POWER, PRIMACY, AND THE CORPORATE LAW PIVOT

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ABSTRACT

As a Vice Chancellor, Chancellor, Chief Justice, and now a private citizen, Leo Strine has consistently recognized the shape of power relations within corporate law. With his wry wit and sharp prose, he has cut to the quick on issues such as director independence, shareholder rights, and the separation of ownership from ownership. Underlying these decisions are both the recognition of the underlying power dynamics at play and the pursuit of fairness under the law. As the Chief Justice has gone from lawmaker to commentator, his perspective has shifted on the role of corporate law in shaping society. Like him, we recognize that corporations and corporate law have led our economy away from the middle-class-oriented prosperity of the New Deal toward a bleaker landscape dominated by corporate behemoths that leave working Americans behind. We argue that corporate law must pivot to include workers under its aegis in order to restore a fairer working environment, economy, and polity. Chief Justice Strine is well positioned to take us in that new direction.

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INTRODUCTION

Corporate law is about power. It dictates who controls the legal entity that houses most American businesses, and thereby who can use its property, what goods or services it sells, who works for the company, and who can take its profits. Delaware has always seemed to be something of an odd match with corporate law; one of the smallest states, it sits snug between New Jersey and Maryland, almost hiding up the banks of the Delaware River. And yet when business titans clash, their disputes often end up in the courtrooms of the First State.[1]

Over his twenty-one years on the Delaware bench, former Vice Chancellor, Chancellor, and Chief Justice Leo Strine became perhaps the most influential and beloved corporate law jurist in the country. Along with his incisive judicial opinions, Strine has regularly published thoughtful and pointed commentary on corporate law and policy. Far from daunted by the stakes of the matters before his court, Strine brought a sharp wit and a keen eye to the proceedings, focusing on the need for fair play. Moving beyond the courtroom, he has expanded his field of play considerably. But he brings the same concerns about justice, fairness, and the fate of the less powerful.

In this essay, we explore Strine's jurisprudence and commentary from this perspective of power and equity. As a jurist, constrained by the law and more optimistic about the underlying endeavor, Strine understood and acknowledged the unparalleled role of shareholders within the Delaware corporate law framework. But as he has watched the rapacious appetite of corporate entities render the rest of society overmatched, his views have shifted about the ultimate role of corporate law within the economy. This shift parallels a new perspective in the broader culture about the importance of worker participation in actual governance of the corporation. Having been left behind for too long, workers want a new approach. Corporate law is ready to pivot, we argue, and Strine is ideally positioned to lead us toward a new set of power structures.

I. THE JURISPRUDENCE OF POWER RELATIONS AND FAIR PLAY

Delaware courts live in rarefied air: they handle raucous and unwieldy

1. One striking illustration of the power of the Delaware Chancery: then-Disney CEO and Chairman Michael Eisner sitting in Chancellor Chandler's courtroom in Georgetown, Delaware, which has a population of approximately eight thousand people. World Population Review, *Georgetown, Delaware Population 2022*, https://worldpopulationreview.com/us-cities/georgetown-de-population [https://perma.cc/ASN2-MNVC] (last visited February 22, 2022). For a discussion of the courtroom drama, see JAMES B. STEWART, DISNEYWAR (2006).

disputes among the biggest corporations on the planet. As a member of the Delaware Chancery and Supreme Court, Strine used his humor and sharp insights to poke through the grandiosity of corporate law and unearth the human realities within. And while those looking for evidence of employee, environmental, social, and governance (EESG) and worker empowerment in his role as a jurist will find sympathetic statements, Strine firmly believed in following the law, and Delaware law clearly embodies the principles of shareholder primacy.[2] Within these confines, Strine took on the role of honest broker: a fair-minded and savvy umpire looking out for the rules while understanding the importance of context.

Strine's opinions demonstrate a concern for power imbalances and for the fairness of the process. His decision in *In re Oracle Corp. Derivative Litigation* is reflective of this approach.[3] In response to a derivative suit against Oracle for alleged insider trading by three Oracle directors, the company set up a special litigation committee to review the litigation. When the committee passed on taking it up, plaintiffs alleged that the group was not sufficiently independent to judge the matter impartially. Despite recognizing the committee's lengthy report and diligence bona fides, the Vice Chancellor found reasonable doubt as to the committee's impartiality. Two of the members of the committee were faculty members at Stanford University, leading to potential conflicts with the alleged wrongdoers—one was a Stanford professor, and the other two were significant donors to the university.[4] The axes of relations between the five were cross-cutting, complex, and fraught with potential for bias.[5] Although the traditional Delaware standard on lack of independence looked more towards dependence—notions of domination and control—Vice Chancellor Strine chose a more nuanced view of the concept. He wrote: "Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement."[6] Noting that directors are generally "deeply enmeshed in social institutions," he did not impugn their good faith; rather, he found that "persons of integrity and reputation can be compromised in

2. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 25–26, 48 (Del. Ch. 2010) (holding that defendant directors, controlling stockholders of Craiglsist, Inc., breached their fiduciary duties to eBay, a minority shareholder of the company).

3. *In re* Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003).

4. *Id.* at 920–21.

5. It did not help the sense of fair play that many of these connections did not come to light until discovery. *Id.* at 929 ("In view of the modesty of these disclosed ties, it was with some shock that a series of other ties among Stanford, Oracle, and the Trading Defendants emerged during discovery.").

6. *Id.* at 938.

their ability to act without bias when they must make a decision adverse to others with whom they share material affiliations."[7] By looking beyond the formalities to understand the colorful palette of human relations, Vice Chancellor Strine provided a much more realistic and power-centered perspective on the independence requirement.

In dealing with litigation surrounding mergers and acquisitions (M&A)—a critical aspect of Delaware's domain—Strine looked to determine the nature of the deal that had been struck and to hold the parties to their bargain. His decision in the IBP-Tyson merger reflected his understanding that Tyson had intentionally ignored warning signs before the deal was consummated but then tried to act on its post-merger regrets.[8] These combatants knew what they were getting into, and that people could get hurt. In assessing the process that led to the agreement, Vice Chancellor Strine wrote:

> The negotiations between IBP and Tyson did not take place between a world-wise, globe-trotting capitalist with an army of advisors on one side, and Jethro Bodine, on the other. Instead, two equally sophisticated parties dealt with each other at arms' length with the aid of expensive and highly skilled advisors.[9]

And in finding that specific performance of the merger was appropriate, despite the acrimony between the two sides, the Vice Chancellor stated:

> Tyson will have the power to decide all the key management questions itself. . . . While this may be unpleasant for the top level IBP managers who might be replaced, it was a possible risk of the Merger from the get-go and a reality of today's M & A market.[10]

This view of M&A reality reflects Strine's bifurcated approach while on the bench: corporate armies fought against themselves in one world, while civilians needed protection in the other. Boardroom battles were conducted between directors, executives, corporate raiders, hedge fund and pension fund managers, controlling stockholders, and their coterie of lawyers and bankers—scenes replayed in books like *Barbarians at the Gate*[11] and *DisneyWar*.[12] The civilians on the outside—average, hard-working people who made the cars, swept up the Disneyland streets, and went about their business with honor and decency—were not really part of the internecine

7. *Id.* at 938, 947.
8. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 23 (Del. Ch. 2001).
9. *Id.* at 72–73.
10. *Id.* at 83–84.
11. BRYAN BURROUGHS, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990).
12. STEWART, *supra* note 1.

struggles. To the extent they were threatened with collateral damage, Strine looked to shield them.

On April 5, 2010, twenty-nine coal miners died at the Upper Branch Mine in Raleigh, West Virginia, after a series of explosions within the mine; safety authorities later determined that the mine had been managed in a "profoundly reckless manner."[13] Massey Energy Company owned the mine, and its president Don Blakenship was subsequently convicted of criminal charges for the incident.[14] Soon thereafter, the company sought to merge with Alpha Natural Resources, Inc., but Massey shareholders filed suit to enjoin the merger in order to proceed directly on their derivative claims against Massey management. Contraposed to those executives, the shareholders had a sympathetic narrative—seeking justice against the wrongdoers.

Vice Chancellor Strine, however, had his eye on something other than these corporate matters in the midst of tragedy:

> Amidst public concern about the human loss at Upper Big Branch, the stock market focused on what it does, thereby allowing profit seekers to buy and sell Massey stock based on their differing views about what this terrible event, and Massey's mode of operating, portended for the company's ability to generate future cash flows.[15]

He denied the shareholders' requested injunction, ultimately leaving the merger's fate to a shareholder vote.[16] Recognizing that Massey leadership's flagrant disregard for safety regulations was likely a *Caremark* violation,[17] the Vice Chancellor nevertheless reflected on the ultimate victims of the mine's disaster:

> The purpose of the mine safety laws is not to protect Massey and its stockholders, it is to protect miners. The purpose of the environmental laws is not to protect Massey and its stockholders, it is to protect the environment. Against what are these laws directed? The answer is obvious: the incentive for entities to

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13. *April 5, 2010: Explosions Rock the Upper Big Branch Mine*, W. VA. PUB. RADIO (April 5, 2021, 7:19 AM), https://www.wvpublic.org/radio/2017-04-05/april-5-2010-explosions-rock-the-upper-big-branch-mine [https://perma.cc/9P6G-SFH3].

14. *Id.*

15. *In re* Massey Energy Co., No. 5430, 2011 WL 2176479, at *1 (Del. Ch. 2011).

16. *Id.* at *4 ("If Massey stockholders believe that the company can do better by remaining independent, they have the uncoerced, informed chance to make that decision for themselves.").

17. *Id.* at *21.

generate externalities in their pursuit of profits.[18]

Looking at them purely from the limited vantage of the corporate governance morality play, shareholders here were victims of the same managerial predations as workers. From a wider perspective, however, shareholders were part of the corporate governance that had resulted in the accidents. Strine did not countenance management's alleged law-breaking, nor did he view it as an instantiation of shareholder wealth maximization.[19] But neither did he see the shareholders as powerless players left to uncertain fate. As he noted ruefully, looking to broader notions of complicity: "Subterranean mining will never be a risk-free or entirely clean business. That is a reality and every self-aware adult in this intensely energy-consuming society has coal on his conscience."[20]

In his oversight of corporate gamesmanship, Strine had a keen eye for the rogues and ne'er-do-wells, and was not afraid to call them out for their malfeasance.[21] He was skeptical of transactions undertaken by controlling shareholders, understanding the underlying power dynamics and looking out for the disempowered minority holders.[22] He was not afraid to call out Delaware's existing jurisprudence for its failings.[23] He was a maverick, but

18. *Id.* at *23.

19. Vice Chancellor Strine noted: "Despite the straw man arguments of certain academics, Delaware law does not charter law breakers. Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.' As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law." *Id.* at *20.

20. *Id.* at *23.

21. *See, e.g.*, Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1030 (Del. Ch. 2004) (finding that controlling shareholder Conrad Black "breached his fiduciary and contractual duties persistently and seriously").

22. *See, e.g.*, *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 764 (Del. Ch. 2011) ("A focused, aggressive controller extracted a deal that was far better than market, and got real, market-tested value of over $3 billion for something that no member of the special committee, none of its advisors, and no trial expert was willing to say was worth that amount of actual cash."); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005) (noting the "obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its [minority] stockholders"); *see also* Richard B. Schmitt, *Delaware Defender Leo Strine Is Fighting to Uphold the State's Reputation As the Venue for Corporate America to Get A Fair Shake*, A.B.A. J., Nov. 2012, at 52, 55 ("Strine has been highly suspicious of transactions initiated by controlling shareholders.").

23. *See, e.g.*, *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 643 (Del. Ch. 2005) ("Even more, by creating a standard of review that makes it impossible for a controlling

one who was cognizant of the ultimate structure of the game being played and the boundaries within which he needed to operate.[24]

As his tenure on Delaware courts proceeded, however, Strine did seem to develop a more jaundiced view of the machinations of institutional shareholders and their advocates. This edge was accompanied by a growing interest in corporate law "civilians"—those normal folks who were largely ignorant about how intrigues at the highest levels affected their retirement savings, their consumer options, their jobs. The disconnect between the corporate governance "game" and the economic ramifications of that game seemed more disturbing. As he noted in a recent article:

> In the back and forth about short-term effects on stock price, Tobin's Q, survivorship bias, and the like, the flesh-and-blood human beings our corporate governance system is supposed to serve get lost. But, unless we consider the economic realities of these ordinary human investors and how those realities bear on what is best for them, we are not focused on what is most important in assessing the public policies shaping our corporate governance system.[25]

This theme had emerged earlier, primarily in his academic work. He bemoaned that average Americans were drawn into these corporate power plays seeming against their will, calling them "forced capitalists."[26] Perhaps Strine's most prominent *idée fixe* has been the ongoing "separation of ownership from ownership" as manifested in the growing power and prominence of investing intermediaries.[27] Eyeing the potential for diverging incentives between these institutional investors and their ultimate

stockholder to structure a going private merger in any fashion that will enable a successful attack on a complaint that alleges financial unfairness on a notice pleading basis, [*Kahn v. Lynch Communication Systems, Inc.*] has generated perverse incentives for both defense and plaintiffs' counsel that cast doubt on the integrity of the representative litigation process.").

24. Vice Chancellor Leo E. Strine, Jr., *Toward A True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1759 (2006) (stating that "[a]s a judge who decides corporate law cases," his expressed views would be "necessarily constrained").

25. Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1871 (2017).

26. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in A More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4 (2007) ("As a result of these changing dynamics, most ordinary Americans have little choice but to invest in the market. They are in essence 'forced capitalists,' even though they continue to depend for their economic security on their ability to sell their labor and to have access to quality jobs.").

27. *Id.* at 6–7.

beneficiaries, Strine believes them to be behind much of the governance mischief of our age.[28] The consequence? Rapid shareholder turnover with a short-term focus, disengagement from the beneficial owners, rocketing compensation for executives and the lawyers and bankers who work with them, and corporate abandonment of workers and communities.[29] The compact between Big Business and the rest of society had been shattered, with grievous results.[30]

In surveying the damage that corporate-law civilians have suffered, Strine has had less patience with the aggrieved cries of institutional shareholders.[31] Perhaps that explains his sometimes puzzling indifference to seemingly legitimate shareholder concerns about managerial overreach.[32] After all, given their power with the corporation, they shouldn't have much to complain about.[33] Over time, his frank acknowledgements of shareholder power—"only capital has the right to vote!"[34]—have curdled into something

28. Strine, *supra* note 24, at 1765–66 ("The traditionalist has no illusions that the interests of mutual fund managers are identical to those of their shareholders, most of whom are not invested in pursuit of short-term quick hits but to build wealth to send children to college or sustain themselves after retirement—the sort of wealth that comes only from a diverse portfolio, containing corporations that deliver profits by producing useful products and services.").

29. Strine, *supra* note 25, at 1871–72; *see* Claire A. Hill & Brett H. McDonnell, *The Agency Cost Paradigm: The Good, the Bad, and the Ugly*, 38 SEATTLE U. L. REV. 561, 562 (2015) (describing how corporate executives "have used short-term gimmicks to get short-term stock price gains that will increase their own compensation, while making the corporation and its shareholders no better off").

30. Ira M. Millstein, Leo E. Strine, Jr. & Eric Talley, *Looking Back with A Legend: Ira Millstein Reflects on the Impact of Milton Friedman's Views on Corporate Governance*, 76 BUS. LAW. 945, 947 (2021).

31. *See* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 451 (2014) ("Bebchuk is the sincere champion of one group of 'agents' wielding power and authority over others' money—the money managers who control most of the investments belonging ultimately to ordinary Americans who are saving to pay for their retirements and for their children's education—against another group of 'agents' that he believes is somehow more conflicted—the agents who actually manage corporations that make real products and deliver useful services (i.e. 'productive corporations').").

32. *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013) (permitting the board to adopt forum-selection bylaws on a contractual theory, despite an absence of shareholder approval).

33. Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1177 (2017) ("The boards of these corporations believed that the republic they were governing owed its loyalty to its only citizens, and those citizens are called stockholders.").

34. Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1187 (2002).

more soured on the enterprise.

II. PROBLEMS WITH PRIMACY

Shareholder primacy has been the consensus governance model in corporate law for decades,[35] and the right of shareholders to elect the board of directors has been around even longer.[36] The theoretical foundation for this arrangement, though, did not achieve full flower until the law and economics movement in corporate law at the end of the last century. One prominent model describes the corporation as a nexus of freely bargained contracts among all corporate constituents, and therefore presumptively the most efficient way to structure firm governance.[37] Another model focuses on shareholders in their roles as owners of the corporate residual, which in theory gives them the appropriate incentives to make good firm decisions.[38] Rights to the residual also provide shareholders with a common interest in maximizing corporate profits, which arguably reduces their tendency to squabble about firm decisions and thus promotes efficiency.

In their foundational work on the law and economics of corporate law, Frank Easterbrook and Daniel Fischel married these two models into a simple, intertwined structure. Their book, *The Economic Structure of Corporate Law*,[39] reaffirmed the shareholder primacy norm by arguing that shareholders were the most economically vulnerable of the firm's participants. This vulnerability, coupled with their homogeneous preferences for wealth maximization, meant that shareholders should be

35. Cede & Co. v. Technicolor, Inc., 634 A2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."); *see also* E. Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices—or Vice Versa?*, 149 U. PA. L. REV. 2179, 2184 (2001) (stating that Delaware law adopts the norm of shareholder primacy).

36. *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1351–53 (2006) (noting that shareholders have had voting power extending back to the earliest of corporations).

37. *See* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory."); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) ("The corporation is a complex set of explicit and implicit contracts, and corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy.").

38. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983).

39. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

accorded the basic governance rights of the corporation.[40] This homogeneous interest in profits also eliminated the possibility of destructive voting cycles, à la Arrow's theorem.[41] Easterbrook and Fischel contended that the other participants in the corporation agreed, through their own contracts, to provide shareholders with residual rights to the corporation's profits and the voting rights that come with them.[42] Thus, the shareholder primacy norm provided the overriding purpose to the corporate form, while the nexus of contracts theory demonstrated how the parties reached this arrangement through something akin to voluntary agreements. These arguments for the exclusive shareholder franchise, many of which are now more than four decades old, continue to be cited, recited, and relied upon by the universe of scholars of corporate governance.

We and others have questioned these traditional arguments for the shareholder franchise. The nexus of contracts model of the corporation is an entirely fictitious account of the corporation and its constituents, and tells us very little about the choices that actual shareholders and other corporate constituents would make in the absence of various constraints.[43] The argument based on the residual is undercut by the growing realization that shareholders do not have a common interest in wealth maximization, but instead have interests that diverge along a number of dimensions.[44] As a result, scholars are losing trust in shareholders with significant power,[45] and

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40. *Id.* at 67–68.

41. *Id.* at 69–70.

42. *Id.* at 17, 37.

43. *See* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 50–67 (2020) (putting forward alternate descriptive and normative theories of the corporate form); Grant M. Hayden & Matthew T. Bodie, *Shareholder Voting and the Symbolic Politics of Corporation as Contract*, 53 WAKE FOREST L. REV. 511 (2018) (critiquing the nexus of contracts theory and shareholder voting).

44. HAYDEN & BODIE, *supra* note 43, at 68–102; *see* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 791 (2017) (describing "several sources of conflict among shareholders, including differing investment horizons and needs for cash payouts, empty voting, and competing outside interests"); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 477–98 (2008) (detailing divergent shareholder interests); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 574–92 (2006) (describing rent seeking and other features that conflict with the shareholder primacy account of shareholder voting).

45. Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1258 (2008) ("[A]ctivist shareholders are using their growing influence not to improve overall firm performance, as has generally been assumed, but to profit at other

there is even support for nonvoting shares and passive shareholding.[46] Those who support strengthened shareholder power are accused of supporting special interests and shadow agendas.[47] And the argument based on Arrow's theorem, with its prediction of firm-destroying voting cycles, was nonsensical from the very beginning.[48] Thus, the intellectual foundations of shareholder primacy have been subject to a sustained critique, mostly from the inside.

This has left us in a curious position. The intellectual foundations of shareholder primacy—particularly those espoused by Easterbrook and Fischel—are on shaky ground. And there has been little attempt to shore them up by rehabilitating the original arguments or developing new ones. At the same time, the "corporate governance machine"[49] lumbers on, oblivious to the collapse of the very ideas that helped set it in motion.

It is at this moment, though, that Strine's recent scholarly contributions are the most valuable. First, along with Aneil Kovvali, he identifies some compelling empirical reasons for doubting Easterbrook and Fischel's theory of the corporation.[50] Second, he gives a straightforward explanation for the continued dominance of shareholder primacy despite the collapse of its theoretical justifications: the exercise of corporate political power.[51] And Strine makes both contributions with the authority of one who has spent a

shareholders' expense."); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1750 (2006) ("[S]hareholder voting is properly understood not as a primary component of the corporate decisionmaking structure, but rather as an accountability device of last resort, to be used sparingly, at most.").

46. Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 697–98 (2019); *see* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 497 (2018) (arguing that passive funds should not have voting rights).

47. *See, e.g.*, Bainbridge, *supra* note 45, at 1754 (claiming that Lucian Bebchuk's argument for shareholder empowerment would help "precisely the institutions most likely to use their position to self-deal—that is, to take a non-pro rata share of the firm's assets and earnings—or otherwise to reap private benefits not shared with other investors"); Strine, *supra* note 31, at 451.

48. HAYDEN & BODIE, *supra* note 43, at 103–21; *see also* Grant Hayden & Matthew Bodie, *Arrow's Theorem and the Exclusive Shareholder Franchise*, 62 VAND. L. REV. 1219 (2009) (arguing that cyclical outcomes are unlikely).

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

50. *See* Aneil Kovvali & Leo E. Strine, Jr., *The Win-Win That Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders* (U. Chi. Coase-Sandor Inst. for Law & Econ., Research Paper No. 940, 2022) (outlining data that suggests that shareholder primacy has not redounded to the benefit of workers).

51. *Id.* at 3–5, 25–32; Dorothy S. Lund & Leo E. Strine, *Corporate Political Spending is Bad Business*, HARV. BUS. REV. (Jan.-Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business [https://perma.cc/K8W3-VJ7C].

career in the "real world" of corporate law.

Strine points to several situations where the theory of shareholder primacy founders on the shoals of the modern corporate world. The theory, for example, describes a corporation devoted to the interests of shareholders as a "win-win" situation for other corporate constituents (and, more broadly, society).[52] This is the familiar argument from the residual, where shareholders are free to maximize returns to the corporation while those spoils are divvied up among other constituents by contract and regulation.[53]

Unfortunately, this isn't quite how things have unfolded. Instead, corporations have generated enormous wealth for shareholders, but largely at the expense of other constituents, especially workers.[54] Studies document that much of the rise in returns to equity is not the result of genuine economic growth, but a result of a reallocation of the rewards from other stakeholders—especially workers—to shareholders.[55] The decline in unionization and reduction in worker protections has left labor in a position where they are able to capture a diminishing share of the returns; more win-lose than win-win. The prediction that shareholder primacy would produce a tide that lifts all boats has not materialized.

This leads Strine to examine what went wrong. The culprits, it turns out, are a series of flawed assumptions. For example, institutional investors with more narrow, short-term interest control most of the corporate voting these days.[56] More important, the argument for the residual depends on labor power or government regulation to force firms to internalize the costs of their behavior. These protections, though, have declined dramatically. Labor protections, antitrust law, environmental protections, and the like continue to break down, allowing shareholders to allocate more of the gains to themselves.[57] The win-win scenario assumes the continued presence of these

52. *See* Kovvali & Strine, *supra* note 50, at 7–10 (citing EASTERBROOK & FISCHEL, *supra* note 39).

53. *See id.* (explicating Easterbrook and Fischel's version of the argument from the residual); *see also* HAYDEN & BODIE, *supra* note 43, at 88–102 (explaining and critiquing the argument from the residual).

54. *See* Kovvali & Strine, *supra* note 50, at 10–14 (discussing studies that show increased shareholder returns have come at the expense of other constituencies).

55. *See id.* (citing, among other sources, Daniel L. Greenwald, Martin Lettau & Sydney C. Ludvigson, *How the Wealth Was Won: Factors Shares as Market Fundamentals* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25769, rev. Apr. 2021), https://www.nber.org/system/files/working_papers/w25769/w25769.pdf [https://perma.cc/ZPN8-86WS]; Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, Spring 2020, at 63).

56. *See id.* at 15–23 (discussing the power of institutional investors).

57. *See id.* at 23–39 (detailing the decline in protections for other corporate stakeholders).

protections to make the move from exclusive shareholder control to a shared prosperity. "Easterbrook and Fischel," however, "assumed all of the important problems away."[58] These unwarranted assumptions explain the predictive failure of their project.

Strine's other contribution is to help explain the reasons behind the continuing dominance of shareholder primacy. And dominate it does: despite recent lip service to other stakeholders in the form of debates about corporate purpose, there is no serious move to tinker with the underlying governance structures of corporations. How does such a system survive with its theoretical underpinnings in tatters? The answer, according to Strine, is straightforward: corporations have deployed their political power in a way to diminish external protections for other stakeholders and free corporations to pursue profits on behalf of their shareholders.[59]

This explanation is undoubtedly true. But it nonetheless bears emphasis as an important part of the story. The existing system is not going to fall apart simply because the original justifications turned out to be faulty. Nor is it going to self-correct. Once corporate power is exercised in the political arena—and we've seen this occur across the board, as legislatures, agencies, and courts become more responsive to corporate concerns—it's going to be very difficult to develop a political solution to the problem.

Strine and his coauthors, then, have identified and exposed some of the key shortcomings of shareholder primacy theory. They have, in the words of Oliver Wendell Holmes, done the work of dragging the dragon "out of his cave on to the plain and in the daylight, [so] you can count his teeth and claws, and see just what is his strength."[60] But it's important to remember that, for Holmes, this was only the first step. "The next is either to kill him, or to tame him and make him a useful animal."[61]

58. *Id.* at 4.

59. *See id.* at 3–5 (noting that corporate use of political power eroded protections for stakeholders); *id.* at 25–32 (describing corporations' effective use of political power); *see also* Lund & Strine, *supra* note 51 (discussing the effect of *Citizens United* on corporate political spending and the contrast between corporations' public statements versus their political donations); Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United*,* 100 CORNELL L. REV. 335, 335–43 (2015) (identifying a tension between the conservative justices' *Citizens United* decision and conservative corporate theory).

60. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

61. *Id.*

III. A PIVOT TO PARTICIPATION

A. External Reforms are Insufficient

We might have had a chance at a world where corporate warriors could battle within the Chancery's care and the rest of the world would not suffer repercussions. This is the post-New Deal world, where for a time jobs for working-class (white) Americans were more plentiful, unions bargained for strong wages and benefits, and business executives waved hello to line workers from their neighboring driveways.[62] Maybe this world never really existed, at least in its idealized form, but unionization rates did reach one-third of private sector workers in the 1950s, and in the 1970s CEO pay was only thirty times the average worker's pay, rather than 350 times.[63] Something seems dangerously broken about our current levels of economic inequality, our indifference to the looming climate catastrophe, and our political polarization and intolerance for each other's perspectives. We need to reassess where we have been for the last half-century—particularly the last twenty years.[64]

So, what to do? In the early to mid-twentieth century, unions organized employees across the country by economic force.[65] In industries such as auto manufacturing, truck driving, and steel production, they held together and went on strike to improve their wages and benefits. There is strong evidence that unions were the key to the post-War economic boom and the rising

62. Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged Its Ultimate Decline, A Response to Cuéllar, Levi, and Weingast*, 57 HARV. J. ON LEGIS. 67, 79 (2020) ("For many white Americans, the post-War era is one of a confident America, proceeding from its victory over evil forces to a prosperous time of greater inclusiveness.").

63. Abigail Johnson Hess, *In 2020, Top CEOs Earned 351 Times More than the Typical Worker*, CNBC, (Sept. 15, 2021, 1:12 PM), https://www.cnbc.com/2021/09/15/in-2020-top-ceos-earned-351-times-more-than-the-typical-worker.html [https://perma.cc/U6VW-YXJM].

64. *Cf.* Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 399 (2021) ("For at least forty years, a strain of economic thinking, typically embraced by those who believe that society is best served when corporations focus solely on making profits for stockholders, has increased the power of economic elites and gone to war against the regulatory state and externality protections put in place by the New Deal and Great Society to protect workers, consumers, the environment, and society generally.").

65. *See* Nicholas Kristof, *The Cost of a Decline in Unions*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/19/opinion/nicholas-kristof-the-cost-of-a-decline-in-unions.html [https://perma.cc/L44B-6BCX] (describing how unions have been integral to maintaining the middle class and suggesting that the decline in unions has led to income inequality).

fortunes of the middle class.[66] However, these representatives of collective worker power have been significantly diminished. The percentage of unionized private-sector employees has been steadily shrinking since its 1950s peak of about 35% to the current 6.1%.[67] As labor law scholars have chronicled, this withering of union power has many potential causes: sustained campaigns of employer hostility, weakened legal protections for workers and unions in a variety of contexts, competition from globalization and automation, and changing expectations about collective action and solidarity.[68] To this point, the nation has failed to undertake serious efforts to revive its fortunes.

Labor law needs reform.[69] But there are also structural problems with labor law as the primary driver of economic change. The NLRA creates zones of power and influence that leave the underlying business organizational structure intact. Employers are only required to bargain on specific topics that could be considered "mandatory" subjects of bargaining;[70] they have no duty to negotiate over issues such as product development, financing, leadership composition, executive compensation, and internal firm governance.[71] Employers may be forced to talk with the employees' representatives about the employees' bargain with the firm, but

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66. *See* JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1–2 (2014) (describing how unions were "*the* core equalizing institution" for income equality).

67. *Economic News Release: Union Members Summary*, U.S. BUREAU LAB. STAT. (Jan. 20, 2022, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/J47H-4KW3]; *see also* TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 128 (2012) (discussing the decline in union membership).

68. *See, e.g.*, ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (1st ed. 2006) (documenting the decline of union power and making proposals for how to revive it); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990) (same but proposing reforms that go beyond revamping union power); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528 (2002) (noting the gap between workers' desire for union representation and the actual supply of such representation); Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2769 (1991) (stating that private sector unionization has decreased nearly 30% from its peak).

69. For examples of proposals for reform, see JULIUS GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010); SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY, https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf [https://perma.cc/AW38-XL5Z].

70. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (discussing the mandatory subjects of collective bargaining).

71. *See id.* (emphasizing a party's freedom to bargain or not bargain over other subjects).

they have no duty to talk about how it runs the business.[72] Labor law doesn't provide employees and their representatives with participation in managerial decision-making.[73]

Moreover, the exclusion of labor from corporate governance means that the power of the corporate form will continue to be exerted against efforts to bolster workers. As our honoree at this symposium has recognized, the flow of funds from corporate coffers has flooded our political system, wiping out other participants in the process.[74] Although unions have significant political power in the United States, ultimately their donations are dwarfed by Wall Street contributions. Corporate leaders and financiers provide significantly more money to political campaigns than do unions.[75] A relatively small number of families provide a big chunk of overall political spending.[76] As a result, corporate spending reflects the interests of those who run the corporations and exercise absolute or effective control over them. Their interests do not align with those of ordinary workers.[77]

It is worth remembering that the New Deal was not the product of a harmonious partnership between capital and labor; established business interests fought tooth and nail against the reforms.[78] It took a terrible depression, a failed status quo presidency, and a visionary reformer with

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72. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (explaining how every decision made that may affect job security does not trigger mandatory bargaining).

73. *Cf.* Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181, 186–87 (1987) (discussing criticisms of the NLRA and the NLRB as weak and ineffectual).

74. Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 452 (2019); Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U.L. REV. 1007, 1033 (2020).

75. Dave Jamieson & Paul Blumenthal, *Labor Unions Spent a Record Amount on the Elections. But Not as Much as These 5 People*, HUFF. POST (Nov. 8, 2016, 4:52 PM), https://www.huffingtonpost.com/entry/labor-union-election-2016_us_58223b92e4b0e80b02cd7259 [https://perma.cc/D6L9-RD9K].

76. Nicholas Confessore, Sarah Cohen & Karen Yourish*, The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), https://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html [https://perma.cc/FB8G-BGVP] ("These donors' fortunes reflect the shifting composition of the country's economic elite. . . . Most built their own businesses, parlaying talent and an appetite for risk into huge wealth: They founded hedge funds in New York, bought up undervalued oil leases in Texas, made blockbusters in Hollywood.").

77. Strine, *supra* note 74, at 1033 ("For diversified investors, any increased profitability by particular corporations that results from externalities is suffered by them both as Worker Investors and as human citizens who pay taxes, breathe air, and have values not synonymous with lucre.").

78. KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL (W.W. Norton & Co. 2010).

huge Congressional majorities to enact the suite of regulatory protections that created the modern American administrative state. Because those reforms left the basic corporate governance structure in place, the internal relationship between corporate management and workers remained unfairly balanced against labor. If we want a stable new equilibrium that empowers ordinary working folks, we need a new power structure to sustain it.

B. Why Workers (and Other Stakeholders) Need Governance Rights

In its current incarnation, "stakeholderism" is a fairly anemic concept. In the debates about corporate purpose, it appears as the foil to shareholder primacy. In fact, however, many proponents of stakeholder theory take the underlying system of shareholder governance for granted—the debate is over whether the shareholder-elected board (and the officers they employ) should pay any attention to constituents other than those who elect them.[79] And this version of stakeholderism is duly criticized as being bad for shareholders and perhaps even counterproductive for the very stakeholders it seeks to empower.[80] All the while, the possibility of giving other stakeholders real governance rights is scarcely mentioned.[81]

Strine's vision of the corporation is largely in line with this conception of stakeholderism. He recognizes the flaws in shareholder primacy and argues for a series of changes to corporate law (and other regulatory regimes) to address them.[82] He advocates for a move toward the public benefit corporation model, where the firm has a duty to all stakeholders and to avoid causing harm to society[83] (but, notably, does not give other stakeholders

79. *See generally* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 67–184 (Elizabeth Pollman & Robert B. Thompson, eds., 2021) (essays debating the board's duty to consider the interests of stakeholders).

80. *See*, *e.g.*, Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 92 (2020) (claiming that stakeholderism should not be expected to provide extra protection to stakeholders and in fact may hurt them by reducing the size of the overall economy).

81. *See id.* at 161–63 (briefly considering giving other constituents voting rights but then making a series of largely conclusory arguments against it).

82. Strine, *supra* note 64.

83. *Id.* at 424–32.

enforcement rights).[84] He favors mandatory ESG reporting.[85] He believes that corporations should have compensation committees determine pay levels for all employees[86] and develop workforce committees to give workers the voice they lack in nonunionized workplaces.[87] He'd like to see restrictions on corporate political spending.[88] And he believes external regulatory regimes—such as those protecting workers, consumers, and the environment—should be strengthened and restored to their former glory.[89] The most promising corporate governance reforms "do not involve a revolution, but a restoration."[90]

When it comes to extending real governance rights to other stakeholders, however, Strine is more cautious. Take codetermination. While he's open to the idea, he believes that it is not as politically feasible as his restorative legislative agenda.[91] He also thinks that codetermination is unlikely to succeed without first building up the repositories of worker power that already exist in countries with significant codetermination regimes, such as strong unions, works councils, and an underlying infrastructure of worker representation.[92] And he's worried that many of the details of codetermination haven't been worked out—such as who, exactly, gets to vote for worker representatives; who may serve as such a representative, and how much they are paid; how frequently the elections are held, and who pays

84. *See id.* at 424, ("[O]ne of the most central proposals for reforming corporate law, the public benefit corporation model, builds on and strengthens traditional corporate law, rather than turning it upside down."); *id.* at 424 n.91 ("[T]here is now debate around how effective the PBC model is in promoting a stakeholder governance approach . . . . [W]e will have more evidence in coming years."); *see also* Jill E. Fisch & Stephen Davidoff Solomon, *The "Value" of a Public Benefit Corporation*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 68, 76 (Elizabeth Pollman & Robert B. Thompson, eds., 2021) ("Stakeholders lack any enforcement rights, even if a PBC explicitly identifies its mission as pursuing the interests of those stakeholders.").

85. Strine, *supra* note 64, at 432; Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance* 53–54 (Ctr. for L. & Econ. Stud., Colum. Univ. Sch. of L., Working Paper No. 643, 2021).

86. Strine et al., *supra* note 85, at 54–56.

87. *Id.* at 56–58.

88. Strine, *supra* note 64, at 429–31; Kovvali & Strine, *supra* note 50, at 3–5, 25–32; *see also* Lund & Strine, *supra* note 51 (discussing the risks of corporate political spending).

89. *See* Strine et al., *supra* note 85, at 58–61 ("Putting worker directors on boards cannot be expected to help American workers unless the promise of equity toward workers exemplified by the New Deal is restores."); Strine, *supra* note 64, at 433 ("[R]evitalized external regulation is essential to restoring a fair American economy.").

90. Strine, *supra* note 64, at 397.

91. Strine et al., *supra* note 85.

92. *See* Strine, *supra* note 64, at 434 (discussing the political conditions that need to change before codetermination can function appropriately).

for them; and the like.[93] Better to start with more modest reforms before moving on to consider codetermination.[94]

While we are cheered by Strine's desire to move toward codetermination, we don't find the arguments in favor of delaying that move to be altogether convincing. First, the restoration of New Deal types of worker protections (to say nothing of later consumer and environmental protections) involves a tremendous number of moving parts. It would require quite a bit of legislative momentum to shore up protections for all other corporate constituents, especially in the face of continued corporate political spending on behalf of shareholders. Though more radical, it may be easier, in a single legislative moment, to restructure large corporations from the inside out.

Second, though it's been claimed elsewhere as well,[95] we know of no evidence that the success of codetermination depends on the presence of other repositories of worker power. The mere fact that the two coexist in some of the European countries does not prove the point. Maybe the ongoing viability of top-down, codetermined corporate boards depends upon the presence of bottom-up, worker protections. Maybe it's the other way around.[96] In truth, strong worker protections within and without the corporation are probably mutually reinforcing, and it seems best to use a belt-and-suspenders approach. In any case, the argument that we should not move forward with codetermination because workers *lack* political and economic power is self-defeating, to say the least.[97]

When it comes to the more practical concerns, our country could (and most likely would) phase in any system of codetermination. We could, for

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93. Strine et al., *supra* note 85, at 34–50.

94. Strine et al., *supra* note 85, at 50–63 ("[A]dvocates of codetermination must create a foundation on which a reasonably effective system of minimalist codetermination can stand, and that creates the genuine potential for moving from minimalism to a more complete, ground-up system . . . .").

95. *See, e.g.*, Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 877 (2020) (discussing the institutional, legal, and economic differences that supposedly make codetermination more suitable in Germany than the United States).

96. Take, for example, a key part of that underlying apparatus in Germany—the shop-level works councils. Such entities are currently prohibited by § 8(a)(2) of the National Labor Relations Act in the United States, and for good reason. We worry that such committees may be used by firms to fend off real unions or, more broadly, give their workers a false sense that they have a real voice in company affairs. A codetermined corporate board, however, alleviates that worry, and paves the way for shop-level worker committees.

97. *See* Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 347 (2021) ("The relative powerlessness of workers . . . becomes reason to retain the feature of the governance structure that disempowers them to begin with.").

example, start with corporations of a certain size before extending it to smaller firms. We could give corporations tax incentives to move toward codetermined governance. And we could ramp up the required percentage of worker representatives on the boards over time. These kinds of measures would allow for the development of the supporting infrastructure for worker representation and permit us to make the kinds of tweaks and course corrections that would be demanded by such a significant change.

And all this leads us to a broader point. One thing missing from the agenda of most advocates of stakeholder theory, and from discussions of corporate purpose more generally, is the real prospect of assigning governance rights to stakeholders. This is somewhat understandable. For a long time, stakeholder advocates didn't really have much of a model for allocating rights and responsibilities among corporate participants.[98] But, at this point, such models exist, including ours that points towards extending governance rights to workers in typical situations but is flexible enough to accommodate other stakeholders in more unusual situations.[99] There's also been increasing awareness among American corporate law scholars of the continuing vitality of codetermination in many European countries.[100]

We think that the corporate purpose debates make little sense unless they involve giving some stakeholders—in particular, workers—full governance rights in corporations. One reason for this is that stakeholder interests need to be defined by the stakeholders themselves. The recent debates over corporate purpose have centered on whether shareholder-elected boards should take account of the interests of other stakeholders, not how those interests are defined. It's largely assumed that boards and corporate officers will be able to discern what's in the best interests of various stakeholders. But there's little reason to think this is true, which raises the question—what's the best way to capture the preferences of these other corporate constituents?

For many corporate stakeholders, the answer might be that their interests are best handled through regulation (such as environmental stakeholders) or contract (such as consumers). That is, those stakeholders may express their preferences through the political system or through contracting (or refusing to contract with) the corporation. Others, such as

98. *See* HAYDEN & BODIE, *supra* note 43, at 158–60.

99. *See id.* at 145–71.

100. *See, e.g.*, Dammann & Eidenmüller, *supra* note 95 (discussing why codetermination has succeeded in Germany); Strine et al., *supra* note 85 (comparing the United States to other nations with board codetermination); Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labor Law*, 23 COLUM. J. EUR. L. 135 (2016) (explaining how German codetermination arose).

workers, should be able to express their interests more directly, through their elected representatives on the board. The Accountable Capitalism Act,[101] proposed by Senator Elizabeth Warren, would require that companies with more than $1 billion in gross receipts have employees select at least 40% of the seats on the board.[102] Senator Tammy Baldwin has proposed the Reward Work Act,[103] which proposes that one-third of directors be selected directly by employees.[104] These proposals build on the work of progressive corporate law scholars who have advocated for more direct employee involvement in corporate governance.[105]

From the point of view of law and economics, which generally eschews the kind of paternalism that comes with telling people what they should want, there should be nobody better to express the true preferences of workers than the workers themselves. Having shareholder-elected board members, or the officers they hire, make decisions about what they think is best for workers is always going to be an approximation. Board members might guess, for example, that workers are primarily interested in higher wages. In fact, we know from several recent studies that employees at codetermined firms in Germany effectively trade away wages in return for better job security. A study by E. Han Kim, Ernst Maug, and Christoph Scheider, for example, confirmed that employees at full-parity codetermined firms are better protected against layoffs during industry downturns,[106] but pay a premium

101. Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

102. *Id.* § 6(b)(1).

103. Reward Work Act, S. 2605, 115th Cong. (2018).

104. *Id.* § 3(b).

105. *See, e.g.*, MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 16 (1995) (arguing that boards of directors should take into account the effects of their decisions on all of the corporation's stakeholders, including employees); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 287 (1998) ("[W]orkers should have some kind of representation on the board of directors or have some role in electing directors, and . . . directors of companies should be held to have some kind of fiduciary duties to workers in the employ of their firm."); Robert Hockett, *Why (Only) ESOPs?*, 12 STAN. J.L. BUS. & FIN. 84, 85 (2006) (arguing for a broader approach to the "ownership society" through employee ownership); Brett H. McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429 (2011) (discussing possible strategies for creating a role for employees in corporate governance); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008) (arguing for the preeminence of employees in corporate governance).

106. E. Han Kim, Ernst Maug & Christoph Scheider, *Labor Representation in Governance as an Insurance Mechanism*, 2018 REV. FIN. 1251, 1286. In another study, Jäger, Schofer, and Heining concluded that "worker representation on boards does not appear to affect wage setting, as measured by average wages, firms' wage policies, the wage structure within firms,

equal to 3.3% of their wages for this employment insurance.[107] Importantly, this swap of wages for job security has no effect on shareholders one way or the other.[108] And this, too, is a generalization; workers may well value different things in different industries and under different economic conditions. But there's certainly no reason to think shareholder-elected boards have better insight into the preferences of their workers than the workers themselves.

Ultimately, stakeholderism without governance rights offers illusory, meaningless protection. So long as a corporate board is accountable to shareholders alone, they will ultimately cater to shareholder interests. The Business Roundtable letter from CEO's pledging to pursue the interests of stakeholders other than shareholders has, thus far, been an empty promise.[109] And without any legal accountability, it's difficult to see how it could be otherwise. Even public benefit corporations, which constitute the core of Strine's prescription for recovery from shareholder primacy, lack a real enforcement mechanism. Shareholders still define the interests of other stakeholders and shareholders still call the shots.

CONCLUSION

We fully agree with Strine's call for "a forthright agenda that emphasizes the shared interests of working people of all colors, as well as connects the decline in gainsharing between workers and the corporations for whom they toil with the decline in unions and overall employee voice."[110] We may differ a bit on the relative weights of various proposals, and the appropriate timeline to follow. But the need for structural change in

or the degree of rent sharing." Simon Jäger, Benjamin Schoefer & Jörg Heining, *Labor in the Boardroom*, 136 Q.J. ECON. 669, 720 (2021). This suggests, then, that this feature of employment insurance at codetermined firms was not a result of employee entrenchment in the form of employee-manager collusion, and it did not come at the expense of other corporate constituents.

107. Kim et al., *supra* note 106, at 1279, 1286. The benefit of this employment insurance was really only experienced by white collar and skilled blue collar employees; unskilled blue collar workers do not receive much in the way of job security protections. *Id.* at 1286. The authors of the study attribute this finding to the lack of real representation of unskilled workers on supervisory boards. *Id.*

108. Kim et al., *supra* note 106, at 1286.

109. Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, 40 YALE J. REGUL. (forthcoming 2023), https://dx.doi.org/10.2139/ssrn.4026803; James Mackintosh, *Shareholders Reign Supreme Despite CEO Promises to Society*, WALL ST. J. (Feb. 10, 2022, 7:40 AM), https://www.wsj.com/articles/shareholders-reign-supreme-despite-ceo-promises-to-society-11644496644 [https://perma.cc/V6PP-3MUW].

110. Strine, *supra* note 62, at 69.

governance is overwhelmingly clear. The corporate law academy and the corporate governance community must recognize the failure of the status quo and pivot to a new perspective. We are fortunate that our friend from Delaware is well-positioned to lead us in this new direction.