BOOK REVIEW

WILL THE REAL SHAREHOLDER PRIMACY PLEASE STAND UP?

THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION. By Stephen M. Bainbridge. Cambridge, U.K.: Cambridge University Press. 2023. Pp. 223. $34.99.

Reviewed by Ann M. Lipton[*]

INTRODUCTION

In 2019, the Business Roundtable (BRT), a fifty-year-old association of American chief executive officers,[1] shocked corporate governance theorists with a new statement of corporate purpose, committing to "deliver[ing] value" to all corporate stakeholders, such as consumers, employees, suppliers, and communities.[2] Shareholders were included on the list, but only at the very bottom.[3] The accompanying press release described the statement as a "[m]ove [a]way from [s]hareholder [p]rimacy."[4]

The statement hit like a bombshell. Shareholders protested,[5] op-eds debated its significance,[6] professors studied its effects,[7] law review

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[1] *About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us [https://perma.cc/5Y8L-GLR5].

[2] BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://system.businessroundtable.org/app/uploads/sites/5/2023/02/WSJ_BRT_POC_Ad.pdf [https://perma.cc/Q9SC-SGHY].

[3] *Id.*

[4] Press Release, Bus. Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans" (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/3MAP-ZZC5].

[5] *See, e.g.*, Press Release, Council of Institutional Invs., Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [https://perma.cc/9EB9-3DJF].

[6] *Compare* Steven Pearlstein, Opinion, *Top CEOs Are Reclaiming Legitimacy by Advancing a Vision of What's Good for America*, WASH. POST (Aug. 19, 2019, 5:00 AM), https://www.washingtonpost.com/business/2019/08/19/top-ceos-are-reclaiming-legitimacy-by-advancing-vision-whats-good-america/ [https://perma.cc/97DH-2RG6], *with* Helaine Olen, Opinion, *CEOs Don't Want to Be Blamed for Inequality — Or Do Anything About It*, WASH. POST (Aug. 22, 2019, 6:54 PM), https://www.washingtonpost.com/opinions/2019/08/22/ceos-dont-want-be-blamed-inequality-or-do-anything-about-it/ [https://perma.cc/B2TL-GM6X].

[7] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1034 (2022); Jens Dammann & Daniel Lawrence, *CEOs'*

articles mushroomed.[8] The question whether corporations should be run solely to benefit shareholders, or whether instead they should be run to benefit all communities affected by their behavior, has been debated for over 100 years,[9] and it appeared as though America's business elite had radically reshaped the conversation. No longer would corporations fight tooth and nail to avoid new regulation,[10] no longer would they aggressively — and illegally — oppose any efforts at unionization,[11] no longer would they stall the development of new technologies that could protect the planet from the ravages of climate change.[12] Instead, big business would take a holistic view of its responsibilities, recognizing that all of us participate in a shared endeavor to facilitate human flourishing.

Alas, it was not to be. Just six days later, the BRT issued a series of clarifying remarks, including the following:

> The Statement is not a repudiation of shareholder interests in favor of political and social goals. Rather, the Statement reflects the fact that for corporations to be successful, durable and return value to shareholders, they must consider the interests and meet the fair expectations of a wide range of stakeholders in addition to shareholders.[13]

Translation: Corporations would continue to function as a vehicle for increasing shareholder wealth; other constituencies would be accommodated only as instruments to achieve that end. Status quo ante restored.

Professor Stephen Bainbridge's new book, *The Profit Motive: Defending Shareholder Value Maximization*, uses the BRT's original statement as a jumping-off point to offer a spirited defense of

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Endorsements of Stakeholder Values: Cheap Talk or Meaningful Signal? An Empirical Analysis, J. CORP. L. (forthcoming) (manuscript at 9), https://ssrn.com/abstract=4458576 [https://perma.cc/SSD2-EVHR].

8 *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 94–95 (2020).

9 *See id.* at 103–06.

10 *See, e.g.*, Ayesha Rascoe, *Pharmaceutical Groups Are Suing the Biden Administration for Its Medicare Plans*, NPR (Sept. 3, 2023, 8:04 AM), https://www.npr.org/2023/09/03/1197461131/pharmaceutical-groups-are-suing-the-biden-administration-for-its-medicare-plans [https://perma.cc/9TUB-QYTN].

11 *See, e.g.*, Noam Scheiber, *Judge Finds Amazon Broke Labor Law in Anti-union Effort*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/business/economy/amazon-union-staten-island-nlrb.html [https://perma.cc/89S6-7GR3]; Robert Iafolla & Parker Purifoy, *Starbucks Is Racking Up Labor Law Violations as Rulings Roll In*, BLOOMBERG L. (June 2, 2023, 5:31 AM), https://news.bloomberglaw.com/daily-labor-report/starbucks-is-racking-up-labor-law-violations-as-rulings-roll-in [https://perma.cc/H82R-82T5].

12 Lauren Kent, *Big Oil Companies Are Spending Millions to Appear "Green." Their Investments Tell a Different Story, Report Shows*, CNN (Sept. 8, 2022, 11:09 AM), https://www.cnn.com/2022/09/07/energy/big-oil-green-claims-report-climate-intl [https://perma.cc/X7YH-YHZM].

13 Bus. Roundtable, *Redefined Purpose of a Corporation: Welcoming the Debate*, MEDIUM (Aug. 25, 2019), https://bizroundtable.medium.com/redefined-purpose-of-a-corporation-welcoming-the-debate-8f03176f7ad8 [https://perma.cc/D9KU-8DA9]; *see also Business Roundtable Statement on the Purpose of a Corporation: Two Year Anniversary*, BUS. ROUNDTABLE, https://www.businessroundtable.org/purposeanniversary [https://perma.cc/M3D6-UNNG].

shareholder wealth maximization as the ultimate end of corporate governance.[14] Beginning with an analysis of classroom standards like *Dodge v. Ford Motor Co.*,[15] and continuing through the modern era, Bainbridge argues both that shareholder value maximization is the legal obligation of corporate boards, and that it *should in fact be so*, partly because of wealth maximization's prosocial tendencies, but largely because of the lack of a viable alternative. Drawing on his decades of work as one of America's most influential corporate governance theorists, Bainbridge offers up sharp critiques of the kind of enlightened managerialism reflected in the BRT's original statement, and advocated by academics like the late Professor Lynn Stout[16] and practitioners like Martin Lipton.[17] Along the way, he also has harsh words for trendy alternatives such as "environmental, social, and governance" (ESG) investing and proposals to reform the structure of the corporation itself.

In many ways, *The Profit Motive* is an essential resource for any theorist, or student, in this field. Deftly intertwining economic theory with sharp anecdotes and historical retrospectives, Bainbridge offers an entertaining account of the *realpolitik* of corporate functioning and the major legal developments that brought us to where we are today. When it comes to critiques of stakeholderism, however, Bainbridge's blows land with varying force. Though his analysis of managerialism is thorough and his objections well-taken, he elides the fact that many of today's stakeholderists are not managerialists, but instead seek to enhance shareholders' ability to demand more prosocial behavior from their portfolio companies. The difference is significant, because it shifts the conversation away from managerial agency costs to questions of shareholder power and competency. In particular, it raises the possibility that a divided form of corporate government may create, if not more moral corporations, then at least ones that are less capable of inflicting harm on the rest of society.

This Review proceeds in the following parts. In Part I, I explain some of the intellectual history behind the debates over corporate purpose and the approaches taken by modern theorists. In Part II, I explore Bainbridge's argument that, under current law, corporate directors are required to act to maximize shareholder wealth. In Part III, I critique Bainbridge's defense of the current regime, with a particular emphasis

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[14] Bainbridge distinguishes wealth maximization from "shareholder primacy," on the ground that the latter phrase also encompasses a strong role for shareholders in corporate governance (p. 13). This Review treats "shareholder primacy" as equivalent to the notion that corporations should be run for shareholders' benefit, with the question of how control rights should be allocated as a separate issue.

[15] 170 N.W. 668 (Mich. 1919).

[16] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–51 (1999).

[17] No relation to the author. For an example of his views, see MARTIN LIPTON ET AL., WACHTELL LIPTON ROSEN & KATZ, THE NEW PARADIGM 1 (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf [https://perma.cc/4XNG-5MVP].

on teasing out the distinctions among theorists that render Bainbridge's arguments incomplete. The Conclusion follows.

I. THE CORPORATE PROBLEM

The debate over corporate purpose dates back to the rise of the great corporations in the late nineteenth century.[18] The central question is whether corporate managers should operate companies solely to earn profits for the benefit of their shareholders, or whether instead they should run them with a view toward benefitting all of their constituencies.

As Bainbridge recognizes, this is, at bottom, a regulatory problem (p. 10). Managers of public companies direct and coordinate staggering amounts of capital provided by a dispersed and fluid set of investors, and oversee armies of labor provided by employees and contractors. These resources, combined, may exceed those of governments, and as such, depending on how they are deployed, may inflict tremendous costs on society as a whole. The true north for regulatory purposes is to channel corporate *discretion*, so managers exercise their power with a view toward prosociality rather than self-aggrandizement.

But discretion is by definition impossible to dictate; the fact of its existence makes compliance difficult to gauge.

The earliest and simplest proposal for a discretion-cabining rule was that of shareholder wealth maximization: the requirement that corporate managers attempt to maximize the value of the business for the benefit of its shareholders.[19] This "shareholder primacist" orientation has long been defended as prosocial because it prevents managers from co-opting investors' capital for their own benefit, while other types of antisocial impulses — to make dangerous products or pollute the environment or exploit workers — can be managed through the external regulatory system. Minimum-wage requirements, environmental requirements, product quality requirements, and the like, set floors of acceptable corporate behavior (pp. 86, 90), while markets enable contractual counterparties to refuse to deal with firms that will not ensure fair treatment (p. 89).[20]

But even a rule of shareholder wealth maximization, easy to articulate, is realistically unenforceable via the court system, due to the challenges of distinguishing a *failed* business strategy (or one that has yet to

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[18] C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 77 (2002).

[19] *See* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) [hereinafter Berle, *For Whom Corporate Managers Are Trustees*]; William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolfe Berle and* The Modern Corporation, 34 J. CORP. L. 99, 107–08 (2008).

[20] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 37–39 (1991); Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 (2001).

come to fruition) from one that was never intended to maximize profit in the first place. That led to what Delaware, the leading jurisdiction for the incorporation of public companies, calls the distinction between the "standard of conduct" and the "standard of review"[21]: Though corporate directors and officers are, under Delaware law, formally required to act in the "best interests of the corporation and its stockholders" at all times,[22] courts will only substantively review their conduct for compliance at the extremes, namely, in situations that present intolerable risks of self-dealing.[23] For all other business decisions, courts will defer to managers' judgment, giving them an exceptional amount of leeway to arrange corporate affairs as they see fit.[24] This "business judgment rule" ensures that the practical enforcement of any requirement that managers maximize the value of the equity comes not through judicial command at all, but through the structure of the corporate form, which, among other things, gives only shareholders the right to select corporate directors.

A. The Business Judgment Rule and the Shareholder/Stakeholder Divide

Because the business judgment rule itself precludes any substantive examination of most corporate decisionmaking, for a long time, few cases ever articulated directors' duties with any precision, and when they did, they couched the standard in terms of a vague invocation of the best interests of the "corporation."[25] That left the formal legal obligation imposed on corporate managers both inscrutable and of questionable relevance. In that space rose a descriptive debate about the content of that obligation, and a normative one about what the obligation should in fact be.

The descriptive debate stemmed from two aspects of the case law. First, the requirement that directors advance the "corporation's best interests"[26] allowed for the possibility that directors were required to accommodate all stakeholders who contribute to corporate functioning,

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[21] Totta v. CCSB Fin. Corp., No. 2021-0173, 2022 WL 1751741, at *15 (Del. Ch. May 31, 2022), *aff'd*, 302 A.3d 387 (Del. 2023).

[22] IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne, 301 A.3d 596, 623 (Del. Ch. 2023).

[23] Firefighters' Pension Sys. of Kan. City, Mo. Tr. v. Presidio, Inc., 251 A.3d 212, 249–50 (Del. Ch. 2021). Theoretically, a court could also closely review managers' conduct if there is evidence of a lack of care, but that rarely occurs, if only because damages are usually unavailable. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2023).

[24] *Firefighters' Pension*, 251 A.3d at 249.

[25] *E.g.*, *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66–67 (Del. 2006) (citing *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 755–56 (Del. Ch. 2005)).

[26] *In re* RJR Nabisco Inc. S'holders Litig., No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989).

and not merely the shareholders.[27] For many years, the clearest judicial pronouncement equating corporate purpose with shareholder wealth maximization specifically arose from the old *Dodge v. Ford Motor Co.* case, decided by the Supreme Court of Michigan in 1919. There, the court credited Henry Ford's testimony that he was canceling a shareholder dividend and ploughing funds back into the business in order to "spread the benefits of this industrial system" to his workers so that they might "build up their lives and their homes."[28] In response, the court insisted that "[a] business corporation is organized and carried on primarily for the profit of the stockholders,"[29] and may not be transformed into a "semi-eleemosynary institution."[30] It ordered Ford to reinstate the dividend (though it permitted Ford to proceed with his expansion plans).[31] *Dodge*'s forthright articulation of the wealth-maximization principle has made it a staple of business law casebooks, but also of debatable relevance in the modern era (and in the state of Delaware).[32]

Second, and more generally, the descriptive debate concerned what qualifies as "law." So long as the business judgment rule ensured there was no *enforceable* requirement that managers strive to maximize shareholder wealth — so long as the only *enforceable* requirement was that managers not loot corporate resources for their personal benefit — one could plausibly argue that no such "law" existed in the first place.[33]

This is what Justice Oliver Wendell Holmes might call the "bad man" view of the law, i.e., that the "law" consists solely of the consequences imposed for transgressions.[34] Ironically, in the corporate context, the "bad man" view was in fact a license to do good: if courts would not force managers to pursue profit by the most rapacious means available, managers would be, in a sense, legally free to direct corporate resources for the benefit of a variety of stakeholders.

Viewed through that lens, *Dodge* was wrongly decided, not so much for its invocation of a duty of shareholder wealth maximization, but for its failure to defer to the board's judgment as to the most advisable

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[27] *E.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH 28 (2012); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 899 (1990); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 526 (2011); Cynthia A. Williams, *For Whom Is the Corporation Managed and What Is Its Purpose? A Stakeholder Perspective Based on the Law of Delaware*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 165, 167 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[28] 170 N.W. 668, 671 (Mich. 1919).

[29] *Id.* at 684.

[30] *Id.* at 683.

[31] *Id.* at 684–85.

[32] *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 166 (2008).

[33] *See* STOUT, *supra* note 27, at 31; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005); Johnson, *supra* note 27, at 900; Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1415–18 (2008).

[34] O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

manner of running a business (even in the face of managerial exhortations of the common good).[35] Indeed, *Shlensky v. Wrigley*,[36] another classroom chestnut, presents the most direct contrast: despite a controlling shareholder's insistence that his business decisions were predicated on concern for the local community rather than the corporation itself, an Illinois court refused to take him at his word, invented plausible wealth-maximizing justifications for his actions, and dismissed a shareholder challenge to his stewardship.[37]

While the descriptive debate played out over what these cases *meant*, the normative one played out over the social consequences of a profit-maximization principle. Such a rule might have the virtue of channeling managerial discretion away from self-dealing and in favor of shareholders, but it could also redirect it toward exploiting everyone else. And given corporations' political power, bureaucratic complexity,[38] and expertise in the relevant fields that often overshadows that of regulators,[39] there remained the possibility that the regulatory and contractual controls trumpeted by shareholder primacists would simply be inadequate to constrain managers' antisocial impulses (p. 93).[40]

Over the years, stakeholderist commenters have proposed a variety of solutions to this problem, including by fundamentally altering the corporate structure,[41] and, less aggressively, by expanding managers' fiduciary duties to encompass obligations toward nonshareholder constituencies.[42] One of the more prominent of these proposals came from Professors Lynn Stout and Margaret Blair, whose "team production"

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[35] For this reason, some argue that *Dodge v. Ford* is properly viewed not as a case about corporate purpose, but as one about exploitation of minority investors in a closely held corporation, a context where courts have been more willing to order dividend payments. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 319–20 (1998); Dalia T. Mitchell, *Shareholder Wealth Maximization: Variations on a Theme*, 24 U. PA. J. BUS. L. 700, 707–08 (2022).

[36] 237 N.E.2d 776 (Ill. App. Ct. 1968).

[37] *Id.* at 778, 780–781.

[38] *See* J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 877–81 (2017); Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203, 218–19 (2022).

[39] Steven L. Schwarcz, *Intrinsic Imbalance: The Impact of Income Disparity on Financial Regulation*, 78 LAW & CONTEMP. PROBS., no. 3, 2015, at 97, 107.

[40] *See* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1197, 1203–04 (2011); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 356–57 (2015); Jens Dammann & Horst Eidenmüller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963, 975.

[41] *E.g.*, RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 71 (1976); GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION 161–71 (2020); Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* THE CORPORATION IN MODERN SOCIETY 25, 41–43 (Edward S. Mason ed., 1959).

[42] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 635–36 (1992); Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, *in* PROGRESSIVE CORPORATE LAW 219, 219 (Lawrence E. Mitchell ed., 1995).

theory posited that the job of a corporate board is to engender the trust of multiple contributors to the corporate enterprise — including shareholders, creditors, and labor — by balancing their interests and ensuring that no one group exploits the others.[43]

The normative case for a stakeholder orientation, however, has been sharply criticized for its indeterminacy: if even a rule of wealth maximization is too complex for courts to oversee — and has practical application only through the exercise of shareholder power — how could an obligation to benefit *all of society* be any more administrable?[44] In many cases, the argument for a stakeholder orientation depended less on the formal legal doctrine than on the reality that shareholders did *not*, in fact, exercise much power at all: dispersed and relatively passive, with few governance rights and facing enormous structural barriers to replacing managers who were insufficiently vigorous in pursuing shareholder interests, the realities of public company governance might allow for just enough "slack" — as Professor Einer Elhauge put it — to enable a degree of managerial magnanimousness toward nonshareholder constituencies.[45]

B. A "Tectonic Shift"[46]

In recent years, the nature of corporate governance has changed. A bevy of new legal rules — some of which Bainbridge discusses in his book (pp. 75–76) — have given investors more power to control corporate behavior. Federal regulation of retirement plans encouraged a transition to mutual fund investing, funneling trillions of dollars to a relatively small handful of asset managers,[47] and transforming the shareholder base from roughly two-thirds retail in 1979 to over seventy percent institutional today.[48] Thus, formerly dispersed and relatively

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[43] Blair & Stout, *supra* note 16, at 250–51.

[44] Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model?*, 77 BUS. LAW. 773, 777–78 (2022); Bebchuk & Tallarita, *supra* note 8, at 116–23; David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 29–31 (1979); EASTERBROOK & FISCHEL, *supra* note 20, at 38.

[45] Elhauge, *supra* note 33, at 739; *see* Bruner, *supra* note 33, at 1417; Johnson, *supra* note 27, at 900–01; Blair & Stout, *supra* note 16, at 310. This is why Stout lamented the modern trend toward increasing shareholder power within the corporate form: it made it difficult for directors to accommodate the interests of nonshareholders. *See* Lynn A. Stout, Response, *The Toxic Side Effects of Shareholder Democracy*, 161 U. PA. L. REV. 2003, 2019–20 (2013).

[46] Ronald J. Gilson & Jeffrey N. Gordon, *The Sotheby's Poison Pill Case: The Plate Tectonics of Delaware Corporate Governance*, CLS BLUE SKY BLOG (May 15, 2014), https://clsbluesky.law.columbia.edu/2014/05/15/the-sothebys-poison-pill-case-the-plate-tectonics-of-delaware-corporate-governance/ [https://perma.cc/G924-2NKM].

[47] Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 165–76 (2013); Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 299 (2017).

[48] Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 730 (2018); DIV. OF CORP. FIN., U.S. SEC. & EXCH. COMM'N, STAFF REPORT ON CORPORATE ACCOUNTABILITY 381 (1980).

passive retail shareholders gave way to concentrated, sophisticated, and regulated asset managers, complete with legal obligations to exercise their voting power for the benefit of their funds.[49] Federal rules that limited the size of private funds were relaxed, supercharging the development of a new class of activist investors who take minority stakes in companies and — with the support of mutual funds and other institutional voters — spur corporate management changes that boost stock prices.[50] New federal disclosure requirements, as well as developments in accounting technology, made it easier for shareholders to monitor executives' performance.[51] Federal law encouraged reforms to management compensation schemes, first through tax exemptions for performance bonuses (p. 75),[52] and later by mandating that shareholders be given a nonbinding opportunity to approve or disapprove of executive pay (p. 76).[53]

The result is that legal interventions have enabled shareholders — and share prices — to exert far greater control over managerial conduct than they did even thirty years ago.[54] Perhaps more reacting to the shift than driving it, Delaware case law has become much clearer about articulating a formal legal rule that managers have a duty to "maximize value" for the equity holders in "every scenario."[55] Whatever

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[49] Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 TRANSACTIONS: TENN. J. BUS. L. 175, 182–86 (2017).

[50] Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 308–10 (2018) [hereinafter Lipton, *Divorce Court*]; Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 901 (2013).

[51] *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1548 (2007); James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 444 (2022).

[52] The Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.), eliminated the tax exemption for performance bonuses (p. 75). The majority of executive pay nevertheless remains based upon the company's financial performance (p. 75).

[53] Dorothy S. Lund & Elizabeth Pollman, Essay, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2620 (2021).

[54] Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1910 (2013); William W. Bratton, Shareholder Primacy Versus Shareholder Accountability 21 (July 14, 2023) (unpublished manuscript), https://ssrn.com/abstract=4431055 [https://perma.cc/5SR8-JPEH].

[55] Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, 2017 WL 1437308, at *20 (Del. Ch. Apr. 14, 2017); *see also In re* Trados Inc. S'holder Litig., 73 A.3d 17, 37 (Del. Ch. 2013) ("[T]he duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 31–36 (Del. Ch. 2010) ("Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders," *id.* at 33; directors must not "deprive stockholders of value-maximizing opportunities," *id.* at 31); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 999 (Del. Ch. 2005) (interpreting Delaware precedent to reflect the principle that "stockholders are the only corporate constituency whose best interests are an end,

"slack" may have once existed to permit managerial beneficence toward nonshareholder constituencies, little remains of it today.

Proponents of stakeholderism — broadly defined to mean that corporate governance should accommodate the needs of both shareholder and nonshareholder constituencies — have adjusted to this new environment. Today, there is less appetite for arguing that managers' fiduciary obligations should extend to stakeholders, and more emphasis on the structural soup of incentives that influence managerial behavior. In particular, given the "new shareholder-centric reality,"[56] advocates have focused on the duties and incentives of institutional shareholders, and the possibility that they might use their governance rights to advance the social preferences of the human beneficiaries they represent.

As a result, stakeholderists today can roughly be categorized into three basic camps. The first of these, hewing to the original movement, posits that corporations should not be run solely in shareholders' interests. Instead, corporations should be run to balance the interests of its constituencies: to earn a fair return to investors, but also to provide decent wages and working conditions to employees, useful and safe products to consumers, and refrain from damaging the environment on which the surrounding communities depend. The critical aspect of this version of stakeholderism is that it holds shareholder desires should not exclusively dictate corporate functioning, because, the argument goes, other groups also have claims on managerial loyalty.[57] For those who fall into this camp, a lot of today's thinking centers on how to operationalize these principles in a world of empowered shareholders.[58]

Another approach to stakeholderism — though, to be fair, stakeholderism is something of a misnomer — is ESG investing, or investing based on "Environmental, Social, Governance" factors. This newly popular concept was first developed by the United Nations as a means to persuade financial institutions to adopt socially responsible principles when overseeing their investments,[59] but since then, the phrase has

rather than an instrument, of the corporate form"); Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010) (recognizing the "corporate goal of stockholder wealth maximization"); *In re* Rural Metro Corp. S'holder Litig., 88 A.3d 54, 80 (Del. Ch. 2014) ("Stockholders' best interest must always, within legal limits, be the end. Other [corporate] constituencies may be considered only instrumentally to advance that end." (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012) (alteration in original))).

56 Rock, *supra* note 54, at 1910.

57 *E.g.*, Blair & Stout, *supra* note 16, at 253; Cornelius J. Peck, *The Meanings of Employer: Consequences for the National Labor Relations Act*, 11 MISS. COLL. L. REV. 309, 337–39 (1991) (describing various proposals to involve employees in corporate governance); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 135 (2006). *See generally* Summer Kim, *Consumer Primacy: A Dynamic Model of Corporate Governance for Consumer-Centric Business*, 2022 UTAH L. REV. 235; David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253 (2009).

58 *See, e.g.*, sources cited *supra* note 57.

59 Elizabeth Pollman, The Making and Meaning of ESG 11 (Nov. 9, 2022) (unpublished manuscript), https://ssrn.com/abstract=4219857 [https://perma.cc/U6PH-X9A3].

become somewhat infamous for its malleability.[60] In today's parlance, it operates as something of an umbrella term for two distinct strands of stakeholderist thought.[61]

The first of these — sometimes called "shareholder welfarism"[62] — envisions that investors themselves can choose to forego some degree of profit-seeking, and instead demand more prosocial behavior from portfolio companies, either by divesting from bad actors, or by using their voting power to influence corporate policy. They may choose to do so because they exist in society as more than just investors — they are also employees, consumers, and community members — and therefore may have a financial, or simply ethical, preference for corporate social responsibility. This is not truly stakeholderism because it accepts that shareholders exclusively have first claim on any excess value the corporation may generate. It simply recognizes that shareholders themselves may prefer to redirect that value to nonshareholder interests.

The other approach — sometimes called "enlightened shareholder value"[63] or "instrumental stakeholderism"[64] — proposes that companies may in fact improve their financial performance on shareholders' behalf if they are more attentive to the needs of nonshareholder constituencies because, in the long term, maintaining strong relationships with employees, customers, and communities ultimately encourages these stakeholders to contribute more to the corporate enterprise. As with "shareholder welfarism," this approach contends that shareholders have a role to play in promoting corporate prosociality, because corporate managers operate under short-term incentives or informational deficits that preclude them from recognizing the benefits to be derived from prosocial behavior.[65]

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[60] *Id.* at 20–28.

[61] 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, 397 (2020); *see* Ann M. Lipton, *ESG Investing, or, If You Can't Beat 'Em, Join 'Em*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 27, at 130, 133–34 [hereinafter Lipton, *Join 'Em*].

[62] Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 260–61 (2017) [hereinafter Hart & Zingales, *Shareholder Welfare*]; Marcel Kahan & Edward Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANALYSIS 108, 112 (2023).

[63] Robert P. Bartlett & Ryan Bubb, Corporate Social Responsibility Through Shareholder Governance 11 (July 13, 2023) (unpublished manuscript), https://ssrn.com/abstract=4354220 [https://perma.cc/87Z7-7ML5]; Dorothy S. Lund, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 27, at 92.

[64] Bebchuk & Tallarita, *supra* note 8, at 108.

[65] *See* Bartlett & Bubb, *supra* note 63, at 60, 62; Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 886–87 (2020). Most theorists recognize these three basic approaches, though how they are grouped together for the purposes of discussion may vary. *See, e.g.*, Kahan & Rock, *supra* note 62, at 109. That said, there are any number of approaches to

This is the point at which Bainbridge enters the fray.

II. WHAT IS LAW?

In the first part of his book, Bainbridge seeks to establish that corporate directors operate under a legal obligation to maximize value for the equity holders. To make his case, Bainbridge reviews the decisions that comprise the standard law school curriculum, like *Dodge*, *Wrigley*, and *A.P. Smith Manufacturing Co. v. Barlow*,[66] to demonstrate that, properly interpreted, they stand for the proposition that directors must operate the corporation in a manner that maximizes profits (pp. 27–49). After that introduction, he engages arguments that *Dodge* does not represent the current state of the law (pp. 50–72). In so doing, he delves a bit into the pre-*Dodge* history of the wealth-maximization requirement (pp. 51–54) before returning to the usual business class syllabus with *Revlon, Inc. v. MacAndrews & Forbes Holdings*[67] and *Unocal Corp. v. Mesa Petroleum Co.*,[68] as well as some of Delaware's more recent decisions on the subject (pp. 59–64). Experts in the field are likely already familiar with these decades-long debates over the proper interpretation of the classroom canon, but Bainbridge contextualizes his discussion with a rich factual account of the events that led up to each dispute, helpfully situating it within the larger concerns of its historical era. In that respect, his book provides an invaluable classroom supplement that is sure to be of interest to students and educators alike; these are the kinds of stories that not only provide deeper insights into the material, but also help socialize future business lawyers into a shared legal culture.

As for his interpretation of Delaware law, Bainbridge might have given more credit to the stakeholderist position that he purports to refute. Though Bainbridge is surely correct that Delaware courts — especially in recent years — have repeatedly invoked "the corporate goal of stockholder wealth maximization,"[69] Delaware courts have also described managerial fiduciary duties as running to "the corporation and its shareholders," suggesting these duties must include some consideration for the *entity* as a whole (and thus all of its constituencies).[70] And

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stakeholderism that may be difficult to categorize precisely. Ethical and religious investors, for example, may encourage corporations to adopt a pure stakeholderist approach, but because their influence stems from their status as shareholders, it is difficult to escape the shareholder-primacist nature of their demands. Similarly, benefit corporations — explicitly organized to pursue social goals alongside profit-seeking — will only exist if shareholders will it so, and thus similarly exemplify a form of shareholder welfarism (p. 81).

[66] 98 A.2d 581 (N.J. 1953).

[67] 506 A.2d 173 (Del. 1986).

[68] 493 A.2d 946 (Del. 1985).

[69] Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010); *see also* cases cited *supra* note 55.

[70] *E.g.*, Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) (citing *Revlon*, 506 A.2d at 179; Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

these duties are, in fact, meaningful ones, at least under some circumstances. This was seen most overtly in *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*,[71] where the Delaware Supreme Court held that directors' fiduciary duties to the corporate entity may be enforced by the *shareholders* of a solvent corporation, but the *creditors* of an insolvent one — even though directors at no point owe fiduciary obligations to the creditors directly.[72] Bainbridge acknowledges the case (p. 23), but not the implication: that the entity as the object of fiduciary attention is recognized under Delaware law, apart from any obligation owed to its shareholders or even its residual claimants. 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).[73] After all, Delaware (like other states) requires that corporations refrain from paying dividends once their capitalization levels fall below certain thresholds,[74] which further suggests that there are limits to how far opportunism in favor of shareholders can be extended.

That said, even if Bainbridge could have approached this aspect of the book differently, it is hard to argue with his ultimate conclusion that, at least as far as Delaware is concerned, while the company remains solvent, shareholder wealth maximization is formally the legal obligation of a public company board.

Despite that intellectual victory, Bainbridge is perhaps too quick to dismiss the claims of Stout and others in her camp that the business judgment rule — and courts' general reluctance to interfere with managerial decisionmaking — amounts to a de facto retreat from shareholder wealth maximization (pp. 66–70). He is surely correct that *doctrinally*, the business judgment rule does no such thing, but the claim (at least in its most persuasive form) is not that *doctrinally* the rule should be so interpreted; the claim is that courts *in practical effect* softened the harsh consequences of a shareholder primacist rule by mitigating its application,[75] and that "law" should be defined by reference to its real-world effects. *That* argument cannot be combatted by

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[71] 930 A.2d 92 (Del. 2007).

[72] *Id.* at 100–02.

[73] This is what occurred in *In re Nine West LBO Securities Litigation*, 505 F. Supp. 3d 292 (S.D.N.Y. 2020). Though the case was not decided in a Delaware court or under Delaware law, it did imply that directors may have violated their duties to the entity by approving a transaction that benefitted shareholders while rendering the entity insolvent and unable to pay preexisting debt. *Id.* at 314.

[74] DEL. CODE ANN. tit. 8, § 170 (West 2023); *e.g.*, N.Y. BUS. CORP. LAW § 510(b) (McKinney 2024).

[75] *See* sources cited *supra* note 33; *see also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 273–77 (1992).

interpreting the reasoning of the case law, because it rests on the proposition that the reasoning is not where the "law" is actually located.[76]

Indeed, there is some irony in Bainbridge's rejection of "law" so defined, because it would have assisted him with his secondary argument, that shareholder primacy reigns *even in the thirty non-Delaware jurisdictions* that have explicitly adopted "constituency" statutes (pp. 70–72). Pennsylvania's constituency statute, for example, provides that "the best interests of the corporation" may include consideration of shareholder and nonshareholder interests, and that the board of directors "shall not be required" to regard "the interests of any particular group" as "dominant or controlling."[77] Bainbridge correctly notes that these statutes do not require sacrificing shareholder interests for the interests of nonshareholders (pp. 70–71) — in that sense, they do not impose a "stakeholder" fiduciary duty — but oddly, and contrary to his interpretation when they were first adopted,[78] he also maintains they do not permit corporate managers to favor stakeholders over shareholders, despite their relatively straightforward language (p. 71).[79]

But, even here, Bainbridge is correct if we use the methods he derides in his opponents, namely, identify "law" not in the formal recitation of fiduciary duty, but in the actions that *are in fact* permitted or required. Though no court would fault a corporate director for favoring employees over shareholders in a constituency jurisdiction (or, for that matter, in Delaware, in most scenarios, due to the business judgment rule), the real drivers of corporate decisonmaking are found not in a courtroom, but in the balance of power between shareholders and managers. In that sense, under most circumstances and in most public

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[76] Bainbridge also contends that the business judgment rule cannot alleviate the duty of wealth maximization, because it does not apply in certain scenarios, such as when a firm is being sold for cash (p. 67). In fact, it will apply even then, if shareholders vote to approve the deal, *see* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 314 (Del. 2015), and, as Bainbridge has recognized, shareholders may very well have diversified portfolios that would cause them to favor even non-wealth-maximizing transactions, *see* Stephen M. Bainbridge, *Preserving Director Primacy by Managing Shareholder Interventions*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 231, 233 (Jennifer G. Hill & Randall S. Thomas eds., 2015); *see also* Lipton, *Divorce Court*, *supra* note 50, at 320.

Notably, there are any number of commenters who both agree that corporations are, and should be, run for shareholders' benefit, while simultaneously recognizing that there is no *legally enforceable* duty of shareholder wealth maximization with respect to the day-to-day management of the firm. *E.g.*, Engel, *supra* note 44, at 17; Smith, *supra* note 35, at 286.

[77] 15 PA. CONS. STAT. § 1715 (2022); *see also* Allen, *supra* note 75, at 276.

[78] *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 994–95 (1992).

[79] Bainbridge finds support in scholarship concluding that the few cases that have been litigated under constituency statutes ultimately gave directors the same overweening discretion they would have had in a shareholder primacist jurisdiction (p. 71) (quoting Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 223–25 (2012); Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOY. L.A. L. REV. 765, 784–86 (2009)), and concludes from this that it's the *constituency* statutes that have no bite.

companies, managers have very limited ability to favor employees over shareholders, and the wealth-maximization requirement reigns supreme, as Bainbridge demonstrates by recounting how hedge fund activism came for socially responsible Etsy (p. 161). Indeed, Bainbridge himself admits that the structure of the corporate form is as much "corporate law" as the doctrine itself (p. 78). To put it another way, if law is defined as the practical reality of corporate governance, it is fair to say that it is not found in formal articulations of directors' fiduciary duties.

III. WHAT IS STAKEHOLDERISM?

In the second part of his book, Bainbridge gets to the meat of his argument: not only is wealth maximization the law, but it is a *good thing* that it is the law. Using the BRT Statement as a framing device (pp. 85–104), he considers and then rejects several arguments that might be offered in favor of permitting corporate directors to advance societal objectives. One of his main concerns, that he revisits at various points (pp. 114–17, 134–38, 141–42, 149, 154–56), is the same objection to stakeholderism that has reigned since 1932: that it offers no alternative decision maxim, and therefore in practice licenses managers to reallocate corporate resources according to their own personal preferences.[80]

With respect to the BRT Statement and similar approaches, Bainbridge is surely on firm ground. The Statement contained no binding promises and offered no explanation for how trade-offs among stakeholders would be made.[81] As Bainbridge points out, Martin Lipton — who built his career defending boards from any restrictions on their authority — has endorsed similarly anodyne commitments (pp. 116–17), and, in fact, was a champion of the BRT Statement itself.[82] This is hardly surprising: back in the 1980s, Lipton for a brief time managed to persuade the Delaware Supreme Court that boards should have discretion to erect defenses against hostile takeovers in order to protect the interests of employees and surrounding communities,[83] before the court retrenched and clarified that stakeholder welfare is only relevant to the extent it instrumentally contributes to stockholder wealth.[84] In other words, there is a long history of boards appealing to stakeholderism in order to preserve their own prerogatives, and it is a strategy Lipton has employed for decades.

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[80] Berle, *For Whom Corporate Managers Are Trustees*, *supra* note 19, at 1367.

[81] Bebchuk & Tallarita, *supra* note 8, at 127–28.

[82] *See* MARTIN LIPTON, WACHTELL, LIPTON, ROSEN & KATZ, STAKEHOLDER CORPORATE GOVERNANCE BUSINESS ROUNDTABLE AND COUNCIL OF INSTITUTIONAL INVESTORS (2019), https://static.reuters.com/resources/media/editorial/20190821/liptononcii--8.20.19.pdf [https://perma.cc/X7G8-V5H6].

[83] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

[84] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

The challenge for Bainbridge, however, is that, contrary to his claim that "most stakeholder capitalism advocates focus . . . on . . . the fiduciary duties of corporate managers" (p. 146), most stakeholder capitalism advocates do not, in fact, focus on fiduciary duties at all — many avoid them entirely. Instead, they tend to fall into the camps described above, in particular, ESG — which in turn, can either mean shareholder welfarism or enlightened shareholder value — or "pure" stakeholderism, which, rather than resting on director fiduciary duties alone, often includes proposals to redesign the corporate form itself. Bainbridge's objections to stakeholderism therefore must be evaluated alongside the claims that stakeholderists actually make.

A. Shareholder Welfarism, or Profit-Sacrificing ESG

The key move of shareholder welfarism, or profit-sacrificing ESG, is that it originates from the shareholder side rather than the management side. Corporate managers purport to adopt ESG principles, but the theoretic basis for doing so is that they are responding to shareholder demand. This does, in fact, seem to be the reality: as Professors Cathy Hwang and Yaron Nili document, today, ESG adoption at the company level is usually urged first by shareholders.[85]

That ESG originates from shareholder demand matters a great deal, because — at least to the extent we are talking about profit-sacrificing versions of ESG — it cuts the legs out from under some of the traditional objections to stakeholderism (and ones that Bainbridge shares), namely, that it offers no decision principle for choosing among constituencies, and that managers have no legitimacy to craft social policy (pp. 94–95, 149–50).[86] In other words, ESG is an attempt to *solve* those earlier problems. Managers would not be unconstrained — they would be following shareholder instructions, communicated through voting, engagement, and market behavior — and legitimacy would come from two places. First, to the extent one imagines the corporation should be run for its shareholders, ESG theory offers a more nuanced portrait of what shareholders actually want, rather than legally flattening all differences between them,[87] and second, to the extent the ultimate

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[85] Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE ARCHIVE (Apr. 15, 2020), https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/ [https://perma.cc/TZ6H-XDS6].

[86] *See also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (1962); Engel, *supra* note 44, at 29–31.

[87] *See* Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1045 (1996) (arguing that shareholders' presumed preference for wealth maximization is a legal fiction); Hart & Zingales, *Shareholder Welfare*, *supra* note 62, at 270 (arguing that managers' fiduciary duties should include shareholders' actual interests, and not merely their presumed interest in wealth maximization); Bratton, *supra* note 54, at 40; *cf.* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 574–75 (2009) (arguing that corporations behave altruistically in response to demands of investors and other constituencies).

investors — the ones who stand behind mutual funds and pension funds — are the great mass of America's workers, consumers, and retirees, their desires would reflect the preferences of the general public, and therefore carry with them a democratic legitimacy similar to government action.[88]

In truth, though the ESG label may be new, the concept is a very old one. As far back as the early 1900s, theorists argued that investment by retail shareholders would result in greater democratic control over corporate behavior.[89] Through the 1950s, women stockholders sought to leverage their voting power to seat women candidates on public company boards,[90] and in 1970, Ralph Nader spearheaded what was known as "Campaign GM," hoping to persuade the shareholders of General Motors to restructure its board to emphasize corporate social responsibility.[91] But in those days, shareholders were mostly dispersed individuals, and hard to corral; these efforts rarely succeeded.[92] What today's ESG movement depends upon, then, is the relatively recent institutionalization of the shareholder base — making coordination of enormous amounts of capital far easier to accomplish — as well as, perhaps, new technologies that facilitate retail voting.[93]

That's the idea, anyway; the reality, of course, is that profit-sacrificing ESG has yet to live up to its promise, and even without engaging its theoretical underpinnings, Bainbridge ably points out some of the implementation problems (pp. 87–88, 101–04, 158). The essential difficulty is the same one that has always plagued stakeholderism: when values conflict, which take priority? If protecting the environment means shedding jobs, how should the company choose? Is it better to divest from fossil fuel companies entirely, or remain invested and attempt to encourage a transition to green energy? The result is that there are no agreed upon metrics for evaluating corporate ESG performance, and ESG scoring systems are infamous for their inconsistencies (pp. 102, 137, 140–41).[94] Though some executive compensation schemes include

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[88] Bratton, *supra* note 54, at 27.

[89] JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY 27, 113, 134 (2011); Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1077–78 (2015).

[90] Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 561–62, 596–600 (2022). There is also a long history of shareholders using the proposal mechanism to encourage prosocial corporate behavior. Wells, *supra* note 89, at 1081–82, 1083–85.

[91] Donald E. Schwartz, *Proxy Power and Social Goals — How Campaign GM Succeeded*, 45 ST. JOHN'S L. REV. 764, 764–66 (1971).

[92] Haan, *supra* note 90, at 596–600; Wells, *supra* note 89, at 1084–85. Even in failure, they could occasionally result in at least a few corporate reforms. *See id.* at 1084.

[93] *See, e.g.*, Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 52–53 (2021); *see also* ICONIK, https://www.iconikapp.com/ [https://perma.cc/T899-RP98].

[94] Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FIN. 1315, 1316 (2022).

financial rewards for achieving ESG goals, so far, the incentives are trivial and the goals easily manipulated (pp. 120, 140).[95] Large institutional investors often mouth ESG commitments but fail to live up to them in their voting and investment choices (pp. 113, 158–60).[96]

More fundamentally, however, because Bainbridge either overlooks or ignores the shareholder-centric nature of ESG, he also does not engage the strongest critique of it: that the empowered asset managers on which it depends have no more motivation or legitimacy to make decisions on behalf of the public interest than do the CEOs of operating companies.[97] That is, institutional investors are entrusted with the funds of natural persons, frequently workers saving for retirement, and have neither the legal authorization nor the moral high ground to diminish that wealth in order to further some notion of the public good (as judged by portfolio managers).

That said, many ESG proponents readily admit these flaws and advocate for changes that would strengthen the movement, such as more rigorous metrics for assessing corporate social and environmental behavior,[98] and improved disclosure of corporate social and environmental performance.[99] Advocates have also suggested that institutional investors be forced to attend to the preferences of their ultimate (retail) beneficiaries. This may occur, for example, with greater SEC oversight of fund greenwashing,[100] by greater disclosure of mutual fund voting

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[95] *See also* Patrick Temple-West & Eva Xiao, *Investors Warn "Fluffy" ESG Metrics Are Being Gamed to Boost Bonuses*, FIN. TIMES (Aug. 27, 2023), https://www.ft.com/content/25aed60d-1deb-4a41-8f39-00c92702b663 [https://perma.cc/7AA2-ETWD]. *But see* Shira Cohen et al., *Executive Compensation Tied to ESG Performance: International Evidence*, 61 J. ACCT. RSCH. 805, 807 (2023).

[96] To be fair, institutional investors typically claim to support ESG from a financial, rather than profit-sacrificing, point of view. *See, e.g.*, Larry Fink, *A Sense of Purpose: Larry Fink's 2018 Letter to CEOs*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/8ZAF-9HJV] ("Without a sense of purpose, no company . . . can achieve its full potential. . . . It will succumb to short-term pressures to distribute earnings, and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth. . . . And ultimately, that company will provide subpar returns to the investors . . . .").

[97] Bainbridge makes only a fleeting reference to this problem (p. 96), without further exploration, because he does not approach ESG as a matter of shareholder demand.

[98] *E.g.*, Ingo Walter, *Sense and Nonsense in ESG Ratings*, 5 J.L. FIN. & ACCT. 307, 332–34 (2020); Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869, 874–75 (2021).

[99] Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 280; Andrew W. Winden, *Jumpstarting Sustainability Disclosures*, 76 BUS. LAW. 1215, 1216–17 (2021); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 926 (2019).

[100] The SEC has undertaken a number of new initiatives to combat mutual fund greenwashing, including proposed rules, *see* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279), new regulation of mutual fund names, *see* Investment Company Names, 88 Fed. Reg.

behavior,[101] by reforming ERISA and pension plan fiduciary obligations,[102] and by requiring mutual fund asset managers to take the preferences of fund investors into account when voting shares.[103]

One of the more provocative attempts to address the problem of *fund manager* illegitimacy is the portfolio argument. Theorists like Professors Madison Condon and Jeffrey Gordon accept that institutional investors may only have the motivation and the legal remit to maximize the value of their investments on behalf of their ultimate beneficiaries, but observe that wealth maximization at the level of the *portfolio* of a diversified institutional investor is not the same as wealth maximization at the level of an individual firm.[104] Specifically, certain industries may cause so many negative externalities — fossil fuel companies that contribute to wealth-destroying climate change, for example — that a diversified investor would rather see them reduce their (profitable) activity levels, than continue to generate emissions with devastating

70436 (Oct. 11, 2023) (codified at 17 C.F.R. pts. 230, 232, 239, 270, 274), and investigations and enforcement actions against fund managers that do not follow their own stated policies, *see* Press Release, SEC, Deutsche Bank Subsidiary DWS to Pay $25 Million for Anti-Money Laundering Violations and Misstatements Regarding ESG Investments (Sept. 25, 2023), https://www.sec.gov/news/press-release/2023-194 [https://perma.cc/EBG8-X64U]; Press Release, SEC, SEC Charges Goldman Sachs Asset Management for Failing to Follow Its Policies and Procedures Involving ESG Investments (Nov. 22, 2022), https://www.sec.gov/news/press-release/2022-209 [https://perma.cc/L88L-M5XL]; Press Release, SEC, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), https://www.sec.gov/news/press-release/2022-86 [https://perma.cc/T238-L9LA]; DIV. OF EXAMINATIONS, SEC, RISK ALERT: THE DIVISION OF EXAMINATIONS' REVIEW OF ESG INVESTING (2021), https://www.sec.gov/files/esg-risk-alert.pdf [https://perma.cc/HVU5-UW7K].

[101] Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, 87 Fed. Reg. 78770 (Dec. 22, 2022) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249, 270, 274).

[102] David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106, 2168–86 (2014).

[103] Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 5 (2023); Caleb N. Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689, 697 (2023); Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 195, 213–14 (2022) [hereinafter Hart & Zingales, *Corporate Governance*]. Bainbridge does argue that because mutual funds do not vigorously support ESG causes, one can infer that the retail investors whom they represent do not support them either (p. 159). But he admits that funds "greenwash" (pp. 158–59), and has opposed SEC efforts to require greater disclosure of mutual fund voting behavior, *see* Stephen M. Bainbridge, *Dear Securities and Exchange Commission: I Do Not Want to Know How My Funds Vote*, PROFESSORBAINBRIDGE.COM (Nov. 15, 2021), https://www.professorbainbridge.com/professorbainbridgecom/2021/11/dear-securities-and-exchange-commission-i-do-not-want-to-know-how-my-funds-vote.html [https://perma.cc/SR6H-NYKR], which makes it difficult to infer anything about what retail investors' preferences may be. Not to mention, though the market has retrenched recently, the amount of money that has flowed to ESG assets suggests there is at least some retail investor taste for it, *see* Andrew Ross Sorkin et al., *Is E.S.G. Falling Out of Favor?*, N.Y. TIMES: DEALBOOK (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/business/dealbook/esg-big-oil-deals.html [https://perma.cc/4UHB-JGE3], though, again, between the problems of greenwashing and the different conceptions behind ESG, it is hard to read too much into those figures, either.

[104] *See* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 16 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 659–60 (2022).

consequences for the rest of the economy.[105] Or, more simply, a diversified institutional investor may maximize its own wealth by causing some of its portfolio firms to reduce their own. The strength of the portfolio approach, then, is that it offers a model for why institutional investors might pursue profit-sacrificing ESG within existing legal and market frameworks.

No doubt, one might fault all of these ideas. Scholars have argued with some force that market mechanisms prevent shareholders from agreeing to sacrifice profits among themselves,[106] that it is impractical or impossible to promote the value of a portfolio by limiting the externalities of specific companies,[107] that shareholder voting and engagement cannot communicate clear instructions to corporate managers,[108] and that the legitimacy problem persists because the investing public is not reflective of the general public.[109] The important point is that these conversations represent the heart of the ESG debate today.

To be sure, profit-sacrificing ESG lies on the fault line of a longstanding tension in corporate law, which is that shareholders are free to vote for any reason at all, but corporate managers are (formally) only permitted to make decisions to benefit the individual firm.[110] Scholars perennially offer solutions to this problem, including proposals to minimize the influence of shareholders who are deemed a threat to the corporate polity, such as mutual funds,[111] diversified shareholders,[112] activist

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[105] Diversified investors may also have a financial interest in reducing other kinds of negative externalities, like structural racism. *See* Ann M. Lipton, *A Most Ingenious Paradox: Competition vs. Coordination in Mutual Fund Policy*, 71 CASE W. RSRV. L. REV. 1275, 1284–85 (2021); *see also* Jim Hawley & Jon Lukomnik, *The Long and Short of It: Are We Asking the Right Questions? Modern Portfolio Theory and Time Horizons*, 41 SEATTLE U. L. REV. 449, 462–63 (2018).

[106] *See* Patrick M. Corrigan, "ES" Versus "G" in Corporate Governance: You Can't Have It All 6–8 (Feb. 16, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729606 [https://perma.cc/3KHB-DM6U]; Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511, 532–33 (2023); Paul Brest et al., Essay, *How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 217–18 (2018).

[107] Bartlett & Bubb, *supra* note 63, at 28–33, 47–50; Tallarita, *supra* note 106, at 536–47; Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497, 499–500 (2023).

[108] Bartlett & Bubb, *supra* note 63, at 5.

[109] William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 521 (2013); Lipton, *Join 'Em*, *supra* note 61, at 145; *see* Bartlett & Bubb, *supra* note 63, at 23.

[110] Lipton, *Divorce Court*, *supra* note 50, at 303. Gordon points out, for example, that today, most firms have optimized their structure to accommodate the risk preferences of the diversified investors who make up their shareholder base, even though from a single-firm perspective, these designs may not be optimal. Gordon, *supra* note 104, at 667. Thus, it is shareholder preference — not fiduciary obligation — that in fact guides managerial decisionmaking.

[111] *See, e.g.*, Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 495–97 (2018); Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151, 1155–58 (2019).

[112] *See, e.g.*, Lawrence A. Cunningham, *The Case for Empowering Quality Shareholders*, 46 BYU L. REV. 1, 10–13 (2020).

shareholders,[113] and hedged shareholders.[114] Bainbridge's longstanding solution has been to minimize shareholder power across the board,[115] a project embarrassed by the new trend towards shareholder-centricity and hedge fund activism (p. 163).

This, however, is the fundamental point of the stakeholder position: the corporate orientation toward shareholder wealth maximization is inherently artificial, and requires the constant tinkering of the state to define and maintain.[116] Shareholder primacists treat corporate governance as something distinct from governmental regulation, but in today's world, regulation is constantly being deployed to enact a particular vision of ideal corporate functioning, and so long as that is the case, there is no reason not to use the same tools to encourage an alternative vision.[117] To the extent the ESG movement involves sacrificing profits, the goal is to move away from Bainbridge's "hypothetical bargain," which presumes shareholders are pure wealth maximizers (p. 154), in favor of surfacing the preferences that shareholders in fact hold. As for directors' fiduciary duties under this scheme, some have suggested they be reinterpreted to include shareholders' real-life preferences rather than the presumed preference for wealth maximization,[118] but many simply lean into the operational reality of the business judgment rule[119]: directors cannot, in fact, be legally forced to make wealth-maximizing decisions, and so long as the shareholders support them, they cannot be practically forced to do so, either.[120]

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113 *See, e.g.*, Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risks of Mistargeting*, 132 YALE L.J. 411, 415 (2022).

114 *See, e.g.*, Henry T.C. Hu & Lawrence A. Hamermesh, *Decoupling and Motivation: Recalibrating Standards of Fiduciary Review, Rethinking "Disinterested" Shareholder Decisions, and Deconstructing "De-SPACs,"* 78 BUS. LAW. 999, 1007–22 (2023); Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775, 787–804.

115 *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 603 (2006) [hereinafter Bainbridge, *Shareholder Voting Rights*]; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550–51 (2003) [hereinafter Bainbridge, *Director Primacy*].

116 *See* Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RSRV. L. REV. 863, 888–92 (2019) [hereinafter Lipton, *What We Talk About*].

117 *See* Ann M. Lipton, *Beyond Internal and External: A Taxonomy of Mechanisms for Regulating Corporate Conduct*, 2020 WIS. L. REV. 657, 692 [hereinafter Lipton, *Beyond Internal*]; Kent Greenfield, Debate, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 947, 970–71 (2008).

118 *See* Hart & Zingales, *Shareholder Welfare*, *supra* note 62, at 263.

119 *See* Condon, *supra* note 104, at 59–60; 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, 1318–19 (2020); *cf.* Griffin, *supra* note 103, at 696 (outlining differences between the true and assumed shareholder preferences, while excluding any discussion of whether shareholder proposals would cause corporate directors to violate their fiduciary duties).

120 Professors Marcel Kahan and Edward Rock challenge this approach; they argue that while shareholders may urge wealth-reducing policies at particular firms, they will need to obscure that fact in order for their campaigns to succeed, which will ultimately make their efforts less effective. *See* Kahan & Rock, *supra* note 107, at 516.

B. Enlightened Shareholder Value, or Financial ESG

Defenders of shareholder wealth maximization as the sole corporate purpose maintain that profit-seeking is ultimately *prosocial*, because profits will largely be unattainable via antisocial behavior. Democratically elected governments will adopt regulatory regimes that extract a price for misbehavior; markets — including consumer, labor, and debt markets — will further punish bad actors.[121] Corporations will therefore find it more profitable to limit themselves to those activities that society judges to be valuable; the forces of regulation, and the forces of the market, will align investor preferences with those of the broader public.

Bainbridge agrees (pp. 166–68). Throughout his book, he casually identifies all the ways profit seeking results in prosocial behavior. The market punishes corporations that break the law (p. 91), and companies increase their profits by providing strong benefits to employees (p. 133). Exxon shareholders acted out of profit motive when they supported a dissident slate of directors that promised a more aggressive approach to the climate transition (p. 160). When corporations engage in social activism that aligns with their customers' preferences, sales and stock prices increase (p. 87). Corporations may strengthen relationships with employees and customers by catering to their political and social preferences (pp. 100, 112, 133). Businesses may stave off onerous regulation by highlighting their social commitments (p. 113). Even Henry Ford's benevolence towards his employees was a feint to forestall an aggressive unionization movement (pp. 30–31).

Given all of this, it is unclear why Bainbridge derides the notion that ESG might have a "business case" (pp. 101–04), or what it is about financial-style ESG that inspires his ire (pp. 21, 94). Reduced to its essentials, financial ESG is nothing more than an attempt to isolate and identify the particular social responsibility measures that will ultimately redound to the corporate benefit. After all, if Bainbridge is correct, and there is no "business case" for socially responsible behavior, that fact should condemn shareholder primacy, rather than justify it. Society must be able to arrange its markets and regulatory apparatus so as to constrain the worst of the negative externalities generated by the corporate form, else there can be no assurances that the benefits conferred by wealth-maximizing corporations exceed the harms they inflict (pp. 166–67),[122] which would then only bolster the case for some form of stakeholderism.

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[121] *See* EASTERBROOK & FISCHEL, *supra* note 20, at 37–39; Hansmann & Kraakman, *supra* note 20, at 442.

[122] *See* David G. Yosifon, *The* Citizens United *Gambit in Corporate Theory: A Reply to Bainbridge on Strine and Walter* 2 (Santa Clara Univ. Sch. of L., Working Paper No. 4-14, 2014), https://ssrn.com/abstract=2510967 [https://perma.cc/ZK8Y-VCTT]; Strine & Walter, *supra* note 40, at 379–82 (2015).

Granted, Bainbridge is correct when he argues that there is scant evidence that socially responsible investing strategies outperform the market (p. 103); as Professors Max Schanzenbach and Robert Sitkoff have noted, ESG as a *trading strategy* may be unsuccessful for the same reason any other active trading strategy fails, that is, markets are efficient and the costs of interpreting information are high.[123] And certainly, such a wide variety of policies have been brought under the ESG umbrella that it is doubtful all are wealth maximizing, especially not all at the same firms.[124] But if the profit motive means anything, it means that if prosocial behavior is profitable — and Bainbridge claims that it is — companies will tout their prosocial commitments, and investors will identify underpriced good actors and overpriced bad ones. Certainly, the most sophisticated investors in the world are making the attempt, and not cheaply: asset managers and financial advisors are pouring money into climate analytics,[125] and many make use of the standards set by the Sustainability Accounting Standards Board (SASB), which developed a ratings and reporting system to identify financially material ESG items in different industries.[126] Indeed, despite his denunciation of financial ESG, Bainbridge eventually concedes in a footnote that financial ESG is, ultimately, the same thing as shareholder primacy (p. 104).

To be sure, it is almost certainly the case that activists who *in fact* favor nonfinancial ESG mask their true intentions with spurious claims of a business case for their preferred corporate social behavior. That is, precisely because corporations are so efficiently constructed to seek profits, those who seek to channel corporate behavior in a particular direction frequently try to make a financial case for it, the strength of which may be less than robust.[127] As a result, it is common for skeptics

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123 Schanzenbach & Sitkoff, *supra* note 61, at 437–43. An alternative claim is that shareholders can achieve outsized profits via *voting* and *governance* behavior if not via *trading* behavior, though that requires an account of why shareholder prodding is necessary to persuade corporate managers to adopt profit-maximizing strategies. *See* Lipton, *Join 'Em*, *supra* note 61, at 139–40. Scholars have offered various theories in this regard. *See, e.g.*, Bartlett & Bubb, *supra* note 63, at 60; Fisch & Sepe, *supra* note 65, at 878–79; Lund, *supra* note 63, at 102–03.

124 *See* Fisch & Schwartz, *supra* note 103, at 21.

125 *See* Madison Condon, *Climate Services: The Business of Physical Risk*, 55 ARIZ. ST. L.J. 147, 173–74 (2023); *see also* Madison Condon, *"Green" Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (forthcoming 2d ed.) (manuscript at 4), https://ssrn.com/abstract=4556184 [https://perma.cc/22EN-XLAA].

126 *See How Investors Use SASB Standards*, SASB, https://sasb.org/investor-use/esg-integration/ [https://perma.cc/F3J9-VNAA]. SASB has since been folded into the International Financial Reporting Standards. *SASB Standards*, IFRS, https://www.ifrs.org/issued-standards/sasb-standards/ [https://perma.cc/MRF7-F3TZ]; *see also* Caley Petrucci & Guhan Subramanian, ESG Amnesia in M&A Deals 26 (Feb. 1, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4594776 [https://perma.cc/9LE9-C6FQ] (explaining how "74% of U.S. investors integrate ESG in their M&A agenda").

127 Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 554–55 (2020) [hereinafter Lipton, *Not Everything Is About Investors*]; Barzuza, Curtis & Webber, *supra* note 119, at 1276–79.

to attack ESG efforts on the grounds that they leech value from firms under a false flag of wealth maximization, and fleece investors with high advisory fees while providing little evidence of improved performance.[128] But Bainbridge, though briefly alluding to this complaint (pp. 87–88), seems far less concerned that *nonfinancial* ESG may masquerade as *financial* ESG — he believes it impossible that companies would abandon profit seeking under any circumstances (pp. 108–10, 112, 118–21, 151, 161) — than the reverse, which he disparages as "greenwashing" (pp. 87–88, 117–22).[129] Greenwashing is a major concern of Bainbridge's. The BRT statement, he argues, was a type of greenwashing: soothing talk about social responsibility with no agenda for actual change (pp. 112–13, 117–23).

Certainly, if you are an investor, or simply a citizen, who would like to see corporations make meaningful social commitments, then you might be offended by a pretense to social responsibility that lacks follow through. The basis for objection by a self-styled *profit maximizer*, however, is less clear. According to Bainbridge, even the pretense keeps regulators at bay, satisfies customers, and softens a union-busting agenda. If *Dodge* demonstrates anything, it's that companies were putting an altruistic face on profit-seeking long before the ESG acronym was a twinkle in the United Nations' eye, and surely can be counted on to do so centuries from now. PR springs eternal.

This all makes the reasons behind Bainbridge's antipathy toward greenwashing somewhat opaque. Is he advocating on behalf of naïve employees and consumers? Well-meaning investors? The book is unclear, but Bainbridge exudes such disdain for the politically liberal causes that comprise the typical ESG agenda — referencing "woke" values and "social justice warriors," (pp. 105, 108–10, 117), even conjuring a mocking fantasy of CEOs who attempt to placate their overprivileged children home from "posh private schools" where they have been "indoctrinated in social justice politics" (p. 117) — that it is difficult not

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[128] Fisch & Schwartz, *supra* note 103, at 21–22, 43; Lipton, *Join 'Em*, *supra* note 61, at 136–37; Robert Armstrong, *The ESG Investing Industry Is Dangerous*, FIN. TIMES (Aug. 24, 2021), https://www.ft.com/content/ec02fd5d-e8bd-45bd-b015-a5799ae820cf [https://perma.cc/H8H7-R8S8]; Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1014–15 (2020). Commenters also complain that mutual funds, in particular, greenwash with ESG efforts in order to guard themselves against regulation — a more serious charge than when performed by operating companies, because far from being profit-maximizing for investors, these behaviors put the fund managers at odds with their clients' interests. *See* Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 449–50 (2022); Bratton, *supra* note 54, at 48–49.

[129] Occasionally, Bainbridge suggests that corporate chieftains purport to pursue social responsibility as a means of either consolidating their own power, or placating their own consciences (pp. 114–18), but then immediately reverts to the argument that pretensions to social responsibility always mask a profit motive (pp. 122–23).

to suspect his true objection is *expressive*. After all, Milton Friedman, the modern Prometheus of shareholder primacy, also bemoaned the social responsibility "window dressing" of his day, because he believed it eroded societal respect for private enterprise — but he admitted it would be hypocritical to demand that business managers forego profitable public relations campaigns out of concern for the state of public discourse.[130]

C. True Stakeholderism

The final form of stakeholderism — call it "true" stakeholderism — posits that firms should in fact be managed to benefit all constituencies, treating corporations as a cooperative project. In this category belongs the managerialism of the BRT Statement, the team production theory of Blair and Stout, as well as more radical proposals for reforms of the corporate structure.

Bainbridge is thorough in his critiques of this form of stakeholderism, and his objections can roughly be divided between the substantive and the procedural. His substantive argument is that shareholders, with no specific claim on corporate assets, are the most "vulnerable" of corporate stakeholders (p. 88): employees and other constituencies receive contractual protections, as well as the protection of general welfare legislation such as labor, environmental, and consumer laws (pp. 89–90), while shareholders receive only the corporate "residual," or, whatever assets are left over after others receive their due (p. 128). Citing Professor Robert Miller, Bainbridge points out that to the extent these contractual and legal protections set a "floor" for what nonshareholders will receive, any stakeholderist orientation necessarily means shareholders can only be made worse off, not better, in any balancing model (pp. 155–56).[131] For shareholders to be certain of any return at all (let alone one worth the risk of investment), they must be assured that directors will devote their energies to ensuring that plenty is left over for them to claim.

These are longstanding defenses of shareholder primacy, and Bainbridge covers the field thoroughly, though the reader may find it somewhat incongruous to refer to today's shareholder base as "vulnerable" (a characterization that presumably has never before been applied to the likes of BlackRock and Elliott Investment Management). After all, nonshareholders are not the only group protected by "general welfare" legislation; even in a stakeholderist world, there would remain

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[130] Milton Friedman, *A Friedman Doctrine — The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/HB25-RZRE].

[131] The author cites Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model?*, 77 BUS. LAW. 773, 778–79 (2022).

securities disclosure requirements, market structure regulation, the duties owed to clients by brokers and investment advisors, various prohibitions on managerial self-dealing, and favorable tax treatment of capital gains and dividend income. Shareholders, in other words, are not uniquely bereft of congressional solicitude.

As for procedural concerns, Bainbridge identifies various implementation problems that are likely to accompany a stakeholderist model, and certainly, when it comes to managerialism, as above, Bainbridge convincingly demonstrates why that center cannot hold. Today's empowered, financially motivated shareholders are unlikely to tolerate sacrifices of their wealth for long (p. 161), and a stakeholderism that depends solely on the goodwill of corporate directors offers neither a mechanism for assessing performance (p. 138) nor a justification for why directors should exercise such public power in the first place (pp. 94–96, 149–50).

Which is precisely why many stakeholderists want to rebuild the corporation from the ground up, chiefly by giving employees and other constituencies a formal role on corporate boards.[132] Sometimes, the claim is that multistakeholder governance would actually facilitate information sharing and thereby improve corporate performance,[133] but the main appeal is that multistakeholder governance would force corporate managers to attend to the needs of nonshareholders without assuming the role of omniscient guardians of the public. Represented groups would bargain — not hypothetically (pp. 154–55), but actually — to reach the most optimal arrangements among themselves. Bainbridge offers a rapid-fire set of criticisms of these proposals, everything from empirical studies that identify little benefit from Germany's codetermination system (pp. 145–46) to a "too many cooks" rationale supposing that multiple constituencies will create boardroom friction by jockeying for resources (pp. 141–42, 144).

This last point is an intriguing one because the same observation can be offered as a feature of multistakeholder governance, rather than a bug. As Bainbridge acknowledges, one of the most important issues that stakeholderism is meant to address is that of corporate power (pp. 98–99, 143): Americans in particular have long been suspicious of concentrated power, whether held by politicians or by private actors. Giant corporations have always represented a singular problem because

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[132] *See, e.g.*, HAYDEN & BODIE, *supra* note 41, at 171; Kim, *supra* note 57, at 268; DAVID YOSIFON, CORPORATE FRICTION 200–01 (2018); Brett McDonnell, *Stakeholder Governance as Governance by Stakeholders*, SEATTLE U. L. REV. (forthcoming) (manuscript at 17), https://ssrn.com/abstract=4557291 [https://perma.cc/BA2Y-MDXM]; Dammann & Eidenmüller, *supra* note 40, at 992–94.

[133] *See* HAYDEN & BODIE, *supra* note 41, at 156–57; Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 355–56 (2008); Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 805 (2011); Greenfield, *supra* note 117, at 981.

they may control massive swaths of the economy while wielding enough political clout to evade democratic discipline. In a very real sense, they may behave like unelected governments.

The shareholder primacist position is that malign corporate influence should be combatted with countervailing power, i.e., sufficiently developed markets and a robust regulatory regime to render antisocial behavior expensive, and therefore unprofitable.[134] In keeping with this view, there is a species of stakeholderist-like proposals that seeks to strengthen these market mechanisms, by providing nonshareholder constituencies sufficient information to bargain with — or shun — antisocial corporate actors.[135]

But an alternative to *strengthening* countervailing power is *weakening* the corporate form itself, to make it *less* efficient, and therefore *less* powerful in its pursuit of profit. There is, in fact, a longstanding regulatory tradition exactly along these lines. The earliest corporations, for example, were expected to dissolve after a specified amount of time, were prohibited from holding shares in other companies, and were subject to sharp limits on capitalization[136] — measures that ensured that corporations stayed small and unlikely to amass significant political influence. Antitrust law was also seen as a means to limit corporate power, and in addition to its substantive prohibitions on monopolization and conspiracy — that is, prohibitions on particular forms of conduct — it also prohibits competing firms from employing overlapping directors, thus ensuring a form of structural separation.[137] In 1935, Congress imposed taxes on intercorporate dividends to discourage pyramid-like holding companies that made it easier to control massive companies with only a small equity investment,[138] and Professor Mark Roe has argued that regulation of mutual fund structure was designed to minimize the ability of large financial institutions to exercise control over their portfolio companies.[139]

Regulators have also, at various times, limited corporate power by imposing cumbersome *procedural* requirements on corporate action. These friction-generating rules have the effect — and likely the purpose — of making it more difficult for corporations to act, and thus to

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[134] That's the theory; in practice, many shareholder primacists also object to proposals for regulation. Aneil Kovvali & Leo E. Strine, Jr., *The Win-Win That Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307, 324–25 (2022).

[135] *E.g.*, Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307, 366 (2023); Lipton, *Not Everything Is About Investors*, *supra* note 127, at 513–16; Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 U.C. DAVIS L. REV. 1445, 1448 (2022).

[136] David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 209–10.

[137] *See* 15 U.S.C. § 19.

[138] Dammann & Eidenmüller, *supra* note 40, at 988–90.

[139] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 103–04 (1994).

exert outsized influence in the world. For example, for a long time, corporations could only make major changes, such as charter amendments and mergers, with a unanimous shareholder vote[140] — difficult to obtain in many cases, and virtually impossible if the corporation raised significant amounts of capital from a dispersed investor base.[141] These strictures limited corporations' size and ensured they would remain wedded to the narrow purposes for which they were originally chartered. Today, it is likely that at least some advocacy in favor of, say, separation of chair and CEO roles, and shareholder approval of corporate political spending, is intended more to stymie corporate activity than to enhance the quality of decisionmaking.[142]

Professors Jens Dammann and Horst Eidenmüller argue that a system of codetermination can have a similar effect.[143] Their main claim is that concentrated corporate wealth, when controlled entirely by managers who are beholden to shareholders, can be used to undermine democratic institutions (such as, for example, with unlimited political spending).[144] If employees are represented in the boardroom, however, then power is deconcentrated among a much more heterogeneous group, making it more difficult to wield.[145] Bainbridge cites with approval the conclusions that Dammann and Eidenmüller reached in an earlier article, that codetermination may impede decisionmaking (p. 144),[146] but shortly thereafter, Dammann and Eidenmüller relied on that very fact to conclude that the democracy-preserving effects of such boardroom frictions outweighed any economic harms they might cause.[147]

D. Cultivating Friction

Boardroom friction might, in the end, be the chief virtue of ESG investing, as well, regardless of how ESG is defined.

One purported flaw with respect to welfarist ESG is that shareholders are necessarily heterogeneous; they will differ with respect to their social preferences.[148] The same may be said even when shareholders seek to maximize their wealth: as Bainbridge points out, shareholders may operate on different timelines or have different notions as to the most profitable course of action (pp. 68, 160–61). Introducing the "enlightened shareholder value" concept into the mix only magnifies these

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140 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 87, 90, 93 (1992).

141 *See* Lipton, *Beyond Internal*, *supra* note 117, at 673.

142 *Id.* at 674.

143 Dammann & Eidenmüller, *supra* note 40, at 992.

144 *Id.* at 975, 997–98.

145 *Id.* at 992–93.

146 The author cites Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 910.

147 *See* Dammann & Eidenmüller, *supra* note 40, at 999.

148 Bartlett & Bubb, *supra* note 63, at 24.

problems, because the number of variables to consider, and the longer time frames on which performance is evaluated, makes it even harder to identify optimal strategies.[149]

Bainbridge has explained, in both this book and in earlier writings, that corporate law's traditional solution to shareholder heterogeneity is to render it irrelevant, by giving shareholders formal input into only a very small number of corporate decisions (pp. 68–69).[150] Corporations are therefore able to coordinate vast resources under the authority of a single, small group of people — the board of directors — whose fiat authority makes power relatively simple and easy to wield. The wealth-maximization constraint — enforced less through formal legal requirements than through corporate and market structure — ensures that power will be focused, with ruthless efficiency, on a singular end. On some occasions, Delaware courts have gone so far as to hold that director fiduciary duties run to the *shares* — the financial instruments — rather than the real-life investors who hold them, thus erasing investors themselves from the corporate form entirely.[151]

Public choice theorists argue that when a unified, dedicated minority is devoted to advancing a particular goal, it may overcome a majority opposition that faces collective action problems and diffuses its energies among multiple priorities.[152] In a manner of speaking, that is how corporations are designed; they are streamlined for profit maximization, in a world where few sources of countervailing power (such as unions and consumer advocates) have the same single-mindedness. That efficiency and narrowness of focus, in addition to the concentration of resources enabled by the corporate form, allows corporate lobbying and political interests to have outsized influence in the regulatory sphere.[153] The conflicting views of shareholders are eliminated from the equation in order to strengthen corporate power.

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[149] Lund, *supra* note 63, at 100–01; Schanzenbach & Sitkoff, *supra* note 61, at 450.

[150] Bainbridge, *Director Primacy*, *supra* note 115, at 554–59.

[151] *In re* AMC Ent. Holdings, Inc. S'holder Litig., 299 A.3d 501, 530 (Del. Ch. 2023) (holding that voting rights "are appurtenant to the share of stock that carries the voting power; they are not personal rights belonging to the stockholder who happens to own the shares"); *see* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010) (describing the "financial interest of the shares" (quoting Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 174 (2009))).

[152] Charles K. Rowley, *Public Choice Trailblazers Versus the Tyranny of the Intellectual Establishment*, *in* READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 47, 62–66 (Charles K. Rowley & Friedrich G. Schneider eds., 2008); Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184 (1991).

[153] Yosifon, *supra* note 40, at 1203–04, 1210; *see also* Citizens United v. FEC, 558 U.S. 310, 471 (2010) (Stevens, J., concurring in part and dissenting in part) ("When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. . . . Corporations . . . are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure.").

In fact, the corporate form has evolved over time to minimize the effects of shareholder heterogeneity. Examples abound: as above, the unanimity voting requirement for mergers and charter amendments was reduced to a majority vote requirement.[154] Recently, in response to an influx of either irrational or passive retail shareholders,[155] Delaware even relaxed the majority vote requirement for certain types of charter amendments, thus minimizing the impact of dissenting voices.[156] Delaware used to limit voting agreements to ten years, but that restriction was eventually removed, enabling shareholders to lock in a homogenous block vote indefinitely.[157] Delaware used to closely scrutinize self-interested behavior by controlling shareholders which, as a practical matter, made such behavior costly and difficult to undertake; in 2014, the Supreme Court of Delaware adopted procedures to allow controllers to act without such scrutiny,[158] and may be set to loosen those restrictions even further.[159] Delaware, and other states following its lead, have recently made it easier to effectuate a takeover of a publicly traded company without going through the expense and delay of a shareholder vote,[160] thus making mergers easier and faster to achieve. Even the internal affairs doctrine, which dictates the choice of law applicable to a firm's governance, has hardened from an imprecise standard generally favoring the law of the organizing state into an implacable requirement,[161] which provides more certainty to corporate planners and thus eases decision-making.

Disclosure requirements imposed by the SEC focus on matters relevant to financial performance exclusively, making it difficult for investors even to express a preference for anything other than wealth maximization.[162] Courts participate in the same project by adopting doctrines, such as the concept of "puffery," that treat representations pertaining to corporate governance and social behavior as categorically

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154 HORWITZ, *supra* note 140, at 93.

155 *See* Jeff Montgomery, *AMC Stock Split Fight Shapes Del. Corporate Law Overhaul*, LAW360 (July 19, 2023, 9:38 PM), https://www.law360.com/articles/1696516/amc-stock-split-fight-shapes-del-corporate-law-overhaul [https://perma.cc/X4Z2-ZCH8].

156 *See Delaware Implements Amendments to the Delaware General Corporation Law, Effective as of Aug. 1, 2023*, BAKERHOSTETLER (Aug. 21, 2023), https://www.bakerlaw.com/insights/delaware-implements-amendments-to-the-delaware-general-corporation-law-effective-as-of-aug-1-2023/ [https://perma.cc/V74P-SMTL].

157 Brenda G. Houck, Commentary, *1994 Statutory Amendments to the Delaware General Corporation Law*, 20 DEL. J. CORP. L. 477, 492–94 (1995). The Model Business Corporation Act made a similar change. *See* MODEL BUS. CORP. ACT § 7.30(c) (AM. BAR ASS'N 2016); *id.* cmt.

158 Kahn v. M & F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014).

159 *See* Order, *In re* Match Grp., Inc. Derivative Litig., No. 368, 2022 (Del. May 30, 2023).

160 DEL. CODE ANN. tit. 8, § 251(h) (West 2023); *e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 3-106.1 (West 2023); TEX. BUS. ORGS. CODE ANN. § 21.459(c) (West 2023); FLA. STAT. § 607.11035 (2023).

161 Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 326–27 (2023).

162 Lipton, *What We Talk About*, *supra* note 116, at 873–75.

immaterial to investors, thus precluding any remedies for misrepresentations on these subjects and, in practical effect, making it more difficult for investors to police the quality of internal corporate decisionmaking procedures.[163]

Mutual fund investing was popularized in part due to changes to the tax code and the adoption of ERISA,[164] and mutual funds are subject to a host of rules that ensure a general level of similarity of preference: among other things, they must be diversified,[165] liquid,[166] and relatively passive with respect to their role in corporate governance;[167] receive limited or no performance-based compensation;[168] equalize voting rights among investors;[169] and — due to rules governing the construction of 401(k) menus — are strongly encouraged to focus on financial performance while eschewing any attempt to achieve social goals.[170] Meanwhile, ERISA requires pension funds to invest with a view to maximizing fund returns, even if such investments might be contrary to the interests of the funds' employee-beneficiaries.[171]

One mechanism by which shareholders have traditionally sought a voice in corporate governance — and thus the ability to express actual preferences as opposed to legally presumed ones — has been through the use of shareholder proposals under Rule 14a-8.[172] However, the SEC recently adopted a number of amendments to make that rule more difficult for shareholders to access.[173]

The upshot is that a thick web of legal standards streamline corporate functioning as much as possible,[174] while optimizing for profit

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163 Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 112–16 (2017).

164 Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 928–31, 960 (2013).

165 Alan L. Kennard, *The Hedge Fund Versus the Mutual Fund*, 57 TAX L. 133, 135 (2003).

166 *Id.*; ROE, *supra* note 139, at 120.

167 *See* ROE, *supra* note 139, at 103–04; John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1423–33 (2019); 15 U.S.C. § 18a(c)(9) (prohibiting stock acquisitions that would substantially lessen competition, but excepting stock acquired "solely for the purpose of investment").

168 Jeff Schwartz, *Reconceptualizing Investment Management Regulation*, 16 GEO. MASON L. REV. 521, 560 (2009).

169 Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, 88 F.4th 103, 108–10 (2d Cir. 2023); 15 U.S.C. § 80a-18(i).

170 Hart & Zingales, *Corporate Governance*, *supra* note 103, at 205–07.

171 Webber, *supra* note 102, at 2108–13.

172 *See* 17 C.F.R. § 240.14a-8 (2023); *see also* Wells, *supra* note 89, at 1078.

173 Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Release No. 34-89964, 85 Fed. Reg. 70240 (Nov. 4, 2020) (codified at 17 C.F.R. pt. 240), https://www.sec.gov/files/rules/final/2020/34-89964.pdf [https://perma.cc/SL4X-E47M].

174 Countervailing sources of law may, however, impede this project, such as compliance requirements imposed by regulatory agencies. *See* Lipton, *Beyond Internal*, *supra* note 117, at 669–73.

maximization and stamping out any hint that investors may prefer anything else.[175]

Thus, while Dammann and Eidenmüller argue that shareholder homogeneity enables the efficiency of decisionmaking that contributes to corporate power,[176] it is important to recognize that homogeneity is not a natural feature of the landscape; it is a product of this legal structure, which presumes a singular preference on investors' behalf, and conveniently eliminates most paths by which contrary preferences can be expressed. This is by design; the theory has been that accommodating heterogeneity would disrupt corporate functioning by pulling management in different directions and preventing businesses from executing a singular strategy.[177]

What ESG investing actually *does*, then, as a practical matter, is create a permission structure for shareholders to seek information about, and express preferences over, a broad range of corporate conduct, often offering disparate and conflicting views. It surfaces and empowers a *heterogeneity* among shareholder preferences that corporate managers increasingly feel the need to accommodate, at least to some degree. Whether ESG is pursued for its financial value, or its social value, may matter less than that it creates visible disagreement, requiring corporate managers to placate different shareholder constituencies. Professors Yaron Nili and Roy Shapira warn that directors feel "overwhelmed with the scope and complexity of their newfound ESG responsibilities,"[178] and that pressure to appoint new board members with domain-specific ESG expertise may "disrupt the functioning of the board as a group," resulting in a less cohesive board overall.[179] In other words, ESG may fracture the unitary vision that has given the corporate form such power.[180] From a shareholder primacist perspective, that is precisely why it should be stamped out; but if one is concerned that the legal technology of the corporation is *too efficient* in overcoming societal guardrails, this is a virtue to be cultivated.

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[175] Greenwood, *supra* note 87, at 1052–53 ("If the corporation were run by and for real people, it would be a hotbed of political controversy. Real people argue about goals — so they must be represented by politicians, not technicians. The fictional shareholders, however, all agree on the goal; they have no need or use for politics. If the real people disagree with the fictional representation, the real people may simply be disregarded as not real shareholders.").

[176] *See* Dammann & Eidenmüller, *supra* note 40, at 992 (explaining how heterogeneity among decisionmakers would disrupt corporate power).

[177] EASTERBROOK & FISCHEL, *supra* note 20, at 70; *see* Bainbridge, *Shareholder Voting Rights*, *supra* note 115, at 608–11; Blair & Stout, *supra* note 16, at 313.

[178] Yaron Nili & Roy Shapira, *Specialist Directors*, YALE J. ON REGUL. (forthcoming) (manuscript at 33–34), https://ssrn.com/abstract=4648018 [https://perma.cc/TPM2-WSR5].

[179] *Id.* at 29.

[180] *See also* Bartlett & Bubb, *supra* note 63, at 5, 46–47 (warning of distraction costs if corporate managers must consider shareholder social preferences); Schanzenbach & Sitkoff, *supra* note 61, at 448 (arguing that shareholder involvement to effectuate ESG policies "could dull managerial incentives while reducing the quality of managerial decisionmaking").

As ESG has become politically controversial, mutual funds have sought to avoid the spotlight by passing on voting power to their beneficiaries — in some cases, other institutions (such as pension funds[181]), and in others, retail shareholders.[182] New technologies are being employed to make it easier for retail shareholders to express preferences, as well.[183] One risk is that the resulting vote dispersion may reduce shareholder power across the board,[184] but another possibility is that an empowered shareholder base will continue to divide management focus, thus perhaps reversing decades of optimizing the corporate form for a perfect and societally dangerous efficiency.

CONCLUSION

Far more interesting than the BRT's Statement is the question *why*, just a few days later, the BRT felt it necessary to offer bland reaffirmations of shareholder primacy.[185] Almost certainly, the BRT was reacting to the firestorm of criticism it received from a number of shareholder-aligned groups, such as, as Bainbridge points out, the Council of Institutional Investors (CII) (pp. 165–66). The CII might be viewed as a surprising source of criticism: as an association consisting of pension plans, the CII is populated by some of the most vocal proponents of ESG approaches to corporate governance.[186] Its objection, then, suggests it did not view the Statement as aligned with ESG at all.

That is the schism that *The Profit Motive* does not interrogate. The book provides the reader with a thorough and entertaining explanation of the logic of shareholder wealth maximization, but in conflating all forms of stakeholderism, Bainbridge leaves unanswered the key question dominating today's debate: who decides? The BRT envisioned that it

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[181] *See generally* Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. CAL. L. REV. 881, 936–37 (2023) (describing pass-through voting for pension funds).

[182] Brooke Masters, *BlackRock Offers a Vote to Retail Investors in Its Biggest ETF*, FIN. TIMES (July 17, 2023), https://www.ft.com/content/3f0f26bf-cb33-4fd4-a1dd-4104cd294b17 [https://perma.cc/RJ72-UR4B].

[183] *See* ICONIK, https://www.iconikapp.com/individuals [https://perma.cc/X4LF-P63J] (offering automatic voting for retail investors in accord with their preset preferences); Press Release, Broadridge, Shareholder Voting Made Even Easier with the Updated Enhanced ProxyVote App (Mar. 30, 2022), https://www.broadridge.com/press-release/2022/updated-enhanced-proxyvote-app [https://perma.cc/VM8A-B27R].

[184] Jill Fisch, *The Uncertain Stewardship Potential of Index Funds*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 454, 470 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[185] *See* sources cited *supra* note 13.

[186] *See, e.g.*, *Corporate Governance*, OFF. OF THE N.Y. STATE COMPTROLLER, https://www.osc.state.ny.us/common-retirement-fund/corporate-governance [https://perma.cc/S58Y-DYQJ]; Cynthia A. Williams & Jill E. Fisch, Petition for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure (Sec. & Exch. Comm'n Oct. 1, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf [https://perma.cc/6SQV-3U6U] (petitioning the SEC for a rulemaking on ESG disclosures). This petition was signed by multiple members of the CII. *See U.S. Asset Owners*, COUNCIL OF INSTITUTIONAL INVS., https://www.cii.org/us%20asset%20owners [https://perma.cc/Q9Q6-NGLH].

would be *management's* responsibility to allocate corporate surplus among various stakeholders, and it was *that* division of authority that the CII likely found most problematic.[187]

That said, despite the philosophical differences among various stakeholderist approaches, there is at least one unifying mechanism of action: by introducing a new source of demand on board attention, stakeholder claims can *weaken* corporate power vis-a-vis society at large, and thus prevent corporations from distorting public policy in favor of capital, to the detriment of other constituencies. That's the benign story, anyway: an alternative potential outcome is that new shareholder demands will carry exactly as much weight as their voting power, enabling some shareholder groups to extract economic rents to vindicate their private interests. There is no obvious way to distinguish legitimate bargaining among various interest groups from illegitimate exploitation; indeed, the shareholder wealth maximization norm itself likely originated out of concern that dominant shareholders would otherwise use their power to tunnel wealth away from minority investors.[188] While one can imagine the societal good that flows from directors sacrificing profits to benefit consumers and employees, sacrificing profits so they can be redirected to shareholder factions would be a much less satisfying outcome, both for capital raising and innovation generally, and for investor welfare specifically. The more that corporate boards are forced to attend to the interests of different shareholder groups, the more that problem may once again come to the fore.

So Bainbridge is correct that the BRT Statement and its aftermath tell the story of today's stakeholderism. The story it tells, ironically, centers the shareholders after all.

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[187] Council of Institutional Invs., *supra* note 5 ("To achieve long-term shareholder value, it is critical to respect stakeholders, but also to have clear accountability to company owners. . . . BRT has articulated its new commitment to stakeholder governance (which actually resurrects an older policy view) while (1) working to diminish shareholder rights; and (2) proposing no new mechanisms to create board and management accountability to any other stakeholder group.").

[188] *See* Smith, *supra* note 35, at 319–20; Mitchell, *supra* note 35, at 707–08.