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TIMES THEY ARE A-CHANGIN': WHEN TECH EMPLOYEES REVOLT!

ANAT ALON-BECK*

ABSTRACT

The COVID-19 pandemic sparked social distancing, economic crisis, mass layoffs, furloughs, inequality, and civil unrest. Corporate responses to the pandemic have profound effects on employee rights, employees' role in the corporations that they serve, and overall economic activity in the United States. In the last few decades, corporate governance scholarship neglected the role of employees—"human capital"—and mainly focused on the relationship between directors, managers, and shareholders. There are calls from the public for a revolution in corporate law in the United States, mirroring the current social movements that oppose shareholder wealth maximization, to resist short-termism and achieve long-term value. Corporations are being pressured by institutional investors to incorporate a deep obligation to act for the benefit of society at large in their charters, and to include employees formally, as stakeholders, in the governance of corporations. Tech employees joined these calls and are revolting by organizing, striking, and publicly speaking out against their employers. Tech employees demand that their employers redefine corporate purpose and pursue long-term value while using a stakeholder lens. These developments contribute to a "paradigm shift" in thinking about talent management and corporate culture. In 2020, companies finally realized that "shareholder

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*Assistant Professor, Case Western Reserve University School of Law. I would like to thank Michal Agmon-Gonnen, Constance Bagley, Lucian Bebchuk, Christopher Bruner, Karen Chesley, Patrick Corrigan, Jens Christian Dammann, Charles Elson, Yuliya Guseva, Assaf Hamdani, Sharona Hoffman, Marcel Kahan, Kobi Kastiel, Charles Korsmo, Juliet Kostritsky, Ann Lipton, Martin Lipton, John Livingston, Geeyoung Min, Demari Muff, Robert Rapp, Gabriel Rauterberg, Asaf Raz, Cassandra Roberston, Edward Rock, Darren Rosenblum, Helen Scott, Omari Scott Simmons, Verity Winship, and Emily Winston. A special thank you to William J. Moon for inviting me to participate in the Maryland Law Review's symposium program on Delaware's Emerging Competition and the Future of American Corporate Law, and to Brandon Wharton and the amazing law review editors for all of their hard work in editing my submission. I want to dedicate this piece to my amazing mentors, Karen Brenner, Deborah Burand, Edward Rock, Gerald Rosenfeld, Helen Scott and Lynn Stout, who greatly influenced my world views. I hope that my research will inspire the new generation of law students, entrepreneurs, corporations, shareholders and other stakeholders to work together to achieve long-term value and to one day incorporate in their charters a deep obligation to act for the benefit of society at large.

primacy" is not a good business strategy for attracting, engaging, and retaining their workforce.

This Article will address the old but ongoing debate in corporate governance theory, from the current dominant shareholder-centric corporate governance to collaborative (stakeholder-centric) corporate governance, and the new corporate personhood theory. It answers the question of whether our corporate law allows directors to take stakeholder interests into account. It offers a pragmatic solution to the age-old debate on whether corporate law allows directors to take stakeholder interests into account by arguing that our corporate governance theory can be extended to include the protection of directors (or officers) if they take employee interests into account in decision-making. However, this Article also argues that if public companies decide to take stakeholder interests into account, then they should formally change their charters (or certificates of incorporation). Moreover, and more importantly, they should be required to disclose additional information and file periodically with the relevant state and federal authorities, akin to Public Benefit Corporations ("PBCs"). Public companies must disclose information on their various efforts to promote their public benefit mission and purpose—and the results of such efforts—to their shareholders and the public. Different states have different reporting requirements for PBCs, which these companies can easily follow. There is new legislation that was recently passed by the Delaware House of Representatives that makes it easier for a traditional corporation to convert to a PBC. With regard to federal authorities, the U.S. Securities and Exchange Commission ("SEC") should move to a prescriptive approach (a specific line-item requirement) and require public companies to disclose information on talent management. The SEC must further develop agreed-upon metrics in order to assess these efforts and the reports on performance results.

> American workers are more educated than ever, more skilled, and doing more to create corporate profits than ever, but they have shared far less in the fruits of that labor. To help redress this problem, workers must be given more voice within the corporate boardroom, and top managers and directors must give greater thought to how they treat their employees. Companies should have board-level committees that ensure quality wages and fair worker treatment.
>
> Leo Strine[1]

> [D]isclosure would lead firms to increase human capital investment, it should help raise workers' wages and benefit the economy overall.
>
> Center for American Progress[2]

I. INTRODUCTION

The COVID-19 pandemic is disrupting our way of life and highlighting the structural inequalities in our society. Corporate responses to the pandemic have profound effects on employee rights, employees' role in the corporations that they serve, and overall economic activity in the United States. In the last few decades, corporate governance scholarship neglected the role of employees—"human capital"—and mainly focused on the relationship between directors, managers, and shareholders. Employees around the country are directly affected by the pandemic and millions have experienced financial instability, furloughs, and layoffs. The research, statistics, and literature on the impacts of COVID-19 on the U.S. labor market are evolving rapidly. According to the Bureau of Labor Statistics, as of mid-

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1. Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* 2 (Univ. of Pa., Inst. for L. & Econ., Rsch. Paper No. 19-39, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924.

2. ANGELA HANKS, ETHAN GURWITZ, BRENDAN V. DUKE & ANDY GREEN, CTR. FOR AM. PROGRESS, WORKERS OR WASTE? HOW COMPANIES DISCLOSE—OR DO NOT DISCLOSE— HUMAN CAPITAL INVESTMENTS AND WHAT TO DO ABOUT IT 2 (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/06/03042031/HumanCapital.pdf.

April 2020, the unemployment rate stands at 14.7% (some studies suggest a higher number closer to 20%),[3] and more than 36 million U.S. workers have filed for unemployment benefits.[4]

Despite the fact that unemployment has hit an all-time high in many countries across the globe, including the United States, large firms, especially ones in the tech industry, are finding that the talent that they need to grow, compete, and survive is in short supply.[5] In the new "knowledge economy,"[6] companies depend on their talent—employees—to provide the human capital that helps the firm grow and compete in this dynamic, complex, and everchanging world. There is a shortage in skilled labor that contributes to a "war for talent"[7] where large companies, especially tech companies, aggressively compete for talent. As repeat players in competitive markets, these companies must establish and maintain a credible reputation in order to attract, engage, and retain talent. Companies that cannot attract, engage, or retain talent will not be able to grow and compete.

All businesses, including tech businesses, have to navigate the unprecedented hardships from the COVID-19 pandemic, which resulted in a

3. *See* Laura Montenovo, Xuan Jiang, Felipe Lozano Rojas, Ian M. Schmutte, Kosali I. Simon, Bruce A. Weinberg & Coady Wing, *Determinants of Disparities in COVID-19 Job Losses* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27132, 2020). Note that the number can be as much as 20% according to Shahar Ziv. *Id.* ("The fraction of workers who report that they were 'employed but absent' from work during the CPS reference week grew from 2.5% in February to 7.3% in April. If these absent workers are actually unemployed, then the unemployment rate might be closer to 20%.").

4. *Id.*

5. ERNST & YOUNG, PARADIGM SHIFT: BUILDING A NEW TALENT MANAGEMENT MODEL TO BOOST GROWTH 5 (2012), https://www.ey.com/Publication/vwLUAssets/EY-paradigm-shift/$FILE/EY-paradigm-shift.pdf ("The scarcity of talent is quickly turning out to be the single biggest obstacle to growth. Globally, companies are having trouble filling critical positions – roles in which they need people with the advanced skills essential to move the business forward.").

6. *See* ROBERTO MANGABEIRA UNGER, THE KNOWLEDGE ECONOMY (2019). Also, Powell and Snellman define the knowledge economy as "production and services based on knowledge-intensive activities that contribute to an accelerated pace of technological and scientific advance as well as equally rapid obsolescence. The key components of a knowledge economy include a greater reliance on intellectual capabilities than on physical inputs or natural resources . . . . " Walter W. Powell & Kaisa Snellman, *The Knowledge Economy*, 30 ANN. REV. SOCIO. 199, 201 (2004), https://scholar.harvard.edu/files/kaisa/files/powell_snellman.pdf.

7. *See infra* notes 77–79 and accompanying text; *see, e.g.*, Anat Alon-Beck, *INSIGHT: When Unicorn Employees Revolt and Push for IPO*, BLOOMBERG (Sept. 30, 2019, 4:01 AM), https://news.bloomberglaw.com/securities-law/insight-when-unicorn-employees-revolt-and-push-for-ipo; Anat Alon-Beck, *The Unicorn War for Talent: The Employees Fire Back. WeWork Is the Latest Example.*, FORBES (Jan. 29, 2020, 12:12 PM), https://www.forbes.com/sites/anatalonbeck/2020/01/29/the-unicorn-war-for-talent-the-employees-fire-back-wework-is-the-latest-example/#1f178def35da; Anat Alon-Beck, *Unicorn Stock Options—Golden Goose or Trojan Horse?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 23, 2018), https://corpgov.law.harvard.edu/2018/09/23/unicorn-stock-options-golden-goose-or-trojan-horse/.

global health and financial crisis. International organizations[8] and global institutional investors,[9] which comprise public pensions, asset management firms, and faith-based funds, are calling on the business community to respond to the pandemic responsibly by taking stakeholder interests into account when making decisions that affect employees, communities, and the markets.[10] Tech employees are joining these calls by revolting and demanding that their employers step up to the plate, redefine corporate purpose, and pursue long-term value while using a stakeholder lens. They want their employers to take into account multiple factors—including health-care, political, and socio-economic factors—when making business decisions that can affect not only their rights but the rights of other stakeholders.[11] There are many examples of companies, such as Facebook, Amazon, Google, Salesforce, and Microsoft, that take employee badmouthing and public complaints very seriously.[12] They do so because such behavior can cause not only a reputational damage to the firm, but also higher costs of monitoring the labor force.[13]

Tech employee activism is not a new phenomenon and has been taking place in the past few years. There are many examples of tech employees, as discussed in further detail below, who are putting pressure on decision

8. *See* UNITED NATIONS, SHARED RESPONSIBILITY, GLOBAL SOLIDARITY: RESPONDING TO THE SOCIO-ECONOMIC IMPACTS OF COVID-19 7 (2020), https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf ("The United Nations calls on all businesses and corporations to take three primary actions: a. Adhere to health, safety guidelines and provide economic cushions to workers, including through ensuring worker safety and social distancing and secure wages for those working from home. b. Provide financial and technical support to governments by contributing to the COVID-19 Solidarity Response Fund. c. Repurpose their facilities and business plans to focus on meeting the needs of this crisis. Some have begun to do so; we need many more to follow in suit.") (emphasis omitted).

9. The Interfaith Center on Corporate Responsibility's *Investor Statement on Coronavirus Response* was supported by 251 long-term institutional investors representing over $6.4 trillion in assets under management with global exposure across capital markets. INTERFAITH CTR. ON CORP. RESP., INVESTOR STATEMENT ON CORONAVIRUS RESPONSE (2020), https://www.iccr.org/sites/default/files/page_attachments/investor_statement_on_coronavirus_response_04.02.2020.pdf.

10. *See id.*; *see also Investors Call on Companies to do Their Part to Support Workers and Markets During the Coronavirus Crisis*, INTERFAITH CTR. ON CORP. RESP. (Mar. 26, 2020), https://www.iccr.org/investors-call-companies-do-their-part-support-workers-and-markets-during-coronavirus-crisis.

11. *See*, *e.g.*, April Glaser, *Kickstarter Workers Vote to Form First Union in Tech Industry,* NBC News (Feb. 18, 2020, 11:07 AM), https://www.nbcnews.com/tech/tech-news/kickstarter-workers-vote-form-first-union-tech-industry-n1138006; Becca Blazak, *The Move Towards Stakeholder Capitalism*, TechEquity Collaborative (Apr. 30, 2020), https://techequitycollaborative.org/2020/04/30/the-move-towards-stakeholder-capitalism/.

12. *See infra* notes 69–72 and accompanying text.

13. Anat Alon-Beck, *Unicorn Stock Options—Golden Goose or Trojan Horse*, 2019 COLUM. BUS. L. REV. 107, 118 (2019).

makers in their firms to enhance social, environmental, and economic values, and to use innovative decision-making methods.[14] This recent surge in activism, with an embedded social purpose and value creation, is often a direct result of a market, government, or even philanthropic organizations' failure to respond to and alleviate social problems.[15] Academics, business leaders, policymakers, and legislators are grappling with how to respond to this relatively new phenomenon. The shortage in skilled labor and the recent public reports on tech employee uprisings are contributing to a "paradigm shift"[16] in thinking about the purpose of corporate law, talent management, and corporate culture. In 2020, companies finally realized that "shareholder primacy" is not a good business strategy for attracting, engaging, and retaining their workforce.[17]

This Article will address the old but ongoing debate in corporate governance theory, from the current dominant shareholder-centric corporate governance model, to collaborative (stakeholder-centric) corporate governance and the new corporate personhood theory.[18] It answers the

14. Allison Bailey, Vikram Bhalla, Rainer Strack, Diana Dosik & Judy Oh, *Organizing for the Future with Tech, Talent, and Purpose: Winning the '20s*, BOS. CONSULTING GRP. (Sept. 16, 2019) ("The workforce is changing as well. Millennials and Generation Z employees are on track to make up 59% of the workforce by 2020, according to Manpower Group. These employees have different expectations about engagement and working models—our research shows that 67% of millennials expect employers to have purpose and their jobs to have societal impact, and a Gallup study suggests that, by 2028, 73% of all teams will have remote workers.").

15. Noam Scheiber & Kate Conger, *The Great Google Revolt*, N.Y. TIMES MAG. (Feb. 18, 2020), https://www.nytimes.com/interactive/2020/02/18/magazine/google-revolt.html; Muzaffar Chishti & Jessica Bolter, *"Cubicle Activism": Companies Face Growing Demands from Workers to Cut Ties with ICE and Others in Immigration Arena*, MIGRATION POL'Y INST.: POL'Y BEAT (Oct. 30, 2019), https://www.migrationpolicy.org/article/cubicle-activism-companies-face-worker-demands-cut-ties-ice; Kate Mackenzie, *Employee Activism Works—Even When It Doesn't*, BLOOMBERG (Feb. 26, 2020, 5:00 AM), https://www.bloomberg.com/news/articles/2020-02-26/employee-activism-works-even-when-it-doesn-t.

16. ERNST & YOUNG, HOW AND WHY HUMAN CAPITAL DISCLOSURES ARE EVOLVING 1 (2019), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/cbm/ey-how-and-why-human-capital-disclosures-are-evolving.pdf; Steve Klemash, Bridget M. Neill & Jamie C. Smith, *How and Why Human Capital Disclosures Are Evolving*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 15, 2019), https://corpgov.law.harvard.edu/2019/11/15/how-and-why-human-capital-disclosures-are-evolving/.

17. BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf [hereinafter STATEMENT ON THE PURPOSE OF A CORPORATION]; Maggie Fitzgerald, *The CEOs of Nearly 200 Companies Just Said Shareholder Value Is No Longer Their Main Objective*, CNBC (Aug. 19, 2019, 7:38 AM), https://www.cnbc.com/2019/08/19/the-ceos-of-nearly-two-hundred-companies-say-shareholder-value-is-no-longer-their-main-objective.html; Michael Birshan, Madeleine Goerg, Anna Moore & Ellora-Julie Parekh, *Investors Remind Business Leaders: Governance Matters,* MCKINSEY & CO. (Oct. 2, 2020), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/investors-remind-business-leaders-governance-matters.

18. *See infra* Part IV.

question of whether our corporate law allows directors to takes stakeholder interests into account. This debate is relevant today as the pandemic shines a light on a new movement in corporate law, which calls on companies and institutional investors to adopt a new theory of the purpose of the corporation. Amongst the movement's notable spokespeople are Martin Lipton, Colin Mayer, and Alex Edmans. [19]

Lipton is a leading American lawyer, who founded the law firm of Wachtell, Lipton, Rosen & Katz, and who advocates for companies, asset managers, and investors to embrace the principles of his new corporate governance framework, *The New Paradigm*, which takes stakeholder interests into account to achieve long-term value and resist short-termism.[20] Mayer is an Oxford Professor who is collaborating with the British Academy's Future of the Corporation Project, and urges for a more radical reform. In his recent book, *Prosperity: Better Business Makes the Greater Good*, Mayer proposes a new theory of the purpose of business: "[t]he purpose of business is to produce profitable solutions to the problems of people and planet, and in the process it produces profits."[21] Edmans is a Professor of Business at Gresham College and Professor of Finance at London Business School. He offers a new financial theory "pieconomics" in his book *Grow the Pie*, which shows that "the most successful companies don't target profit directly but are driven by purpose—the desire to serve a societal need and contribute to human betterment."[22]

The Article will introduce this new literature with an emphasis on employees as stakeholders. In the last few decades, U.S. corporate governance scholarship neglected the role of employees—"human capital"—and mainly focused on the relationship between directors, managers, and shareholders. Employees outside the United States have a formal role in corporate governance. In the United States, on the other hand, there is an increase in shareholder activism and a decline in worker power (in the form of decreased bargaining power). This Article will contribute to the literature by building on the work of Edward Rock and Lynn Stout.

The focus on corporate governance due to economic crisis is not new. Following the 2008 instability and economic crisis, which was caused by abuses of large corporations, there was a renewed interest in the corporate governance practices of modern corporations and the oversight duties of

19. *See infra* Part IV.

20. Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/.

21. COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 39 (2018).

22. ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 1 (2020).

institutional investors.[23] Many countries around the world changed their corporate governance codes to take stakeholder interests into account.[24]

Unfortunately, in the United States, the change is mostly rhetorical. United States business leaders, who are subject to mounting pressures from employees and institutional investors, recently adopted the controversial Business Roundtable Statement on the Purpose of a Corporation, and even included investing in employees as a priority.[25] However, as correctly pointed out by Harvard Professor Lucian Bebchuck, many of the signatories were probably using the statement for public relations purposes ("social washing") without taking any drastic steps to implement their own suggestions.[26] Despite the statement, the traditional "shareholder primacy" view is still very dominant in the United States, as explained in further detail below.

Consequently, twelve years after the last crisis, a slightly different question needs to be raised: Do we need to make legal changes to allow firms to commit to their employees (stakeholders)? The question here is not whether corporate law mandates concern for stakeholders but rather whether it permits it. As noted, there have been calls by academics, business leaders, politicians, and workers for firms to take stakeholder interests into account.[27]

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23. *See* Kent Greenfield, *The Third Way*, 37 SEATTLE U. L. REV. 749, 749 (2014) ("This moment has been engendered because of the increasing skepticism the public is showing toward corporations and the people who manage them. The skepticism springs from shocks in the economic and political fields that revealed the risks of unbridled corporate power, short-termism, managerial opportunism, and shareholder (read Wall Street) supremacy.").

24. *See* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?* 101–02 (Inst. for L. & Econ., Rsch. Paper No. 20-22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561164. The United Kingdom and the European Union, as well as other countries around the world, have moved towards a stewardship model by legislating stewardship codes, which state social and economic objectives. *Id.* at 103 n.10.

25. STATEMENT ON THE PURPOSE OF A CORPORATION, *supra* note 17.

26. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, CORNELL L. REV. (forthcoming Dec. 2020). Many did not amend their corporate governance guidelines following the Business Roundtable statement. *Id.*

27. *See* FROM SHAREHOLDER PRIMACY TO STAKEHOLDER CAPITALISM: A POLICY AGENDA FOR SYSTEMS CHANGE (2020), https://www.wlrk.com/docs/From-Shareholder-Primacy-to-Stakeholder-Capitalism-TSC-and-B-Lab-White-Paper.pdf. This white paper, which was produced by non-profit organizations B Lab and The Shareholder Commons, proposes the U.S. push through a Stakeholder Capitalism Act. *Id.* at 11; *see also* Frederick Alexander, *From Shareholder Primacy to Stakeholder Capitalism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 26, 2020), https://corpgov.law.harvard.edu/2020/10/26/from-shareholder-primacy-to-stakeholder-capitalism/; *Accountable Capitalism Act*, https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf (last visited Dec. 12, 2020); STATEMENT ON THE PURPOSE OF A CORPORATION, *supra* note 17; Gregory V. Milano, *The Return on Purpose: Before and During a Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 9, 2020), https://corpgov.law.harvard.edu/2020/11/09/the-return-on-purpose-before-and-during-a-crisis/; Ronald J. Gilson & Curtis J. Milhaup*, Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 2,

This trend will hopefully lead to more empowered workers, increased responsibility, and the ability to "grow the pie."[28] But it can also backfire and be used and abused by management as a public relations tool, in a way that will allow management to continue to control and exploit its workforce.[29]

This Article will focus on human capital and corporate governance. Traditional corporate law scholars in the United States hold the view that the legal relationships between labor, capital, and the firm are very different.[30] Both labor and capital contribute to and invest in the firm; however, capital shareholders (or their agents) are the ones who get to decide how the firm is to be governed.[31] Leading labor law scholars disagree. For example, Clyde Summers postulates:

> [T]he employees who provide the labor are as much members of that enterprise as the shareholders who provide the capital. Indeed, the employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders.[32]

There is a paradigm shift regarding the role of talent, human capital, and culture in corporate governance. This shift is driven by various influential stakeholders, including the Global Reporting Initiative, the Embankment Project for Inclusive Capitalism, the Business Roundtable, the Sustainability Accounting Standards Board ("SASB"), the U.S. Securities and Exchange Commission ("SEC"), and tech workers.[33] These groups have identified human capital and culture as important parts of a company's intangible assets, which "are now estimated to comprise on average 52% of a company's market value," according to Ernst & Young.[34] These groups are pushing

2020), https://corpgov.law.harvard.edu/2020/11/02/shifting-influences-on-corporate-governance-capital-market-completeness-and-policy-channeling/; Edward B. Rock, For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose (2020) (unpublished manuscript), https://ssrn.com/abstract=3589951.

28. EDMANS, *supra* note 22.

29. *See* Bebchuk & Tallarita, *supra* note 26.

30. *See* Edward B. Rock & Michael L. Wachter, *Tailored Claims and Governance: The Fit Between Employees and Shareholders, in* EMPLOYEES AND CORPORATE GOVERNANCE (Margaret Blair & Mark J. Roe eds., 1999).

31. On the intersection of labor and capital as two principal inputs to the firm, see Rock & Wachter, *supra* note 30. *See also* Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1627 (2001).

32. Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMPAR. CORP. L. & SEC. REGUL. 155, 170 (1982).

33. Stephen Klemash, Jennifer Lee & Jamie Smith, *Human Capital: Key Findings from a Survey of Public Company Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 24, 2020), https://corpgov.law.harvard.edu/2020/05/24/human-capital-key-findings-from-a-survey-of-public-company-directors/.

34. ERNST & YOUNG, *supra* note 16, at 1.

management to modernize corporate decision-making and strategy to foster innovation and create long-term value.[35] There is a need to understand how large companies are managing and measuring human capital.[36]

Corporate decisions and responses to this crisis have profound effects on employee rights, employees' role in the corporations that they serve, and overall economic activity in the United States. Working conditions are one of the main factors that directly contribute to underlying health conditions of individuals and communities.[37] The pandemic illuminates the disparities between people who are able to work remotely from home and those that find it very difficult to do so because of their social and economic conditions. The disparities between people are exacerbated depending on the type of work that they perform and the overall policies of their employers.[38] Our health is directly affected by the ways in which we "live, learn, work, and play."[39] What if directors (or managers) want to take these factors into account when they make decisions about the future of their companies but are concerned about their liability if they do? This Article answers the question of whether our corporate law allows directors to take stakeholder interests into account. It offers a pragmatic solution to the age-old debate: Our corporate governance theory can be extended to include the protection of directors (or officers) if they take employee interests into account in decision-making (as long as there is no conflict of interest).

The Article further argues that if public companies decide to take stakeholder interests into account, then they should be required to formally change their charters (certificates of incorporation). Moreover, and more

35. *Id.*

36. For example, the Embankment Project for Inclusive Capitalism ("EPIC") is a project intended "to identify and create new metrics to measure and demonstrate long-term value to financial markets." COAL. FOR INCLUSIVE CAPITALISM, EMBANKMENT PROJECT FOR INCLUSIVE CAPITALISM 4 (2018), https://www.epic-value.com/#report. EPIC was launched by the Coalition for Inclusive Capitalism and Ernst & Young, and participated in by more than thirty asset owners (such as Allstate, CalPERS and MetLife), asset managers (like Vanguard, State Street and Fidelity), and companies (three of which are in the Top 100 Companies). *Id.*

37. *See Health Equity Considerations & Racial & Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL AND PREVENTION (July 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html; *see also* SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER, WORKER POWER AND VOICE IN THE PANDEMIC RESPONSE (2020), https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984e5bc12a806c_Clean%20Slate_Worker%20Power%20and%20Voice%20in%20the%20Pandemic%20Response.pdf.

38. ELISE GOULD & VALERIE WILSON, ECON. POL'Y INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY (2020), https://www.epi.org/publication/black-workers-covid/; Laura Montenovo, Xuan Jiang, Felipe Lozano Rojas, Ian M. Schmutte, Kosali Simon, Bruce A. Weinberg & Coady Wing, *Unequal Employment Impacts of COVID-19*, ECONOFACT (June 1, 2020), https://econofact.org/unequal-employment-impacts-of-covid-19.

39. *Health Equity Considerations & Racial & Ethnic Minority Groups*, *supra* note 37.

importantly, they should be required to disclose additional information and file periodically with the relevant state and federal authorities, akin to Public Benefit Corporations ("PBCs"). They should be required to disclose to their shareholders, and the public, information on their various efforts to promote their public benefit mission and purpose, and the results of such efforts. Different states have different reporting requirements for PBCs, which these companies can easily follow.[40] Moreover, there is new legislation that was recently passed by the Delaware House of Representatives and signed into law on July 16 by Delaware Governor John Carney. The 2020 amendments to the General Corporation Law of the State of Delaware (the "DGCL") make it easier for a traditional corporation to convert to a PBC.[41] With regard to federal authorities, the SEC should move to a prescriptive approach (a specific line-item requirement) and require public companies to disclose information on talent management.[42] The SEC should further develop agreed-upon metrics in order to assess these efforts and the reports on performance results.

The following is an account of the long debate over the theory of the firm and the purpose of the corporation. This Article contributes to the literature in two ways: (1) by shedding light on new forms of tech employee

40. For more on the state by state required public reporting requirements, see Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 HASTINGS BUS. L.J. 37 (2018).

41. The amendments make changes to Delaware PBCs. For a full analysis of the changes and the problems that they are addressing, see Richard Carroll, Chad Davis, Elizabeth Fenton, Alex Ferraro, Richard Forsten, Jourdan Garvey, William Gee, Jessica Jones & Pamela Scott, *2020 Delaware General Corporation Law & Alternative Entity Amendments*, JD SUPRA (July 23, 2020), https://www.jdsupra.com/legalnews/2020-delaware-general-corporation-law-69690/ ("First, the amendments greatly reduce appraisal rights in connection with a conversion to a PBC. . . . .In addition, the amendments remove certain super-majority voting provisions that previously applied to PBCs. . . . .The amendments eliminate Sections 363(a) and 363(c) thus lowering the thresholds to become, or transition away from being, a PBC to the statutory defaults of majority approval (unless otherwise stated in a corporation's certificate of incorporation). Finally, the amendments clarify some lingering concerns regarding director liability in a PBC . . . This has important practical implications for directorial exculpation from liability and indemnification."). For more analysis, see Soyoung Ho, *SEC Adopts Disclosure Rule on Human Capital Management*, THOMSON REUTERS TAX & ACCT. (Aug. 28, 2020), https://tax.thomsonreuters.com/news/sec-adopts-disclosure-rule-on-human-capital-management/.

42. On August 26, 2020, the SEC voted to adopt amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosures (Item 105) that registrants are required to make pursuant to Regulation S-K. The new disclosure rules affect how public companies manage their human capital. It should be noted that the SEC specifically decided against the prescriptive approach (under Item 101 of Regulation S-K) and instead the new disclosure is based on materiality "to the extent such disclosures would be material to an understanding of the registrant's business." Press Release, SEC, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), https://www.sec.gov/news/press-release/2020-192. *See infra* Part VIII for more analysis on this.

activism and the ways in which they affect traditional corporate governance practices; and (2) by proposing a simple pragmatic strategic management solution to the age-old debate over shareholder versus stakeholder corporate governance, by suggesting a focus on disclosure of information to the public.

The following is an overview of the parts in this Article, and the research questions addressed in the respective Parts.

Part II sheds light on recent tech employee activism.[43] Part III provides a review of the development of research on the theory of the firm, including principal-agent, property rights, and team production.[44] Part IV provides a review of the long debate over the purpose of the corporation and introduces the new personhood theory.[45] The purpose of Parts III and IV is to lay the foundation to a new proposed suggestion to the old debate over the purpose of the corporation model. They present the historic-doctrinal review of the development of theory-of-the-firm research, which is the basis for this Article's theme and discussions, as well as introduce some pioneers who have fashioned the theory of the firm research during the past few decades.

Parts V, VI and VII propose different solutions.[46] Part V proposes the expansion of director fiduciary duty.[47] It asks the question: Where does fiduciary duty lie? Can directors who take actions to maximize the benefit of stakeholders, such as employees, enjoy the protections of the business judgement rule ("BJR")? Part VI deals with the problem of inadequate monitoring of public management and proposes to require public companies that choose to take stakeholder interests into account to re-incorporate as PBCs.[48] Part VII proposes to require public companies that choose to take stakeholder interests into account to disclose information.[49] Part VIII concludes that companies that create value for society can also deliver greater returns to investors.[50] To do so, companies need to invest in their stakeholders for the long run.[51]

II. TECH EMPLOYEE ACTIVISM

Why focus our attention on employees? This Article focuses on the employees, the "E" in "EESG," which stands for Employee, Environmental,

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43. *See infra* Part II.
44. *See infra* Part III.
45. *See infra* Part IV.
46. *See infra* Parts V–VII.
47. *See infra* Part V.
48. *See infra* Part VI.
49. *See infra* Part VII.
50. *See infra* Part VIII.
51. There are many studies on this. I recommend reading Edmans's new book for examples on companies that are successful in this. EDMANS, *supra* note 22.

Social, and Governance priorities.[52] The term EESG was coined by Leo Strine, Jr., the former Chief Justice of the Delaware Supreme Court.[53] Strine calls on corporate America to take employee interests into account in its decision-making.[54]

Strine's suggestions perhaps struck a chord with the business community, as evidenced by the recent controversial Business Roundtable Statement on the Purpose of a Corporation, which included investing in employees as a priority.[55] Unfortunately, as noted above, Bebchuck showed in his paper that many companies are probably using the statement as a public relations move and have not taken drastic steps to implement their own suggestions.[56]

So, why do CEOs care about their employees? Or at least make a public statement that they care about them? The driving forces for the current changes in the rhetoric of business leaders (and policymakers) stem from the pressure of investors and employees. This Article will focus on the employees. Tech employees started a revolution and now force the management and boards of large tech companies to take their interests and opinions into account, as well as the purpose of the corporation, in governance, decision-making, and political activity.[57]

The recent COVID-19 pandemic expands the disparities between capital and labor. It has profound effects on employee rights and the overall economic activity in the United States.[58] Unfortunately, the pandemic did not spare the tech industry. Public and private tech employees, working in large to small companies, have been affected in ways ranging from changes to their work environments to massive layoffs. Thanks to websites such as Layoff.com, which collects data on tech industry cuts, there are reports on

52. Strine, Jr., *supra* note 1, at 3.

53. *Id.*

54. *Id.*

55. *See* STATEMENT ON THE PURPOSE OF A CORPORATION, *supra* note 17.

56. *See* Bebchuk & Tallarita, *supra* note 26 at 3–4. Many did not amend their corporate governance guidelines following the Business Roundtable statement. *Id.* at 25.

57. *See* Anat Alon-Beck, *The Facebook Saga: When Tech Employees Revolt*, FORBES (July 22, 2020, 2:24 PM), https://www.forbes.com/sites/anatalonbeck/2020/07/22/the-facebook-saga-when-tech-employees-revolt/?sh=18021ef56c32; *see also* Silicon Valley Revolt: Meet the Tech Workers Fighting Their Bosses Over Ice, Censorship and Racism (Mar. 29, 2019), https://www.theguardian.com/us-news/2019/mar/28/tech-workers-silicon-valley-activism; Matt Lavietes, *Silicon Valley Firms Are Facing a Rise in Anger From a New Source: Their Own Employees*, CNBC (July 8, 2018, 11:58 AM), https://www.cnbc.com/2018/07/05/tech-ceos-are-losing-unilateral-power-rapidly-in-a-new-unexpected-way.html.

58. *World Economic Situation and Prospects: April 2020 Briefing, No. 136*, UNITED NATIONS (Apr. 1, 2020), https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-april-2020-briefing-no-136/.

over 80,000 tech employees who lost their jobs.[59] Did the fear of layoffs stifle tech employee activism? Surprisingly—no.

On June 1, 2020, many employees of Facebook, Inc. publicly voiced their disagreement with their management's decision for the first time. Specifically, they opposed CEO Mark Zuckerberg's decision to not remove from its platform a post by President Trump on the Floyd protests, which followed a week of demonstrations and riots across the country.[60] Tech employee activism in the form of protest against the employer is not a new phenomenon. It can take several forms and involve governance issues that are internal, including employment related conditions (such as pay), or external, including social issues, such as ethics concerning development, production, or government contracts.

In the Facebook example, employee activism took two forms: collective and individual.[61] In the individual context, Facebook employees turned to social media platforms and the Internet to publicly disagree with Zuckerberg's inaction.[62] There are even reports of some employees who went as far as to quit their jobs or call on Zuckerberg to quit his job.[63] In the collective context, on Monday, June 1, 2020, the employees organized a virtual strike against the company. Zuckerberg controls 57.9% of the voting rights on Facebook's board, but despite this fact, while Zuckerberg and his management team took the complaints very seriously, they did not impose content restrictions or warnings initially. Furthermore, the public complaints represent a shift in Facebook employees' expectations, which is evident from

59. *See* LAYOFFS TRACKER, https://layoffs.fyi/tracker/ (last visited Dec. 12, 2020). Layoffs.fyi has tracked all tech startup layoffs since the coronavirus was declared a pandemic. *Id.* The data is compiled primarily from public reports. *Id.*; *see also* Sarah McBride & Christopher Cannon, *Covid-19 Brings a Reckoning of Layoffs to Silicon Valley*, BLOOMBERG (May 28, 2020), https://www.bloomberg.com/graphics/2020-coronavirus-technology-layoffs.

60. Ryan Mac & Alex Kantrowitz, *Tweets, Dissent, and a Walkout: Facebook Employees Revolt Over Zuckerberg's Approach to Trump*, BUZZFEED NEWS (June 1, 2020, 6:03 PM), https://www.buzzfeednews.com/article/ryanmac/tweets-walkout-facebook-employees-zuckerberg-trump-protest ("Last Thursday, in addressing protests in Minneapolis, Trump wrote on Twitter and Facebook that 'when the looting starts, the shooting starts,' a historically charged phrase that suggested that violent action would be taken against protesters.").

61. Freshfields Bruckhaus Deringer LLP, *Employee Activism in the Tech Industry*, LEXOLOGY (Feb. 7, 2020), https://www.lexology.com/library/detail.aspx?g=7b9aa959-64ef-46de-a969-c1abed649d22.

62. Sheera Frenkel, Mike Isaac, Cecilia Kang & Gabriel J.X. Dance, *Facebook Employees Stage Virtual Walkout to Protest Trump Posts*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/06/01/technology/facebook-employee-protest-trump.html.

63. Donie O'Sullivan, *Exclusive: He Quit His Facebook Job Because of Zuckerberg's Inaction on Trump's Posts*, CNN (June 5, 2020, 6:32 AM), https://www.cnn.com/2020/06/05/business/facebook-employee-resigns/index.html.

the employees disparaging their employer and making public complaints.[64] These actions cause not only reputational damage to Facebook as an employer, but also impose higher costs for the firm in monitoring its labor force.[65]

On June 6, 2020, scientists funded by the Chan Zuckerberg Initiative ("CZI") sent a letter criticizing Zuckerberg and "Facebook's role in diffusing inaccurate information"; some even called for Zuckerberg to resign.[66] Facebook's decision was in contrast to the decision of another social media platform and rival—Twitter. Twitter's management responded to employee activism differently by placing a warning label on President Trump's tweet, which included the same message as his post on Facebook. On June 17, 2020, a few weeks after the public employee revolt, civil rights activists—a coalition consisting of Color Of Change, NAACP, ADL, Sleeping Giants, Free Press, and Common Sense Media —joined the revolution and started a campaign against Facebook called "Stop Hate for Profit."[67] The Stop Hate for Profit campaign persuaded many of Facebook's advertisers to boycott the company and stop spending advertising money on Facebook and Instagram.[68]

Large companies joined the campaign and included The North Face (the first to join), REI, Patagonia, Unilever, Verizon, and more. This campaign managed to hurt Facebook's reputation and financial interests. Facebook's stock dropped more than 7% after Unilever announced that it would no longer advertise on the platform, stating that "[c]ontinuing to advertise on these

64. Judith Samuelson, *Why Do We Still Call It Capitalism?*, QUARTZ AT WORK (Apr. 9, 2018), https://work.qz.com/1247835/spotifys-ipo-should-make-us-consider-why-we-still-use-the-term-capitalism/.

65. For more on private tech companies and unicorn employee activism, see generally Alon-Beck, *supra* note 13. *See* Vladimir Atanasov, Vladimir Ivanov & Kate Litvak, *The Impact of Litigation on Venture Capitalist Reputation* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13641, 2007), http://www.nber.org/papers/w13641. For more on agency costs and reputation, see Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

66. COLLECTIVE ACTION IN TECH, https://collectiveaction.tech (last visited June 30, 2020).

67. *See* STOP HATE FOR PROFIT, 'https://www.stophateforprofit.org/demand-change (last visited June 30, 2020). *See also* Afdhel Aziz, *Facebook Ad Boycott Campaign 'Stop Hate for Profit' Gathers Momentum and Scale: Inside the Movement for Change*, FORBES (June 24, 2020, 10:35 AM), https://www.forbes.com/sites/afdhelaziz/2020/06/24/facebook-ad-boycott-campaign-stop-hate-for-profit-gathers-momentum-and-scale-inside-the-movement-for-change/#6110d2a16687.

68. The Color of Change website states: "From the monetization of hate speech to discrimination in their algorithms to the proliferation of voter suppression to the silencing of Black voices, Facebook has refused to take responsibility for hate, bias, and discrimination growing on their platforms. And what has allowed Facebook to continue racist practices is the $70B of revenue from corporations every year. Companies have a choice to make about whether they want their businesses featured on Facebook's platforms side-by-side with racist attacks on Black people." *Calling on Facebook Corporate Advertisers to Pause Ads for July 2020*, COLOR OF CHANGE (June 19, 2020), https://colorofchange.org/stop-hate-for-profit/.

platforms at this time would not add value to people and society."[69] Therefore, it is not surprising that on June 26, 2020, Zuckerberg caved to the mounting public and economic pressure, despite his fears of regulation by the government, and announced new policies. Facebook's employees won the battle.

Twitter and Facebook are not alone. Since 2018, Amazon,[70] Google,[71] Microsoft,[72] Salesforce[73] and other tech giants have also dealt with employee activism, in which the companies have been asked to alter their dealings with the federal government and cancel government contracts due to ethical, geo-political concerns and the purpose of their corporation. These cases highlight the fact that tech employees have the power to change the status quo.

It is not surprising that tech employees are the ones leading by activism. They are turning their attention to their employers—large corporations and the managers who manage them. They are calling on their employers to take corporate social responsibility into account. Perhaps they will be able to do what policymakers, academics, and leading lawyers were not able to do, and that is to change our current corporate law to mirror social movements, to take stakeholder interests into account, to resist short-termism, and to achieve long-term value by forcing their employers to incorporate in their charters a deep obligation to act for the benefit of society at large.

A. Tech Employees vs. Non-Tech Employees

Tech employees are different than employees in other industries for the following reasons. First, our economy is based on knowledge and, as such, it relies on intangible assets, which are comprised of brain power. As stated

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69. Jon Swartz, *Facebook Reverses Policies as Ad Boycott Sends Stock Down*, MARKETWATCH (June 28, 2020, 2:41 PM), https://www.marketwatch.com/story/facebook-shares-drop-7-as-unilever-halts-advertising-prompting-changes-at-social-networking-giant-2020-06-26?mod=investing.

70. *See* Ali Breland, *Trump Era Ramps Up Tech Worker Revolt*, HILL (June 30, 2018, 6:27 PM), https://thehill.com/policy/technology/394597-trump-era-ramps-up-tech-worker-revolt ("At Amazon, workers banded together to oppose the company selling its facial recognition software to law enforcement agencies out of fears the technology could harm marginalized communities.").

71. *See id.* ("Google said it would not renew its Project Maven contract with the Pentagon, reportedly because of pressure from employees.").

72. *See id.* ("Microsoft employees are pushing CEO Satya Nadella to drop the company's contract with Immigration and Customs Enforcement (ICE) in protest over the agency separating children from families caught crossing the southern border illegally."). Also, on June 8, 2020, Microsoft employees used a Facebook group—"Young Microsoft FTEs"—to revolt against Microsoft. COLLECTIVE ACTION IN TECH., *supra* note 66. The Tech Workers Coalition reported that "Hundreds of Microsoft employees have signed a letter to the company's top executives asking for Microsoft to take action in the wake of national protests." *Id.*

73. *See* Breland, *supra* note 70 ("Salesforce workers earlier this week penned their own letter to CEO Marc Benioff urging him to review its contract with Customs and Border Protection, also out of concern with the administration's family separation policy.").

by Colin Mayer in his new book, *Prosperity: Better Business Makes the Greater Good*:

> Over the last forty years there has been a remarkable transformation in the corporation. Forty years ago, 80 per cent of the market value of US corporations was attributed to tangible assets—plant, machinery, and buildings—as against intangibles—licenses, patents, and research development. Today, intangible assets account for 85 per cent of the market value of US corporations.[74]

Second, tech employees are highly educated, trained and paid. According to the labor market analysis, when employees receive specific training, they are very valuable to the firm, and turnover is very costly.[75] There are similarly qualified, but less experienced, employees who would have to acquire the requisite skills before they can reach the level of the employee that left the firm. Therefore, employment contracts with tech employees are designed as long-term contracts to prevent their departure.[76]

Third, U.S. tech companies are engaged in a war for talent,[77] where they experience difficulty with attracting, engaging, and retaining talent.[78] Retaining talent and preventing "leakage from firm knowledge resources to other competitors" is therefore incredibly important to the employer firm. High-tech firms can control knowledge hazards by adopting stock option plans. According to Gorga and Halberstam, in general, startup tech firms use equity compensation to avoid the high costs associated with employee turnover and prevent the negative effect that high employee turnover has on company morale.[79]

Finally, tech employees are usually also equity holders (shareholders) in their firm, as I explain in my paper, *Unicorn Stock Options*.[80] Employee option grants made it possible for employees to participate in the growth of the business without having to put significant amounts of capital at risk to

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74. MAYER, *supra* note 21, at 31.

75. See Oliver E. Williamson, Michael L. Wachter & Jeffrey E. Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250, 253 (1975).

76. *Id.*

77. *See* Elizabeth G. Chambers, Mark Foulon, Helen Handfield-Jones, Steven M. Hankin & Edward G. Michaels III, *The War for Talent*, 3 MCKINSEY Q. 44, 46 (1998). Chambers et al. coined the term "war for talent." *Id.* at 44*; see also* Shira Ovide, *Honey, I Shrunk Apple's Profit Margins*, BLOOMBERG OP. (Aug. 2, 2018, 12:06 PM), https://www.bloomberg.com/opinion/articles/2018-08-02/apple-aapl-at-1-trillion-honey-i-shrunk-the-profit-margins.

78. *See* Chambers et al., *supra* note 77, at 46–47; *see also* Amir Efrati & Peter Schulz, *How Tech Firms Stack Up on Pay*, THE INFORMATION (Sept. 13, 2016, 12:45 PM), https://www.theinformation.com/articles/how-tech-firms-stack-up-on-pay.

79. *See* Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123, 1185, 1192 (2007).

80. Alon-Beck, *supra* note 13, at 136.

pay the ordinary income tax that otherwise would be immediately due on the additional cash compensation needed to win the war for talent.[81] This mechanism became popular due to the recognition that employee equity-sharing improves overall firm productivity, shareholder returns, and profit levels.[82]

The practice of giving startup employees equity (share-ownership) and the promise of equity (options) in order to attract, engage, and retain talent is very important. It improves overall company performance and allows the employees in the firm, who contributed their sweat equity—"human capital"—to benefit from the gains of the firm's success following an IPO. The issue of equity compensation is very relevant to the stakeholder capitalism debate. Some stakeholder theory scholars believe that we need to reform the pay structures of public companies by providing broad-based equity compensation to all employees, which will contribute to better firm performance.[83]

According to Edmans, broad-based employee share compensation can benefit society in a way that grows the pie.[84] Edmans suggests that we do not cut the CEO's pay and redistribute it to others in the company (which will split the pie differently), but rather give the CEO incentives to grow the pie and create long-term value by investing in stakeholders.[85] Edmans postulates that, "while growing the pie is important, the division must also be fair.[86] If the firm succeeds, it's not just down to the CEO—workers contributed substantially also. If they are given shares, they'll benefit from a larger pie, rather than all the gains going to executives."[87] But, unfortunately, in other industries in the United States, not only do employees not get any equity but according to a recent study by Stansbury and Summers, there is a decline in

81. In order to attract labor to Silicon Valley, startups used stock option plans. *See* William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can Be Regained*, 36 SEATTLE U. L. REV. 857, 865 (2013); *see also* WILLIAM LAZONICK, SUSTAINABLE PROSPERITY IN THE NEW ECONOMY? BUSINESS ORGANIZATIONS AND HIGH-TECH EMPLOYMENT IN THE UNITED STATES 39–79 (2009) (discussing the Cisco example).

82. *See* Saul Levmore, *Puzzling Stock Options and Compensation Norms*, 149 U. PA. L. REV. 1901, 1901 (2001) ("These options could take many forms, but there is remarkable conformity in the practice of giving a class of employees a large percentage of compensation . . . . . .in the form of options . . . ."); *see also* Thomas A. Smith, *The Zynga Clawback: Shoring Up the Central Pillar of Innovation*, 53 SANTA CLARA L. REV. 577, 589–606 (2013) (discussing at-will contracts and equity compensation).

83. Alex Edmans, Xavier Gabaix & Dirk Jenter, *Executive Compensation: A Survey of Theory and Evidence* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23596, 2017), https://www.nber.org/system/files/working_papers/w23596/w23596.pdf

84. EDMANS, *supra* note 22.

85. *Id.*

86. *Id.*

87. *See id. at 39–40.*

overall worker power.[88] They postulate that the decline started in the 1980s and that the following three factors contributed to it:

> First, institutional changes: the policy environment has become less supportive of worker power by reducing the incidence of unionism and the credibility of the "threat effect" of unionism or other organized labor, and the real value of the minimum wage has fallen. Second, changes within firms: the increase in shareholder power and shareholder activism has led to pressures on companies to cut labor costs, resulting in wage reductions within firms and the "fissuring" of the workplace as companies increasingly outsource and subcontract labor. And third, changes in economic conditions: increased competition for labor from technology or from low-wage countries has increased the elasticity of demand for U.S. labor, or, in the parlance of bargaining theory, has improved employers' outside option.[89]

Therefore, the enigma continues: Can the revolt by tech employees lead to a shift in the prevalent corporate governance theory from current shareholder-centric corporate governance to collaborative (stakeholder-centric) corporate governance model? Maybe time will tell. But one thing is clear: Tech workers are accumulating power by organizing, unionizing, and forming tech cooperatives.[90] Their activism concerns various issues, including external social and ethical considerations regarding investment, development, production, and manufacturing. This activism contributed to a paradigm shift in thinking about talent management and corporate culture. As noted above, in 2020, CEOs realized that they needed to take their talent seriously. Therefore, shareholder primacy is not a good business strategy for attracting, engaging, and retaining their workforce.

The following is a discussion on the purpose of the corporation and the challenges associated with calls for change.

III. THEORY OF THE FIRM

On June 24, 2020, at 9:00 AM EST, like many young corporate law scholars around the United States, I eagerly watched an online debate called "Stakeholder versus Shareholder Capitalism: The Great Debate" between Oxford Professor Colin Mayer and Harvard Professor Lucian Bebchuck.[91] It

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88. Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193.

89. *Id.* at 2–3.

90. *See supra* notes 71–73 and accompanying text.

91. University of Oxford, Saïd Business School, *Stakeholder Versus Shareholder Capitalism: The Great Debate*, YOUTUBE (June 25, 2020), https://www.youtube.com/watch?v=cUpyL1zVF50&feature=emb_title.

was indeed a great debate. The debate illustrated the differences between U.S. and UK corporate thinking on the theory of the firm and the purpose of the corporation.

Since the end of the twentieth century,[92] the views of Milton Friedman[93] and Michael Jensen[94] have become popular in the United States for using shareholder primacy as a corporate governance model.[95] These theories mandate that management of large public firms maximize managerial opportunism, "shareholder (read Wall Street) supremacy" and short-termism.[96] Therefore, management cannot realistically pursue long-term projects, such as research and development, because such projects cannot produce instant financial returns to the shareholders.[97]

Moreover, stakeholder scholars criticize shareholder scholars[98] for advocating for shareholder primacy, which centers solely on the interests of shareholders as the "sole residual claimants" and "owners" of the corporations, ignoring all the other stakeholders.[99] They further suggest that

92. *See* Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 711 (2015) ("Toward the end of the twentieth century, however, American public companies began to change. The shift began in academia with the rise of the Chicago School of free market economists. Influential economic thinkers like Milton Friedman and Michael Jensen, apparently viewing the public corporation rather like a gigantic sole proprietorship, argued that the absence of shareholder power in public companies noted by Berle and Means was a problem to be solved rather than a deliberate legal strategy to achieve asset lock-in.") (citation omitted)); *see also, e.g.*, Henry Hansmann & Reinier Kraakman, *What is Corporate Law? in* THE ANATOMY OF CORPORATE LAW: A FUNCTIONAL AND COMPARATIVE ANALYSIS (2004).

93. *See generally* Milton Friedman, *A Friedman Doctrine— The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html (publishing under the name Fulton Friedman); *see also* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 18 (2012).

94. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *see also* STOUT, *supra* note 93, at 18.

95. *See also* Henry Hansmann & Reinier Kraakman, *The End of History of Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001).

96. *See* Greenfield, *supra* note 23, at 749; Hansmann & Kraakman, *supra* note 92, at 712 n.88 ("[T]his assumption is tantamount to assuming that shareholders act like psychopaths who are indifferent to the consequences that their investing decisions impose on others."); Stout, *supra* note 92, at 711–12 (maximizing "shareholder value" means maximizing the increase of share price and dividends).

97. *See* Stout, *supra* note 92, at 712.

98. *See* Stout, *supra* note 92, at 711.

99. *Id.* at 711 n.87 ("Rather than owning corporations, shareholders own shares, which are a contract with the corporate entity. Similarly, the corporate entity is its own residual claimant. While the idea of shareholder 'ownership' of the firm might be forgiven as a convenient and harmless metaphor when describing a company with a controlling shareholder, it is grossly misleading when applied to a board-controlled company.") (citation omitted).

investors focus on short-term results due to their emphasis on stock market liquidity.[100] In the words of Lynn Stout, "shareholder value thinking had replaced managerialism as the dominant business philosophy in public corporations."[101]

That is why stakeholder scholars from around the world are calling for a radical change in the theory and philosophy of current corporate governance theory.[102] The corporate patterns and theories that we observe today are not merely products and consequences of the technology or development narratives, but lie in politics and economic philosophy as well.[103] Therefore, one of the goals of this Article is to touch on managerialism, which is supposed to allow boards of directors to plan for a long-term strategy of growth to benefit society as a whole.[104]

Before diving into the different theories of why firms exist, it must be noted that the UK recently changed its corporate governance code effective January 1, 2019.[105] The changes were meant to restore public trust in UK

100. *See* COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013); STOUT, *supra* note 93, at 16–18 ("The short-term focus of investors and corporate boards is currently one of the key issues in the corporate governance debate."); Ira M. Millstein, *Re-examining Board Priorities in an Era of Activism*, CLS BLUE SKY BLOG (Mar. 11, 2013), https://clsbluesky.law.columbia.edu/author/ira-m-millstein/ ("[C]orporate boards around the country should re-examine their priorities and figure out to whom they owe their fiduciary duties.. . . . Some activists are using their newfound power to sway and bully management to focus on the short term, meet the quarterly targets and disgorge cash in extra dividends or stock buy backs in lieu of investing in long-term growth."). Therefore, it is not surprising that recent empirical research already shows that even profitable technology companies these days increasingly prefer to stay private as long as possible in order to avoid the pressures of short-term strategies that result from public ownership. *See Rival Versions of Capitalism*: *The Endangered Public Company*, ECONOMIST (May 19, 2012), http://www.economist.com/node/21555562; Joann S. Lublin & Spencer E. Ante, *A Fight in Silicon Valley: Founders Push for Control*, WALL ST. J. (July 11, 2012, 11:50 AM), https://www.wsj.com/articles/SB10001424052702303292204577519134168240996.

101. *See* Stout, *supra* note 92, at 713. Stout also refers to the work of corporate scholar Edward Rock, who stated that "[m]anagers now largely think and act like shareholders." *Id*. (quoting Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1988 (2013)).

102. The initiative is led by Professors Lynn Stout and Margaret Blair. *See* STOUT, *supra* note 93; Greenfield, *supra* note 23, at 749; *see also* Kent Greenfield, *The Stakeholder Strategy*, 26 DEMOCRACY 47, 48 (2012).

103. An examination of classic corporate governance theory will demonstrate that "the public corporation is as much a political adaptation as an economic or technological necessity." Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 10 (1991).

104. *See* Anat Alon-Beck, The Coalition Model, a Private-Public Strategic Innovation Policy Model for Encouraging Entrepreneurship and Economic Growth in the Era of New Economic Challenges, 17 WASH. U. GLOB. STUD. L. REV. 267 (2018).

105. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE (2018), https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code (effective for accounting periods beginning on or after Jan. 1., 2019).

businesses and to focus on the purpose of the corporation.[106] Additionally, the British Academy started a large and ambitious project—the "Future of the Corporation"—that concludes "the purpose of business is to solve the problems of people and planet profitably, and not profit from causing problems."[107]

One of the most outspoken voices is that of Colin Mayer, who postulates that "constraining the firm to a single narrow objective has had wide-ranging and damaging consequences: economic, environmental, political, and social."[108] He further states that "it is only once one has defined a company's purposes that one can ascertain either its appropriate structure and conduct or its performance."[109] He rejects the view that regulation is an appropriate response to firm misbehavior. He rather mainly relies on a firm's commitment to corporate purpose.

Critics of Mayer's view point out that we cannot put "too much faith in private ordering proclamations of a 'corporate purpose' or of a set of values." If we give too much discretion to executives to take stakeholder interests into account, we run into the risk of enhancing their powers and insulating them from oversight and criticism, while diminishing the need for regulations.[110]

Another popular view is that of Alex Edmans, who postulates that "companies can create both profit and social value."[111] Edmans advocates for using the new theory of his pieconomics, which is an approach to business that "seeks to create profits only through creating value for society."[112] Edmans further states that pieconomics "doesn't imply unfettered pursuit of

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106. The New Code principles are on: (1) alignment of company purpose, strategy, values and corporate culture; (2) effective engagement with shareholders and stakeholders; (3) responsibilities of the board to ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success; (4) consideration of the length of service of the board as a whole and the need for regular board refreshment; and (5) alignment of remuneration and workforce policies to the long-term success of the company and its values. *Id.* The New Code provisions are on: (1) the board's role in monitoring and assessing culture; (2) mechanisms for gathering the views of the workforce; (3) reporting on how stakeholder interests, and the other matters set out in section 172, have influenced the board's decision-making; (4) succession planning and board member contribution; (5) diversity and inclusion; (6) the length of tenure of the chair; (7) board responsibility for identifying and assessing emerging risks (in addition to the principal risks); (8) holding periods for long-term incentive schemes; and (9) pension arrangements. *Id.*

107. THE BRITISH ACAD., PRINCIPLES FOR PURPOSEFUL BUSINESS: HOW TO DELIVER THE FRAMEWORK FOR THE FUTURE OF THE CORPORATION 8 (2019), https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf.

108. *See* MAYER, *supra* note 21, at 34.

109. *See* MAYER, *supra* note 21, at 7.

110. Marco Ventoruzzo, *On 'Prosperity' by Colin Mayer: Brief Critical Remarks on the (Legal) Relevance of Announcing a Multi-Stakeholders 'Corporate Purpose'* 10 (Bocconi Legal Stud. Research Paper No. 3546139, 2020), https://ssrn.com/abstract=3546139.

111. *See* EDMANS, *supra* note 22, at 3.

112. *See* EDMANS, *supra* note 22, at 3.

social goals, cheerfully ignoring profits."[113] Edmans understands the agency cost problems and the potential for abuse.

The following is an overview of three competing theories that attempt to explain why firms exist. My suggestion works best when understanding the normative foundations and analysis of the team production approach. There are many competing economic theories that try to explain why firms exist.[114] The main three theories are the principal-agent approach,[115] property rights approach,[116] and team production approach.[117]

The principal-agent and property rights approaches are highlighted extensively in current economics and law writings.[118] However, according to scholars Blair and Stout, when these theories are applied to public firms, they are lacking.[119] Therefore, there is a need to center on the team production approach.[120]

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113. *See* EDMANS, *supra* note 22, at 31.

114. *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390 (1937); Charles R.T. O'Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE U. L. REV. 1247, 1250 (2012) ("[C]oase . . . saw the firm as having an 'inside' and an 'outside' and a distinct central actor—the entrepreneur. . . . Coase looked inside the firm and identified the entrepreneur as the central economic actor; it was the entrepreneur who consciously allocated resources within the firm by command."); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 257 n.19 (1999) ("Coase answered that a key feature of production in a firm is a 'hierarchical' structure under which an entrepreneur who needs to acquire materials and services retains the right to direct the exact details of what and how products or services are delivered. A firm, therefore, consists of the systems of relationships which come into existence '[when] the direction of resources . . . becomes dependent on the buyer.' Firms emerge, Coase speculated, when it would be too costly and complicated to write contracts that give the buyer of the product or services the necessary degree of control. Coase's analysis focuses on why entrepreneurial firms exist. . . . Coase's entrepreneur could solve her problem (the need to direct or control the product or service she is buying) using separate employment contracts between the entrepreneur and each employee. Hence Coase's theory of the 'firm' does not tell us why 'corporations' are needed.") (citations omitted).

115. *See* Blair & Stout, *supra* note 114, at 257–58 (noting that this approach "explores contracting problems that arise when one actor hires another to act on her behalf").

116. *See id.* at 258 (observing that this path "examines problems associated with coordinating productive activities where it is too costly to write and enforce complete contracts, focusing especially on the role played by property rights as a solution for closing contractual gaps").

117. *See id.* (noting that this path "considers the role hierarchy may play in policing against shirking problems that may arise in coordinating team production").

118. *See, e.g.*, *id.*

119. *Id.*

120. *Id.*

A. Principal-Agent

Agency problems are viewed today as the main issue that corporate law scholarship has to resolve.[121] Contemporary scholars[122] use agency law to explain the notion that the corporation is comprised of collections of assets that are jointly owned by principals (shareholders), who hire agents (directors and officers) to manage the corporation's assets on their behalf.[123] They further contend that the shareholders are powerless because shareholders do not have the same knowledge of the firm's operations as managers do. The managers, therefore, always have the potential for exercising abusive behavior such as cheating, mismanaging, and stealing from the shareholders. According to legal scholar Frank Easterbrook, "[e]ven when they do not, the potential of misconduct remains."[124]

The Agency solution to such problems is to give shareholders powers over directors, such as allowing shareholders to remove boards that do not perform according to shareholder expectations, or strapping executive pay to shareholder profits.[125]

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121. *See* Stout, *supra* note 92, at 705 ("Indeed, a casual reader could be forgiven for concluding that the *only* problem posed by corporate entities is the challenge of eliminating the waste that results when corporate managers fail to run firms in an optimal fashion (usually assumed to be a profit-maximizing fashion)."); *see also* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1909–10 (recounting the ways in which agency costs are viewed as "the central problem of U.S. corporate law").

122. The subsequent are examples of scholars who utilize the principal-agent model. In legal theory, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991), and Lucian Arye Bebchuck, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992). In economics, see Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980) ("The firm is viewed as a set of contracts among factors of production, with each factor motivated by its self-interest. . . . In the classical theory, the agent who personifies the firm is the entrepreneur who is taken to be both manager and residual risk bearer. . . . The main thesis of this paper is that separation of security ownership and control can be explained as an efficient form of economic organization within the 'set of contracts' perspective.").

123. *See* Blair & Stout, *supra* note 114; Jensen & Meckling, *supra* note 94.

124. *See* EASTERBROOK & FISCHEL, *supra* note 122, at 1.

125. *See, e.g.*, Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 700 (2007) (arguing that shareholders should have added powers to remove boards of directors); *see* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004) (arguing that shareholder returns should be tied to executive pay); *See* Lucian Arye Bebchuck, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 835 (2005) ("[A]s part of their power to amend governance arrangements, shareholders should be able to adopt provisions that would give them subsequently a specified power to intervene in additional corporate decisions. Power to intervene in game-ending decisions (to merge, sell all assets, or dissolve) could address management's bias in favor of the company's continued existence. Power to intervene in scaling-down decisions (to make cash or in-kind distributions) could address management's tendency to retain excessive funds and engage in empire-building. Shareholders' ability to adopt, when necessary, provisions that give themselves a specified additional power to intervene could thus produce benefits in many companies."); *see* Stout, *supra* note 92.

There are four problems with the Agency solution. First, the agency theory doesn't take into account directors' motivation to serve the corporation and the stakeholders to the best of their ability in order to keep their reputation and position.[126] Second, as a result of the emphasis on the interests of "present-day shareholders," managers and directors are having difficulty with pursuing long-term strategies.[127] Third, sometimes the agent in a public corporation is the one that has "trouble getting the principal to perform her end of the deal."[128] Fourth, there is "fundamental ambiguity" in public corporations with regard to which party has control over the other, and which party is the one who is contributing the productive inputs.[129]

B. Property Rights

The firm is defined as a "bundle of assets under common ownership,"[130] which has "a contractual structure with: 1) joint input production; 2) several input owners; 3) one party who is common to all the contracts of the joint inputs; 4) who has rights to renegotiate any input's contract independently of contracts with other input owners; 5) who holds the residual claim; and 6) who has the right to sell his central contractual residual status."[131]

According to Blair and Stout, this theory does not distinguish between ownership and control of shareholders in a public corporation.[132] In reality,

126. *See* Stout, *supra* note 92, at 706 n.66 ("The primary motivation for directors to do their best to serve corporate entities may be some combination of the desire to keep the entity healthy so they can keep their board positions; the desire to maintain and build their own status and reputations as business leaders; and the altruistic desire to benefit the executives, employees, customers, and shareholders to whom they may feel a sense of obligation. History has proven that this imperfect set of incentives can be sufficient to allow board-controlled nonprofit and for-profit corporate entities to survive and thrive for decades and even centuries, and play major roles in the global economy."); *see also* Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite* Homo Economicus *to Join Your Board)*, 28 DEL. J. CORP. L. 1, 6 (2003) (discussing the effects of the business judgment rule—because of the business judgment rule, directors can still shirk their duties and fail to devote adequate time and attention to the corporate entity).

127. *See* STOUT, *supra* note 93, at 7 ("[I]nfluential economic and legal experts are proposing alternative theories of the legal structure and economic purpose of public corporations that show how a relentless focus on raising the share price of individual firms may be not only misguided, but harmful to investors.").

128. *See* Blair & Stout, *supra* note 114, at 259.

129. *Id*.

130. *Id*. at 278; *see also* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 692 (1986); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1763 n.28 (1989).

131. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization,* 62 AM. ECON. REV. 777, 794 (1972).

132. *See* Blair & Stout, *supra* note 114, at 278.

the shareholders do not directly control the public corporation.[133] Additionally, it is hard to view the shareholders of public corporations as owners of the firm (a bundle of assets), because of the intangible nature of the key assets of the public corporation—including intellectual property, human-capital, and knowledge.[134] It is very hard to put a price on, evaluate, and—if need be—sell these intangible assets to a third party in order for the shareholders to retrieve any portion of their investment.[135] Viewing the public corporation as a bundle of assets under common management is misleading, according to Blair and Stout.[136] Therefore, they propose a different approached called "team production."[137]

C. Team Production

"Team production" proposes to view the public corporation as a "nexus of firm-specific investments."[138] According to the team production theory, the public corporation should be regarded as a "team of people who enter[ed] into a complex arrangement to work together for their mutual gain."[139] The public corporation, therefore, is viewed as a team of employees, shareholders, and other stakeholders, who contracted to partake in a process of dispute resolution and internal goal setting.[140]

Directors of public corporations are trustees who take into account the interests of all the stakeholders and are regarded as "mediating hierarchs."[141] Therefore, directors should not solely concentrate on maximizing shareholder returns and should instead settle the competing claims of all stakeholders. They are "hired" to "limit shirking and deter rent-seeking behavior among team members."[142]

133. *Id.*
134. *Id.*
135. Alchian & Demsetz, *supra* note 131, at 794.
136. *See* Blair & Stout, *supra* note 114, at 277.
137. *See infra* Part C.
138. *See* Blair & Stout, *supra* note 114, at 275 (citation omitted).
139. *Id*. at 278.
140. *See id.* According to Blair and Stout, stakeholders in a corporation "enter into a '*pactum subjectionis*' under which they yield control over outputs and key inputs (time, intellectual skills, or financial capital) to the hierarchy." *Id.* at 278 (citation omitted).
141. *See id.* at 281.
142. *Id*. at 274. This theory leads to the next theory that was developed by Lynn Stout. *See* Stout, *supra* note 92, at 685–86.

IV. THE PURPOSE OF THE CORPORATION

What is the purpose of the corporation?[143] There is an old debate over the purpose of the corporation.[144] This is part of a 1930s Harvard Law Review debate between two notable corporate law scholars: Adolfe A. Berle, Jr.[145] and Merrick E. Dodd.[146] This debate about the purpose of the corporation includes a dispute about the roles and responsibilities of corporate managers and directors and continues to this day.[147] The debate takes place in the law, labor, finance, and management literatures.

This question is still very much relevant today because of the dominance of Berle's[148] view, which holds that the main purpose of the company is to increase its profits, thereby increasing the value of its shares or bonds to the benefit of its members or shareholders, so as to increase their financial gains. Lynn Stout was one of the prominent legal scholars who called for a radical change in the theory and philosophy of current corporate governance theory.[149]

According to Stout, the rise of shareholder primacy thinking began in the 1970s with the rise of the so-called "Chicago School of free-market

143. Fisch & Solomon, *supra* note 24.

144. *Id.* at 101.

145. *See* Adolf A. Berle, Jr., *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (arguing in favor of profit as a corporation's sole purpose).

146. *See* E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (arguing that a corporation has both profit-making and social service purposes).

147. *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE. L. REV. 1423, 1442 (1993) (addressing the debate over corporate responsibility set off by the growing prominence of corporations and the increasing independent power of managers); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1385–86 (2008) (observing a debate in the contemporary corporate governance space); Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 J. BUS. L. 631, 633 (2009) (discussing "the ambiguities of corporate law by challenging corporate governance models that favor only one view of corporate purpose, and by identifying the differing norms that corporate case law and statutes impose"); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 31 (2005) (exploring the nexus between shareholder ethical responsibility and corporate law); Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 174 (2001) (reviewing "corporate finance literature on institutional investors' activities in corporate governance and us[ing] the findings of the empirical literature to inform normative recommendations for the proxy process"); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190 (2002) (suggesting "that we have made at least some intellectual progress over the intervening decades on the question of the proper role of the corporation"); Leo E. Strine, Jr., *Making it Easier for Directors to Do the Right Thing*, 4 HARV. BUS. L. REV. 235, 235 (2014) (arguing that "benefit corporation statutes have the potential to change the accountability structure within which managers operate").

148. *See* Berle, Jr., *supra* note 145.

149. *See e.g.*, Anat Alon-Beck, *The Law of Social Entrepreneurship - Creating Shared Value through the Lens of Sandra Day O'Connor's iCivics*, 20 U. PA. J. BUS. L. 520 (2017).

economists."[150] The "Chicago School" philosophy is that management should focus on and be evaluated based on economic analysis, and that the corpoarte purpose or goal is to make shareholders as wealthy as possible. Stout further postulated that this idea simplified the overall agency problem of large public corporations because corporate performance could be "easily measured through the single metric of share price."[151]

For the last twenty years, corporate governance scholars and practitioners have been requiring managers of public companies to maximize shareholder value by putting emphasis on short-term results.[152] Policymakers, practitioners, and academics alike hold strong views that investors' emphasis on stock market liquidity, which is evidenced by a growth in high frequency and algorithmic trading activity and short-term holding periods, encourages a focus on short-term results.[153] As a result, they argue that large public companies are shying away from investing in research and development, which requires long-term strategic planning (incorporating potential failures) that can affect the price of the company's stock price.[154] The short-term focus of investors and corporate boards continues to be a highly contested issue in the corporate governance debate.[155]

Today, this debate continues with different prominent actors, which are represented generally by Lucian Bebchuck[156] on the one hand, versus Martin Lipton[157] and Ed Rock[158] on the other. Rock is currently the Reporter working on introducing stakeholder elements into the Restatement under the American Law Institute Council's Restatement of Corporate Law project.[159] Rock's undertaking is extremely important due to the recent pressure placed

150. STOUT, *supra* note 93, at 18 .

151. *Id.* at 18–19.

152. Stout, *supra* note 92, at 719.

153. *See* STOUT, *supra* note 93.

154. *See* STOUT, *supra* note 93.

155. For discussion on shareholder value, see MAYER, supra note 100. *See also* Millstein, *supra* note 100 ("[C]orporate boards around the country should re-examine their priorities and figure out to whom they owe their fiduciary duties. . . . Some activists are using their newfound power to sway and bully management to focus on the short term, meet the quarterly targets and disgorge cash in extra dividends or stock buy backs in lieu of investing in long-term growth.").

156. *See* Bebchuk & Tallarita, *supra* note 26.

157. Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020/ (discussing potential for emergence of stakeholder governance in 2020).

158. *See* Rock, *supra* note 121.

159. *Laying Down the Law: Edward Rock Will Oversee Drafting of the First ALI Restatement on Corporate Governance*, NYU (Apr. 5, 2019), https://www.law.nyu.edu/news/ideas/edward-rock-ALI-corporate-governance-restatement.

on corporate boards and manageres by business leaders, policymakers, entrepreneurs, and investors to take stakeholder interests into account.[160]

At the same time, certain scholars are advocating for a "third way." For example, an article by Leo Strine and co-authors calls for "[b]ridging the [c]onceptual [d]ivide" between the shareholder and stakeholder theories.[161] Asaf Raz's purpose-based theory suggests that directors owe their duties neither to shareholders, nor to stakeholders.[162] Instead, their loyalty is to the corporation as a separate legal person.[163] When they act, directors have a duty to advance the corporation's purpose.[164] That purpose, dictated by state corporate law,[165] is first to act lawfully: by definition, the corporation is legally required to meet all of its obligations to stakeholders.[166] Once it has done so, the corporation is free to pursue its own profit.[167] The corporation is free to take stakeholders' interests into account, even beyond their existing legal rights, to the extent this promotes its success and purpose.[168]

In order to navigate the unprecedented COVID-19 pandemic, which resulted in a global health and financial crisis, there are calls for solidarity, mandating cooperation between the public, private, and civic sectors.[169] Businesses and corporate boards around the globe are asked to step up to the plate and take healthcare and socio-economic issues into account when making decisions. But, the question remains whether the board can—or should, or must—consider the interests of other stakeholders besides shareholders. The following is an explanation of the stakeholder approach.

A. Understanding the Stakeholder Approach

There is much debate over "the essence of the board's fiduciary duty, and particularly the extent to which the board can or should or must consider the interests of other stakeholders besides shareholders."[170] As noted, since

160. Alon-Beck, *supra* note 149.

161. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1067 (2002).

162. Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 523 (2020).

163. *Id.* at 529.

164. *Id.*

165. *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989).

166. Raz, *supra* note 162, at 529–30.

167. *Id.* at 538. However, shareholders only indirectly enjoy the corporation's profits. The corporation has no duty to make a dividend or buyback at any given time, and should usually operate for the long-term in a manner determined by its fiduciaries. *Id.*

168. *Id.* at 553.

169. *See* UNITED NATIONS, *supra note* 8, at 7.

170. Martin Lipton, Karessa L. Cain & Kathleen C. Iannone, *Stakeholder Governance and the Fiduciary Duties of Directors,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 24, 2019), https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors/ (emphasis omitted).

the end of the twentieth century,[171] legal scholars and economists, such as Milton Friedman[172] and Michael Jensen,[173] have been using shareholder primacy as a corporate governance model,[174] which mandates the management of large public firms to maximize managerial opportunism, "shareholder (read Wall Street) supremacy," and short-termism.[175] Scholars who advocate for "shareholder primacy" focus solely on the shareholders as the "sole residual claimants" and "owners" of the corporations, ignoring all the other stakeholders.[176] They suggest that investors focus on short-term results due to their emphasis on stock market liquidity.[177] In the words of Lynn Stout, "shareholder value thinking had replaced managerialism as the dominant business philosophy."[178]

These views are now clashing headfront with the calls for management teams and boards to develop business strategies that will encourage long term success, taking into account all stakeholders and not merely stockholders.[179]

171. *See* Stout, *supra* note 92, at 711 ("Toward the end of the twentieth century, however, American public companies began to change. The shift began in academia with the rise of the Chicago School of free market economists. Influential economic thinkers like Milton Friedman and Michael Jensen, apparently viewing the public corporation rather like a gigantic sole proprietorship, argued that the absence of shareholder power in public companies noted by Berle and Means was a problem to be solved rather than a deliberate legal strategy to achieve asset lock-in."); *see also, e.g.*, Hansmann & Kraakman, *supra* note 92.

172. *See* Friedman, *supra* note 93; *see also* STOUT, *supra* note 93, at 18.

173. Jensen & Meckling, *supra* note 94; *see also* STOUT, *supra* note 93.

174. *See also* Hansmann & Kraakman, *supra* note 95, at 440–41.

175. *See* Greenfield, *supra* note 23, at 749; *see also* STOUT, *supra* note 93, at 712 (maximizing "shareholder value" means maximizing the increase of share price and dividends. "This assumption is tantamount to assuming that shareholders act like psychopaths who are indifferent to the consequences that their investing decisions impose on others."); Hansmann & Kraakman, *supra* note 93.

176. *See* Stout, *supra* note 92, at 711, 711 n.87 ("Rather than owning corporations, shareholders own shares, which are a contract with the corporate entity. Similarly, the corporate entity is its own residual claimant. While the idea of shareholder 'ownership' of the firm might be forgiven as a convenient and harmless metaphor when describing a company with a controlling shareholder, it is grossly misleading when applied to a board-controlled company.") (citation omitted).

177. *See* STOUT, *supra* note 93, 693 ("The short-term focus of investors and corporate boards is currently one of the key issues in the corporate governance debate."); MAYER, *supra* note 100; Millstein, *supra* note 100. Therefore, it is not surprising that recent empirical research already shows that even profitable technology companies these days increasingly prefer to stay private as long as possible in order to avoid the pressures of short-term strategies that result from public ownership. *See Rival Versions of Capitalism, supra* note 100.

178. Stout, *supra* note 92, at 713. Stout also refers to the work of Edward Rock, who stated that "[m]anagers now largely think and act like shareholders." *Id.* (quoting Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1988 (2013)).

179. The stakeholder approach theory has four main building blocks: corporate planning, systems theory, corporate social responsibility, and organizational theory. *See also* R. Edward Freeman & John McVea, *A Stakeholder Approach to Strategic Management* 1–7 (Darden Bus. Sch. Working Paper No. 01-02, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=263511 ("The impetus behind stakeholder management was to try and build a framework that was responsive to the concerns of managers who were being buffeted by unprecedented levels of

The stakeholder approach defines "stakeholders" as "any group or individual who is affected by or can affect the achievement of an organization's objectives."[180]_There is an ongoing debate between scholars of the traditional view of fiduciary duty,[181] who claim that management is responsible for protecting the interests of the shareholders,[182] and scholars of the stakeholder approach, who claim that management is responsible for protecting the interest of all stakeholders.[183] It should be noted that there is also a management stakeholder approach, which is a "strategic management process" and not merely a strategic planning process.[184] The strategic management process allows management to actively design a new direction for the firm, which will take into account how the firm can have an effect on the environment and on society, in addition to how the environment and society possibly will affect the firm. [185]

Even the shareholder primacy guru Michael C. Jensen himself changed some of his statements and conceded that, "we cannot maximize the long-term value of an organization if we ignore or mistreat any important constituency."[186] Human capital is a very important constituency because it is a valuable intangible asset, on which the success and progress of the company depends. As noted by my co-author, Constance Bagley:

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environmental turbulence and change. Traditional strategy frameworks were neither helping managers develop new strategic directions nor were they helping them understand how to create new opportunities in the midst of so much change. As Freeman observed '[O]ur current theories are inconsistent with both the quantity and kinds of change that are occurring in the business environment of the 1980's. . . . . A new conceptual framework is needed.' A stakeholder approach was a response to this challenge." (citation omitted)).

180. *Id.*

181. *See, e.g.*, Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 595 (1997).

182. *See generally* OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1984) ("Williamson [1984] used a transaction cost framework to show that shareholders deserved special consideration over other stakeholders because of 'asset specificity.' He argued that a shareholder's stake was uniquely tied to the success of the firm and would have no residual value should the firm fail, unlike, for example, the labor of a worker.").

183. Freeman & McVea, *supra* note 179, at 16–17 ("Freeman and Evan [1990] have argued, to the contrary, that Williamson's approach to corporate governance can indeed be used to explain all stakeholders' relationships. Many other stakeholders have stakes that are, to a degree, firm specific. Furthermore, shareholders have a more liquid market (the stock market) for exit than most other stakeholders. Thus, asset specificity alone does not grant a prime responsibility towards stockholders at the expense of all others."); *see also* William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, *in* ETHICAL THEORY AND BUSINESS 75 (Tom L. Beauchamp & Norman E. Bowie eds., 5th ed. 1993).

184. Freeman & McVea, *supra* note 179, at 9 ("Strategic planning focuses on trying to predict the future environment and then independently developing plans for the firm to exploit its position.").

185. *Id.*

186. *See* CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY 24 (8th ed. 2016).

"Especially during difficult times, we consider it particularly important for the board of directors to focus on ensuring the fair treatment of their employees, not merely on incentivizing the executives."[187]

Nevertheless, one question remains: How are the board of directors or management going to accomplish these goals? In order to answer this question, we must turn to the boundaries of fiduciary duties.

V. FIDUCIARY DUTY

> "Fiduciary relationships are crucial to any individual in any society. That is because few individuals are self-sufficient and fewer, if any, can live alone."
> Tamar Frankel[188]

It may be possible to "expand" the scope of a director's existing fiduciary duties to include the protection of employee interests. However, this is a suggestion that is open for further analysis and debate in the United States. As a director has an obligation to act according to "the best interests of the company," we can argue that taking employee and stakeholder interests into account is in the best interest of the company.[189]

How does one become a fiduciary? In the corporate law context, a person becomes a fiduciary by serving as a director or officer.[190] To whom does a corporate fiduciary's duties run? The answer can change depending on the state or nation in question. According to Velasco, in Delaware, "the answer is straightforward: it is ultimately to the shareholders alone."[191] In

187. Anat Alon-Beck, *Instead of Panicking Over the Coronavirus, Maybe We Should Start Innovating*, FORBES (Feb. 28, 2020, 9:58 AM), https://www.forbes.com/sites/anatalonbeck/2020/02/28/instead-of-panicking-over-the-coronavirus-maybe-we-should-start-innovating/?sh=85250d77eaf4.

188. Tamar Frankel, *The Rise of Fiduciary Law* 2 (Boston Univ. Sch. of L., Pub. L. Rsch. Paper No. 18-18, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237023.

189. For more on this line of suggestion, see Jennifer G. Hill, *Corporate Governance and the Role of the Employee*, *in* PARTNERSHIP AT WORK: THE CHALLENGE OF EMPLOYEE DEMOCRACY 110 (Paul J. Gollan & Glenn Patmore eds., 2003); *see also* Fisch & Solomon, *supra* note 17, at 130.

190. *See* Julian Velasco, *Fiduciary Principles in Corporate Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 61 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019). Employees and other agents of the corporation are also fiduciaries, but that is more properly understood as an aspect of agency law rather than corporate law. *See* Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019); Aditi Bagchi, *Fiduciary Principles in Employment Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019). In addition, shareholders with a controlling interest in the corporation may be held to have fiduciary duties.

191. *See* Velasco, *supra* note 190; Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners."); Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Fiduciary Law: Searching for the Optimal Balance*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019).

other states or nations, it is possible that the fiduciary duty will be extended more broadly.[192]

Fiduciary duty regulates relationships in many legal fields[193] and has a long history.[194] The duty is imposed upon people or organizations in a position of trust or confidence in order to deal with agency costs, asymmetric information, and conflicts of interest when they exercise "discretionary power in the interests of another person."[195]

There is a way to settle the dispute between Dodd and Berle with regard to directors in the exercise of their fiduciary duties. If we take the Berle view, which is the dominant view in Delaware, as noted in further detail below, the directors or managers can be protected under the business judgment rule as long as their decision was informed, in good faith, and for the best interests of the company. Therefore, as long as employee interests are in the best interests of the company, the court will abstain from reviewing the merits of the decision.

Directors and officers are fiduciaries. As fiduciaries, they are trusted with managing the firm on behalf of the shareholder (or capital investors). In this relationship, the recipients of the fiduciary services, the capital investors, depend on the services provided by the fiduciaries. The relationship between the fiduciaries and the capital investors (shareholders) is asymmetrical.[196]

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192. *See* Velasco, *supra* note 190 (discussing constituency statutes).

193. *See* Frankel, *supra* note 188. *See generally* Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 227 (Evan J. Criddle et al. eds., 2019); Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 249 (Evan J Criddle et al. eds., 2019); EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY, chs. 1–7 (2016); DeMott, *supra* note 190; Bagchi, *supra* note 190; Dana M. Muir, *Fiduciary Principles in Pension Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 167 (Evan J. Criddle et al. eds., 2019); Emily L. Sherwin, *Formal Elements of Contract and Fiduciary Law*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 167 (Paul B. Miller & Andrew S. Gold eds., 2016); Andrew Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 MELB. U. L. REV. 478 (2005); Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploratory Essay*, 77 WASH. U. L. Rev. 319 (1999); Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647 (2015); Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits* (Jan. 30, 2018), *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019).

194. *See* Frankel, *supra* note 188, at 2 ("It was recognized in Roman law and the British common law and appeared decades ago in religious laws, such as Jewish law, Christian law, and Islamic law. Internationally, fiduciary law has a place in European legal system in Chinese law, Japanese law and Indian law.") (citations omitted).

195. *See* UNITED NATIONS ENVIRONMENT PROGRAMME FINANCE INITIATIVE (UNEP FI) & PRINCIPLES FOR RESPONSIBLE INVESTMENT (PRI), FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf.

196. *See generally* Jensen & Meckling, *supra* note 94. For further discussion on agency problems and strategies to reduce them, see also John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A

The shareholders depend on the fiduciaries because they "cannot acquire the knowledge and expertise necessary for all the services that all fiduciaries can, and do, offer."[197] In return, they reward fiduciaries for their services.

Fiduciaries acquire power over their investors, as they often have the discretion to decide how to invest the funds that investors have invested in the firm.[198] In many cases, there is an imbalance in the relationship between the fiduciary and the beneficiary. The investors lack the ability to exercise oversight (monitoring) over the beneficiary. They might not possess expertise to be able to "fully evaluate and judge the value, quality and reliability of services, and whether it satisfies their needs."[199]

Fiduciary duty, therefore, is important to curtail the fiduciary's power, so that it is not "abused and misused, intentionally or negligently."[200] Moreover, fiduciary duty requires the directors and officers, "who manage other people's money [to] act responsibly in the interests of beneficiaries or investors, as opposed to serving their own interests."[201]

Any decision that is a business decision is protected under the business judgment rule ("BJR"). The BJR is a common law defense developed by courts and an important concept to understanding fiduciary duty in corporate law. The BJR is (and has been for decades) the most important protection against personal liability for directors and officers.[202] It allows directors and officers in a corporation to take calculated business risks and prevents the courts from second-guessing such business decisions.[203]

Delaware courts interpret the BJR as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[204] If a fiduciary makes a decision that will benefit

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COMPARATIVE AND FUNCTIONAL APPROACH (Reinier H. Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda & Edward Rock. eds., 2d ed. 2009); George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 83 Q. J. ECON. 488, 493 (1970).

197. *See* Frankel, *supra* note 188, at 3.

198. *See* UNEP FI & PRI, *supra* note 195, at 10 ("In practice, these fiduciaries have discretion as to how they invest the funds they control. The scope of that discretion varies. It may be narrow, for example, in the case of tailored mutual funds where the beneficiary specifies the asset profile and only the day-to-day stock selection and other management tasks are left to the investment decision maker. It may be wide, as with many occupational pension funds. Further, some public funds are subject to considerable state control and the discretion afforded to these decision makers may be further narrowed by parameters set by government.").

199. *See* Frankel, *supra* note 188, at 3.

200. *Id.*

201. *See* UNEP FI & PRI, *supra* note 195, at 10 ("The manner in which these duties are framed differs between countries and between common and civil law jurisdictions.") (citation omitted).

202. There is a difference between the Duty of Care and the Duty of Loyalty.

203. Velasco, *supra* note 190.

204. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

employees as stakeholders, that decision will contribute to the financial growth and overall long-term value creation in the company. Accordingly, such a decision should be considered a business decision protected under the BJR.

Therefore, in order to prevent abuse by fiduciaries in the United States, courts should adopt the "all things being equal rule."[205] This rule means that fiduciaries can and should take employees' interests into account (as stakeholders) in such a way as to "generate collateral benefits, but only if such an investment [is] 'equal to or superior' in risk, return, and soundness to other alternatives."[206]

In order to prevent abuse, there is a need for fiduciaries to be transparent about their business decisions and to implement better corporate reporting on EESG issues, investment beliefs, long-term mandates, integrated reporting, and performance.

VII. THE PROBLEM OF INADEQUATE MONITORING OF PUBLIC MANAGERS

There are several theories that deal with the problem of inadequate monitoring of public managers, as noted above. The dominant theory is the agency theory, which deals with the shirking behavior of agents.[207] Both the shareholder and stakeholder theories must deal with the uncertainty surrounding the potential opportunistic conduct of the managers.[208]

Investors take information risks—the "adverse selection" challenge[209]—into account prior to any engagement with or investment in a company. The investors of public companies are usually apathetic and have either a hard time or no desire to acquire information about the portfolio company and risks. That is why there is always a need for disclosure of information.

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205. UNEP FI & PRI, *supra* note 195, at 11 ("In the US, for example, the decision maker's duty is to exercise reasonable care, skill and caution in pursuing an overall investment strategy that incorporates risk and return objectives reasonably suitable to the trust.").

206. *See* Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 85 (2015); Jayne Elizabeth Zanglein, *Protecting Retirees While Encouraging Economically Targeted Investments*, 5 KAN. J.L. & PUB. POL'Y, 47, 49 (1996) ("The Department of Labor's position under the direction of Lanoff became known as the 'all things being equal' test.").

207. *See, e.g.*, Bengt Holmström, *Moral Hazard and Observability*, 10 BELL J. ECON. 74, 75 (1979).

208. *See also* PAUL GOMPERS & JOSH LERNER, THE VENTURE CAPITAL CYCLE 127–31 (1999); Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital Financed Firms*, 2002 WIS. L. REV. 45, 54–55 (2002).

209. *See* Akerlof, *supra* note 196, at 493 (firms' offerings of equity may be associated with "lemons" problem); *see also* Utset, *supra* note 208, at 56; GOMPERS & LERNER, *supra* note 208, at 129.

According to Jensen and Meckling, the agency problem is a common problem and exists in all enterprises and cooperation forms.[210] Therefore, it is not a unique characteristic of a company that takes shareholders or stakeholder interests into account.

The analysis of the agency theory assumes that the main problem is to align the interests of the principal and agent, and to get the agent to follow the principal's orders, without taking into account the agent's interests.

Therefore, adopting a strategic stakeholder approach to management would not increase the insulation of corporate leaders from shareholders. Corporate leaders are already insulated, and it is very difficult today to hold them personally accountable for their actions, unless they clearly violate their duty of loyalty. That is why we should require managers that want to take stakeholder interests into account to ask their shareholders to either incorporate such an obligation in the company's charter, with a specific purpose, or to convert the company to a PBC.

In his Article, *Making It Easier For Directors To "Do The Right Thing"?*, Justice Strine postulates that the benefit corporation statutes "have the potential to change the accountability structure within which managers operate."[211] In theory, if adopted, these statutes can mandate that managers take stakeholder interests into account and "do the right thing."[212] Unfortunately, however, it seems that this new form is not that popular for the reasons listed below. As evidenced by the fact that approximately 4,000 companies have adopted this new form in the United States, including well-known companies such as Patagonia and Kickstarter.[213]

A. The Public Benefit Corporation

There is a rise in legislation of hybrid corporate forms in the United States, where legislators in thirty-five states across the country (and the District of Columbia) have enacted some form of innovative social enterprise legislation. Legislators have passed forty-five bills, mirroring current social

210. *See* Jensen & Meckling, *supra* note 94, at 309 ("The problem of inducing an 'agent' to behave as if he were maximizing the 'principal's' welfare is quite general. It exists in all organizations and in all cooperative efforts—at every level of management in firms, in universities, in mutual companies, in cooperatives, in governmental authorities and bureaus, in unions, and in relationships normally classified as agency relationships such as are common in the performing arts and the market for real estate. The development of theories to explain the form which agency costs take in each of these situations (where the contractual relations differ significantly), and how and why they are born will lead to a rich theory of organizations which is now lacking in economics and the social sciences generally.").

211. Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 235 (2014).

212. *Id.*

213. *See* Alon-Beck, *supra* note 149, at 523.

movements.[214] "[T]he most common form of social enterprise legislation adopted is the benefit corporation legislation."[215] Even Delaware, a state that is considered to be pro-management, due to its court decisions and statutes,[216] adopted such a form in 2013—the Public Benefit Corporation ("PBC"). Unfortunately, many companies find it hard to adopt this form because there is inadequate guidance in Delaware and other states on how managers and directors can balance the company's profit purpose with its public benefit purpose.[217] There is also uncertainty in the event of litigation over breach of fiduciary duties.

In my article, *The Law of Social Entrepreneurship - Creating Shared Value through the Lens of Sandra Day O'Connor's iCivics*, I note that social

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214. *See* Alon-Beck, *supra* note 149, at 523 n.7 (citing ARIZ. REV. STAT. §§ 10-2401–22; ARK. CODE ANN. §§ 4-36-101–401; CAL. CORP. CODE §§ 14600–31 (2013); CAL. CORP. CODE §§ 2500–3503; COL. REV. STAT. §§ 7-101-501–11, 6-113-102; S.B. 23, 2014 SESS.; DEL. CODE ANN. TIT. 8, §§ 361–68; D.C. CODE §§ 29-1301.01–1304.01; FLA. STAT. ANN. §§ 607.601–13; FLA. STAT. ANN. §§ 607.501–13; HAW. REV. STAT. §§ 420D-1–13; IDAHO CODE ANN. §§ 30-20-01–13; 805 ILL. COMP. STAT. ANN. 40/1–5.01; 805 ILL. COMP. STAT. 180/1-5, 1-10(A)(1), 1-26, 15-5; H.B. 1015, 119th GEN. ASSEMB., 2015 SESS.; LA. REV. STAT. ANN. §§ 12:1801–32; LA. REV. STAT. ANN. §§ 12:1301(A)(11.1), 1302(C), 1305(B)(3), 1306(A)(1), 1309(A); ME. REV. STAT. TIT. 31, §§ 1502, 1508, 1559, 1611; MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01–08; MD. CODE ANN., CORPS. & ASS'NS §§ 11-4A-1201–08, 11-1-502, 5-6C-03; MASS. GEN. LAWS CH. 156E, §§ 1–16; MICH. COMP. LAWS §§ 450.4102, 4204(2), 4803(1); MINN. STAT. ANN. §§ 304A.001–301; H.B. 258, 64th LEG. SESS.; NEB. REV. STAT. §§ 21-401–14; NEV. REV. STAT. §§ 78B.010–190; N.H. REV. STAT. ANN. §§ 293-C:1–13; N.J. STAT. ANN. §§ 14A:18-1–11; N.Y. BUS. CORP. LAW §§ 1701–09; ORE. REV. STAT. §§ 60.750–70; 15 PENN. CONS. STAT. §§ 3301–05; R.I. GEN. LAWS ANN. §§ 7-5.3-1–13; R.I. GEN. LAWS §§ 7-16-2, 9, 49, 76; S.C. CODE ANN. §§ 33-38-110–600; TENN. CODE ANN. §§ 48-28-101–402; UTAH CODE §§ 16-10B-101–402; UTAH CODE ANN. §§ 48-2C-102, 403, 405, 412, 1411; VT. STAT. ANN. TIT. 11A §§ 21.01–14; VT. STAT. ANN. TIT. 11, §§ 3001(27), 3005(A), 3023(A); VA. CODE ANN. §§ 13.1-782–91; REV. CODE WASH. 23B.25.005–150; W. VA. CODE ANN. §§ 31F-1-101–501; WY. STAT. ANN. §§ 17-29-102(A)(IX), 108, 705).

215. *See id.* at 524. The benefit corporation ("BC") model is the most common form that was adopted by states (it is also called sustainable business corporation ("HI"), benefit company ("OR")). *See* SOCIAL ENTERPRISE LAW TRACKER, http://socentlawtracker.org/#/map (last visited Aug. 3, 2017) (providing a status tool that shows the various states and D.C. that enacted the benefit corporation legislation). The other forms are the social purpose corporation ("SPC"), the public benefit corporation ("PBC), the general benefit corporation ("GBC"), the specific benefit corporation ("SBC"), the low-profit limited liability company ("L3C"), and the benefit limited liability company ("BLLC"). *Id.*; *see also* Ana Vinueza & Kristin Hiensch, *Social Enterprise Legislation in the United States: An Overview*, MORRISTON FOERSTER (Sept. 20, 2016), http://impact.mofo.com/resources/social-enterprise-legislation-in-the-united-states-an-overview/.

216. *See* BAGLEY, *supra* note 186, at 638.

217. Jen Barnette, *Delaware Public Benefit Corporation – Is It Right for You? A Five-Part Test*, COOLEYGO.COM, https://www.cooleygo.com/delaware-public-benefit-corporation-is-it-right-for-you-a-five-part-test/ (last visited June 30, 2020) ("One of the main differences between a traditional Delaware corporation and the PBC relates to the director's fiduciary duties. Whereas under Delaware law, directors of traditional corporations must manage the corporation in the best interests of the stockholders, the PBC requires directors to balance the interests of stockholders, the public benefit purpose and the interests of those materially affected by the PBC's conduct. It's good news that there have been no lawsuits relating to a PBC's fiduciary duties but this lack of precedent leaves little guidance on how directors are to balance these potentially competing interests.").

entrepreneurs are dealing with legal uncertainty and capital formation difficulties.[218] They have to "persuad[e] their potential investors and other audiences that they are indeed credible and are leading a social enterprise as they claim, which result in inefficiencies in raising capital. There are additional challenges associated with structuring, launching, funding, and counseling social enterprises," which are also discussed in detail in that article.[219]

Until we develop agreed-upon metrics for assessment, there will always be difficulty associated with measuring value creation and intangible assets of public benefit corporations. There is debate on whether these firms can simply be measured by monetary performance or traditional profit creation. Instead, they "should be evaluated based on their impact on the public, the communities that they serve, the services that they offer, and the various products that they create."[220]

Moreover, some will claim that the management of PBCs "cannot capture the full social value that was created in an economic form [to] justify spending or paying" for the resources used by the firm, even when "improvements can be measured and attributed to a given intervention."[221] That is why social entrepreneurship scholars like Gregory Dees suggest that social entrepreneurs should not be concerned with wealth creation, but rather with mission-related impact, as "[w]ealth is just a means to an end for social entrepreneurs."[222] The question is whether markets have difficulty with evaluating social value creation, improvement, and overall public goods. Dees claims that markets have difficulty determining whether the resources that are used by the social entrepreneur in order to create value actually generate sufficient social value to justify their use.[223] Edmans also finds that equity markets fail to fully incorporate the value of intangible assets, but also that employee satisfaction improves overall firm performance.[224]

To illustrate, note that Edmans used the list of the "100 Best Companies to Work For in America" to measure employee satisfaction, and collected data that was available since 1984.[225] He also looked at the future stock

218. *See* Alon-Beck, *supra* note 149 at 535.

219. *Id.* at 564–65.

220. *Id.* at 566.

221. *Id.* at 567.

222. J. Gregory Dees, *The Meaning of "Social Entrepreneurship"*, DUKE UNIV. INNOVATION AND ENTREPRENEURSHIP 2–3 (last updated May 30, 2001), https://centers.fuqua.duke.edu/case/wp-content/uploads/sites/7/2015/03/Article_Dees_MeaningofSocialEntrepreneurship_2001.pdf.

223. *Id.* at 3.

224. Edmans finds that employee satisfaction is valuable to firm value while "not immediately capitalized by the market because it is intangible." Alex Edmans, *Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices*, 101 J. FIN. ECON. 621, 629 (2011).

225. *Id.* at 621.

returns of these companies in order to measure the financial performance.[226] Edmans found that a "value-weighted portfolio of the '100 Best Companies to Work For in America' earned an annual four-factor alpha of 3.5% from 1984 to 2009, and 2.1% above industry benchmarks."[227] Therefore, investors should want management to invest in employees and to make sure that the employees are satisfied for engagement, retention, and recruitment purposes. Below are some suggestions that this Article makes about disclosure of this information to investors and the public.

Perhaps, now that we have these great results, we will see a surge in traditional public companies that decide to take stakeholder interests into account and convert to PBCs. As noted above, management should be required to disclose a specific purpose if they decide to take stakeholder interests into account or convert into a PBC (especially if there is a potential conflict of interest). The following are some examples of established companies that already decided to convert to PBCs despite the many challenges associated with such a decision.

Companies that have successfully converted their status range from fashion, technology,[228] news,[229] and banks,[230] to crowdfunding platforms. For example, Patagonia, a clothing company, was among the first established companies that converted to a benefit corporation as soon as the benefit corporation legislation was available in California.[231] Kickstarter, the crowdfunding platform, is also a great example of a Delaware PBC.[232]

Perhaps more tech companies will decide to incorporate as a PBC before they do an IPO. Recently, Lemonade Inc., a technology-driven renters' and

226. *Id.* at 624.

227. *Id.* at 621.

228. CiviCore changed from an LLC to a Delaware Public Benefit Corporation in January 2017. *CiviCore Becomes a Public Benefit Corporation*, PR NEWSWIRE (Jan. 17, 2017, 7:40 AM), https://www.prnewswire.com/news-releases/civicore-becomes-a-public-benefit-corporation-300391285.html.

229. Philadelphia Media Network (news outlet) changed to a Delaware Public Benefit Corporation in January 2016. Elizabeth K. Babson & Robert T. Esposito, *The Year in Social Enterprise: 2016 Legislative and Policy Review*, FAEGRE DRINKER (Feb. 7, 2017), https://www.faegredrinker.com/en/insights/publications/2017/2/the-year-in-social-enterprise-2016-legislative-and-policy-review.

230. Virginia Community Capital (community-based bank) changed to a Virginia Benefit Corporation in April 2016. Rick Alexander, *VCC: America's First Benefit Corporation Bank*, VA. CMTY. CAP. (Apr. 3, 2016), https://www.vacommunitycapital.org/news/2016/04/03/vcc-americas-first-benefit-corporation-bank/.

231. *See* Matt McDermott, *Patagonia Becomes a California Benefit Corporation*, MSAYLA (Jan. 3, 2012), https://msayla.com/patagonia-becomes-a-california-benefit-corporation/.

232. Yancey Strickler, Perry Chen & Charles Adler, *Kickstarter is Now a Benefit Corporation*, KICKSTARTER BLOG (Sept. 21, 2015), https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation.

homeowners' insurance startup, was the second PBC to file for an IPO.[233] Lemonade Inc. is incorporated in Delaware, and according to its prospectus, is committed for the long-term to "make insurance a public good."[234] Perhaps if things go well for Lemonade Inc., other startups will follow.

Another development is with regard to new legislation that was recently passed by the Delaware House of Representatives. This new legislation, if signed into law, will make it easier for a traditional for-profit C-corporation to convert to a PBC by eliminating the current 2/3 voting requirements for a corporation to amend its certificate of incorporation or merge with another entity to become a PBC.[235]

The following are suggestions with regard to managing human capital, pertaining to public disclosures and agreed-upon metrics for assessments.

VIII. INFORMATION IS POWER

> "There is … one regulatory sphere that requires a holistic set of disclosures for public consumption: the federal securities laws."
> Ann M. Lipton[236]

There is a paradigm shift in the U.S. investment community with regard to the desire to understand the management of human capital. Transparency with regard to human capital management is incredibly important for business and society—so much so that our regulators, the SEC, are now tasked with proposing, drafting, and enforcing new disclosure rules.

On August 8, 2019, the SEC proposed amendments, pursuant to Regulation S-K, "to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosures (Item 105) that registrants are required to make . . . ."[237] Section 108 of the Jumpstart Our Business

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233. Cydney Posner, *Will There Be a Renewed Interest in IPOs of Public Benefit Corporations?*, COOLEY PUBCO (June 22, 2020), https://cooleypubco.com/2020/06/22/ipos-public-benefit-corporations/.

234. *See id.*

235. Some commentators noted that "the Delaware legislature made it particularly difficult to convert a traditional corporation to a PBC." *Id.* Note that, originally, the vote required for conversion was 90%, which made it well-nigh impossible for a traditional public company to convert to a PBC. *Id.*

236. Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE. J. REG. 499, 507 (2020).

237. 'Press Release, SEC, SEC Proposes to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 8, 2019), https://www.sec.gov/news/press-release/2019-148; Sanjay M. Shirodkar & Deborah R. Meshulam, *SEC Proposes to Modernize Certain Rules: Transitioning from a Prescriptive to a Principles-Based Approach?*, DLA PIPER (Sept. 10, 2019), https://www.dlapiper.com/en/us/insights/publications/2019/09/sec-proposes-to-modernize-certain-rules/.

Startups Act (the "JOBS Act") mandates that the SEC's staff review the disclosure requirements in Regulation S-K and issue a report.[238]

Prior to and following the announcement by the SEC, investor groups have filed comment letters asking the SEC to establish mandatory disclosure rules on how public companies manage their human capital, which would be both prescriptive and principles-based.[239] The SEC decided against a prescriptive disclosure approach and chose to require a principle-based approach, which allows "companies to decide for themselves whether their human capital is important enough to their business to warrant disclosure."[240] Unfortunately, as a result of this choice, in practice, public companies will probably not provide much insight into how they manage their talent.

In the new economy, which is a "knowledgeable economy,"[241] employees are incredibly important to the firm, as their knowledge contributes to the firm's intangible assets.[242] Tech companies especially rely on their human capital to grow and innovate. Advocacy groups including Workforce Disclosure Initiative ("WDI"), The Human Capital Management Coalition ("HCMC"), The CFA Institute, JUST Capital, and others commented that the SEC should use its mandate and require companies to disclose more information to their investors and the public on human capital management.[243] The following are requests for changes to disclosure rules.

WDI[244] is a project managed by ShareAction,[245] which is supported by a signatory group of 138 investor signatories with over $14 trillion in assets under management. WDI calls for greater transparency on workforce

238. *See* Press Release, SEC, *supra* note 237.

239. Soyoung Ho, *Investor Groups: SEC Should Write Prescriptive 'Human Capital' Disclosure Rule*, THOMSON REUTERS TAX & ACCOUNTING (Jan. 3, 2020), https://tax.thomsonreuters.com/news/investor-groups-sec-should-write-prescriptive-human-capital-disclosure-rule/.

240. Soyoung Ho, *Investor Groups: SEC Should Write Prescriptive 'Human Capital' Disclosure Rule*, THOMSON REUTERS TAX & ACCOUNTING (Jan. 3, 2020), https://tax.thomsonreuters.com/news/investor-groups-sec-should-write-prescriptive-human-capital-disclosure-rule/.

241. UNGER, *supra* note 6.

242. For example, the intangible assets can take the form of a patent, a trade secret, or a list of customers. *See also* JAMES V. DELONG, THE STOCK OPTIONS CONTROVERSY AND THE NEW ECONOMY 7 (2002), https://www.cei.org/pdf/3055.pdf ("Much of the capital value of the company may reside in the brains of the workers, not in identifiable physical capital.").

243. Ho, *supra* note 240.

244. SHAREACTION, https://shareaction.org/wdi/ ("The WDI is part funded by the Department for International Development (DFID) and our dedicated investor signatories. In addition, a range of civil society and private sector organisations are helping to shape the WDI. The initiative is also endorsed by the Pensions and Lifetime Savings Association (PLSA).") (last visited Dec. 12, 2020).

245. ShareAction is a UK-based responsible investment NGO. *See id.*

policies and practices in companies' direct operations and supply chains.[246] In a comment letter to the SEC, WDI stated:

> [W]e express concern about the principles-based approach which would allow companies significant flexibility in the information they select for disclosure. We also raise concerns over the use of a subjective materiality threshold for determining disclosure since the Commission already requires registrants to report material information. Removing the rules based [sic] approach could have the effect of reducing the amount of information that is disclosed and available to investors. Given the opportunity, many companies continue to exclude certain material human capital topics from their public disclosure such as the number of employees and turnover. It is therefore problematic to rely on a registrant's management to evaluate the significance of this information given the current poor state of disclosure on human capital topics.[247]

HCMC is a "cooperative effort among a diverse group of influential institutional investors to further elevate human capital management as a critical component in company performance . . . . The HCMC is led by the UAW Retiree Medical Benefits Trust and includes 30 institutional investors representing over $5.9 trillion in assets."[248] In a comment letter to the SEC, HCMC stated:

> [P]erformance on certain human capital metrics are material to investors across all companies. Materiality is defined by reference to what a reasonable shareholder would consider important in deciding how to invest or vote. A broad range of investors have identified certain human capital-related information as likely to influence their decision making [sic], and a substantial majority of the comments submitted on the Petition supported some degree of standardized, comparable disclosures across all companies. The HCMC believes that consistency and comparability in reporting promotes efficiency both for issuers who would have concrete guidance on what to report and how, and for investors who would no longer need to pore through reams of documents to find basic information on the workforce. It allows investors to easily and efficiently compare companies and benchmark performance. It also levels the playing field between large institutional investors who can demand (and afford) more data from companies on human

246. SHAREACTION, *supra* note 244.

247. Letter from Martin Buttle, Head of Good Work, ShareAction, to Vanessa A. Countryman, Sec'y, 'SEC (Dec. 21, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6577976-201111.pdf.

248. *Human Capital Management Coalition*, UAW RETIREE MED. BENEFITS TR., http://www.uawtrust.org/hcmc (last visited July 1, 2020).

> capital, and smaller retail investors who, on a practical basis, often cannot.[249]

The Center for American Progress further advocates for changes to our accounting rules, as follows:

> Companies' expenditures on worker training and skills show up not as a valuable investment similar to R&D but as an increase in general overhead, a measure that managers have shown a proclivity for cutting and whose reduction is often cheered by investors. This treatment of human capital ignores the findings of numerous studies: Investments in human capital enhance productivity and are more valuable to a firm than general overhead expenses.[250]

Leo Strine, former Chief Justice of the Delaware Supreme Court, has joined these calls for greater recognition of human capital investments.[251] Strine offers several great proposals, including new accounting rules that will treat corporate investments in the workforce as capital expenditures.[252] Strine also calls on public companies to set up board committees that will be focused on the welfare of the workforce.[253] Strine's suggestions are all welcome.

Former SEC Commissioner Robert Jackson and current SEC Commissioner Allison Lee also expressed their concerns about the shift to a principles-based disclosure approach, in a published joint statement. They stated:

> One concern with principles-based disclosure is that it gives company executives discretion over what they tell investors. Another is that it can produce inconsistent information that investors cannot easily compare, making investment analysis—and, thus, capital—more expensive. Our concern is that the proposal's principles-based approach will fail to give American investors the information they need about the companies they own.[254]

This Article joins the call for change. By selecting a principles-based disclosure regime, the SEC failed to take meaningful steps to improve access for investors and employees to information regarding human capital management, efforts, and results. The SEC should move to a prescriptive

249. Letter from Cambria Allen-Ratzlaff, Chair, Human Capital Management Coalition, to Vanessa A. Countryman, Sec'y, SEC 4 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6322887-194462.pdf (citation omitted).

250. Hanks et al., *supra* note 2, at 1.

251. Strine, Jr., *supra* note 1.

252. *Id.* at 7.

253. *Id.* at 2.

254. Liz Dunshee, *S-K Modernization: Two SEC Commissioners Concerned About "Principles-Based" Proposal*, THECORPORATECOUNSEL.NET (Aug. 28, 2019), https://www.thecorporatecounsel.net/blog/2019/08/s-k-modernization-two-sec-commissioners-concerned-about-principles-based-proposal.html.

approach (a specific line-item requirement) and require public companies to disclose information on various topics, including the following: (1) workforce composition (including workforce demographics[255] on hiring, promotion, compensation and incentives,[256] layoffs, furloughs, other employment policies and practices) broken down by major job categories; (2) information with regard to layoffs and furloughs (additional information on demographics of employees, such as rehires, training, healthcare and other benefits); (3) information on training, skill building, and capabilities;[257] and (4) information on healthcare coverage and best practices to ensure employee health, safety, and well-being during the pandemic.

Disclosures will help investors understand how management makes decisions on human capital and culture. Management should disclose the metrics that they use in order to make hiring, retention, training, and firing decisions. Disclosures will also help talent—the employees—bargain with the firm. Currently, the reality is that employees do not have formal representation in the governance of the firm and do not possess sufficient information on the practices of their employers to negotiate their contracts with the firm.[258] Lack of representation and lack of access to information contribute to the systemic problem of lack of diversity amongst the largest employers in our nation.

As noted above, although both labor and capital contribute to the firm, only capital gets to decide on how the firm is to be governed. Now, even capital investors demand to have information on human capital management of public firms.[259] Now, more than ever, management and directors need to step up, disclose information on their employment practices, take care of their employees, make sure that their interests are represented in governance

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255. According to the HCMC proposal, demographics information should include the following categories: "number of full-time, part-time, contingent, subcontracted and outsourced workers." Doreen Lilienfeld & Max Bradley, *Human Capital Management Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 20, 2020) (citing Letter from Hum. Cap. Mgmt. Coal. to William Hinman, Dir., SEC Division of Corporation Finance (July 6, 2017)), https://corpgov.law.harvard.edu/2020/03/20/human-capital-management-disclosure/#11).

256. According to the HCMC proposal, information on compensation and incentives should include "bonus metrics [and] measures to counterbalance risks created by incentives." *Id.*

257. According to the HCMC proposal, information on skills should include the following categories: "training, alignment with business strategy, skill gaps." *Id.*

258. *See, e.g.*, Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1687 (2019); *see generally* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017) (describing FOIA's procedural obstacles).

259. David McCann, *Investors to SEC: Mandate People Disclosures*, CFO (July 20, 2017), https://www.cfo.com/people/2017/07/investors-to-sec-mandate-people-disclosures-human-capital/; Hope Spencer & Kelly Simoneaux, *Public Company Alert: Are You Ready for the New Human Capital Management Disclosure?*, NAT'L L. REV. (Oct. 28, 2020), https://www.natlawreview.com/article/public-company-alert-are-you-ready-new-human-capital-management-disclosure.

decisions, and "integrat[e] human capital considerations into the overarching strategy to create long-term value."[260] As noted in my *Forbes* op-ed article with Constance E. Bagley: "Once the COVID pandemic is contained and firms go back to fighting to attract and keep the best workers, individuals will remember (and easily share on social media) which firms lent a hand and which only took care of the folks at the top."[261]

IX. CONCLUSION

This Article also joins the call for a return to a basic "managerialism" philosophy.[262] Managers of public corporations nowadays cannot realistically claim that they are pursuing long-term projects, such as taking employee interests into account, without disclosing information on these issues to investors and the public. Therefore, the current disclosure regime must change to a prescriptive-based disclosure regime, which will improve access to information. The move to a prescriptive approach will compel directors (or management) to seriously take into account the interests of their employees and not simply use a public statement as a PR move.

There is a need for bright-line rules, such as agreed-upon metrics for assessment, or a requirement that all public companies disclose the same type of information with regard to investment in human capital and culture. We cannot leave it up to management to determine whether disclosure on human capital is required and under which circumstances.

Human capital disclosure requirements would encourage managers and directors to take employee interests into account. This suggestion would grow the economy, encourage innovation, and benefit the firm, its shareholders, and its stakeholders. Nevertheless, it has limitations.

There is no one-model-fits-all format. It should be recognized that managers (or directors) can run into problems given geopolitical realities, as well as developments at the local, state, federal, and international levels, which can confound these relations..

Also, legal scholars will continue to rewrite, reinterpret, and think about the stakeholder versus shareholder models, and the purpose of the corporation. However, using this modest suggestion and its variants would develop into a new high-bar standard for expanding strategic and sustained economic growth of the companies involved, by encouraging innovation and development for generations to come.

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260. Klemash, Lee & Smith, *supra* note 33.

261. Anat Alon-Beck, *Stakeholder Capitalism: Should Employees Demand Change?*, FORBES (June 11, 2020), https://www.forbes.com/sites/anatalonbeck/2020/06/11/stakeholder-capitalism-should-employees-demand-change/#69b05f193b7d.

262. *See* Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1171 (2013).

In the meanwhile, the SEC can and should intervene in the market and alleviate the lack of mandatory reporting and access to information, which also contribute to the systemic problem of lack of diversity amongst the largest employers in our nation. Our securities laws can require public companies to disclose information relating to their human capital practices as suggested above. Furthermore, such reports must be made mandatory and not left to the discretion of the companies.