2022

Stakeholderism, Corporate Purpose, and Credible Commitment

Lisa Fairfax
University of Pennsylvania Carey Law School

STAKEHOLDERISM, CORPORATE PURPOSE, AND CREDIBLE COMMITMENT

*Lisa M. Fairfax**

One of the most significant recent phenomena in corporate governance is the embrace, by some of the most influential actors in the corporate community, of the view that corporations should be focused on furthering the interests of all corporate stakeholders as well as the broader society. This stakeholder vision of corporate purpose is not new. Instead, it has emerged in cycles throughout corporate law history. However, for much of that history—including recent history—the consensus has been that stakeholderism has not achieved dominance or otherwise significantly influenced corporate behavior. That honor is reserved for the corporate purpose theory that focuses on shareholders and profit. Thus, many view the most recent embrace of stakeholderism as empty rhetoric. In light of this view, and the relatively fickle history of allegiance to stakeholderism, this Article seeks to explore whether we can expect that this most recent resurgence of stakeholderism will be different and hence whether we can expect that corporate actors will work to ensure that their corporations are governed in a way that benefits all stakeholders.

Relying on the theory of credible commitment—a theory focused on predicting whether economic actors will comply with their promises—this Article argues that there are considerable obstacles to achieving stakeholderism. This Article first argues that there are some reasons for optimism that this most recent embrace of stakeholderism will translate into reality. Second, and despite that optimism, this Article draws upon credible commitment theory to argue that it is unlikely that stakeholderism will have a lasting impact on corporate conduct unless corporations make a credible commitment to operating in a way that advances stakeholder interests and a broader social purpose. Third, this Article not only highlights the significant credible commitment

* Presidential Professor, University of Pennsylvania Carey Law School. Special thanks to Elizabeth Pollman, Jill Fisch, Anita Allen, Dorothy Roberts, Tom Baker, Veronica Root Martinez, Usha Rodrigues, Kristin Johnson, Guy Charles, Gina-Gail Fletcher, Kevin Davis, Andrew Schwartz, and Shaun Ossei-Owusu for their comments and perspectives on earlier versions of this draft. All errors, of course, are mine.

challenges posed by efforts to pursue a stakeholder-related corporate purpose, but it also reveals significant concerns with the ability of prevailing reforms to overcome those challenges. Nevertheless, this Article argues that these concerns do not necessarily doom to failure the credible commitment effort. Instead, relying on the too often overlooked emphasis credible commitment theory places on norms, this Article insists that the collection of governance mechanisms aimed at achieving credible commitment, even if flawed, may facilitate norm internalization in a manner that increases the likelihood that corporate actors will align their behaviors with stakeholderism.

INTRODUCTION

One of the most significant recent phenomena in corporate governance is the outspoken embrace of the view that corporations should operate in a manner that benefits society and all of the corporations' stakeholders.[1] This Article refers to this view of corporate purpose as stakeholderism.[2] This recent embrace of stakeholderism is best captured by two of the most

[1] See, e.g., Elizabeth Pollman, The History and Revival of the Corporate Purpose Clause, 99 Tex. L. Rev 1423, 1447–51 (2021) [hereinafter Pollman, History and Revival]; Colin Mayer, Prosperity: Better Business Makes the Greater Good 5–7, 9 (2018) (proposing that corporations be legally required to articulate a purpose); Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 Cornell L. Rev. 91, 124–26 (2020) (discussing reactions reflecting belief that focus on social purpose represented a "significant turning point"); Ofer Eldar, Designing Business Forms to Pursue Social Goals, 106 Va. L. Rev. 937, 939 (2020) (discussing trends toward firms pursuing social goals); Jill E. Fisch & Steven Davidoff Solomon, Should Corporations Have a Purpose?, 99 Tex. L. Rev. 1309, 1309–11 (2021) [hereinafter Fisch & Solomon, Should Corporations Have a Purpose?]; Elizabeth Pollman, Corporate Social Responsibility, ESG and Compliance, *in* The Cambridge Handbook of Compliance 662, 662–63 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

[2] See infra note 146 (explaining other labels used to refer to stakeholder-centered view of corporate purpose).

influential actors in the business community. In 2018, Larry Fink, the Chief Executive Officer ("CEO") of BlackRock, Inc. ("BlackRock"), the world's largest shareholder and asset manager,[3] posted a letter to CEOs proclaiming that corporations had an obligation to make a "positive contribution to society."[4] Fink asserted that corporations should be operated with a view towards benefitting all stakeholders as well as the broader community.[5] In 2019, Fink reiterated these sentiments, proclaiming that corporations need to have purpose and that "[p]urpose is not the sole pursuit of profits but the animating force for achieving them."[6]

Along these same lines, in 2019, the Business Roundtable, the nation's leading nonprofit association of chief executives and directors, released a statement signed by 181 CEOs, expressing a commitment to embracing a corporate purpose that included a "fundamental commitment" to deliver value to all of the corporations' stakeholders.[7] The Business Roundtable made clear that its statement was aimed at "[r]edefin[ing]" corporate purpose to promote "an economy that serves all Americans."[8] A 2020 *Fortune* survey revealed that sixty-three percent of CEOs surveyed agreed with the Business Roundtable statement.[9]

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[3] See The Rise of BlackRock, Economist (Dec. 5, 2013), https://www.economist.com/leaders/2013/12/05/the-rise-of-blackrock [https://perma.cc/CVY2-R373]; Liam Kennedy, Top 500 Asset Managers 2021, IPE (June 2021), https://www.ipe.com/reports/top-500-asset-managers-2021/10053128.article [https://perma.cc/8M8U-3YTX] (identifying BlackRock, Vanguard, and State Street as three of the largest asset managers).

[4] See Larry Fink, 2018 Letter to CEOs: A Sense of Purpose [hereinafter Fink, 2018 Letter], https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/HU35-78YS] (last visited Apr. 14, 2022).

[5] See id.

[6] Larry Fink, 2019 Letter to CEOs: Purpose and Profit [hereinafter Fink, 2019 Letter], https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter [https://perma.cc/Y3NB-JSA7] (last visited Apr. 14, 2022).

[7] Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans,' Bus. Roundtable (Aug. 19, 2019) [hereinafter Business Roundtable Statement], https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/XJS9-TTR4].

[8] Id.

[9] See Ira T. Kay, Chris Brindisi, Blaine Martin, Soren Meischeid & Gagan Singh, The Stakeholder Model and ESG: Assessing Readiness and Design Implications for Executive Incentive Metrics – A Conceptual Approach, PayGovernance (Sept. 1, 2020), https://www.paygovernance.com/viewpoints/the-stakeholder-model-and-esg [https://perma.cc/K2JF-WAZZ]; Alan Murray & David Meyer, The Pandemic Widens Rifts; Businesses Need to Help Heal Them, Fortune (May 11, 2020), https://fortune.com/2020/05/11/coronavirus-pandemic-stakeholder-capitalism/ [https://perma.cc/53H3-P39R].

There are certainly reasons to be skeptical about the potential impact of this statement. First, we have been here before.[10] The concept of a corporate purpose focused on stakeholders and social purpose is far from new. As early as 1932, Columbia Law Professor Merrick Dodd insisted that the corporation must serve a community of interests, including employees, creditors, and the broader society, and that the corporation should behave in a socially responsible manner.[11] Moreover, throughout the history of corporate law, various scholars and corporate actors have advanced the view that corporations have an obligation to be socially responsible and serve the interests of all stakeholders impacted by the corporation's activities, including shareholders, non-shareholders, and the broader community.[12] Despite these periods, many scholars consistently and vehemently insist that "shareholder primacy," which maintains that the corporation's purpose is to maximize profits to its shareholders,[13] should serve as the primary guide for how corporate

[10] See Leo E. Strine, Jr., Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock, 76 Bus. Law. 397, 411–15 (2021) [hereinafter Strine, Restoration] (discussing origins of social purpose debate).

[11] See E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1147–48, 1161 (1932).

[12] See Lisa M. Fairfax, Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries, 59 Wash. & Lee L. Rev. 409, 432 (2002) [hereinafter Fairfax, Doing Well While Doing Good]; Lisa M. Fairfax, The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms, 31 J. Corp. L. 675, 690–98 (2006) [hereinafter Fairfax, Rhetoric of Corporate Law] (noting proliferation of social purpose and social responsibility rhetoric in corporate documents and throughout the business community); Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 280–81 (1999); William W. Bratton, The Economic Structure of the Post-Contractual Corporation, 87 Nw. U. L. Rev. 180, 208–15 (1992) (outlining the "entity theory" of corporation); Timothy L. Fort, The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes, 73 Notre Dame L. Rev. 173, 184–86 (1997) (detailing stakeholder theory); C.A. Harwell Wells, The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century, 51 U. Kan. L. Rev. 77, 91–96 (2002) (discussing the debate on corporate social responsibility sparked by Dodd's 1932 article).

[13] See Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property 8–9 (1932); Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times Mag., Sept. 13, 1970, at 32, 33, 126 (stating that corporate executives are employees of shareholders). For a discussion of more recent supporters of shareholder maximization, see, for example, Sanjai Bhagat & Glenn Hubbard, Should the Modern Corporation Maximize Shareholder Value?, AEI Econ. Perspectives, Sept. 1, 2020, at 1, 3–4 and Bebchuk & Tallarita, supra note 1, at 94–95. See also Fairfax, Doing Well While Doing Good, supra note 12, at 430–31 (discussing shareholder primacy theory); Edward B. Rock, For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose, 76 Bus.

agents govern their corporation.[14] This includes scholars who believe that stakeholderism is more appropriate.[15] The very fact that we have been here before, and that scholars continue to dismiss stakeholderism, suggests reason for skepticism about whether the promises contained in stakeholderism will be realized. A second reason for skepticism is the fact that many corporations, including those who signed the Business Roundtable commitment, have a history related to socially responsible acts that is questionable at best.

This history, coupled with the historically fickle nature of the embrace of stakeholderism, begs an important question: Can we really expect that the most recent embrace of stakeholderism will translate into real change in corporate behavior? This Article answers that question by drawing on insights from the theory of credible commitment. The theory of credible commitment is an ideal lens through which to explore the viability of stakeholderism because it is aimed at exploring the extent to which individuals will honor the promises they make in an economic exchange.[16]

With credible commitment theory as a backdrop, this Article makes four important claims. This Article begins by acknowledging reasons to be skeptical about the impact of the most recent embrace of stakeholderism on corporate behavior. Nonetheless, this Article first contends that the type of corporate actors involved in this most recent embrace, coupled with socially conscious stakeholders' growing ability to influence corporate reputation and bottom line through their use of twenty-first century public and social media platforms, may be influential enough to offer a genuine opportunity to turn the corner, thus setting the stage for corporations to genuinely make efforts to operate in a manner that advances the interests of all stakeholders.

Second, however, this Article argues that unless corporations make a credible commitment to ensuring that corporations will focus on other stakeholders, it is not likely that corporations will be able to seize this opportunity so that it translates into a genuine shift in corporate attitude and behavior, particularly in the medium and long-term. In advancing this

Law. 363, 363–67, 375 (2021) [hereinafter Rock, For Whom is the Corporation Managed?] (detailing various perspectives on stakeholderism).

14 See Henry Hansmann, How Close is the End of History?, 31 J. Corp. L. 745, 746 (2006); Fairfax, Rhetoric of Corporate Law, supra note 12, at 690.

15 See Fairfax, Rhetoric of Corporate Law, supra note 12, at 682.

16 See infra Part II (describing credible commitment theory).

argument, this Article draws from credible commitment theory to remind us that the realities of the economic environment along with the nature of economic promises mean that we cannot simply assume that corporations will be incentivized to adhere to their commitments, even if we assume they are acting in good faith when they make those commitments. In other words, this Article reminds us why corporate commitments have credibility problems.

Third, this Article not only argues that there are significant challenges to credible commitment in the context of stakeholderism but also questions whether available corporate governance mechanisms can overcome these challenges. In so doing, this Article sketches out a typology of factors necessary to facilitate credible commitment, and through the lens of this typology, demonstrates the manner in which prevailing credible commitment vehicles, even if reformed, may fall short of addressing those factors.

However, this Article argues that this demonstration does not doom credible commitment in this area to failure. To be sure, several prominent scholars have concluded that the kind of credible commitment flaws highlighted in this Article render efforts to actualize stakeholderism infeasible.[17] This Article rejects that conclusion. Instead, this Article argues that such a conclusion fails to account for the emphasis credible commitment theorists place on informal constraints in the form of norms and thus fails to account for the possibility that the cumulative effect of reforming foundational governance mechanisms may serve a very important normative function.[18] This Article uses the term "norm" to refer to expectations regarding how individuals ought to behave.[19] Social science and empirical research reveal that norms can have a significant impact on behavior because individuals feel pressure to align their

[17] See Bebchuk & Tallarita, supra note 1, at 147; Rock, For Whom is the Corporation Managed?, supra note 13, at 391–95 (noting factors that complicate implementing a regime of stakeholder primacy); Dorothy S. Lund, Corporate Finance for Social Good, 121 Colum. L. Rev. 1617, 1619–21 (2021).

[18] See infra Part IV.

[19] For general discussion of the meaning of the term "norm," see Cristina Bicchieri, Norms in the Wild: How to Diagnose, Measure and Change Social Norms 28–32 (2017) [hereinafter Bicchieri, Norms in the Wild]; Cristina Bicchieri, The Grammar of Society: The Nature and Dynamics of Social Norms 29 (2006) [hereinafter Bicchieri, The Grammar of Society]; Eric A. Posner, Law and Social Norms 5 (2000); Cass R. Sunstein, Social Norms and Social Rules, 96 Colum. L. Rev. 903, 914 (1996) [hereinafter Sunstein, Social Norms]; Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. Pa. L. Rev. 1643, 1656–57 (1996).

behavior with prevailing norms.[20] While external pressures such as those embedded in formal rules and legal constraints associated with corporate governance vehicles can ensure norm compliance, norms have the greatest chance of influencing behavior when they are internalized.[21] This is because when norm internalization occurs, individuals comply with the norm irrespective of formal rules, legal enforcement, or other forms of external pressure.[22] While the process of norm internalization is inexact, consistent and repeated exposure to norms, the credibility and legitimacy of normative sources, and the visibility of the norm can all contribute to the process of norm internalization.[23] Based on these insights, this Article argues that the collection of governance mechanisms aimed at achieving credible commitment, even if flawed, will be instrumental in facilitating norm internalization in a manner that increases the potential for corporate actors to align their behaviors with stakeholderism.

From this perspective, credible commitment theory suggests that while these reforms may not be an end, they may facilitate a means to an end. That is, their cumulative effect may be to increase the likelihood that individual corporate actors will believe that they ought to embrace stakeholderism, thereby increasing the likelihood that such actors will seek to engage in behaviors that align with such embrace—even or especially when external actors are not around to pressure them to do so.

Part I of this Article highlights the most recent embrace of stakeholderism and then articulates reasons for skepticism and optimism related to that embrace. Part II introduces the theory of credible commitment and demonstrates why credible commitment is necessary to actualize stakeholderism. Part II then draws upon credible commitment theory to advance a typology of factors that hinder credible commitment. Finally, Part II utilizes that typology to illustrate how the significant challenges associated with credible commitment apply to corporate behavior in general and to behavior focused on stakeholders in particular.

In light of this illustration, Part III begins by identifying the set of factors necessary for overcoming credible commitment challenges to stakeholderism. Part III concludes by surfacing several flaws with prevailing credible commitment reforms and pinpointing the difficulties with overcoming those flaws.

[20] See infra Section IV.B.
[21] See infra Section IV.B.
[22] See infra Section IV.B.
[23] See infra Part IV.

Despite this conclusion, Part IV redeems the collection of proffered reforms by demonstrating that they can play a role in facilitating credible commitment through increasing the potential for norm internalization, and thus opening a pathway for altering corporate behavior in favor of stakeholderism in a manner that does not rely on formal rules and constraints. Part IV then addresses important limitations and concerns associated with this norm internalization exercise. Part V concludes.

Credible commitment theory demonstrates that credible commitments are an essential component to any economic promise, thereby highlighting the importance of credible commitment to the promises embedded in stakeholderism. That theory also highlights the difficulty of credibly committing to stakeholderism and raises serious concerns about whether reforms can combat those difficulties. Viewed from this lens, credible commitment theory appears to confirm the skepticism with which many have greeted this new wave of stakeholder rhetoric. However, this Article concludes with a note of optimism. It is entirely possible that the collection of mechanisms aimed at reforming core aspects of our governance system can facilitate credible commitment by altering the normative expectations that guide corporate behavior, paving the way for corporations to make real on their promise to focus on all of their stakeholders.

I. ONCE AGAIN, STAKEHOLDERISM

A. The Rise in Rhetoric

In 2018, BlackRock CEO Larry Fink made headlines with the entire business community when he posted his annual letter to CEOs stipulating the expectation that corporations focus on social purpose, stakeholders, and the broader community.[24] Fink explained his view as follows:

> [T]he public expectations of your company have never been greater. Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their

[24] See Fink, 2018 Letter, supra note 4.

> stakeholders, including shareholders, employees, customers, and the communities in which they operate.[25]

Emphasizing the need to focus on all stakeholders, Fink further asked this set of questions:

> Companies must ask themselves: What role do we play in the community? How are we managing our impact on the environment? Are we working to create a diverse workforce? Are we adapting to technological change? Are we providing the retraining and opportunities that our employees and our business will need to adjust to an increasingly automated world? Are we using behavioral finance and other tools to prepare workers for retirement, so that they invest in a way that will help them achieve their goals?[26]

Fink doubled down on these sentiments in his next annual letter to CEOs, noting that corporations need to have purpose and that "[p]urpose is not the sole pursuit of profits but the animating force for achieving them."[27]

Mirroring Fink's views, other institutional investors have embraced the view that corporations should focus on issues beyond shareholders and profit. Both State Street Global Advisors, Inc. and The Vanguard Group, the other two of the largest asset managers,[28] have also insisted that corporations should be managed with a view towards enhancing the interests of all of their stakeholders.[29] Thus, both groups have emphasized the importance of engaging with non-shareholder stakeholders such as employees and suppliers as well as the importance of addressing broader societal concerns such as supporting local communities and being mindful of environmental issues.[30] In the words

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[25] Id.
[26] Id.
[27] See Fink, 2019 Letter, supra note 6.
[28] See Kennedy, supra note 3.
[29] See State Street, 2016 Corporate Responsibility Report 4 (2016), http://www.statestreet.com/content/dam/statestreet/documents/values/StateStreet_2016_CorporateResponsiblityReport.pdf [https://perma.cc/NC3G-LJZS] (emphasizing the importance of creating value for clients and shareholders, engaging employees and suppliers, and supporting communities and the environment); David M. Silk, Sabastian V. Niles & Carmen X.W. Lu, ESG, Sustainability, and CSR: Governance and the Role of the Board, *in* The Lawyer's Corporate Social Responsibility Deskbook: Practical Guidance for Corporate Counsel and Law Firms 9, 11 (Alan S. Gutterman, Margaret M. Cassidy, Travis Miller & Ashley C. Walter eds., 2019).
[30] See supra note 29.

of the former CEO of Vanguard, "By taking a broader, more complete view of corporate purpose, boards can focus on creating long-term value, better serving everyone—investors, employees, communities, suppliers and customers."[31] Consistent with these sentiments from the leading institutional investors, studies reveal that a large number of institutional shareholders have begun to profess a commitment to stakeholderism and thus a belief that corporations should be run in a manner that enhances the interests of all stakeholders while being mindful of the broader community and societal concerns.[32] In this regard, there appears to be a groundswell of institutional shareholders embracing stakeholderism.

Activist shareholders also have begun to embrace the view that corporations should focus broadly on delivering value to all of their stakeholders.[33] Shareholder activists such as ValueAct Capital, JANA Partners, and Blue Harbor have announced plans to align their investment priorities with a focus on social and environmental factors.[34] This announcement is remarkable not only because activist shareholders are often viewed as caring only about the financial bottom line but also because they are perceived as willing to discard the interests of other stakeholders in pursuit of financial gain.[35] The fact that activist shareholders are also embracing stakeholderism highlights the emerging consensus around the importance of stakeholderism.

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[31] See Corporations' New Purpose—To Serve All Stakeholders Not Just Shareholders, Indus. Week (Aug. 20, 2019) [hereinafter Industry Week], https://www.industryweek.com/leadership/article/22028107/corporations-new-purpose-to-serve-all-stakeholders-not-just-shareholders [https://perma.cc/A4GD-XLGC] (quoting Bill McNabb, former CEO of Vanguard) ("[I]t seems the corporate world is all in.").

[32] See Robert G. Eccles & Svetlana Klimenko, The Investor Revolution, Harv. Bus. Rev., https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/C9AU-G5M5] (finding that ESG issues were "almost universally" at the top of the minds of executives of some forty-three global institutional shareholders, and thus such investors were taking "meaningful steps" to integrating sustainability issues into their investment criteria). The article also noted that from 2006–2018, the number of investors agreeing to incorporate ESG issues into their investment decisions grew from 63 to 1,715. See id.

[33] See Silk et al., supra note 29, at 11; Thomas Franck, Social and Sustainable Investing Gets a Boost from an Unlikely Source: Wall Street Activists, CNBC (Apr. 27, 2018), https://www.cnbc.com/2018/04/27/social-investing-gets-a-boost-from-an-unlikely-source-activists.html [https://perma.cc/WX8Q-56PR].

[34] See Silk et al., supra note 29, at 11; Eccles & Klimenko, supra note 32.

[35] See Franck, supra note 33 (noting that shareholder activists were "once known for pushing for extreme cost-cutting or just about anything that would boost the bottom line").

Further highlighting this consensus, major corporations and their leaders have aligned themselves with stakeholderism. In August 2019, Business Roundtable, the nation's leading nonprofit association of chief executives, released a statement in which it affirmatively noted that it was "mov[ing] away from shareholder primacy" and towards a "commitment to all stakeholders."[36] The statement expressed a "fundamental" commitment by the 181 CEOs who signed the statement to lead companies for the benefit of all stakeholders. Importantly, the statement pledged to deliver value to customers, invest in employees (including fostering diversity and inclusion), deal fairly and ethically with suppliers, support communities (including protecting the environment by embracing sustainable practices throughout businesses), and generate long-term value for shareholders.[37] The statement ended with the following:

> Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.[38]

CEOs of the corporations who signed the commitment have spoken individually about the importance of the commitment and their support for stakeholderism.[39] For example, Johnson & Johnson's CEO stated that the statement "affirms the essential role corporations can play in improving our society."[40] The CEO of Progressive Corp. noted that "the best-run companies do more" than "generate profits and return value to shareholders"; those companies "put the customer first and invest in their employees and communities."[41]

Beyond the Business Roundtable statement, other influential groups have gravitated towards stakeholderism. On the heels of the Business Roundtable statement, the World Economic Forum issued a manifesto essentially denouncing shareholder primacy and urging companies to adopt a model of corporate purpose aimed at serving the interests of all

[36] Business Roundtable Statement, supra note 7.
[37] See id.
[38] Id.
[39] See Industry Week, supra note 31.
[40] Id.
[41] Id.

stakeholders.[42] The manifesto proclaimed that the "purpose of a company is to engage all its stakeholders in shared and sustained value creation."[43]

B. Stakeholderism as Aligned with For-Profit Purpose

In embracing stakeholderism, all of the aforementioned corporate actors not only profess a belief that stakeholderism aligns with the most appropriate way to operate a for-profit corporation but also insist that it is more appropriate than shareholder primacy.[44] That is, they insist that stakeholderism is more consistent with the desire to generate better returns and support the long-term health of the corporation than shareholder primacy.[45] Commenting on the importance of the Business Roundtable statement, Jamie Dimon, the CEO and Chair of JPMorgan Chase & Co., insisted that corporations had embraced the statement "because they know it is the only way to be successful over the long term."[46] Johnson & Johnson's CEO stated that a corporate purpose focused on delivering value to all stakeholders "better reflects the way corporations can and should operate."[47] The president of the Ford Foundation insisted that businesses needed to focus on "generating long-term value for all stakeholders" in order to ensure "prosperity and sustainability for both business and society."[48] Along these same lines, the CEO of Progressive Corp. stated: "In the end, it's the most promising way to build long-term value."[49] From this perspective, advocates of stakeholderism have made clear their belief that stakeholderism is entirely consistent with the goals of a for-profit corporation and is a more

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[42] Klaus Schwab, Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution, World Econ. F. (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ [https://perma.cc/UA89-UYGJ].

[43] Id.

[44] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1310 (noting that the corporate purpose debate is an "effort to reorient corporate decision-making away from economic value maximization in favor of broader societal objectives").

[45] See Franck, supra note 33; Industry Week, supra note 31 (noting industry leaders' emphasis on the positive impact of the commitment on long-term value creation).

[46] See Lila MacLellan, Nearly 200 CEOs Just Agreed on an Updated Definition of "the Purpose of a Corporation," Quartz (Aug. 19, 2019), https://www.yahoo.com/video/nearly-200-ceos-just-agreed-140249549.html [https://perma.cc/C5WH-EFKZ] (quoting Dimon).

[47] See Industry Week, supra note 31.

[48] See id.

[49] See id.

appropriate mechanism for achieving those goals than shareholder primacy.

These corporate actors also appeared to be expressing a belief that corporations can achieve stakeholderism within the traditional for-profit corporation. To be sure, in recent years alternative entities have emerged aimed at enabling economic actors to advance the interests of other stakeholders. For example, the benefit corporation is a new and increasingly popular corporate form that seeks to enable corporations to advance social objectives alongside profit goals.[50] Certainly some have suggested that the best mechanism for achieving stakeholderism is through opting into a benefit corporation statute. However, the Business Roundtable statement, and the sentiments expressed by actors supporting that statement, appears to suggest that corporations can achieve stakeholderism without resorting to changing the corporate form. Hence this Article focuses on whether this suggestion is credible.

C. Reasons for Skepticism

1. The Fickle Road of Stakeholder Rhetoric

One of the primary reasons for skepticism is the fact that we have heard these kinds of sentiments throughout the history of corporate law, but they never seem to gain significant traction or lasting acceptance. Indeed, the sentiments reflected in stakeholderism are far from new.[51] There has been a long-standing debate in corporate law about corporate purpose.[52] On

[50] See, e.g., Jill E. Fisch & Steven Davidoff Solomon, The "Value" of a Public Benefit Corporation, *in* Research Handbook on Corporate Purpose and Personhood 68, 68–69 (Elizabeth Pollman & Robert B. Thompson eds., 2021) [hereinafter Fisch & Solomon, "Value" of a Public Benefit Corporation]; Michael B. Dorff, Why Public Benefit Corporations?, 42 Del. J. Corp. L. 77, 79–81 (2017); Roxanne Thorelli, Note, Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit, 101 Minn. L. Rev. 1749, 1765 (2017).

[51] See Nell Minow, Six Reasons We Don't Trust the New "Stakeholder" Promise from the Business Roundtable, Harv. L. Sch. F. on Corp. Governance (Sept. 2, 2019), https://corpgov.law.harvard.edu/2019/09/02/six-reasons-we-dont-trust-the-new-stakeholder-promise-from-the-business-roundtable/ [https://perma.cc/Y9UM-Z2PZ] ("We've seen this before.").

[52] See Fairfax, Rhetoric of Corporate Law, supra note 12, at 676; Fairfax, Doing Well While Doing Good, supra note 12, at 430–33; Henry N. Butler & Fred S. McChesney, Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation, 84 Cornell L. Rev. 1195, 1195 (1999) (noting that the corporate purpose question has been debated "ad nauseum"); William T. Allen, Our Schizophrenic Conception of the Business Corporation, 14 Cardozo L. Rev. 261, 264–66 (1992) (explaining the competing conceptions of corporate purpose).

one side of the debate are those who subscribe to the more conventional "shareholder primacy" view of the corporation and its purpose, contending that the corporation exists to maximize profits to its shareholders.[53] On the other side of the debate are those who embrace the view that corporations should focus on the interests of all of its stakeholders.[54] This debate has animated corporate law for decades.

Many trace the genesis of this debate to the 1930s dialogue between Harvard Law Professor Adolf Berle and Columbia Law School Professor Merrick Dodd.[55] Relying on the notion that corporate officers and directors hold shareholders' property in trust, Professor Berle insisted that the proper purpose of a corporation was to maximize shareholders' property interest, i.e., their profits.[56] Professor Dodd vehemently disagreed, insisting that corporate officers and directors were trustees for the corporate enterprise as a whole.[57] As a result, those officers and directors have an obligation not only to focus on the concerns of all of the stakeholders within that enterprise but also to engage in socially responsible endeavors.[58]

Modern versions of this debate abound.[59] Thus, scholars such as Stephen Bainbridge, Lucian Bebchuk, Henry Hansmann, and Edward Rock contend that corporations should focus primarily on shareholders

[53] See Fairfax, Doing Well While Doing Good, supra note 12, at 430; Berle & Means, supra note 13, at 8–9 (referring to shareholders as "owner[s]" and noting that corporate governance must focus on the problems caused by the separation of ownership and control); Friedman, supra note 13, at 33.

[54] See Fairfax, Doing Well While Doing Good, supra note 12, at 432; see also Bratton, supra note 12, at 208–15 (discussing entity theory); Fort, supra note 12, at 184–86 (detailing stakeholder theory); David Hess, Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness, 25 J. Corp. L. 41, 54 (1999) (explaining popularity of stakeholder theory); John H. Matheson & Brent A. Olson, Corporate Cooperation, Relationship Management, and the Trialogical Imperative for Corporate Law, 78 Minn. L. Rev. 1443, 1465–69 (1994) (noting stakeholder theory).

[55] See Fairfax, Doing Well While Doing Good, supra note 12, at 436–37 (describing the debate); Dodd, supra note 11, at 1147–48.

[56] A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049, 1049 (1931) ("[A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders . . . .").

[57] Dodd, supra note 11, at 1160–61.

[58] Id.

[59] See Fairfax, Rhetoric of Corporate Law, supra note 12, at 681–82.

and maximizing profit.[60] Milton Friedman famously stated that "[t]he [s]ocial [r]esponsibility [o]f [b]usiness [i]s to [i]ncrease [i]ts [p]rofits."[61] In his treatise, Professor Robert Clark argued that corporate purpose involves the relationship between shareholders and directors and officers.[62] By sharp contrast, many others such as Cynthia Williams, Kent Greenfield, and Lynne Dallas have embraced a conception of corporate purpose that focuses on attending to the interests of all corporate constituents.[63] Professors Lynn Stout and Margaret Blair have advanced a "team production" theory of the corporation which embraces the view that corporations have a responsibility to balance the concerns of all corporate stakeholders.[64] This theory substantially contributed to the ongoing debate about the most appropriate corporate purpose norm.

Despite this debate, corporate scholars have almost universally agreed that shareholder primacy has been the victor in this debate.[65] In 2005, Professor Henry Hansmann insisted that there was "increasing consensus among the relevant actors[] around the globe" that a corporate purpose focused on shareholders represented "the most attractive social ideal for the organization."[66] Even scholars who prefer the social purpose theory grudgingly admit that shareholder primacy has dominated the corporate governance landscape.[67] As one commentator noted, even though shareholder primacy "has always had skeptics," "[s]hareholder primacy has been the core operating principle of public companies for about 50

[60] Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green, 50 Wash. & Lee L. Rev. 1423, 1423–25 (1993); see supra notes 13, 14.

[61] Friedman, supra note 13, at 32.

[62] Robert Charles Clark, Corporate Law 30 (1986).

[63] See Strine, Restoration, supra note 10, at 413 (discussing list of scholars focused on stakeholder concerns); Jill E. Fisch, Keith L. Johnson & Cynthia A. Williams, Why Corporate Sustainability Disclosure Has Become a Mainstream Demand, NYU L. 11–12, https://www.law.nyu.edu/sites/default/files/Corporate%20Sustainability%20Disclosure%20by%20Fisch%20Johnson%20Williams%209.18.pdf [https://perma.cc/JV6T-XCWV] (last visited Apr. 12, 2022); Lynne L. Dallas, Two Models of Corporate Governance: Beyond Berle and Means, 22 U. Mich. J.L. Reform 19, 19–25 (1988).

[64] Blair & Stout, supra note 12, at 281 (describing directors as "mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps . . . the productive coalition . . . together").

[65] See Fairfax, Rhetoric of Corporate Law, supra note 12, at 682.

[66] Hansmann, supra note 14, at 746.

[67] See Fairfax, Rhetoric of Corporate Law, supra note 12, at 682, 690.

years."[68] Consistently, Professors Lucian Bebchuk and Roberto Tallarita note that despite the recurring debate around purpose, shareholder primacy represented the dominant corporate purpose theory at the turn of the twenty-first century.[69] The fact that stakeholderism has emerged throughout history without appearing to gain any dominance is cause for skepticism about the viability of the most recent embrace. From this perspective, it is no surprise that in response to the Business Roundtable statement, corporate law scholars discounted it, with one referring to the statement as "thankfully" just empty rhetoric.[70]

To be sure, the emerging support for stakeholderism has sparked yet another debate about the most appropriate corporate purpose. Thus, in the months after its publication, scholarly voices have emerged in support of the Statement and the corresponding embrace of stakeholderism.[71] Colin Mayer has written a book advocating that corporations be legally required to articulate a socially responsible corporate purpose.[72] Alex Edmans' recent book echoes the sentiments in the Business Roundtable statement, arguing that corporations should focus on a purpose that creates value for all of society.[73] However, there is also a growing number of scholarly critiques of the statement, aligning with the sentiment that it reflects empty rhetoric and that it is normatively undesirable.[74] Those who view the statement as a mere rhetorical device appear to have history on their side, underscoring the skepticism about the realistic impact of sentiments embracing stakeholderism.

[68] Andrew Winston, Is the Business Roundtable Statement Just Empty Rhetoric?, Harv. Bus. Rev. (Aug. 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric [https://perma.cc/33EX-R45T].

[69] See Bebchuk & Tallarita, supra note 1, at 106.

[70] Id. at 95–96; Jesse Fried, The Roundtable's Stakeholderism Rhetoric is Empty, Thankfully, Harv. L. Sch. F. on Corp. Governance (Nov. 22, 2019), https://corpgov.law.harvard.edu/2019/11/22/the-roundtables-stakeholderism-rhetoric-is-empty-thankfully/ [https://perma.cc/CF28-AE3D].

[71] See, e.g., Strine, Restoration, supra note 10, at 399–400; Eldar, supra note 1, at 939–43; Winston, supra note 68.

[72] See Mayer, supra note 1, at 6–7, 12.

[73] See Alex Edmans, Grow the Pie: How Great Companies Deliver Both Purpose and Profit 3–4 (2020) (noting that a corporate focus on social value increases the pie for everyone, making the corporation more profitable).

[74] See infra notes 81, 82; Rock, For Whom is the Corporation Managed?, supra note 13, at 393–95; Bhagat & Hubbard, supra note 13, at 11.

2. The Gap Between Rhetoric and Reality

Some question the sincerity of the embrace of stakeholderism based on the activities of the Business Roundtable and many of the corporations who have expressed a commitment to stakeholderism. In so doing, many point to the historical activities of the Business Roundtable and the statement's signatories.[75] One commentator has noted that the Business Roundtable has fought against many efforts aimed at advancing the interests of other stakeholders.[76] Similar sentiments have been expressed related to the corporations who signed the Business Roundtable statement. As one commentator noted, "Scan the list of 181 signatories to the recent memo and it's a Who's Who of corporate behavior that has burdened and disadvantaged the very stakeholders they now will champion."[77] Others point out that the Business Roundtable signatories include companies that have spent years fighting against actions beneficial to stakeholders or otherwise engaging in activities that have proved harmful to other stakeholders.[78] Still others have noted that many corporations "have been preaching—though arguably not living" the concept of social purpose for some time.[79] As a result, some have insisted that the historical activities of the corporations pose a "serious credibility problem."[80]

Commentators also have highlighted corporate actions and statements that occurred after the statement's release to support this credibility problem. For example, Professor Dorothy Lund notes that Amazon announced that it would cease paying medical and health benefits for

[75] See, e.g., Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1337–38.

[76] See Barry Ritholtz, Stakeholder Capitalism Will Fail if It's Just Talk, Bloomberg (Aug. 21, 2019), https://www.bloombergquint.com/gadfly/business-roundtable-shareholder-primacy-shift-judged-by-actions [https://perma.cc/2B7Z-K8BT] (listing, among other things, efforts to prevent consumer protection initiatives and fights against unions).

[77] See id.; see also Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1337–38 (discussing inconsistency between commitments and corporate conduct).

[78] See Winston, supra note 68 (noting that the fact that Exxon Mobil "has spent decades questioning climate change and slowing global action" makes it difficult to believe that the company now cares for the stakeholders); Lund, supra note 17, at 1619–20 (pinpointing labor and employment violations of companies who signed the Business Roundtable statement).

[79] MacLellan, supra note 46 (noting that the Business Roundtable statement "will be welcomed, but with skepticism").

[80] Minow, supra note 51; see also Winston, supra note 68 (noting that the history of some corporations makes it "really hard to take some of these signatures seriously").

part-time workers mere days after signing the statement.[81] In this same vein, Professors Bebchuk and Tallarita's survey of Business Roundtable signatories revealed that such companies do not believe that the statement committed them to materially change their behavior.[82] Given the seeming inconsistencies between companies' historical behavior and the promises associated with the statement, Bebchuk and Tallarita insist that this belief confirms their view that the statement does not signal a shift towards more socially responsible behavior.[83]

D. Reasons for Optimism

1. New Voices

While the embrace of stakeholderism is not new, those who have embraced it are new. Indeed, it is clear that the concept of stakeholderism has captured the attention of the business community, perhaps because they are being embraced by members of the business community who have heretofore been closely aligned with shareholder primacy.[84] Thus, when making its statement about stakeholderism, the Business Roundtable explicitly noted that it had previously endorsed a corporate purpose centered on shareholder primacy.[85] In fact, in 2002, the Business Roundtable issued the following statement:

> Corporations are often said to have obligations to stockholders and to other constituencies, including employees, the communities in which they do business, and government, but these obligations are best viewed as part of the paramount duty to optimize long-term stockholder value.[86]

In light of this statement, the Business Roundtable took great pains to make clear that its 2019 statement reflected an explicit departure from its prior conception of corporate purpose.[87] One commentator noted that the statement is "radically different" from its previous view that the corporation owed its duty to stockholders and that other stakeholders were

[81] Lund, supra note 17, at 1619–20.
[82] Bebchuk & Tallarita, supra note 1, at 131–32.
[83] Id. at 137.
[84] See Silk et al., supra note 29, at 15–16.
[85] See Business Roundtable Statement, supra note 7.
[86] See The Business Roundtable, Principles of Corporate Governance 30 (2002), [https://perma.cc/REW7-33UX].
[87] See Business Roundtable Statement, supra note 7.

only of derivative importance.[88] Another commentator referred to the statement as a "sea change."[89] Hence, while stakeholderism is clearly not new, the Business Roundtable endorsement of that rhetoric is new. The Business Roundtable's embrace of stakeholderism represents a significant development in corporate governance.

The embrace by large and influential investor groups like Vanguard, State Street, and BlackRock is also new. Indeed, traditional investors who embraced stakeholderism were those who had a more obvious connection to stakeholders, such as labor unions, pension funds, and faith-based organizations.[90] Thus, it is new that the top three asset managers in the world have strenuously supported stakeholderism. It is also new that equity and fixed-income investors—those who have historically been "hands-off" when it comes to embracing a stakeholder ideal—have actively begun to do so.[91]

It is new that hedge fund activists have begun to embrace stakeholderism. Indeed, as one commentator noted, concepts associated with social purpose and corporate social responsibility had been the "bastion" of "do-gooders" but had not caught the attention of high-profile activists.[92] Certainly for these activists, this shift in focus on stakeholders reflects a new paradigm.[93]

Perhaps most significantly, what is new is the growing consensus among many corporate actors about the propriety of stakeholderism. As one set of commentators notes, while the concepts of sustainability and social purpose embedded in stakeholderism are by no means new, what is new is the "move into the mainstream of the investment world."[94] Importantly, research suggests that this move into the mainstream will continue to expand.[95] The fact that the concepts reflected in stakeholderism are increasingly being viewed as core components of

[88] MacLellan, supra note 46.

[89] Industry Week, supra note 31.

[90] See Silk et al., supra note 29, at 9; see e.g., Kevin Bifulco, Faith-Based Investment and Sustainability, Inspire (Mar. 26, 2019), https://www.inspireinvesting.com/post/faith-based-investment-and-sustainability [https://perma.cc/G5D3-SNLR].

[91] See Eccles & Klimenko, supra note 32.

[92] Franck, supra note 33.

[93] See id. (quoting hedge fund activists' reference to the embrace of social and environmental concerns as a "new paradigm for smart investing"); Eccles & Klimenko, supra note 32.

[94] Daniel C. Esty & Quentin Karpilow, Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation, 36 Yale J. on Regul. 625, 648 (2019).

[95] See id. at 649–50.

good corporate governance by a growing cross section of the corporate community is new and bodes well for the possibility that those concepts will actually impact corporate conduct.

2. New Weight

The recent stakeholderism embrace is also significant because it has come from some of the most influential actors in the business community. Fink's statements are influential because BlackRock is influential.[96] BlackRock is the world's largest shareholder and asset manager.[97] BlackRock holds a position in almost every major corporation in the world, and it is the single biggest shareholder in many of those companies.[98] Indeed, BlackRock owns at least five percent of more than half of all publicly traded companies.[99] BlackRock therefore has a unique seat at the corporate table coupled with a unique and unprecedented ability to capture the attention of much of the business community and influence the decisions made by members of that community.[100] As a result, the fact that BlackRock has put its weight behind supporting and encouraging corporations to pay heed to their social purpose and commitment to all stakeholders is especially notable and impactful. Moreover, BlackRock, State Street, and Vanguard are three of the largest asset managers in the world. Hence, their collective voices reflect significant influence in the corporate arena.

In addition, as the nation's leading nonprofit association of chief executives, Business Roundtable has long held a key position as the voice of the nation's largest corporations and their boards.[101] One commentator referred to Business Roundtable as "America's most influential group of corporate leaders."[102] Business Roundtable has been viewed as one critical source of the collective sentiments of the country's major public officers and directors—those actors with the most influence over the corporation and its operations.[103] Illustrative of this influence, the

[96] See Shawn McCoy, How BlackRock Wields Vast Influence over Government & Economy, GV Wire (July 9, 2018), https://gvwire.com/2018/07/09/how-blackrock-wields-vast-influence-over-government-and-the-economy/ [https://perma.cc/8B5B-MKB7].
[97] Id.; The Rise of BlackRock, supra note 3.
[98] The Rise of BlackRock, supra note 3.
[99] McCoy, supra note 96.
[100] See id.; The Rise of BlackRock, supra note 3.
[101] See MacLellan, supra note 46.
[102] Id.
[103] See id.

signatories to the Business Roundtable statement led companies with an aggregate market capitalization exceeding $11 trillion and reflect over one-third of total market capitalization in the U.S. equity market.[104]

3. New Pressure

This most recent embrace is significant because it has emerged during a period in corporate law when shareholders have greater power and have demonstrated a willingness to use that power to pressure corporations around issues related to social purpose.[105] In the past few decades, shareholder power has increased dramatically, leading to an environment in which shareholders have increased influence over corporate affairs.[106] Importantly, shareholders have been willing to use their increased influence to pressure corporations to engage in more socially responsible behaviors.[107] Shareholder pressure has gotten results.[108] These results indicate that shareholders' increased power may trigger an increased opportunity for this most recent embrace of stakeholderism by shareholders to result in real change. As one commentator has noted, the one core reason why stakeholderism may be more than empty rhetoric is that investors like BlackRock are putting pressure on companies to rethink the role of business in society and to alter their actions consistent with their new role.[109]

4. New Public Environment

Stakeholders' increased power and visibility in influencing corporate affairs also raises the likelihood that corporations comply with commitments made to those stakeholders. The current information environment ensures not only that stakeholders can more easily acquire information about a corporation but also that such information is available

[104] Bebchuk & Tallarita, supra note 1, at 106.
[105] See Lisa M. Fairfax, From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm, 99 B.U. L. Rev. 1301, 1322–27 (2019) [hereinafter Fairfax, From Apathy to Activism].
[106] See id. at 1327–28.
[107] See, e.g., Franck, supra note 33; Fink, 2018 Letter, supra note 4.
[108] See Fairfax, From Apathy to Activism, supra note 105, at 1327–29; Lisa M. Fairfax, Just Say Yes? The Fiduciary Duty Implications of Directorial Acquiescence, 106 Iowa L. Rev. 1315, 1319–20 (2021) [hereinafter Fairfax, Just Say Yes?].
[109] See Fairfax, Just Say Yes?, supra note 108, at 1319–20.

to them on a continual basis.[110] The Internet also enables stakeholders to more easily communicate directly with one another, providing alternative avenues for the sharing of corporate information such as online reviews, blogs, and Instagram posts.[111] This information environment dramatically increases stakeholders' ability to influence corporate behavior and reputation.[112] As Professor Hillary Sale notes, this new environment means that corporations are no longer simply beholden to directors, officers, and shareholders.[113] Instead, outside stakeholders increasingly have more influence over corporations, particularly public corporations.[114] Sale notes that the publicness of corporations means that corporations are increasingly under pressure to align their behavior to stakeholder expectations.[115] In response, corporations expend significant resources managing their reputations to appeal to stakeholders.[116]

Increasingly this includes a commitment to advancing stakeholder interests. Empirical and anecdotal evidence reveals that stakeholders have increasingly come to expect that corporations will manage their businesses with an eye towards how their business activities impact social issues ranging from environmental matters to race relations.[117] Moreover,

[110] See Keri Calagna, Managing Reputation Risk, Wall St. J. (July 24, 2017), https://deloitte.wsj.com/cmo/2017/07/24/managing-reputation-risk/ [https://perma.cc/YV7G-56F4] (noting steep rise in stakeholder influence resulting from widespread availability of corporate information as a result of 24/7 news coverage); Judy Larkin, Strategic Reputation Risk Management 14 (2003) (noting that the Internet enables information to be shared about corporations and their behaviors with broad audiences).

[111] See Larkin, supra note 110, at 14, 17.

[112] See id. at 14; Hillary A. Sale, The Corporate Purpose of Social License 6–7 (2019), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3189&context=facpub [https://perma.cc/XKC2-4GHM] (noting increased ability of public actors to influence private company affairs).

[113] Hillary A. Sale, The New "Public" Corporation, 74 L. & Contemp. Probs. 137, 138, 148 (2011) [hereinafter Sale, The New "Public" Corporation] (noting that corporations must address the expectations of Main Street and must operate with a sense of their "publicness"); Hillary A. Sale, Public Governance, 81 Geo. Wash. L. Rev. 1012, 1034 (2013) [hereinafter Sale, Public Governance] (noting that the key to understanding corporation's publicness is understanding that groups outside of the corporation impact corporate governance and create pressure for reform).

[114] See Sale, The New "Public" Corporation, supra note 113, at 148; Sale, Public Governance, supra note 113, at 1034–35.

[115] See supra note 114.

[116] See Ann M. Lipton, Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure, 37 Yale J. on Regul. 499, 513 (2020).

[117] See Larkin, supra note 110, at 18–19; Terry Nguyen, Consumers Don't Care About Corporate Solidarity. They Want Donations., Vox (June 3, 2020), https://www.vox.com/the-goods/2020/6/3/21279292/blackouttuesday-brands-solidarity-donations [https://perma.cc/H7

that evidence reveals that corporations respond to these expectations, seeking to align both their rhetoric and behavior with increased stakeholder expectations around socially responsible practices.[118] The publicness of corporations, and the stakeholder pressure that stems from that publicness, increases the likelihood that corporations will align their behavior to public expectations about social and antisocial activity.[119] Corporations are willing to spend considerable sums seeking to manage their reputations to appeal to stakeholders who increasingly expect corporations to engage in socially responsible behaviors.[120] This new environment of stakeholder influence increases the potential that corporate rhetoric related to stakeholders will be transformed into reality.

* * *

There are clearly reasons to be skeptical about the extent to which the recent embrace of stakeholderism will have any significant impact on corporate behavior. However, this Section offers some reasons for optimism. As a result, this Article suggests that this new embrace of stakeholderism may represent a new opportunity for advocates of that norm to mobilize for real change. The next Part of this Article reveals that the ability to take advantage of that opportunity and actualize stakeholderism depends upon credible commitment.

II. CREDIBLE COMMITMENTS AND CORPORATE PURPOSE

The theory of credible commitment is an ideal lens through which to analyze the viability of stakeholderism because that theory is aimed at exploring the extent to which individuals will honor the promises they make in an economic exchange. While credible commitment theory has not been used to evaluate the viability of corporate purpose, others in the corporate law and securities arena have relied upon credible commitment theory to explain and understand the behaviors of corporate actors in

3J-4USR] ("People overwhelmingly prefer to buy from companies that share their beliefs and values . . . ."); Omar Rodríguez-Vilá & Sundar Bharadwaj, Competing on Social Purpose, Harv. Bus. Rev., https://hbr.org/2017/09/competing-on-social-purpose [https://perma.cc/KC2X-RMNG] (last visited Apr. 14, 2022) ("Consumers increasingly expect brands to have not just functional benefits but a social purpose. As a result, companies are taking social stands in very visible ways.").

[118] See Larkin, supra note 110, at 3–4 (discussing the rising importance of corporate reputation and stakeholder perceptions and the impact on corporate behavior).

[119] See Lipton, supra note 116, at 510.

[120] Id. at 513–16.

various economic contexts.[121] Thus, credible commitment theory can provide valuable insights to the issue regarding whether we can expect corporate actors to honor the commitments underlying their embrace of stakeholderism.

In particular, credible commitment theory offers a typology of factors for understanding why credible commitment to stakeholderism may prove especially challenging. This typology centers around four factors: (1) the uncertainty associated with the content of the commitment, (2) the long-term nature of the commitment, (3) the fact that the commitment seeks to advance the interests of multiple parties, and (4) the lack of stakeholder voice in the current accountability regime. After emphasizing the importance of credible commitment, this Part will explore that typology in relation to stakeholderism.

A. The Credible Commitment Imperative

First and most importantly, credible commitment theory demonstrates the relatively intuitive fact that credible commitments are necessary to ensure that actors adhere to the promises they make in an economic exchange. The theory of credible commitment seeks to determine how best to ensure that actors honor their promises in an economic exchange.[122] Such theory has its genesis in the economics literature.[123] Nobel Prize winner Douglass North, the economist most closely

[121] See Edward Rock, Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure, 23 Cardozo L. Rev. 675, 685 (2002) [hereinafter Rock, Securities Regulation]; Ronald J. Gilson & Alan Schwartz, Corporate Control and Credible Commitment, 43 Int'l Rev. L. & Econ. 119, 120 (2015).

[122] See Douglass C. North, Institutions and Credible Commitment, 149 J. Institutional & Theoretical Econ. 11, 11 (1993) [hereinafter North, Institutions and Credible Commitment] (relying on game theory to analyze issues associated with credible commitment); Douglass C. North, Institutions, Institutional Change and Economic Performance 5–6 (1990) [hereinafter North, Institutional Change] (discussing the importance of human behavior and individual decisions that create our institutions and affect the costs of transacting); Oliver E. Williamson, The Economic Institutions of Capitalism 48–49 (1985) (noting that parties devise institutions to generate compliance with bargains and pinpoint how best to create "credible commitments").

[123] Nahalel A. Nellis, Note, Deficiencies in European Monetary Union's Credible Commitment Against Monetary Expansion, 33 Cornell Int'l L.J. 263, 271–72 (2000) (crediting R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 4 (1960), and North, Institutional Change, supra note 122, at 4, for the birth of credible commitment theory).

associated with credible commitment theory,[124] and other economists realized that the mere fact that actors make promises does not guarantee that those promises will be kept. Instead, a credible commitment must be made. "Credibility is a critical aspect of any commitment because 'a promise is not valuable unless its beneficiary believes that it will be kept.'"[125] In other words, without credibility there is less assurance that economic actors will comply with any commitments that they make.

The need for credible commitment is linked to discretion. At its core, credible commitment theory focuses on identifying mechanisms for restricting, conforming, or incentivizing the use of discretionary power in order to render commitments more reliable.[126] This is because when there is considerable discretion, there is considerable need for assurances that such discretion will be exercised in a manner that aligns with commitments.[127]

North emphasizes that we cannot assume that economic actors will use their discretion to comply with their commitments even if they are acting in good faith.[128] North admits that credible commitment is not the entire solution to the problem of ensuring that economic actors keep their promises, but it is "overwhelmingly the most pressing."[129]

While credible commitment theory has not been used to evaluate the viability of corporate purpose, corporate and securities law scholars have recognized the critical importance of credible commitment in other contexts.[130] Professor Edward Rock has highlighted the need for credible commitment in the securities law context and therefore relied on the insights of credible commitment theory to evaluate strengths and weaknesses related to credible commitments involving our disclosure

[124] See also Nellis, supra note 123, at 272 (identifying North as the economist who applied Coase's theory to argue that reductions in transaction costs occur through institutions, which constrain human behavior).

[125] Charles Anthony Smith, Credible Commitments and the Early American Supreme Court, 42 Law & Soc'y Rev. 75, 79 (2008) (citing Douglas G. Baird, Robert H. Gertner & Randal C. Picker, Game Theory and the Law 51 (1994)).

[126] Nellis, supra note 123, at 272 (noting that theory of credible commitment focuses primarily on identifying sources of constraints that "'disable or render costly' the use of discretionary power," quoting Kenneth A. Shepsle, Discretion, Institutions, and the Problem of Government Commitment, *in* Social Theory for a Changing Society 245, 250 (Pierre Bourdieu & James S. Coleman eds., 1991)).

[127] See North, Institutions and Credible Commitment, supra note 122, at 13.

[128] See id. (noting that rational actors can act in a multitude of ways when confronted with complicated choices, even when they have seemingly identical tastes).

[129] Id. at 14.

[130] See Rock, supra note 121, at 685–86; Gilson & Schwartz, supra note 121, at 120.

regime.[131] In fact, Rock contends that making commitments credible is among the most important features of corporate law.[132] Professors Ronald Gilson and Alan Schwartz have addressed the need for credible commitments for certain corporate governance arrangements, particularly in the context of matters involving controlling shareholders.[133] These scholars have recognized the fact that credible commitments are necessary to ensure that corporate officers and directors comply with their obligations.

Importantly, current commentators also have implicitly recognized the need for a credible commitment in the context of corporate purpose. For example, Martin Lipton has complained about the lack of adequate assurances or devices that can ensure that corporate officers and directors will adhere to their responsibilities towards other stakeholders.[134] This complaint is in essence a concern about credible commitment. It is also clear that the skepticism related to whether corporations will honor the sentiments within the Business Roundtable statement stems from a lack of belief in the credibility of their commitment—the lack of any means for assuring us that such corporations will be compelled to make good on their promises.[135] This suggests that the dividing line between empty rhetoric and meaningful change is credible commitment. At its core, therefore, both the skeptics and those who profess some level of optimism about the viability of stakeholderism have all recognized that a credible commitment is necessary to ensure that corporations deliver on that norm.

B. A Typology of Credible Commitment Challenges

Credible commitment theory highlights a typology of factors that make credible commitment especially challenging. First, the lack of clarity or certainty related to the meaning or contours of a commitment undermines the establishment of a credible commitment.[136] Second, commitments

[131] Rock, supra note 121, at 676–77.

[132] See id. at 676 n.2.

[133] Gilson & Schwartz, supra note 121, at 120.

[134] Martin Lipton, Corporate Purpose: Stakeholders and Long-Term Growth, Harv. L. Sch. F. on Corp. Governance (May 29, 2019), https://corpgov.law.harvard.edu/2019/05/29/corporate-purpose-stakeholders-and-long-term-growth/ [https://perma.cc/68YU-LKFS].

[135] See Minow, supra note 51; Ritholtz, supra note 76; Winston, supra note 68 (expressing skepticism since some signatories had acted in direct opposition to Business Roundtable initiatives); MacLellan, supra note 46.

[136] See Nellis, supra note 123, at 287–89 (demonstrating how lack of clarity in the meaning of credit institutions undermines credible commitment); Jason Webb Yackee, Bilateral

involving decisions whose impacts can only be assessed in the long run or that must be kept over a long period of time raise credibility concerns.[137] Third, commitments that involve promises to a range of different interests or groups pose special credibility problems.[138] Fourth, when there exists no appropriate mechanism for holding economic actors accountable for the commitment, it is harder to take the commitment seriously.[139]

C. Credible Commitment Challenges to Stakeholderism

As an initial matter, credible commitment theory informs us that credible commitment is particularly necessary in the corporate arena because of the considerable discretion afforded to actors within that arena. One of the core tenets of corporate law is that directors and officers have broad discretion to manage the affairs of the corporation.[140] This discretion ensures that directors and officers can make decisions free from second-guessing from other actors.[141] However, credible commitment theory makes clear that this broad discretion undermines the credibility of corporate commitments.[142] Credible commitment theory also reveals that the typology of factors that pose credibility challenges applies with special force in the context of stakeholderism.

Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?, 42 Law & Soc'y Rev. 805, 812 (2008) (discussing credible commitment problems associated with the ambiguous standards and uncertain definition of promises within Bilateral Investment Treaties ("BITs")); North, Institutional Change, supra note 122, at 6 (noting the need to reduce uncertainty), 96–97 (describing how the common law, an example of institution, reduces uncertainty through incremental modification).

[137] See North, Institutions and Credible Commitment, supra note 122, at 13, 15.

[138] See Sebastian Krapohl, Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs, 10 Eur. L.J. 518, 521–22 (2004) (demonstrating that a credible commitment problem exists in making promises to diffuse interests of multiple groups); Nellis, supra note 123, at 274–75; North, Institutional Change, supra note 122, at 95 (indicating that it is necessary to constrain human interaction when there are a large number of players in a game).

[139] See North, Institutions and Credible Commitments, supra note 122, at 18 (discussing the importance of accountability); Yackee, supra note 136, at 808.

[140] See Smith v. Van Gorkom, 488 A.2d. 858, 872 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Fairfax, Doing Well While Doing Good, supra note 12, at 439.

[141] See Fairfax, Doing Well While Doing Good, supra note 12, at 439–40.

[142] See North, Institutions and Credible Commitment, supra note 122, at 13 (noting the importance of disabling discretion for certain credible commitments); Nellis, supra note 123, at 272 (noting the connection between discretion and credible commitment challenges).

1. Identifying the Commitment

Credible commitment problems arise in two ways when there is a lack of clarity regarding the nature of the commitment. First, the lack of clarity related to the meaning or contours of a commitment undermines the establishment of a credible commitment.[143] Indeed, when commitments are ambiguous or unclear, it is extremely difficult to pinpoint actions promised and to determine if an actor's conduct has complied with the commitment, rendering the commitment potentially meaningless.[144] Second, lack of clarity creates accountability concerns. It is extremely difficult to hold a promisor accountable for failing to comply with a commitment that is vague or ambiguous.[145]

Stakeholderism itself involves significant lack of clarity, underscored by the difficulty in best describing stakeholderism. As an initial matter, the multitude of labels by which stakeholderism has been referred (ranging from stakeholder capitalism to Corporate Social Responsibility ("CSR"), Environmental, Social, and Governance ("ESG"), and sustainability) underscores a certain lack of clarity related to the theory's meaning and contours.[146] There is also a decided lack of clarity with respect to the concerns and groups whose interests are to be pursued under stakeholderism. Does it only include environmental and social issues? Does it involve a commitment to charitable giving or altruistic behavior? With respect to community concerns, does it include local, regional, national, or global communities? Which stakeholders are included—just employees, consumers, and customers? What about creditors and suppliers? An assessment by Professors Bebchuk and Tallarita reveals that state statutes expressly granting corporations the ability to advance

[143] See Nellis, supra note 123, at 287 (demonstrating how lack of clarity in the meaning of credit institutions undermines credible commitment), 290 (demonstrating how lack of clarity related to the nature of the activities that comply with the commitment creates problems for the credibility of that commitment); Yackee, supra note 136, at 808, 812.

[144] See Yackee, supra note 136, at 808, 812.

[145] See id. at 812.

[146] Labels range between "sustainability," "corporate social responsibility" ("CSR"), "stakeholder capitalism," "stakeholderism," "stakeholder governance," and environmental, social, and governance ("ESG"). See, e.g., Fairfax, Doing Well While Doing Good, supra note 12, at 432 (articulating "corporate social responsibility"); Bratton, supra note 12, at 208–15 (analyzing different theories for defining legal corporate entities); Fort, supra note 12, at 184–85 (discussing "stakeholder theory"); Hess, supra note 54, at 54–55 (touching on "stakeholder theory," "stakeholder management," and "corporate social responsiveness"); see also Wells, supra note 12, at 82–96 (explaining the history behind the modern legal debate regarding corporate social responsibility).

the interests of non-shareholder stakeholders (so-called other constituency statutes) are not aligned on the question of which interests should be advanced under the "stakeholder" label and thus differ on both the groups and the interests identified.[147] This lack of clarity not only makes it difficult to pinpoint the precise nature of the commitment but also makes it difficult to ascertain whether or not actors are complying with their commitment when they engage in or forego particular actions or decisions.[148] In other words, this lack of clarity impedes the establishment of credible commitment as well as the ability to hold actors accountable for their commitment.

Perhaps most importantly, there is considerable lack of clarity with respect to the content of stakeholderism itself. This issue has at least two dimensions. First, there is a lack of clarity about the centrality of shareholder concerns to stakeholderism.[149] On one end of the spectrum are those who insist that stakeholderism means that corporations should pursue stakeholder interests, but only so long as those interests are plausibly related to shareholder concerns.[150] On the other end of the spectrum are those who contend that stakeholderism stands for the principle that corporations should be free to sacrifice shareholder concerns in the pursuit of other stakeholder interests.[151] Importantly, many have opined that only the latter formulation of stakeholderism merits our attention because the former aligns with corporations' current discretion and hence does not reflect a significant shift in corporate

[147] See Bebchuk & Tallarita, supra note 1, at 105, 117 (noting that all statutes list employees and customers; some identify creditors, society, and local community, but others do not).

[148] See id. at 115–16, 119–20.

[149] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1323 ("Purpose advocates send mixed messages about the relationship of corporate purpose to shareholder value.").

[150] See id. at 1329–30; Brandon Boze, Margarita Krivitski, David F. Larcker, Brian Tayan & Eva Zlotnicka, The Business Case for ESG, Stanford Closer Look Series 1, 1 (May 23, 2019), https://ssrn.com/abstract=3393082 [https://perma.cc/STC3-C74A]; Bebchuk & Tallarita, supra note 1, at 109 (discussing notion that consideration of stakeholders represents a means to the end of shareholder welfare); Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1310 (noting that the corporate purpose debate is an effort to reorient corporate decision-making away from profits and in favor of broader societal objectives).

[151] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1332–33 (noting the position that the consideration of stakeholder interests is permissible even if inconsistent with shareholder value); Lund, supra note 17, at 1626–27; Bebchuk & Tallarita, supra note 1, at 114.

purpose.[152] This Article's aim is not to resolve the question about the precise meaning of stakeholderism, but instead to pinpoint the lack of clarity associated with that meaning along with the insight that this lack of clarity poses significant credible commitment challenges because it once again underscores the difficulty of establishing and enforcing the commitment.

The second clarity concern relating to the content of stakeholderism is the lack of clarity surrounding the kinds of actions that advance the various interests associated with stakeholderism.[153] For example, the Business Roundtable statement professes a commitment to "deliver[] value to [their] customers."[154] What exactly does that mean? If you are an airline company, does that mean that you must provide customers with reasonably priced flights? Free snacks, meals, and other amenities? Have more flight routes? Have more direct flight routes? Minimize wait times? It is entirely possible that different customers may have different understandings of what constitutes "value." In fact, research suggests that investors and other stakeholders pursue stakeholderism for a wide array of reasons, which impact their understanding about the kinds of actions that advance stakeholderism.[155] Unless we have a better appreciation for the actions that comply with stakeholderism, we may struggle to evaluate the validity or veracity of a corporation's commitment to that norm.

Importantly, the concern about lack of clarity as it relates to stakeholderism is not novel. Indeed, historically one of the primary criticisms of stakeholderism was lack of clarity.[156] The lack of clarity with respect to who is covered by stakeholderism, and what actions comply with stakeholderism, raises serious concerns about whether we can fully

[152] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1330–32; Lund, supra note 17, at 1620, 1626; Bebchuk & Tallarita, supra note 1, at 110 (noting that the conception that stakeholder concerns are linked to the long-term shareholder value is not conceptually different from "old fashioned" shareholder primacy).

[153] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1337 (noting lack of clarity around what commitments in corporate purpose documents mean).

[154] Business Roundtable Statement, supra note 7; see also Bebchuk & Tallarita, supra note 1, at 127 (referring to the statements in the Business Roundtable statement as "remarkably vague" and offering "nonspecific and underdefined commitments"); Eldar, supra note 1, at 939 (referring to statements as vague).

[155] See Esty & Karpilow, supra note 94, at 653 (noting difference between investors who seek to "screen[] out bad actors" and those who look for a mix of sustainability and financial performance).

[156] See supra note 146 and accompanying text.

articulate or identify compliance with stakeholderism.[157] Credible commitment theory confirms that this lack of clarity creates an obstacle for meaningful commitment to stakeholderism.

2. The Trouble with Time

North has noted that a core credible commitment issue centers around how to bind actors to agreements across time.[158] Timing concerns have at least two dimensions. The first concern centers around ensuring that there is no change of heart and thus that there are assurances that present commitments will be honored through the entire tenure of the promise.[159] The second timing concern stems from the fact that some commitments can only be realized after the passage of time.[160] This makes it difficult to determine if current actions comply with the commitment or otherwise will influence future behavior in the appropriate manner.[161] Of note, timing concerns in the corporation may be magnified by the fact that individuals responsible for complying with corporate commitments are likely to change with the passage of time.

The credibility challenges associated with time apply with special force in the context of stakeholderism. The hallmark of stakeholderism is that, rather than focusing on short-term profit, the corporation should be run to ensure the long-term health of the corporation.[162] Proponents of stakeholderism insist that in order to focus on the long term, corporations must focus on the interests of the many non-shareholder stakeholders whose efforts support the long-term health of the corporation.[163] In this regard, the focus on the long term is inextricably linked to stakeholderism

[157] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1337–38.
[158] See North, Institutions and Credible Commitment, supra note 122, at 11, 13, 15 (noting that time is critical and that credible commitment focuses on how best to bind players to an agreement "across space and time").
[159] See id. at 14.
[160] See id. at 15.
[161] See North, Institutional Change, supra note 122, at 107 (noting concerns with time and that credible commitments are intended to facilitate "the long-run performance of economies").
[162] See Fairfax, Doing Well While Doing Good, supra note 12, at 438; A.A. Sommer, Jr., Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later, 16 Del. J. Corp. L. 33, 52 (1991).
[163] See Fairfax, Doing Well While Doing Good, supra note 12, at 438 (noting that courts allow directors to make decisions that further the corporation's long-term interests); Sommer, supra note 162, at 52.

and its focus on advancing stakeholder interests.[164] However, this focus on the long term reflects both concerns that make timing an issue for credible commitment. This long-term focus poses credible commitment challenges because of the difficulty with ensuring that promises will be kept over an extended period of time as well as the difficulty with assessing whether current behaviors will have the desired long-term result. The long-term aspect of stakeholderism therefore impedes the ability to take the commitment seriously.[165]

3. Multiple Stakeholders and the Trade-off Dilemma

Commitments made to multiple groups pose credibility challenges on two fronts. First, the commitment risks being illusory if it fails to articulate how best to weigh competing interests and make appropriate trade-offs. This is especially true when such groups have differing and competing interests.[166] Without articulating the rules associated with these trade-offs, such commitments pose serious credibility challenges. Second, commitments to multiple groups raise accountability concerns by creating a potential to play groups off of one another.

Clearly stakeholderism envisions a commitment to multiple stakeholders. Critics of stakeholderism argue that one of its primary flaws is that it focuses on multiple stakeholders without any guidance around how best to advance the interests of many different groups who may have different and conflicting interests.[167] To be sure, the rise in shareholder power has revealed that the shareholder primacy norm also poses challenges in this area because shareholders often have different and divergent interests.[168] Stakeholderism magnifies this problem. While proponents of stakeholderism insist that this problem has been overstated and can be overcome, even those proponents acknowledge that

[164] See Fairfax, Doing Well While Doing Good, supra note 12, at 438; Sommer, supra note 162, at 52.

[165] See Sommer, supra note 162, at 52 (explaining skeptics' view by using an example of when long-term stakeholderism conflicts with long-term shareholderism).

[166] See Krapohl, supra note 138, at 521–22.

[167] See Bainbridge, supra note 60, at 1435–42; Bebchuk & Tallarita, supra note 1, at 119–21.

[168] See Iman Anabtawi & Lynn Stout, Fiduciary Duties for Activist Shareholders, 60 Stan. L. Rev. 1255, 1283 (2008); Iman Anabtawi, Some Skepticism About Increasing Shareholder Power, 53 UCLA L. Rev. 561, 564 (2006); K.A.D. Camara, Classifying Institutional Investors, 30 J. Corp. L. 219, 229–42 (2005).

stakeholderism may be more challenging because it requires directors to weigh a broader range of competing interests.[169]

This trade-off concern is multidimensional. For example, trade-offs often must be made between individuals within a stakeholder group.[170] Employees are not monolithic. If corporations have the goal of advancing workforce diversity, are there trade-offs to be made associated with focusing on one form of diversity rather than another? There are also, of course, trade-offs between different stakeholder groups.[171] Consider the interests of airline customers who want more flight routes and the interests of airline employees for whom additional flight routes may mean less downtime. This is magnified by the trade-offs between shareholders and non-shareholder stakeholders. That is, between airline customers who want cheaper flights with more free amenities and shareholders who may want to maximize profits by raising ticket prices and charging fees for even basic amenities. These examples reveal that a commitment to all stakeholders could be rendered meaningless unless there is some guidance regarding how corporations should make trade-offs.[172]

The second concern with commitments made to multiple groups is that such commitments raise accountability problems. Such commitments may be difficult to enforce because of the difficulty of pinpointing whether an individual's actions reflect noncompliance or simply a furtherance of the interests of one of many groups. This creates a credible commitment problem because the actor making the commitment can play different groups off of one another and opportunistically breach commitments with different groups by externalizing the costs on one

[169] See Ronald M. Green, Shareholders as Stakeholders: Changing Metaphors of Corporate Governance, 50 Wash. & Lee L. Rev. 1409, 1418 (1993).

[170] See, e.g., Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1333–35; Robert H. Mundheim, What is the Significance of the Business Roundtable Statement on the Purpose of a Corporation? Salzburg Glob. Seminar (Oct. 22, 2019), https://www.salzburgglobal.org/news/impact/article/robert-h-mundheim-what-is-the-significance-of-the-business-roundtable-statement-on-the-purpose-of-a-corporation [https://perma.cc/9X6Z-XVQR].

[171] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1333–35.

[172] See Bebchuk & Tallarita, supra note 1, at 119–21 (noting that how best to resolve trade-offs is a challenging question that must be resolved by advocates of stakeholderism). Bebchuk and Tallarita note that some deemphasize the trade-off problems, suggesting that there are "win-win" situations. See id. at 129. This Article agrees that such a suggestion is unrealistic. These concerns have been raised in the context of constituency statutes and public benefit corporations that enable corporations to consider a range of stakeholder interests. See Thorelli, supra note 50, at 1764–65; Anthony Bisconti, The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in *Revlon* Land?, 42 Loy. L.A. L. Rev. 765, 794 (2009).

group while receiving benefits from another.[173] Commentators have dubbed this the "two masters" problem: "[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither."[174] Importantly, accountability problems arise even if actors are not playing one group off of another because corporations can simultaneously engage in "good" and "bad" actions.[175] As the late Professor Lynn Stout noted, there is a "yin and yang" that often animates corporate conduct and frustrates those seeking to ensure that corporations engage in conduct that advances the interests of multiple stakeholders.[176] Stout observed that this yin and yang means that "[i]n the process of producing desirable things, corporations can produce less desirable things as well."[177] This yin and yang also may negate the ability to assess corporate compliance, or otherwise may make it difficult to hold corporations responsible for noncompliance. At the very least, the variety of commitments embedded in stakeholderism poses credibility challenges associated with how best to hold corporations accountable to those commitments.

Some have suggested that the connection between trade-off concerns and credible commitment challenges has been vastly overstated for several reasons.[178] First, the concern ignores the reality that businesspeople must make trade-offs all the time.[179] Second, and in so doing, the concern fails to give sufficient weight to the expertise of businesspeople who have developed the capacity to make such trade-offs. Advocates of stakeholderism insist that businesspeople routinely make trade-offs and that businesspeople routinely make trade-offs involving

[173] See Nellis, supra note 123, at 275.

[174] Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 38 (1991); see Fairfax, Doing Well While Doing Good, supra note 12, at 432–33; Bainbridge, supra note 60, at 1435–42.

[175] See Lynn Stout, Sergio Gramitto & Tamara Belinfanti, Citizen Capitalism: How a Universal Fund Can Provide Influence and Income to All 18–19 (2019).

[176] See id.

[177] See id. at 18.

[178] See Colin Mayer, Shareholderism versus Stakeholderism – A Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita 1–2 (ECGI Working Paper Series in Law, Paper No. 522/2020, 2020).

[179] See id. Blair and Stout indicate that there should be no rule to resolve trade-offs. Instead, they insist that directors should be trusted to resolve trade-offs. See Blair & Stout, supra note 12, at 327. This Article contends that this resolution raises accountability and thus credibility concerns.

stakeholders.[180] Third, the trade-off concern proves too much. Trade-offs are an inevitable by-product of business decisions, and it would be difficult to imagine a rule that could delineate precise guidance for every trade-off decision.[181] If the trade-off dilemma prevents credible commitment, it suggests that no commitment can be credible. In this regard, the emphasis on trade-offs appears to prove too much, completely eviscerating the possibility of any credible commitment in the corporate sphere.

These observations miss the point. Emphasizing the importance of trade-offs to credible commitment does not ignore the reality of business decisions. Indeed, this Article does not disagree that businesspeople routinely make trade-offs. Nor does this Article disagree that many businesspeople have the capacity and expertise to make those trade-offs. However, this Article does insist that unless there are some guiding principles regarding how those trade-offs should be made, we have less assurances that businesspeople are considering the right inputs when making those trade-offs. That is, we have less assurances that those trade-offs are consistent with corporate commitments to other stakeholders. Moreover, without guiding principles, we have no significant yardstick by which to measure the propriety of those trade-offs. The issue is not whether or not businesspeople have the capacity to make trade-offs. Instead, the issue is whether we have sufficient assurances that corporate actors will make those trade-offs with the appropriate considerations.[182] The fact is that trade-offs are challenging in any corporate setting. Stakeholderism exacerbates these challenges. The concerns raised in Part I about the misalignment between corporations' activities and their stated commitment to stakeholderism suggest that corporations have not been making the appropriate trade-offs, thereby suggesting at the very least that corporations need better guidance in this area. Importantly, to the extent directors' current trade-offs are guided by shareholder primacy, it is arguable that their current trade-offs are guided by financial

[180] See Blair & Stout, supra note 12, at 325–27.

[181] See Fairfax, Doing Well While Doing Good, supra note 12, at 430–33; see also Lawrence E. Mitchell, A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes, 70 Tex. L. Rev. 579, 589 (1992) (describing the complexity of navigating trade-offs when balancing different stakeholder interests); Green, supra note 169, at 1418–19 (questioning emphasis on directors' inability to make trade-offs).

[182] See Lipton, supra note 116, at 509–10 (noting that a core difficulty with social purpose norm is determining whether economic actors are making appropriate trade-offs with respect to securities disclosures).

considerations. From this perspective, directors' historical expertise may not be aligned with the needed experience with making trade-offs in the context of a normative environment that does not prioritize shareholders. Moreover, the lack of clarity surrounding the precise nature of stakeholderism means that it is not entirely clear *what* considerations should be guiding trade-off concerns. Collectively, these observations reveal that the fact that directors routinely make important trade-offs does not negate the difficulties associated with making those trade-offs. Instead, credible commitment theory makes clear that the promise to deliver value to multiple stakeholders, without any guidance about the factors to be considered when making those trade-offs, poses unique challenges that may render commitments to stakeholderism significantly less credible.

4. The Accountability Puzzle

Credible commitment challenges emerge when there is no guarantee that accountability vehicles can be aligned with commitments. Accountability is an important aspect of credible commitment.[183] Commitment is made credible when the promisee has some assurances that the promisor will be held accountable for complying with the commitment.[184]

Commitments to stakeholderism raise thorny accountability concerns. Corporate law vests accountability primarily in directors and shareholders. The fact that accountability rests with these two groups necessarily raises credible commitment concerns stemming from the potential that the incentives of these groups may not be aligned with stakeholder commitments.[185] Given the range of legal and extralegal factors aimed at focusing director attention on shareholders, directors' incentives are not necessarily aligned with other stakeholders. Moreover, while shareholders have certainly been on the forefront of pressuring corporations to advance socially responsible commitments, many have

[183] See North, Institutions and Credible Commitment, supra note 122, at 18; Yackee, supra note 136, at 808.

[184] See supra note 183.

[185] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1335 (noting concern that current environment does not modify the fact that shareholders ultimately control corporate decision through their voting power and capital market discipline); Julian Velasco, Shareholder Primacy in Benefit Corporations, *in* Fiduciary Obligations in Business 318, 320–22 (Arthur B. Laby & Jacob Hale Russell eds., 2020) (noting concerns about reliance on shareholders in the context of benefit corporations).

questioned the veracity of their efforts and the extent to which we can be assured that their efforts will persist.[186] Irrespective of whether directors or shareholders make good representatives for stakeholder concerns, the reality is that stakeholders essentially have no formal accountability role in the current governance structure. Instead, stakeholders must depend upon directors or shareholders to represent their interests. This dependence raises credible commitment concerns.

D. Credible Commitment Solutions

North and other credible commitment theorists agree that in order to overcome or minimize hurdles to credible commitment, mechanisms must be devised that constrain or guide discretion to align with particular commitments and promote commitment compliance.[187] North refers to such mechanisms as institutions.[188] North has theorized that institutions overcome credible commitment challenges when they provide two critical elements: (1) a set of understandable rules, and (2) a system to impartially enforce those rules.[189] In his article on credible commitments in the securities law context, Professor Rock confirms the need for rules and a reliable and objective enforcement mechanism in the corporate arena.[190] Similarly, in their recent scholarship on the impact of corporate purpose, Professors Fisch and Solomon argue that in order for corporate purpose to achieve its instrumental value, statements related to corporate purpose must be concrete enough to ascertain their meaning, and they must be enforceable.[191]

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[186] See, e.g., Michal Barzuza, Quinn Curtis & David H. Webber, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, 93 S. Cal. L. Rev. 1243, 1246–48, 1263–64, 1275 (2020).

[187] Addressing credible commitment challenges is linked to reducing transaction costs. See North, Institutions and Credible Commitment, supra note 122, at 18. North built on Ronald Coase's theory that low transaction costs facilitate economic bargains, arguing that reduced transaction costs constrain behavior. See id. at 11 (explaining and expanding on Coase's work); North, Institutional Change, supra note 122, at 4; Nellis, supra note 123, at 272.

[188] See North, Institutional Change, supra note 122, at 3–4, 97. According to North, if institutions do not provide constraints, there is nothing to bind actors to the promises they make. See North, Institutions and Credible Commitment, supra note 122, at 11–13.

[189] See North, Institutions and Credible Commitment, supra note 122, at 18, 21 (asserting that credible commitments require a method to both measure and enforce the agreement or commitment); Yackee, supra note 136, at 808 (indicating that "effective institutional solutions to the credible commitment problem" focus on the creation of formal rules and systems to enforce those rules).

[190] See Rock, supra note 121, at 685–86.

[191] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1344.

Collectively, rules and impartial enforcement overcome the commitment challenges identified in Part C. Rules give voice to the content of the commitment, providing the principles around which to organize behavior.[192] A lack of clearly identifiable rules exacerbates uncertainty and ambiguity, making it difficult to interpret the commitment and thus difficult to ensure adherence to the commitment.[193] By contrast, clear and identifiable rules help alleviate the uncertainty and ambiguity that make credible commitment challenging. When commitments involve multiple groups or interests, rules must incorporate a set of guiding principles regarding how best to make critical trade-offs among diffuse interests. In these ways, rules constrain behavior, thereby reducing the transaction costs associated with complying with commitments. That is, rules facilitate credible commitment.

To be clear, this Article does not use the term "rules" to suggest that we must generate clear-cut rules for every commitment in order to reduce uncertainty and better ensure the credibility of the commitment. The well-worn literature regarding the propriety of rules versus standards reveals that while clear-cut rules may offer more predictability, particularly with respect to enforcement, clear-cut rules can be both under- and over-inclusive, inflexible, difficult to update, and more susceptible to manipulation.[194] This Article does not seek to resolve the rules-versus-standards debate. However, insights from that debate only underscore the importance of at least some degree of certainty for ensuring commitment credibility. Indeed, that debate makes clear that vague or ambiguous standards increase discretion and thus may reduce the credibility of a commitment by reducing the clarity needed to ensure rule compliance and predictable enforcement.[195] More importantly, the debate regarding rules

[192] See Rock, supra note 121, at 686–87 (finding credible commitment necessitates specifying rules or guiding principles animating the commitment); Krapohl, supra note 138, at 525–26.

[193] See Yackee, supra note 136, at 812 (noting the credible commitment challenges associated with ambiguous promises of uncertain meaning).

[194] See Shawn J. Bayern, Against Certainty, 41 Hofstra L. Rev. 53, 58 (2012); Samuel W. Buell, Good Faith and Law Evasion, 58 UCLA L. Rev. 611, 612–13 (2011) (noting rules have a greater susceptibility to manipulation); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 559, 588–89 (1992); Mark V. Tushnet, Playing with the Rules, 90 Mich. L. Rev. 1560, 1560–61 (1992); Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 268 (1974) (noting over- and under-inclusiveness of rules).

[195] See Julian J.Z. Polaris, Backstop Ambiguity: A Proposal for Balancing Specificity and Ambiguity in Financial Regulation, 33 Yale L. & Pol'y Rev. 231, 248 (2014); James J. Park,

versus standards reveals the importance of having at least some standard aimed at defining behaviors reflected in particular commitments. This is because even supporters of standards agree that there must be some content around the standard in order to provide sufficient clarity for purposes of compliance and enforcement.[196] In other words, standards also reduce uncertainty because standards contain some content. Indeed, the debate regarding rules versus standards reveals that the difference between rules and standards is a matter of degree.[197] Moreover, that debate suggests that optimal regulation (and, by extension, optimal credibility) likely requires some combination of precise rules and more broad standards.[198] From this perspective, while credible commitment theory does not require clear-cut rules associated with all commitments, that theory, informed by this debate, does suggest that we at least need standards that involve some specific directives associated with those commitments, along with more specific rules in some contexts, in order to ensure commitment credibility.[199] In this regard, this Article uses the term "rules" broadly to incorporate some set of guiding principles by which we can pinpoint the content of the commitment at issue.

Along these same lines, some have argued that vagueness and uncertainty are not inconsistent with constraints on behavior.[200] Certain

Rules, Principles, and the Competition to Enforce the Securities Laws, 100 Calif. L. Rev. 115, 119 (2012); Diane Lourdes Dick, Confronting the Certainty Imperative in Corporate Finance Jurisprudence, 2011 Utah L. Rev. 1461, 1466; Cass R. Sunstein, Problems with Rules, 83 Calif. L. Rev. 953, 1021–22 (1995); Eric A. Posner, Standards, Rules, and Social Norms, 21 Harv. J.L. & Pub. Pol'y 101, 113 (1997).

[196] See Bayern, supra note 194, at 58–59; Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 383 & n.18, 410–11 (1985); Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 75–76 (1983); Ofer Raban, The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism, 19 B.U. Pub. Int. L.J. 175, 190–91 (2010).

[197] See Bayern, supra note 194, at 59; Kaplow, supra note 194, at 560; Posner, supra note 195, at 113; Schlag, supra note 196, at 383–84; Diver, supra note 196, at 76; Ehrlich & Posner, supra note 194, at 258.

[198] See Polaris, supra note 195, at 242.

[199] See id.; Schlag, supra note 196, at 383 n.18; Diver, supra note 196, at 71.

[200] See Jeremy Waldron, Vagueness and the Guidance of Action, *in* Philosophical Foundations of Language in the Law 58, 62–63 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter Waldron, Vagueness and the Guidance]; Jeremy Waldron, Vagueness in Law and Language: Some Philosophical Issues, 82 Calif. L. Rev. 509, 510, 535 (1994) [hereinafter Waldron, Vagueness in Law] (noting that vagueness is not necessarily inconsistent with commitments and that the need to eliminate vagueness has been exaggerated). Scholars suggest that it may be impossible to eliminate vagueness. See id. at 510–11, 522–26 (noting that even precise rules do not constrain behavior because individuals must interpret and apply

levels of vagueness allow for adaptability and flexibility.[201] Certain levels of vagueness may also guard against overly narrow interpretations of specific rules.[202] However, even those who insist that there are virtues to vagueness admit that vagueness raises concerns related to the use of discretion.[203] Moreover, those scholars acknowledge that vagueness may be beneficial in some circumstances but not in others.[204] Then, too, advocates of vagueness do admit that *some* guidance or direction is necessary so that actors may have an appreciation of how best to exercise their discretion.[205] Perhaps more importantly, such advocates argue that internalized norms overcome vagueness concerns because, once a norm is internalized, it offers guidance around how best to modify behavior and curtail discretion.[206] From this perspective, advocates of vagueness do not contend that vagueness does not present commitment challenges, but rather they argue that other factors (i.e., norms) serve to ameliorate those challenges.[207]

Enforcement similarly constrains behavior and thus reduces hurdles to credible commitment. Vigorous and consistent enforcement operates to increase the transaction costs associated with noncompliance and thus helps deter nonadherence to the commitment.[208] By contrast, weak or nonexistent enforcement undermines the ability to establish a credible commitment by undermining the ability to provide specific and general deterrence.[209] Enforcement is especially important for commitments that must be kept over a long period of time because such enforcement guards against the potential that actors will change their minds or behaviors.[210]

the rules). Scholars in this area note the similarities to their concerns related to vagueness and the rules-versus-standards debate. See Waldron, Vagueness and the Guidance, supra, at 65.

[201] See Waldron, Vagueness and the Guidance, supra note 200, at 65.

[202] See id. at 70–71.

[203] See id. at 72–73.

[204] See id. at 70–71.

[205] See id. at 66–67; see Waldron, Vagueness in Law, supra note 200, at 537 (noting that vagueness does not mean the same as lack of guidance).

[206] See Waldron, Vagueness and the Guidance, supra note 200, at 65 (noting that when an actor internalizes a norm, the norm serves as a source of guidance that ensures he makes, monitors, and modifies his behavior consistent with the norm and that norms provide the input that helps direct discretion towards particular behavior).

[207] See id.

[208] See Nellis, supra note 123, at 281; Rock, supra note 121, at 685–86, 697.

[209] See Rock, supra note 121, at 685.

[210] See id. at 697 (finding long-term commitments in securities regulation not credible without corresponding commitment to identify and enforce breaches).

Others implicitly have focused on the importance of rules and enforcement in the recent embrace of stakeholderism. On the one hand, commentators have pointed out that whether corporations actually focus on stakeholderism will depend on how "specifically and quantifiably" goals are defined.[211] On the other hand, those commentators have emphasized the need for articulating the specific mechanisms corporations will use to enforce those goals.[212] These observations align with prevailing theory regarding how best to overcome credible commitment challenges.

* * *

Credible commitment theory raises significant concerns about the extent to which stakeholderism can be realized. This is because, first and foremost, the credible commitment theory highlights the fact that without mechanisms in place to ensure that corporate directors will be compelled to focus on all stakeholders, there is no guarantee that stakeholderism will be realized. Second and equally as important, credible commitment theory reveals that there are significant challenges to credible commitments in the corporate space generally and specifically with stakeholderism. These challenges stem from the long-term nature of the commitment, the uncertainty associated with the content of the commitment, the fact that the commitment is being made to advance the interests of multiple parties, and the lack of stakeholder voice in the current accountability regime. The next Part of this Article assesses whether we can plausibly overcome these challenges.

III. HICCUPS WITH EXISTING CREDIBLE COMMITMENTS VEHICLES

There is a wide array of vehicles corporations can utilize as plausible sources of credible commitment.[213] Potential credible commitment vehicles range from third-party certification, emphasizing shareholder proposals and bylaw changes, tethering stakeholder goals to executive compensation, altering corporate charters, creating new legal entities, and reliance on sustainability indices—to name a few. It is beyond the scope of this Article to assess all of these vehicles. However, this Article will examine three of the most prevalent and oft-cited reforms. The

[211] See Minow, supra note 51 (expressing a need to have stakeholder goals tied to compensation).
[212] See id.
[213] See Silk et al., supra note 29, at 13 (noting key trends in addressing ESG issues).

examination reveals that they each individually may fall short when measured against the typology of factors needed to be overcome in order to facilitate credible commitment.

A. Inherent Limits of Fiduciary Duty

This Article began with an analysis of fiduciary law for several reasons. Scholars have argued that fiduciary duty law represents one of the most promising vehicles for facilitating credible commitment.[214] On the one hand, rigorous judicial review of that law serves as a crucial standard-setting mechanism providing guidance and clarity about the rules of engagement related to particular conduct.[215] Such review also helps to ensure that commitments are kept over the long term. On the other hand, courts serve as objective accountability vehicles through their enforcement of fiduciary duty breaches.[216] Because effective judicial review and enforcement enables parties to credibly commit to the promises captured by fiduciary duty law, that law is a viable source of credible commitment and hence worthy of exploration.[217] Finally, the fact that fiduciary law governs all corporations, both public and private, makes it especially appealing as a credible commitment vehicle.[218]

Recently, several prominent scholars have indicated that fiduciary law, appropriately reformed, is one of the most viable mechanisms for facilitating credible commitment to stakeholderism.[219] Scholars and legislators have argued that fiduciary duty law can be reformed in at least two respects: (1) by making the fiduciary obligation to other stakeholders mandatory,[220] thereby enhancing the rules or guidelines associated with stakeholderism, and (2) by broadening the class of people who can bring fiduciary suits to include non-shareholder stakeholders, and thus

[214] See Gilson & Schwartz, supra note 121, at 120 (noting that many jurisdictions address the credible commitment problem through fiduciary law).

[215] See id. at 120–21.

[216] See id. at 120 (noting that courts will void transactions that do not comport with fiduciary duty laws).

[217] See id. at 120–21; Yackee, supra note 136, at 808 (noting the necessity of an effective judiciary for credible commitments); North, Institutions and Credible Commitments, supra note 122, at 21 (noting that enforcing institutional constraints is essential to the establishment of a polity).

[218] See Gilson & Schwartz, supra note 121, at 120–21, 120 n.9.

[219] See Strine, Restoration, supra note 10, at 403–04.

[220] See id. at 430–31; Hess, supra note 54, at 66–67 (arguing that reporting about social impacts should be mandatory); Sommer, supra note 162, at 44.

increasing the potential for enforcement to align with stakeholder concerns.[221] This Article raises concerns regarding whether either of these changes are likely to overcome the flaws associated with fiduciary duty law as a credible commitment device for stakeholderism.

1. The Illusory Promise of Fiduciary Mandates

Throughout history, many proponents of stakeholderism have advocated mandating an obligation to stakeholders.[222] In their view, such a mandate would serve to ensure that directors pay heed to stakeholder concerns.[223]

However, seeking to mandate a fiduciary obligation to stakeholders is unlikely to enhance its credible commitment potential because (1) it is unlikely to constrain discretion in a manner that produces clear rules and guidelines, and (2) it fails to respond to trade-off concerns.

First, it is not entirely clear that a mandate would be significantly different than the current fiduciary environment. Of course there is a body of case law suggesting that corporate directors cannot pay heed to the interests of other stakeholders because they owe their fiduciary duty to shareholders and maximizing their profit.[224] However, the vast majority of corporate law scholars have come to appreciate that fiduciary duty law grants boards wide discretion to advance the interests of non-shareholders.[225] This is because courts assess breaches of fiduciary duty

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[221] See Strine, Restoration, supra note 10, at 428 (discussing Senator Warren's model of public benefit corporations); Hess, supra note 54, at 72.

[222] See Fairfax, Doing Well While Doing Good, supra note 12, at 411–12 & n.10 (explaining scholars who call for mandating corporate commitment to advancing interests of stakeholders).

[223] See id.

[224] See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010).

[225] Lipton, supra note 116, at 504–05; see also Pollman, History and Revival, supra note 1, at 1443–47 (providing examples of corporations who have missions aligned with their corporate brand that seek to advance interests of the public, such as Ben & Jerry's); Lund, supra note 17, at 1620–21 (asserting that CSR bonds could induce corporations "to take profit-sacrificing actions that have large welfare benefits"); Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1323 (noting that "the proposition that existing law prohibits corporate decision makers from considering and incorporating the interests of stakeholders and society" is overstated); Bebchuk & Tallarita, supra note 1, at 94 (suggesting that "external" interventions, including labor and consumer protection laws, will incentivize companies to behave in ways that benefit stakeholders); Strine, Restoration, supra note 10, at 424–25 (noting judicial authority supporting board discretion in this area); Robert B.

against the business judgment rule, which grants directors broad discretion. Consistent with this discretion, except in limited circumstances,[226] courts already grant corporations the flexibility to advance and even favor the interests of non-shareholders.[227] Moreover, if corporate officers and directors have the obligation to operate in the best interests of the corporation, and there is growing consensus that such operation must include focusing on other stakeholders, then theoretically this obligation (and the corresponding mandate) already exists.[228] And in fact, there are some courts willing to recognize this obligation.[229] From this perspective, this begs the question of what more work a mandate would do.

Second, it is not clear if a mandate would limit discretion to provide the hoped-for rule clarity needed to facilitate credible commitment. It seems likely that mandating a focus on other stakeholders will expand, rather than constrain, the discretion afforded to boards under the business judgement rule. In other context, legislatures have been quick to point out that mandates associated with advancing stakeholder interests would be impractical and unworkable because courts would not be equipped to provide clear rules with respect to such a mandate.[230] Judges routinely

Thompson, Anti-Primacy: Sharing Power in American Corporations, 71 Bus. Law. 381, 390 (2016) (noting survey revealing that most directors felt accountable to multiple stakeholders); Larry E. Ribstein, Accountability and Responsibility in Corporate Governance, 81 Notre Dame L. Rev. 1431, 1436 (2006) ("[M]anagers who carefully attend to the firm's profits also must seek at least to some extent to further society's interests.").

[226] See Fairfax, Doing Well While Doing Good, supra note 12, at 458–59 (pinpointing takeover and sale of control settings in which fiduciary duty demands focus on shareholder value); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985); *Revlon*, 506 A.2d at 182.

[227] See Fairfax, Doing Well While Doing Good, supra note 12, at 439–40; see also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (noting that business judgment rule acknowledges managerial prerogatives and ensures that directors' judgment will be respected by the courts absent abuse of discretion); Martin Lipton, supra note 134 (noting that courts have used the business judgment rule to sanction the ability of boards to advance the interests of their various stakeholders, and thus "[t]here is no legal impediment" to boards following the path of "balancing the interests of all stakeholders").

[228] See Ribstein, supra note 224, at 1442; see also Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019) (noting that a corporation has an obligation to focus on consumer health and safety, given that its only product line (ice cream) was solely dependent on consumer confidence in health and safety of the product).

[229] See *Marchand*, 212 A.3d at 809 (holding that directors' fiduciary duties require monitoring risks related to consumer health and safety because they are critical to their mission).

[230] See Sommer, supra note 162, at 45 (explaining legislature's clarification in the context of interpreting constituency statutes).

express concern with second-guessing director decisions and extreme reluctance with being asked to more precisely define the contours of those decisions.[231] One can only imagine that these concerns and reluctance will be exacerbated in the context of a mandated focus on stakeholders. It seems plausible that courts may grant directors more—rather than less—discretion in recognition of the difficulties associated with seeking to meet the needs of a vast array of constituents.[232] From this perspective, it seems relatively unlikely that a mandate would solve credible commitment challenges associated with fiduciary duty law because it is unlikely that courts will significantly alter the broad discretion they grant director decisions in this area.[233]

Third, such a mandate does not respond to the trade-off concern. This trade-off concern relates not only to trade-offs between shareholders and non-shareholder stakeholders but also among stakeholder groups.[234] Others have raised significant concerns about the ability of fiduciary law to promote stakeholderism precisely because it fails to pinpoint how best to make trade-offs among various groups.[235] Mandating a focus on stakeholders does not ameliorate these concerns. Indeed, similar to the reluctance to give guidance around business decisions more generally, judges have expressed concern about disturbing decisions that involve difficult trade-offs.[236] This reluctance suggests that corporations may have more, rather than less, discretion with such a reform, thereby undermining credible commitment.

At the very least, these observations suggest that fiduciary law itself will not produce guidelines with respect to appropriate trade-offs. As a result, even if the law expands directors' discretion to make trade-offs, it

[231] See Fairfax, Doing Well While Doing Good, supra note 12, at 437–39.

[232] See Jonathan D. Springer, Corporate Constituency Statutes: Hollow Hopes and False Fears, 1999 Ann. Surv. Am. L. 85, 108 (noting judicial reluctance to impose duties on directors or to find directors liable when there are no clear rules about how to make trade-offs).

[233] See Sommer, supra note 162, at 44 (pinpointing problems with the effort to mandate directors' duties to other stakeholders).

[234] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1321 (noting that scholars have pointed out that shareholders may have heterogenous interests); Anabtawi & Stout, supra note 168, at 1283 (noting conflicting goals among shareholders).

[235] See Lipton, supra note 134 (noting that principles governing director behavior fall short of providing real assurances concerning commitments to social purpose when they do not address how to weigh competing objectives); Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1333–35 (same); Bebchuk & Tallarita, supra note 1, at 119–21; Sommer, supra note 162, at 55.

[236] See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); Fairfax, Doing Well While Doing Good, supra note 12, at 437–39.

seems unlikely that the law will help to meaningfully shape or guide those trade-off decisions, undermining the extent to which the law itself can overcome credible commitment challenges posed by these trade-off issues.

2. Authority Without Accountability

To be sure, granting groups other than shareholders the authority to bring fiduciary duty claims does at least ensure that stakeholders are not wholly dependent upon shareholders for conforming corporate behavior to stakeholderism. Other than creditors in very limited circumstances,[237] shareholders are currently the only group that has standing to bring suit for breach of fiduciary duty.[238] This fact poses a challenge for enforcement of the commitment.[239] It means that shareholders not only must support board actions that advance stakeholder concerns but also that shareholders must be willing to hold boards accountable for their failure to advance such concerns.[240] To be sure, shareholders have been taking a leading role in both supporting and encouraging director action aimed at advancing stakeholder concerns. This suggests that stakeholders can depend upon shareholders. Consistent with this suggestion, there are very few lawsuits seeking to challenge boards' decisions to focus on other stakeholders or social issues.[241] However, it is not clear to what extent stakeholders can depend upon shareholders to hold directors accountable when they ignore stakeholder concerns. Indeed, until very recently, there were no reported cases of shareholders using fiduciary law to bring

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[237] See Kelli A. Alces, Strategic Governance, 50 Ariz. L. Rev. 1053, 1054–55 (2008) (explaining creditor rights in the "zone of insolvency"); Henry T.C. Hu & Jay Lawrence Westbrook, Abolition of the Corporate Duty to Creditors, 107 Colum. L. Rev. 1321, 1384 (2007); Jonathan C. Lipson, Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation, 50 UCLA L. Rev. 1189, 1190 (2003); Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613, at *1 (Del. Ch. 1991).

[238] See Del. Ch. Ct. R. 23.1.

[239] See Fisch & Solomon, "Value" of a Public Benefit Corporation, supra note 50, at 75 (noting that, in the context of public benefit corporations, accountability concerns arise when enforcement of fiduciary rights rest solely with shareholders).

[240] See Lipton, supra note 116, at 506; Lipton, supra note 134 (noting that shareholders must consistently support board decisions to manage the interests of stakeholders).

[241] See Fairfax, Doing Well While Doing Good, supra note 12, at 440. But see Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (challenging decision to focus on creditors rather than shareholders); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 11 (Del. Ch. 2010) (challenging decision to further social purpose goals rather than profit-making concerns).

actions against directors for ignoring the interests of other stakeholders.[242] Thus, as of 2015, Gilson and Schwartz's survey of fiduciary law failed to unearth any such cases.[243] Perhaps more importantly, it is not clear that stakeholders can depend upon shareholders to hold directors accountable for actions that fail to appropriately prioritize stakeholder concerns when they conflict with shareholder interests, especially shareholders' short-term profit interests.[244] At the very least, therefore, changing the standing rules gives stakeholders a seat at the table in terms of fiduciary duty breaches. Thus, setting aside the logistical hurdles associated with granting a wide variety of stakeholder groups the ability to bring fiduciary duty claims, altering the standing rules does ensure that these groups are not wholly dependent on shareholders to vindicate their interests. Hence, such a grant appears to enhance the ability of fiduciary law to serve as an accountability check for stakeholderism.

However, changing the standing rules may not be sufficient to salvage the enforcement deficits associated with fiduciary duty law and thus may be of limited utility for credible commitment purposes. Indeed, Gilson and Schwartz suggest that the fact that courts impose the laxest standard of review when assessing claims under the business judgment rule renders fiduciary duty law incapable of performing its credible commitment function.[245] This review standard is compounded by procedural hurdles, indemnification provisions, and exculpatory statutes, all of which make it nearly impossible to bring claims against directors or to hold directors personally liable for breaching their duties.[246] If we assume that the same

[242] See Gilson & Schwartz, supra note 121, at 124–25 (discussing dearth of cases); Springer, supra note 232, at 108–09 (same). But see Kevin LaCroix, The Gap Hit with Board Diversity Derivative Lawsuit, The D&O Diary (Sept. 2, 2020), https://www.dandodiary.com/2020/09/articles/director-and-officer-liability/the-gap-hit-with-board-diversity-derivative-lawsuit/ [https://perma.cc/3JM9-N56P] (discussing Oracle, Facebook, The Gap, and other shareholder lawsuits challenging corporate decision-making related to diversity).

[243] See Gilson & Schwartz, supra note 121, at 124–25 (discussing low likelihood of shareholders litigating these cases).

[244] See Lipton, supra note 116, at 505–06 (suggesting that dependence on shareholders for accountability is problematic because stakeholders' long-term interests may be sacrificed for near-term financial gains).

[245] See Gilson & Schwartz, supra note 121, at 120–21.

[246] For a discussion of the procedural hurdles to director liability, see Harry G. Hutchison, Presumptive Business Judgment, Substantive Good Faith, Litigation Control: Vindicating the Socioeconomic Meaning of *Harhen v. Brown*, 26 J. Corp. L. 285, 292 (2001); Carol B. Swanson, Corporate Governance: Sliding Seamlessly into the Twenty-First Century, 21 J. Corp. L. 417, 437 (1996); Daniel R. Fischel & Michael Bradley, The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis, 71 Cornell

procedural rules and standard of review would apply to court analysis of these claims, it seems unlikely that vesting authority in another group would alleviate the concerns around the weakness of the enforcement apparatus.[247] Thus, such an alteration may not address the core defect in the accountability challenges posed by fiduciary duty law as a credible commitment vehicle.

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In the end, fiduciary duty law may serve as more shield than sword. The law shields directors who make commitments to other stakeholders or otherwise advance interests beyond shareholders and profit but does very little to ensure that commitments to these groups will be credible. This is because that law does very little to set rules that ensure directors' focus on other stakeholders or that would guide directors with respect to how best to make trade-offs among stakeholders or between stakeholders and shareholders. Then, too, the law has a decidedly weak enforcement system. Perhaps more importantly, reforms do not appear to alter this reality. In this regard, the very discretion that fiduciary duty law provides produces a credible commitment problem that the law likely cannot solve.[248]

B. The SEC: Rule Reluctance and Disclosure Limitations

This Article next focuses on mandated disclosure from the Securities and Exchange Commission ("SEC") because credible commitment theorists and corporate scholars have placed great weight on the ability of independent agencies such as the SEC to facilitate credible commitment. North and other scholars often look to potential independent agencies when seeking to facilitate or enhance credible commitments because if those agencies have rulemaking authority and the capacity to enforce those rules, independent agencies offer the promise of fairness and impartiality and thus the promise of strong credible commitment vehicles.[249] Rock has argued that the SEC's mandated disclosure regime serves as a valuable source of credible commitment for public

L. Rev. 261, 286 (1986); John C. Coffee, Jr. & Donald E. Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform, 81 Colum. L. Rev. 261, 326–27 (1981).

[247] See Bebchuk & Tallarita, supra note 1, at 112–13.

[248] See Springer, supra note 232, at 124 (noting that fiduciary law simply cannot provide the "quick fix" for ensuring that directors pay attention to other stakeholders).

[249] See Krapohl, supra note 138, at 521; Nellis, supra note 123, at 273.

companies.[250] In Rock's view, the SEC's extensive and detailed mandated disclosure regime operates as an invaluable rule-setting vehicle for credible commitments, particularly because the regime helps to ensure the quality of disclosed information.[251] Rock also maintains that the SEC's mandated disclosure regime addresses concerns about long-term commitments by committing public companies to a certain level of quality periodic disclosure that spans the time they remain public.[252] In addition, the elaborate public and private enforcement mechanisms available to the SEC provide the kind of significant enforcement necessary for credible commitments.[253]

The emphasis on the SEC begs an important question about how mandated *disclosure* promotes the rule-setting and accountability necessary to facilitate credible commitment. The answer is that disclosure impacts behavior, albeit indirectly, because the obligation to disclose focuses corporate attention on particular issues, thereby guiding behavior with respect to those issues.[254] In this regard, disclosure operates as an indirect rule. Importantly, in an environment where shareholders and other stakeholders have demonstrated a desire for greater sustainability disclosure,[255] mandated disclosure increases the likelihood that companies without particular policies and practices will adopt them to ward off potential shareholder and stakeholder backlash.[256] As one expert observes, "It's easier to do than to make up a reason why you didn't, and it's certainly less embarrassing."[257]

[250] See Rock, supra note 121, at 685, 688.
[251] Id.
[252] See id. at 694.
[253] See id. at 687–88, 703. Rock also notes that the history and range of enforcement options makes the SEC a more viable source of credible commitment than contractual arrangements or the stock exchanges. See id. at 696–97.
[254] See Robert B. Thompson & Hillary A. Sale, Securities Fraud as Corporate Governance: Reflections Upon Federalism, 56 Vand. L. Rev. 859, 861 (2003) (arguing that disclosure is the most important tool for regulating public company behavior); Paul Rissman & Diana Kearney, Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility, 49 Env't. L. Rep. 10155, 10160 (2019) (asserting that disclosure serves as a primary mechanism for influencing corporate behavior); Lipton, supra note 116, at 509 (suggesting that disclosure obligations indirectly guide corporate behavior).
[255] See infra notes 266 and 267.
[256] See Rissman & Kearney, supra note 254, at 10160 (noting that disclosure alters behavior because of effort to prevent bad outcomes).
[257] Jill Goldsmith, Corporate Boards Will Get More Diverse in 2021 with Social Justice Jolt, New Regs, Covid Impact, Deadline (Dec. 30, 2020, 1:35 PM), https://deadline.com/202

As this observation suggests, the most valuable aspect of disclosure is its impact on accountability. This is because accurate and effective disclosure is designed to empower shareholders, stakeholders, and regulators to police corporate conduct.[258] Disclosure impacts accountability in at least three vital ways. First, disclosure provides valuable information to shareholders and other stakeholders who can use the information to pressure corporations to adopt certain policies and practices or otherwise alter their behavior.[259] Second, including disclosure in SEC filings increases the likelihood of board oversight, better ensuring that the board will pay heed to these issues and hold management accountable for them.[260] Third, disclosure enables the SEC to use its enforcement tools to hold companies accountable for inaccurate or misleading disclosures.

The SEC also appears to be a viable source of credible commitment because its rules apply to all public companies, thus offering a source of broad reach. Moreover, so long as a company is public, it must comply with the SEC's disclosure rules, ensuring that commitments associated with those rules are credible over an extended period of time.[261]

Alas, current law mandates very little in the realm of key information related to employees, customers, clients and suppliers.[262] Rock and others insist that in order for the SEC to serve as a useful source of credible

0/12/url-media-company-boards-diversity-push-2021-outlook-1234663128/ [https://perma.cc/9UL8-ZNDN] (quoting executive director of MSCI ESG Research).

[258] See Jena Martin, Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda, 56 Colum. J. Transnat'l L. 530, 535–36 (2018); Lipton, supra note 116, at 509; Robert A. Prentice, The Inevitability of a Strong SEC, 91 Cornell L. Rev. 775, 822–23 (2006); Rissman & Kearney, supra note 254, at 10160 (asserting that disclosure impacts behavior by making bad behavior an expensive prospect).

[259] See, e.g., Impact Management Project, Statement of Intent to Work Together Towards Comprehensive Corporate Reporting 2 (2020) [hereinafter Statement of Intent], https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf [https://perma.cc/P5CB-C2JG].

[260] Some advocates believe that mandated disclosure on its own, as opposed to voluntary reporting, better ensures board oversight of such disclosure because the board pays closer attention to information required to be reported by the SEC. However, it may be that additional work needs to be done to ensure appropriate board oversight. See, e.g., Jill E. Fisch, Making Sustainability Disclosure Sustainable, 107 Geo. L.J. 923, 957–58 (2019) (proposing that rules be created that require boards to oversee the reporting process related to social issues and that there be a board certification process akin to that mandated for financial reporting).

[261] See Lipton, supra note 116, at 508.

[262] See Fisch, supra note 260, at 934–40 (describing mandates of discrete information related to ESG and sustainability concerns).

commitments, its disclosure rules must involve a mandate.[263] Without such a mandate, the level, nature, and extent of the disclosure would be suboptimal and thus ineffective for purposes of credible commitment.[264] Unfortunately, our experience with voluntary disclosure related to stakeholder-related issues only underscores the importance of mandated disclosure.[265] In 2018, more than eighty-six percent of S&P 500 companies had issued corporate social responsibility ("CSR") or sustainability reports, up from some twenty percent in 2011.[266] Beyond these sustainability reports, there also is voluntary corporate disclosure related to human capital and other sustainability issues both within the proxy statement and in other publicly available documents.[267] However, because there are no uniform rules or guidelines that dictate exactly what is contained in the current body of disclosed information, the vast majority of commentators agree that the reported information is suboptimal, not only because it is too vague and often fails to provide meaningful information, but also because it varies widely from one company to another.[268] Importantly, one law firm acknowledged that

[263] See Rock, supra note 121, at 690–91. Other scholars have also pointed out the importance of mandated disclosure to ensuring that corporations comply with particular obligations. See Frank H. Easterbrook & Daniel R. Fischel, Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev. 669, 695 (1984); Paul G. Mahoney, Mandatory Disclosure as a Solution to Agency Problems, 62 U. Chi. L. Rev. 1047, 1048 (1995); Prentice, supra note 258, at 819.

[264] See John C. Coffee, Jr., Market Failure and the Economic Case for a Mandatory Disclosure System, 70 Va. L. Rev. 717, 722 (1984).

[265] See Prentice, supra note 258, at 807 (noting that voluntary disclosure in this area is strategic rather than optimal). Prentice also notes that voluntary financial disclosure has also proven ineffective and suboptimal. Id. at 806–07.

[266] See Governance & Accountability Inst., Flash Report: 86% of S&P 500 Index Companies Publish Sustainability Reports in 2018, GlobeNewswire (May 16, 2019, 10:00 ET), https://www.globenewswire.com/news-release/2019/05/16/1826306/0/en/FLASH-REPORT-86-of-S-P-500-Index-Companies-Publish-Sustainability-Reports-in-2018.html [https://perma.cc/RT62-DE7Y]; Jill M. D'Aquila, The Current State of Sustainability Reporting, CPA J. (July 2018), https://www.cpajournal.com/2018/07/30/the-current-state-of-sustainability-reporting/ [https://perma.cc/7MU3-BF36].

[267] See Steve Klemash, Bridget M. Neill & Jamie C. Smith, How and Why Human Capital Disclosures are Evolving, Harv. L. Sch. F. on Corp. Gov. (Nov. 15, 2019), https://corpgov.law.harvard.edu/2019/11/15/how-and-why-human-capital-disclosures-are-evolving/ [https://perma.cc/FF2F-MMSE].

[268] See id. (detailing 2019 study of proxy data related to human capital for Fortune 100 companies); Esty & Karpilow, supra note 94, at 657; Lipton, supra note 116, at 561–62 (noting that voluntary reports related to sustainability are "demonstrably insufficient" and "notoriously incomplete and inconsistent"); Fisch, supra note 260, at 947–52; Virginia Harper Ho & Stephen Kim Park, ESG Disclosure in Comparative Perspective: Optimizing Private

voluntary disclosures are "carefully drafted" so as not to be viewed as "formal commitments."[269]

The lack of mandated disclosure also undermines the extent to which disclosure can serve as a useful accountability mechanism. First, the SEC's powerful enforcement capabilities cannot be utilized unless and until the SEC mandates obligations that it can enforce. Second, without consistent, reliable, and effective disclosure, it is difficult for shareholders and stakeholders to effectively monitor corporate behavior and thus play an accountability role.[270]

The credible commitment potential of the SEC's disclosure regime has led many stakeholderism advocates to call for mandated disclosure in this area. These calls have both practical and theoretical limitations.

1. The Feasibility Concern

On the one hand, the recent change in administration may signal an opportunity to mandate disclosure in this area. On the other hand, the current and historical resistance to such a mandate appears to be a significant stumbling block. There have been periodic efforts to obtain disclosure on issues related to stakeholders, and most of those efforts have proven unsuccessful.[271] Indeed, it is around these very issues that the SEC appears most resistant to require disclosure.[272] Perhaps most importantly, it is around these very issues that corporations and their allies appear most vocal and motivated to prevent change.[273]

Ordering in Public Reporting, 41 U. Pa. J. Int'l L. 249, 266–68 (2019); Barnali Choudhury, Social Disclosure, 13 Berkeley Bus. L.J. 183, 211 (2016); D'Aquila, supra note 266; Prentice, supra note 258, at 807.

[269] Lipton, supra note 116, at 561–62 (quoting memo from Mayer Brown).

[270] See id. at 567 (noting that clear stakeholder-oriented disclosures have the potential to ensure more robust enforcement).

[271] See, e.g., id. at 537–53 (detailing historical calls for stakeholder-oriented disclosure); Rissman & Kearney, supra note 254, at 10162–63 (describing cycles of efforts to advance disclosure and SEC reluctance); Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197, 1235 (1999). Ann Lipton insists that efforts to promote disclosure within the securities law framework are doomed to fail because they seek to conceal the true intent of disclosure and frame disclosure as meant for investor audiences only. Lipton, supra note 116, at 556–57.

[272] See, e.g., Martin, supra note 258, at 547 (noting, for example, the SEC's reluctance around the resource extraction rule).

[273] See Rissman & Kearney, supra note 254, at 10167–68 (describing intense efforts of Business Roundtable and other influential business groups aimed at blocking mandated sustainability disclosure).

2. Limitations of Disclosure

Even if we manage to get significant rulemaking around stakeholder issues, credible commitment theory suggests that mandated disclosure may be a flawed commitment vehicle. First, it is not entirely clear that mandated disclosure can generate a set of clear rules or guiding principles. Indeed, whether disclosure leads to the adoption of clear rules facilitating behavior may depend upon the SEC's willingness to choose certainty in its rulemaking over deference. The SEC's principles-based approach to disclosure translates into the SEC favoring corporate flexibility over clear definitions and guidelines. Unfortunately, research reveals that when the SEC is not sufficiently specific about required disclosure obligations, those obligations are less likely to result in clear rules that alter behavior.[274] For example, with respect to disclosure related to board diversity, the SEC chose not to define diversity, instead deferring to boards about how best to define the term.[275] For those hoping the disclosure obligation would lead to an indirect rule increasing board diversity, this deference dashed those hopes.[276] Research reveals that the disclosure obligation had little impact on generating a rule that impacted behavior because the obligation was too vague.[277] Importantly, the SEC's recent disclosure obligations related to human capital suffer from the same flaw, shying away from offering specific guidance about the types of behaviors associated with human capital management, and thereby suggesting that the SEC remains reluctant to provide the clarity that would facilitate credible commitment.[278]

Then, too, it may be that the ability to create clarity through disclosure is especially challenging with respect to stakeholderism. Our history with mandated disclosure in general suggests that the disclosure obligations most likely to generate clear rules are those that are procedural or relatively simple and straightforward. For example, it is relatively easy to see how a disclosure obligation related to whether or not a company has a committee of independent directors could result in a "rule" encouraging

[274] See Yaron Nili, Beyond the Numbers: Substantive Gender Diversity in Boardrooms, 94 Ind. L.J. 145, 184 (2019).
[275] See id. at 183–84.
[276] See id. at 185–86.
[277] See id. at 184–86.
[278] See Modernization of Regulation S-K Items 101, 103, and 105, 84 Fed. Reg. 44,358, 44,388 (Aug. 23, 2019) (requiring description of human capital resources).

companies to have such directors.[279] By contrast, disclosures related to stakeholderism contemplate much more complex and voluminous information. For example, the Sustainability Accounting Standards Board ("SASB"), one of the leading independent nonprofits that sets standards to guide sustainability disclosure, has developed a comprehensive set of seventy-seven industry-specific sustainability disclosure standards along with a range of metrics associated with how best to disclose particular information.[280] This kind of complexity may undermine the ability to encourage straightforward rules. In September of 2020, the five leading sustainability reporting institutions that collectively guide the overwhelming majority of qualitative and quantitative sustainability disclosures in the world came together to issue a statement of intent about how best to generate comprehensive and effective sustainability disclosure.[281] The statement of intent was framed by the acknowledgement that disclosure in this area is much more complex than financial reporting because of the nature of the topics and the many different stakeholder interests associated with those topics.[282] Indeed, the statement of intent noted that, despite decades of efforts to produce sustainability frameworks and standards, the disclosure landscape remains confusing, in large part because of the complex nature of seeking to develop clear standards associated with the myriad of topics embedded in stakeholderism.[283] The statement of intent highlights the difficulties with relying on disclosure to overcome the certainty challenges associated with credible commitment in this area. At the very least, the statement of intent suggests that overcoming those challenges may take some time.

In order to overcome credible commitment challenges, disclosure must address the trade-off concern or at least provide some guidance in this area. Unfortunately, it is not clear if disclosure can adequately address this issue. Professor Jill Fisch has proposed a reform that would require

[279] See Yaron Nili, Out of Sight, Out of Mind: The Case for Improving Director Independence Disclosure, 43 J. Corp. L. 35, 45–46, 52 (2017) (explaining manner in which regulatory changes related to director independence accelerated director independence at public companies).

[280] See Materiality Map, Sustainability Acct. Standards Bd. (2018), https://www.sasb.org/wp-content/uploads/2021/11/MMap-2021.png [https://perma.cc/8LFT-V2PB].

[281] See Statement of Intent, supra note 259, at 2–4 (describing collaboration among the Sustainability Accounting Standards Board ("SASB"), Global Reporting Initiative ("GRI"), Climate Disclosure Standards Board ("CDSB"), International Integrated Reporting Council ("IIRC"), and CDP).

[282] See id. at 2.

[283] See id. at 2–3.

companies to identify and discuss the three most important social issues to their operations.[284] Such a proposal may respond to trade-off concerns by enabling corporations to prioritize stakeholder issues, at least at a broad level. However, Fisch acknowledges that one drawback of her proposal is that it does not capture all of the issues around which corporations must make trade-offs.[285] Unfortunately, proposals that seek to be more comprehensive fail to address trade-off issues altogether. While the SASB standards are aimed at enabling corporations to tailor disclosure to their specific industries, those standards do not offer guidance or metrics around how corporations make trade-offs within specific industries.[286]

There are also important accountability flaws with disclosure. In the context of disclosure, rather than policing noncompliance with substantive conduct, the SEC will be limited to policing for inaccuracies and misleading information. This means that so long as corporations accurately disclose, corporations can engage in problematic behaviors without facing regulatory consequences.[287] Thus, the SEC's impressive array of enforcement tools may be of limited utility in a regime focused on disclosure, thereby undermining hopes for accountability.

There are also limits to the extent to which disclosure will result in shareholders and other stakeholders holding corporations accountable for underlying behavior. Reliance on shareholders as an accountability check means being dependent on shareholders remaining committed to policing corporate behaviors focused on stakeholder concerns. As this Article has mentioned elsewhere, shareholders have been leading the way in this area, including pressing for more significant disclosure and engagement.[288] Moreover, recent cases in which shareholders have brought suit against corporations for misleading disclosures related to social issues reveal that shareholders may be willing to play a more robust accountability role in

[284] See Fisch, supra note 260, at 956–59 (proposing the adoption of Sustainability Discussion and Analysis modeled after existing Management Discussion and Analysis).

[285] See id. at 959–61.

[286] The rules provide a framework for disclosure, but they do not provide guidance on trade-offs. See Materiality Map, supra note 280.

[287] See Martin, supra note 258, at 570. In the context of other social rules such as resource extraction, Martin suggests that we cannot depend upon the SEC to use its enforcement powers given its seeming reluctance to interfere with business practices involving social issues. See id. at 547.

[288] See Rissman & Kearney, supra note 254, at 10171 (noting shareholders' impact on corporate sustainability measures).

this area.[289] Hence, there is at least potential that shareholders can play an accountability role in this area. Nonetheless, there is still concern that shareholders may not serve any accountability function with respect to issues around which shareholders are not aligned with stakeholders. Many also have expressed concern that activist shareholders may pressure corporations to ignore stakeholder concerns or may target corporations for focusing on such concerns.[290] These observations suggest that reliance on shareholders has both benefits and drawbacks.

Advocates also hope that more robust disclosure will enhance non-shareholder stakeholders' ability to hold corporations accountable. Importantly, there is a growing recognition that stakeholders consume corporate disclosure and use that disclosure to assess corporate behavior, particularly with respect to social issues.[291] However, whether or not stakeholders can serve as an accountability check depends on their ability to digest disclosed information, their willingness to pressure corporations, and corporations' sensitivity to that pressure. On the one hand, research reveals that today's stakeholders are more willing and better equipped to exert pressure on corporations, particularly with respect to matters related to social concerns.[292] Research also indicates that today's public company is much more vulnerable to external pressure and thus more likely to bow to such pressure.[293] On the other hand, research also confirms that external stakeholder pressure is a "clumsy" accountability vehicle for many reasons.[294] Even with more reliable information, available research confirms that stakeholders may not be fully capable of understanding the

[289] See Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019); In re Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *1 (Del. Ch. 2021); In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 120–21 (Del. Ch. 2009).

[290] See Rissman & Kearney, supra note 254, at 10164–65.

[291] See Lipton, supra note 116, at 556–57; Sale, The New "Public" Corporation, supra note 113, at 148; Sale, Public Governance, supra note 113, at 1034–35.

[292] See Esty & Karpilow, supra note 94, at 633–34; Robert G. Eccles, Scott C. Newquist & Roland Schatz, Reputation and Its Risks, Harv. Bus. Rev. (Feb. 2007), https://hbr.org/2007/02/reputation-and-its-risks#:~:text=Executives%20know%20the%20importance%20of,ranges%20of%20products%20and%20services [https://perma.cc/R74D-3BKY].

[293] See Larkin, supra note 110, at 9; Roy Shapira, A Reputational Theory of Corporate Law, 26 Stan. L. & Pol'y Rev. 1, 7–8 (2015); Kishanthi Parella, Reputational Regulation, 67 Duke L.J. 907, 929 (2018); Tillmann Wagner, Richard J. Lutz & Barton A. Weitz, Corporate Hypocrisy: Overcoming the Threat of Inconsistent Corporate Social Responsibility Perceptions, 73 J. Mktg. 77, 83 (2009).

[294] See Parella, supra note 293, at 961 (noting that relying on external reputational sanctioning by stakeholders may result in unpredictable, attenuated, unrealized, and unintended consequences); Martin, supra note 258, at 577–79.

information, undermining their ability to monitor or impact corporate behavior.[295] Stakeholders also may not be able to effectively detect or respond to all instances of inappropriate behaviors.[296] This often stems from the fact that information may be too complex or voluminous for stakeholders to digest.[297] Then, too, research indicates that stakeholders often overreact to certain misbehaviors and underreact to others, increasing the potential that stakeholders may be an imperfect vehicle for monitoring corporate behavior.[298] Buttressing this concern, research reveals that stakeholders (both shareholders and non-shareholders) have biases that may undermine their ability to appropriately detect and assess corporate misbehavior.[299] In addition to concerns about the ability to process and react to disclosed information, research reveals that it is often difficult for stakeholders to remain vigilant over the long term, decreasing the likelihood that they can generate the sustained pressure needed to create lasting or structural changes.[300]

Finally, because disclosure does not mandate substantive behavior, it is entirely possible that corporations will not be susceptible to stakeholder pressure. Indeed, even in this current environment, research reveals that the "naming and shaming" employed by stakeholders to constrain corporate behavior does not work on every corporation, especially some of the most problematic corporations.[301] In light of these concerns, credible commitment theorists have warned that external pressure from stakeholders has severe limitations and thus may not be the most effective source of accountability for facilitating credible commitment.[302]

[295] See Martin, supra note 258, at 576–77.
[296] See id.
[297] See id.
[298] See Shapira, supra note 293, at 10.
[299] See Stephen J. Choi & A.C. Pritchard, Behavioral Economics and the SEC, 56 Stan. L. Rev. 1, 5, 14–15 (2003).
[300] See Parella, supra note 293, at 959.
[301] See Martin, supra note 258, at 574–75, 574 nn.192–93 (citing research).
[302] See North, Institutions and Credible Commitment, supra note 122, at 13; Rock, supra note 121, at 685–86; see also Esty & Karpilow, supra note 94, at 635 (warning of the limits of stakeholder pressure for holding corporations accountable for sustainability goals).

C. Credible Commitment and Compensation

Another noteworthy reform is one that seeks to tie attainment of social goals to executive compensation.[303] This solution has appeal. Research suggests that executives are highly sensitive to their compensation, and thus tying corporate goals to compensation can incentivize executive behavior towards meeting those goals.[304] Most of the current compensation structures are aimed at producing alignment with shareholders and financial goals.[305] The hope is that incorporating social goals into compensation will increase attention to—and focus on—those goals. Indeed, two prominent compensation consultants have referred to tying compensation to sustainability goals as the "final link in the chain of improving corporate accountability for sustainability."[306]

Alas, this solution has flaws from a credible commitment standpoint. First, and most obviously, it only focuses on accountability; it fails to establish clear rules. Advocates of this reform appreciate that it can only produce its intended results if we are clear about what is being measured

[303] See Mark Roe, Holger Spamann, Jesse Fried & Charles Wang, The Sustainable Corporate Governance Initiative in Europe, 38 Yale J. on Regul. Bull. 133, 149–50 (2021); Minow, supra note 51; Bebchuk & Tallarita, supra note 1, at 140–53 (noting compensation reforms linking executive pay with stakeholder concerns); Kay et al., supra note 9; Seymour Burchman, A New Framework for Executive Compensation, Harv. L. Sch. F. on Corp. Governance (Mar. 13, 2020), https://corpgov.law.harvard.edu/2020/03/13/a-new-framework-for-executive-compensation/ [https://perma.cc/2BCC-SZ7D]; Seymour Burchman & Mark Emanuel, A Stakeholder Approach and Executive Compensation, Harv. L. Sch. F. on Corp. Governance (Oct. 8, 2019), https://corpgov.law.harvard.edu/2019/10/08/a-stakeholder-approach-and-executive-compensation/ [https://perma.cc/P3WZ-ZCAU].

[304] See Bebchuk & Tallarita, supra note 1, at 140–47 (noting importance of compensation to director behavior); Michael B. Dorff, Does One Hand Wash the Other? Testing the Managerial Power and Optimal Contracting Theories of Executive Compensation, 30 J. Corp. L. 255, 257 (2005) (highlighting how few areas more closely aligned with executive interests than pay); Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, Managerial Power and Rent Extraction in the Design of Executive Compensation, 69 U. Chi. L. Rev. 751, 761 (2002) [hereinafter Bebchuk et al., Managerial Power]; Lund, supra note 17, at 1630–32.

[305] See Bebchuk & Tallarita, supra note 1, at 141.

[306] Seymour Burchman & Blair Jones, 5 Steps for Tying Executive Compensation to Sustainability, Harv. Bus. Rev. (July 19, 2019), https://hbr.org/2019/07/5-steps-for-tying-executive-compensation-to-sustainability [https://perma.cc/99KK-AQ38]; see also Don Delves, Stakeholder Capitalism, Executive Compensation and Corporate Governance, WTW (Sept. 13, 2019), https://www.willistowerswatson.com/en-US/Insights/2019/09/stakeholder-capitalism-executive-compensation-and-corporate-governance [https://perma.cc/Q8S4-JKSB] (noting that in order to ensure corporate focus on stakeholder concerns, executive compensation must change); Stavros Gadinis & Amelia Miazad, Corporate Law and Social Risk, 73 Vand. L. Rev. 1401, 1419 (2020) (noting that the strongest indicator of ESG's strength is the effort to link incentive pay with ESG goals).

and how best to link measurable goals with compensation.[307] The second flaw stems from the uncertain nature of executive compensation reform as an accountability metric. In other words, to the extent supporters hope that this reform can serve as a form of accountability, many have expressed serious doubts about whether regulating corporate behavior through executive compensation can actually achieve its intended goal of aligning that behavior with stakeholder interests.[308] The next Sections discuss both of these issues.

1. The Uncertain Road to Rule Clarity

As an initial matter, the process of generating clear metrics for advancing stakeholder goals within the compensation framework is likely to be extremely challenging. Commentators and compensation experts agree: currently, there are no clear standards and there is no clear consensus around how best to measure social goals in the context of compensation.[309] Moreover, the process of pinpointing clear measures aimed at linking executive compensation to shareholder interests and financial goals has been fraught with challenges.[310] And this process relates to creating compensation measurements for shareholder interests which are viewed as "relatively well-defined and measurable."[311] Any challenges in designing compensation schemes will be magnified by seeking to tie stakeholder goals with compensation because of the multiplicity of interests and the need to make clear how trade-offs will be

[307] See Roe et al., supra note 303, at 150.

[308] See Bebchuk & Tallarita, supra note 1, at 156–58; David I. Walker, The Challenge of Improving the Long-Term Focus of Executive Pay, 51 B.C. L. Rev. 435, 450 (2010).

[309] See Josh Cable, Report: Majority of S&P 500 Firms Link Sustainability to CEO Compensation, EHS Today (May 9, 2014), https://www.ehstoday.com/environment/article/21916304/report-majority-of-sp-500-firms-link-sustainability-to-ceo-compensation [https://perma.cc/YQJ8-9HVW] (noting that there was "much room for improvement" in the way companies incorporated sustainability factors into compensation); Burchman & Jones, supra note 306; Delves, supra note 306.

[310] See Lucian Bebchuk & Jesse Fried, Pay Without Performance: The Unfulfilled Promise of Executive Compensation 61, 80 (2004); Robert J. Rhee, Intrafirm Monitoring of Executive Compensation, 69 Vand. L. Rev. 695, 707–08 (2016); Charles M. Elson & Craig K. Ferrere, Executive Superstars, Peer Groups, and Overcompensation: Cause, Effect, and Solution, 38 J. Corp. L. 487, 493–94 (2013); Bebchuk et al., Managerial Power, supra note 304, at 789–93 (describing the obstacle of camouflage and compensation); Mark J. Loewenstein, The Conundrum of Executive Compensation, 35 Wake Forest L. Rev. 1, 10 (2000); Susan J. Stabile, Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?, 2 U. Pa. J. Lab. & Emp. L. 227, 232–33 (1999).

[311] See Bebchuck & Tallarita, supra note 1, at 159.

reconciled.[312] Accurate measurement may be particularly hard because some goals and interests may not be easily measurable or quantifiable, especially in the short term.[313] The fact that we have been struggling to generate reliable and accurate sustainability measures for more than three decades underscores the challenging nature of this process and raises concerns about linking that process with the current challenges of setting appropriate compensation. At the very least, these observations suggest getting rule clarity around this issue may be a long and arduous process. Unless and until we can pinpoint how best to establish rules in this area, linking compensation to stakeholder concerns may not serve to facilitate credible commitment.

Illustrative of this point, many companies already purport to link social goals with executive compensation, but research suggests that their efforts are less than satisfying because such companies do not have clear measurements in place. Thus, a 2014 study indicates that a majority of S&P 500 companies reported having compensation practices that link executive pay to sustainability goals.[314] Similarly, a 2013 study revealed that forty-three percent of companies reported linking executive pay to ESG goals.[315] However, a study of S&P 500 companies published in 2016 found that most companies relied on targets and measurements that were ineffective and thus failed to lead to improved behavior with respect to identifiable social goals.[316] Importantly, commentators note that it is difficult to pinpoint an accurate number of companies linking social goals to compensation precisely because there is disagreement about how best to measure whether or not companies are capturing social goals within their compensation framework.[317] Consistent with credible commitment

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[312] See id. (speculating that seeking to tie compensation to stakeholders would be "orders of magnitude more challenging" than the challenges posed by linking to shareholder interests); Walker, supra note 308, at 450 ("We have little experience with very long-term executive incentive pay arrangements and really no idea which instruments would best link pay and performance over longer periods.").

[313] See Bebchuck & Tallarita, supra note 1, at 159; Ben Schwefel, Note, "Green" Performance: The Future of Performance-Based Executive Compensation?, 6 San Diego J. Climate & Energy L. 247, 262 (2015); Walker, supra note 308, at 450.

[314] See Cable, supra note 309.

[315] See Amy Knieriem, Carol Silverman, Susan Eichen & Kim Moriarty, Focus on Corporate Sustainability, 22 Corp. Governance Advisor, 2014 WL 12813826 (citing 2013 study revealing that forty-three percent of companies reported linking executive pay to ESG goals).

[316] See Karen Maas, Do Corporate Social Performance Targets in Executive Compensation Contribute to Corporate Social Performance?, 148 J. Bus. Ethics 573, 581 (2018).

[317] See Gadinis & Miazad, supra note 306, at 1420.

theory, the lack of sufficient rules undermines the ability of executive compensation to serve its credible commitment function.

Importantly, trade-off concerns are especially challenging in this area, further undermining the effort to gain rule clarity and thus hoped-for credible commitment. Indeed, there exists an array of potential social goals, and thus corporations must wrestle with which goals they will link to compensation.[318] Pinpointing how best to prioritize goals or what weight different goals should be given will likely be challenging, especially because it may need to change over time. The fact that corporations can engage in both good and bad acts simultaneously means that considering trade-offs and prioritization in this area will be especially salient or else there will be a risk that executives will be rewarded even when they engage in practices that some stakeholders view as problematic. As credible commitment theory suggests, failing to resolve these critical trade-off issues will undermine the ability to rely on executive compensation as a viable credible commitment vehicle.

2. Accountability Illusions?

Even if we manage to pinpoint clear metrics, it is not clear if tying compensation to those metrics will further accountability goals. Our experience in the realm of executive compensation more broadly has revealed that the practice of seeking to achieve particular goals through compensation does not reliably work. Thus, throughout history we have adopted several regulations aimed at altering pay practices to curb compensation, and while those regulations successfully altered pay practices, they failed to reduce overall compensation.[319] Studies seeking to determine if linking social goals to compensation has an appreciable impact on corporate attention to those goals have found mixed results. Thus, one recent study indicates that linking social goals to executive compensation can lead to an increase in social initiatives and the advancement of particular climate goals.[320] However, that study questions whether compensation metrics can similarly impact other goals. Another study found no link between the use of social metrics in executive compensation and improvements in corporate activity benefitting

[318] See Bebchuck & Tallarita, supra note 1, at 159; Walker, supra note 308, at 450.

[319] See supra notes 312 and 313.

[320] See Caroline Flammer, Bryan Hong & Dylan Minor, Corporate Governance and the Rise of Integrating Corporate Social Responsibility Criteria in Executive Compensation: Effectiveness and Implications for Firm Outcomes, 40 Strategic Mgmt. J. 1097, 1099 (2019).

stakeholders.[321] A closer look at the data suggested that this result stemmed in large part from the fact that the vast majority of corporations choose soft, qualitative, hard-to-quantify measures when linking social goals to compensation.[322] These studies confirm the importance of accurate measures while also raising questions about whether those measures can achieve the goal of promoting all kinds of socially desirable corporate behavior.

Importantly, our experience with seeking to regulate corporate behavior through compensation has revealed that it is difficult to use incentive payment structures to impact executive behavior for several reasons. First, there are several legal and extralegal factors that impact executive behavior beyond compensation, and hence those factors may mute or counteract the impact of pay arrangements.[323] Second, incentive compensation not only is one of several components of executive pay arrangements but also is generally a relatively small component of overall pay packages.[324] This means that incorporating social goals into incentive pay arrangements means squeezing those goals into an already small aspect of total executive compensation. More importantly, our experience has indicated that the small portion of pay attributable to these incentive structures may not be sufficient to impact executive and thus corporate behavior.[325] Third, unless incentive pay is linked to factors around which executives have control, there will be a misalignment.[326] Tying an executive's compensation to issues over which she has no control undermines the ability of compensation to impact her performance while potentially rewarding or punishing her inappropriately.[327] Fourth,

[321] See Maas, supra note 316, at 581–82.

[322] See id. at 581–83 (indicating that hard, quantitative measures can lead to results).

[323] See, e.g., Walker, supra note 308, at 452; Bebchuk et al., Managerial Power, supra note 304, at 772; Bebchuk & Fried, supra note 310, at 80.

[324] See Bebchuk & Fried, supra note 310, at 121–22; Iman Anabtawi, Explaining Pay Without Performance: The Tournament Alternative, 54 Emory L.J. 1557, 1566–67 (2005) (noting that compensation packages consist of several different components, and the incentive element often constitutes a small percentage); Kay et al., supra note 9 (noting that incentive metrics associated with social goals count for five to twenty percent of annual incentive goals); Sullivan & Cromwell, Sustainability Matters: The Rise of ESG Metrics in Executive Compensation 3 (2020), https://www.sullcrom.com/files/upload/SC-Publication-Sustainability-Matters-The-Rise-of-ESG-Metrics-in-Executive-Compensation.pdf [https://perma.cc/F7HM-C8AN] (noting one study revealing that ESG factors only comprise five percent of total incentive compensation).

[325] See Anabtawi, supra note 324, at 1566–67.

[326] See Roe et al., supra note 303, at 150.

[327] See Anabtawi, supra note 324, at 1563, 1566.

executive compensation arrangements are capable of manipulation, particularly given that executives continue to have a large role in the pay process.[328] For example, if targets are set around goals that are already reached or are relatively insignificant, pay arrangements will not serve to meaningfully advance social purpose goals.[329]

Finally, our experience reveals that there is a serious possibility of unintended consequences associated with tying compensation to corporate goals, thereby undermining accountability.[330] Many worry about the possibility that linking compensation to specific goals can create perverse incentives for executives. For example, tying compensation to stock price had the unintended consequence of executives over-focusing on that measure of performance, leading to risky and in some cases fraudulent executive conduct.[331] Moreover, tying executive compensation to stock and equity compensation had the unintended consequence of substantially increasing overall executive compensation.[332]

This reform also poses accountability challenges because it does not appropriately wrestle with the role of shareholders in the compensation process.[333] Shareholders have discretion over executive compensation, particularly through their advisory vote on executive compensation ("[s]ay on pay").[334] When shareholders exercise their vote, their primary focus has been whether executive pay is linked to financial performance.[335] Moreover, as a result of the say on pay vote, corporations have made considerable efforts to ensure that their pay packages are linked to financial performance.[336] As with other areas, shareholders' heightened role over compensation raises the question of how much

[328] See Bebchuk et al., Managerial Power, supra note 304, at 767.

[329] See Bebchuk & Tallarita, supra note 1, at 160–61.

[330] See id. at 159–60; Lund, supra note 17, at 1630.

[331] See Sanjai Bhagat & Roberta Romano, Essay, Reforming Executive Compensation: Focusing and Committing to the Long-Term, 26 Yale J. on Regul. 359, 362 (2009).

[332] See Bebchuk et al., Managerial Power, supra note 304, at 792–93; Bhagat & Romano, supra note 331, at 362–63; John C. Coffee, Jr., What Caused Enron? A Capsule Social and Economic History of the 1990s, 89 Cornell L. Rev. 269, 274 (2004); Kevin J. Murphy, Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options, 69 U. Chi. L. Rev. 847, 850 (2004).

[333] See Bebchuck & Tallarita, supra note 1, at 161.

[334] See Lisa M. Fairfax, Sue on Pay: Say on Pay's Impact on Directors' Fiduciary Duties, 55 Ariz. L. Rev. 1, 4 (2013) [hereinafter Fairfax, Sue on Pay].

[335] See id. at 36; Semler Brossy, 2021 Say on Pay & Proxy Results 3–4 (2022), https://semlerbrossy.com/wp-content/uploads/2022/01/SBCG-2021-SOP-Report-2022-01-31.pdf [https://perma.cc/HQ5W-BQV6].

[336] See Fairfax, Sue on Pay, supra note 334, at 37–38.

shareholders will be willing to sacrifice in order to enable corporations to pursue stakeholder issues. Compensation consultants worry that shareholders and proxy advisors may object to an overemphasis on stakeholder concerns.[337] This objection will carry significant weight given shareholders' influential role over compensation practices.[338] No reform has engaged the issue regarding how best to reconcile the potentially competing concerns that may emerge between existing say on pay incentives and those embedded in the desire to link pay to stakeholder goals. At the very least, this reform poses a credibility concern because of the lack of stakeholder voice associated with accountability.

IV. CREDIBLE COMMITMENTS AND THE VALUE OF NORMS

As the discussion in Part III suggests, many of the most promising existing vehicles for establishing credible commitment have deficiencies, and there is reason to believe that some of those deficiencies cannot be overcome. That discussion may therefore suggest strong reason for pessimism about the ability of reforms to facilitate credible commitment and thus genuinely influence corporate behavior. Indeed, several prominent scholars have concluded that the kind of credible commitment flaws highlighted in this Article render efforts to actualize stakeholderism infeasible.[339] This Article rejects that conclusion and instead salvages the importance of these reforms to credible commitment by demonstrating that those reforms can serve a very vital normative function.[340]

A. Norms Defined

This Article uses the term "norms" to refer to expectations regarding how individuals *ought* to behave.[341] In this regard, norms are aspirational

[337] See Kay et al., supra note 9 (noting that shareholders and proxy advisors "may react adversely to non-financial metrics weighted more than 10% to 20% of annual incentive scorecards").

[338] See id.

[339] See Bebchuk & Tallarita, supra note 1, at 157; Rock, For Whom is the Corporation Managed?, supra note 13, at 394; Lund, supra note 17, at 1619–21.

[340] See Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1339–40 (noting that while corporate purpose cannot be used to compel benevolent social behavior, it does have an instrumental value, enabling corporations to direct and manage stakeholder expectation and also gain a comparative advantage).

[341] See Bicchieri, Norms in the Wild, supra note 19, at 11; Bicchieri, The Grammar of Society, supra note 19, at 4; Posner, supra note 19, at 8; Sunstein, Social Norms, supra note

and refer to behaviors that individuals are expected to follow and that individuals expect others to follow.[342] A norm also refers to behavior for which you believe you will be punished if you fail to follow or for which you believe you should punish others for their failure to follow.[343] Thus, the behavioral expectation of a norm is supported by the strong sense that compliance will be rewarded while noncompliance will be condemned.

Along these same lines, norms in the corporate context refer to expectations regarding how corporations and corporate actors *ought* to behave. Thus, corporate purpose can be viewed as a normative expectation regarding the interests that corporations and corporate actors *ought* to consider and advance when making business decisions. By extension, stakeholderism can be viewed as the normative expectation that corporations and corporate actors *ought* to consider and advance the interests of all stakeholders.[344]

B. Impact of Norms on Behavior

1. Norms Generally

There is a voluminous body of research confirming that norms influence behavior.[345] This research reveals that individuals learn about

19, at 914; Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2032 (1996) [hereinafter Sunstein, Expressive Function]; Cooter, supra note 19, at 1656.

[342] See supra note 341.

[343] See supra note 341.

[344] As so defined, the stakeholderism norm does not resolve the tension between so-called enlightened shareholder primacy, which considers stakeholders because that consideration enhances shareholders' interest, and "true" stakeholderism, which views shareholders as one among many stakeholders and thus does not prioritize them. See Bebchuk & Tallarita, supra note 1, at 94, 97.

[345] See, e.g., Bicchieri, Norms in the Wild, supra note 19, at 11–12; Gary S. Becker, Accounting for Tastes 225 (1996); Donald J. Black, The Behavior of Law 118–19 (1976); Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765, 1769 (1996); Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 Mich. L. Rev. 1724, 1787–88 (2001); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractional Relations in the Diamond Industry, 21 J. Legal Stud. 115, 134–35 (1992) [hereinafter Bernstein, Opting Out]; David Abrams, Roberto Galbiati, Emeric Henry & Arnaud Philippe, When in Rome... On Local Norms and Sentencing Decisions 4 (Scis. Po, Working Paper No. 2019-04, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3357122 [https://perma.cc/2HPZ-RXSX]; David A. Hoffman & Tess Wilkinson-Ryan, The Psychology of Contract Precautions, 80 U. Chi. L. Rev. 395, 422–23 (2013); Amitai Aviram, A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems, 22 Yale L. & Pol'y Rev. 1, 20–22 (2004); Adam B. Badawi, Interpretive Preferences

appropriate norms from their broader social and non-social environment.[346] The research also reveals that adherence to norms is reinforced by approvals for those who follow norms and sanctions for norm violators.[347] Finally, and perhaps most importantly, research makes clear that norms often influence behavior irrespective of formal rules and enforcement vehicles.[348] In other words, because norms refer to perceptions regarding expected behavior, individuals often will comply with norms even when there is no external pressure to do so.

2. Norms and Corporate Behavior

Similar to norms in other contexts, corporate scholars have argued that norms impact corporate behavior and often play a more significant role in shaping corporate behavior than formal rules and regulations.[349] As an initial matter, there is a voluminous body of research indicating that norms impact corporate behavior.[350] The research also indicates that norms are often more important than formal rules and sanctions because corporate actors comply with norms even in the absence of formal legal

and the Limits of the New Formalism, 6 Berkeley Bus. L.J. 1, 12–14 (2009); Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 4 (1991); Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 Int'l Rev. L. & Econ. 215, 216 (1994) [hereinafter Cooter, Structural Adjudication]; Sergey Gavrilets & Peter J. Richerson, Collective Action and the Evolution of Social Norm Internalization, 114 PNAS 6068, 6068 (2017); Dietrich Rueschemeyer, Usable Theory: Analytic Tools for Social and Political Research 7–8 (2009).

346 See Sunstein, Expressive Function, supra note 341, at 2026.

347 See supra note 341.

348 See, e.g., North, Institutions and Credible Commitment, supra note 122, at 12.

349 See infra note 350.

350 See Posner, supra note 19, at 148–53; Margaret M. Blair & Lynn A. Stout, Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law, 149 U. Pa. L. Rev. 1735, 1748–50 (2001) (suggesting that social norms, rather than law and economic incentives, govern corporate behavior); John C. Coffee, Jr., Do Norms Matter? A Cross-Country Evaluation, 149 U. Pa. L. Rev. 2151, 2151–54 (2001); Donald C. Langevoort, The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability, 89 Geo. L.J. 797, 816–17 (2001); Edward B. Rock & Michael L. Wachter, Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation, 149 U. Pa. L. Rev. 1619, 1621–22 (2001); David A. Skeel, Jr., Shaming in Corporate Law, 149 U. Pa. L. Rev. 1811, 1820 (2000); Melvin A. Eisenberg, Corporate Law and Social Norms, 99 Colum. L. Rev. 1253, 1291–92 (1999) (noting that changes in norms will translate into changes in corporate behavior); Edward B. Rock, Saints and Sinners: How Does Delaware Corporate Law Work?, 44 UCLA L. Rev. 1009, 1016 (1997); Cooter, supra note 19, at 1690–94; Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943, 946–47 (1995).

rules or sanctions compelling compliance.[351] Although such formalities can contribute to and reinforce norms regarding appropriate corporate behavior, corporate scholars have strenuously argued that norm compliance in the corporate arena does not depend on formal legal rules and institutions.[352] Instead, a prevailing norm will ensure that corporate actors themselves pinpoint rules to guide their conduct.[353] This is because once a norm takes root, compliance with the norm becomes an end in itself, not a means to avoid sanction or obtain rewards.[354] As a result, corporate actors conform their behavior to the norm irrespective of external pressure, sanctions, or rewards.

3. Norms and Credible Commitment

Credible commitment theorists similarly emphasize the importance of norms for facilitating credible commitment because norms operate to constrain or guide behavior.[355] According to North, when there are norms supporting particular behavior, those norms facilitate credible commitment by increasing the likelihood that people within the entire organization, particularly those tasked with implementing and monitoring implementation of various institutional commitments, align their behavior to those commitments.[356] Because they involve shaping and guiding people's understanding of appropriate behavior, norms play a significant role in constraining behavior and thus a significant role in credible commitment.[357]

Importantly, credible commitment theorists agree with norm scholars more generally that once a norm has been embraced, it operates independent of formal rules and enforcement measures.[358] Norms not only "supplement, modify, or reinforce formal rules" but also can be more important than those rules for constraining or guiding behavior because they do not depend on external pressure.[359] This is because compliance with a norm becomes an end in itself, not a mechanism to avoid external disapproval or sanctions or otherwise to garner external rewards or

[351] See Langevoort, supra note 350, at 816–17; Skeel, supra note 350, at 1820–22, 1824–26.
[352] See supra note 351.
[353] See North, Institutions and Credible Commitment, supra note 122, at 12–13.
[354] See id.; Sunstein, Expressive Function, supra note 341, at 2032–33.
[355] See North, Institutions and Credible Commitment, supra note 122, at 11–12.
[356] See id. at 12–13.
[357] See id. at 20.
[358] See id. at 12.
[359] See id.

approval.[360] The norm helps ensure commitment compliance because actors take it upon themselves to exercise their discretion in compliance with the norm and, by extension, in compliance with the commitment.[361] As a result, norms serve to overcome credible commitment challenges by serving an important gap-filler role.[362] Norms ensure that gaps are filled by individuals themselves when they seek to comply their behavior with expected norms. In this way, norms are vital to credible commitment because norms guide discretion and give content to vague aspirations. Credible commitment theory therefore makes clear that norms serve to enhance, supplement, and strengthen formal rules and enforcement and hence serve as an important glue for facilitating credible commitments.

4. Norms and Stakeholderism

Both critics and supporters of stakeholderism have implicitly recognized the importance of norms to any reform effort. On the one hand, critics have argued that the current normative environment is too heavily focused on shareholders and financial performance for stakeholderism and related reforms to impact corporate behavior.[363] Bebchuk and Tallarita insist that the robust incentives associated with shareholder value undermine the ability to create norms in favor of stakeholders.[364] In this same vein Lund notes, "It is naïve to expect corporations to do something other than maximize profits when corporate law's incentive structure rewards corporate fiduciaries who prioritize shareholder wealth."[365]

By contrast, advocates of stakeholderism hope reforms shift the normative focus away from shareholder primacy.[366] Such advocates maintain that new rules related to stakeholders are critical for establishing

[360] See id; Sunstein, Expressive Function, supra note 341, at 2032–33.
[361] See North, Institutions and Credible Commitment, supra note 122, at 12.
[362] See id.
[363] See Bebchuk & Tallarita, supra note 1, at 128; Rock, For Whom is the Corporation Managed?, supra note 13, at 391–95; Lund, supra note 17, at 1619–20.
[364] See Bebchuk & Tallarita, supra note 1, at 146.
[365] Lund, supra note 17, at 1620; see also Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761, 776–77 (2015) (highlighting that it is considered a breach of fiduciary duty to consider "an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth").
[366] See Strine, Restoration, supra note 10, at 428.

norms that encourage corporate behavior that advances stakeholder norms and shifts the normative focus away from shareholder primacy.[367]

In this regard, both sides of the stakeholderism debate have acknowledged the importance of norms in facilitating or destabilizing credible commitment.

C. Importance of Norm Internalization

Scholars focused on norms have made clear that the best way to ensure that norms will impact behavior is through the process of norm internalization.[368] Norms can influence behavior as a result of either external or internal incentives.[369] Norms that influence behavior based on external pressure or incentives stem from rules, laws, or some other external pressure that incentivizes behavior in compliance with the norm.[370] Some norms are internalized such that acting according to the norm becomes an end in itself rather than a means to achieve rewards or avoid sanctions.[371] Internalized norms ensure behavioral compliance without reliance on external pressures or formal rules and enforcement vehicles.[372] Internalized norms are thus more significant than norms that result from formal external rules because an internalized norm influences behavior without need to resort to, or depend upon, external rules or sanctions.[373] Hence, there is widespread agreement that internalized norms are the best mechanism for ensuring that human or institutional behavior aligns with norms.[374]

[367] See id.

[368] See Sunstein, Expressive Function, supra note 341, at 2031–33; Robert Cooter, Expressive Law and Economics, 27 J. Legal Stud. 585, 585–86 (1998) [hereinafter Cooter, Expressive Law]; Robert Cooter, Torts as the Union of Liberty and Efficiency: An Essay on Causation, 63 Chi.-Kent. L. Rev. 523, 539–40 (1987); Kaplow, supra note 194, at 570; see also Waldron, Vagueness and the Guidance, supra note 200, at 63, 71 (explaining that norm internalization operates to ensure individuals monitor and control their own behavior on the basis of the norm).

[369] See Nellis, supra note 123, at 272–73; North, Institutional Change, supra note 122, at 4 (noting that constraints can be formal—such as rules, constitutions, or the common law—or informal such as conventions or codes of behavior); North, Institutions and Credible Commitment, supra note 122, at 12.

[370] See North, Institutional Change, supra note 122, at 4.

[371] See id.

[372] See id.

[373] See id.

[374] See Sunstein, Expressive Function, supra note 341, at 2031; Cooter, Expressive Law, supra note 368, at 585–86; Waldron, Vagueness and the Guidance, supra note 200, at 63, 71; Cooter, Structural Adjudication, supra note 345, at 220–21.

This agreement extends to the credible commitment context. Credible commitment theorists point out that internalized norms represent a significant source of credible commitment because they influence behavior by ensuring that individuals themselves exercise their discretion consistent with the internalized norm.[375] Norm internalization is also important for facilitating credible commitment because internalized norms help overcome vagueness and trade-off concerns that create obstacles for credible commitment. This is possible because once a norm is internalized, such internalization increases the likelihood that we can depend upon individuals themselves to make appropriate trade-offs or fill in gaps left open by vague commitments in a manner that is consistent with internalized norms.[376] As a result, internalized norms not only reinforce formal rules but also supplement and modify them.[377] Thus, mechanisms that promote norm internalization play a strong role in facilitating credible commitment.

D. Norm Internalization and Commitment Credibility

1. Factors Promoting Norm Internalization

Credible commitment research pinpoints at least three factors that facilitate norm internalization. First, there must be some indication that the embrace of a new norm or a shift in norms is plausible.[378] Such a shift sets the stage for the internalization of the norm. Second, increased visibility of the norm,[379] along with consistent and repeated exposure to the norm, enhances norm internalization by increasing the likelihood that individuals will come to view the norm as an acceptable and desired aspect of expected behavior.[380] Finally, the embrace of the norm by powerful and influential leaders significantly increases the likelihood of

[375] See Cooter, Structural Adjudication, supra note 345, at 220–21.
[376] See id. (norms as gap fillers).
[377] See North, Institutions and Credible Commitment, supra note 122, at 12.
[378] See Daniel Villatoro, Guilia Andrighetto, Rosaria Conte & Jordi Sabater-Mir, Self-Policing Through Norm Internalization: A Cognitive Solution to the Tragedy of the Digital Commons in Social Networks, 18 J. Artificial Soc'ys & Soc. Simulation, 1 (2015); Rueschemeyer, supra note 345, at 77 (explaining that norms can be imposed by a powerful authority or person); Gavrilets & Richerson, supra note 345, at 6068; Daniel C. Feldman, The Development and Enforcement of Group Norms, 9 Acad. Mgmt. Rev. 47, 50 (1984).
[379] See Cristina Bicchieri & Hugo Mercier, Norms and Beliefs: How Change Occurs, 63 Jerusalem Phil. Q. 60, 63–64 (2014).
[380] See id.

norm internalization because individuals take their behavioral cues from such leaders.[381] This Article argues that the current environment along with the cumulative effect of reforms aligns with the aforementioned factors in a manner that may facilitate norm internalization, thereby increasing the potential that corporate actors may conform their behavior to expectations around stakeholderism.

2. Setting the Stage for Internalizing the Stakeholderism Norm

A norm cannot be internalized unless and until the norm achieves some prevalence because that prevalence helps create a perception about the desirability and acceptability of a given norm. Indeed, a norm, and thus norm internalization, is contingent upon individuals' perceptions of what society deems appropriate.[382] In this regard, the growing embrace of a norm helps set the stage for norm internalization. Importantly, when a desired norm runs counter to a preexisting norm, there must be a normative shift reflecting the embrace of the new norm and thus setting the stage for internalization of that norm.[383] While the existence and even prevalence of a norm is no guarantee of norm internalization and behavioral compliance, it does pave the way for norm internalization and thus increased norm compliance.[384]

The current environment, coupled with the impact of the push for reforms related to stakeholderism, may set the stage for norm internalization related to stakeholderism by increasing the possibility of a broader normative shift towards stakeholderism. Norms can develop or shift after several small changes related to a particular expectation, which is sometimes referred to as "norm bandwagon."[385] In this respect, a prior norm slowly erodes to give way to a new norm.[386] In fact, several prominent corporate scholars have repeatedly insisted that the shareholder primacy norm has slowly eroded in favor of stakeholderism.[387] The

[381] See Cristina Bicchieri & Alexander Funcke, Norm Change: Trendsetters and Social Structure, 85 Soc. Rsch. 1, 2 (2018) (discussing reference networks, influential leaders, and trendsetters).

[382] See Sunstein, Expressive Function, supra note 341, at 2026.

[383] See id. at 2032–33.

[384] See Bicchieri, Norms in the Wild, supra note 19, at 1–2; Bicchieri & Funcke, supra note 381, at 19.

[385] See Sunstein, Social Norms, supra note 19, at 909.

[386] See id.

[387] See Ribstein, supra note 225, at 1436; Fairfax, From Apathy to Activism, supra note 105, at 1314; Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1323.

Business Roundtable statement may be a reflection of norm bandwagon and thus the gradual erosion of shareholder primacy in favor of stakeholderism. Norms also can shift based on the actions of a small group of defectors, referred to by one scholar as norm cascade.[388] Here again, the embrace of stakeholderism by influential groups including the Business Roundtable and institutional investors such as BlackRock and State Street may be a signal of a norm cascade. Whether viewed as a norm bandwagon or norm cascade, the Business Roundtable statement may reflect a normative shift that helps set the stage for internalization of the stakeholder norm. In addition, the push to adopt reforms aimed at more firmly establishing stakeholderism may be yet another sign of a normative shift that serves to promote norm internalization. This push may be all the more significant because it comes from a variety of different sources and thus furthers the norm cascade or norm bandwagon effect signaled by the Business Roundtable statement itself. As a result, the cumulative impact of reforms may help set the stage for norm internalization related to stakeholderism.

3. Visibility and Repeated Exposure to Stakeholderism

The cumulative effect of reforms, along with the discourse around reforms, may facilitate norm internalization by promoting visible, consistent, and repeated exposure to the stakeholder norm. Scholars have insisted that visibility and repeated exposure to a norm facilitate norm internalization.[389] Because reforms individually and collectively represent a repeated emphasis on stakeholderism from a variety of different sources and in a variety of different contexts, the impact of those reforms is to generate visibility and repeated exposure in a manner that may contribute to an environment where norm internalization can occur.[390] The cumulative nature of the reforms is even more important because the reforms impact governance mechanisms that are linked and thus reinforce one another and, by extension, reinforce the normative

[388] See Sunstein, Social Norms, supra note 19, at 909; see also Bicchieri & Funcke, supra note 381, at 19; Feldman, supra note 378, at 50; Eisenberg, supra note 350, at 1264 (explaining that norms can shift after defection of a few influential actors).

[389] See Sunstein, Expressive Function, supra note 341, at 2026, 2031; Ellickson, supra note 345, at 167–68.

[390] See Villatoro et al., supra note 378, at 2; Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. Rev. 338, 362–63 (1997); Eisenberg, supra note 350, at 1264 (discussing critical mass and tipping).

preference for stakeholderism across the corporate sphere. This reinforcement provides added visibility that may serve to enhance the potential for norm internalization. Indeed, reforms centered on fiduciary duty, executive compensation, and SEC disclosure strike at the most critical incentive structures in the corporate ecosystem.[391] Even Bebchuk has acknowledged that the pressure to conform to norms plays an important role in executive compensation and other critical corporate governance arrangements.[392] By seeking to alter those norms, reforms not only signal a shift away from shareholder primacy but also bring important visibility and exposure that may enhance the potential for norm internalization.

4. Following the Leaders on Stakeholderism

The fact that influential shareholders and asset managers are pushing for stakeholderism, and that reforms encourage the embrace of stakeholderism by influential institutions, also may promote norm internalization. The literature related to norms makes clear that norm internalization is significantly enhanced when credible, influential, and powerful leaders embrace the norm.[393] Importantly, that literature reveals that it only takes the embrace of a norm by a few powerful leaders and influential institutions to facilitate norm internalization.[394] Credible leaders or "trendsetters" serve a vital signaling function that has a strong impact on setting expectations and thus facilitating norm internalization.[395] The literature therefore suggests that the influential shareholders and asset managers pushing for stakeholderism may operate to promote norm internalization. Moreover, the institutions associated with reforms—particularly the SEC and corporate boards—may serve an important signaling function that facilitates norm internalization.

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[391] See Eisenberg, supra note 350, at 1264–66, 1278 (discussing normative roles played by fiduciary law and boards).

[392] See Bebchuk et al., Managerial Power, supra note 304, at 794.

[393] See Sunstein, Expressive Function, supra note 341, at 2034 (importance of norm entrepreneurs); Sunstein, Social Norms, supra note 19, at 919 (source can be supportive or disqualifying).

[394] See Villatoro et al., supra note 378, at 2; Rueschemeyer, supra note 345, at 77 (explaining that norms can be imposed by a powerful authority or person); Gavrilets & Richerson, supra note 345, at 6068; Feldman, supra note 378, at 50.

[395] See Bicchieri & Funcke, supra note 381, at 2–6 (discussing reference networks, "first movers," and trendsetters).

These observations suggest that while there may be credible commitment hurdles with each individual reform, the cumulative effect of the reforms may promote norm internalization and thereby increase the possibility that corporate actions align with stakeholderism. If reforms facilitate norm internalization, they also facilitate credible commitment because norm internalization helps ensure that we can rely on corporate actors to exercise their discretion in a manner that ensures norm compliance.[396] Norm internalization is especially significant because of its potential to counteract concerns about vagueness and trade-offs. Hence, if reforms can facilitate norm internalization, they can help facilitate credible commitment to stakeholderism.

E. Normative Challenges

To be sure, there are several factors that pose challenges for norm internalization related to stakeholderism. First, there is limited research surrounding how norms are created and disrupted, and thus there is a decided lack of clarity around understanding and promoting norm internalization.[397] Indeed, much of the norm research has focused on the observable impacts of norms without consistent focus on the factors that facilitate norm development.[398] As a result, we have limited understanding of the norm internalization process.[399] To be sure, as the discussion in Section IV.D above illuminates, scholars have identified factors they believe promote norm development and internalization.[400] However, the research in this area is less robust than those focused on the

[396] See Ellickson, supra note 345, at 184–85 (discussing norms involved in being a good neighbor). For examples of social norms, see Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Calif. L. Rev. 1051, 1135 (2000) (norms of fairness); Sunstein, Social Norms, supra note 19, at 914 (norms of good manners); Sunstein, Expressive Function, supra note 341, at 2030 (norms of courtesy); Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1496–97 (1998) (norms of fairness).

[397] See Villatoro et al., supra note 378, at 1 (noting that why and how norms are created and internalized remains an open and difficult question); Feldman, supra note 378, at 52 (“Empirical research on norm development and enforcement has substantially lagged descriptive and theoretical work.”); Tracey L. Meares & Dan M. Kahan, Law and (Norms of) Order in the Inner City, 32 Law & Soc’y Rev. 805, 809 (1998) (noting that a specific definition of norm remains elusive); McAdams, supra note 390, at 352–54 (explaining that the origins of norms remain a puzzle); Eisenberg, supra note 350, at 1262.

[398] See supra note 397.

[399] See supra note 397.

[400] See supra notes 378–81 and accompanying text.

link between norms and behavioral compliance. This more limited research could hinder our ability to understand how best to facilitate reforms that can generate norm internalization.

Second, the strength of the shareholder primacy norm may undermine the feasibility of norm internalization related to stakeholderism. Scholars have emphasized the considerable difficulty of altering pre-existing norms.[401] Once a norm is in place, people will adhere to it and defend it even if it is costly or inefficient.[402] The considerable legal and extralegal factors supporting the shareholder primacy norm may make altering the normative environment appear to be a heavy lift.[403] Of course, many scholars have argued that the strength of the shareholder primacy norm has been greatly exaggerated, suggesting that disrupting that norm may not be as challenging as some predict.[404] However, the relative dominance of the shareholder primacy norm may make internalizing a norm that runs counter to shareholder primacy relatively difficult.

Third, available research raises questions about whether norms can take root in the corporate environment. Indeed, there is disagreement regarding whether norms impact corporate behavior. Some corporate scholars have suggested that norms do not play a significant role in shaping corporate behavior.[405] Others have suggested that norms only impact behavior under specific conditions or with respect to certain types of transactions that are not relevant to this Article's inquiry.[406] Indeed,

[401] See Bicchieri, Norms in the Wild, supra note 19, at 16; Bicchieri, The Grammar of Society, supra note 19, at 47–48.

[402] See Gavrilets & Richerson, supra note 345, at 6068 (explaining that people ignore costs they incur when following existing norms and are often willing to pay high costs to defend existing norms); Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Pa. L. Rev. 1697, 1711–13 (1996) (arguing that norms are persistent even when they are suboptimal because of several factors including information costs and lags); Posner, supra note 19, at 8.

[403] See Bebchuk & Tallarita, supra note 1, at 104–06; Lund, supra note 17, at 1619–20; Strine, supra note 365, at 776–77.

[404] See Blair & Stout, supra note 350, at 1735; Fairfax, From Apathy to Activism, supra note 105, at 1312–14; Fisch & Solomon, Should Corporations Have a Purpose?, supra note 1, at 1323 (noting that "corporations currently have the power—and indeed the obligation—to consider" stakeholder interests).

[405] See Marcel Kahan, The Limited Significance of Norms for Corporate Governance, 149 U. Pa. L. Rev. 1869, 1899 (2001).

[406] See Bernstein, Opting Out, supra note 345, at 135; Badawi, supra note 345, at 12–14; Ellickson, supra note 345, at 9–10; Cooter, supra note 19, at 1664 (comparing social norms with laws); Janet T. Landa, A Theory of the Ethnically Homogenous Middleman Group: An Institutional Alternative to Contract Law, 10 J. Legal Stud. 349, 356 (1981) (discussing barriers to entry for non-ethnically homogenous outsiders and the strategies they may undertake, such as increased reputational credit).

research suggests that norms are most likely to emerge in insular networks with high frequency transactions.[407] Such research therefore suggests that norms may be difficult to facilitate for large public corporations.[408] While many corporate scholars insist that norms are relevant for all forms of corporate behavior,[409] this kind of research begs the question about the viability of norm internalization related to stakeholderism.

Fourth, norm internalization may prove challenging if there are significant incidents of non-compliance with stakeholderism. Research suggests that norm internalization is significantly undermined by the lack of visible compliance with, and enforcement of, particular norms.[410] If corporations fail to comply with the commitments associated with stakeholderism, or are not held accountable for their lack of compliance, their actions run the risk of undermining norm internalization.[411] In addition, if corporate actors fail to signal disapproval of those who violate the stakeholderism norm, this failure also reduces the likelihood that individual actors within the corporation will feel compelled to align their behaviors with stakeholderism.[412] Moreover, research reveals that this lack of compliance with norms can generate perceptions of corporate hypocrisy, causing actors within and outside of the corporation to doubt the credibility of corporate actors as well as the sincerity of the professed norm.[413] This doubt undermines the likelihood of norm internalization. In this regard, if corporations embrace stakeholderism without visible compliance along with visible disapproval of norm violators, those actions may hinder norm internalization.

[407] See, e.g., Bernstein, Opting Out, supra note 345, at 135; Badawi, supra note 345, at 12–14; Ellickson, supra note 345, at 9–10; Cooter, supra note 19, at 1664; Barak D. Richman, Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange 105–06 (2017); Landa, supra note 406, at 356 (explaining that high transaction costs incentivize personalistic markets).

[408] Research related to norm creation has focused on insular networks. See Badawi, supra note 345, at 12–14; Bernstein, Opting Out, supra note 345, at 135; Ellickson, supra note 345, at 9–10; Cooter, supra note 19, at 1664; Landa, supra note 406, at 356. Such research, therefore, may suggest that norm creation may prove more difficult in settings that are not insular or relatively close-knit such as a large corporation.

[409] See supra note 350.

[410] See Rueschemeyer, supra note 345, at 77; Villatoro et al., supra note 378, at 2; Feldman, supra note 378, at 52; Coffee, supra note 350, at 2177.

[411] See Rueschemeyer, supra note 345, at 77; Villatoro et al., supra note 378, at 2.

[412] See Rueschemeyer, supra note 345, at 77; Villatoro et al., supra note 378, at 2 (explaining that violations of a norm may indicate that the norm is losing importance).

[413] See Wagner et al., supra note 293, at 83; Parella, supra note 293, at 926–32.

Fifth, scholars disagree about the extent to which norms can take root when commitments are overly vague. Some scholars suggest that vagueness is a hindrance to norm internalization.[414] Others insist that norm internalization ameliorates vagueness concerns.[415] This disagreement begs an important question about whether norms are the problem or the solution with respect to credible commitment to stakeholderism.

Finally, it is important to note that norms are not a kind of magic elixir. Neither the prevalence of a norm nor norm internalization guarantees norm compliance. Instead, research suggests that even when norms are created, there are many instances of non-compliance, and thus there is no guarantee that the entire solution to the credible commitment problem is norms.[416] Indeed, norm violations coexist with norm compliance.[417] In this regard, norms, and the potential for norm internalization, cannot be the entire answer to the problem of credible commitment.

To be sure, this Article does not seek to use norms and the potential for norm internalization related to stakeholderism to over-simplify the problems associated with credible commitment. However, this Article does insist that the cumulative impact of reforms may facilitate norm internalization in a manner that increases the likelihood that stakeholderism can take root in the corporate ecosystem. As a result, those reforms may be valuable even if they have significant credible commitment flaws.

[414] See, e.g., Polaris, supra note 195, at 252.

[415] See Waldron, Vagueness and the Guidance, supra note 200, at 65, 69 (arguing that vagueness is not inconsistent with norms because norms allow for some evaluative judgment; norms provide input that directs judgment and discretion); H.L.A. Hart, The Concept of Law 206–07 (2d ed. 1994) (noting that norms consist of general standards which "must be intelligible and within the capacity of most to obey"); Raban, supra note 196, at 188–89 (noting that bright-line legal rules can lead to vague outcomes, especially when attempting to replicate social norms); Kaplow, supra note 194, at 570; Posner, supra note 195, at 116.

[416] See Gavrilets & Richerson, supra note 345, at 6068 (explaining that virtually all norms can be violated under appropriate conditions); Rueschemeyer, supra note 345, at 70 (noting that norm violations are pervasive); Rueschemeyer, supra note 345, at 72 (discussing how norms' obligatory character varies).

[417] See Sunstein, Social Norms, supra note 19, at 918; Gavrilets & Richerson, supra note 345, at 6068 (noting that virtually all norms can be violated under appropriate conditions); Rueschemeyer, supra note 345, at 70–72 (norm violations are pervasive).

CONCLUSION

There is significant rhetoric from the most influential actors in the business arena about the importance of social purpose and advancing the interests of all corporate stakeholders. This rhetoric posits that stakeholderism is better suited to the long-term health of the corporation, financial and otherwise.

This rhetoric has been challenged as empty, and perhaps even opportunistic, talk. Challengers certainly have valid concerns: this rhetoric is not new; it also never appears to gain legitimacy or prominence. Moreover, in the past there have been significant gaps between rhetoric and reality as it relates to commitments involving other stakeholders. These concerns beg the question whether the recent rise in rhetoric will lead to changed behavior.

This Article is mindful of such concerns, but nevertheless offers some reasons for optimism. Many influential shareholders and actors in the corporate arena have embraced stakeholderism, and these actors have displayed a willingness to use their influence to pressure corporations around stakeholder-centered issues. In this regard, the stage may be set for finally moving the needle on stakeholderism.

However, without a credible commitment, the stage may remain empty, and hence corporations may not be able to take advantage of the opportunity presented by this most recent embrace of stakeholderism. This Article not only highlights the difficulties involved with credible commitment in this area but also illuminates the challenges associated with overcoming those difficulties through some of the more familiar credible commitment vehicles. Although the collection of commitment vehicles may facilitate norm internalization and thus credible commitment, the challenging nature of even that endeavor should be recognized.

To be sure, this Article insists that we should remain committed to addressing credible commitment problems. At the very least, the increased rhetoric around stakeholderism reflects a growing consensus that stakeholderism is the most appropriate theory of corporate purpose. Hence, identifying ways in which corporations can credibly commit to that theory is clearly worth the effort.