Fiduciary Duties for a Globalized World: Stakeholder Theory Reconceived

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Abstract. The narrative that the sole purpose of a corporation is to maximize shareholder value dominates US corporate law. A subset of scholars contests this paradigm, arguing that corporate directors should also take into account the interests of additional stakeholders, in what is termed the "stakeholder theory" of the corporation. This conversation has become more urgent because the transnational nature of corporate activities today creates new forms of risk that the traditional, narrow focus on shareholder value fails to address. Moreover, recent corporate law proposals by Presidential candidates such as Senator Elizabeth Warren incorporate stakeholder theory and have reinvigorated this debate. Even groups of prominent business leaders increasingly promote the need for companies to consider a wider set of stakeholders.

This Article analyzes the use of stakeholder theory in corporate law, including in US constituency and benefit corporation statutes. It also considers the historic work of corporate scholars promoting stakeholder theory. It concludes that, to date, stakeholder theory suffers from significant weaknesses because it is too vague and is unenforceable. Such challenges are avoidable. Stakeholder theory, if thoughtfully formulated, holds promise as a way to help corporations manage risk and meet social expectations while maintaining profits. The recent stakeholder theory-based corporate law proposals do not take into account historical lessons, making it particularly urgent to learn from the past and develop approaches that provide clearer instructions to corporate directors and lead to better societal outcomes.

This Article proposes a New Stakeholder Theory that provides concrete guidance to directors as they oversee the management of

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social risk affecting third parties while maintaining a focus on shareholder value.

Introduction

Corporate law scholars have long debated whether corporations should exist solely to benefit shareholders—a shareholder-centric view—or whether they have responsibilities to consider or benefit a broader swathe of society. The latter perspective is often termed the "stakeholder theory" of the corporation. Such stakeholders include not only shareholders but also other constituencies, such as employees and community members. In practical terms, and as further developed below, US corporate law embodies both competing views to some degree, although the shareholder-centric model dominates.

A single-minded focus on shareholder value can lead to a failure to consider and manage impacts on stakeholders that can be matters of life and death. This myopic approach in turn can have significant and adverse impacts on companies in well-publicized cases. For example, Talisman Energy, a Canadian oil company, continued operations in Sudan when the government faced allegations of genocide and crimes against humanity. Because the government reportedly used Talisman's airstrips to launch attacks on nearby communities,[1] Talisman eventually faced a major lawsuit in the United States for complicity in the government's crimes, and its stock price was significantly deflated until it exited Sudan.[2] It is not clear that Talisman's actions violated Sudanese law, nor were there effective courts in Sudan in which to bring such a claim, so a traditional legal compliance approach might not have identified these risks.

More recently, agricultural companies and investors faced widespread allegations of involvement in "land grabs" in Africa. Many traditional land users were displaced without compensation, leaving them destitute and worsening the continent's food security.[3] Traditional land users often have no legal rights to land, and host governments presented the land to investors as "fallow."[4] These large-scale land transactions affecting poor and food-insecure farmers led to widespread criticism and social

[1] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 299 (S.D.N.Y. 2003).

[2] *See id.* at 296; Richard Bloom & Lily Nguyen, *Talisman Shares Rise on Sudan Sale,* GLOBE & MAIL (Apr. 17, 2018), https://perma.cc/UAY5-NL2B.

[3] *See* Olivier de Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 504, 544 (2011).

[4] Ernest Aryeetey & Zenia Lewis, *African Land Grabbing: Whose Interests Are Served?*, BROOKINGS (June 25, 2010), https://perma.cc/Z8VP-DL82.

unrest. For example, the Financial Times reported that Daewoo planned to acquire half of Madagascar's arable land,[5] a plan that failed due to popular unrest and eventually contributed to a coup d'état.[6] After a significant campaign by Oxfam, major brands such as Nestlé, Unilever, Mars, and Coca-Cola agreed to implement a "no land grabs" policy in their global operations.[7]

In the above examples, companies failed to proactively assess potential impacts on communities, although they were eventually forced to do so due to public outcry and legal risk. Such reputational pressure is, however, the exception and not the rule, given the scale of corporate activity in many remote corners of the world. As a result, such pressure is unlikely to prompt most companies to formally integrate concern for stakeholders into corporate operations, even though doing so is often good for shareholders in the long-term. The following scenario is more typical and demonstrates the implications of a strictly shareholder-centric approach. Imagine that a little-known, publicly traded US corporation plans to establish a large soy plantation in a remote region of the Amazon, which will be its first foreign asset. The foreign government agrees to obtain the land and sell it to the company for a reasonable price. The company will pay the government's security forces to remove any current inhabitants using expropriation. The board of directors, keen to benefit from rising soy prices, quickly approves the deal. The board subsequently learns from local staff that a small indigenous tribe was violently displaced as a result of the project and received no compensation from the government. The tribe, removed from its traditional land base and food sources, is now starving. Because the company is little-known and the tribe is small and obscure, the adverse impacts of the plantation do not affect the company's reputation, stock price, or behavior. The board does nothing to assist the tribe.

While the foreign government certainly bears some responsibility for such events, corporations can also help prevent such impacts from occurring in the first place through adequate corporate oversight embodied in fiduciary duties. A reconceived approach to stakeholder theory can help create such oversight through a New Stakeholder Theory. This would address the inadequacies of a purely shareholder-centric vision of the corporation by diminishing company externalities and enhancing societal confidence in corporations.

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[5] Javier Blas, *Land Leased to Secure Crops for South Korea*, FIN. TIMES (Nov. 18, 2008), https://perma.cc/5NFQ-ZXCY.

[6] Venusia Vinciguerra, *How the Daewoo Attempted Land Acquisition Contributed to Madagascar's Political Crisis in 2009*, *in* CONTEST FOR LAND IN MADAGASCAR: ENVIRONMENT, ANCESTORS AND DEVELOPMENT 221, 231–32, 242–43 (Sandra J.T.M. Evers et al. eds., 2013).

[7] *See Land*, OXFAM BEHIND THE BRANDS, https://perma.cc/8K3T-MZBW.

In many instances, although not necessarily in the scenario above, such oversight would help reduce long-term risk to the company itself, as well as society. Indeed, by focusing on stakeholders, companies can protect shareholders from a growing and increasingly tangible set of legal, reputational, and financial risks.

Shareholder-centric theorists rightly critique stakeholder theory, as it is typically formulated, for its vagueness. Stakeholder theory typically states that directors should "consider" non-shareholder stakeholders but does not advise whether directors should evaluate positive or negative impacts (or both) on those stakeholders. In the past, stakeholder theory was translated into law with broad wording, and consideration of these non-shareholder stakeholders often was optional. Moreover, directors' duties to consider other stakeholders have been unenforceable because no regulatory body has been instructed to enforce such a duty, and potentially injured stakeholders lack standing. It is hardly surprising that vaguely worded, optional, and unenforceable statutes fail to successfully guide corporate behavior.

This Article fills a gap in corporate governance scholarship by proposing New Stakeholder Theory—a concrete, enforceable reformulation of stakeholder theory that would adequately guide director decision-making. Such a reformulation is timely given recent proposals by Presidential candidates that have revived conversations with regard to stakeholder theory. Adding to the evidence of an inflection point, the Business Roundtable—which represents almost 200 CEOs—revised its Principles of Corporate Governance in August 2019. The Principles now call for companies to focus on contributing to the well-being of a wider range of stakeholders, rather than focusing narrowly on shareholder value.[8] Revisiting stakeholder theory is also timely because many leading companies are now integrating environmental, social, and governance ("ESG") concerns into their risk management systems. They do so in large part because ESG integration is increasingly believed to improve shareholder value over the long term. A revised stakeholder theory would also cause laggard companies to adopt these good practices.

According to New Stakeholder Theory, in addition to enhancing shareholder value, directors should ensure that the corporation establishes reasonable processes to identify and seek to avoid significant *adverse* impacts on stakeholders. Directors should oversee and review such efforts, which will in many cases mitigate long-term risk for the company as a whole and thus benefit shareholders—the very reason that some large companies already conduct such diligence. These duties would direct

[8] *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (August 19, 2019), https://perma.cc/67SY-QQ6Y.

companies' energy to focus on minimizing externalities rather than primarily on philanthropic efforts, which often yield more branding value than meaningful societal impact or effective risk management. Laws creating these enhanced directors' duties could identify certain key mechanisms that should be included. Excessive prescription regarding how companies should manage these challenges may be unwise, however, because companies follow various risk management processes.

To make this fiduciary duty meaningful, history shows that it needs to be enforceable. This could occur several ways. For example, regulators could be empowered to enforce the law. They could do so by fining companies that fail to implement a process to identify and address ESG issues in their broader value chain, at least through their first-tier suppliers and perhaps beyond. Alternatively, laws could grant standing to certain adversely affected stakeholders (not just shareholders) to enforce these duties. Because so much company behavior crosses borders today, the efficacy of standing would hinge on non-US stakeholders being able to pursue a cause of action. The extent to which such standing should be extended is, however, likely to be contested. Regardless of the exact mode of enforcement, companies should not be subject to a flood of legal action under New Stakeholder Theory. This is because the Theory offers a concrete roadmap for directors to meet their expanded fiduciary duties and avoid company liability, provided they have implemented the requisite reasonable processes.

In the scenario above, such processes likely would have identified that the region contained indigenous peoples, and that the government had a history of relocating them with highly inadequate compensation, often leading to illness and death. When due diligence identified such significant impacts, the board would ensure that the corporation established mitigation steps to prevent forced relocation in the first place. These could include, for example, working with the government to ensure that the indigenous group received compensation or considering a nearby plot of land that would not have such adverse impacts. Board committee minutes would presumably reflect such discussions and oversight.

Such an approach may sound onerous, but it is not unduly so. It would build on existing directors' duties under *Caremark*[9] to make a good-faith effort to ensure that "a corporate information and reporting system, which the board concludes is adequate, exists."[10] The approach would simply explicitly expand the scope of what such systems should cover. Some leading corporations already conduct social due diligence as part of their risk mitigation strategies. These companies are often motivated by

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[9] *In re* Caremark Int'l, 698 A.2d 959 (Del. Ch. 1996).

[10] *Id.* at 970.

potential risks to their reputation. However, reputational consequences do not affect all companies equally, pointing to the need to reformulate directors' duties rather than relying on this existing pressure point. Moreover, expanding fiduciary duties in this manner is in line with global legal trends and business behavior, and indeed would help leverage a trend to a tipping point.

Such reconceived fiduciary duties would create a level playing field for the corporations that already expend resources to manage their adverse societal impacts, even when not legally mandated. If corporate directors were to proactively seek to identify and address significant adverse impacts that might be legally permitted, particularly in emerging economies, they would in many instances reduce risk for the corporation as well as stakeholders. Because directors' duties to other stakeholders would be narrow, such efforts would not significantly detract from efforts to build the value of the corporation for shareholders.

This Article proceeds in three main parts. Part I reviews both shareholder and stakeholder theories of the corporation and the theoretical and practical challenges arising from their current formulations. This Part identifies the key, but solvable, shortcomings in stakeholder theory. Part II examines international trends, which indicate that new experiments with stakeholder theory are ongoing and likely to continue. Such developments include corporate law in other jurisdictions, international law related to corporations, and business practice. Even in the United States, Congress is for the first time considering legislation that would mandate human rights due diligence, although it is unlikely to pass in the near future,[11] and the European Union is seriously considering a similar law.[12] Some of these developments, unfortunately, maintain the problems that have long plagued stakeholder theory, diminishing its ability to achieve its promise of helping corporations meet societal expectations. Part III argues that the time is ripe to revise fiduciary duties in the United States to account for corporations' societal impacts and reflect a clearer understanding of stakeholder theory, while maintaining a primary focus on shareholder value. It proposes such a reformulation. These fiduciary duties should be sufficiently narrowly defined so that they are understandable and amenable to oversight, but not overly prescriptive.

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[11] *See* Amal Bouchenaki et al., *Mandatory Human Rights Due Diligence on the Cards in the US?*, LEXOLOGY (July 25, 2019), https://perma.cc/R9NT-G6NJ.

[12] *See* Benjamin Fox, *Table Human Rights Due Diligence Law, MEPs Tell Commission*, EURACTIV (Mar. 28, 2019), https://perma.cc/U8RX-VKRP.

I. Corporate Purpose and Fiduciary Duties: New Views on an Old Debate

The debate regarding the purpose of corporations and related fiduciary duties is almost as old as the United States. This Part briefly outlines the history of the dispute and the current legal status quo. It identifies flaws in both the shareholder and stakeholder theories of the corporation. It focuses particularly on problems in the stakeholder theory of the corporation and how these could be ameliorated, a topic that has not received adequate attention and leaves stakeholder theory highly, and justly, vulnerable to attack.

Most states' corporation laws define the purpose of a corporation. Typically, the corporate purpose is formally defined as "any lawful purpose," providing corporations with flexibility to pursue various types of business through multiple strategies.[13] Informally, lawyers and businesspeople frequently understand corporate purpose to be the increase of shareholder value.[14]

Relatedly, directors' duties define the obligation of corporate directors to act in good faith on behalf and in the interests of a beneficiary or beneficiaries.[15] Today, many colloquially understand directors to hold a fiduciary duty to the shareholders, although from a legal perspective, the situation is more complex. In popular culture, the idea has taken hold that the purpose of the corporation is to increase shareholder value, and directors, as fiduciaries, owe their duties only and zealously to shareholders.

Interpretations of the corporation's purpose have varied over time, particularly over the past two centuries.[16] Shortly after US independence,

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[13] *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(b) (2016) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.").

[14] As Professor Robert B. Thompson notes, shareholder wealth maximization and its assumed corollary of duties to shareholders have substantial reach as a "mission" statement accepted by many scholars, regulators, and businesspeople. Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 389 (2016). Moreover, many large US corporations state in their principles of corporate governance that management power should be exercised for shareholders. *See id.* Thompson also notes, however, that a 1989 study suggests that directors felt accountable to multiple constituencies, and only a minority strictly believed in shareholder primacy. *Id.* at 390.

[15] Benedict Sheehy & Donald Feaver, *Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted, or Prescribed?*, 37 DALHOUSIE L.J. 345, 350 (2014). In the United States, this is considered a duty of loyalty.

[16] Corporations far predate the founding of the United States, and in many cases were vehicles for groups to support social causes or, in the case of the East Indies Company, were in essence arms of the state. *See* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 109–10 (1888). A number of scholars provide an excellent summary of the early history of

corporations were typically created to serve a public purpose as defined by the government. For example, state governments formed corporations in the early days of the United States to pool capital and enable the building of basic infrastructure for public use.[17] Such corporations on the one hand served their shareholders, but on the other served the public interest as defined by the states that provided their charters.[18] Corporations could not form easily—they required governments to grant them charters, called "special charters," on a restricted, one-off basis.[19]

Later, as their efficiencies became apparent, corporations became a more widely used vehicle. States began to create general corporation statutes, enabling the easy formation of additional corporations.[20] Nevertheless, states that created general corporation statutes "did so on the assumption that they reserved the power to restrict corporations from engaging in conduct inconsistent with the public interest."[21] Through the mid-nineteenth century, most corporations were formed to serve a public function rather than for purely private business objectives.[22] They were understood to be artificial entities created for a particular use to society.[23] Their purpose has, however, long been a point of debate—a debate that became of increasing importance with the growth of large, public corporations.

The question of corporate purpose is inherently interwoven with the issue of directors' fiduciary duties. If the purpose of a corporation is to increase shareholder value, then logically the directors' duties are to the shareholder, or at least to the corporation—a relatively shareholder-centric view. If, however, the corporation also has a public purpose, directors potentially owe their duties to a broader set of constituents. This is the formulation underlying stakeholder theory. How these fiduciary duties are currently envisaged is discussed below.

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corporations. *See, e.g.*, *id.* at 105. This Article, however, focuses on their history starting with US independence, in part because their use and prevalence evolved significantly in the nineteenth century.

17 Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 126 (2012) ("Most business corporations of this period were 'internal improvement' companies empowered to construct and operate turnpikes, toll bridges, and wharves and to charge a fee for their use.").

18 David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207 (1990). The influential jurist William Blackstone of the late colonial era noted that corporations were to serve the public interest. Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 893 (2016).

19 Millon, *supra* note 18, at 208.

20 *Id.* at 206.

21 Strine & Walter, *supra* note 18, at 881.

22 Millon, *supra* note 18, at 207.

23 *Id.*

A. *Shareholder-Centric Theory*

As public corporations mushroomed across the nation in the early twentieth century and the number of shareholders grew, legal scholars worried that shareholder control over corporate management was too attenuated and dispersed.[24] Such limited oversight heightened the risk of managerial self-dealing and poor or negligent use of shareholder assets.[25]

In an influential article published in 1932, legal scholars Adolf Berle and Gardiner Means noted a fundamental structural challenge: stockholders invested their funds in corporations, yet the managers of the corporations were often unaccountable to their increasingly numerous and disparate stockholders.[26] Berle and Means termed this the "separation of ownership from control."[27] Due to the concern that corporate managers would abuse their power, Berle and Means argued that a director's fiduciary duty should be as a trustee for the shareholders.[28] This position gained support in the seminal case *Dodge v. Ford Motor Co.*,[29] which some scholars cite as establishing shareholder primacy to be the dominant legal paradigm, although this is a matter of dispute.[30]

Around the same time, certain legal scholars promoted an understanding of the corporation as a natural entity, instead of an artificial entity created to serve the public. This was part of an effort to deregulate corporations and place them under the ambit of private law—focused on interactions between private parties—instead of public law, which

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24 *See* Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2005 (2013).

25 *Id.* at 2004.

26 *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 277 (1933). For a more detailed history of the debate regarding shareholder primacy, including the Berle–Dodd debate, see generally Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

27 *See* Stout, *supra* note 24, at 2005 (quoting ADOLF A BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (1939)).

28 *See* Millon, *supra* note 18, at 221.

29 204 Mich. 459 (1919).

30 *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998). Some argue that *Dodge v. Ford Motor Co.* was in fact a case about suppression of minority shareholders. *See id.* at 320. Henry Ford was seeking to squeeze out his competition, the Dodges, by cutting dividends to shareholders. *Id.* at 315. The Dodges were minority shareholders in the closely held corporation who had begun to manufacture their own cars. *Id.* at 315–16. Ford planned to dramatically expand his production facilities with the funds that otherwise would be paid to shareholders. *Id.* at 316. The plain language of the case does not indicate a clear shareholder primacy model, as the court notes that the incidental use of corporate funds for charitable purposes, such as building a hospital for employees, is acceptable. *Dodge*, 204 Mich. at 506–07. For additional analysis, see Smith, *supra*, at 317–20.

governs activities that affect society.[31] Under this view, which has at least rhetorically prevailed, the corporation exists so that shareholders can profit through the management of their money by fiduciaries.[32] As creatures of private law, corporations have no inherent responsibility to the public beyond existing for a "lawful purpose," as required in state incorporation statutes.[33] Proponents of this view assume that shareholders would wish for their director-trustees to maximize shareholder value, and therefore that maximizing this value is a fiduciary duty.[34] Moreover, some reason that the very purpose of the corporation is to maximize shareholder profit, although this assertion has no basis in statute.[35] This perspective has become known as the shareholder-centric theory of the corporation. In essence, it assumes that the purpose of the corporation is to increase shareholder value, and that directors' duties are coterminous.[36]

A shareholder-centric theory has the great attraction of seeming simple because it narrows the number of actors of interest and the possible range of duties. For the past century, many corporate law scholars have focused primarily on issues of accountability by managers to shareholders, looking within the four virtual walls of the corporation for efficiencies in this space.[37] Professors Henry Hansmann and Reinier Kraakman, for example, memorably supported the dominance of the shareholder-centric view in their article, *The End of History for Corporate Law*.[38]

Due to the narrow scope of their focus, shareholder theorists need not concern themselves with the social impact of corporations except on shareholders. Proponents of a shareholder-centric view might argue, however, that they are still mindful of a corporation's impact on society. They might note that their theory is the most effective way for corporations to indirectly achieve a positive social purpose, as a successful corporation would support economic growth and wealth through shareholder

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31 Millon, *supra* note 18, at 203.

32 *See id.* at 211.

33 *See id.* at 213.

34 *See* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1392 (2008).

35 *See id.* at 1425.

36 *See* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 286–87 (2013). Notably, some scholars argue for shareholder maximization while also claiming that directors have primacy. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

37 Millon, *supra* note 18, at 225.

38 Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

dividends.[39] According to many shareholder-centric theorists, other areas of law are expected to address the social impacts of corporations and minimize externalities,[40] although this proposition has significant and increasingly evident weaknesses, as further explored below. However, the premise that the primary role of a corporation, and thus of its directors' fiduciary duties, is to maximize shareholder value, is frequently seen to have dominated in theory and in law.[41]

B. *Stakeholder Theory*

Despite the recent dominance of the shareholder-maximization paradigm, a competing perspective has persevered—one insisting that corporations have a broader role in society and duties to stakeholders, not just shareholders. As noted earlier, this viewpoint is not new; to the contrary, it aligns with US corporate history of the late colonial and early independence eras.

In response to Berle and Means' argument that directors are trustees for shareholders, and in the midst of the Great Depression, Professor Merrick Dodd wrote a famous article that is often viewed as the birthplace of stakeholder theory.[42] He defended the view that the corporation is an artificial entity, noting that "business is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profit to its owners."[43] He noted that legislation may in some cases limit the potentially adverse effects of companies on stakeholders, particularly workers and consumers, but argued that more was needed.[44] He suggested that dispersed and numerous shareholders would not effectively pressure managers to consider and act to manage the corporation's social impacts.[45] As a result, he argued that professional

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39 *Id.* at 441 ("The point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests. It follows that even the extreme proponents of the so-called 'concession theory' of the corporation can embrace the primacy of shareholder interests in good conscience.").

40 *See id.* at 442.

41 *See, e.g.*, Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'*, 29 SYDNEY L. REV. 577, 578 (2007).

42 *See* Charles M. Elson & Nicholas J. Goossen, *E. Merrick Dodd and the Rise and Fall of Corporate Stakeholder Theory*, 72 BUS. LAW. 735, 735 (2017).

43 E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1149 (1932).

44 *Id.* at 1153.

45 *Id.*

business managers should proactively manage corporations to fulfil their public-service function, whether or not specific regulations forced them to do so.[46] He favorably cited a General Electric executive who argued that he had duties not only to shareholders, but also to workers, customers, and the general public.[47] In short, Dodd argued that directors should account for and foster the corporation's role in society, considering impacts on employees, consumers, and the public.[48] This is known as the stakeholder theory of the corporation. It assumes that as a result of their public purpose, corporations—and presumably directors—have duties to constituents besides shareholders.

Ever since, US stakeholder theorists have waged a campaign of attrition against proponents of the shareholder-centric view. In some cases, they have made advances as a legal, if not cultural, matter.

Most significantly, in twenty-nine states, companies are allowed, but not required, to consider the interests of stakeholders beyond shareholders under so-called "constituency statutes."[49] These statutes were passed after the takeover frenzy of the 1980s and were intended to allow directors to resist takeovers given their adverse impacts on employees and communities in the United States.[50] The laws are written broadly, allowing directors the discretion to consider impacts on certain constituencies, such as employees or communities, in addition to shareholders. As later discussed in Section I.D, the extent to which they have been enforced is limited, and consideration of these other stakeholders is discretionary.

C. *The Current State of Equilibrium*

The current reality in the United States lies between the extreme versions of these two competing models. On the one hand, most states have passed constituency statutes that allow but do not mandate corporations to consider the interests of stakeholders who do not hold shares. Connecticut's constituency statute is an exception, *requiring* corporations to consider other stakeholders.[51] These statistics would suggest at first glance that the stakeholder model has triumphed in over half the states, although the analysis below indicates that the impact of such laws on corporate decision-making is questionable.

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46 *Id.* at 1153–54.

47 *Id.* at 1155.

48 *Id.* at 1153.

49 *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 108.

50 Keay, *supra* note 41, at 595–96, 596 n.119.

51 *See* Springer, *supra* note 49, at 101.

Delaware has not adopted a constituency statute, and Delaware's courts hew more closely to the shareholder-centric view. Given that Delaware is home to 66 percent of US Fortune 500 companies and more than fifty percent of all publicly traded companies, its influence is undeniable.[52] Interestingly, however, scholars debate how clearly Delaware law establishes that directors' duties are to shareholders alone. First, some note Delaware statutes simply state that directors' fiduciary duties are to the corporation itself, not necessarily to shareholders alone.[53] Some scholars also argue that the seminal cases that purportedly embrace a shareholder-centric view are highly fact-specific.[54] Second, the business judgment rule arguably provides so much discretion to directors that they can, in practice, make decisions that consider the interests of other stakeholders, as long as they provide a rhetorical gloss tethering those actions to shareholders' interests.[55] United States courts, including Delaware's, typically grant considerable deference to directors through the business judgment rule—a judicially crafted doctrine holding that, so long as the board of directors acts in good faith and can demonstrate it gathered adequate facts and deliberated on a decision,[56] courts will not second-guess the Board's decision-making and hold it liable for decisions.[57] As a result, the shareholder-centric ideal that directors make decisions while focusing only on

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52 DEL. DIV. CORPS., 2015 ANNUAL REPORT 1 (2015), https://perma.cc/RRA9-CLAL; Suzanne Barlyn, *How Delaware Became a Hub of Corporate Secrecy*, BUS. INSIDER (Aug. 24, 2016), https://perma.cc/3E6E-K4FA.

53 *See* Johnson, *supra* note 36, at 284.

54 *See, e.g.*, Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* 7 (Univ. of St. Thomas Sch. of Law, Working Paper No. 08-22, 2008), https://perma.cc/N8N4-U36C. The eBay decision, for example, recently upheld the argument that directors' fiduciary duties require them to promote the interests of shareholders alone. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010).

55 *See* Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, U. PA. J. BUS. L. 631, 656–57 (2009).

56 Whether a decision is "an informed one" protected by the business judgment rule "turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'" Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). Notably, when discussing stakeholder versus shareholder views, some commentators focus on the directors' duty of loyalty. *Id.* at 872–73. The business judgment rule is used in Delaware to evaluate whether a director met her duty of care. *Id.* The business judgment rule is, however, relevant to this discussion. Courts have used the business judgment rule to justify the decisions of directors to take steps that are not obviously in the interest of shareholders, such as making corporate donations. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 742–43 (2005). The business judgment rule thus arguably undermines the duty of loyalty and is therefore relevant.

57 Elhauge, *supra* note 56, at 770.

the interests of shareholders is sometimes disconnected from reality, even in Delaware.[58]

Some scholars even argue that, as a practical matter, the business judgment rule provides such substantial discretion that it renders moot arguments over whether directors can consider and prioritize the interests of stakeholders other than shareholders.[59] Nevertheless, corporate directors sometimes may feel the need to justify their actions as being in shareholders' interests, as this is arguably the prevailing norm embodied in Delaware law.[60] This concern may chill corporate actions that would benefit non-shareholders and for which a strong, pro-shareholder business case is not apparent.[61]

In sum, the shareholder and stakeholder theories coexist uneasily in the current US legal regime. In many cases, directors may—but need not—make decisions that primarily benefit parties other than shareholders. And, even where afforded that discretion, directors are reportedly hesitant to exercise it due to worries about shareholder suits and the prevalence of shareholder-centric rhetoric in corporate culture, as is explored further in Part II.[62]

Stakeholder theory has gained new attention due to the rise of a progressive wing in the Democratic Party that has proposed significant changes to corporate law. For instance, as part of her Presidential campaign, Senator Elizabeth Warren introduced a bill calling for directors to balance the pecuniary interests of shareholders against the "best interests of persons that are materially affected" by the corporation.[63] Her proposal seeks to address "the dedication to 'maximizing shareholder value' [which] means that the multi-trillion dollar American corporate system is focused explicitly on making the richest Americans even richer."[64] This proposal garnered significant media attention and reignited a longstanding corporate law debate.[65] Senator Warren's approach helpfully focuses on a critical challenge, but it replicates existing stakeholder theory, including its

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58 *See id.* at 770–71.

59 Elhauge, for example, suggests that the business judgment rule is sufficiently deferential that directors can consider social or environmental impacts, even if doing so appears not to benefit or arguably harms shareholders. *Id.* In his view, the threat of shareholder litigation would still loom to some degree, but in reality, courts are unlikely to be asked to make such determinations. *Id.* at 790.

60 *See id.* at 849.

61 *See id.* at 862.

62 *See* discussion *infra* Section II.C.2.

63 Accountable Capitalism Act, S. 3448, 115th Cong. § 5(c)(1)(A)(ii) (2018).

64 Press Release, Elizabeth Warren, Warren Introduces Accountable Capitalism Act (Aug. 15, 2018), https://perma.cc/7RHG-JPMG.

65 *See, e.g.*, Erin Durkin, *Elizabeth Warren Unveils Bold New Plan to Reshape American Capitalism*, THE GUARDIAN (Aug. 15, 2018), https://perma.cc/P62M-8HJN.

vagueness, and thus underscores the importance of a more precise and prescriptive New Stakeholder Theory.[66] The Business Roundtable's revised 2019 Principles on Corporate Governance also contributes to the discussion by acknowledging the need for businesses to consider impacts on a broader set of stakeholders but provides no roadmap for doing so.[67] Given this public debate, as well as consideration of mandatory human rights due diligence laws in Europe and the United States, it is timely to examine whether and how stakeholder theory can finally be made viable so that any changes reflect past learnings.

D. *Shortcomings in the Established Models*

The two models, shareholder theory and stakeholder-centric theory, continue to vie for primacy. Each has merits but also presents substantial theoretical and practical challenges as currently formulated. Most critically, neither provides adequate guidance that enables directors to facilitate corporate success while managing societal expectations.

This Section briefly discusses challenges found in the shareholder-centric model. The most substantial problem with the shareholder-centric model is that it is simply not fit for multinational corporations operating in a globalized world.

Next, this Section examines the stakeholder model and the potential conundrums it presents in its current, amorphous form. Perhaps because US stakeholder theorists have been in a defensive posture, sympathetic scholars have made little effort to dissect the concept and identify whether it can be made more tangible, actionable, and amenable to oversight. This Section explores this question by identifying potential refinements to stakeholder theory, and concludes by examining three case studies—addressing, respectively, constituency statutes, benefit corporations, and the UK Companies Act 2006. This Section considers the extent to which the theorists unpacked stakeholder theory and the practical consequences of their formulations.

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[66] The legislation calls for directors to balance the pecuniary interests of shareholders against the "best interests of persons that are materially affected" by the corporation. S. 3448, § 5(c)(1)(A)(ii). Like previous stakeholder theories, the proposal does not include procedural expectations, and thus does not provide practical guidance for directors. The law would only apply to very large companies—many of which are already at least taking some steps to mitigate their adverse societal impacts due to reputational pressure—and thus misses a chance to level the playing field by improving the performance of laggards. *See id.* § 4. Finally, the legislation calls for corporations to create a public benefit, which, as explained later in this article, would likely lead to a focus on public-facing philanthropy rather than on adverse impacts. *Id.* § 5(b)(2). This Article unpacks each of these issues and how stakeholder theory can be more effectively defined.

[67] *Statement on the Purpose of a Corporation*, *supra* note 8.

1. Problems with the Shareholder-Centric Model

Even accepting for argument's sake the premise that corporations are purely private entities, the shareholder-centric model is problematic. These shortcomings are notable because they illustrate that the accusations of vagueness and lack of accountability frequently levelled against stakeholder theory apply, at least to some degree, to the shareholder primacy model as well. Because existing scholarship considers at length these critiques of shareholder primacy, the discussion here is brief.

Many arguments in favor of shareholder primacy come from scholars who seek to lay out clear and accountable relationships.[68] They posit that directors are the agents of shareholders.[69] This is presumably based on the assumption that shareholders "own" the corporation.[70] On that view, directors, as agents, should take their orders from the shareholders.[71] Some question, however, whether shareholders even "own" the corporation.[72] If

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[68] *See, e.g.*, Bruner, *supra* note 34, at 1405.

[69] *See id.* Some law and economics professors have developed a related theory, that the corporation is a nexus of contracts through which various parties enter into private contractual relationships. *See, e.g.*, William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 415 (1989); Bruner, *supra* note 34, at 1397. This theory postulates that employees can protect their interests through their employment contracts, and also looks to labor and environmental laws to diminish corporate externalities. Bruner, *supra* note 34, at 1398. The nexus of contracts approach is still shareholder-centric in that shareholders are supposed to be the primary beneficiaries of board decision-making. *Id.* at 1397. For a short summary of the nexus of contracts approach, see *id.* at 1397–1401.

[70] *But see* Stout, *supra* note 24, at 1191.

[71] Scholars also critique shareholder primacy because shareholders are not the only vulnerable parties. *See* Keay, *supra* note 41, at 585–86. Employees invest in the firm in terms of developing job-specific skills, which makes it difficult for them to leave. *Id.* Moreover, some argue that if a company is a separate legal entity, the shareholders own shares, not the company itself, which erodes the agency concept. *See, e.g.*, *id.* at 586.

[72] For arguments on both sides, see Thompson, *supra* note 14, at 392–93. As Stout notes,

> As owners of stock, shareholders' rights are quite limited. For example, stockholders do not have the right to exercise control over the corporation's assets. The corporation's board of director's holds that right. Similarly, shareholders do not have any right to help themselves to the firm's earnings; the only time they can receive any payment directly from the corporation's coffers is when they receive a dividend, which occurs only when the directors decide to declare one. As a legal matter, shareholders accordingly enjoy neither direct control over the firm's assets nor direct access to them. Any influence they may have on the firm is indirect, through their influence on the board of directors. And (as Berle himself famously argued) in a public corporation with widely dispersed share ownership, shareholder influence over the board is often so diluted as to be negligible. Thus, while it perhaps is excusable to loosely describe a closely held firm with a single controlling shareholder as 'owned'

not, the fundamental premise that directors owe their duties to the shareholders appears to be wrong. Indeed, Merrick Dodd questioned this premise, and argued that the duty was owed to the corporation as an entity, which is the ultimate beneficiary.[73] This latter view would provide greater flexibility to directors' decision-making. The fundamental premise that directors are the agents of shareholders, or that the sole purpose of the corporation is to increase shareholder value, is thus contested in a variety of manners.[74]

Proponents of the shareholder primacy approach argue that it is best for society if business is efficient and maximizes profits.[75] They suggest that a business is more efficient—and thus presumably more profitable—if directors need only consider one objective, *e.g.*, maximizing shareholder value—and that additional objectives could overwhelm their decision-making process.[76] This theory has superficial appeal, but reality suggests that, in practice, certain directors already consider objectives beyond maximizing shareholder value, as discussed above.[77] It might be better to guide directors in these additional considerations so that they maximize value for society. Moreover, this efficiency theory survives only if one confines the examination to the four corners of the corporation—a set of conceptual blinders permitting insufficient consideration of externalities, which, as discussed below, are highly inefficient for society as a whole.[78]

Another important question is one of accountability: whether shareholders are truly able to oversee the directors so that they do not shirk their duties or engage in self-dealing.[79] Concerns about shirking and self-dealing are valid and are used to effectively criticize the stakeholder

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> by that shareholder, it is misleading to use the language of ownership to describe the relationship between a public firm and its shareholders.

Stout, *supra* note 24, at 1191 (footnotes omitted).

73 Dodd, *supra* note 43, at 1161. Under this latter view, good management of the corporation itself often, but not necessarily, has the indirect effect of maximizing shareholder value. Sheehy & Feaver, *supra* note 15, at 352.

74 As many scholars have noted, another criticism is that directors are not involved in the day-to-day running of the corporation. *See, e.g.*, Thompson, *supra* note 14, at 396. Management, they note, not the Board, manages the company, although there typically is some overlap between the Board and management. *See id.* at 394–95; *see also* Robert C. Bird & Stephen Kim Park, *Organic Corporate Governance*, 59 B.C. L. REV. 21, 43–45 (2018) (noting multiple ambiguities in shareholder primacy theory explained in part by its failure to acknowledge the roles of internal forces within the firm, such as compliance systems).

75 Notably, no state clearly supports shareholder wealth maximization as the goal of the corporation. Bruner, *supra* note 34, at 1425.

76 Keay, *supra* note 41, at 583–84.

77 *See, e.g.*, Choudhury, *supra* note 55, at 657.

78 *Infra* pp. 16–18.

79 *See* Keay, *supra* note 41, at 583–84.

model.[80] It is, however, quite unclear whether the shareholder-centric model itself adequately addresses such scenarios. In reality, shareholders rarely bring suits against directors, and the costs of overseeing directors are significant.[81] Historically, the United States has seen comparatively more shareholder suits, such as derivative actions seeking to restrict directors' decisions and enforce their duties to shareholders, than have other common law jurisdictions such as the United Kingdom.[82] Nevertheless, even in the United States, shareholders face substantial difficulty in such lawsuits. US courts typically grant considerable deference to directors through the business judgment rule. Consequently, the amount of shareholder oversight is limited. As one scholar notes, the costs of exercising voting rights and removing directors are significant: "For 99 per cent of shareholders, to exercise control over a firm is always a fairy tale."[83] Accountability thus presents a problem for the shareholder-centric model.

The idea that shareholders are responsible stewards of the corporation and its long-term value is increasingly questionable. Importantly, many proponents of shareholder primacy espoused their theories when shareholders were a different mix of entities.[84] Some of the best-known progenitors of the shareholder-centric model call for corporate law—and directors—to strive principally for long-term shareholder value.[85] Shareholder primacy has, however, long faced the critique that it supports short-term thinking and short-term shareholder profits over the long-term health of the corporation.[86] This problem is likely to worsen as hedge funds and other short-term investors increasingly dominate the group of shareholders.[87] Long-term institutional investors are decreasing their investments in equities.[88] Today, US shareholders on average hold shares in a particular company for approximately twenty-two seconds.[89] If shareholder-primacy proponents envisaged shareholders supporting wise long-term decision-making, their understanding of shareholders' identities and objectives is outdated. Moreover, how courts should evaluate whether a

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80 *See id.* at 583.

81 *See* John Armour, *Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment* §§ IV.4, VI.1 (Univ. of Oxford & ECGI, Working Paper No. 106/2008, 2008).

82 *See id.* § I.

83 Charlie Xiao-chuan Weng, *Inside or Outside the Corporate Law Box? Shareholder Primacy and Corporate Social Responsibility in China*, 18 EUR. BUS. ORG. L. REV. 155, 160 (2017).

84 *See* Stout, *supra* note 24, at 2006 & n.13, 2017–19.

85 *See, e.g.*, Hansmann & Kraakman, *supra* note 38, at 439.

86 *See* Keay, *supra* note 41, at 585.

87 *See* Andrew Johnston, *The Shrinking Scope of CSR in UK Corporate Law*, 74 WASH. & LEE L. REV. 1001, 1033 (2017).

88 *Id.*

89 Sheehy & Feaver, *supra* note 15, at 363.

decision is in the interests of shareholders depends substantially on whether the shareholder is a long- or short-term investor. The ideal of a thoughtful shareholder who will hold management accountable to support the long-term economic value of the firm is increasingly unrealistic.

Indeed, this shift in shareholder constituencies is one factor suggesting that consideration of stakeholders other than shareholders is necessary to ensure long-term corporate health and viability. When companies consider the interests of stakeholders other than shareholders, they often better manage long-term risk to the company.[90] In today's quarterly report-focused business culture, long-term risk receives too little attention. A shareholder-centric approach can be myopic and lead to a failure to see broader risk unfolding over a longer horizon. Stakeholder theory, counterintuitively, could help address this problem and lead to better returns for shareholders.

Perhaps the most significant critique of the shareholder-centric view involves one of its underlying assumptions. The proponents of a shareholder-centric model generally concede that "[a]ll thoughtful people" think corporations should be run for the "interests of society as a whole."[91] They believe, however, that this is best done through shareholder primacy.[92] As noted above, they contend that corporations' adverse externalities should be managed not through the mechanism of directors' duties, but instead through other fields of law—such as labor or environmental law—which allegedly provide superior tools.[93]

This position might have been defensible in a pre-globalized economic ecosystem. For example, the United States has in place robust, if not perfect, laws to deter oil spills or excessive use of force by private security providers, as well as the capacity to enforce those laws.[94] Arguably, so long as companies follow the law, their externalities should be minimized and socially acceptable. Yet this reasoning breaks down for a multinational corporation for several reasons.

First, in emerging economies, laws might be inadequately drafted or implemented. They might not, for example, protect fundamental labor rights. In an extreme example, the government of Uzbekistan for many years forced school children to harvest cotton each year—a practice considered a "Worst Form[] of Child Labour" by the International Labour Organization—and also utilized forced labor.[95] A company could buy cotton

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[90] *See* Stout, *supra* note 24, at 2020–21.

[91] *See, e.g.*, Hansmann & Kraakman, *supra* note 38, at 441.

[92] *See, e.g.*, *id.*

[93] *See, e.g.*, *id.* at 442.

[94] *See, e.g.*, 33 U.S.C. § 2702 (2012); 42 U.S.C. § 1983 (2012).

[95] *See* INT'L LABOUR ORG., THIRD PARTY MONITORING OF THE USE OF CHILD LABOUR AND FORCED LABOUR DURING THE UZBEKISTAN 2015 COTTON HARVEST 3–4 (2015).

from a plantation there and benefit from child labor while remaining in compliance with national laws.[96] This would fall far short of commonly agreed-to labor standards and create reputational risk for the company if any journalists or activists noticed, even if the cost of the cotton was lower and facially better for shareholder value.[97] In another example, some governments mandate inadequate processes for mining companies to conduct social-impact assessments or do not require them at all.[98] Indeed, the government itself might even undertake forced resettlement of a population without compensation on behalf of the mining company.[99] Such a scenario might comply with national law, but it would fall well below industry good practice and would likely violate international law.[100] Forced resettlement in some instances leads to significant long-term costs for mining companies that later face substantial community unrest and even sabotage; however, this is not always the case, and quantifying these costs has proven challenging.[101] A strictly shareholder-centric approach would make it difficult for directors to justify considering these risks and taking steps to address them if they could not show a likely impact on stock price. The traditional shareholder-centric view suggests that if the law does not forbid the externality, however severe, directors should not take steps to avoid the harm unless the externality would damage their shareholders,

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96 *See, e.g.*, ROB SWINKELS ET AL., ASSESSING THE SOCIAL IMPACT OF COTTON HARVEST MECHANIZATION IN UZBEKISTAN 19, 27 (2016). The issue of forced labor, including child labor, in Uzbek cotton has received substantial attention. INT'L LABOUR ORG., *supra* note 95, at 3; Annie Kelly, *Uzbekistan Ban on Child Labour Forces More Adults into Cotton Workforce*, THE GUARDIAN (Nov. 13, 2014), https://perma.cc/F8ZX-K29K. Notably, if that company were to import those goods into the United States, it would violate the Tariff Act of 1930, which forbids the import of goods produced with forced child labor into the United States. 19 U.S.C. § 1307 (2012). However, in most jurisdictions, the purchase of components produced somewhere in the supply chain with forced labor is not illegal, just unsavory. *See* MINDEROO FOUND., MEASUREMENT ACTION FREEDOM 40 (2019).

97 Notably, if corporate directors believed it was likely that the company would attract the attention of journalists or campaigners for such actions, the directors might take steps to avoid involvement in such impacts in order to protect shareholder value. Many companies, however, operate under the radar and therefore might not feel compelled to address such issues for the sake of shareholder value.

98 *See* Stacy Corneau, *Assessing Environmental and Social Impacts of Mining for Sustainable Development*, INTERGOVERNMENTAL FORUM (Jan. 16, 2019), https://perma.cc/SD2D-LG7K; *see also* RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR 27 (2014).

99 *See* W. COURTLAND ROBINSON, RISKS AND RIGHTS: THE CAUSES, CONSEQUENCES, AND CHALLENGES OF DEVELOPMENT-INDUCED DISPLACEMENT 11 (2003).

100 *See id.* at 36–37. Forced resettlement often has dire impacts on relocated communities, particularly when compensation is inadequate, and can lead to violations of the rights to food, housing, and even health and life. *See id.* at 11–12.

101 This assumption is based on the fact that very few such studies that quantify such costs exist. For one of the few studies evaluating such costs, see DAVIS & FRANKS, *supra* note 98, at 30.

which is often difficult to prove.[102] It certainly does not encourage them to consider such impacts.

Second, historical proponents of a shareholder-centric view developed their theories before the current wave of globalization, and presumably assumed that corporations operated primarily in their home country.[103] The democratic government charged with managing externalities represented not only the company, but also affected communities and employees.[104] It was not an unreasonable assumption that national law would balance the interests of the different groups. If the law failed to do so, impacted groups could bring lawsuits or launch campaigns to influence a responsive government to change the laws when they were inadequate.[105]

This is simply not today's reality. Corporate impacts often occur in despotic, undemocratic, or corrupt states that are unresponsive to popular demands.[106] The courts in a significant number of nations are corrupt and incompetent,[107] and popular unrest is often quelled with violence. Moreover, affected groups typically cannot bring cases in a corporation's home state courts due to standing issues, forum non conveniens, and sheer physical and financial constraints.[108] Adding to the challenge, home states are hesitant to regulate the extraterritorial actions of their corporations for fear of subjecting them to a competitive disadvantage.[109]

In practice, modern multinational corporate behavior is unrestrained by law in many countries.[110] This creates a significant governance gap with all-too-human consequences. This is not to say that other factors do not shape corporate behavior in such contexts. Indeed, embedded corporate culture and reputational concerns do constrain the behavior of at least some of the largest and best-known companies.[111] But this is not primarily

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102 *See* Johnston, *supra* note 87, at 1007–08.

103 *See* Wayne Wood, *The Cost of Progress: Ensuring the Tax Deductibility of International Corporate Social Responsibility Initiatives*, 4 GLOBAL BUS. L. REV. 1, 6–7 (2013).

104 *See* Strine & Walter, *supra* note 18, at 922.

105 *See id.* at 922 n.307.

106 *See* Christopher Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, HUMAN RIGHTS WATCH, https://perma.cc/CU9A-FFR9.

107 This claim is borne out through a review of the State Department's annual Country Reports on Human Rights Practices. U.S. DEP'T OF STATE, 2018 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2019); *see also* TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007 167–71 (2007).

108 ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME, AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW 24 (2006). For an excellent discussion of the barriers to lawsuits against corporations in their home countries for adverse impacts on stakeholders such as communities, see generally *id.*

109 *But see id.* at 16.

110 *See id.* at 24.

111 *See* DAVIS & FRANKS, *supra* note 98, at 10.

due to law, and a stakeholder approach to corporate law could encourage such wise constraints on corporate behavior for a broader array of companies.[112] The theory that companies should simply obey even very weak laws and are not responsible for any other externalities is often good neither for companies themselves nor society.

2. Problems with Stakeholder Theory

Stakeholder theory, while intuitively appealing, presents its own set of theoretical and practical challenges. It often is formulated at a high level: corporations have a responsibility to society, and directors therefore potentially have duties to stakeholders in addition to shareholders.[113] As its critics note, this formulation is painfully vague and provides little guidance to directors.[114] The concept nevertheless is a promising tool in today's environment. It simply requires greater definition.

Clarifying and legally enshrining directors' duties to consider stakeholders has the potential to help tip corporate leaders towards the adoption of a new norm, a direction in which some are already headed, as discussed below.[115] Success is more probable if the concept is defined with sufficient specificity to constitute a "complete norm."[116] A complete norm identifies that a *certain group* has an *obligation* to do *something* in *certain circumstances*, "subject to a *penalty* for noncompliance."[117] Ideally, it would also identify who can *enforce* the norm.[118] A complete norm helps provide ample guidance, and can also be legally enforceable.

A series of focused questions provide clearer and more concrete guidance to formulate a complete norm. Such questions should include:

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112 This suggestion is not new. In 1932, Dodd argued that directors should be expected to take a proactive approach to consider external impacts. *See* Dodd, *supra* note 43, at 1153. This concern is, however, increasingly pressing as US corporations operate more often in countries with limited rule of law. *See* Albin-Lackey, *supra* note 106. The shareholder-centric proponents have not made a convincing response to this concern. *See, e.g.*, Robert Phillips et al., *What Stakeholder Theory Is Not*, 13 BUS. ETHICS Q. 479, 487 (2003).

113 *See* Dodd, *supra* note 43, at 1156.

114 *See* Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605, 608 (2009).

115 Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1661 (1996).

116 *Id.*

117 *Id.* (emphasis added).

118 *See id.* at 1661 n.53.

* Type of obligation: What sort of responsibility should directors have? To make the world a better place through philanthropic activities? To avoid making it worse for affected stakeholders?

* In what circumstances and what the duty targets: To whom and when should directors owe their duties? To stakeholders that would be significantly impacted by a decision? To anyone who takes an interest in the decision? The term "stakeholder" is a notoriously imprecise concept.[119]

* Types of entities covered: Should these expectations apply to all companies, or only large ones or those with an international presence?

* Procedural or substantive: Should the "something" that directors are expected to do be substantive or procedural? To meet their obligation, are companies expected to deliver substantively, or do they just need to show that they considered potential impacts on stakeholders and tried to manage the impacts? What type of evidence should directors be expected to produce to demonstrate that they met their duties?

* Bounding the universe of concerns: Are there objective benchmarks by which we can set parameters around the societal obligations of companies such that the expectations of companies do not expand endlessly?

* Who can enforce the responsibility? Shareholders, affected stakeholders, or regulators?

* Type of remedy: What should the remedy be? Should companies be required to pay damages, and if so, when? Should the relief be injunctive, such as a requirement to consider impacts on stakeholders in the future or change some aspect of management? Or could the remedy be regulatory, such as a time frame to address gaps in ESG management systems or be subject to a fine or loss of a corporate charter?

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119 *See* Orts & Strudler, *supra* note 114, at 606.

Table 1: A Typology of Stakeholder Theory and Its Potential Iterations

	Vague definitions	**More specific definitions**
Objectives	Improve social or economic conditions	Avoid negative externalities
Type of Obligation	"Consider" stakeholders	Follow procedures indicating meaningful effort to identify and address issues
Targets of duty	Interested stakeholders	Potentially significantly affected stakeholders
Scope of responsibility	Any impacts construed as environmental or social in nature	Impacts specified in international law or other standards
Accountability	Accountability mechanism unclear; only shareholders have standing/ and/or regulatory body not charged with enforcement of stakeholder aspects of law	Regulators can enforce the standard/ injured stakeholders have standing and/and or other enforcement

These questions are answerable, but a survey of US law and foreign jurisdictions suggests that few serious efforts have been made to parse and particularize stakeholder theory. Consequently, the legal formulations currently, but unnecessarily, remain overly broad. For stakeholder theory to progress and realize its potential, greater specification is essential; otherwise, it will continue to fail to guide corporations and never attain its promise. Part III identifies responses to the questions that help focus stakeholder theory in a manner most likely to provide helpful guidance to directors, while reducing corporate externalities.

First, however, three case studies help to exemplify how the quandaries above arise in practice. They demonstrate the risk that if stakeholder theory is sloppily translated into law, is not mandatory, and is not enforceable by parties other than shareholders, it will have little impact and might even enable corporate whitewashing, contrary to good intentions.

a. *Case Study One: Constituency Statutes*

US constituency statutes exemplify several problems with the typically broad formulations of stakeholder theory. As noted above, under these statutes, companies are allowed, but not required, to consider the interests of stakeholders beyond shareholders.[120] The laws do not specify: (1) how directors should prioritize various stakeholder groups; (2) whether they should focus on philanthropy or avoiding externalities; and (3) how they should be held accountable for their decisions.[121] These ambiguities are exacerbated by the fact that consideration of stakeholders is discretionary in all but one state, and the stakeholders lack standing in any event.[122]

Very few litigants have attempted to enforce constituency statutes.[123] As a result, case law has not resolved most of the ambiguities noted above. "Of twenty-nine states with constituency statutes, twenty-one do not appear to have any case law on the matter whatsoever. In the eight remaining states, only eleven relevant cases appear to have been decided from 1985 to the present," and few of these explore constituency statutes in any depth.[124] None of these cases explores or identifies whether directors adequately considered community concerns.[125]

That there are so few suits is not surprising since "the constituencies enumerated in the statutes appear to lack standing."[126] Indeed, four states actually specify that these constituencies *lack* standing.[127] Furthermore, in all but one state with a constituency statute, directorial consideration of constituent interests is discretionary.[128] Springer argues that courts are unlikely to grant standing to constituents claiming rights under a discretionary statute, extrapolating that "[c]onstituency group invocation of constituency statutes in an action to prevent a corporation from taking or refraining from a certain action would therefore be an exercise in futility."[129] It might thus seem pointless to bring such a suit—a view the statistics above support.

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120 Springer, *supra* note 49, at 101.

121 *Id.* at 107.

122 *See* Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV., 1227, 1231 (2004); Springer, *supra* note 49, at 101.

123 *See* Springer, *supra* note 49, at 108.

124 *See id.* at 108–20.

125 *See id.*

126 *Id.* at 108.

127 *Id.* at 100.

128 *Id.* at 101.

129 Springer, *supra* note 49, at 108. Connecticut is the possible exception because directors are obliged to affirmatively consider other stakeholders. *Id.* at 101.

Of course, shareholders in principle could also bring suits for breaches of fiduciary duties. For example, a shareholder could bring a claim that the directors failed to consider the impacts of a particular decision on a constituency. The shareholder may, however, also suffer from standing problems; if a shareholder were not able to demonstrate that she had been injured—since, after all, the failure was with regard to another stakeholder—it is unclear that the shareholder would have standing absent a clear effect on stock price.[130]

Moreover, director consideration of other constituencies is discretionary.[131] Even if the shareholder were able to obtain standing, it is unclear how a court would review a director's decision to consider such constituents. Courts already apply the deferential business judgment rule to review directors' decision-making regarding the interests of shareholders, and they are likely to display even greater deference regarding how to apply discretionary guidance in constituency statutes.[132] Most fundamentally, shareholders simply have not brought such cases, either because they lack the incentive or because the probability of failure is so high.[133]

Enforceability is of course not always essential for a law to influence behavior. Laws can influence behavior by shifting actors' senses of what is expected of them.[134] Arguably, however, these constituency statutes are too vague to have such an effect.[135] The fact that consideration of other stakeholders is discretionary also substantially weakens the normative force of constituency statutes.[136] Additionally, they present directors with

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130 *See* Tyler v. O'Neill, 994 F. Supp. 603, 609 (E.D. Pa. 1998); Springer, *supra* note 49, at 112.

131 *See* Springer, *supra* note 49, at 101.

132 *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 678–79 (2013); Springer, *supra* note 49, at 108.

133 Shareholders do occasionally bring suits against corporations for misrepresentation or fraudulent actions, where the underlying facts involve significant social or environmental impacts. *See, e.g.*, Jonathan Stempel, *BP Oil Spill Lawsuit in U.S. Wins Class-Action Status*, REUTERS (May 21, 2014), https://perma.cc/2DAU-VMC6. Such claims focus primarily on the company's misleading statements to investors, rather than any discretionary duties to consider impacts on stakeholders such as communities or employees. *See id.* Moreover, such cases tend to be brought only after a disaster has occurred, and even then only if it was significant enough to affect a company's stock price. *See id.* This is not particularly helpful to the individuals injured in the incident, who in any case would not recover any damages unless they happened to be shareholders in addition to victims. *See* John W. Welch, *Shareholder Individual and Derivative Actions: Underlying Rationales and the Closely Held Corporation*, 9 J. CORP. L. 147, 150 (1984). In short, shareholder litigation is unlikely to force directors to consider stakeholders as a general and preventive matter, and in any case tends to occur after disaster strikes.

134 *See* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 250 (Eyal Zamir & Doron Teichman eds., 2014).

135 *See* McDonnell, *supra* note 122, at 1231; Springer, *supra* note 49, at 108.

136 *See* Springer, *supra* note 49, at 101.

a broad array of issues and stakeholders to potentially consider, and little direction regarding how they should do so.[137] To the extent they have affected corporate behavior, the impact might be difficult to measure. In one case, a Board might undertake a philanthropic gesture toward community arts; in another, an effort to support schools; and in a third, the development of policies that exceed environmental standards. It is difficult to shift corporate behavior when the standards are so vague, and it might not be possible to identify shifts, given the wide range of behavior covered.

b. *Case Study Two: Benefit Corporations*

A major effort is underway to enable and require self-selecting companies to have a social and environmental mission. In recent years, thirty-three US states, including Delaware, passed legislation that allows companies to register as benefit corporations.[138] Such legislation typically requires a company to commit to producing a general public benefit for society and the environment, have "expanded fiduciary duties of directors which require consideration of non-financial interests," and "report on its social and environmental performance against a third-party standard."[139]

On the one hand, benefit corporations are an exciting development because they provide a vehicle for businesses that wish to fulfill a social purpose. On the other hand, they present at least four significant governance challenges, as discussed in more depth below. Careful drafting could have avoided most of these problems.

First, most benefit corporation laws do not clearly identify the stakeholders upon whom directors should focus.[140] Many simply require the board to "consider" stakeholders besides those related to the intended public benefit,[141] a formulation that unhelpfully replicates the vague standards found in most state constituency statutes. In a slightly better

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137 *See* McDonnell, *supra* note 122, at 1231; Springer, *supra* note 49, at 96.

138 Joanne Bauer & Elizabeth Umlas, *Do Benefit Corporations Respect Human Rights?*, STAN. SOC. INNOVATION REV., Fall 2017, at 27.

139 *Id.* at 29 (quoting William H. Clark, Jr. & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* 15 (white paper 2013)). The benefit corporation movement has become international. Italy recently passed a benefit corporation law, and the United Kingdom allows for "Community Interest Companies," which similarly have a social purpose. *Id.*

140 *See* McDonnell, *supra* note 122, at 1231; Springer, *supra* note 49, at 96.

141 *See* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 623 (2017).

practice, some laws call for directors to consider the impact of corporate actions on those "materially affected by the corporation's conduct."[142]

Second, what exactly directors are to do for these external constituents is ambiguous.[143] As with constituency statutes, it is unclear whether Boards should seek to avoid adversely affecting stakeholders or should seek to improve their lives, and directors as a result potentially enjoy a very broad ambit of discretion.[144] These instructions are too vague to be helpful to directors.

Third, as with constituency statutes, affected stakeholders are unable to enforce these duties, leaving them relatively toothless. Most states explicitly provide that directors do not owe their duties to these external stakeholders;[145] consequently, typically only shareholders can bring cases against the directors for breaches of fiduciary duties.[146] This explicit limitation of duties thus creates the same standing problems—and lack of incentives to bring suit—that emerged in the context of constituency statutes.[147]

Fourth, benefit corporation laws focus primarily, and unsurprisingly, on creating a "material positive impact on society and the environment"[148] which may emphasize philanthropy[149] and deemphasize the consideration

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142 *See id.* at 622 (quoting TENN. CODE ANN. § 48-28-104(d) (2015)). Such affected parties would include shareholders, who have an obvious financial interest in the benefit corporation's success.

143 Some benefit corporation statutes call for directors to "consider" constituents' interests alongside those of shareholders, while others more specifically expect directors to "balance" them. *See id.* at 623–24. Yet this provides little direction as to what directors should do for those stakeholders. *See id.* at 624–25. Colorado and Delaware's laws focus on stakeholders materially affected by the corporation's actions. *See id.* at 624.

144 *See* McDonnell, *supra* note 122, at 1231.

145 Heminway, *supra* note 141, at 624–25.

146 *See id.* at 632 & n.84, 633.

147 *See* Springer, *supra* note 49, at 108.

148 B LAB, MODEL BENEFIT CORP. LEGISLATION § 102 (2017), https://perma.cc/LA8P-E8G8. For further discussion of the meaning of general purpose, see Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 144–45 (2016). Benefit corporations are required to identify these intended benefits in their corporate charters. Heminway, *supra* note 141, at 618–19.

149 The state statutes enumerate examples of such benefits. In certain states, benefit corporations can or must define the particular benefits they intend to achieve in their corporate charters—called a "specific benefit." *See* Heminway, *supra* note 141, at 619–20. In some states, they can simply rely on general benefit language which, per the above, requires a "material positive impact on society and the environment, taken as a whole." *Id.* at 619. State laws list possible specific benefits such as serving low-income communities, bettering human health, stimulating development of knowledge, or protecting or restoring the environment. *Id.*

of stakeholders, much less negative impacts on them.[150] The only cause of action under the benefit corporation laws of many states enables certain shareholders to enforce the corporation's intended public benefit.[151] There is no mechanism to enforce requirements that directors consider all stakeholders.[152] Because only the "material benefit" requirement is enforceable, it is likely to drive directors' thinking.

The likely emphasis on philanthropy or positive impacts highlights the importance of a question emphasized in Section I.D: should a corporation's public purpose be to improve society through philanthropy or avoid harming it? The distinction is not academic—it affects where the corporation spends resources, what expertise it requires, and how directors allocate their time and decision-making resources. Moreover, there is a risk that corporations will spend resources on philanthropic projects to distract from significant adverse impacts arising from their core business. Unfortunately, the benefits of the high-visibility philanthropic project are likely to be significantly less than the societal costs of illegally low wages or environmental damage.[153] In their current formulation, benefit corporation statutes do not prevent this cynical behavior and may even encourage it by rewarding philanthropy with a legally-approved marketing label.[154]

In sum, benefit corporations are an exciting development, but one plagued by mostly avoidable governance challenges. Most importantly, the directors' duties to stakeholders—like constituency statutes—fail to specify whether directors should seek to benefit such stakeholders or to avoid harming them, and thus do not establish a clear and actionable standard of conduct. Moreover, the stakeholders cannot enforce such duties. This in turn creates a risk that companies that claim to benefit society may engage in poor practices that adversely affect stakeholders, yet they can claim the reputational advantages of the benefit corporation label due to their philanthropic activities.[155]

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150 For a more detailed discussion of the complications and seemingly divergent agendas of directors' stakeholder duties versus the benefit corporation's mandated public purpose, see Johnson, *supra* note 36, at 289.

151 Heminway, *supra* note 141, at 631. In most instances, plaintiffs must hold a significant percentage of the corporation's shares, such as 2–5%, to be qualified to bring such a suit. *Id.*

152 *See* Springer, *supra* note 49, at 101.

153 *See* Bauer & Umlas, *supra* note 138, at 28–30.

154 *See id.*

155 Some argue that the public benefit requirement combined with ambiguous duties to stakeholders heightens the risk of corporate whitewashing, which could in the long run undermine the reputations of benefit corporations. *See id.* at 33. For example, a benefit corporation could espouse an environmental goal, such as developing wind farms that provide electricity to communities in an emerging economy. The company might fail to make efforts to mitigate the impacts of the wind farms

Apart from these governance challenges, the movement's impact may be ultimately limited to a narrow band of the total corporations registered in the United States. Approximately two thousand companies have registered as benefit corporations,[156] a notable number, but one that does not suggest that significant portions of corporate America will re-register as benefit corporations in the near future.

c. *Case Study Three: UK Companies Act of 2006*

The United Kingdom provides an example of a recent shift, albeit subtle and debated, towards a stakeholder model.[157] This shift, however, once more reflects the ambiguity and lack of enforceability plaguing constituency statutes and benefit corporations.

Like the United States, the United Kingdom is a liberal market economy, and the two countries share a common law heritage. Both historically followed fairly similar approaches to corporate governance and fiduciary duties.[158] With the passage of the UK Companies Act in 2006, some argue that the two systems diverged in important ways.[159] The UK Companies Act calls for directors to consider not only the success of the company for the benefits of its members, but also its impacts on particular stakeholders.[160] Specifically, it states that directors should "promote the success of the company for the benefit of its members as a whole [e.g. its shareholders], and in doing so have regard (amongst other matters) to— . . . (b) the interests of the company's employees . . . [and] (d) the impact of the company's operations on the community and the environment."[161]

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on migratory birds, a food source on which local indigenous communities depend for subsistence living. The company might thus injure local communities even as it fulfills its self-professed public benefit. This example raises significant concerns that a benefit corporation could use a philanthropic program to deflect attention from adverse environmental or human rights impacts. Bauer and Umlas conjecture that a benefit corporation could be listed under state law and still have in place exceedingly poor labor practices. Such a corporation might even be able to obtain certification from B-corporation, a not-for-profit that certifies benefit corporations in an effort to avoid such whitewashing. *See id.* at 29.

156 *Id.* at 27. Heminway notes that some of these benefit corporations may have registered accidentally. Heminway, *supra* note 141, at 614.

157 Keay, *supra* note 41, at 579.

158 For a detailed account of the prevalence of shareholder and stakeholder models over time in the United Kingdom, see generally Johnston, *supra* note 87.

159 *Id.* at 1035.

160 Companies Act 2006, c. 2, § 172(1) (UK).

161 Section 172(1) as a whole reads:

> Duty to promote the success of the company (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of

Interpretations of the law suggest that the directors continue to owe their fiduciary duties to shareholders rather than other interest groups, but that the law urges them to consider a broader range of issues, including stakeholders, when considering the well-being of the company.[162] This approach has been deemed the "enlightened shareholder value approach" and has been heralded by some as an integration of stakeholder thinking into the UK's overall shareholder-centric approach.[163] At a minimum, it explicitly empowers directors to consider impacts on stakeholders other than shareholders, such as communities and employees, if directors wish to do so.[164] The law does not provide guidance as to which sorts of impacts directors should consider, nor how to prioritize them, such as by significance.[165]

The law creates a cause of action only for shareholders,[166] a fact that generates skepticism about its likely impact.[167] Such concern deepens when considered in light of the fact that the UK Companies Act of 1980 already required directors to consider in the performance of their functions "the interests of the company's employees in general, as well as the interests of its members."[168] Despite that language, no director ever faced liability under the previous law for failing to consider an employee's interests.[169] In a manner reminiscent of constituency statutes, the lack of

> the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.

Id.

162 Keay, *supra* note 41, at 592.

163 This is debated. First, whether UK corporate law has become more or less shareholder-centric may depend in part on the time frame one considers. At least one commentator argues that prior to 1948, directors had substantial discretion regarding how they addressed their impacts on non-shareholders. Johnston, *supra* note 87, at 1002. Second, although on the one hand, the UK Companies Act 2006 specifically enumerated the expectation that directors consider impacts on communities—seemingly a shift in the direction of stakeholder theory—the Act also for the first time statutorily defined directors' duties, and defined them as to be owed to the shareholder. *See id.* at 1031–32.

164 Keay, *supra* note 41, at 599.

165 *Id.*

166 *Id.* at 607.

167 *See id.* at 609.

168 Companies Act 1985, c. 6, § 309 (1) (UK) (repealed 2007).

169 Johnston, *supra* note 87, at 1024.

enforcement arose at least in part because directors' duties were owed to the corporation, not employees, so employees presumably lacked standing.[170]

In sum, the UK Companies Act 2006 is arguably somewhat stronger than most US constituency statutes because it requires, rather than merely allows, directors to consider impacts on other, enumerated stakeholders. That expectation in UK law, however, is highly caveated because it must be consistent with the interests of the members of the corporation, which will create occasional conflicts. Moreover, these directors' duties suffer from the same vagueness as US constituency statutes.

d. *Summarizing the Case Studies: Common Problems and One Improvement*

As Table Two below demonstrates, the stakeholder aspects of constituency statutes, benefit corporations, and the UK Companies Act are drafted similarly in almost all instances. They consistently fail to identify whether, when directors consider stakeholders, they should seek to improve or simply avoid adversely impacting their state.[171] None of them specify if directors should be judged by whether they considered the interests of stakeholders or in fact succeeded in causing or preventing particular impacts on them.[172] Certain benefit corporation statutes usefully specify that directors should consider "materially affected" stakeholders, which helps directors focus their energies and is the one useful innovation emerging from the case studies.[173] Constituency statutes and the UK Companies Act remain vague on this point. None of the laws specify what types of social or environmental impacts directors should consider by benchmarking them against international laws or other standards.[174] Finally, none of the three enable injured stakeholders to bring enforcement actions when directors fail to consider their interests.[175] Although in principle, shareholders could bring suits under constituency statutes or the UK Companies Act, they also are likely to lack standing to do so unless they can show injury to themselves.[176] The three laws are thus mostly legally unenforceable, nor are they specific enough to help shift norms.[177]

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170 *Id.*

171 *See* discussion *supra* pp. 13–25.

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *See* discussion *supra* pp. 13–25.

Table Two: Comparing Laws to Iterations of Stakeholder Theory

	Vague definitions	**More specific definitions**
Objectives	Improve social or economic conditions	Avoid externalities
	Constituency statutes	
	Benefit corporations	
	UK Companies Act	
Type of obligation	"Consider" stakeholders	Follow procedures indicating effort to identify and address issues
	Constituency statutes	
	Benefit corporations	
	UK Companies Act	
Targets of duty	Interested stakeholders	Potentially significantly affected stakeholders
	Constituency statutes	
		Certain benefit corporation statutes
	UK Companies Act	
Scope of responsibility	Any impacts construed as environmental or social in nature	Impacts specified in international law
	Constituency statutes	
	Benefit corporations	
	UK Companies Act	
Accountability	Accountability mechanism unclear; only shareholders have standing/ and/or regulatory body not charged with enforcing stakeholder aspects of law	Regulators can enforce the standard/injured stakeholders have standing and/or other enforcement
	Constituency statutes	
	Benefit corporations	
	UK Companies Act	

II. An Evolving Reality: Towards a Tipping Point?

This Part first examines corporate law trends in other jurisdictions, noting that some increasingly embrace stakeholder models of the corporation. Certain of these laws are quite specific and could help inform a revised US model.

This Part then considers a development in international soft law that seeks to fill governance gaps by calling for corporations to consider their adverse social impacts on third parties. This development has influenced both national law and international guidelines, and again points to increasing societal pressure for companies to take such steps. Indeed, the EU is now considering a law mandating that companies implement this international soft law.[178] Lastly, this Part examines corporate practices, noting that corporate leaders themselves increasingly believe they should consider sustainability and impacts on third parties and are taking steps to do so. However, only certain types of corporate actors are taking such actions, suggesting that legal intervention may be necessary to level the playing field and force laggards to change their practices. These trends, taken as a whole, suggest that a reformulation of US directors' duties in accordance with New Stakeholder Theory would be timely.

A. *National Laws*

In other national jurisdictions, the stakeholder approach appears to be gaining strength, including in countries with a similar legal heritage to the United States. This includes the United Kingdom, as outlined in the case study above, and other common law countries.[179] In some countries, particularly Germany and the Nordic nations, the shareholder primacy theory has never dominated.[180] Rather, Germany requires boards to

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178 *Call for Input: EU Commission Study on Regulatory Options for Mandatory Human Rights Due Diligence*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://perma.cc/QE23-73AB.

179 The laws of two other common law nations, Canada and Australia, are permissive. Sheehy & Feaver, *supra* note 15, at 368 n.111. In Canada, directors owe fiduciary duties to the corporation itself by maximizing the value of the corporation. *Id.* at 365–66. In so doing, they can consider the interests of multiple stakeholders, including employees, communities, suppliers, creditors, and others. Peoples Dep't Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, paras. 36, 42 (Can.). Australia, also a common law jurisdiction, allows and even expects directors to consider the interests of non-shareholders in some instances. *See* Sheehy & Feaver, *supra* note 15, at 354–55.

180 Germany and Northern European countries, which have coordinated market economies, have historically employed a more holistic understanding of the appropriate role and goals of the corporation, and do not adhere to the shareholder primacy model. Peter A. Hall & Daniel W. Gingerich, *Varieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis*, 39 BRIT. J. POL. SCI. 449, 453 (2009). Coordinated market economies refer to countries in which

include employee representatives to ensure that their interests affect decision-making, inherently deviating from the shareholder primacy model.[181] This is sometimes called a co-determination model.[182]

This Part touches briefly on corporate law developments in two BRIC countries to exemplify the fact that these countries have moved toward a stakeholder model, while corporate law in the United States has remained relatively static.[183] Moreover, recent legal developments in France and Switzerland set out expectations for corporations to create procedures to manage their adverse social and environmental impacts, in keeping with New Stakeholder Theory.

China and India each, in their own ways, recently defined corporations to have duties to society as well as to shareholders. Under China's 2006 Company Law, "[i]n the course of doing business," a company must not only comply with laws, but also "conform to social morality and business ethics, act in good faith, subject itself to the government and the public supervision, and undertake social responsibility."[184] This suggests that business should consider a broader range of issues than merely delivering value to shareholders, in contrast to the shareholder-centric model.[185]

India's corporate law creates a hybrid approach, with duties to both shareholders and stakeholders.[186] The 2013 Companies Act states that directors must "act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the

"firms typically engage in more strategic interaction with trade unions, suppliers of finance and other actors." *Id.* at 452.

181 *See* Rebecca Page, *Co-Determination in Germany-A Beginners' Guide* 10 (Hans-Böckler Found., Working Paper No. 33, 2011), https://perma.cc/L6SX-DMSE.

182 For more regarding co-determination, see Horst Eidenmüller et al., *Corporate Co-Determination German-Style as a Model for the UK?*, U. OXFORD FAC. L.: OXFORD BUS. L. BLOG (July 18, 2016), https://perma.cc/Z3GG-GPD4.

183 The BRIC countries include Brazil, Russia, India, and China, and together make up around 40 percent of the earth's population. *BRIC Countries: Definition*, BUS. DICTIONARY, https://perma.cc/Z3VN-BE87.

184 Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 175, 202 (2013).

185 Some commentators argue, however, that Chinese law calls for a shareholder-centric model overall. *See, e.g.*, Weng, *supra* note 83, at 164. According to statute, "[t]he board of directors shall be accountable to the shareholders assembly." *Id.* A recent survey indicates that most Chinese attorneys, including in-house counsel, state that directors should consider the interests of all constituencies, including the company, shareholders, and employees. *Id.* at 170. Chinese judges recognize that, in principle, directors owe their duties to shareholders; yet, they also believe that, to fulfil their fiduciary duties, executives should consider all constituencies' interests. *Id.* at 169.

186 Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465, 483 (2017).

protection of the environment."[187] This arguably created two good-faith duties for directors: to promote the objects of the company for the benefit of its members and, separately, to act in good faith in the best interests of stakeholders.[188] Some have critiqued the law because it does not further define "stakeholders," and does not provide greater guidance on how to balance these different interests.[189] The Indian example is another clear indicator of a global shift away from a purely shareholder-centric model, and the philanthropic expectations for companies are specific and enforceable.

These two examples do not necessarily help to formulate a tighter and more workable definition of a stakeholder approach in the United States. In both instances, the purpose of the corporation and the director's precise burden in considering other stakeholders remain vague. The examples simply indicate that multiple formulations of a stakeholder model already exist, and that the model is gaining influence internationally in influential jurisdictions.

Recent developments in other foreign jurisdictions provide more specific guidance to corporate management with regard to how they should consider social and environmental impacts. For example, France recently passed a law requiring certain large companies to create and implement an effective "vigilance" plan through which they can identify and prevent their potential, significant, and adverse impacts on human rights, health and safety, and the environment.[190] They also are expected to exercise such vigilance over the activities of their subsidiaries, subcontractors, and suppliers with which they have an established business relationship as defined in French jurisprudence, regardless of whether those entities are located in France.[191] The law identifies required elements of companies'

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[187] *Id.* at 484. The 2013 Companies Act also requires independent directors to "safeguard the interests of all stakeholders, . . . [and] balance the conflicting interest of the stakeholders." *Id.*

[188] *Id.* at 484 n.98.

[189] *See, e.g.*, *id.* at 484. India's 2013 Companies Act also, somewhat uniquely, requires companies to implement a Corporate Social Responsibility ("CSR") policy, which requires that they spend a certain percent of their annual budget on philanthropy or explain why they have not. Afsharipour & Rana, *supra* note 184, at 218. Companies over a certain size must create a CSR Committee at the Board level and spend at least two percent of their budget on philanthropic CSR activities, or explain in their annual report why they did not do so. *Id.* at 218–22 (describing draft and final versions of the rules adopted to implement the act, including a list of CSR activities companies may undertake). If they fail to do so, the company may be subject to fines, and the directors may even face jail time. *Id.* at 218–19.

[190] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Contractors], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017, art. 1. The requirement of the vigilance plan was inserted into the French commercial code. *Id.*

[191] *Id.*

vigilance plans, including: risk mapping that includes risk identification, analysis, and prioritization; actions to mitigate such risks or prevent severe impacts; procedures to regularly evaluate the practices of subsidiaries, subcontractors, and suppliers; and a mechanism to ensure implementation and review of the efficacy of such implementation.[192] Such a plan must be public, and any person with a legitimate interest in the plan can ask a judge to compel its production if a covered company fails to produce it.[193] Injured parties can also bring tort-like actions[194] for damages if a covered company's failure to create or implement an effective vigilance plan is causally related to the injury.[195]

The French law usefully instructs companies—presumably including their directors—to consider their potential significant impacts, and specifies the types of impacts of interest: human rights, health and safety, and environmental.[196] The law broadly specifies the types of processes companies should put into place and provides them with flexibility within that broad framework.[197] Indeed, the lawmakers who supported the proposal emphasized their wish to encourage corporate creativity in devising and implementing the plan, so long as the plan is effective.[198] Injured parties are able to bring actions, but only if the company fails to meet the law's procedural requirements.[199] This, in essence, provides a safe harbor for companies that make reasonable efforts to prevent such harms. On the whole, the French law, although not framed in the context of directors'

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192 *Id.*

193 *Id.* The law initially included a potential tort action for victims when corporations fail to exercise such vigilance, with fines up to 30 million euros, but the Constitutional Council stripped this provision because the law was considered too vague to include a punitive damages option. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-750DC, Mar. 23, 2017 (Fr.), https://perma.cc/JH6D-GH8C. Punitive damages are rare in France and legally understood to be a criminal punishment. *See id.*

194 Béatrice Parance & Elise Groulx, *Regards croisés sur le devoir de vigilance et le* duty of care, 145 JOURNAL DU DROIT INTERNATIONAL (CLUNET) 21, 29 (2018). The cause of action is called "une action quasi-délictuelle pour dommages." *Id.* at 26. It is similar to a "délit," or a misdemeanor, in French law, but does not quite amount to a "délit" in terms of gravity and has a less demanding threshold for evidence. *See id.* at 34.

195 Loi 2017-399 du 27 mars 2017, art. 2.

196 The French vigilance law does not create duties for boards directly, but it in essence requires these companies to adopt a duty of due diligence, to be implemented through their vigilance plans. *See id.* at art. 1. The boards presumably have a role in ensuring that the companies carry out their duty.

197 *See id.*

198 *See* Parance & Groulx, *supra* note 194, at 32.

199 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Contractors], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017, art. 1.

duties, provides substantially more guidance to corporate leadership than the case studies above regarding how they are expected to identify and manage their potential adverse impacts on third parties.

Switzerland will soon hold a national initiative—similar to a referendum—on a draft law with extraterritorial effect that would require corporations to conduct human rights due diligence.[200] The draft law identifies basic human rights due diligence steps that companies are expected to take, while providing them with significant flexibility regarding the details.[201] The due diligence language draws heavily upon the U.N. Guiding Principles on Business and Human Rights,[202] discussed below. The Swiss draft law would create liability in Swiss courts for violations of internationally recognized human rights or international environmental law,[203] but the measure would also provide a safe harbor for corporations that caused harm but had carried out adequate due diligence to try to prevent it.[204] Similar legislation is under consideration in Germany and at the EU level.[205]

The French law and pending Swiss legislation create duties for corporations to consider their adverse societal impacts in their decision-making and provide a broad framework to guide them, while leaving the details of precisely how they do so up to the corporations.[206] The French and Swiss laws are process-focused, concentrating on significant adverse impacts and requiring companies to put into place procedures to prevent them, rather than mandating particular substantive outcomes.[207] The Swiss draft

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200 *Over 140'000 Signatures for the Swiss Responsible Business Initiative*, SWISS COAL. FOR CORP. JUSTICE (Apr. 14, 2016), https://perma.cc/LEQ7-9YL8. In Switzerland, if a group files its intent to create a popular initiative and obtains more than one hundred thousand signatures in favor of such an initiative within 18 months, the group can bypass Parliament and the populace can vote on the law. The Federal Authorities of the Swiss Confederation, *What Is a Federal Popular Initiative?*, DEMOCRACY: THE SWISS POLITICAL SYSTEM, https://perma.cc/EB3X-YCUG. Such popular initiatives change the Swiss Constitution, and a number have passed in recent years. *Id.*; *Details About the Initiative*, SWISS COAL. FOR CORP. JUSTICE, https://perma.cc/M7DE-XBZR.

201 *See* SWISS COAL. FOR CORP. JUSTICE, *supra* note 200.

202 *Id.*

203 Maurice Page, *Suisse: Dépôt de l'initiative populaire pour des multinationales responsables*, PORTAIL CATHOLIQUE SUISSE (Oct. 10, 2016, 11:00 AM), https://perma.cc/XEY7-YZF9.

204 SWISS COAL. FOR CORP. JUSTICE, THE INITIATIVE TEXT WITH EXPLANATIONS (2018), https://perma.cc/GHH5-AK5J.

205 Jan-Ove Becker et al., *Germany Seeks to Mandate Human Rights Due Diligence for Companies and Their Global Partners*, JD SUPRA (Apr. 26, 2019), https://perma.cc/SM55-CMKB; Page, *supra* note 203.

206 *See* Michael Congiu et al., *Dutch and French Legislatures Introduce New Human Rights Due Diligence Reporting Requirements*, LITTLER (Mar. 13, 2017), https://perma.cc/746Q-TEZP; SWISS COAL. FOR CORP. JUSTICE, *supra* note 204.

207 *See* Congiu et al., *supra* note 206; *Details About the Initiative*, *supra* note 200.

even draws on international law to define the types of impacts that are of concern.[208] They both enable affected injured stakeholders to bring suit if a company fails to make reasonable efforts to prevent adverse impacts.[209] Both the French law and Swiss draft are notable because they answer the questions about stakeholder theory outlined in this Article more specifically than do any of the common law jurisdiction case studies discussed above, and they create accountability. These examples suggest potential paths for more stakeholder-focused directors' duties in the United States that are sufficiently specific to generate norms that shift behavior.[210]

B. *International Legal Developments*

Major developments in international law provide guidance to a more specific formulation of stakeholder theory. The U.N. Guiding Principles on Business and Human Rights ("U.N. Guiding Principles") emerged from the six-year mandate of the U.N. Special Representative on Business and Human Rights, Professor John Ruggie.[211] He held dozens of stakeholder meetings that helped identify and crystallize existing understandings of the appropriate role of the corporation with regard to human rights.[212] In

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208 SWISS COAL. FOR CORP. JUSTICE, *supra* note 204.

209 Nicolas Bueno, *The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability*, *in* ACCOUNTABILITY AND INTERNATIONAL BUSINESS OPERATIONS: PROVIDING JUSTICE FOR CORPORATE VIOLATIONS OF HUMAN RIGHTS AND ENVIRONMENTAL STANDARDS (L.F.H. Enneking et al., eds., forthcoming Dec. 2019) (manuscript at 20), https://perma.cc/F3P7-W8NT.

210 Another trend suggests rising global pressure on companies to consider their social impacts. *See* U.N. ENV'T PROGRAMME FIN. INITIATIVE (UNEP FI) & FOLEY HOAG LLP, BANKS AND HUMAN RIGHTS: A LEGAL ANALYSIS 5, 21, 40 (2015) [hereinafter UNEP FI], https://perma.cc/HGL2-9UJ7. Increasing numbers of countries have passed laws requiring companies to disclose their approach to addressing their social impacts. *See id.* at 34, 39. As of 2010, 142 countries' standards included a sustainability-related reporting requirement, the majority of which were mandatory. GLOB. REPORTING INITIATIVE, PUBLIC SECTOR SUSTAINABILITY REPORTING: REMOVE THE CLUTTER, REDUCE THE BURDEN 8 (2012), https://perma.cc/S4SF-PAWK. The countries imposing such requirements are from a broad range of geographies, including Brazil, France, China, and members of the European Union. For an overview of several of these reporting regimes, see UNEP FI, *supra* note 210, at 37, 39. This does not rise to the level of requiring directors to consider the effects of their decisions on stakeholders, nor does it formally alter the purpose of corporations, but it does evince an effort to encourage companies to consider their societal impacts.

211 *See* Press Release, U.N. Office of the High Commissioner for Human Rights, New Guiding Principles on Business and Human Rights Endorsed by the U.N. Human Rights Council (June 16, 2011), https://perma.cc/W3JH-D6P5; *UN Guiding Principles on Business and Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., https://perma.cc/P76E-27RA.

212 *See* U.N. GAOR, 63rd Sess., 27th mtg. at 7, U.N. Doc. A/C.3/63/SR.27 (Oct. 27, 2008) https://perma.cc/KR6G-B54E (Statement of the U.N. Special Representative on Business and Human Rights, John Ruggie); Press Release, *supra* note 211; *UN Guiding Principles on Business and Human Rights*, *supra* note 211.

essence, he found that many large, multinational corporations already professed a commitment to respecting human rights.[213] At the end of his mandate, he submitted the U.N. Guiding Principles to the U.N. Human Rights Council, and they became the first—and as of yet, only—U.N.-approved guidelines for business and human rights, that is, specified societal impacts.[214]

In Professor Ruggie's view, an articulation of the responsibility of corporations vis-à-vis human rights was necessary to address global governance gaps.[215] The U.N. Guiding Principles call for corporations to respect human rights—meaning not to infringe on human rights, or, colloquially, to "do no harm."[216] To accomplish this goal, corporations are to conduct "human rights due diligence," (i.e., the integration of relevant human rights considerations into management systems, including policies, procedures, monitoring, and grievance mechanisms).[217] The emphasis of the U.N. Guiding Principles differs from US constituency statutes and benefit corporations in at least four vital ways.

First, the U.N. Guiding Principles were prescriptive in that they did not say corporations "may" consider human rights; they said that they "should."[218]

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213 For example, the U.N. Special Representative on Business and Human Rights conducted a survey of all Fortune 500 companies to determine if they addressed human rights in their policies. One hundred and two of the companies responded to the survey. JOHN G. RUGGIE, HUMAN RIGHTS POLICIES AND MANAGEMENT PRACTICES OF FORTUNE GLOBAL 500 FIRMS: RESULTS OF A SURVEY 3 (Sept. 1, 2006), https://perma.cc/R7WG-GMXB. Of these, seventy-five percent stated that they refer to specific international human rights instruments or standards in their policies. *Id.* at 5. Ninety-one percent claimed that they had policies or procedures in place that addressed human rights. *Id.* at 10.

214 *See* Press Release, *supra* note 211. The U.N. Human Rights Council unanimously endorsed the U.N. Guiding Principles in June 2011. *Business and Human Rights*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, https://perma.cc/X525-NQ4F.

215 U.N. GAOR, *supra* note 212, at 6–7.

216 John Ruggie (UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises) *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 24, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), https://perma.cc/4MKV-WY7A.

217 U.N. Office of the High Comm'r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 15–16, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *U.N. Guiding Principles*], https://perma.cc/ZNN7-ANHX.

218 *Id.* at 13. Notably, however, the U.N. Guiding Principles are soft law and not binding unless translated into domestic law. *See* U.N. Office of the High Comm'r for Human Rights, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, at 8, U.N. Doc. HR/PUB/14/3, U.N. Sales No. E.14.XIV.6 (2014) [hereinafter *Frequently Asked Questions*], https://perma.cc/3RWD-NLJR. They rely on social pressure and the development of a global norm for their momentum, as well as their eventual translation into domestic law. *See id.*

Second, they explicitly focused on avoiding *adverse* impacts on human rights rather than encouraging corporate philanthropy.[219] In other words, rather than argue that corporations had proactive duties to increase peoples' enjoyment of human rights, such as the right to education or freedom of speech, the U.N. Guiding Principles focused on preventing harm as a vital first step.[220] In so doing, they focused on a recognized corpus of expectations, embodied in the rights listed in the International Bill of Human Rights.[221]

Third, the U.N. Guiding Principles laid out basic procedural parameters that businesses should follow to discharge their responsibility to respect human rights.[222]

Fourth, the U.N. Guiding Principles called for companies to provide remedy for harms if they caused or contributed to the adverse human rights impact.[223] If companies have a lesser degree of involvement—for example, they are "directly linked" in U.N. Guiding Principles parlance—they should seek to mitigate the impacts using their leverage with the entity directly responsible but are not expected to provide remedy.[224]

This formulation had several strengths. The multinational companies that attended the meetings Professor Ruggie convened already agreed that they had a responsibility not to harm human rights, and many had publicly available policies or statements to this effect.[225] Additionally, this emphasis on avoiding adverse impacts reduced the risk that an emphasis on the enjoyment of human rights might have raised—that companies would engage primarily in philanthropy and use this to "offset" their negative human rights impacts.[226] A responsibility to have positive impacts also risks conflating the role of companies with that of the government, which

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219 *See U.N. Guiding Principles*, *supra* note 217, at 13–14, 19.

220 *See id.* at 26.

221 *Id.* at 13. The International Bill of Human Rights includes the most fundamental and commonly accepted human rights instruments, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the ILO Core Conventions. *Id.* at 14; *see also Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (1996), https://perma.cc/PKL8-76UN.

222 *See U.N. Guiding Principles*, *supra* note 217, at 16–17, 33–34.

223 *See id.* at 15–16, 24.

224 *Id.* at 14, 24–25.

225 JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 92 (W.W. Norton & Co. 2013) ("[V]irtually every company and industry CSR initiative acknowledges the corporate responsibility to respect human rights.").

226 *See* Ruggie, *Protect, Respect and Remedy*, *supra* note 216, ¶ 55.

might undermine democratic pressure on the government to provide public goods.[227]

From a practical perspective, the "responsibility to respect" provided a framework for corporations and those reviewing their actions that on the one hand provided specificity but on the other hand allowed corporations flexibility in their approaches.[228] The U.N. Guiding Principles created a basic procedural framework that built on existing management systems to help companies manage human rights risks.[229] The U.N. Guiding Principles note that companies should focus first on their most severe impacts.[230]

The U.N. Guiding Principles helped establish form and rigor for the existing understandings of large, well-known corporations regarding their human rights responsibilities. Governments—including the US government—and many NGOs agreed with the formulation, and the U.N. Guiding Principles received unanimous support in the U.N. Human Rights Council.[231] The U.N. Guiding Principles also have prompted additional soft law guidance for corporations and human rights, as well as national law.[232]

For example, international institutions rapidly incorporated aspects of the U.N. Guiding Principles, including the Organization for Economic Co-operation and Development's ("OECD") Guidelines for Multinational Enterprises.[233] The OECD also subsequently issued guidance for various

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227 *See, e.g.*, *id.* ¶ 53.

228 *U.N Guiding Principles*, *supra* note 217, at 15, 35.

229 *See id.* at 5, 18, 30.

230 *See id.* at 18, 22, 26.

231 Press Release, *supra* note 214.

232 *See* Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L.J. 591, 613 (2016); John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* 18-21 (Corp. Responsibility Initiative, Working Paper No. 67, 2017), https://perma.cc/3U4K-QSZ6.

233 *See* Ruggie, *supra* note 232, at 18–19; *Responsible Business Conduct and the Corporate Responsibility to Respect Human Rights*, OECD, https://perma.cc/PP25-7ZSY. Although the OECD Guidelines for Multinational Enterprises are not legally enforceable, any party can bring a complaint that a corporation has violated them to OECD National Contact Points, which are non-judicial review mechanisms. OECD, *supra*. The National Contact Points have issued several statements interpreting the OECD Guidelines, and, implicitly, the U.N. Guiding Principles, in particular contexts. *See, e.g.* NORWEGIAN NAT'L CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERS., FINAL STATEMENT: COMPLAINT FROM LOK SHAKTI ABHIYAN, KOREAN TRANSNATIONAL CORPORATIONS WATCH, FAIR GREEN AND GLOBAL ALLIANCE AND FORUM FOR ENVIRONMENT AND DEVELOPMENT VS. POSCO (SOUTH KOREA), ABP/APG (NETHERLANDS) AND NBIM (NORWAY) 7, 22–23, 26, (2013), https://perma.cc/5HU5-48AQ; *Norwegian Bank Investment Management Violates OECD Guidelines*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: NAT'L CONTACT POINT FOR RESPONSIBLE BUS. CONDUCT NOR. (May 27, 2013), https://perma.cc/SJ6Y-LBMT.

sectors that incorporate the due diligence approach of the U.N. Guiding Principles.[234] The International Finance Corporation—the private sector lending arm of the World Bank Group—likewise incorporated aspects of the U.N. Guiding Principles when the International Finance Corporation revised its Policy on Environmental and Social Sustainability, which helps guide its lending to the private sector.[235] The International Organization for Standardization adopted a social responsibility standard in late 2010 that was based on the then-draft U.N. Guiding Principles.[236]

The U.N. Guiding Principles have also affected national law. Most obviously, they inspired the Swiss draft law and influenced the French law.[237] Reporting guidance for the UK Companies Act also refers to the U.N. Guiding Principles.[238] Moreover, the European Union is considering a directive mandating human rights due diligence.[239] The U.N. Guiding Principles additionally influence the practices of large and well-known companies, as discussed in greater detail in the following section. Overall, the U.N. Guiding Principles provide influential building blocks for a tighter formulation of stakeholder theory.

C. *Corporate Practice*

Corporate practice indicates that certain large companies integrate social and environmental concerns into their management systems and Board-level decision-making.[240] Across the world, however, only a small percentage of companies do so.[241] Of those that make significant sustainability commitments, key questions include how they determine which issues they should focus on and the extent to which concerns about duties to shareholders limit their ability to act.

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[234] These tools are available at *Sectors*, OECD, https://perma.cc/W4N8-ANNE.

[235] *See* INT'L FIN. CORP., POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY ¶ 12 (Jan. 1, 2012), https://perma.cc/EB3T-W8FE.

[236] *See* Ruggie, *supra* note 232, at 18; *What is ISO 26000—Guidance on Social Responsibility?*, AM. SOC'Y FOR QUALITY, https://perma.cc/NLX3-7J9B.

[237] *See* EUROPEAN COAL. FOR CORP. JUSTICE, *French Corporate Duty of Vigilance Law: Frequently Asked Questions* (Mar. 24, 2017), https://perma.cc/T2PA-W2NU; SWISS COAL. FOR CORP. JUSTICE, *supra* note 204, at 1–2.

[238] U.K. FIN. REPORTING COUNCIL, GUIDANCE ON THE STRATEGIC REPORT 26 (2014), https://perma.cc/4ZET-CQT6. The reporting guidance, however, only requires directors to report on impacts related to communities that are material. *Id.* at 4.

[239] Fox, *supra* note 12.

[240] Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV., May–June 2019.

[241] *Id.*

1. Commitments to Stakeholders Beyond Shareholder Value

Certain large corporations have taken steps for a number of years to become more sustainable. For example, as of 2017, nine thousand companies have joined the U.N. Global Compact.[242] The U.N. Global Compact is a voluntary initiative; companies that join it commit to ten environmental, labor, human rights, and anticorruption principles.[243] The extent to which member companies actually implement these principles varies widely, since participants are only required to pay an annual and tax-deductible participation fee and submit a Communication on Progress.[244] These Communications on Progress vary widely in quality.[245] Nevertheless, the number of companies that participate in the U.N. Global Compact serves as an indicator of the pressure that they feel at least to profess an interest in sustainability.[246] These companies are both national and multinational actors. Although nine thousand may sound like a large number without context, it is vanishingly small when compared to the world's approximately thirty million companies and seventy-seven thousand transnational corporations.[247] At the same time, many or most of the world's largest and most influential corporations are U.N. Global Compact members.[248]

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242 *Update on UN Global Compact Participation: 2017 Midyear Status*, U.N. GLOB. COMPACT (July 12, 2017), https://perma.cc/V3KG-D2DL.

243 *The Ten Principles of the UN Global Compact*, U.N. GLOB. COMPACT, https://perma.cc/7R85-ACD9.

244 *See Discover Ways to Engage*, U.N. GLOB. COMPACT, https://perma.cc/3GS8-8G9N; *The Communication on Progress (CoP) in Brief*, U.N. GLOB. COMPACT, https://perma.cc/Z78A-V4UT. The greatest value of the U.N. Global Compact is arguably its role as a learning forum. The U.N. Global Compact has numerous sub-groups and national bodies where interested businesses come together to learn and focus on particular issues or engage in joint advocacy. *See The SDGs Explained for Business*, U.N. GLOB. COMPACT, https://perma.cc/J2X3-F7BJ.

245 *See The Communication on Progress (CoP) in Brief*, *supra* note 244.

246 *Update on UN Global Compact Participation: 2017 Midyear Status*, *supra* note 242.

247 Estimates of the total number of companies and multinational corporations vary, and the data above is outdated but gives an approximate sense of the size of the universe of company actors. A 2011 study relied on a 2007 database that identified thirty million companies worldwide. Stefania Vitali et al., *The Network of Global Corporate Control*, PLOS ONE (Oct. 26, 2011), https://perma.cc/FMK6-8DRL. According to UNCTAD, as of 2006, there were seventy-seven thousand multinational corporations. UNCTAD, INVESTMENT BRIEF NUMBER 5 (2006), https://perma.cc/9NVD-866J.

248 For example, PepsiCo and Shell are both members. *Our Participants*, U.N. GLOB. COMPACT, https://perma.cc/3S23-YN94.

CEO surveys also indicate that the managers of large companies believe that they should consider sustainability and social impact.[249] A PriceWaterhouseCoopers survey of global CEOs of large corporations found that seventy-six percent believe satisfying societal needs is important.[250] Moreover, sixty-nine percent purported to support a stakeholder-centric approach.[251] They agreed that the purpose of business is to balance the interests of all stakeholders.[252] As previously noted, the CEO-led Business Roundtable revised its Principles of Corporate Governance to state that companies have responsibilities to stakeholders beyond shareholders.[253]

2. The Shareholder-Centric Model's Chilling Effect

The shareholder-centric model, however, appears to have a chilling effect even on global CEOs. In a survey of U.N. Global Compact member company CEOs, twenty-eight percent stated that considering the long-term societal impact of their business is inconsistent with their responsibilities to shareholders.[254] This population of companies surveyed is probably not representative since they have made an explicit commitment to sustainability, so it is likely that more CEOs would express this concern in the general universe of corporations.[255]

Even among the U.N. Global Compact CEOs, concern about shareholder value maximization may have a deeper chilling effect than the above statistics suggests. A 2013 survey found that "business leaders are in many cases unable to locate and quantify the business value of sustainability; are struggling to deliver the business case for action at scale; and see market failure as hindering business efforts to tackle global challenges."[256] In 2013, thirty-seven percent of the CEOs reported that the "lack of a clear link to business value [wa]s a critical factor in deterring them from taking faster action on sustainability."[257] This concern has risen over time as

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[249] PRICEWATERHOUSECOOPERS, 17TH ANNUAL GLOBAL CEO SURVEY: SUSTAINABILITY 3 (2014), https://perma.cc/FH4F-22RU.

[250] *Id.* at 11.

[251] *Id.*

[252] *Id.* at 11–12.

[253] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://perma.cc/N8TP-57UB.

[254] *See, e.g.*, U.N. GLOB. COMPACT & ACCENTURE STRATEGY, THE DECADE TO DELIVER: A CALL TO BUSINESS ACTION 12 (2019), https://perma.cc/G4HY-ZX4W.

[255] Unfortunately, this data is not provided by country, so it is not possible to see how national laws may affect viewpoints on this issue. *See id.* at 3.

[256] U.N. GLOB. COMPACT & ACCENTURE STRATEGY, THE U.N. GLOBAL COMPACT–ACCENTURE CEO STUDY ON SUSTAINABILITY: ARCHITECTS OF A BETTER WORLD 12 (2013), https://perma.cc/635M-M4JJ.

[257] *Id.* at 13.

companies seek to implement sustainability efforts.[258] In 2007, only eighteen percent of CEOs in the same survey expressed concern that they could not demonstrate this link.[259] This data suggests that concerns about the responsibility to generate shareholder value are constricting the ability of corporations to pursue sustainability goals. In at least some cases, such laws—or common understandings of them—appear to impede corporations from fulfilling what they see as their public purpose.[260]

Additional data suggests that current legal formulations are, at a minimum, failing to assist companies that wish to play a positive role in society.[261] Fifty-five percent of the CEOs in the U.N. Global Compact survey believed that more regulation was the best way to help businesses make progress on sustainability goals and create a level playing field.[262]

3. Emphasis on Philanthropy

The reasons US companies undertake sustainability activities may be indicative of the types of activities they undertake. US CEOs report that one of the key reasons for their companies' sustainability efforts is to support marketing and branding.[263] This suggests that corporate priorities are likely to be those that are trendy or present an opportunity for branding, rather than a focus on the efforts most needed to manage the company's societal impact.

There is nothing inherently wrong with companies pursuing sustainability efforts that help build their brand and reputations, but it means that scarce resources may not be available to address the company's underlying impacts resulting from its core business. For example, diminishing the ubiquitous problem of excessive work hours in a company's supply chain is harder to market than an innovative new product that also reduces environmental impact, or an exciting new philanthropic project.[264] The worst adverse social impacts sometimes might have no impact on the company's reputation or bottom line, and therefore might not receive attention.[265] Indeed, anecdotally, corporate marketing teams often are

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258 *Id.*

259 *Id.*

260 *Id.* at 12.

261 *See id.* at 46.

262 U.N. GLOB. COMPACT & ACCENTURE STRATEGY, *supra* note 256, at 46.

263 Thomas Singer, *CEOs Reveal Their 2017 Sustainability Priorities*, CHIEF EXECUTIVE (Feb. 27, 2017), https://perma.cc/3G2Y-6DED.

264 *See* Eccles & Klimenko, *supra* note 240.

265 *See* Sarah LaBrecque, *10 Things We Learned About Marketing Sustainable Products*, THE GUARDIAN (May 20, 2014), https://perma.cc/N3FC-K46Q.

hesitant even to publicly discuss efforts to address problems in corporate value chains because this can bring up negative images in the consumer's or investor's mind, which in turn become associated with the business.[266] In short, the tendency to engage in sustainability for marketing purposes means that companies may not focus on their most significant impacts on society, but rather what is likely to brand them favorably. This means that sustainability efforts may be ad-hoc, unpredictable, and not necessarily focused where they are most needed without legal intervention.

Relatedly, if US CEOs perceive reputational enhancement to be the reason to engage in sustainability activities, what does this mean for the many companies that are not known to the public? The companies doing the most to address their social impact are typically large and well-known, and they have sizeable reputations to safeguard.[267] The practices of thousands of other companies are unknown.[268] A large number of companies simply may lack incentives to act on sustainability issues. To be sure, certain other factors beyond branding and reputation can prompt sustainability efforts. Some companies also find that sustainability efforts also help them attract or retain qualified employees.[269] Additionally, risk can motivate companies. If a company faces an advocacy campaign or lawsuit related to poor environmental or labor practices, this can spur both that company and its peers to take action.[270] Again, however, such campaigns and lawsuits tend to focus on well-known brands.

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266 *See* Pamela Laughland & Tima Bansal, *The Top Ten Reasons Why Businesses Aren't More Sustainable*, IVEY BUS. J. (Jan.–Feb. 2011), https://perma.cc/JK93-CVJF.

267 *See, e.g.*, Andrew J. Hoffman, *The Next Phase of Business Sustainability*, STAN. SOC. INNOVATION REV., Spring 2018, at 35, 36.

268 *See* Paul Polman & CB Bhattacharya, *Engaging Employees to Create a Sustainable Business*, STAN. SOC. INNOVATION REV., Fall 2016 at 34, 34.

269 For example, Unilever's focus on a sustainable business model is believed to have helped prompt its employee engagement score of approximately eighty percent compared with a thirteen percent global average. CB Bhattacharya, *How Companies Can Tap Sustainability to Motivate Staff*, UNIV. OF PA.: KNOWLEDGE@WHARTON (Sept. 29, 2016), https://perma.cc/VKN8-LJEW ("76% of Unilever's 170,000 employees feel their role at work enables them to contribute to delivering to the sustainability agenda, and about half of all new employees entering the company from university cite Unilever's ethical and sustainability policies as the primary reason for wanting to join the company.").

270 Most recently, a series of lawsuits brought under California's unfair advertising and competition laws claimed that well-known companies such as Nestlé, Costco, and Mars were benefiting from forced labor in their extended seafood supply chains and had failed to inform consumers of this fact on their labelling. *See, e.g.*, Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 956 (C.D. Cal. 2015). The companies were already taking steps to address forced labor in their seafood supply chains, but they and their peers have since increased their efforts. For more information, see SEAFOOD TASK FORCE, HOW THE TASK FORCE IS LEADING THAILAND'S SEAFOOD SUPPLY CHAIN TOWARDS A MORE SUSTAINABLE PATHWAY 6 (2016), https://perma.cc/GAQ9-B2R9.

A close look at corporate implementation bears out the argument that a relatively narrow band of large and well-known companies are seriously engaged in managing their adverse social impacts, which typically is discussed in the terminology of human rights.[271] For example, of the nine thousand companies in the U.N. Global Compact, twenty-six are members of its human rights working group.[272] Forty-eight multinational companies are members of multi-stakeholder or industry initiatives focused on improving their human rights performance, and there is some overlap between this group and the thirty members of the U.N. Global Compact Human Rights Working Group.[273] Responsible investors filed shareholder proposals pertaining to human rights for twenty-three companies in 2017, all large and well-known companies.[274] Virtually all of these companies are Fortune 500 members with brands that enjoy high levels of public recognition, such as Unilever, Coca-Cola, BP, Microsoft, and Hewlett Packard.[275]

Certain companies are taking steps to integrate the U.N. Guiding Principles into their management systems, indicating their influence.[276] The following anecdotes indicate significant uptake among global companies, with oversight sometimes extending to the Board committee level. For example, after the launch of the U.N. Guiding Principles, Nestlé created a Human Rights Due Diligence Program and carries out human rights impact assessments where appropriate.[277] Human rights activities are reported to Nestlé in the Society Committee, which is headed by the Chairman of Nestlé's Board.[278] Coca-Cola formally endorsed the U.N. Guiding Principles in 2011, carries out various activities to implement

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271 *See Our Participants*, *supra* note 248; *see e.g.*, *Johnson & Johnson Statement on Human Rights*, JOHNSON & JOHNSON (Apr. 2018), https://perma.cc/FM9V-RBKK.

272 David Weissbrodt, *Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373, 380 (2008); *Update on UN Global Compact Participation: 2017 Midyear Status*, *supra* note 242.

273 *See Our Participants*, *supra* note 248. These initiatives include the Voluntary Principles on Security and Human Rights, International Council on Mining and Metals, IPIECA's Human Rights Working Group, and the Global Network Initiative, each of which include a substantial human rights component, as opposed to or in addition to focusing on sustainability broadly. *See Human Rights*, IPIECA, https://perma.cc/K3L4-KXSH; *Protecting and Advancing Freedom of Expression and Privacy in the ICT Sector*, GLOB. NETWORK INITIATIVE, https://perma.cc/2QJT-HHXY; World Bank Grp., Multilateral Inv. Guarantee Agency et al., *The Voluntary Principles on Security and Human Rights: An Implementation Toolkit for Major Project Sites* ii-iii (Working Paper, July 2008), https://perma.cc/S8TR-8XHE.

274 *See* HEIDI WALSH & MICHAEL PASSOFF, PROXY PREVIEW 51 (2017) (listing social, human rights, and environmental shareholder proposals from 2017).

275 *See, e.g.*, *Search Fortune 500*, FORTUNE 500, https://perma.cc/4P62-HDH4.

276 *See, e.g.*, *Assess and Address Human Rights Impacts*, NESTLÉ, https://perma.cc/2BMY-P36R.

277 *Id.*

278 *Governance and Policies*, NESTLÉ, https://perma.cc/QX54-HBX6.

them, and holds an annual conference for businesses on the topic of human rights.[279] The Nominating and Corporate Governance Committee of PepsiCo's Board of Directors is responsible for annually reviewing policy issues, including human rights.[280] The company has also created a senior-level Human Rights Operating Council[281] and adopted the U.N. Guiding Principles in its policies.[282] Barrick Gold, Tullow Oil, and other mining and oil companies have created external boards or Board committees that address corporate social responsibility ("CSR") issues, including human rights.[283] Many other large, mostly Western companies have also adopted the U.N. Guiding Principles due diligence system framework and integrated the approach into their management systems.[284]

Overall, this data suggests that, on the one hand, certain large and influential companies with massive supply chains are taking significant steps to manage their adverse social impacts. In the area of adverse social impacts—or human rights—lesser-known companies are either left out of or choose not to join key initiatives to move that agenda forward.[285] Moreover, these lesser-known companies receive little attention from responsible investors and other parties that might push them to improve their practices.[286] In short, concern about reputation will only drive certain companies to undertake sustainability efforts. Moreover, those efforts are likely to focus on CSR for the purposes of branding and focus on philanthropy or flagship programs that may deliver more buzz than impact.

III. A Proposal for New Stakeholder Theory

There is a norm or consensus emerging among the largest and most reputation-sensitive corporations that they should undertake sustainability activities, although what those should encompass remains vague.[287] These companies perhaps have created sufficient momentum for what Cass Sunstein calls a "norm bandwagon," in which small shifts in norms

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279 *Better Shared Future*, THE COCA-COLA CO., https://perma.cc/NB8F-RWMC.

280 *PepsiCo*, BUS. & HUMAN RIGHTS RES. CTR., https://perma.cc/7KBZ-VGL6.

281 *Id.*

282 *PepsiCo Global Human Rights Statement*, PEPSICO (June 2017), https://perma.cc/5ETQ-EX6D.

283 For example, Professor Ruggie sits on Barrick's CSR Board. *Barrick Announces Inaugural Board Members of Corporate Social Responsibility Advisory Board*, BARRICK (Mar. 2, 2012), https://perma.cc/C2WX-EDM5.

284 *See* Kirk O. Hanson & Stephan Rothlin, *Taking Your Code to China*, 3 J. INT'L BUS. ETHICS 69, 70 (2010).

285 *See* BUS. & HUMAN RIGHTS RES. CTR., FTSE 100 & THE UK MODERN SLAVERY ACT 4 (2018).

286 *See* Ankush Patel, *Asleep At the Wheel!*, CSR J. (Jan. 27, 2018), https://perma.cc/F9BZ-CW7T.

287 *See* RUGGIE, *supra* note 213, at 2–3.

can help lead to significant changes.[288] Corporate culture has arguably reached a point where a longstanding and legally supported norm (e.g., shareholder value maximization) has begun to lag behind the beliefs of corporate leadership and society.[289] One could even argue that the world's largest and best-known companies are nearing a tipping point that will make sustainability efforts an expected aspect of their corporate activities.

However, this norm development is still nascent and primarily involves a small club of large multinationals.[290] Norm dissemination and behavior change among US companies more broadly has proved challenging.[291] In the United States, a core narrative survives in some quarters that the "social responsibility of business . . . [is] to increase its profits," and that the ends justify almost any means.[292] This strong form of shareholder primacy may still prompt behavior that society and some corporate leaders no longer consider desirable. In such instances, for norms to reach a tipping point, government intervention may be necessary.[293]

The sustainability agenda has made considerable progress through voluntary business initiatives.[294] Law, however, is necessary to reach a broader swathe of companies.[295] Moreover, carefully formulated legal rules promise to free corporations to pursue certain societal goals without fear of violating their duties to shareholders. Law can direct corporate efforts where they are most needed, and help CSR move from philanthropy to meaningful changes to a company's core activities and impacts. And last, a focus on stakeholders can help prompt consideration of new forms of

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288 Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

289 *See id.*

290 *See Company Policy Statements on Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., https://perma.cc/H75S-ACNJ.

291 *See* Ruggie, *Protect, Respect and Remedy*, *supra* note 216, ¶ 5.

292 This quote comes from the famous article by Milton Friedman. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 126.

293 *See* Sunstein, *supra* note 288, at 953–54. Directors arguably continue to adhere to the old model, in part due to the reputational or even legal consequences of following their belief system. *See id.* at 958–59. Sunstein notes that people may actually reject existing norms but fail to state their opposition publicly, and that once public opposition becomes less costly, new norms may rapidly come into being. *Id.* Changing laws can support such a process. Sunstein notes that there are several grounds justifying government intervention to express certain social values and thus help change norms, meanings, and roles. *Id.* at 953. Another argument bolsters the need for government intervention. Shareholder value maximization could be considered what Robert Cooter terms a "normative failure" that occurs when a group—here, the shareholders—permits its members to externalize costs onto outsiders. Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 978 (1997). Again, in such instances, norms theorists note that government intervention may be necessary. *Id.*

294 Ursula Wynhoven, *Partners in Responsibility*, 39 L.A. LAW. 26, 28 (2016).

295 As Sunstein notes, law has an expressive function: it can overcome collective action problems, voice social values, and prompt changes in norms. Sunstein, *supra* note 288, at 958–59.

reputational and operational risk that adversely affect company performance in the long run—helping counteract short-term corporate thinking.[296] The time is ripe for such an effort.

A promising way to address the governance gaps identified above would be through a careful reformulation of stakeholder theory. The current environment provides an opportunity to develop a stakeholder model that more clearly steers corporate decision-making and creates a degree of social accountability while providing concrete guidance and enforceable standards. This is best achieved by adjusting the expectations applied to corporate decision-making at a high level (e.g., directors' duties). Shifting from a model in which directors have *discretion* to consider certain impacts on stakeholders, to one where they *must* consider those impacts, is a mechanism to compel corporations, including mid-size and lesser-known ones, to identify and address their adverse social impacts.

A. *Outline of New Stakeholder Theory*

In principle, reforming directors' duties is an ideal way to embed concern for societal impacts into the culture and daily work of a corporation and prevent rather than respond to adverse impacts. This is likely why the stakeholder model has persisted despite the consistent efforts of many academics to consign it to history. The importance of directors' duties is widely understood: the duties are integral to corporate law courses taught in business and law schools, and changing them could indeed help shift the manner in which directors, and thus corporations, make decisions and examine environmental and social risk.[297]

New Stakeholder Theory seeks to avoid the vagueness of the laws outlined above through greater specificity sufficient to provide clear procedural guidance to directors. This more discrete articulation of directors' duties would lead to a tighter, implementable, and reviewable version of fiduciary duties that takes into account stakeholders and creates a New Stakeholder Theory, one appropriate for the geopolitical reality of the twenty-first century.

1. Significant Impacts on Stakeholders, with Impacts of Relevance Identified

New Stakeholder Theory calls for directors to oversee the identification and mitigation of potentially *significant* impacts on stakeholders,

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[296] *Contra* Keay, *supra* note 41, at 585.

[297] *See* Lyman P.Q. Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483, 1494 (2002).

rather than impacts of any magnitude. The latter standard would be impractical and overwhelming for directors.[298]

The law or implementation guidance would identify a set of international standards to help define the universe of social (and potentially environmental) impacts that directors should consider. For example, directors should prioritize avoiding adverse impacts on rights listed in the International Bill of Human Rights.[299] Laws could also focus directors' attention on environmental impacts enumerated in key environmental conventions and agreements.[300] Although most of these international conventions focus primarily on the role of governments, companies can play a role in respecting the benchmarks in them as well. Alternatively, a law could require directors to seek to avoid adverse impacts on the issues listed in a business-focused soft law standard, such as the OECD Guidelines for Multinational Enterprises.[301] Referring to a specific universe of concerns identified in international law would narrow the scope of potentially significant impacts that directors would be expected to consider while allowing for the fact that corporate externalities vary meaningfully by sector and locale.

Guidance accompanying the law could also help define or provide indicators of what impacts might be "significant." This would help companies avoid, for example, cross-border employment litigation of a mundane nature (if a cause of action did not previously exist). Further, the definition of "significant" could consider issues such as whether the harm is irremediable, rises to the level of an international crime, or affects a significant number of individuals.

2. Focus on Adverse Impacts, Not Philanthropy

Directors should focus on the principle of avoiding adverse societal impacts, both social and environmental. This would focus directors' attention where it is most urgently needed. It would help counteract the tendency for corporations to focus primarily on flashy philanthropic programs that help with branding, or to even seek to "offset" wrongdoing in their core business through philanthropy. The law should not prevent companies from undertaking philanthropic activities, but it should not

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[298] Although some benefit corporation statutes use the term "material," the term "significant" is preferable because the term "material" is a term of art in securities law.

[299] *See Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, *supra* note 221.

[300] Such environmental conventions and agreements would potentially include the Convention on Biological Diversity and the Basel, Rotterdam, and Stockholm Conventions on chemicals and hazardous waste, among others.

[301] *Soft Law*, OECD, https://perma.cc/8YH5-GVXH.

focus on fostering such an expectation. Corporations that also wish to engage in philanthropy can always do so by choice, and the benefit corporation is a ready legal vehicle for such endeavors. Formally, however, directors' expected roles would be clear: to avoid significant adverse social and environmental impacts, (i.e., to identify and manage certain negative externalities created by their firm).

3. Focus Primarily on Effective Procedures

If New Stakeholder Theory is to be made enforceable, judicial review or other enforcement bodies should focus primarily on procedure. In that sense, the Theory would be similar to the business judgment rule. Directors should be expected to oversee the corporation's reasonable steps to identify and mitigate significant adverse societal impacts in at least some parts of its value chain. If directors can show that they oversaw a robust process to identify and address significant impacts and considered and sought to address such significant impacts when they were identified, the standard should be satisfied. This would encourage directors to oversee the management of social risk, while recognizing that such systems are unlikely to always succeed in both identifying risks and preventing their impacts, especially in a company's value chain. The review should generally reward genuine effort.

A focus on procedure is appropriate for three reasons. First, companies, particularly large corporations, have a variety of impacts, and determining which ones are most significant is an issue on which reasonable minds could disagree, although, as noted earlier, statutes or official guidance should help define significance. Second, the standard should focus primarily on adequate procedures because, even if corporations genuinely seek to mitigate adverse impacts, they may not succeed. This is especially so when adverse impacts are not under the company's direct and sole control, but rather arise in the value chain. Genuine efforts to mitigate should count. Third, a procedural focus would enable corporations to build on their existing risk management systems, an approach that plays to many companies' strengths.

Laws or accompanying guidance could provide certain expected procedural elements. These could include measures such as including a director with ESG expertise on the Board or creating an ESG subcommittee. The law could, for example, mandate that ESG issues be included on the Board's meeting agenda with a certain frequency. It could also identify basic elements of a management system to oversee these issues. Any such guidance should reflect the diversity of covered companies and provide for reasonable flexibility rather than a one-size-fits-all approach.

The primary focus on procedure—meaningful risk identification and response—will be critiqued by civil society organizations. There is a legitimate concern about a potential lack of remedy for those injured if a company can show it followed a reasonable procedure that either missed the risk entirely or failed to adequately prevent it. This concern might better be addressed through separate or companion legislation that creates cross-border liability for companies with a stricter standard of conduct for a limited number of particularly grave human rights or environmental impacts that companies cause or to which they contribute. In some instances, laws may already exist to hold companies liable for such impacts. A lack of transnational jurisdiction for such laws is, however, often a barrier, and could be addressed.

4. Not Applicable to Small Companies

These directors' duties should only apply to companies over a certain size to avoid creating an undue burden on very small businesses. A number of US laws apply to businesses with fifty or more employees, so this is one possible threshold, although focusing on slightly larger businesses might be preferable.[302] The likely impacts of small businesses with fewer than fifty employees are often more limited than those of medium and large businesses, so the scope of reasonable due diligence could also be reduced for small businesses. Yet the law should not be drafted to only include the largest companies, since many of these are already taking significant, if imperfect, steps to address social risk. Rather, there is an acute need to push other large and medium sized companies that do not face equivalent social pressure to do the same.

5. Enforcement and Remedy

The issue of enforcement presents a challenge. The analysis above suggests that directors should be expected to have processes in place to consider social risk in corporate operations and also, at a minimum, the operations of their business partners. Some would argue that efforts to identify and seek to address such impacts should extend through the

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[302] For example, the Affordable Care Act, Family Medical Leave Act ("FMLA"), and equal opportunity reporting for federal contractors all apply to companies with more than fifty employees. *See Small Business Requirements*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://perma.cc/RT5C-U5RB; *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T OF LAB., https://perma.cc/ET8L-GT7T; *What Employers Need to Know About the Affordable Care Act*, INTERNAL REVENUE SERV. (May 13, 2019), https://perma.cc/CU87-37DW.

entire value chain—and, indeed, international standards such as the U.N. Guiding Principles on Business and Human Rights call for just that approach.

The most difficult question is not whether directors should consider impacts beyond their own operations. They should, starting with their direct business partners and potentially extending through more of their value chain. The challenge is how to elicit a genuine effort by companies, while not holding them to an unachievable standard of outcome for impacts far distant in their value chains.

Arguably, the best balance can be achieved by differentiating between the scope of oversight responsibility and the scope and mechanism of accountability. Directors could be responsible for ensuring a system of oversight for their own operations, and also at least some parts of their value chain. Enforcement—or accountability—however, could be made available primarily for impacts arising from their own operations and possibly those over which they have some control, such as their subsidiaries, if they did not exercise oversight.

Some manner of enforcement seems necessary based on history. The UK Companies Act did not provide standing to stakeholders nor other meaningful enforcement mechanisms, nor did US constituency statutes or benefit corporations. This lack of accountability is assumed to be one of the reasons that each country's statutes permitting consideration of stakeholder interests had a limited impact. This experience suggests that enforcement in some form is vital for such statutes to achieve their intended impact—or any impact at all.

6. Enforcement Could Take Diverse Forms

Regulators could be charged with enforcement. They could, for example, be empowered to fine companies that fail to exercise reasonable oversight of the societal impacts of their value chains, including efforts to address the impacts—whether or not successful. Third parties could also be provided the right to request investigations by the regulator if they could provide basic evidence suggesting the company did not seek to identify and address these impacts. A review of Board and committee minutes and management systems would enable the regulator to quickly ascertain whether the directors met their duty.

It would be vital that the regulator be funded and trained to proactively carry out this role if the regulator has any important role in enforcement. Previous laws focused on social risk have not had their intended impact because regulators were unwilling or hesitant to enforce them—often because they had no understanding of sustainability issues and reportedly felt that the laws fell outside of their agencies' mandates and their

own capacities.[303] In other instances, the regulator simply was not empowered to undertake any meaningful form of enforcement, or enforcement was optional, and competing priorities meant enforcement did not occur.[304] Enforcement should first target the companies making few or no efforts to address social risk, rather than just focusing on the best-known brands, which are often ahead on this journey.

Another enforcement option is conferring standing on a limited set of adversely affected stakeholders. An explosion of legal complaints is likely to be a potential concern, particularly in the litigious United States. Such a surfeit could, however, arguably be avoided if laws are drafted mindfully. At least three design principles and one historic fact deserve consideration.

First, standing could only exist for stakeholders who experienced significant adverse human rights impacts due to a company's *own* actions or possibly the actions of those with which it has a direct business relationship, such as subsidiaries. The question of who should have standing is likely to be highly debated. Regardless of where that debate lands, there is an argument that such standing should exist for those who do not live in the United States so that the law has extraterritorial effect. Second, the procedural standard based on reasonableness could help; if liability is removed (or reduced) if a company follows adequate procedures, that is likely to limit litigation. Third, statutory or regulatory guidance regarding what constitutes "significant" impacts could help ensure that the complaints involve serious impacts, not run-of-the-mill grievances. Last, learning from history, the number of shareholder derivative suits is surprisingly small.[305] This area of law might prove no more litigious, especially given the many practical barriers that stakeholder litigants would face, both geographic and financial. The ability of stakeholders subjected to significant impacts to enforce the law would nevertheless provide it with teeth, even if they rarely exercised those rights.

If standing only exists for stakeholders who are injured by the company or closely related entities, this could mean that companies would ignore risk in the rest of their value chains, even among first-tier suppliers, for example. This would be problematic because often the worst human rights impacts in a company's value chain are more distant. At the same

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303 *E.g.* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 938–39 (2019) (discussing the SEC's objection to the enactment of Dodd–Frank "claiming that the required disclosures fell outside its core mission").

304 David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 338 (2011).

305 Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 87–88 (2011).

time, a company often cannot easily or immediately affect change in its extended value chain. It is one thing to expect companies to identify and take what steps they can to address such risks, but it is quite different to provide standing for injured stakeholders to bring a complaint against a company several steps removed from the harm. One possible solution would be to combine a mix of regulatory enforcement and standing for stakeholders. For example, the law could provide standing to a limited set of stakeholders more directly injured by the company's actions (or lack thereof). Regulators could then ensure that directors oversee social impacts across a wider spectrum of the company's value chain.

Another alternative would be to enable a court to enjoin directors to create processes that would avoid such adverse impacts in the future. However, if injunctive relief were the available remedy, this would require courts to determine the precise procedures a particular company should have in place, which is outside the scope of the expertise of most judges. Judges would then have to monitor whether companies have complied. Given limited judicial expertise and the time burden of monitoring compliance, courts would likely be extremely hesitant to provide such injunctive relief.

Other mechanisms could encourage directors to consider the adverse impacts of companies on stakeholders. For example, companies could be required to publicly report on how they take into account and manage adverse environmental and social impacts. This would simply make mandatory the sustainability reports that many companies already produce and might encourage consistency and less puffery in the reporting. Reporting requirements in the social sustainability space, however, have had limited success. For example, France has required social and environmental reporting by large companies since 2001,[306] but nevertheless determined it was necessary to later pass the vigilance law discussed in Part II, mandating companies to have management systems to address their human rights impacts.[307] California passed the California Supply Chains Transparency Act in 2010, which required that companies report on the narrower issue of whether and how they seek to prevent modern slavery in their supply chains.[308] Perhaps because there are virtually no enforcement

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306 Idil Kaya, *The Mandatory Social and Environmental Reporting: Evidence from France*, 229 PROCEDIA SOC. & BEHAV. SCI. 206, 209 (2016). These requirements became more rigorous in 2013, requiring reporting across forty categories, as well as verification of the information provided by an independent third party. *Id.* at 210.

307 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Contractors], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017, art. 1.

308 California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West 2012).

mechanisms, many covered companies are believed not to have reported under the California law.[309] Reporting on how directors are overseeing the social and environmental impacts of the company could be a helpful complement to a change in their fiduciary duties, but a reporting requirement is unlikely to shift corporate culture and behavior on its own.

7. Identifying the Meaning of Reasonable Due Diligence

Given that the voluntary integration of ESG issues, including human rights, is a relatively nascent corporate practice, a key question is: who determines whether due diligence is reasonable? Basic expectations of due diligence could be included in the statute, per the French vigilance law.[310] Providing more detail in a statute—which could be useful to directors and those providing oversight—is challenging, however, as what constitutes reasonable due diligence varies by the sector, size of company, and severity of the company's likely impacts. Alternatively, judges or regulators could be left on their own to make this reasonableness determination, which has been the approach for the business judgment rule. Judges in particular, many of whom came to the bench long before sustainability gained its current status in corporate practice, may find it difficult to determine what is reasonable.

The best approach likely lies between these two. The OECD offers a useful approach. It has developed a number of guidance notes for environmental and human rights due diligence tailored to specific sectors.[311] These were developed with substantial input from corporations, NGOs, governments, and academics.[312] Statutes in the United States could point to these as resources for judges (the United States is a member of the OECD), and expert regulators could develop additional guidance.

B. *Benefits of Moving Toward New Stakeholder Theory*

Scholars have argued that shifting social norms is one of the primary functions of law.[313] In this case, given that large corporations are already focused broadly on CSR and sustainability, norms are ripe for tipping

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[309] *See* KNOW THE CHAIN, FIVE YEARS OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 8 (2015), https://perma.cc/4E9G-E788.

[310] Loi 2017-399 du 27 mars 2017, art. 1.

[311] *Sectors*, *supra* note 234.

[312] *See* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 4 (2011), https://perma.cc/SJG2-AXEQ.

[313] *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996).

through a carefully constructed legal intervention that helps focus that energy on certain actions and levels the playing field for corporate actors by demanding more of laggards.

Some might argue that this formulation is still too broad and could continue to provide directors with a surfeit of choice. As noted earlier, however, directors already consider issues such as sustainability and philanthropy, and have substantial license to do so due to the business judgment rule.[314] New Stakeholder Theory would help direct those impulses so that they have greater benefit to society. Moreover, a clearer standard of conduct would provide greater business certainty in two ways: First, it would remove the chill on corporate actions that support sustainability because it would clarify that corporations not only can but should pursue efforts to mitigate their societal impacts. Second, it would help directors understand how to thoughtfully prioritize such efforts, rather than react to the latest trend or reputational attack.

Finally, New Stakeholder Theory would help level the playing field for the companies that already are taking proactive steps to mitigate their adverse societal impacts. Many large multinationals already consider their societal impacts and have integrated such concerns into their management systems.[315] They identified their most likely adverse impacts and developed approaches to address them.[316] The scale of such efforts may vary depending on the company's resources, but leaders in many industries provide a template for others to emulate. Requiring other companies to take similar measures helps level the playing field for the companies that already voluntarily seek to do the right thing and creates a focus on addressing long-term risks, to the benefit of shareholders and other stakeholders alike.

It is time to take stakeholder theory seriously and to test it in a form that has a chance of success in guiding and incentivizing business behavior.

Conclusion

The shareholder-centric view is problematic in part because it does not address increasingly significant corporate externalities arising from globalization of the corporate form. The shareholder-centric model is supposed to create accountability from directors to shareholders, but due to the business judgment rule and certain statutes, directors already

314 *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

315 *E.g.*, *Better Shared Future*, *supra* note 279.

316 *Id.*

consider the interests of other stakeholders and engage in philanthropy on a highly ad hoc basis.

Current stakeholder theory is also problematic. On the one hand, consideration of a broader set of stakeholders may help corporations overcome short-term, quarterly thinking and focus on long-term risk, to their own benefit. It also promises to help companies manage their impacts and meet societal expectations. On the other hand, as currently formulated in legal scholarship and the law, stakeholder theory calls vaguely for directors to "consider" stakeholders, which hardly provides useful guideposts to directors seeking to manage their societal impacts.

New Stakeholder Theory, as outlined in this Article, would provide guidance to directors, while maintaining their overall focus on shareholder value. According to New Stakeholder Theory, directors should oversee the identification and management of adverse social (or human rights) and environmental impacts on stakeholders, focusing on those that are significant, according to criteria defined by statute. New Stakeholder Theory does not call for corporations to undertake philanthropy.

Such duties would be enforceable. One option would be for regulators to review and fine companies that fail to carry out this oversight for their own operations and at least portions of their value chains. Alternatively, or additionally, the law could create standing for a narrow band of stakeholders adversely affected by the company, but the law would typically protect directors if they can demonstrate they went through a reasonable process to identify and manage such adverse impacts.

New Stakeholder Theory reflects developments in international law and other national jurisdictions, as well as calls from the business community itself for a shift to a stakeholder model. Such a shift in US corporate law would be timely and would reasonably reflect emerging social expectations of corporations.