbates economic inequality, and threatens to upset the checks and balances of democratic government.[277]

Viljoen's primary argument is that "the data-collection practices of the most powerful technology companies are aimed primarily at deriving (and producing) population-level insights regarding how data subjects relate to others, not individual insights specific to the data subject."[278] Taking on data as a democratic medium, rather than an individualized medium, presents two specific problems to solve: a sociality problem whereby the law can account for the social effects of data production, as well as a legitimacy problem in terms of who decides whether society-wide systems of data collection, use, and disclosure should be restricted. As Viljoen describes them, "[t]he sociality problem demonstrates the need in data-governance law for an expanded account of the interests at stake in information production, while the legitimacy problem points to the need for data-governance law to expand its remit by considering whose interests are relevant for deciding whether a particular instance of data production is legitimate, and on what grounds."[279] In particular, she highlights these specific concerns:

> This reorientation raises core questions of democratic governance: how to grant people a say in the social processes of their own formation; how to balance fair recognition with special concern for certain minority interests; how to identify the relevant "public" or institutional level of civic life at which to coalesce and govern such collective interests; and

274. *Id.* at 583.

275. *See id.* at 584 ("[D]ata's capacity to cause social harm [is] a fundamentally relevant feature of datafication.").

276. *Id.* at 580.

277. *See id. at* 580–81.

278. *Id.* at 578.

279. *Id.* at 582.

> how to not only recognize that data production produces winners and losers, but also develop fair institutional responses to these effects.[280]

Addressing these larger concerns will take institutional structures, rather than individual rights. According to Viljoen's approach, data management requires democratic institutions that can reflect the choices of those who are affected by the data use practices. Potential responses include requiring public access and management of existing proprietary data flows or employing governmental officers who would have access to the data systems.[281] Viljoen also suggests that democratizing governance of data production may also be "part of ongoing efforts to democratize other spheres of life, most notably the workplace."[282]

Viljoen's emphasis on the relational nature of data matches up well with the democratic participation theory of firm governance. Users have strong interests in the management of social media platforms: many users spend significant amounts of time online, meet friends, form important relationships, and conduct much of their relational life in these spaces. Once on a specific platform, users face significant costs to exit. Big tech companies also have the power to manipulate their users or drive them to distraction in order to foster engagement. As Viljoen recognizes, it's not just a matter of individual dignity and autonomy: there are important social effects that deserve organizational efforts at management and response.[283] Providing users with representation on the governing boards of their social media platforms would be an important step to fostering legitimacy and accountability for these companies.[284]

In *The New Governors*, Kate Klonick puzzles through the difficulties relating to content moderation on the large social media platforms.[285] While many users have complained about

280. *Id.* at 638.

281. *Id.* at 645.

282. *Id.* at 647.

283. *Id.* at 602.

284. There is, however, one point on which Viljoen would move beyond user representation in firm governance. Discussing proposals for private data trusts to protect users' interests, she notes that they generally permit participation by those subjects from whom the data is collected or related. *Id.* at 647–48. Viljoen, however, believes that all those on whom the data products are used—all those whose actions are judged or opportunities are limited based on the algorithmic decision-making processes—should have a voice in governing the data. *Id.* at 648.

285. Klonick, *supra* note 263.

restrictive speech regulation by the companies—so much so that one may have bought a platform based on this concern[286]—the traditional analogies for speech regulation have failed to match the moment.[287] The article's critical insight is that these companies "have developed a system that has marked similarities to legal or governance systems," making them essentially the institutional "governors" of some of our most important spaces for public interaction, discussion, and debate.[288] Pointing to the immense power of these tech giants, she argues that "the biggest threat this private system of governance poses to democratic culture is the loss of a fair opportunity to participate, which is compounded by the system's lack of direct accountability to its users."[289] Rejecting regulatory options such as common-carrier regulations,[290] Klonick argues that "[i]n some ways, the ideal solution would be for these platforms to put their intricate systems of self-regulation to work to solve this problem themselves without regulatory interference."[291] Although users do have some input into the policies that the platforms put in place to govern interaction, at present the platforms have only indirect methods of accountability to user interests and demands.[292] Klonick sees the possibility of a corporate law solution:

> One regulatory possibility might be a type of shareholder model—but this fails not only because Zuckerberg owns controlling shares of Facebook, but also because shareholder values of maximizing company profits are perhaps not well matched with user concerns over equal access and democratic accountability. One potential nonregulatory solution to

286. Pete Syme, *Elon Musk Says There Wasn't a Single 'Breaking Point' that Made Him Buy Twitter, but that He Feared a Rise in Online 'Groupthink,'* BUS. INSIDER (Dec. 5, 2022), https://www.businessinsider.com/elon-musk-bought-twitter-over-free-speech-concerns-media-groupthink-2022-12 [https://perma.cc/3WAT-WPCD]; Elizabeth Lopatto, *Elon Musk Learns the Hard Way that Being a Twitter Troll Is Way More Fun than Being a Mod*, VERGE (Nov. 11, 2022), https://www.theverge.com/2022/11/11/23451931/elon-musk-twitter-bankrupt-verification-ftc [https://perma.cc/FF75-ZFX4].

287. Klonick, *supra* note 263, at 1602–03.

288. *Id.* at 1602.

289. *Id.* at 1603.

290. *Id.* at 1661.

291. *Id.* at 1665.

292. *Id.* at 1666–68; *see id.* at 1668 ("Besides exit or leveraging of government, media, or third-party lobbying groups, users are simply dependent on the whims of these corporations. While platforms are arguably also susceptible to the whims of their users, this is entirely indirect—through advertising views, not through any kind of direct market empowerment.").

> this problem would be for these corporations to register as public benefit corporations, which would allow public benefit to be a charter purpose in addition to the traditional maximizing profit goal.[293]

It makes sense to search for an internal governance solution but have difficulty finding one under current law—shareholder primacy and the exclusive shareholder franchise stand in the way. Even if these companies reincorporated as public-benefit companies, that structure would still not be directly accountable to users. Instead, social media users are left to channel their preferences regarding firm decision-making through individual contract and state regulation, both of which have proven wholly inadequate to the task. Under our democratic participation model, users would meet the applicable metrics to warrant participation in governance. Social media users have a strong interest in platform decision-making, especially when it comes to data privacy and content moderation. And, like gig platform companies, social media companies already possess the kind of information that would allow them to identify their users and give them the opportunity to participate in governance, creating a real mechanism of internal accountability.

As might now be apparent, one of the more interesting features of our model of democratic participation is that it performs a bit of jujitsu with respect to some recent, troubling aspects of shareholder primacy. Over the last twenty years, technological innovations involving the internet and smart phone apps have generated tremendous wealth for shareholders.[294] But many of these innovations—the use of internet platforms to match gig workers with customers, moving from sales to licensing regimes, connecting the world through social media platforms—have benefited shareholders, in part by allowing companies to push additional externalities onto their workers,[295] customers,[296] and

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293. *Id.* at 1668.

294. *See* Amy C. Arnott, *Top 15 Value-Creating US Stocks of the Past Decade*, MORNINGSTAR (Feb. 19, 2025), https://www.morningstar.co.uk/uk/news/261058/top-15-value-creating-us-stocks-of-the-past-decade.aspx [https://perma.cc/D3RA-TLZL] ("[A]ll the members of the 'Magnificent Seven' group of large-cap tech stocks have . . . generated significant shareholder wealth over the past decade.").

295. *See supra* Part II.C.3 (discussing the misclassification of platform workers to their detriment).

296. *See supra* Part II.C.4 (discussing the use of licensing agreements rather than consumers owning the product they purchase).

users.[297] At the same time, many of the traditional arguments against extending governance rights to these additional stakeholders have turned on the logistical difficulties in identifying and tracking them.[298] These new technologies, though, allow these companies and others to track their gig workers, licensees, and social media users with tremendous precision.[299] And this, of course, means that these stakeholders have readily manageable markers of their interest in the ongoing success of their corporations. Thus, under our model, the very technologies that have allowed firms to put the squeeze on other stakeholders make it harder to blame logistics for not folding them into the structure of corporate governance.

6. Creditors and Suppliers

Creditors are the one set of stakeholders for whom shareholder primacy theory has made a special accommodation. According to that theory, shareholders deserve the sole set of governance rights because of their interest in the corporate residual, to which they alone are entitled.[300] However, when a corporation experiences extreme financial exigency or enters insolvency, the incentive structures change.[301] At such times shareholders can forfeit their grip over corporate control either through the operation of contractual covenants or through the formal mechanisms of the bankruptcy process.[302] Corporations may also award special voting rights to creditors that kick in under certain circumstances.[303] Although Delaware law had been read to require protections for creditors within the "vicinity of

297. *See supra* Part II.C.5 (discussing the costs of careless content moderation being born by users of social media companies).

298. *See supra* Part II.A (discussing Bebchuk and Tallarita's argument regarding the problem of determining which stakeholders to account for).

299. *See, e.g.*, ZUBOFF, *supra* note 237, at 135–37 (discussing the massive amount of tracking done by Google and Facebook).

300. EASTERBROOK & FISCHEL, *supra* note 48, at 67–68.

301. *Id.* at 69 ("When the firm is in distress, the shareholders' residual claim goes under water, and they lose the appropriate incentives to maximize on the margin.").

302. *Id.*

303. DEL. CODE ANN. tit. 8, § 221 (2023–24) ("Every corporation may in its certificate of incorporation confer upon the holders of any bonds, debentures or other obligations . . . the power to vote in respect to the corporate affairs and management of the corporation . . . .").

insolvency,"[304] the Delaware Supreme Court has ruled that creditors cannot bring a direct action against a corporation's directors for an alleged breach of fiduciary duty even when the corporation is operating within the zone of insolvency.[305] However, creditors of an insolvent corporation do have standing to bring derivative claims against directors on behalf of the corporation for breaches of fiduciary duties.[306] But this shift in duties does not carry over to voting rights, which remain in the hands of shareholders.[307] And other than these specific (and out-of-the-

304. Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."). *But see* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 789–90 (Del. Ch. 2004) (arguing that an expansion of fiduciary duty to creditors "involves using the law of fiduciary duty to fill gaps that do not exist"). For a discussion of this shift in directors' fiduciary duties, and an argument against such duties as owed to creditors, see Frederick Tung, *Gap Filling in the Zone of Insolvency*, 1 J. BUS. & TECH. L. 607, 610 (2007) ("[A]t least for commercial creditors, fiduciary duties that include such creditors are unnecessary and may be counterproductive.").

305. N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007); Sabin Willett, Gheewalla *and the Director's Dilemma*, 64 BUS. LAW. 1087, 1088 (2009) ("The court in *Gheewalla* held that a corporate director has no fiduciary duty to the corporation's creditors, regardless of the company's financial health.").

306. *Gheewalla*, 930 A.2d at 101; Quadrant Structured Prods. Co. v. Vertin, 115 A.3d 535, 556 (Del. Ch. 2015) ("[A]t the point of solvency, . . . the universe of potential plaintiffs expands to include creditors."). Some commentators have speculated that directors might have duties not to render the corporation unable to pay its creditors. Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584, 1596 (2024) (book review) ("One might go further and conclude that the duty of shareholder wealth maximization ends at the point of making a deliberate choice to render the company unable to pay its creditors (such as, for example, approving a leveraged buyout that will generously compensate the shareholders but layer the company in unsupportable debt).").

307. Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1330 (2007) ("Voting and other embedded ownership rights of shareholders are not considered at all by the doctrines' residual claimant analysis, which implies they do not exist or have any value. In actuality, even if the company is troubled, shareholder exclusivity as to voting continues: Shareholders retain the right to select directors and approve other actions.").

ordinary) circumstances, creditors are excluded entirely from participation in governance, just like other stakeholders.[308]

In considering voting rights for creditors under democratic participation theory, it is important to recognize the complexity of this seemingly straightforward category. A grouping of a corporation's "creditors" contains a potentially broad spectrum of claimants. Corporate bondholders are the most obvious examples, followed by banks that have provided secured loans, revolving lines of credit, or other types of lending. But suppliers can also be creditors if they extend credit to buyers, or even if they just haven't been paid. Unpaid employees are creditors, as are those workers and retirees to whom future benefits are owed.[309] In theory, anyone to whom the company has future payment responsibilities could be considered a creditor—even landlords and governments.

Given the multiplicity of potential relationships that fall under the heading of "creditor," we hesitate to offer a bright-line prescription for their treatment under democratic participation theory. Traditional creditors such as bondholders and banks may seem in some ways like prime candidates for inclusion in governance through the democratic participation model. They have strong interests in the ongoing business that are related to but different from shareholder interests.[310] They are easy to identify and could be allocated voting power according to the

308. Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1215 (2006) ("According to [the] conventional account, creditors receive no special rights against the corporation. The creditors' power is limited to suing the debtors when they fail to pay as promised. Creditors do not have their hands on the levers of power."); William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815, 1819 (2013) ("Lenders sit 'outside' of the corporation, and look to specific, bargained-for rights to protect their interests rather than the apparatuses of governance and fiduciary duty.").

309. Federal law requires pension benefits to be funded through a separate plan, which may be considered separate from the company itself for a variety of purposes. *See, e.g.*, 29 U.S.C. § 1132(d)(1) (establishing that the plan may sue or be sued as an entity). However, officers of the corporation have fiduciary responsibilities to the plan and may be liable for violations of those duties to the plan and its beneficiaries. Gail Cagney, Note, *Corporate Officers as Employers: Eristic Liability Under ERISA*, 52 BROOK. L. REV. 1211, 1211 (1987) (noting successful actions holding corporate officers to be employers in ERISA cases).

310. *See* Frederick Tung, *Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance*, 57 UCLA L. REV. 115, 120 (2009) (discussing similarities and differences in creditor and shareholder interests).

metrics of their loan. However, loans are more difficult to quantify across types than shares: Loans are measured not just by amount loaned, but also the seniority of the debt, the terms of repayment, and the contractual provisions that are associated with failure to make a payment or default.[311] Moreover, creditors' interests are more limited than shareholders, employees, or even consumers. They have an interest in the organization as an ongoing concern, but only to the extent that the entity is willing and able to repay its debt according to the loan.

The same is true of suppliers. A corporation's suppliers can fall across a dizzying array of relationships—one-timers, on-and-off agreements, long-term partners. Status as supplier is not in and of itself a sufficient marker of a strong degree of interest in the future of the corporation. But certain suppliers may have sufficiently large and long-term deals that governance rights are a better solution than a traditional contract for sale.

The complexity of contracts for debt and for supplied goods and services may generally counsel for a more contractually oriented approach—one that may include voting rights in special circumstances, according to the wishes of the parties.[312] The easier it is to contract for such rights, the more justifiable it is to leave it to contracts. But we should also consider what alternative mechanisms are available to protect creditor and supplier interests. Voting rights might not be a priority for creditors and suppliers that have other avenues to exercise power. Commentators such as Fred Tung have argued that creditors exercise "routine and significant" influence over governance even without board representation.[313] Suppliers have also bargained for board

311. Emily Winston, *Managerial Fixation and the Limitations of Shareholder Oversight*, 71 HASTINGS L.J. 699, 705 (2020) ("Even the more specific contracts, such as those with suppliers and creditors, will still have unspecified terms and will need to be negotiated repeatedly over the course of the corporation's life.").

312. BAINBRIDGE, *supra* note 14, at 89 (noting that bondholders and other substantial creditors memorialize their relationship with the firm "in complex contracts containing various representations, warranties, covenants, and conditions designed to protect the bondholders from conduct by the corporation that puts their interests at risk").

313. Tung, *supra* note 310, at 117 (2009) ("In fact, banks and other private lenders exercise influence over firm management that is both routine and significant. Private lender influence often exceeds that of shareholders—including major shareholders—and the board of directors, and may even dictate

seats when their long-term interests are intertwined with the actions of another firm.[314] While negotiations do impose transaction costs, creditors making large loans and suppliers with extensive long-term agreements can better absorb costs of negotiating voting rights into the deal than smaller or more distant stakeholders. In addition, creditors and suppliers generally have specific contract claims that are simpler to enforce.[315] They can secure their loans with liens against existing assets, insuring that at least some value will remain to reimburse the lender. And the bankruptcy system is set up to provide relief when the corporation can no longer manage its debts—a system with its own set of courts, special remedies, and focused attention on the interests of those to whom the corporation owes money.

Such reasoning may seem to justify the status quo, since arguably all stakeholders could negotiate for voting participation alongside shareholders.[316] But as separate businesses, creditors and suppliers can more easily bargain for such rights, they can also protect their interests through other mechanisms.[317] They

fundamental business decisions traditionally left to the board or officers, even outside of the distress context."). Creditors looking for governance rights to protect their interests can negotiate for preferred stock or other types of securities that provide voting rights under certain circumstances, such as the failure to pay a preferred dividend. *See* Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 543–44 (2010) ("Some creditors are negotiating for shareholder-like rights in their financial and other contracts with the corporation. These creditors are seeking and obtaining the right to approve or veto fundamental corporate transactions, to appoint directors or observers to the board, and to retain professionals for the corporation.").

314. *See, e.g.*, Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515, 517 (Ohio 1990) (noting that the long-term contracting between a steel manufacturer and an iron ore shipper was so intertwined as to include a seat on the shipper's board of directors for the manufacturer).

315. *See* Big Lots Stores, Inc. v. Bain Cap. Fund VII, LLC, 922 A.2d 1169, 1180 (Del. Ch. 2006) ("[C]reditors are usually better able to protect themselves [through contract] than dispersed shareholders."), *abrogated in part by* N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007).

316. Justin Blount, *Creating a Stakeholder Democracy Under Existing Corporate Law*, 18 U. PA. J. BUS. L. 365, 376 (2016) ("[Certain] type[s] . . . of democracy have been fulfilled in the traditional creditor arrangement because the creditors consented to it by voluntarily lending the business money without receiving any participatory rights in return.").

317. The fact that creditors and suppliers exist outside the boundaries of the firm—generally constituting their own firms—is another reason for excluding

are not similarly situated to shareholders, employees, or individual customers, who are dispersed and are not as well served by enforceability mechanisms such as bankruptcy. Democratic participation provides some support for their inclusion in governance, but this support is more context-dependent and not nearly so strong as other groups.

7. Other Stakeholders

Our theory of democratic participation may counsel for including representatives from other stakeholder groups as well. The theory is certainly flexible enough to deal with less common situations where there might be accurate and manageable markers of constituent interest and assign voting rights accordingly. However, stakeholder theory has too often devolved into a hand-waving effort to encompass all stakeholders without specifying when and how these stakeholders should be given specific governance rights.[318] For democratic participation to succeed, there must be accurate and manageable markers of interest that can translate into specific governance structures.

In the collection of potential stakeholders to the corporation, the set of relatively specific actors such as employees, consumers, and creditors is sometimes rounded out with a reference to the "community."[319] The concept of community is in some ways the meta-stakeholder, as (seemingly) all corporate law theorists agree that the true aim of corporate law—as with any area of law—is to maximize societal welfare.[320] But the idea of

them from internal governance. *See* HAYDEN & BODIE, *supra* note 59, at 155 tbl. Because they have the power to exercise coordination rights under law, separate firms are better positioned to exercise the bargaining power necessary to gain governance power or strong alternative enforcement mechanisms. *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020) (highlighting antitrust law's preference for economic coordination accomplished through vertical contracting).

318. Eric W. Orts & Alan Strudler, *The Ethical and Environmental Limits of Stakeholder Theory*, 12 BUS. ETHICS Q. 215, 219 (2002) ("[T]he greater number of different stakeholders one recognizes, the more divergent and irreconcilable their interests.").

319. *See* Blair & Stout, *supra* note 80, at 250 ("Executives, rank-and-file employees, and even creditors or the local community may also make essential contributions and have an interest in an enterprise's success.").

320. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RSRV. L. REV. 1043, 1055 (2008) (noting that for shareholder primacists, "[t]he purpose of corporations, and corporate law, is to benefit society . . . ; the best way to

community as stakeholder is generally a bit more grounded in a specific locale. Standard constituency statutes include a reference to the community or community concerns when describing the list of outside constituencies to consider.[321] Courts have also included communities when compiling a list of stakeholders beyond shareholders.[322] The idea hearkens back to the notion of corporations rooted in the community, acting as good corporate citizens. Such thinking has, for example, justified corporate charitable contributions, especially to local civic and educational organizations.[323] Communities certainly have a stake in the governance of corporations that operate within their ambit: corporations can pollute a town and poison its children;[324] they can

benefit society is to maximize the value of the firm; the best way to maximize value to the firm is for management to act as if only shareholders matter").

321. *See, e.g.*, 805 ILL. COMP. STAT. ANN. 5/8.85 (West 2024) (noting that boards can consider the effects of any action upon "communities in which offices or other establishments of the corporation or its subsidiaries are located"); N.J. STAT. ANN. § 14A:6-1 (West 2024) (specifying that a director may consider "the effects of the action on the community in which the corporation operates"). For more discussion, see Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 96–97 (discussing common sets of constituents). Such statutes were thought to be representative of the stakeholders developed through stakeholder theory. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 21 (1992) ("The term 'stakeholders' thus correlates with the 'corporate constituency.' Both are defined to include 'suppliers, customers, employees, stockholders, and local community, as well as management in its role as agent for these groups.'").

322. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (allowing a board to take broader considerations into account with anti-takeover measures, including "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)").

323. *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953) ("[M]odern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."); *see also* Leo E. Strine, Jr., *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 180 (2017) (discussing the important role that E.I. du Pont de Nemours and Company (DuPont) played in its local community).

324. *See, e.g.*, JONATHAN HARR, A CIVIL ACTION (1995) (discussing a corporation's trichloroethylene contamination of a local water supply).

close a plant and decimate the town's workforce;[325] they can relocate a sports team and crush fans' hopes and memories.[326]

In terms of democratic participation theory, however, communities will often be a poor fit for governance rights. Some businesses may be confined to one particular community, but many more range across a variety of towns, cities, states, and even nations. Assessing which community—and at what level—should have a say becomes incredibly complicated. And communities, of course, have a strong alternative avenue for managing their relationship with a corporation: regulation. Communities are represented by local, state, and federal governments that enact laws to enforce the community's will. In most instances, this avenue will be the primary method that communities can have a voice over the actions of the corporation. However, we don't want to foreclose the possibility that communities may, in some circumstances, have sufficient interests to warrant participation in governance along with sufficiently accurate and manageable markers to justify governance rights.[327] There are countless examples of communities investing in corporations or corporation-related projects through low-interest loans, tax breaks, or co-funded projects.[328] Local governments may want board representation or

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325. *See, e.g.*, Ben Popken, *Ohio Orders GM to Pay $28 Million for Closing Lordstown Plant*, NBC NEWS (Sept. 28, 2020), https://www.nbcnews.com/business/autos/ohio-orders-gm-pay-28-million-closing-lordstown-plant-n1241292# [https://perma.cc/DPH3-PBNY] (reporting on a plant closure that employed 3,700 workers).

326. *See, e.g.*, WILLIAM GILDEA, WHEN THE COLTS BELONGED TO BALTIMORE: A FATHER AND A SON, A TEAM AND A TIME (1994) (recounting the author's memories of the Baltimore Colts, who abruptly relocated to Indianapolis in 1984); Dan Moore, *The Long, Sad Story of the Stealing of the Oakland A's*, RINGER (Jun. 21, 2023), https://www.theringer.com/2023/06/21/mlb/oakland-as-leaving-for-vegas-john-fisher-reverse-boycott [https://perma.cc/AZN8-78Y6] (reporting on the Oakland Athletics owner's plan to move the team from Oakland to Las Vegas).

327. We put to the side situations where the community has interests in governance through traditional investment forms, such as sovereign wealth funds or state pension funds.

328. *See, e.g.*, Blair & Stout, *supra* note 80, at 276 n.61 (discussing how a local community "may make firm-specific investments if, for example, it builds roads, schools, or other infrastructure to meet the needs of the firm or its employees"); Strine, *supra* note 58, at 1948–49 (discussing subsidies to DuPont from Delaware state and county governments, costing taxpayers over fifty-seven million dollars, for keeping operations in the state).

other governance input in exchange for their investments, similar to private joint venturers.[329]

The environment presents an even slipperier case for democratic participation, as both everyone and no one can be seen as representing the earth, its climate, and the sustainable future of humankind. Working within the system of shareholder primacy, shareholder activists and scholars have made a strong case that the interests of shareholders include a livable planet.[330] The "E" in ESG investing stands for environmental concerns, and shareholder representatives such as Larry Fink have stressed the importance of sustainability in managing portfolios.[331] Even shareholders bent on maximizing wealth would want to avoid the systemic risk of harm that climate change could wreak on the economy.[332] At the same time, the environment is a classic public good, and environmental harm is a classic externality.[333] An understanding that this quarter's wealth maximization may be harmful in the long run may not be sufficient to deter short-term profits that hasten our planet's uninhabitability.[334]

329. The Volkswagen board includes representation for the German state of Lower Saxony. *See* Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1265 (2022).

330. *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017) (arguing that the maximization of shareholder welfare goes beyond the maximization of wealth); Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363 (2021) (detailing the ongoing debates about corporate purpose extending past maximizing wealth to social, environmental, and other concerns); Michael Copley, *Businesses Face More and More Pressure from Investors to Act on Climate Change*, NPR (Apr. 9, 2023), https://www.npr.org/2023/04/09/1168446621/businesses-face-more-and-more-pressure-from-investors-to-act-on-climate-change [https://perma.cc/4T2Y-GLFW].

331. Andrew Ross Sorkin & Michael J. de la Merced, *It's Not 'Woke' for Businesses to Think Beyond Profit, BlackRock Chief Says*, N.Y. TIMES (Jan. 17, 2022), https://www.nytimes.com/2022/01/17/business/dealbook/larry-fink-blackrock-letter.html [https://perma.cc/AMB3-SC9B].

332. *See, e.g.*, Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 17 (2020) (describing how systemic risks such as climate change pose a threat to wealth maximization).

333. Winston, *supra* note 311, at 711 ("Perhaps most prominently, there is no naturally existing market for environmental inputs. As a public good, regulation is necessary to ensure that environmental resources are not depleted by corporate production.").

334. *See, e.g.*, Brett McDonnell, Hari M. Osofsky, Jacqueline Peel & Anita Foerster, *Green Boardrooms?*, 53 CONN. L. REV. 335, 339 (2021) ("Our findings

It's conceivable to fashion governance structures that include representation for communities or the environment. But it would be difficult to have markers of interest that were both accurate and manageable. Local government officials could nominate a board representative to represent community and environmental interests, but a corporation would have to have a narrow geographic range to have a government entity that properly reflected those interests in their entirety. Community representatives could instead be elected by employees or customers,[335] but those groups have interests of their own that would not be representative of the community as a whole. Environmental groups would have the expertise and the commitment to the cause to nominate directors,[336] but which group or groups should be chosen? Perhaps a community could decide that, in order to seriously address the looming disaster of global warming, all incorporated entities needed an environmental director on their board, chosen or approved by community officials. This mix of regulation and governance may seem extreme, but so is the climate crisis.[337]

CONCLUSION

Democratic governance is an established method for organizations to resolve questions of purpose and, more importantly, how that purpose is put into action. As our society moves away from the distortions of shareholder primacy, we need to ensure that governance changes follow as well. Going forward, stakeholder models must look to provide participation in voting rights for stakeholders that meet appropriate criteria. In this Article, we have endeavored to provide one such model based on the strength of stakeholder interests, the accuracy of markers for

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indicate these corporate and financial law initiatives have not yet had a significant impact on underlying corporate behavior in ways that substantively affect the allocation of resources and capital to address climate change.").

335. *See* J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 98–99 (2017) (suggesting that employees or customers could elect community and environmental board representatives).

336. *Id.* at 99.

337. Brad Plumer & Elena Shao, *Heat Records are Broken Around the Globe as Earth Warms, Fast*, N.Y. TIMES (July 6, 2023), https://www.nytimes.com/2023/07/06/climate/climate-change-record-heat.html [https://perma.cc/PB6S-EH5A] (reporting on the three hottest days in Earth's modern history and overall rising temperatures).

those interests, and the manageability of possible voting processes. Corporate purpose is inextricably tied to corporate governance, and our model of democratic participation allows us to make that connection. We hope others will join in assessing our proposed model and exploring approaches of their own.