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***309** TOWARDS A STAKEHOLDER-SHAREHOLDER THEORY OF CORPORATE GOVERNANCE: A COMPARATIVE ANALYSIS

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Most of the groups and individuals affected by the behavior of American public corporations do not have a voice in their governance. Just as governments retreat from regulating these entities, whether by political choice or as a result of globalization and regulatory arbitrage, [FN1] stakeholders' [FN2] ability to shape corporate behavior themselves remains weak. Government empowers only one corporate stakeholder group--employees--to bargain with corporations for terms in their own interest. ***310** Unions represent a mere fourteen percent of American workers [FN3]--and a paltry eight percent of private sector employees. [FN4] Meanwhile, the law affords but one group of corporate stakeholders, e.g., shareholders, any rights in a corporation's internal governance. [FN5] Those rights, in turn, remain limited. [FN6] In fact, the force most influential on corporate decision-making is arguably the so-called market for corporate control, whereby directors will endeavor to keep stock prices inflated to avoid takeover bids and keep their jobs (and perhaps to take the best advantage of their stock options).

As a consequence of this corporate law regime, a board of directors is often beholden to short-term stock prices, usually at the expense of other stakeholder interests. Thus, the corporation exists as an amalgamation of private interests controlled almost exclusively by a board of directors, wielding the wealth and power of a multinational, yet nevertheless enjoying the rights and liberties afforded individual citizens. [FN7] Faced with the waning power of sovereign governments and deregulation, stakeholders are left with relatively few defenses against abuses of corporate power. [FN8]

In contrast, the governance of public corporations in continental European countries forces those corporations to embrace more obligations to their stakeholders. [FN9] For example, in Germany, not only must public ***311** corporations support social safety net programs, they must also incorporate worker viewpoints into their decision-making. Half of their supervisory boards must seat worker representatives, and unions are powerful and institutionalized. [FN10] Company shares are held en masse by long-term captured investors: banks, other companies, and wealthy families. [FN11] As a result, German public companies orient themselves more towards long-term strategies that are better suited to serve all their stakeholders, including their employees and the surrounding economy. In comparison to their American counterparts, they are viewed as public and political entities serving larger social interests.

Given the lessening role of the state in protecting stakeholders, many progressive advocates seek to incorporate stakeholder protections into the American corporate governance regime. [FN12] These advocates often

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look to the German example for reforms. Yet, the wholesale adoption of the German form of corporate governance in America is unrealistic. For reasons explained later in this paper, Germany's corporate governance model is a product of its unique political and economic history. It is also anathema to popular academic, political, and economic thinking in America. [FN13] Moreover, Germany itself faces pressures to harmonize its corporate governance laws with those found in Anglo-American regimes, both to accommodate its membership in the European Union and to attract foreign minority investors.

A study of stakeholder-oriented corporate governance systems, like that of Germany, may nevertheless prove useful. It suggests another kind of corporate governance model, one that integrates stakeholders in corporate decision-making while accommodating the shareholder-centric ***312** model of the United States, namely, one that empowers corporate stakeholders through their role as corporate stockholders. Stockholders, already enjoying a foothold in American corporate governance, have the best chance of any corporate stakeholder to influence corporate policy. Indeed, the increasing prevalence of “activist” union pension fund investors in Britain and, to a lesser extent, the United States, illustrates the growing realization that public corporations need not only serve the bottom lines of their short-term investors. Unable to influence corporate behavior directly, workers and other stakeholders can, and increasingly do, attempt to change corporate policy by throwing their weight around corporate boardrooms, the halls of Congress, [FN14] and during bureaucratic rulemaking. [FN15]

This paper will set forth an argument as to why the empowerment of stakeholder investors presents the only currently viable means for stakeholders to influence the behavior of the American public corporation. It will accomplish its purpose by first exploring the history of the corporation in America and the theories of the firm that describe the laws and policies that govern them. Through this analysis, it will become clear that, of the various interests that have power over corporate decision-making, shareholders can best accommodate stakeholder interests. The paper will then describe the history and policies underlying corporate governance in Germany. The purpose here is to illustrate how stakeholder interests can be represented in corporate management and decision-making. Next, this paper will analyze corporate governance in the United Kingdom, a regime that is similar to that found in the U.S., but, for reasons that will be explained, is much more favorable to shareholders and therefore to activist stakeholder-shareholders. This analysis will reveal that the empowerment of stakeholder-shareholders can reform corporate governance in the United States. The paper will conclude with an inventory of the current status of stakeholder-shareholder involvement in the governance of public corporations while suggesting some reforms.

I. CORPORATE GOVERNANCE IN AMERICA

In popular theory and practice, corporate governance in America is almost always stated in terms of maximizing shareholder wealth. [FN16] While ***313** scholars often disagree as to the best method of such wealth maximization, the goal itself is rarely disputed. Yet, the corporation was not always understood in these terms. [FN17] As such, it is possible to yet again re-define the American corporation to accommodate stakeholder interests. To justify and discover a worthwhile departure from the accepted thinking, a study of history and theory is useful.

A. The History of the American Corporation

The role played and the interests served by the public corporation in America transformed several times over the past few centuries. While the corporation began first as institution created specifically to serve designated

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social functions, it eventually evolved into a private association governed by a powerful board of directors enjoying a significant amount of discretion and often burdened with the single-minded goal of maximizing the wealth of its diversified shareholders. The modern corporation in America, with its laissez-faire treatment of worker rights, reflects an inherent faith in social mobility over plutocracy. [FN18] Over the past few decades, however, market and political pressures are again revolutionizing the public corporation. Recent changes in corporate law and behavior reflect a growing acceptance of corporate responsibility for public welfare. [FN19] This metamorphosis shows that stakeholder-friendly reforms can indeed occur in America's political and social climate. It also shows that such reforms will come most easily through the manipulation of the shareholder-centric purpose of the public corporation.

1. Before General Incorporation

Before the passage of general incorporation laws, corporations in America existed as specially chartered non-profit organizations, whose special status depended upon their promise to provide some sort of public function. [FN20] The King of England, and later State governments, would grant ***314** special charters to schools, churches, [FN21] and municipalities, [FN22] allowing such organizations to act as legal persons, i.e., to own property and to enter into binding contracts. As artificial entities granted life by virtue of the state, they were subject to regulation by the state. [FN23] Their special, nearly government-like, status in society meant that such organizations served a public purpose, and thus owed particular duties to the community. Their "shareholders" were not owners of business assets, but instead members of an already identifiable and socially meaningful group. [FN24]

The state would also grant charters for corporations serving an economic purpose. Yet it granted corporate status only after negotiation, and only after argument regarding the important public service that the corporation would provide. [FN25] Usually, the government would task the corporation to fulfill a specific need of the state's economy, e.g., to build bridges or roads. [FN26] The charters of these corporations were, therefore, specifically tailored to the corporation's specific business function. Here, too, the state would cede pieces of its sovereignty, endowing corporate managers with powers usually reserved for government. [FN27]

2. General Incorporation and the Separation of Ownership and Control

Later, as a result of politics and industrialization, the States enacted general incorporation laws that permitted persons to incorporate without any special permission or charter. [FN28] The promulgation of general incorporation statutes, permitting the formation of corporations without government consent, arguably arose as a result of American democratic and individualistic values. Simply, special corporation charters smacked of ***315** favoritism and aristocracy. [FN29] Indeed, this separation of the corporation from the state comported with the common law tendency to shift allegiance from a monarchy or sovereign and to place power in the hands of the individual. [FN30]

The dawn of the public corporation in America broke during its industrial age. [FN31] Political unrest bristled at the size, power, and behavior of industries, often dominated by a few power players. The anti-business sentiment culminated in the passage of the Clayton Antitrust Act of 1914, which, among other things, forbade the kind of interlocking directorships that enabled America's capitalistic elite to amass such wealth and power. [FN32] As American industry came to rely less on this "capitalist class," corporate finance increasingly came from a dispersed array of equity investors, [FN33] who would place their wealth into the hands of specialized corporate managers. [FN34] At the same time, directors exploited the relatively weak voice of stockholders

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by retaining earnings rather than distributing dividends, thereby avoiding reliance on banks for their financing. [FN35] The ensuing growth in the size and prevalence of the business corporation in America, as well as the accompanying dispersal of stock ownership, transformed the American economy.

These changes prompted Adolf Berle and Gardiner Means, in their famous treatise, The Modern Corporation and Private Property, [FN36] to identify the negative implications of the concentration of so much public power and wealth into the hands of a corporation's board of directors. [FN37] ***316** Surrendering control and responsibility over their investments, the dispersion of shareholders created a new form of property, one over which shareholders could claim ownership, but no control. [FN38] With this new form of property, shareholders lost their ability, and interest in, attempting to control firm policies, viewing their stocks as investments rather than as an ownership stake in the firm. [FN39] Berle and Means used this change to justify the promulgation of a different kind of property law that accounted for unique characteristics of dispersed stock ownership. [FN40] Their solution was to name a corporation's board of directors as the trustee of this new form of property, to be governed for the benefit of both shareholders and the greater community. [FN41]

Berle and Means also recognized that the growth of the large public company in America predated, for the most part, the consolidation of the federal government's power. [FN42] "[T]he United States was a country in which big business emerged before big government." [FN43] Business, and not government, controlled political and economic policy, at least up until the New Deal era. [FN44] And business did not take stakeholders' interests to heart.

Thus, Berle and Means, contrary to the conclusions drawn by much modern scholarship, [FN45] did not seek only to protect shareholders. Recognizing that the power wielded by the public corporation affected all of society, the authors challenged political and economic scholars to begin examining the corporation's role in society seriously, [FN46] and suggested that the "corporation may have an obligation to serve those beyond its stockholders." [FN47] While they observed that power of the corporation began to resemble that of a sovereign state, [FN48] the authors relied upon shareholders ***317** to ensure boards of directors did not self-deal or shirk in their duties. "In other words, only the owners (the shareholders) could channel corporate power toward socially beneficial goals." [FN49] Thus, in a society rapidly turning into a consumer society, Berle & Means sought to make shareholders the foundation of the modern economic order. [FN50]

3. The Plight of Stakeholders: The New Deal, Union Politics, and Welfare Capitalism

A modern economic order did, in a sense, finally emerge. Because of the politics and legislation of the New Deal, the changes wreaked on society by the growth of the modern public corporation did not devolve into the kind of class warfare witnessed elsewhere in the industrialized world. [FN51] Rather, society relied upon unions to be the coequal and opposing democratic force to the power of corporations as it affected worker interests. Eventually, the government bowed out of the picture, allowing labor and industry resolve their differences through collective bargaining. [FN52]

Following industrialization and the Great Depression, New Deal policies, reflecting an acceptance of a certain degree of government interference in the economy through fiscal policy, social safety nets, collective bargaining, and securities regulation, tempered corporations' influence in society. [FN53] Given the perceived spectacular failure of laissez-faire capitalism and the tragic impact of the Great Depression on the American economy, such interference was seen as justified despite America's embrace of a capitalistic economy.

***318** The labor movement in the United States, approaching the climax of its political power, pursued a le-

gislative strategy that would federalize worker protections. [FN54] Basing the legitimacy of their movement on New Deal legislation, [FN55] trade unionists lobbied for reforms that would mandate the provision of social safety programs to all citizens. [FN56] At the same time, it worked through its new powers of collective bargaining, granted by the Wagner Act of 1935, to pressure employers into providing pension and health benefits, hoping that the result would lay the bricks for national legislation. [FN57] Fearing further social welfare reforms, industry began to select and provide employee benefits on its own initiative. In this way, industry could keep the provision of benefits under its control while taking the steam out of the unions' campaign for national health and retirement protections. [FN58]

During World War II, the government interfered to facilitate this emergent regime of welfare capitalism by mediating disputes and sanctifying the contracts they formed, [FN59] without labor input, with a burgeoning health insurance and private pension industry. [FN60] War-time tax breaks and the National War Labor Board ("NWLB") encouraged corporations to adopt benefits programs before employees had a chance to negotiate over their terms. [FN61] After the war, the turmoil of New Deal politics, and during America's ascendency to economic power, the national government retired from its role as mediator and left industry and labor to hammer out their differences alone. [FN62] Much of the country's social welfare programs thus fell into the hands of corporate America. [FN63] With those hands on the wheel, business was "able to alter the role of the state in industrial relations politics, and in fact to use it to sustain an increasingly insular, ***319** private, firm-centered definition of security." [FN64] In a sense, by the 1950s, these developments realized Berle and Means' goal that the modern public corporation take responsibility for its stakeholders. [FN65]

At least one scholar explains this phenomenon through the lens of legal and political pluralism. During the early twentieth century, politicians, jurists, and academics--perhaps as a compromise between conservative liberal individualism and radical class-based Marxism--came to define and discuss society in terms of group identities. [FN66] These political and legal pluralists were particularly interested in legitimizing labor unions by couching them not in terms of class conflict, but rather as a "forum in which individuals found meanings for their ideas and actions." [FN67] And lawmakers, perhaps unwilling to upset the balance of power, relied upon unions to protect the interests of labor. [FN68] This view glossed over any class conflict, transferring the debate to two competing, but equally legitimate, interest groups. [FN69] It also left to shareholders the responsibility of curbing any abuses of power exercised by corporate management. [FN70] This vision of society, and interest group politics, [FN71] thus facilitated a vision of corporate governance that focused solely on management and investors--relegating labor and work to other (waning) specializations of policy and scholarship. [FN72]

A populist suspicion of concentrated financial power did, however, manifest. But rather than focus on the growing wealth at the disposal of corporate managers, it fell squarely on banks and financial institutions. [FN73] Statutory restrictions on the size and operations of the country's banks prevented them from becoming the dominant financial actors that they are in other industrialized states. [FN74] Therefore, for example, Americans' savings ***320** dropped directly into securities markets and not first through a financial intermediary. [FN75] At the same time, the dispersed character of corporations' ownership structure appealed to populist notions. [FN76]

The high regard for individualism and independence likewise contributed to the formation of a corporate governance regime that excluded stakeholders. The common-law view of ownership accepted property rights as natural, unalienable, and not conditioned on the performance of any social function. Therefore, shareholder ownership rights were sacrosanct, even at the expense of stakeholder interests. [FN77] It certainly emphasized freedom of contract and the protection of private property more than those countries with civil law roots, as such countries tend to accept a more activist role for the state. [FN78] At the same time, dispersed stock ownership

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appealed to the American democratic ideal. [FN79] Thus, this deep-seated American commitment to freedom of contract and individual property rights [FN80] and individual property rights likely helped to sculpt the role of the corporation in the new welfare capitalism.

Finally, the Taft-Hartley legislation, passed by Congress as an amendment to the Wagner Act in 1947, allowed industry to split control of workers' pension funds with employees, taking them out of the hands of unions. [FN81] Their voices muted, corporate stakeholders could not easily flex their muscles in internal corporate governance by virtue as their role as shareholders. [FN82]

***321** 4. Liberalization of Regulation and Globalization

During the 1980s and 1990s, America witnessed a partial reversion to laissez-faire capitalism. As inflation surged, oil prices swelled, and the economy fell into a deep recession in the 1970s, corporate America faced increasing competition from abroad. [FN83] Indeed, the ensuing trade imbalances motivated President Nixon to abandon the Bretton Woods agreement and unpeg international exchange rates from the U.S. dollar. [FN84] With a government pliable after economic and political crisis, industry convinced government to implement "supply-side" economics. The government consequently attempted to jump-start the stagnating economy not by raising consumer demand through fiscal policy, [FN85] but instead by increasing industry supply by decreasing the costs of doing business. [FN86] Corporate tax rates plummeted while free trade treaties multiplied and government began deregulating. [FN87] With the government out of the picture, and with global economic pressures depressing wages and benefits, [FN88] corporations gained concessions from unions during collective bargaining. [FN89] The federal government retreated from strict enforcement of environmental and labor laws, [FN90] union power waned, [FN91] and employment relationships became short-term and contingent. [FN92] With the world open to ***322** new and cheaper labor markets in countries without expensive exogenous regulations, American corporations would move shop, leaving American stakeholders behind with their hands empty. [FN93]

Through this deregulation and the relative absence of the state in providing social security mechanisms and in mediating labor-industry disputes, the public corporation came to resemble less a public entity with special duties and responsibilities to society, and more like a private institution enjoying the benefits traditionally enjoyed by private individual citizens [FN94]--without many of their responsibilities. [FN95] As the conservative American political discourse concentrated on the privatization of social security, healthcare, and worker pensions--and the pruning of government power in general--the corporation as an expression of private economic power became a paradigm of the new political and economic order. Thus, perhaps ironically, the suspicion of conglomerations of power in the hands of the few, most often cast upon governments, enhanced the same kind of conglomeration of power into the hands of a few corporate boards.

5. International Capital Markets and Shareholder Primacy

While the twentieth century saw the nationalization of the public corporation, the twenty-first century bears witness to its internationalization. The elimination of barriers to capital markets, along with privatization of national enterprises and pensions, yielded a new breed of investors with never-before-seen influence on capital markets and, therefore, corporate decision-making. [FN96] Many of these investors clamored for profits, i.e., short-term increases in share price. [FN97] Flooding the world's burgeoning securities markets, these investors are often institutional and managed by intermediaries who do not necessarily share the same values as the companies in which they invest. Indeed, they often do not share the same values as the beneficiaries on whose behalf

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they invest--many of whom are themselves, ironically, corporate stakeholders. [FN98] An increasingly ***323** active hostile takeover market, prompted by stagnating securities markets in the 1970s, likewise turned directors' attention from long-term growth to their short-term job security, and, therefore, short-term stock prices. [FN99] Corporate managers, also aware that unhappy investors could move their money abroad and into to the budding global capital markets, would work hard to keep their stockholders happy. [FN100]

These powerful and wealthy institutional investors, having enough equity interest to make exit difficult, [FN101] began a campaign of "shareholder activism" that pressured corporate management and governments [FN102] to adopt policies favoring "shareholder value," i.e., a principle that anoints the maximization of shareholder wealth as the primary purpose of corporate life. [FN103] They bring their financial leverage and voting power to bear against underperforming corporate boards by waging proxy campaigns against underperforming management and by selling their shares, thus placing downward pressure on stock price and exposing the company to hostile takeover. [FN104]

Having to appease shareholders that clamor for higher returns on their investments, boards have less discretion [FN105] to make decisions that protect stakeholders by pursing long-term growth strategies. [FN106] Adding to the ***324** pressure, executive compensation schemes tied to profits and stock options serve to align managements' interests with those of investors. [FN107] Quarterly financial reporting requirements, in addition, focused management not on long-term sustainable growth, but short-swing profits. [FN108] Simply, although management, labor and other stakeholders may enjoy a common interest in the long-term sustainability of corporations, their shareholders may not. [FN109] As a result, corporate boards began to make increasingly short-term decisions that proved ruinous not only for the long-term survival of companies themselves, but also for their employees, creditors, suppliers and other stakeholders. [FN110] Gone is the insulated, isolated pocket of power once afforded boards of directors that enabled them, in the post-War era, to ***325** bargain with unions and to provide security benefits at their own discretion. [FN111]

6. Socially Responsible Investment and Corporate Social Responsibility

With liberalization and globalization came a reactionary movement, still in its relative infancy. Proponents of corporate social responsibility ("CSR"), wishing to encourage corporations to respect human rights and the environment, began creating guidelines for corporate management that protected communities and corporate stakeholders. [FN112] At the same time, certain institutional investors began seeking out investment opportunities in corporations that embraced such policies. Accordingly, a socially responsible investment ("SRI") movement began.

Most popular in the U.K. and Europe, [FN113] CSR is supported by many sovereign governments who often either encourage or mandate CSR reporting. [FN114] In the U.S., traditionally only academia embraced CSR. [FN115] ***326** However, more and more U.S. companies now recognize that adopting CSR policies helps maintain and enhance their brand names, attract customers, and avoid bad press and costly regulation. [FN116] Also a growing trend, the U.S. government takes measures to advocate CSR. [FN117] Various ***327** private-sector and nongovernmental organizations also promote the CSR movement, publishing guidelines for CSR reporting standards that include, for example, recommendations that companies disclose how they incorporate the interests of corporate stakeholders into their decision-making. [FN118] Intergovernmental organizations likewise promote CSR initiatives. The Organization for Economic Cooperation and Development ("OECD"), [FN119] for example, published guidelines for multinational enterprises aimed at protecting human rights. [FN120] Such instruments provide both political pressures on corporations to adopt CSR initiatives as well as guidance on how

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to implement such reforms.

SRI is also growing more popular, "with the mainstream investment community now recognizing that effective management social and environmental risks are a core business value with a compelling business rationale." [FN121] Many U.S. institutional investors, recognizing that "doing good also increases shareholder value," [FN122] pressure the boards of the ***328** companies in which they invest to adopt CSR. [FN123] They also actively seek out CSR companies in which to invest. [FN124]

These trends show that the public conception of the corporation increasingly accommodates the idea that corporations are entities with duties and responsibilities to the communities their behavior impacts. As such, they are, and should be, more than an accident of the free market. [FN125] Rather, they are increasingly seen as centers of power that must answer to a variety of constituent interests.

7. Conclusions

Over the course of American history, the corporation transformed from a creature of the sovereign government serving public purposes into privately ordered individual business interests. Corporations became entities of immense economic and political power that afford boards of directors and corporate executives largely unfettered discretion to govern as they see fit, subject only to market pressures and the agitations of activist shareholders. Much of the social welfare system was left in into corporate hands, which, as a result of globalization, market pressures, and politics, ***329** squeezed tight. Over the past few decades, however, the political climate began to change, as corporations began to take more account of the impact of their actions on their stakeholders. It is, therefore, realistic to expect that the American public corporation can once again be bent by society to serve some social purposes. And, given this historical interface between corporate constituencies, it makes sense that corporate governance theory should take account of stakeholders. As will be explained in the following section, it certainly does.

B. Theories of the Firm in America

An examination of the legal, political and economic theories that justify and explain the various permutations of the corporate identity augment the understanding gained through the historical narrative of the American corporation. It can provide insight into how or why such a regime came about, and how it can or should be changed.

A review of current literature on the theories of corporate governance popular in the United States reveals that "so much ideology is committed and ink spent on comparatively so little; at stake is simply the definition of the boundaries of the corporation's commitment to shareholder interests. The debate does not challenge the core of that commitment." [FN126] The selection of shareholder value as the driving goal of corporate governance arose because stock price "was seen to be a powerful force for concentrating the minds of managers on making their business more efficient and more profitable." [FN127]

Nevertheless, like the changing history of the role of the American corporation in society, the theories justifying and explaining the corporation governance regime are likewise beginning to take account of stakeholder interests. [FN128] Indeed, the most popular corporate governance theories can be divided into two categories: (1) those that are shareholder-centric, involving propositions regarding how to best serve shareholder interests; and (2) those that are stakeholder-centric, involving propositions ***330** on how to best serve the community of

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interests impacted by corporate behavior. [FN129] As some scholars continue with the shareholder-stakeholder debate, often talking past each other, others are finding ways to meld the two paradigms. Notably, a review of their work reveals that a theory of corporate governance that incorporates stakeholder interests by virtue of their role as shareholders is not all that far-fetched or controversial. It is a theory that takes advantage of a pro-shareholder paradigm already gripping American academia and policy-makers.

A summary of these theories is set forth below.

1. The Public Corporation as Quasi-Sovereign

Before general incorporation, corporations existed by the grace of the sovereign. [FN130] Some scholars extrapolate this concept to create a stakeholder-centric theory that justifies and explains the existence of the corporation in American society. They see the corporation as an extraordinary kind of person, a singular entity that transcends the myriad contracts and relationships that form its internal structure. [FN131] They define corporations as social entities that assume the responsibilities traditionally afforded to governments, and can exercise their powers justly or unjustly just as a government might. [FN132] Historically, corporations were non-profit organizations that could be viewed as "spores" of the U.S. government, taking on roles it was unwilling or unable to assume. Corporations represented churches, educational institutions, and municipal governments. They looked and acted like governments. [FN133]

As corporations transformed into economic institutions, their state-like power over their constituents of society did not wane, but instead increased. ***331** Their hierarchical structures and ability to promulgate and enforce rules upon their members remained, and they began to control public welfare benefits. [FN134] At the same time, corporations began to assert state-like sovereignty over outsiders, through, e.g., shrink-wrap adhesive consumer contracts. [FN135] Thus, like a government, a corporation is both "an association of individual right holders, on the one hand, [and] an entity with state-like powers, on the other." [FN136]

As corporations become increasingly globalized, and therefore not always subject to government regulation, this viewpoint of corporations-as-quasi-sovereigns becomes even more salient. Multinational enterprises, existing outside the jurisdiction of nation-states, are "vested with responsibilities traditionally assigned solely to states" and that they "ought to be recognized as state actors of sorts and on that basis become subject to rules and norms flowing from the same source as rules regulating the conduct of states." [FN137]

The implications of this theory are clear. As a sovereign actor, a corporation ought to have the same duties and responsibilities towards its constituents as a state government. According to Western political theory, [FN138] those duties and responsibilities are rooted in democratic values. "Yet the modern corporation is not controlled by the persons most affected by it." [FN139] This theory, therefore, demands the incorporation industrial democratic principles into modern corporate law. [FN140]

***332** 2. The Corporation as a Trust for Stakeholders

This view recognizes that the modern public corporation facilitates the massive accumulations of wealth to be distributed at the discretion of a handful of managers. It likewise recognizes that the ensuing separation of ownership from control engenders not merely to agency costs for shareholders, but also "enabled large collective institutions to amass coercive power." [FN141] Observing the dismantling of the "property atom," commonly understood as the "separation of ownership and control," Berle and Means, in their famous treatise, therefore made a "political argument about the allocation of power in society, particularly the allocation of power between

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the state and a wide range of collective institutions." [FN142] In essence, because a public corporation modified the treatment of property, the application of traditional liberal property rights was unwarranted. Given the massive political and economic power wielded by the corporation, and because of the inapplicability of traditional property rights, proponents of this view justified governmental interference into corporate governance. According to this view, corporate power should, therefore, be exercised in trust for the community. [FN143] It thus suggests that reforms incorporating stakeholder interests into corporate decisions are appropriate and desirable. A major drawback to this theory exists, however: it is not immediately clear how a firm is to determine what behavior will benefit stakeholders. [FN144]

***333** 3. The Corporation as a Separation of Ownership from Control

This "traditional," or classic understanding of the corporation, [FN145] begins to move away from the two stakeholder-centric theories addressed supra by concerning itself with the plight of disenfranchised stockholders. It describes the corporation as a phenomenon whereby those who own the business' assets are not the same as those who exercise control over them. Stated differently, the modern American public corporation "[splits] the classical entrepreneurial function between salaried executives, who sat atop hierarchical organizations, and anonymous equity participants, who [hold] small stakes and prized market liquidity over participation." [FN146] It regards the corporation as a mechanism of specialization, i.e., allowing those who have capital to place it in the hands of expert entrepreneurs. [FN147] While shareholders contribute equity, and bear the risk of loss of their investment, manager agents direct that capital towards (hopefully) profitable ventures.

Scholars thus often address this theory in terms of "agency costs" arising from the separation of corporate management of company assets from their residual owners, the shareholders. [FN148] The theory posits that generally, an owner's "desire for personal gain, for profits, can be relied upon as an effective incentive to his efficient use of any industrial property he may possess." [FN149] When the owner can no longer control these assets, the theory suggests that this efficient use grows more difficult to achieve. In fact, managers may exploit their power by expropriating shareholder assets and corporate opportunities. [FN150] Accordingly, corporate governance laws ***334** aim to prevent such costs by assigning fiduciary duties to managers and directors, the shareholders' agents, that aim to prevent shirking and disloyalty.

At the same time, shareholders must avoid micromanaging their managers, lest they lose the benefits of the specialization, i.e., the efficiency gains to be realized from the separation of ownership from control. [FN151] Yet, without monitoring, shareholders risk permitting manager opportunism. Corporate governance theories espousing this principal-agent theory thus seek to discover the proper balance between shareholder influence over management and respect for managers' business judgment that maximizes firm value. Regardless, the principal-agent account, both logically and rhetorically, lends itself to the establishment of a "shareholder primacy" norm. [FN152] Managers, as mere agents, must work to maximize the wealth [FN153] of their principals, the shareholder-owners. [FN154]

The principal/agent theory leaves the interests of the corporate constituents to the domain of private contract and market mechanisms. [FN155] ***335** Asserting that workers and creditors remain less vulnerable to management opportunism than shareholders, proponents of the principal-agent model observe that many market mechanisms have arisen to protect their interests, e.g., insurance, collective bargaining, and reputation-based market mechanisms. [FN156] Advocates of the theory even note that the law subsidizes these market remedies by institutionalizing collective bargaining, thereby spreading the fixed costs of negotiation among many parties. [FN157] Accordingly, these mechanisms, boosted by law, "make up an institutional framework that obviates the

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necessity of altering corporate law" to account for stakeholder interests. [FN158] Indeed, agency-theory perspectives "tend to presume a zero-sum game between shareholders and other stakeholders, whereby any regard by management to constituencies other than shareholders is seen as an equivalent to self-dealing." [FN159]

Nevertheless, "[t]o be sure, not all publicly held firms are unionized." [FN160] And, to be sure, not everyone is satisfied with the status quo. [FN161] Inequalities in bargaining power, path dependencies, and collective action problems arguably prevent efficient (and socially acceptable) contractual protections for stakeholders. [FN162]

Given its shareholder-centric characteristics, this theory of corporate governance appears to counsel against pro-stakeholder reforms. It does, however, suggest that shareholders can, and ought, to monitor management. If these shareholders represent stakeholders, the theory does indeed support the involvement of stakeholders in corporate decision-making.

4. The Corporation as a Nexus of Contracts

The nexus of contracts model captivated corporate governance scholarship through the 1980s and 1990s. [FN163] Beginning in the 1970s, political and historical circumstances lead to the rejection of public regulation of private enterprise, generating a fertile environment for the ***336** growth of the law and economics movement in corporate governance theory. [FN164] Corporations were no longer considered public entities with special rights and duties concomitant to their peculiar role in society. Instead, drawing on microeconomics, many in American academia came to see the corporation as a simple nexus of contracts, existing within the domain of private citizens. [FN165] Any negative externality created by this phenomenon would be adequately controlled through private contracting. [FN166] Stakeholder interests, under this theory, are "protected through explicit contractual covenants rather than through the [endogenous] corporate governance mechanism." [FN167]

Academia came to re-interpret Berle and Means' famous treatise regarding the agency costs arising from the separation of ownership and control. [FN168] They reclassified the shareholder not as an owner separated from control, but as a contractual party that bargained for the residual [FN169] profit of the company. Their lack of control was, in fact, not a cost but an efficient, bargained-for aspect of the corporate nexus whereby the shareholders received rights associated with a corporation's residual profits. [FN170] The theory then posits that shareholders, by virtue of this residual interest, are best suited to monitor management shirking and disloyalty. [FN171] Because shareholders only receive a profit after all other stakeholders are paid according to the terms of the contracts, they have the ***337** most incentive to ensure that management maximizes firm wealth. [FN172] And, taking the theory to the end, social welfare is assumed to be maximized when firm wealth is maximized. [FN173]

This theory usually incorporates share price as a proxy for firm wealth. [FN174] Accordingly, proponents of the nexus of contracts theory posit that the goal of corporate governance is to maximize shareholder wealth by maximizing stock prices. [FN175] It thus shifted the conversation about corporations from questions of power, influence, and legitimacy to questions of efficiency and profit maximization. [FN176]

Many scholars, therefore, treat the nexus-of-contracts theory as shareholder centric. However, some critics also recognize that, as a conceptual matter, nothing about the nexus-of-contracts theory requires that "residual claimant" status be assigned solely to shareholders. [FN177] For example, it can be argued that at-will workers bear residual risks and profits because they will either retain or lose their jobs, or enjoy better or worse working conditions, as a result of overall firm performance. [FN178] Labor ***338** laws, like minority shareholder protec-

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tions, arise, therefore, to address workers' residual relationship. [FN179] In addition, the presumption that share price is a good proxy for firm wealth not necessarily a good one: firm value, by its nature, exceeds shareholder value because of the value provided to stakeholders in the form of, e.g., wages, interest payments, and wealth generated by a corporation's suppliers and customers. [FN180] Accordingly, the contract theory anticipates that residual claimant status--and therefore rights to participate in corporate governance--can shift to corporate constituents other than shareholders. [FN181]

Other critics insist that shareholders, through the market mechanisms, choose to cede governance power to managers for efficiency reasons. [FN182] According to this variation, "[a]ctive investor involvement in corporate decision making seems likely to disrupt the very mechanisms that makes the public corporation practicable; namely, the centralization of essentially non-reviewable decision making authority in the board of directors." [FN183] Some even insist that the board of directors is the nexus of contracts, "wielding sui generis powers as a sort of Platonic guardian." [FN184] They argue that rather than direct monitoring and oversight, the market, i.e., the ability for shareholders to sell their shares, adequately disciplines management. [FN185] Because this "market paradigm" suited the political agendas of proponents of economic deregulation in general, [FN186] the nexus-of-contracts theory gained popularity in academia. [FN187] Taking corporate decision-making from the hands of shareholders and placing it in the hands of the board, these critics support a theory that, even if it does not explicitly address stakeholder interests, at least does not advocate a corporate governance regime based solely on shareholder influence on management.

***339** 5. Shareholder Primacy

Over the past few decades, and despite the pro-director variations in the nexus-of-contract theory, the shareholder value movement came to dominate the attention of many scholars of corporate law. [FN188] It posits that share value, whether because of normative or efficiency reasons, is the goal of corporate governance regimes. [FN189] "Shareholder primacy" theories sometimes propose, for example, that because shareholders "own" the corporation, the corporation ought to be governed according to their interests. [FN190] It is then assumed that their interests focus on raising the price of their shares. Shareholder primacy theories also suggest that share price functions as a proxy for overall firm wealth. [FN191] By forcing management to concentrate on raising stock price, corporate governance would encourage firms to become more productive, thereby maximizing social good. [FN192]

Proponents of shareholder primacy seek to empower shareholders, believing that they can best look after their own interests, policing management self-dealing and shirking. They support reforms that, for example, ease proxy access, require majority voting standards for director elections, and eliminate management entrenchment devices like staggered boards and poison pills.

Advocates of shareholder primacy also value the so-called "market for corporate control" as an effective disciplinary tool on corporate management. Theoretically, the tender offer market curbs corporate management's bad behavior by threatening tender offer takeovers for companies with poor management. This market allows better management to acquire corporate assets, use them more efficiently, and thereby increase shareholder value. [FN193]

Critics argue that shareholder primacy encourages short-term thinking that respects only the interests of equity "investors" who, instead of supporting the long-term success of the firm, advocate swings in stock prices that may undermine sustainable growth and employment. [FN194] ***340** Moreover, when stock markets experi-

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ence a bubble, and when equities are over-valued, the market for corporate control will become an ineffective monitor. [FN195]

Nevertheless, the theory does not necessarily exclude stakeholder interests from corporate governance. Nothing in the theory suggests that all shareholders must be bent towards the goal of increasing short-stock price. [FN196] It therefore supports a stakeholder-shareholder theory. Moreover, employee pension funds--and, necessarily, employee stakeholders--would of course benefit from any such increase. [FN197]

6. Specific Investment and Team Theory: Approaching a Stakeholder Model Based on Shareholder Value

Relatively recently, American scholars [FN198] began to reincorporate stakeholder interests into the theory of corporate governance by recognizing the concomitant resources and investments donated to the corporate enterprise by a variety of actors. Based on the economic theory of capital lock-in, [FN199] this model of corporate governance recognizes that team members must make investments specific to the enterprise, putting them at risk if the enterprise failed or if one team member attempted to hold up the others. Thus, corporate production often requires a variety of "stakeholder" groups to make specific investments that cannot be protected by formal contracts and that put them at risk if the business fails or if they are forced to sever their relationship with the firm. [FN200]

The theory therefore suggests that:

> co-investors in projects that need large commitments of specific capital often understand intuitively that, in order to protect the value of the joint project, they need to place control over it into the hands of someone who has neither motive nor easy opportunity to profit from withdrawing assets from the firm. [FN201]

To ensure that capital is locked-in and protected from competing corporate constituencies, corporate decision-making becomes the ***341** responsibility of a neutral mediating hierarch, in the form of a board of directors. The board is tasked with a fiduciary duty to never usurp corporate assets for its own benefit [FN202] and instructed to balance the interests of the various stakeholder contributors. [FN203] So that it might perform this mediating function, the team-theory holds that the board must retain discretion to manage the business according to its own judgment. The existence of this neutral arbiter assigned with the protection of stakeholder interests attracts more firm-specific investment from a variety of groups. For example, unsecured creditors may prove more willing to lend, and employees may prove more willing to put in some extra overtime. [FN204] It therefore encourages a maximum and socially desirable investment from all actors. [FN205]

Debunking the notion of a shareholders' "residual" claim to corporate wealth as a justification for shareholder monitoring of corporate behavior, the team production model of corporate governance observes that shareholders have no right or reasonable expectation to dividends. A board of directors can, for example, elect to distribute corporate profits to employees as bonuses or to re-invest earnings into the business. [FN206] Moreover, the theory recognizes that corporate employees, like shareholders, experience loss upon firm failure in a manner not set forth in their contracts: they are laid off. [FN207] In addition, unlike shareholders and debt-holders, they cannot diversify their human capital in order to mitigate the risk of loss through corporate failures. [FN208] As residual claimants themselves, employees are at least as good monitors of firm performance as shareholders. Other corporate constituencies likewise have "residual" claims upon firm failure: creditors may see their debts become bad, and the community may lose out on tax revenue. [FN209] Therefore, no reason exists that justifies the allocation of monitoring duties on a single corporate constituency, i.e., shareholders. [FN210]

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The team theory of the corporation suffers from a critical flaw: Quis custodiet ipsos custodes? Without any single residual claimant overseeing mediating hierarchs--who do not have an interest in the company apart from their job security--the team theory risks the same kind of opportunism and shirking endemic to other corporate government ***342** models. [FN211] Except, in this model, not even shareholders exist to monitor them. [FN212] And, should monitors be given a residual claim to incentivize them to maximize team wealth, the theory collapses into the traditional principal/agent model. [FN213] Stated differently, if managers are not the agents of one particular group of stakeholders, they are not accountable to anyone at all. [FN214]

While this theory appears to embrace stakeholder interests, its proponents are nonetheless careful to distance themselves from stakeholder theories by couching their argument in terms of economic efficiency. [FN215] It is therefore not properly a "stakeholder" model of corporate law. Moreover, modern corporate law reflects in many respects the team theory. [FN216] Directors, protected by the business judgment rule, enjoy wide discretion to govern the corporation--and distribute its residual--as they see fit. Only in specific circumstances are they under any obligation to maximize shareholder wealth. [FN217] Recent publications from the Securities and Exchange Commission, which regulates public companies, likewise ***343** encourage diversity on boardrooms to encourage the mediation of stakeholder interests. [FN218] Despite the alignment of the team theory with real life, however, modern American corporations do not appear to do a very good job at protecting stakeholders. [FN219] Directors are, after all, free to ignore or undermine those interests. [FN220] Therefore, although the team theory suggests a more stakeholder-oriented corporate governance regime, a different approach is needed.

7. Conclusion

The theories that justify and explain the public corporation in America reveal that, although much contemporary thought focuses on the economic plight of the stockholder, a growing body of scholars also view the corporation as a social institution that exists to serve the welfare of other stakeholders. Indeed, at least one of these theories, the team theory of corporate governance, suggests that the interests of stakeholders and stockholders can be accounted for in a consistent and cohesive manner without having to pick sides. Such theories can be used to justify the incorporation of stakeholder voices into corporate decision-making. When viewed together, the theories of corporate governance also tend to support this incorporation by taking advantage of stakeholders' role as corporate stockholders.

C. Modern Corporate Law in America

Although some scholars of American corporate law ignore the plight of stakeholders, the laws that influence corporate decision-making are less absolutist. The rules that specifically address the duties of boards of directors give them much freedom to steer the corporation bastion as they see fit. Thus, they are often free to choose to protect stakeholder interests at the expense of shareholders. Based upon the acceptance of such laws in America, integrating stakeholder interests more thoroughly into American corporate governance should not prove impossible.

At the same time, however, shareholders do enjoy significant protections that encourage those boards to pursue the shareholder wealth maximization norm. And surely, the laws of corporate governance deny ***344** stakeholders any direct voice in corporate decision-making. With the waning influence of sovereign governments in the face of the growing prevalence of multinational enterprises, those desirous of protecting stakeholders must look for solutions based on sources other than exogenous legal protections. Thus, given the current legal infrastructure, incorporating stakeholder interests into governance must come via their role as shareholders. But first,

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the legal infrastructure is described in more detail in the following paragraphs.

1. State Corporate Laws

By affording corporate management near absolute discretion to manage the affairs of the company, [FN221] state corporate laws permit boards to consider stakeholder interests in corporate decision-making even when such decisions hurt shareholders' bottom line. [FN222] State corporate laws, therefore, do not perfectly adhere to the shareholder wealth maximization norm popular among many American academics. Nevertheless, while such laws provide some direct protections to shareholders, they leave other stakeholders' interests squarely in the hands of a board of directors who may prove indifferent to their concerns. [FN223] Accordingly, those aiming to ***345** incorporate stakeholder interests into corporate governance would do well to exploit their role not as stakeholders, but as shareholders.

The discretion afforded corporate boards allows directors to make decisions that benefit stakeholder interests at the expense of shareholders. [FN224] They may, for example, trigger poison pills, stagger board elections and adopt other protective devices to prevent hostile takeovers that may harm stakeholders. [FN225] Some states even promulgated stakeholder statutes that expressly permit directors to make decisions to benefit constituencies other than shareholders in corporate reorganizations and sales of control. [FN226] Moreover, directors' fiduciary duties, derived from the law of trusts, are owed not only to shareholders, but also to the corporation as a whole--including all its constituents. Indeed, "[j]udges presented with takeover cases are unavoidably aware that the interests of more than stockholders are usually at stake." [FN227] They recognize that:

> "[t]o enable the corporation to reach its current value, decades of investment are often required from employees, creditors, and communities. Investors of capital . . . are seen in this view as the constituency with the most transitory form of investment . . . . [E]xit is fast and low cost." [FN228] Judges will be uncomfortable handing down orders that displace ***346** decisions of directors affecting the future of such corporate institutions.

Indeed, no modern court has struck down a decision by a board of directors because it favored stakeholder interests at the expense of shareholder interests. [FN229]

The law of corporations in the United States gives directors so much discretion that they may even approve self-interested transactions, so long as certain procedural obstacles are met. For example, while the law allows shareholders to sue directors derivatively for self-dealing transactions, those transactions can be immunized from scrutiny if first approved by a sufficiently large number of disinterested directors or by shareholders, after sufficient disclosures are made. [FN230]

At the same time, however, Delaware law permits shareholder wealth maximization norms to permeate some aspects of corporate decision-making. [FN231] Because the law permits only shareholders to elect directors, boards will ever remain cognizant of maximizing those shareholders' investments. Shareholder wealth maximization norms also govern the resolution of conflict of interest situations and during certain sales of corporate control. [FN232] For example, directors must refrain from triggering entrenchment devices that completely foreclose the opportunity for shareholders to sell their shares at a premium during a hostile tender offer. [FN233] Moreover, once directors decide to sell a controlling share of the corporation, they have a fiduciary duty to maximize the price given to their shareholders for their shares. [FN234] Moreover, perhaps cognizant of their ***347** audience, Delaware courts often justify rulings that afford management significant freedom to exercise their business judgment by arguing that such freedom increases shareholder wealth. [FN235] And, while Delaware

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law suggests that directors' fiduciary duties are owed to the corporation as a whole, only shareholders may enforce those directors' fiduciary duties to the corporation through derivative suits. [FN236] Adding to the pro-shareholder flavor, Delaware case law often reflects that board legitimacy rests upon shareholder franchise. [FN237]

Accordingly, Delaware corporate law mediates only the divergent interests between shareholders and management. [FN238] Non-shareholder stakeholders, meanwhile, must rely upon the goodwill of the board. [FN239] Statutes that appear to protect stakeholders only permit boards of directors to consider their interests; they need not, if in their business judgment, they decide not to consider them. [FN240] In contrast, the law does require directors to maximize shareholder wealth in a few circumstances. Therefore, those advocating for the incorporation of non-shareholder stakeholder interests into corporate governance would do well to look to take advantage of the shareholders' foothold into the corporate boardroom.

2. Federal Securities Laws

The Federal Securities Laws, in contrast to Delaware law, clearly favor shareholder wealth maximization norms. These laws arm shareholders with the tools to monitor management of publicly traded ***348** firms: they mandate transparency of financial reporting. Thus, managers, fearful of shareholder “exit” and the ensuing drop in corporate stock prices, will, in theory, manage the company to ensure those stock prices do not drop. [FN241] Shoring up their pro-shareholder incentives, U.S. securities laws also grant shareholders private rights of action and impose criminal sanctions against management for dishonest disclosure. [FN242]

Since the 1930s, the Federal Securities laws have played an important role in regulating corporate governance, i.e., by mandating reporting standards and regulating director elections by promulgating proxy access and disclosure rules. [FN243] The disclosure and transparency regulations, enforced by the U.S. Department of Justice, the Securities and Exchange Commission, and a lively plaintiffs' bar, [FN244] remain the most robust in the world. [FN245] Detailed regulations govern the disclosure of specific information during defined events and periods. Financials must be prepared according to U.S. Generally Accepted Accounting Principles (“GAAP”), and reports must be issued at the initial public offering (the prospectus), at quarterly and yearly increments (the 10-Q and 10-K), [FN246] and during proxy campaigns. [FN247] Generally, these laws seek to empower shareholders to avoid injury and mismanagement by opening up corporations' books. [FN248] As an unintended result of their quarterly reporting requirements, however, directors sometimes focus their attention on short-term results that impact short-term stock prices. [FN249]

***349** The securities laws also regulate the ability of shareholders to access a corporation's proxy statement during director elections, as well as to submit shareholder proposals to a popular referendum during yearly meetings. The securities laws permit, for example, shareholders who hold a sufficient amount of equity to submit their ideas, if they pass certain regulatory hurdles, to a shareholder vote. [FN250]

Recently, the securities laws also began to influence director decision-making in favor of shareholders [FN251] by expanding the shareholder franchise, regulating executive compensation, mandating the creation and composition of certain board committees, and emphasizing the role of legal and professional gatekeepers. [FN252] For example, by eliminating broker discretionary voting for director elections, self-regulatory organizations (“SROs”) like the New York Stock Exchange (“NYSE”) forced institutional investors to seek the opinion of beneficial shareholders in director elections. [FN253] Recent changes to Exchange Act Rules allow more shareholders access to corporate proxy materials, giving them a louder voice in decision-making by allowing

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them an opportunity to change company by-laws. [FN254] New "say-on-pay" advisory votes allow shareholders, moreover, to express their opinions on excessive executive compensation. [FN255] Shareholders are taking advantage of these changes by proposing rules that encourage the election of outside, nonmanagerial directors. Here, the aim is to seat directors that are not beholden to insider managers, and thus more receptive to shareholder concerns. [FN256]

While providing shareholders with a bunch of ammunition, the U.S. securities laws do very little to directly promote worker and stakeholder interests. Although it is argued that a maximized share price serves as a reliable proxy for firm wealth--and therefore worker welfare [FN257]--one might argue they are subversive to such interests. By encouraging directors to focus their attention on share price, the securities laws encourage them to make short-term decisions that do not promote job security, environmental ***350** protection, and long-term investment. Nevertheless, it is possible for stakeholder-shareholders to take advantage of the power afforded them under the federal securities laws to influence corporate policy. [FN258]

3. Federal Labor Laws and Other Regulation

As described above, the endogenous laws that govern the alignment of power and decision-making within a public corporation, i.e., state corporate and Federal securities laws, do not provide for the involvement of any corporate constituency other than directors and shareholders. [FN259] Instead, only exogenous regulations serve to protect the interests of creditors, consumers, workers, and the dependent community. [FN260] However, as a result of globalization, free trade, and the explosion of multinational enterprises, such protections often prove inadequate. [FN261] Stakeholders must, therefore, look instead to influence corporate behavior from the inside. [FN262]

In the U.S., external regulation serves to protect non-shareholder stakeholder interests. For example, the Wagner Act and a system of collective bargaining ostensibly protect the interests of workers, allowing "[l]abor [to seek] its share of the corporate pie by explicit contracting with management." [FN263] The Clean Air Act and Clean Water Act work to protect ***351** the environment. State and Federal fraudulent transfer laws insulate creditors from management expropriation of assets otherwise owing to lenders. Local zoning laws protect communities from industrial hazards and inconveniences. Contract and tort laws protect consumers, workers, creditors, and suppliers. Corporate taxes pay for public goods and fund the amelioration of negative externalities. [FN264] Logically, if such exogenous protections are nonexistent or insufficient, stakeholder interests will remain ignored by corporations unless nurtured through other means.

Arguably, such protections are indeed deficient. For example, as a result of globalization and free trade treaties, union membership in the United States declined precipitously over the past few decades. [FN265] The diminishing relevancy of the trade unionist movement caused labor markets to become "flexible," characterized by job insecurity, work intensification and weak investments in firm-specific training. [FN266] As corporations grow, moreover, their bargaining power increases. More and more of their contracts with stakeholders are no longer freely negotiated, but "shrink wrapped" contracts of adhesion. [FN267]

And, with the explosion of multinational corporations, corporate management can now choose to do business in jurisdictions that do not protect stakeholder interests. [FN268] This "regulatory arbitrage" permits management to transfer wealth that would otherwise serve to protect stakeholders to themselves and to shareholders. Indeed, patterns of economic globalization erode states' power to regulate the impact of corporate behavior on stakeholders. [FN269] Corporations unhappy or unable to compete with "costly" labor, environmental, and other

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stakeholder protection laws can simply move to a jurisdiction that boasts less onerous regulatory burdens. [FN270] Exacerbating the problem, powerful multinational corporations can pressure captive developing country governments, desperate more for income than for labor and environmental protections, to adopt friendly legislation. [FN271] Such antics directly impact the conditions of ***352** local workers and, because of market pressures, depress the wages of U.S. workers while undermining corporate commitment to sustainable development at home. [FN272] Thus, "law understood through the lenses of government legislation and regulation has not 'globalised' overall at the same pace as the economy, business or communications." [FN273]

Despite the erosion of exogenous protections, endogenous corporate governance laws have not yet adapted to incorporate stakeholder interests. [FN274] Unsurprisingly, advocates and international bodies therefore attempt to impose upon multinationals codes of conduct and minimum standards. [FN275] Their efforts remain a work in progress.

D. Conclusions

The theories and history of the firm in the United States show that while some reference is made to the rights and interests of non-shareholder corporate stakeholders in corporate governance, the reality is that corporations, and the courts and governments that control them, often view corporations as mechanisms designed to solely create wealth for shareholders. [FN276] While differences exist as to which corporate constituency should govern to best achieve this goal, the goal itself is, for a large part, uncontroversial.

Yet a thirst for the consideration of stakeholders exists not only in academia, but also as a result of economic crisis and globalization. American workers and communities despair at the loss of jobs to foreign countries, the loss of their healthcare and pension benefits. They rail at the amassing of wealth into the hands of corporate CEOs and bailed-out banks. The time is ripe for the introduction of a new corporate governance regime.

***353** II. CORPORATE GOVERNANCE IN GERMANY

For those looking to change the governance regime of the U.S. public corporation, the German model often appears as an attractive alternative. In Germany, unlike in the U.S., public company stakeholders have a direct role in company governance. They do not rely solely upon exogenous legal protections and collective bargaining. At the same time, minority shareholders enjoy much less protection than their Anglo-American counterparts. The inherent stability of the German corporate governance regime, moreover, appears to weather financial crises better than many other advanced economies. [FN277] It comes as no surprise, therefore, that many advocates for change in the American corporate governance regime commonly look to Germany for guidance.

Yet, while Germany certainly possesses a modern and successful economy, [FN278] its corporate governance regime is a child of its unique culture and history. [FN279] A direct transplant of the German model into the U.S. is therefore impracticable. Nevertheless, a study of its history and character may reveal other avenues of reform.

A. History

The history of the German corporation shows the metamorphoses of a liberal laissez-faire regime to one that not only permits state intervention in its economy, but even rejects much of the individualism so treasured in the

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United States while embracing an idealized notion of the nation-state. Indeed, the greater racial homogeneity, later enfranchisement, lower rate of social mobility, and the more collectivist value system of Germany underlie the significant differences among its corporate governance system. [FN280] In addition, Germany's tradition of civil law, distinct from the common law regimes of the U.S. and U.K., indicates that Germans accept a more activist role of the State in economic policy. [FN281]

***354** The history of the German corporation thus reflects a stakeholder view of corporate governance, which "[obliges] managers to take into account the multiple interests of all stakeholders in a firm, as opposed to the more clearly defined interests of shareholders." [FN282] Germany's unique history and social psychology, therefore, counsels against the adoption of German-style corporate governance in the U.S. [FN283] Recent trends towards convergence, however, illustrate that change is indeed feasible, and that stakeholder-friendly reforms are viable even in modern capitalistic economies.

1. Laissez-Faire Capitalism and the Individual

Once a feudal and mercantilist state, Germany (Prussia), influenced by the liberal tradition of Adam Smith and Immanuel Kant, embraced economic and political freedom in the first half of the nineteenth century. [FN284] State intervention, at this time, was "only accepted as a means to guarantee safety and equality of opportunity." [FN285] Pre-war Germany was prosperous and boasted vibrant capital markets, which were among the most highly developed in the world. [FN286] Indeed, prior to the First World War, these German markets were active, liquid, and larger than the New York Stock Exchange. [FN287] They were among the most highly developed in the world, and ownership of firms was widely diffused. [FN288] This would change.

2. The Birth of the German Welfare State

Beginning in the late nineteenth century, certain portions of the German polity began to rebel against so-called "Manchester Capitalism" [FN289] and to embrace the state as a noble embodiment of the body politic, i.e., the ***355** newly founded German Reich. [FN290] Unlike the United States, where business came to power before government, the state in Germany was strong and centralized and could therefore become deeply involved in economic development. [FN291] The German government at once promoted industrialization while pursuing social harmony and stability. Playing catch-up with its British competitor, the German state encouraged bank-based finance, which was quicker and less cumbersome that developing the deep and liquid capital markets necessary to nurture economic growth. [FN292] Germany even banned secondary securities markets in the 1870s. [FN293]

At the same time, the German state made sure corporate stakeholders had a voice in corporate governance. Social programs included social insurance legislation and worker committee laws. [FN294] Employee participation in firm management, through the implementation of advisory councils, began in the mid-1800s. By 1891, workers obtained powers to review workshop regulations and, in 1920, the first legislation mandating the use of such councils was promulgated. [FN295] The state meant these earliest works councils to force cooperative behavior by unions and management that would facilitate production of coal and then, later, to support the war economy. [FN296]

3. Post World War II

The liberal economic regime receded even more as Germany dealt with its depressed economic conditions between [FN297] and after the World Wars. [FN298] Germany's comfort with its modern-planned economy

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likely arose after World War II, following the Potsdam conference. For example, the "level of industry plan," imposed upon Germany by the Allied powers, regulated the extent and type of manufacturing permitted in the country. The International Authority of the Ruhr, [FN299] and later the Economic Coal and ***356** Steel Community, likewise regulated industrial output. And, during the Bonn Republic, a post-war compromise was struck between unions, government, and corporations, who understood each other to be partners in a market ordering exercise. [FN300] For example, when the British ceded responsibility of Volkswagen back to Germany after World War II, the company's employees, unions, and the German government negotiated a compromise that divided authority over the company between them. The parties agreed on a governance regime for the company that safeguarded the firm against hostile takeovers and incorporated worker voices into company decision-making. [FN301] In the 1950s, Germany constitutionalized codetermination, at least for the largest firms, thereby cementing workers' role in the supervisory boards of public corporations. [FN302]

At the same time, participation of economically weakened private investors shrank [FN303] as the government continued to promote bank-based development. [FN304] By the 1950s and 1960s, Germany's unique variety of capitalism emerged: the creation of large companies with one or two large long-term investors, usually a family or another company, and supported by a powerful bank. [FN305]

4. Globalization and Harmonization Efforts

Over the past two decades, efforts to harmonize [FN306] European company laws and to encourage free trade in the Euro Zone [FN307] transformed the German company yet again. As explained more thoroughly in the next section, a stagnating economy, combined with harmonization efforts and the globalization of capital markets, prompted legal reforms meant to attract foreign equity investors. [FN308] Such efforts bore fruit: The number of ***357** shareholders increased from 3.2 million in 1988 to 5.3 million by the end of 2002, and stock investments as a percentage of wealth held by individuals nearly quadrupled from 1997 to 2002. [FN309] Institutional investors like foreign pension funds become more and more prevalent. [FN310] As a result, observers conclude that Germany is experiencing "a gradual evolution towards a market-oriented equity culture." [FN311] At the same time, however, "the established institutions are not losing their dominant voice." [FN312] Thus, the German model offers an example of the kind of compromise that can be struck between shareholder and stakeholder-based corporate governance regimes.

Germany's accommodation of certain aspects of shareholder primacy in its stakeholder-based corporate governance system, described in more detail below, illustrates that a stakeholder-shareholder theory of corporate governance is possible. First, though, a closer study of the structure and operation of the German public company is useful.

B. Structure of German Public Companies

Undoubtedly, Germany boasts a modern and successful industrial economy. [FN313] The structure of corporate governance in Germany, however, differs markedly from that found in the United States. Such differences counsel against the wholesale adoption of the German form of corporate governance in America. Nevertheless, a study reveals that the incorporation of endogenous stakeholder protections in a modern economy's corporate governance regime is possible, so long as any efforts maintain the balance created by a country's unique social, economic, and political culture. Recent legal and economic changes that encourage Anglo-American-style equity investment in Germany prove the point. Indeed, a closer look at Germany's corporate governance leads to suggestions for stakeholder-friendly reforms in the United States. Accordingly, a brief summary of Ger-

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man corporate law follows below.

***358** 1. Characterization of Equity Markets and Firm Finance

The ownership structure of German firms is dramatically different from their American counterparts. Finance in Germany derives not from securities markets, but from banks and long-term debt. While German capital markets remained, up until the past few decades, relatively under-developed, the legal protection afforded creditors has traditionally been robust. [FN314] Accordingly, controlling shareholders, inter-company cross holdings, and pyramidal ownership structures characterize German equity markets. Most exchange-listed firms are controlled by a family, a majority shareholder, or a combination of large shareholders. [FN315] Moreover, a particular bank (Hausbank), maintaining a long-term relationship with the company, often dominates corporate affairs by exerting its leverage as a lender, the company's primary source of finance, a major shareholder, and proxy voter for deposited shares.

As a result, in contrast to the short-term company financing typical of U.S. and U.K. capital markets, Germany's equity and finance markets are relatively long-term and patient. [FN316] The implications of this structure on corporate governance are discussed in more detail infra. At this point, however, it is useful to note that encouraging the participation of long-term investors may ameliorate the pressures on American corporate boards to sacrifice sustainability for short-term profits.

2. Organizational Forms

In Germany, unlike in the U.S. and U.K., the largest firms take the form of not just public corporations that list shares on public exchanges (Aktiengesellschaften, or "AG"), [FN317] but also limited liability companies ***359** (Gesellschaft mit beschränkter Haftung, or "GmbH"). AGs can be, but rarely are, purely public with a diversified share ownership (Publikhumgesellschaften). More often, a dominate shareholder holds a controlling majority of shares. [FN318] These forms, called Kapitalgesellschaften, grant their equity holders limited liability. As such, they are more heavily regulated, at least in comparison to those business forms that do not confer such benefits on their equity holders. [FN319] Although this paper focuses only upon the governance and characteristics of AGs, both AGs and GmbHs are similar in that they are commonly dominated by a controlling owner. [FN320] Therefore, many of the characteristics of the AG apply to the GmbH.

In the Anglo-American regime, public companies have a unitary board structure that supervises company management. Often, the chairman of the board is the company's chief executive, and many other directors serve operational functions, i.e., the "insider director." [FN321] Outside directors are perceived to be more friendly to shareholder concerns. In contrast, German public corporations have a dual board structure. [FN322] The supervisory board (Aufsichtsrat), which appoints the members of the operational managing board (Vorstand), [FN323] cannot seat any "inside" directors. Rather, the law requires that the membership of a company's supervisory and management boards cannot overlap. [FN324] While managing boards are responsible for all the corporation's business affairs, the supervisory board does retain power to approve certain transactions and to oversee the management board's performance. [FN325] It also enjoys broad powers to gather information and to intervene with operations to carry out its oversight duties. [FN326]

The power of supervisory boards, which are often compared to American "outside directors," [FN327] is limited. [FN328] Once appointed, the managing board owes duties not to the supervisory board, but to the ***360** corporation in general. Therefore, it is possible for the management board to avoid the supervisory board's recommendations, so long as they justify their behavior in terms of the "corporate interest." [FN329] In corpora-

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tions that have a controlling shareholder--which is very common in Germany--the supervisory board often serves as a mere instrumentality of that shareholder and, therefore, does not exercise an independent, mediating voice over corporate affairs. [FN330] In addition, the supervisory boards of dispersed public companies usually maintain a close relationship with the controlling management board. These cozy relations undermine the supposed "independence" of the board and, therefore, arguably allow for insider self-dealing. [FN331] Moreover, while managing boards are theoretically independent from supervisory boards, it is not uncommon for their members to occupy supervisory board members of a parent company. [FN332] The supervisory board, in addition, may only remove managing board members for cause. Thus, in many circumstances, it cannot influence corporate operations except under the most egregious of circumstances. [FN333]

Given the limited power of the supervisory board, one can observe that German companies may suffer from the same kinds of agency costs associated with U.S. firms, despite their different board structures. These costs also--though to different degrees--highlight the importance of having "independent" or "outside" directors approve certain transactions. Given the similarities, coming up with a theory of American corporate governance that takes more stakeholders into account, as does the German model, should not prove impracticable.

3. Shareholders

The relative lack of depth of German equity markets reflects the pattern of shareholder ownership of its companies. Unlike large firms in the U.S. and U.K., whose capitalization is dispersed, controlling shareholders dominate firm equity in Germany for both public corporations and limited liability companies. [FN334] Such shareholders and owners are most often large institutional investors and financial companies, e.g., banks, insurance companies, [FN335] investment funds, and foreign investors. [FN336] Of ***361** these, banks are the most powerful: they can exert leverage by virtue of their status as a firm creditor, shareholder, and proxy for the shares deposited with them by individual shareholders. [FN337]

Often, the identity of the company's ultimate owners remains undisclosed. Inter-firm crossholdings are common in Germany, [FN338] rendering difficult the tracing of firms' overlapping equity holders. Ownership patterns that involve such cross shareholdings, as well as contractual voting and management arrangements, interlocking management and supervisory boards between related companies, and pyramidal ownership structures, [FN339] not only camouflage the ultimate beneficial owners and controllers of German firms, but also act to enhance the power of dominant shareholders. [FN340] The traditional [FN341] role of German banks, as shareholders, proxy holders, and lenders further obscures the source of German firms' ownership and control. Such banks, referred to as Hausbanks, often hold a substantial amount of company equity while also maintaining a debtor relationship with the firm. They can therefore exact controlling leverage by virtue of their dual status as lender and stockholder. Adding to their power, individual shareholders will often deposit their shares with banks who, through powers of attorney, exercise the owners' voting rights. [FN342]

The patterns of German firm ownership create different corporate governance problems than those faced by Anglo-American firms. While majority and controlling shareholders in German corporations enjoy much power over management, minority shareholders enjoy relatively less protections than their U.S. and U.K. counterparts. At the same time, large shareholders generally invest for the long term and naturally assume a greater monitoring role than their diversified U.S. counterparts. [FN343] The principal-agent problem, therefore, shifts from one arising between dispersed shareholders and management to one arising between majority ***362** and minority shareholders. This and other differences are explained in more detail in the following paragraphs.

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These differences certainly offer reasons that German-style corporate governance cannot be immediately exported into the United States. But they also show that U.S. public companies, generally lacking the presence of long-term majority shareholders, could take advantage of some of the benefits associated with these shareholders, i.e., their strong monitoring characteristics and long-term outlook, by encouraging their formation in U.S. markets.

a. Dominant Shareholders

In a company with a majority shareholder, that shareholder will dominate both the supervisory and management boards. [FN344] While this arrangement meets with its own peculiar agency costs, [FN345] it also eliminates some costs that are more familiar to scholars of U.S. corporate governance. Blockholders with large ownership stakes have every reason to monitor management. [FN346] Unlike the diversified shareholders of the American public company, controlling German shareholders have the motivation and the resources to ensure the firm is operated in their interests and without wasting or pilfering corporate assets. [FN347]

German corporate laws reflect the power affording controlling shareholders. For example, shareholders of German AGs convene at an annual general meeting (Hauptversammlung), and can call a nonregular meeting if called by shareholders representing at least five percent of the firm's capitalization. [FN348] They can use such meetings to influence management behavior and to submit their own proposals.

b. The Market for Corporate Control

Many scholars of U.S. corporate governance cite to the so-called “market for corporate control” as an important disciplinary mechanism for corporate boards. It also serves as a source of pressure on management to ***363** pursue short-term stock prices. [FN349] In Germany, however, this phenomenon is less pronounced as it is in Anglo-American corporate governance regimes. [FN350] In fact, “[h]ostile tender offers have been virtually non-existent in Germany until very recently,” [FN351] and until 1995, Germany had no takeover laws, either facilitating takeovers or protecting management from them. [FN352] Simply, hostile takeovers are much more difficult to achieve unless an offeror obtains the support and consent of the controlling shareholder. [FN353] As a result, the “market discipline” which much of American academia relies upon to force corporate management to pursue shareholder wealth maximization, does not exist in Germany. [FN354] This distinction illustrates the different agency costs associated with the German corporate governance regime, and, in so far as the market for corporate control is indeed an effective monitor of corporate management, [FN355] counsels against its wholesale adoption in the U.S. At the same time, its absence encourages corporate managers to pursue long-term growth strategies.

c. Long-Term Bank Control

The role played by banks in German corporate governance is drastically different from that played by banks in U.S. corporations. By virtue of proxy holdings, banks often dominate the shareholder-half of supervisory boards. They also exert influence by virtue of their status as corporate lenders. The house banks commonly possess technical departments tasked to monitor the financial performance of the firm, [FN356] and can pressure management to behave in certain ways or to reveal certain information as they force renegotiations of loan agreements. [FN357] Moreover, banks possess the proxy votes of smaller shareholders, who give them such power in conjunction with managing their stock portfolios. Exercising the voting rights associated with their depository shares as well as the shares ***364** they own directly, the voice of the Hausbank on the supervisory board of German companies is often overwhelming.

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Accordingly, agency costs associated with banks occur that are unheard of in the United States: costs associated with bank interests diverging from the interests of minority shareholders [FN358] and workers. [FN359] At the same time, the role of the German Hausbank eliminates some agency costs familiar to scholars of U.S.-style corporate governance. Possessing an informational advantage, these bank shareholders, unlike their diversified U.S. counterparts, have the means and motivation to monitor management. [FN360] But, because of their multiple roles within the firm, i.e., as stockholder, board member, lender, and financial service provider, [FN361] they may not do so on behalf of all shareholders. [FN362] Nevertheless, their long-term investment outlook means that they will generally aim to preserve the company's long-term financial health--a benefit to all stakeholders.

The prominent role of the Hausbank in German financial markets and in its corporate governance illustrates the implausibility of adopting German-style corporate governance in the United States. It does show, however, that alternative methods of finance, other than through short-term equity investors, is feasible in a modern industrial economy.

***365** d. Lack of Transparency

The transparency of German firm financials remains far behind that expected by investors in U.S. markets. Under the U.S. model, transparency of a firm's performance allows investors to make sound investment decisions by correctly assessing their risk. It also permits investors to police a company's management. The German tradition, however, does not offer the same amount of protection. [FN363] "Without knowing whose interests are representing using those voting rights, it is very difficult for outside investors to assess the incentives of large shareholders in the same firm to act in the interest of all shareholders." [FN364] Fearing expropriation and unknown risk, the cost of equity capital in Germany is relatively great. It deters minority investors, and they will consequently demand a higher return to compensate for the extra risk.

German transparency rules thus reflect the prevalence of majority shareholders in corporate ownership structures, as such insider shareholders can extract all the information they need without exogenous legislation. Financing, in addition, remains available from banks and retained earnings, thus rendering less consequential the higher cost of minority equity investor capital. Its transparency laws, therefore, would not work well in U.S. markets. Their relative weakness, however, reflects the benefits of having a long-term controlling shareholder, as such transparency laws may not prove as necessary for investor protection.

e. Majority Shareholder Rent-Seeking

Despite the benefits that the controlling shareholder may offer in regards to policing management, they also present a different kind of agency cost from that implicated by the wealth of diverse shareholders in the hands of centralized management: "the expropriation of minority investors through the controlling shareholders." [FN365] Indeed, the presence of a blockholder can result in "a kind of crony capitalism in which insiders ***366** loot the firm at the expense of minority shareholders, using inside information and self-dealing." [FN366]

In Germany, minority shareholder protection remains weak [FN367] and significant opportunities remain for a majority shareholder to usurp corporate assets and opportunities from the firm and from minority investors. [FN368] Traditionally, regulations against self-dealing were relatively toothless. [FN369] For example, minority investors do not receive the benefit of statutory appraisal rights in squeeze-out merger transactions. [FN370] Thus, in Germany, a freeze-out may occur while paying minority shareholders less than market value. In contrast, minority shareholders of a U.S. public company, while they cannot stop a merger, they can demand fair

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value for their shares through judicial appraisal. [FN371] Controlling shareholders, moreover, have access to high-quality information that remains out of reach to smaller shareholders, and can use the extra information to their advantage. [FN372] Minority shareholders in Germany, unlike their U.S. counterparts, play no role in approving conflict of interest transactions, and disclosure of such transactions is made only to the supervisory board. [FN373] The United States, of course, enjoys relatively greater minority shareholder protections.

The differences are not only reflected in the law. Large blockholders may find it easier to increase the value of their shares at the expense of minority shareholders, rather than to raise the firm's wealth as a whole. [FN374] Through tunneling, or self-dealing, controlling shareholders that have relatively low cash flow rights, i.e., a bank, can transfer assets to a firm where they have greater cash flow rights. [FN375] In this way, assets are stripped from the company--and its minority investors--and into the pockets of the controlling shareholder. Such self-dealing can be affected through manipulating transfer pricing between related entities and through irregular or excessive executive compensation. [FN376] Controlling shareholders, in addition, can use their crossholdings and pyramidal ownership groups to ***367** transfer corporate assets from a company to a controlled subsidiary without minority shareholders. [FN377] German corporate governance laws attempt to address these agency costs by relying upon the two-tier board structure. Specifically, the supervisory board must approve all majority-shareholder self-dealing transactions. [FN378] Many critics argue, however, that this relatively benign check on majority shareholder power provides cold comfort.

However, given the strong legal safeguards afforded minority investors in the United States, the difficulties presented by the agency costs unique to corporations with majority shareholders may not prove insurmountable should larger shareholders, i.e., stakeholder shareholders, be introduced into American corporate governance.

4. Labor

Unlike the United States, worker involvement in German corporate governance is both endogenous and exogenous. German labor relations rely upon three phenomena: (1) collective bargaining by industry unions; (2) statutory works councils at the company level; and (3) employee codetermination on supervisory boards. [FN379] When combined with a more generous social safety net, these characteristics gives workers more favorable treatment than that provided to workers in the U.S. At the same time, it cannot be seriously argued that Germany is not a successful and advanced industrial economy. [FN380] Indeed, incorporating worker expertise and interests into company decision-making often creates efficiencies that benefit all of a company's stakeholders. A study of German labor relations, therefore, can be useful to one looking to incorporate worker interests into American corporate governance.

a. Codetermination and Works Councils

The direct incorporation of stakeholder interests in the decision-making apparatus of German companies is the most distinctive feature of the German corporate governance regime. All German firms, whether public or not, [FN381] must have works councils serving as labor representatives with rights of information, consultation, codetermination and direct ***368** management of certain business activities. [FN382] The membership of these councils consists of both white- and blue-collar elected employee representatives. Works councils negotiate the specific terms of union collective bargaining agreements and must be consulted with regards to plant closings, relocations, layoffs, and fundamental changes in business operations and organization. [FN383] Although works councils possess only a right of consultation, they can effectively delay corporate changes that negatively impact stakeholders. [FN384]

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More notorious than the use of works councils, German co-determination directly involves workers in the managerial structure of public German corporations. German law mandates that labor representatives share membership of supervisory boards with shareholder representatives. Chosen by direct election or through delegates, worker representatives hold half the board seats of supervisory boards in corporations with over 2,000 employees [FN385] and a third of the seats of companies with over 500 workers. [FN386] Furthermore, German law mandates that union representatives occupy a certain number of these seats. [FN387]

Unsurprisingly, this recipe for board composition earns criticism from minority shareholder advocates, who think it ineffective in monitoring against abuses by both management and majority shareholders. [FN388] Indeed, on its face, this arrangement appears to place significant decision-making power into the hands of labor at the expense of minority shareholders. The dual-board structure, however, curbs workers' influence: The power of supervisory boards in general often proves limited, [FN389] especially for companies with controlling shareholders. [FN390] Moreover, the resolution of many employee-specific issues, like collective bargaining or dispute arbitration, occurs within the ambit of works councils and not before supervisory boards. [FN391] Lastly, the tiebreaker on supervisory boards falls to shareholders, and not to workers. [FN392]

***369** While certain commentators fret that worker involvement in corporate decision-making produces inefficiencies, [FN393] and even accuse it as the culprit behind German economic stagnation in the 1990s, [FN394] it is also argued that such involvement, unlike the adversarial collective bargaining process, fosters an efficient regime of cooperation. [FN395] At the very least, works councils and co-determination may preclude catastrophic conflicts during collective bargaining with industry-wide unions. [FN396] They also arguably create an efficient mechanism to regulate the micro-relationship between employers and employees. [FN397]

b. Unions

Labor relations in Germany also maintain an adversarial relationship akin to that in the U.S., although German unions enjoy significantly more influence than their American equivalents. In Germany, unions (Verein) transcend company-level industrial relations. They instead traverse entire industries, negotiating general agreements that company-specific works councils tailor to specific circumstances. [FN398] Industry-wide unions are organized into federations that wield impressive political power. [FN399] Their collective bargaining agreements protect not just union members, but all workers. [FN400] They also maintain influence inside specific firms by using company works councils as contact points. [FN401]

***370** 5. E.U. Harmonization and Globalization

In Germany, capital market law, as such, did not exist until 1990. [FN402] Over the past fifteen years, [FN403] efforts to harmonize the laws of economies of European Union countries wrought significant changes to the German corporate governance regime. [FN404] Most of these changes caused the appearance of a convergence towards an Anglo-American model of governance. [FN405] At the same time, the international competition for equity capital encouraged the reformation of German corporate governance laws. [FN406] As a result of globalization, deregulation, and privatization, [FN407] significant amounts of equity flooded global capital markets. Countries eager to encourage investment within their borders promulgated minority shareholder protections and transparency reforms. [FN408] Concomitantly, German firms wanting to exploit opportunities on foreign exchanges had to accept U.S.-style reporting requirements and accounting methods. [FN409] These ***371** reforms show that incremental changes in a country's corporate governance regime are possible, and that encouraging a flourishing and liquid capital market is not antithetical to a corporate governance regime that embraces

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stakeholder involvement in corporate decision-making.

As a few examples of harmonization, Germany promulgated minority shareholder protections, [FN410] laws forbidding insider trading, increased transparency through heighted reporting and accounting standards, [FN411] and encouraged derivative lawsuits by shareholders against management. [FN412] It passed rules facilitating communication among shareholders, made derivative suits easier to bring, and streamlined the private enforcement of its securities laws, thereby encouraging U.S.-style shareholder litigation. [FN413] It also created a securities law enforcement bureaucracy roughly analogous to the U.S. Securities and Exchange Commission. [FN414] In 1998, Germany even introduced Sarbanes-Oxley-type legislation, aiming to increase the monitoring effectiveness and risk management of supervisory and management boards. [FN415]

European Union harmonization, [FN416] moreover, has done much to change corporate disclosure requirements and to restrict self-dealing and ***372** insider trading. Since 2006, listed companies in Europe must draw up their books according to International Financial Reporting Standards ("IFRS"), including the disclosure of any retained earnings. [FN417] They must also disclose any insider trading. [FN418] Moreover, companies must now disclose compensation information for their boards, including the existence of any stock options. [FN419] These disclosure requirements are policed by newly empowered public enforcement regimes. [FN420]

The Leviathan-like role the German Hausbank has on supervisory boards likewise wanes. Hoping to capitalize on the same profits enjoyed by their American colleagues in times of plenty, these banks began to exchange their voice on corporate boards for greater liquidity [FN421] and gradually reoriented themselves towards the investment bank paradigm. [FN422] Meanwhile, as a part of reforms passed in 1998, new laws required such banks to abstain from exercising proxy votes in companies where they already held more than five percent of shares and to consult with the actual shareholders before exercising their proxies. [FN423] Now, "individuals may instruct their banking institution to exercise their proxy rights in a particular manner." [FN424]

Similar law cracked down on large blockholders. [FN425] At the turn of the millennium, new legislation prohibited deviations from the one-share one-vote principle. By forbidding multiple voting stock, caps on voting rights, and maximum voting rights, new laws limited the power of controlling shareholders. [FN426] Meanwhile, changes in tax regulation encouraged the sale of cross-corporation shareholdings, enticed banks and other financial institutions to unload some of their controlling blocks. [FN427] As a result, interlocking directorates are declining. [FN428] The European Court of Justice, ***373** moreover, recently held unlawful certain laws entrenching specific shareholders. [FN429]

Harmonization has also somewhat undermined the unique regime of co-determination. Companies may now form as European companies (Societas Europa), [FN430] and can elect to adopt less worker representation on their boards of directors and a unitary board structure [FN431]--even if such companies do business in Germany.

Changes in takeover legislation also occurred. In 1995, a bureaucratic commission introduced voluntary guidelines that counseled bidders to make an offer to all minority shareholders when acquiring a majority of a company's voting shares. [FN432] Later, although Germany blocked the passage of a E.U.-wide takeover code providing strong protections to minority shareholders, [FN433] it did promulgate a takeover law in 2002 [FN434] that permits certain anti-takeover devices [FN435] while requiring all bidders to make an "adequate" offer for all company shares in change of control transactions. [FN436] This provision allows minority shareholders unhappy with the change of events a viable exit option. [FN437] At the same time, worker representatives on supervisory boards no longer act as the impenetrable barrier to takeovers that they once did. Moving in a

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productivity-oriented direction, unions no longer view takeovers as a kind of predatory capitalism. Instead, they now accept certain reorganizations as acceptable instruments of economic behavior. [FN438] As a result of these reforms, the role of Anglo-American investors increased through the 1990s and 2000s. British and American funds now invest actively in German firms. [FN439] ***374** Pension funds, like CalPERS, even direct their shareholder activism towards changing firm governance. [FN440]

Despite such reforms, however, a true convergence appears unlikely: the recent financial recession, as well as the significant differences in ownership and governance structures, [FN441] currently serve to prevent true harmonization. [FN442] Germans, seeing the havoc wreaked by participants in the world's biggest stock markets, are loath to adopt more reforms to bring themselves closer to the Anglo-American model. [FN443] In addition, many scholars argue that path dependence, a term describing the costly nature of economic change, prevents rapid change. [FN444] Thus, Germany's debt-based financial system seems unlikely to change any time soon, as does its corporatist stakeholder-friendly structure.

6. Conclusions

Regardless, those interested in reforming the regime of American corporate governance can learn from the convergent trends. The growth of Anglo-American capital markets in Germany shows that, at a minimum, such markets are not completely antithetical to more stakeholder-friendly models of governance. [FN445] Indeed, the new interest in promoting shareholding has not resulting in a rejection of institutions and practices that shielded the corporate economy from the influence of capital markets, but in a selective modification of the entire system that endows ***375** shareholders with new rights and strengthens institutions through which to exercise them. [FN446] It is possible, given the German experience, that the American corporate governance regime can likewise make “selective modifications” to incorporate more stakeholder-friendly measures. For example, encouraging public pension funds, like CalPERS, to become increasingly active in corporate governance may bring some of the benefits associated with the majority German shareholders, although to a lesser extent. [FN447] Moreover, as neither U.S. nor German law can be said to give primacy to shareholder interests, [FN448] the possibility for stakeholder-friendly reforms is greater than one might expect.

C. Theories of the Firm In Germany: Varieties of Capitalism and Convergence towards the Anglo-American Model?

The theories justifying the German regime of corporate governance reflect an acceptance that the economy serves a social purpose. They also show that taking account of stakeholders may lead to efficiencies that will benefit not only shareholders, but also all stakeholders. Many of these theories overlap those found in American jurisprudence and academia. They therefore lead to the conclusion that stakeholder-friendly governance reforms are possible in America.

1. Varieties of Capitalism

Germany, with its codetermination, union prevalence, and blockholdings, represents an example of a coordinated market economy, against which the U.S. counterpart is often measured. [FN449] However, it is possible that the German version of capitalism is not a product of some innate human characteristic of Germans, but instead is the product of a historical balancing of existing power and economic structures. Under the varieties of capitalism theory of corporate governance, the difference can be explained by assuming that institutions in an economy are arranged so as to be in equilibrium. [FN450] For example, as banks grew into the most important

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source of capital, their role on corporate boards likewise increased. In the leadership vacuum following World War II, unions came to represent popular interests. Their role in corporate governance therefore ***376** increased. [FN451] In contrast, in the United States, New Deal legislation prevented the amassing of political and economic power in banks and other financial institutions. [FN452] At the same time, the Clayton Act of 1914 prohibited interlocking directorships, [FN453] thus preventing the intra-firm cross holdings typical of industry in Germany. Accordingly, American companies had to find financing elsewhere, i.e., in the hands of individual investors. [FN454]

A lesson to be derived from this theory of governance is that so long as the interests of powerful economic and social interests are accommodated and balanced, many different varieties of capitalism can be successful and stable. It thus demonstrates that any given system of governance may not be the penultimate product of economic competition and market pressures, but instead more of an accident. Such a system, like the Anglo-American corporate governance regime, is therefore amenable to reform when social and economic interests change.

2. Stakeholder-Based Governance

In the German variety of capitalism, efficiency and profit are not the only goal of industrial enterprise. Nor is the monetary welfare of shareholders. Rather, Germany's economic model aims to govern human and corporate lives, goals, and aspirations. [FN455] Indeed, outside the former British Empire, "the world's economies are perceived as serving the society as a whole. Citizens and national leaders see the economy as but an element of the larger society." [FN456] This concept, recognized in Germany for decades, has begun to resonate in Anglo-American thinking, especially as corporations globalize and the power of sovereign states wanes.

3. Specific Investment and Team Theory

The German model of corporate governance also resonates with the specific investment model. While rejecting as normative consensus the ***377** shareholder-oriented paradigm, [FN457] the German corporate governance regime also recognizes the specific investments made by multiple stakeholders by affording them voice and protection. It therefore aligns nicely with team theory.

For example, the existence of codetermination and works councils reflect the team-specific investment made by labor. Often, it is argued that stakeholders should not become involved in the management of company affairs because they have no skin in the game--they are adequately protected through contract. Any decisions they make, therefore, will necessarily be inefficient. German corporate law, which mandates their involvement, can be said to recognize that employees "do make a nondiversifiable investment in human capital, an investment that increases the employee's stake in the corporation proportionately to the firm-specificity of the human capital." [FN458] Their involvement in firm decision-making, therefore, is not inefficient but instead will help to enhance firm wealth.

Moreover, the German corporation's long-term relations with its workers, suppliers, banks, and customers "facilitate commitments to permanent employees." [FN459] Long-term commitments by the actors on each side facilitate these stable relationships, as "personal ties are supported by lifetime employment." [FN460] To encourage such long-term commitments, employees, therefore, are given a greater voice over firm affairs. [FN461] Employee involvement, moreover, fosters efficiency-enhancing cooperation, an alternative that increases firm and shareholder wealth more than a system based upon class confrontation. [FN462] In contrast, when financial and worker commitments are more short-term, and employees are not expected to make significant firm-specific

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investments, their influence over management decisions is logically lessened. [FN463]

Similarly, German corporate governance reflects the long-term specific investment of company management. Unlike the United States, ***378** which developed a professional board of director labor market, German managers are "embedded in a much stronger technical culture, which leads to a strong production on production design." [FN464] These managers rise up from the ranks, developing long-term relationships with customers, suppliers, banks, shareholders, and workers. [FN465] Unlike the professional managers of the United States, they enjoy a rich and diverse understanding of the specific industry and the firm itself. They are also insulated from the negative implications of short-term stock price fluctuations. [FN466]

Simply, Germany does not rely upon the enforcement of arm's length contracts to protect stakeholders from opportunism. Rather, German companies use relational contracting based on personal ties, trust, and reputation. [FN467] This institutional arrangement fits well with a team theory of the firm and shows that this theory of corporate governance is possible and profitable to implement.

4. Product Market Discipline

In Anglo-American corporate governance regimes, scholars expect that the market for corporate control will curb agency costs associated with the separation of ownership and control. Essentially, directors, concerned about their job security, will endeavor to keep stock prices high to preclude predatory tender offers. [FN468] Such efforts, in theory, will maximize firm value and protect shareholder interests. In Germany, however, firm management does not face this kind of pressure.

Yet, those that direct German firms are not immune to market pressures. German firms still face powerful international product market competition. This competition drives them to maximize efficiencies and, therefore, firm value, [FN469] which in turn, increases share price. [FN470] In other words, product market competition acts as an adequate proxy for the market for corporate control. [FN471] With the increasingly globalized product market, the pressures of this crucible will grow even greater and will ***379** therefore, theoretically, hone the ability and honesty of German firm management. [FN472]

Presumably, the same product market competition may serve as a disciplining mechanism on the managers of U.S. companies. Accordingly, given that shareholder wealth can be left in the capable hands of the product market, sacrificing some investor voice for other stakeholders may not prove entirely catastrophic to shareholder interests.

5. Shareholder Value, Liberalization, and Institutional Investors

Some commentators argue that the stability created by German's variety of capitalism prevents its transition to a more liberal market economy. [FN473] Nevertheless, the globalization of financial markets creates the same kinds of pressures to enhance shareholder value in German firms as it does in Anglo-American firms. [FN474] At the same time, the growing involvement in German capital markets by foreign institutional investors--especially those hailing from the U.S. and U.K. [FN475]--pressures German firm management to focus more on short term share price. [FN476]

Undoubtedly, shareholder value is becoming more and more influential in Germany. In some German firms, for example, disclosures to investors grew more robust [FN477] and management began to implement informal mechanisms to incorporate investor input into decision-making. [FN478] Notably, some German firms began in-

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centivizing managerial compensation by linking it to share price. [FN479] Foreign institutional investors influence the management of German companies by throwing sunshine on corporate activities and by threatening to withdraw capital unless management increases stock prices. [FN480] As an illustration, CalPERS, a public (defined ***380** benefit) pension fund hailing from California, published corporate governance principles according to which it makes investment decisions. Such guidelines create incentives for German firm management to alter their decision-making to accommodate such investors' preferences. [FN481] Moreover, the growing market for corporate control in Germany, as in the U.S., boosts the shareholder value movement. [FN482] And German unions, once opposed to corporate takeovers a priori because of their perceived threat to worker interests, now view takeovers less as an instrument of class conflict and more as an acceptable instrument of economic behavior. [FN483] Indeed, some proponents of the varieties of capitalism theory of corporate governance [FN484] fear that the shareholder value phenomenon, foreign to the German managed economy, will destabilize its productive institutions by creating an imbalance between the historical relationship between banks, controlling shareholders, and corporations. [FN485]

D. Conclusions

The German corporate governance regime, especially as institutional investors assume an increasing role in corporate decision-making, shows that stakeholder involvement in corporate decision-making is a feasible in a modern, industrialized economy. Moreover, the growing role of minority institutional investors, and the legal changes that accommodate them, illustrate that such involvement may be feasible in economies more dependent upon securities market-based financing. These and other conclusions are explained in more detail below.

1. A Role for Stakeholders in Corporate Decision-Making is Feasible

The German corporate governance regime, which imbeds stakeholder representation into corporate governance, demonstrates that growth and effective corporate management is possible, even if non-shareholder stakeholders, in the form of creditors and workers, help run the firm. In fact, such representation promotes stable, sustainable, and long-term growth. Thus, a corporation need not be governed solely by a board elected by shareholders to be profitable.

In addition, certain convergent trends in Germany reveal that a more stakeholder-friendly model of corporate governance is possible in the U.S. The growing participation of institutional investors in the German corporate governance regime illustrates that governments can integrate ***381** Anglo-American corporate governance concepts with more stakeholder-friendly rules. Similarly, the increasing prevalence of active institutional investors in the United States since the 1990s, and accompanying recession of dispersed stock ownership, [FN486] proves that Anglo-American regimes can indeed accommodate stakeholder interests.

2. Corporate Constituents Can Wear Multiple Hats

The German model also shows that stakeholder interests can also be represented through their roles as investors. German banks assume a role as investor, proxy voter, and board member. It is possible, therefore, that labor and other stakeholders can achieve influence by exploiting its multiple roles in the corporate governance regime.

3. Common Ground Between Labor and Investors

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The German model--especially the recent changes to that model--also brings into relief the common ground that can exist between labor and long-term shareholders. Each seeks a high degree of transparency [FN487] and the long-term profitability of the firm. [FN488] For example, both unions and minority investors reject traditional German accounting standards, which allow companies to hide cash flows in good times and disguise reserves as profits in bad times. [FN489] Both minority investors and workers do not benefit from the stripping of corporate assets through exorbitant executive remuneration policies. [FN490] The common ground between these two groups is powerful enough that "[t]here is absolutely no indication that shareholder value companies attempt to put an end to codetermination." [FN491] This alignment of interests between labor and such investors renders more ***382** feasible a model of governance that incorporates a stakeholder agenda through the shareholder mechanism.

III. CORPORATE GOVERNANCE IN THE U.K.

An examination of the German model reveals that a corporate governance regime that incorporates stakeholder involvement can serve to promote stakeholder interests while also leading to stable industrial growth. In turn, an examination of the U.K. corporate governance regime reveals that such involvement can be facilitated by empowering stakeholders in their role of shareholders in economies less dependent upon debt financing.

For a large part, corporate governance in the U.K. resembles its American counterpart. [FN492] Both countries' public corporations share patterns of widely dispersed share ownership, boast well-developed securities markets, promulgate significant disclosure requirements, and offer minority shareholder protections. They both, also, value shareholder wealth maximization. [FN493]

But in the U.K., one major difference in corporate governance exists: U.K. law affords shareholders much more power over their boards of directors. In the U.K., unlike in the U.S., shareholders can call an extraordinary general meeting with the approval of only shareholders representing ten percent of firm equity, and can remove board members with only a plurality of votes. [FN494] They may also amend corporate charters free of any board gatekeeping function. [FN495] These abilities render corporate ***383** boards, wary of these powers, more welcoming to shareholder proposals. [FN496] It likewise stands in stark contrast to U.S. shareholders, who must wage a costly proxy fight to implement their suggestions. [FN497] In addition, takeover regulation in the U.K. grants greater protections to minority shareholders than in the U.S. While in the U.S., management may utilize protective devices like poison pills, staggered boards, and shareholder rights plans to block hostile tender offers, such conduct is prohibited under U.K. corporate governance rules. [FN498]

The focus on shareholder rights in U.K. corporate governance does not derive from a greater cultural appreciation for private equity markets, however. Britain's commitment to stakeholder protections is arguably as vibrant as that in Germany. [FN499] As in Germany, inter-war economic difficulties created a welfare state that "[accepted] the idea that the state had to provide jobs and comforts when business could not." [FN500]

In fact, at least one scholar explains that it is this commitment to social welfare, illustrated by the relatively strong exogenous protection afforded stakeholders, that account for the difference between the role and protection afforded minority shareholders between the U.S. and the U.K. [FN501] The divergence in the protective devices afforded to minority investors arises from "the different ways in which they [relate] to external regulatory structures that affect relationships among stakeholders in the corporate enterprise." [FN502] Simply, employees in the U.K. enjoy social safety nets and employment protections strong enough to diminish the need to include their voices in corporate governance. [FN503] These protections deflected stakeholder-oriented political

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pressures away from the corporate governance regime and into exogenous legislation. [FN504] Moreover, the labor movement in the U.K., fearful that the use of German-style codetermination and works councils would undermine the power of trade unions, focused their efforts ***384** on collective bargaining instead. [FN505] Thus, unlike the American version, where corporate law takes an ambivalent stance towards stakeholders and shareholders, [FN506] and unlike the German model, incorporating stakeholders directly, corporate governance in the U.K. focuses heavily on shareholder rights.

United Kingdom institutional shareholders take advantage of laws that protect their interests. They are, as a rule, more interventionist and more numerous than their American counterparts. [FN507] And many choose to flex this muscle in a stakeholder-friendly way: its corporations and its institutional investors more often adhere to CSR and SRI policies than those in the U.S. [FN508] In addition, although shareholder wealth is the admitted goal of U.K. corporate law, it is often described in terms of "enlightened shareholder value," which advocates the respect for stakeholder interests because such respect facilitates long-term sustainability. [FN509] This divergence results from different institutional pressures faced by U.K. companies. They arise from Continental Europe's more stakeholder-friendly corporate governance laws, as well as from the increasing prevalence of socially conscious union pension funds [FN510] and nongovernmental organizations ("NGOs"). [FN511] At the same time, many European countries require that certain institutional investors publicly report the degree to which they adopt SRI principles. [FN512] To attract the money of these investors, many U.K. companies embrace "enlightened shareholder value" by, for example, ***385** voluntarily implementing "triple bottom line reporting." [FN513] The level of activism of these institutional investors, indeed, is so high that some observers link their political influence to the U.K.'s relatively shareholder-friendly takeover codes. [FN514]

The U.K. provides an example of how one might accommodate stakeholder interests in a shareholder-centric corporate governance regime. Specifically, it encourages the active involvement of long-term stakeholder shareholders in corporate decision-making. Through "enlightened shareholder investing" and "triple bottom line" reporting, shareholder activism can mesh nicely with both stakeholder protections and shareholder value.

Shareholder activism, however, can also harm stakeholders. Investors, wishing to increase their value to their beneficiaries, will pressure management to increase share value. Such short term planning can lead to layoffs, outsourcing, or worse. [FN515] The results can prove perverse: an underfunded union pension plan, which manages the retirement savings of workers, may fill the role of the activist investor clamoring for short-term profits. [FN516] While in the U.K., social safety net programs will protect these workers, they may not in the U.S.

Thus, lessons are to be learned from the fact that Britain's shareholder-friendly corporate regime arose in conjunction with a relatively robust welfare state. While the U.K. corporate governance regime illustrates the feasibility of empowering stakeholders through their role as shareholders, it also counsels the empowerment of only the right sort of shareholder, and only for the right sort of long-term planning. [FN517]

***386** IV. A STAKEHOLDER-SHAREHOLDER THEORY OF CORPORATE GOVERNANCE

This comparative study of Anglo-American and German corporation law reveals that stakeholder interests may be successfully incorporated into the endogenous U.S. corporate governance regime without undermining the country's economic welfare or disrupting its legal system. More specifically, it counsels the incorporation of stakeholder interests through their role as shareholders. Not only does American corporate law and academic thought already anticipate the participation of shareholders in the management and monitoring of corporations,

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they also already accommodate stakeholder interests--although to an extent considered inadequate by many critics. In the U.S., this shareholder-stakeholder relationship offers the only realistic means for stakeholders to include their interests during corporate decision-making.

Institutional investors that represent the investments of corporate stakeholders are well positioned to advocate for such interests. As agents, institutional investors are retained to dispose of assets according to the desires of their stakeholder beneficiaries. It can be argued, for example, that because pension benefits represent the deferred wages of workers, pension financing should be steered by the owners of those benefits, i.e., the workers. [FN518] If, in turn, the pension fund can exercise its power as a shareholder, it provides an outlet for workers to influence corporate decision-making. [FN519] The same could be said for any individual beneficiary of an institutional investor.

This stakeholder-as-stockholder theory of corporate governance can also be good for the corporate bottom line by focusing management on long-term and sustainable growth [FN520] and by encouraging better investments from corporate constituents. For example, when employees own stock in the company for which they work, their loyalty and motivation increases in comparison to those who do not. [FN521]

Moreover, citizen stockholders can use their investments to wield results for themselves. Ordinary citizens desirous of changing corporate behavior can also get involved through their investment funds. Should "stockholders [take] a moral interest in observing the common good and assisting the needy, boards would be compelled to take these interests into account in their decision-making." [FN522] And because most Americans are ***387** "forced capitalists," [FN523] investing their retirement savings on stock markets, they have the ability to influence corporate decision-making for that good. Facing insecurities and instability in the face of globalization, they may also have the necessary motivation to do so. [FN524]

Not only is the empowerment of shareholder activists the only realistic approach to incorporate stakeholder interests into corporate governance, it is currently the focus of the advocates of pro-stakeholder reforms in corporate governance. [FN525] Regrettably, this movement is in its infancy. But certain steps can be, and are being taken to move the process forward. These events and suggestions are set forth in the remaining paragraphs of this paper.

A. The Stakeholder-Shareholder Movement is Gaining Momentum

Stakeholder representation in corporate decision-making is already growing. For example, in many countries, trade unions currently pursue a dual-tracked approach to representing workers' interests: (1) advocacy through union activity; and (2) advocacy through workers' role as shareholders, i.e., via their pension funds and other long-terms savings plans. [FN526] Trade union engagement through workers' role as shareholders, sometimes referred to as the "stewardship of workers' capital," seeks to promote workers' interests by not only using their status as significant shareholders to pressure management to adopt internationally recognized labor standards, [FN527] but also to embrace more transparent corporate governance practices and more sustainable environmental policies. [FN528] An increasing number of shareholders, especially public sector funds dominated by union organizations, [FN529] table proposals that aim not at maximizing share value in the short term, but instead advocate for other ***388** socially beneficial changes. [FN530] Moreover, empowered perhaps ironically [FN531] by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), activist institutional investors have gained ability to manage securities fraud litigation against corporations. [FN532] Institutional investors can, therefore, pursue their agendas by suing corporations who make misleading disclosures about their impact

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on social welfare. [FN533]

Despite these positive changes, shareholder advocacy of stakeholder interests is far from common and influential in most corporate boardrooms. For example, their activism most often coincides with reforms that support advocates of shareholder primacy. Specifically, shareholder proposals usually call for reforms involving the election and appointment of "independent" directors, majority voting rules, and the de-staggering of corporate boards. Such reforms sometimes tend to promote shareholder value and not stakeholder interests. [FN534] Moreover, public pension funds generally possess a fiduciary duty not to advocate for their beneficiaries' political and social interests, but to maximize the value of their investments. [FN535] When it comes to stakeholder-friendly reform, therefore, they may find their hands tied unless they can couch it in terms of share prices. Meanwhile, most institutional investors will face an uphill battle anyway, as none by themselves possesses a large enough block of shares to force change in corporate policy. [FN536] And many of these investors prefer to sell their shares rather than fight unwelcome corporate decision-making. [FN537] ***389** Still some will seek to "free ride" on others' activism, thereby raising the costs of such activism. [FN538] And many will continue to pursue a short-term stock price agenda. [FN539]

B. Current Trends Toward Corporate Social Responsibility and Socially Responsible Investment Are Inadequate

The need for direct stakeholder advocacy through their role as shareholders is highlighted by the relative lack of success of the CSR and SRI movements to date. The combination of SRI by large investors and CSR by corporations gave many scholars hope that the world's corporations would self-regulate themselves into socially responsible behavior and, therefore, effectively protect stakeholders. But CSR and SRI offer, at best, an incomplete solution. The voluntary nature of CSR causes it to miss some issues and to fail to eradicate some of the worst abuses. [FN540] Any codes of conduct adopted are not legally enforceable except in very limited circumstances. [FN541] Moreover, only the very biggest companies, those that rely upon consumer demand and investor pressure (and especially those in high-impact industries), participate in CSR. [FN542] Thus, most enterprises, who employ the gross majority of the world's workers, remain uninvolved. [FN543]

Furthermore, SRIs fail, for several reasons, to apply consistent and effective pressure on corporations to abide by the CSR agenda. Given the lack of harmonization of reporting standards and full, honest, and complete reporting, SRIs cannot, in a practical manner, perform their oversight function. [FN544] More importantly, even if corporations' CSR performances ***390** were transparent and honest, SRIs arguably violate their domestic "fiduciary duties" by favoring CSR over the maximization of value for their beneficiaries. [FN545] Many self-proclaimed SRIs, despite the best of intentions, still find themselves focusing on short-term profits regardless of any legal duties. [FN546] Indeed, there is no question that despite the strides made in CSR and SRI, "shareholder value," i.e., stockholder wealth maximization, remains the rule in the U.K. and the U.S. [FN547]

C. Suggestions

To empower and encourage the effectiveness of stakeholder-shareholders in influencing corporate decision-making, several legal reforms are possible. Mandatory "triple bottom line" reporting standards for public companies would persuade companies to increase stakeholder protections so that they attract stakeholder and SRI capital. It will also allow stakeholder-shareholders to monitor and police bad corporate behavior. [FN548]

Affording certain types of long-term investors powers to influence corporate decision-making will also en-

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courage the right kind of shareholder activism. For example, distributing voting rights only to large shareholders with vested, long-term interests will encourage management to take a long-term, sustainable, and ultimately more stakeholder-friendly view towards governance. [FN549] Imposing a capital gains tax on short-term investors will have the same effect. [FN550] Allowing shareholders who control a large enough equity stake to call special meetings, as they can in German and U.K. firms, ***391** will also increase their influence. In addition, permitting private sector union members to control their own pension funds, without employer interference, will help enable stakeholder-shareholders to achieve the kind of influence in America that they enjoy in the U.K. [FN551] Likewise, promoting unionization across industries will give these funds greater economic power, and therefore a greater share in the corporations in which they invest. [FN552] These newly empowered stakeholder-shareholders could even nominate and elect their own candidates to corporate boards.

Eliminating quarterly reporting requirements, in addition, will take management attention away from the short-term, and perhaps imprudent, business planning and focus them on long-term, sustainable, and stakeholder-friendly growth. [FN553] Likewise, taming the market for corporate control can ameliorate some of these same pressures. States may also, of course, redefine fiduciary duties to explicitly include stakeholders. [FN554]

V. CONCLUSION

This paper sets forth an argument for including and encouraging stakeholder-shareholder activism based upon a comparative analysis of U.S., German, and U.K. corporate governance regimes. It identifies, through this comparative analysis, the ability of a corporate governance regime to accept certain modifications that incorporate different constituent interests. By comparing the Anglo-American style changes to the German stakeholder model, in conjunction with American corporate law and theory, it is possible to identify certain areas of potential reform that would encourage stakeholder-friendly corporate governance changes. As an example, this paper looks at the U.K. model of heighted shareholder protection and investor activism on behalf of stakeholders. Lastly, it offers ***392** some suggested reforms that might make this stakeholder-shareholder theory of corporate governance a reality.

[FN1]. See Eugene D. Genovese, Secularism in the General Crisis of Capitalism, 42 Am. J. Juris. 195, 202 (1997) (multinational corporations are coming to control the "world economy, over which ... centralized national governments have less and less control."); Larry Catá Backer, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 Colum. Hum. Rts. L. Rev. 287, 290 (2006). Backer goes on to note that:

> [t]he problem of corporate regulation shows the evolution of the transnational--that is, the transformation of a regulatory issue from one exclusively centered within the nation-state (the 'problem' of corporate social responsibility), to one involving three actors: nation-states, international public law institutions, and private law actors (transnational corporations) and institutions (associations of private or transnational civil society actors).

Id. at 294. See also, generally Halina Ward, The Interface between Globalisation, Corporate Responsibility, and the Legal Profession, 1 U. St. Thomas L.J. 813-20 (2004) (noting that the processes of economic and technological globalisation have included significant shifts in the balance of public and private sector responsibilities around the world resulting in governments intituting policies that attract business and encourage regulatory arbitrage); Ilias Bantekas, Corporate Social Responsibility in International Law, 22 B.U. Int'l L.J. 309, 325

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(2004) ("with the exception of bribery and tax evasion, most matters pertinent to MNE operations outside the host State are not subject to extraterritorial legislation"); see also Larry Cata Backer, The Autonomous Global Corporation: on the Role of Organizational Law Beyond Asset Partitioning and Legal Personality, 41 Tulsa L. Rev. 541, 543-44 (2006) ("The character of law as an exogenous force is increasingly belied by an emerging global economic system in which many have suggested 'no one is in charge.' In a globalizing world, the territorial principle produces a perverse effect--limiting, rather than expanding, the importance of law as a force in the regulation of economic enterprises or of those with an interest in them").

[FN2]. "Stakeholders" is a term that traditionally refers to those individuals, other than shareholders, who have a stake in the success of a corporation, e.g., labor, creditors, consumers and the surrounding community. See generally Lawrence Mitchell, A Theoretical Framework for Enforcing Corporate Constituency Statutes, 70 Texas L. Rev. 579 (1992).

[FN3]. Viet D. Dinh, Codetermination and Corporate Governance in a Multinational Business Enterprise, 24 J. Corp. L. 975, 977 (1999) (union membership fell from 40% of the work force to less than 14%, a level below that existing before the Wagner Act was passed).

[FN4]. Cynthia Estlund, Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace, 12 Lewis & Clark L. Rev. 671, 678 (2008). The New York Times, on December 21, 2010, reported that private sector worker unionization had dropped to 7.2% Steven Greenhouse, U.S. Proposes Posted Notice of the Right to Unionize, N.Y. Times, Dec. 21, 2010, http://www.nytimes.com/2010/12/22/business/22labor.html?_r=1&ref=business.

[FN5]. See, e.g., Dinh, supra note 3, at 976 ("The dominance of the contractarian paradigm focused the attention of corporate law scholars for a decade or so on explaining, refining, or challenging the notion the maximizing shareholder value is the most efficient form of corporate governance because it allocates resources efficiently and thereby maximizes social welfare .... For the most part, American corporate law scholars have scantly examined the reasons for the implications of worker participation in the governance of corporations."). These theories of corporate governance in American academia, and their failure to address stakeholder interests, are discussed in more detail infra.

[FN6]. Discussed briefly, infra.

[FN7]. See, e.g., Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 906 (2010) (First Amendment rights afforded to corporations); but see Scott A. Trainor, A Comparative Analysis of a Corporation's Right Against Self-Incrimination, 18 Fordham Int'l L. J. 2139, 2167-68 (1995) (right against self-incrimination not afforded to corporations in the United States).

[FN8]. See Douglas M. Branson, The Very Uncertain Prospect of "Global" Convergence in Corporate Governance, 34 Cornell Int'l L. J. 321, 326 (2001) ("[T]raditional forms of corporate governance, which respond to the Berle-Means separation of ownership from control and the ensuing agency cost problem, simply are not responsive to the problems the growth of large multinationals portend. Worker exploitation, degradation of the environment, economic imperialism, regulatory arbitrage, and plantation production efforts by the growing stable of gargantuan multinationals, whose power exceeds that of most nation states, is far higher on the global agenda than is convergence in governance.").

[FN9]. See Sanford M. Jacoby, Corporate Governance in Comparative Perspective: Prospects for Convergence,

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22 Comp. Lab. L. & Pol'y J. 5, 6 (2000) ("[I]t's possible to identify two distinctive patterns [of corporate governance] among the advanced industrial countries. First, there is the 'shareholder' system, which also goes by such names as the Anglo-American system, the market-outsider system, or simply stock market capitalism. The other is the 'stakeholder' system, which has also been called the relational-insider system, the dedicated-capital system, and welfare capitalism. This is the model that prevails in Germany, Japan and some other countries.").

[FN10]. E.g., Sanford M. Jacoby, Corporate Governance in Comparative Perspective: Prospects for Convergence, 22 Comp. Lab. L. & Pol'y J. 5, 6-7 (2000).

[FN11]. Id.

[FN12]. See Estlund, supra note 4, at 684 ("The single most important safeguard is effective participation by stakeholders, those for whose benefit the relevant laws or social norms were chiefly enacted."). For example, building in worker representation into a corporation's management structure may preclude the need for exogenous labor law protections. See Martin Höpner, Corporate Governance in Transition: Ten Empirical Findings on Shareholder Value and Industrial Relations in Germany 32 (Max-Planck-Inst. for the Study of Societies, Working Paper No. 05/2001, Oct. 2001) (use of works councils and codetermination in Germany reduces the role of labor law).

[FN13]. See John Armour, Simon Deakin, Viviana Mollica and Mathias Siems, Law and Financial Development: What We Are Learning from Time-Series Evidence 5 (European Corporate Governance Inst., Working Paper No. 148/2010, 2010) (the "legal origins" theory of corporate law explains that meta-level rules, norms and practices, mechanisms for lawmaking and dispute resolution, and the conception of the role of government in the economy and society influence financial and corporate law).

[FN14]. For example, the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 gives investors advisory "say on pay" and directed the Securities and Exchange Commission ("SEC") to promulgate rules increasing their access to proxy machinery. Pub. L. No. 111-203 § 951 (2010).

[FN15]. For example, new Rule 14a-11 on proxy access for director elections and amendments to Rule 14a-8. 17 C.F.R. § 240.14a-11 (2011); 17 C.F.R. § 240.14a-8 (2011) (allowing shareholders to include in a company's proxy materials a proposal to amend the company's bylaws to provide for proxy access) (both currently stayed from enforcement pending litigation).

[FN16]. See, e.g., Dinh, supra note 3, at 976; Geoffrey Owen, Tom Kirchmaier & Jeremy Grant, Introduction to Corporate Governance in the US and Europe: Where Are We Now?, 6-25, 6 (Palgrave 2005) (explaining that "[t]he focus on shareholder value as the principal measure of a company's performance was seen to be a powerful force for concentrating the minds of managers on making their businesses more efficient and more profitable"); Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (a notorious case oft-studied in American law schools that holds that a corporation could not cut prices to benefit consumers at the expense of shareholder dividends); and discussion infra.

[FN17]. See discussion infra.

[FN18]. Frank Rich, Who Will Stand Up to the Superrich?, N. Y. Times, November 14, 2010 http://www.nytimes.com/2010/11/14/opinion/14rich.html?hp.

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[FN19]. In particular, the growing multi-nationalization of corporate enterprises highlights the need for reforms, as business moves to countries with less exogenous protections for stakeholders. See, e.g., Branson, supra note 8, at 326.

[FN20]. Liam Séamus O'Melinn, Neither Contract Nor Concession: The Public Personality of the Corporation, 74 Geo. Wash. L. Rev. 200, 216 (2006).

[FN21]. By affording the church corporate charters, the U.S. government could achieve separation of church and state. "The corporation became a vehicle which, by exercising powers that had once belonged exclusively to government, permitted government to get out of the business of religion." Liam Séamus O'Melinn, Neither Contract Nor Concession: The Public Personality of the Corporation, 74 Geo. Wash. L. Rev. 200, 224 (2006).

[FN22]. Dalia Tsuk, Corporations Without Labor: The Politics of Progressive Corporate Law, 151 U. Pa. L. Rev. 1861, 1870 (2003) ("By comparing municipal associations to governments, courts were able to impose checks on their powers, checks that were similar to the limits imposed on sovereign powers."); O'Melinn, supra note 20, at 216-21. By allowing for the incorporation of municipalities, the government could avoid taking on additional governance duties. It was, in a sense, a form of outsourcing. See id., at 228. For a general discussion, see Joan C. Williams, The Invention of the Municipal Corporation: A Case Study in Legal Change, 34 Am. U. L. Rev. 369 (1985).

[FN23]. Tsuk, supra note 22, at 1870-71.

[FN24]. See O'Melinn, supra note 20, at 220 (a corporation had a "real" personality whose "existence did not originate with the state" and which "in appropriate circumstances, could claim priority over the state by virtue of its claim to represent the moral aspirations of its members").

[FN25]. E. Norman Veasey & Christine DiGuglielmo, History Informs American Corporate Law: The Necessity of Maintaining a Delicate Balance in the Federal "Ecosystem," 1 Va. L. & Bus. Rev. 201, 203 (2006).

[FN26]. Id.

[FN27]. O'Melinn, supra note 20, at 230.

[FN28]. Id. at 232; The Political Economy of the Company 30 (Andrew Gamle et al. eds., 2000).

[FN29]. O'Melinn, supra note 20, at 232-33.

[FN30]. See Jacoby, supra note 9, at 8.

[FN31]. See Mark S. Mizruchi & Daniel Hirshman, The Modern Corporation as a Social Construction, 33 Seattle U. L. Rev. 1065, 1072 (2010) ("[t]he large corporation emerged in the United States during the period between 1870 and 1900," culminating with the U.S. Steel conglomerate, Standard Oil and other industries controlled by J.P. Morgan and John Rockefeller).

[FN32]. Id. at 1073 (citing § 8 of the Clayton Act). This phenomenon perhaps helps explain the different ownership structure found in Germany, characterized by many firm cross-holdings. See discussion infra.

[FN33]. Liquid and diverse securities markets created a system of equity-based corporate finance. Shareholders

required such liquidity to induce them to invest in otherwise risky investments. Other industrialized economies relied not on American-style equity financing, but instead on debt financing. One such economy, Germany, is discussed infra.

[FN34]. See, e.g., Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance 4 (1994); Alfred Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business 484-00 (1977) (examining the modern shift toward managers running large corporations and its effect on the concentration in American industries).

[FN35]. Mizruchi & Hirshman, supra note 31, at 1075; 1089 (noting also that the Glass-Steagall Act, by separating commercial and investment banks, prevented them from growing into serious providers of financing). The banks, however, were not completely out of luck: they were well positioned to become neutral intermediaries, i.e., the investment and underwriting banks common in America today. See id. at 1090.

[FN36]. Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property (1932).

[FN37]. Id. at 357-58 (the modern corporation "has brought a concentration of economic power which can compete on equal terms with the modern state" and might some day become "the dominant form of social organization"); Mizruchi & Hirshman, supra note 31, at 1071 ("Berle and Means described the separation of ownership and control with some degree of consternation. The increasing autonomy of management led to a growing concentration of power in a relatively small group of individuals who were potentially unaccountable to any external forces.").

[FN38]. Mizruchi & Hirshman, supra note 31, at 1068-69.

[FN39]. Id. at 1070.

[FN40]. Tsuk, supra note 22, at 188.

[FN41]. Id. This theory of the corporation is discussed in a little more detail, infra.

[FN42]. See Mizruchi & Hirshman, supra note 31, at 1072-75 (Berle & Means wrote during the Great Depression and before World War II and the New Deal, when the United States became an economic power and when the government began to flex its regulatory power over industry); Id. at 1085 ("Prior to the Great Depression, the government played a relatively minor role in the American economy.").

[FN43]. Jacoby, supra note 9, at 9.

[FN44]. Id. at 9-10; Mizruchi & Hirshman, supra note 31, at 1072-73.

[FN45]. Discussed infra.

[FN46]. See Tsuk, supra note 22, at 1881 ("They exposed organizations, associations, and corporations as loci both of individual self-government and of coercive power cloaked by liberal legal thought as free contractual arrangements between individuals."); Mizruchi & Hirshman, supra note 31, at 1068-70.

[FN47]. Mizruchi & Hirshman, supra note 31, at 1071.

[FN48]. Dalia Tsuk, From Pluralism to Individualism: Berle and Means and 20th-Century American Legal

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Thought, 30 Law & Soc. Inquiry 179, 188, 192 (2005) (corporations began to even look like governments, i.e., hierarchical, law-making and law-applying).

[FN49]. Tsuk, supra note 22, at 1872-73; see also id. at 1892 ("Having challenged managers' willingness to assume social responsibilities, Berle put his faith in a new propertied class, a class that was yet to be formed--the shareholders.").

[FN50]. Id.

[FN51]. See id. at 1866 .

[FN52]. See generally Jennifer Klein, The Politics of Economic Security: Employee Benefits and the Privatization of New Deal Liberalism, 16 J. of Pol'y Hist. 34 (2004), available at http://www.yale.edu/history/faculty/documents/PoliticsofEconomicSecurity.pdf.

[FN53]. Tsuk, supra note 44, at 194; Lawrence E. Mitchell, The Innocent Shareholder: An Essay on Compensation and Deterrence in Securities Class Action Lawsuits, 2009 Wis. L. Rev. 243, 243 (200); Klein, supra note 52, at 34 ("The New Deal was a watershed in American political culture and political economy, establishing both a set of structural relationships between business, labor, and the state and a set of ideological expectations that governed their interactions. As a result of New Deal legislation, the national government, for example, would directly intervene in financial, agricultural, housing, energy, and labor markets. The state entered the formerly insular employment realm and compelled employers to pay minimum wages, old-age pensions, and unemployment compensation and to recognize unions and maximum-hours restrictions."). See also Robert B. Thompson & Paul H. Edelman, Corporate Voting, 62 Vand. L. Rev. 129, 143 (2009) ("During the New Deal, Congress and the Roosevelt Administration chose not to federalize state corporations codes but rather to supplement state law with new federal rules, principally disclosure-based, where existing state law seemed inadequate.").

[FN54]. Klein, supra note 52, at 35.

[FN55]. For example, the National Labor Relations Act (the "Wagner Act") and the Social Security Act. See id. at 35; Mizruchi & Hirshman, supra note 31, at 1087 (minimum wage rules, overtime pay, restrictions on the use of child labor).

[FN56]. Klein, supra note 52, at 34, 36-40 (author recounts the history of various political campaigns such as the American Federation of Labor's ("AFL") efforts to add disability and health insurance to the Social Security Act). Id. at 38-39.

[FN57]. Id. at 39, 46 ("Neither CIO nor AFL unionists intended to abandon their support for an expanded welfare state, but they had the sense ... [of] a way in which labor could build on the collective-bargaining regime fashioned by the NWLB and make it part of the broader politics of security."); Estlund, supra note 4, at 677.

[FN58]. Klein, supra note 52, at 44; 50-51; Mizruchi & Hirshman, supra note 31, at 1087-89.

[FN59]. See Klein, supra ntoe 52, at 41-42 (The National War Labor Board, in a series of rulings, held that "workers' rights would be based upon the specific language in a contract, and the contract would function as a 'constitution' or 'a basic statute for the government of an industry or plant.... [And] the board rarely ruled in the union's favor if the [benefits plan] had already been unilaterally implemented by the employer.").

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[FN60]. Id. at 42-43.

[FN61]. Id. at 35, 40-41, 48 (for employers, the unilateral purchase of commercial group insurance offered one key to containing union power and union political goals).

[FN62]. Id. at 49; Mizruchi & Hirshman, supra note 31, at 1084.

[FN63]. See generally Klein, supra note 52.

[FN64]. Klein, supra note 52, at 36; Mizruchi & Hirshman, supra note 31, at 1084-85.

[FN65]. Mizruchi & Hirshman, supra note 31, at 1080.

[FN66]. Tsuk, supra note 22, at 1866.

[FN67]. Id.

[FN68]. Id. at 1868 ("[V]iewing workers' interests as protected by their unions, scholars relied upon other, less immutable social interests or classes, namely shareholders and managers, to tame corporate power.").

[FN69]. Id. at 1877 ("[P]luralists did not single out the working class (or the proletariat). Rather, they viewed all associations as important to individual development, and sought to encourage their growth.").

[FN70]. Id. at 1868, 1878 ("Instead of looking to workers to constrain corporations, corporate law scholars, beginning in the 1930s, sought to limit corporate power by focusing, first, on other social structures--on the classes of managers and shareholders--and then, on the norms of expertise, efficiency, and wealth maximization.").

[FN71]. See Douglas G. Smith, A Comparative Analysis of the Proxy Machinery in Germany, Japan and the United States: Implications for the Political Theory of American Corporate Finance, 58 U. Pitt. L. Rev. 145, 151 (1996) (citing Mark J. Roe, Strong Managers, Weak Owners (1994)).

[FN72]. Tsuk, supra note 22, at 1868; 1875.

[FN73]. Jacoby, supra note 9, at 9.

[FN74]. Id. (for example, the Glass-Steagall Act, eventually repealed in the 1990s, prevented the combination of both investment and commercial banking); Smith, supra note 71, at 152 ("Professor Roe notes that these more centralized foreign structures [in Germany and Japan] would be illegal in the United States. He discusses as examples of legal barriers preventing more concentrated ownership in the United States various financial regulations including the Bank Holding Company Act, the Glass-Steagall Act, and the McFadden Act that prevent the development of German or Japanese-style systems in the United States." Mark J. Roe, Strong Managers, Weak Owners 94-96, 98-99, 170-71).

[FN75]. Smith, supra note 71, at 152-53. This perhaps helps to explain the difference between Germany's corporatist structure of finance and the capital-market finance of the United States. These phenomena are discussed infra.

[FN76]. Id. at 154-56.

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[FN77]. See Ronald J. Columbo, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law Via and Aristotelian Understanding of Ownership, 34 J. Corp. L. 247, 260-62 (2008).

[FN78]. Armour et al., supra note 13, at 2. The authors go on to note that "[c]ommon law systems[, e.g., the legal systems of the U.S., U.K., and Australia] have been found to have more dispersed share ownership, more liquid and extensive capital markets, and more highly developed systems of private credit, than civilian ones." Id.

[FN79]. Mizruchi & Hirshman, supra note 31, at 1079.

[FN80]. Michael Gottesman, Wither Goest Labor Law: Law and Economics in the Workplace, 100 Yale L.J. 2767, 2767-68 (1991).

[FN81]. See Klein, supra note 52, at 49.

[FN82]. This sheds light on why the trade unionist movement does not pursue activist investor strategies in the United States as much as it does in Europe. Indeed, such American "activist investors" are usually government employee pension funds.

[FN83]. Mizruchi & Hirshman, supra note 31, at 1096.

[FN84]. Id.

[FN85]. Commonly referred to as "Keynesian economics."

[FN86]. Mizruchi & Hirshman, supra note 31, at 1097-98.

[FN87]. For example, the repeal of the New Deal era Glass-Steagall Act and the deregulation of the transportation, telecommunications, and utilities industries. See Estlund, supra note 4, at 679; see also Mizruchi & Hirshman, supra note 31, at 1097-98.

[FN88]. For example, from 1979 to 2005, real hourly wages fell by 2.3% for workers in the bottom 10% of the labor market, while those of workers in the top 5% increased 33%. Estlund, supra note 4, at 672. See also id. at 679 ("Transnational mobility of goods and some services means that many domestic producers face more competition from low-wage regions."). For a thorough discussion, see generally Katherine V.W. Stone, In the Shadow of Globalization: Changing Firm-Level Employment Practices and Shifting Economic Risks in the United States (U.C.L.A. Law School, Research Paper No. 07-13, 2007), available at http://ssrn.com/abstract=1023696. The author notes, for example, that increased labor and product market competition drives employers to seek flexibility to hire and fire on notice and to retain workers on an as-needed basis. This puts substantial pressure on historical labor law regimes. Id. at 2. See also Kent Greenfield, Reclaiming Corporate Law in a New Gilded Age, 2 Harv. L. & Pol'y Rev. 1, 3-5 (2008).

[FN89]. Klein, supra note 52, at 34, 52 ("As the state receded, not only did organized labor lack the power at the bargaining table to translate private plans into secure workers' rights. By the mid-1950s, Democratic liberals had neither the ideological commitment nor the political weight to use the state to recast private plans as matters of public security and public interest."). The author then posits that the power of unions waned even further as a result of Cold War red-scares and corruption scandals. Id. at 52-53. Then, "[i]n the 1970s, the tables turned and bargaining started going in the other direction; bargaining for security became a downward spiral of concessions and losses." Id. at 57; Mizruchi & Hirshman, supra note 31, at 1098.

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[FN90]. Mizruchi & Hirshman, supra note 31, at 1098.

[FN91]. Estlund, supra note 4, at 680.

[FN92]. E.g., Stone, supra note 88, at 7-9 (describing the change from long-term, paternalistic and structured relations to the new "flexible labor market"). In 2005, more than 12% of the American work force was either an independent contractor, working from home or at the employer's premises, or as an on-call employee working on an as-needed basis. Stone, supra note 88, at 10 (citing a Department of Labor report). These workers, even though they may perform similar work as "regular" employees, face significantly less pay, reduced benefits, and very limited rights under federal labor laws. Id.

[FN93]. See supra note 1; Stone, supra note 88, at 12-13 (describing reduction in pay, benefits, and job security as a result of global product market competition).

[FN94]. See, e.g., Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[FN95]. For example, corporations enjoy limited liability for the injuries they may cause and special protections under bankruptcy laws not afforded to individuals. They also enjoy lesser tax rates.

[FN96]. See Leo E. Strine, Towards Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance, 33 J. Corp. L. 1, 4 (2007).

[FN97]. Id. at 13.

[FN98]. See id. at 4-5. The result is somewhat perverse; a union pension fund managing the retirement investments of workers may pressure the employer for unhealthy, short term profits--pressure that may ultimately result in layoffs, outsourcing, or worse. See Ronald J. Gilson, Leo Strine's Third Way: Responding to Agency Capitalism, 33 J. Corp. L. 47, 47-48 (2007); Simon Deakin, Squaring the Circle: Shareholder Value and Corporate Social Responsibility in the UK, 70 Geo. Wash. L. Rev. 976, 977 (2002).

[FN99]. Mizruchi & Hirshman, supra note 31, at 1100.

[FN100]. Estlund, supra note 4, at 679.

[FN101]. Mizruchi & Hirshman, supra note 31, at 1101 (describing the "Wall Street Rule"--where investors prefer to sell their shares in a poorly performing company rather than influence governance).

[FN102]. This pressure is made most manifest by the Dodd-Frank Act that affords shareholders greater rights in the management of corporate affairs including, e.g., proxy access reform and "say on pay" measures. Pub. L. No. 111-203 §§ 951, 971.

[FN103]. See, e.g., Peer Zumbansen, Varieties of Capitalism and the Learning Firm: Contemporary Developments in EU and German Company Law--A Comment on the Strine-Bainbridge Debate about Shared Values of Corporate Management and Labor 5, 9 (York University Osgoode Hall Law School CLPE Research Paper 21/2007), available at http://ssrn.com/abstractid=1002680 (noting that globalization of capital markets and the privatization of pension funds increases pressure on stakeholder models of corporate governance).

[FN104]. See, e.g., Scheherazade S. Rehman, Can Financial Institutional Investors Legally Safeguard American

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Stockholders?, 2 N.Y.U. J. L. & Bus. 683, 692 (management's "[f]ailure to [maximize shareholder value] is quickly reflected by declining share prices in the deep and liquid capital markets. Thus failure is generally visible, and either the shareholders, through voting at the annual meeting, or the Board of Directors, by chastising or replacing management, attempt to correct problems as they arise.").

[FN105]. See Backer, supra note 1, at 553 (noting, for example, that Delaware law allows directors to resist tender offers even if offering a high share price). Although the familiar "business judgment rule" protects most management decisions--including those to protect stakeholders--it affords a weak defense indeed against institutional shareholders bent on removing management in proxy contests. See Strine, supra note 96, at 5.

[FN106]. The point presumes, of course, that management is interested in preserving long-term corporate health. Certainly, management desires to ensure that the employer cutting its paychecks survives into the future. And many might argue that management runs adrift of the pursuit of long-term sustainability only when improperly incentivized, i.e., when they hold stock options that, like shareholder activists, reward them for short-term profits. Still, many shareholders, especially pension fund investors, will pressure management to be more socially responsible. See discussion of SRI infra pp. 117-20.

[FN107]. See Rehman, supra note 104, at 692. For a discussion of alternative compensation plans that could encourage long-term thinking, see Lucian A. Bebchuk & Jesse M. Fried, Paying for Long-Term Performance, 158 U. Pa. L. Rev. 1915 (2009).

[FN108]. Strine, supra note 96, at 16 (quarterly statements cause directors to "manage to markets" instead of focusing on long-term plans for growth).

[FN109]. See id. at 3 ("I accept as a reality that management and labor now derive much more of their economic wealth than they used to from the equity they own in the corporations for whom they toil and the stock market more generally. Therefore, both management and labor share an interest in the vitality of American equity markets. At the same time, I also accept the notion that most American workers obtain the bulk of their wealth from their labor and that even most top American managers can trace their wealth (including the equity they have accumulated) to their labor as executives. Therefore, both management and labor might be thought to have more concern than trust fund babies or investment bankers do for the continued ability of American corporations to support domestic employment."). A particularly striking example is the "golden parachute" afforded to Don Blankenship, the notorious masthead of Massey Energy, following the mining disaster in West Virginia that killed 29 miners. Shareholders bristled at the retirement package that Blankenship would be awarded upon his well-deserved ouster: $2.7 million, a free house for life, millions more in deferred compensation, and a 'salary continuation retirement benefit' of $18,241-a-month that will continue for 10 years after his departure at the end of the year. See Matthew Mosk, Critics Say W. Va. Coal Boss Will Get Golden Parachute, ABC News (Dec. 7, 2010), http://abcnews.go.com/Blotter/golden-parachute-don-blankenship-massey-energy/story?id=12333677&tqkw=&tqshow=. The tension among the corporation's stakeholders, here, its workers who need a better boss, and its shareholders, upset at the impact of the golden parachute on the company's bottom line, is palpable.

This does not mean that generating wealth for shareholders is necessarily a bad thing. "The major strengths of the system are its flexibility, transparency and accountability, enabling corporate managers rapidly to respond to competitive challenges and shareholder demands." However, "[i]ts disadvantage are the limited influence of stakeholders other than shareholders and the income and wealth gap between managers and workers on the one hand and shareholders and the rest of society on the other hand." Rehman, supra note 104, at 692.

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[FN110]. It may, for example, drive boards to conduct the regulatory arbitrage, shedding local jobs and moving to low-rent districts. See Strine, supra note 96, at 5. Also familiar are the accounting shenanigans leading to the doom of Enron and other notorious corporations. Many blame such bad behavior on the pressure brought on executives by investors hungry for quarterly profits.

[FN111]. Mizruchi & Hirshman, supra note 31, at 1103.

[FN112]. See generally, e.g., CSR Europe, A Guide to CSR in Europe: Country Insights by CSR 2 (Oct. 2009) (observing, for example, that "growing attention is being paid to the voluntary actions that companies take as part of their CSR strategies to manage their economic, social and environmental impacts and to contribute to the wider societal development") [hereinafter CSR Europe] available at http://www.csreurope.org/data/files/20091012_a_guide_to_csr_in_ europe_final.pdf; Tom Zeller, Jr., Can Business Do the Job All By Itself?, N.Y. Times, Mar. 28, 2010, http://www.nytimes.com/2010/03/29/business/energy-environment/29green.html?pagewanted=1; Ward, supra note 1, at 815 (the current CSR movement arose in the 1990s alongside globalization and free trade movements); Bantekas, supra note 1, at 339 ("CSR is founded on the reasoning that the company owes duties not only to its shareholders but also to its stakeholders"); Sol Picciotto, Rights, Responsibilities and Regulation of International Business, 42 Colum. J. Transnat'l L. 131, 139 (2003).

[FN113]. Technically, CSR as a voluntary principle of governance is most popular in the U.K. Other European countries already have stakeholder protection regulations built into their corporate governance laws. See, e.g., Cynthia Williams & John M. Conley, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, 38 Cornell Int'l L. J. 493, 498-99 (2005). Bantekas, supra note 1, at 320 ("The involvement of the E.U. with CSR commenced in 1995 with the signing of the European Business Declaration against Social Exclusion between the Commission and a group of business leaders. In March 2000, at the Lisbon European Council Summit, E.U. leaders made a special appeal to companies' corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development. The publication of the Commission's CSR Green Paper in 2001 resulted in a consultation process with more than 250 organizations and individuals, leading to the release of an official E.U. strategy document on CSR in July 2002.") (internal quotation omitted); see also Deakin, supra note 98, at 985; Aaron Einhorn, The Evolution and Endpoint of Responsibility: The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code, 35 Denv. J. Int'l L. & Pol'y 509, at 534 ("The stakeholder governance style of European companies, under which corporations consider relationships with employees, consumers, and the environment when making decisions, has made Europe a natural leader in [the CSR development process]").

[FN114]. E.g., CSR Europe, supra note 113, at 4, 15, 58 (noting, e.g., that in Austria, CSR reporting is endorsed by the government but is not yet mandatory; that in France, company reporting on social and environmental responsibility has been mandatory, in some form or another, since 1977; and that in the U.K., the Brown administration appointed a CSR minister that will be issuing reporting guidance); Williams & Conley, supra note 113, at 497 ("In some countries ... there are newly promulgated legal mandates that require the disclosure of much more information about social and environmental risks ... [the laws of] European Union ("EU"), France, and the UK [are] illustrative of the types of rules being promulgated and contrast those with the more limited requirements for social and environmental disclosure in the United States); id. at499 ("On May 5, 2004 ... the British government introduced draft regulations that will require 1290 British-based companies listed on the London Stock Exchange ("LSE"), the New York Stock Exchange ("NYSE"), or NASDAQ to publish an annual Operating and Financial Review and Directors Report ("OFR") ... [that] require[s] companies to identify material social and

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environmental risks and to disclose information about those risks"); id. at 508 ("In its May 15, 2001 Communication on the EU Strategy for Sustainable Development, the Commission "invited" companies with 500 employees or more to publish a triple-bottom-line report in their annual report to shareholders. At that time, the Commission also adopted Recommendation 2001/453/EC on the recognition, measurement, and disclosure of environmental issues in annual reports and financial accounts."); Bantekas, supra note 1, at 326-27 (describing mandatory disclosure rules in France and the U.K.); Aaron A. Dhir, Moving Forward with Corporate Environmental, Social and Governance Disclosure in Canada, Harvard Law School Forum on Corporate Governance and Financial Regulation (Sept. 19, 2010), http:// blogs.law.harvard.educorpgov/2010/09/19/moving-forward-with-corporate-environmental-social-and-governance-disclosure-in-canada.

Triple bottom line reporting is becoming more popular in the U.S., with even the SEC entering the mix. See Commission Guidance Regarding Disclosure Related to Climate Change, 17 C.F.R. Parts 211, 231 and 241 (Feb. 8, 2010) (the SEC promulgates guidance on the advisability of reporting on environmental and climate change risks created by the issuer).

The CSR reporting movement came in tandem with the monitoring and disclosure movement arising after the Enron scandals and manifested most famously in the passage of the Sarbanes-Oxley Act of 2002. "The grounding for this approach has been a normative assumption that the government's power to demand disclosure is broader than any narrowly focused requirement for shareholder wealth maximization." Larry Cata Backer, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 Colum. Hum. Rts. L. Rev. 287, 304 (2006); see also Williams & Conley, supra note 113, at 509.

[FN115]. Backer, supra note 114, at 298 ("In contrast to the American bench and Bar, American academics, increasingly joined by others outside the United States, continued to debate, with greater or lesser intensity, the foundations of a corporation's responsibilities beyond a simple primary obligation to investors"); Williams & Conley, supra note 113, at 499.

[FN116]. See, e.g., Adelle Blackett, Global Governance: Legal Pluralism and the Decentralized State: a Labor Law Critique of Codes of Corporate Conduct, 8 Ind. J. Global Legal Stud. 401, 401-02 (2001) ("[C]orporate actors, through their own codes of corporate conduct, publicize to consumers that they are acting voluntarily to ensure that workers in their global production chain enjoy certain rights. In both cases, these initiatives purport to contribute to improved regulation of the workplace."); Bantekas, supra note 1, at 337 (also noting that as of 2002, about 45% of the Global Fortune Top companies produce environmental, social, or sustainability reports in addition to financial reports); Picciotto, supra note 112, at 139-42 (also giving specific examples of MNE scandals); Zeller, supra note 112; Bantekas, supra note 1, at 336.

This movement is reminiscent of the movement towards welfare capitalism, whereby industry undercut the union movement by providing social welfare benefits on its own terms. See discussion supra.

[FN117]. For example, the U.S. recently endorsed, with the U.K., the Voluntary Principles on Security and Human Rights. Einhorn, supra note 113, at 535. The SEC also issued reporting guidance that encourages companies to assess their impact on global climate change and mandates disclosure of "conflict minerals." See 17 C.F.R. Parts 211, 231 and 241 (Feb. 8, 2010); Conflict Minerals, 75 Fed. Reg. 80948, Exchange Act Release No. 63547 (proposed Dec. 15, 2010).

[FN118]. For example, the Global Reporting Initiative, formed in 1997-98 as a partnership between a Boston-based non-profit, CERES and the United Nations Environmental Program, published sustainability reporting

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guidelines in 2006 (the "G3 Guidelines") that include a provision on how the company incorporates stakeholder interests into its business decisions. The G3 Guidelines, before they were adopted, were released for public comment and subseqently received 270 responses. See G3 Online, Global Reporting Initiative, http:// www.globalreporting.org/ReportingFramework/G3Online/ (last visited March 15, 2011).

[FN119]. The OECD began as a vehicle through which to implement the Marshall Plan following World War II. Existing in its current form since 1962, the OECD serves as a "forum for intergovernmental policy making to manage globalization." See Trade Union Advisory Comm., The OECD Principles of Corporate Governance 2 (Oct. 2004), available at http:// www.tuac.org/en/public/e-docs/00/00/01/0B/document_doc.phtml. Member countries include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Org. for Econ. Cooperation And Dev., The Financial Crisis: Reform and Exit Strategies (Sept. 2009), available at http:// www.oecd.org/document/20/0,3343,en_2649_34813_43726868_1_1_1_37467,00.html [hereinafter OECD The Financial Crisis].

"The policies adopted by the OECD are not binding per se, but a review and compliance process tends to promote a convergence of policies or at least, 'a more concrete definition of obligations.' One of the principal functions of the OECD is to facilitate the flow of information among its members. As one commentator put it, 'the supply of information is the most important element: all concerned emphasize the value of a regular exchange of data."' Harold S. Bloomenthal & Samuel Wolff, Fragile Nature of International Securities Regulation, 10 Int'l Cap. Markets & Sec. Reg §1:81 (Nov 2009).

[FN120]. See Org. for Econ. Cooperation And Dev., OECD Guidelines for Multinational Enterprises (2008), available at http:// www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html; see Christopher N. Franciose, Sharpening the Cutting Edge of the United States' Implementation of the OECD Guidelines for Multinational Enterprises, 30 B.C. Int'l & Compl. L. Rev. 223, 226-27 (2007).

[FN121]. Department for Business, Enterprise and Regulator Reform, Corporate Responsibility Report 11 (2008), available at http:// www.berr.gov.uk/files/file50312.pdf [hereinafter BERR Report].

[FN122]. See, e.g., Zeller, supra note 112; Int'l Corp. Gov. Network, Statement of Principles on Institutional Shareholder Responsibilities 10 P 4.3 (2007) ("Shareholder rights should always be exercised with the objective of delivering sustainable and growing value in mind") [hereinafter ICGN Statement]. The International Corporate Governance Network is "a not-for-profit body, founded in 1995 that has evolved into a global membership organisation of more than 500 leaders in corporate governance. Its members are based in 38 countries from around the world, and include professionals, corporations, policy makers and institutional investors with capital under management in excess of $US 10 trillion." Id. at 2. The ICGN Statement is well-recognized by the institutional investor community. See Directorate for Financial and Enterprise Affairs, OECD Steering Group on Corporate Governance, Corporate Governance and the Financial Crisis: Conclusions and Emerging Good Practices to Enhance Implementation of the Principles, 26 (Feb. 24 2010), available at http://www.oecd.org/dataoecd/53/62/44679170.pdf [hereinafter OECD Steering Group].

[FN123]. Zeller, supra note 112 (observing, for example, that the Financial Times recently hosted a conference for business representatives, sustainability professionals and investors with the goal of putting more pressure on business to adopt CSR, and that insurance giant Lloyd's of London noted that "[p]ressure is building on business

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to address the environmental impact of their operations .... Moves by intergovernmental bodies and regulators suggest that they could soon be made more financially accountable for the pollution they cause.”).

[FN124]. See, e.g., CSR Europe, supra note 112, at 2; Hermes Equity Ownership Services (“Hermes EOS”), Values and Value, Hermes Fund Managers, available at http://www.hermes.co.uk/eos.aspx. Hermes EOS, an institutional investor advisory service well known for its pro-SRI outlook, notes on its website that it “aims always to represent to directors a shareholder's perspective on the company's environmental, social and governance performance and to frame its discussions with companies in terms of long-term Value creation. The stronger and more representative that shareholder voice, the more effective it is likely to be.” Id.

[FN125]. See Roberta Romano, A Cautionary Note on Drawing Lessons from Comparative Corporate Law, 102 Yale L.J. 2021, 2028 (1993) (“U.K. firms are not subject to the same type of ownership restrictions as U.S. firms, yet they have dispersed stock ownership rather than the bank-dominated governance structure of Germany. This difference may be an historical accident; that is, it may be due to disparate industrial development in England and Germany in the late eighteenth and early nineteenth centuries that led to the establishment of different financial institutions.”).

[FN126]. Dinh, supra note 3, at 983. The author goes on to note that “the primacy (as opposed to exclusivity) of shareholder interests as the goal of the corporate enterprise is generally assumed in both corporate jurisprudence and scholarship.” Id.

[FN127]. Owen et al., supra note 16, at 6. Accordingly, much corporate governance literature uses stock price as a proxy for firm (and therefore social) wealth. A common measurement is “Tobin's Q,” a ratio of the book and market value of a company's assets, which theoretically “captures the firm-specific intangle assets such as ‘good managers.”' Ande Anne Anderson & Parveen Gupta, A Cross-Country Comparison of Corporate Governance and Firm Performance: Do Financial Structure and the Legal System Matter?, J. Contemp. Acct. & Econ. (forthcoming), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1417589.

[FN128]. See Branson, supra note 8, at 333 (citing recent scholarship advocating stakeholder models). Branson later observes that most of the world's corporate governance regimes are stakeholder-based models. Id. at 346. Undoubtedly, the growing attention paid to comparative and international law contributed to the growing acceptance of such models by American academics.

[FN129]. See, e.g., Dinh, supra note 3, at 985 (“Progressive--or perhaps more aptly, communitarian--approaches emphasize the nature of the corporation as a distinct and separate entity which owes some sort of obligation to those who are affected by its actions. The stakeholders in this corporate entity include not only the various forms of capital (debt and equity) and labor (management and employees), but also the immediate community, and indeed, the general society.”); Peer Zumbansen & Daniel Saam, The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism, Vol. 03 No. 06, York University Osgoode Hall Law School CLPE Research Paper 30/2007, 23 (2007) (laws and regulations that address the mixed “public and private nature of the norms constituting [the corporate governance regime]” are “unavoidably political”).

[FN130]. Columbo, supra note 77, at 286.

[FN131]. O'Melinn, supra note 20, at 201. The author also argues that the privileges afforded corporations are “seen most powerfully in the exercise of corporate sovereignty over noncontractors” and therefore show “just how shallow is the language of the corporate contract how tenuous is the route towards shareholder primacy.”

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Id. at 206.

[FN132]. Some critics of modern corporation law view it as a mechanism that "ratifies, enables, and sanctifies a corporate system of property holdings which leads to vast inequalities of power and shocking concentrations of capital in a few hands," thus ignoring and failing to account for the reality that corporations as social institutions that impact a wide variety of constituents. Douglas Litowitz, The Corporation as God, 30 J. Corp. L. 501, 508 (2005).

[FN133]. See generally id.

[FN134]. See discussion, supra Part I.A.

[FN135]. See O'Melinn, supra note 20, at 206; Litowitz, at 525 ("the company had more power to influence the lives of local residents than the local government.").

[FN136]. Tsuk, supra note 22, at 1870 (citing Gerald E. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059, 1099 (1980)).

[FN137]. Backer, supra note 1, at 291-92. After all, corporations are taking on increasingly public functions--like pensions and healthcare. Zumbansen, supra note 103, at 37. This view, however, creates dissidence with the "shareholder value" theory of corporate governance popular in the U.S. and U.K. Instead, it is "[m]ore in line ... with the stakeholding approach that views the corporation as a locus of responsibility in relation to a wide array of stakeholders' interests" and not as "a legal instrument for shareholders to maximize their own interests." Silvia Ayuso & Antonio Argandona, Responsible Corporate Governance: Towards a Stakeholder Board of Directors? 2 (University of Navarra IESE Business School, Working Paper No. 701, 2007); Branson, supra note 8, at 326.

[FN138]. For example, those theories espoused by Hobbes, Locke, Rousseau and, later, Paine, Jefferson, and Franklin.

[FN139]. Litowitz, supra note 132, at 525.

[FN140]. See Richard Mitchell, Anthony O'Donnell, & Ian Ramsay, Shareholder Value and Employee Interests: Intersections between Corporate Governance, Corporate Law and Labor Law, 23 Wis. Int'l L. J. 417, 424 (2005) (Stakeholder-centric reformers insist that "[c]orporate boards should be a deliberative forum, representing not solely shareholder interests, but also those interest groups among the company's stakeholders."); See also William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., The Great Takeover Debate: A Mediation on Bridging the Conceptual Divide, 69 U. Chi. L. Rev. 1067, 1077 (2002).

For example, Vice Chancellor Leo E. Strine, Jr., in a recent article that channels democratic political theory--and John Stuart Mill--posits that corporations should be governed as republics, where good governance depends both upon an enlightened electorate and an expert, well-meaning sovereign. See Leo E. Strine, Jr., One Fundamental Corporation Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?, 66 Bus. Law. 1, 5 and n. 13 (2010) [hereinafter Strine, Fundamental Question]; see also Leo E. Strine, Jr., Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America, 119 Harv. L. Rev. 1759, 1775-77 (2006); William B. Chandler III & Leo E. Strine, Jr., The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State, 152 U. Pa. L. Rev. 953, 999-01 (2003).

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[FN141]. Tsuk, supra note 48, at 182.

[FN142]. Id. at 181-82; Strine, Fundamental Question, supra note 140, at 9.

[FN143]. Tsuk, supra note 48, at 182 (Berle and Means made a "proclamation that the power of large economic organizations, as augmented by the separation of ownership and control, should be exercised to satisfy the demands of the community. Corporate power was a power in trust for society.")

[FN144]. Jill E. Fisch, Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 J. Corp. L. 637, 661 (2006). The author notes, and this author agrees, that this problem is often overstated. The existence of guidelines for SRI and CSR prove the point. A discussion of SRI and CSR is provided supra.

[FN145]. Alan J. Meese, The Team Production Theory of Corporate Law: A Critical Assessment, 43 Wm. & Mary L. Rev. 1629, 1630-31 (2002) ("In the past two decades, a consensus of sorts has emerged about the economic function of the public corporation and the state laws that enable its formation. According to this dominant account, enterprises choose the corporate form over other types of business organization to realize the gains produced by the separation of ownership from control").

While often described in term like "original" or "traditional," it is plausible that the principal-agent theory of the corporation did not arise until the law and economics movement of the 1980s, when, it is argued, scholars reinterpreted Berle and Means' famous work. See Tsuk, supra note 48, at 211.

[FN146]. William W. Bratton, Welfare, Dialectic, and Mediation in Corporate Law, 2 Berkeley Bus. L.J. 59, 67 (2005).

[FN147]. See, e.g., id.

[FN148]. Modern-day agency theory also describes agency costs (conflicts of interest) associated with other corporate constituents. See Reinier R. Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach (Reinier R. Kraakman et al. eds., 2d ed. 2009). Nevertheless, the theory still focuses on the agency costs arising between shareholders and managers. See Beate Sjåfjell, The Core of Corporate Governance: Implications of the Takeover Directive for Corporate Governance in Europe (Univ. Coll. Dublin Law, Criminology & Socio-Legal Studies, Working Paper No. 27, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598298.

[FN149]. Dinh, surpa note 3, at 986 (quoting Modern Corporation, supra note 36, at 8).

[FN150]. See, e.g., Theodor Baums & Kenneth E. Scott, Taking Shareholder Protection Seriously? Corporate Governance in the U.S. and Germany 3 (European Corp. Governance Inst., Working Paper No. 17, 2003), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=473185). ("[E]quity investors may be taken advantage of in a number of ways. Those in control of the firm-- who may be its managers or its largest shareholders--may find ways to appropriate corporate assets and income for themselves .... Or those in control may waste corporate resources ... through poor managerial investment and operating decisions").

[FN151]. See Meese, supra note 145, at 1637; Tsuk, supra note 48, at 180 (referring to Berle & Means' famous treatise, the author notes that "[l]egal scholars turn to the book's exegesis of the phenomenon of the separation of ownership from control to justify the shareholder-centered vision of managerial duties, most famously expressed by Milton Friedman, according to which corporate managers are agents of shareholders and must manage the

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corporation in ways that maximize the profits of their principals, to the exclusion of the interests of other corporate constituencies or the community at large."); Klaus J. Hopt, Modern Company and Capital Markets Problems: Improving European Corporate Governance After Enron 453 (European Corp. Governance Inst. Law Working Paper No. 05/2002, 2007), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=356102 ("In public companies, centralized management by the board is the rule. It serves shareholders best, provided that the board is efficient, loyal and competent.").

[FN152]. See Tsuk, supra note 48, at 202 (describing how the popular theory of private property transformed it into natural right or basic human entitlement that must be protected against abusive government power, and how this view arguably translated into a shareholder right to corporate profits).

[FN153]. It is, of course, difficult to determine when wealth is maximized. See Bratton, supra note 146, at 65.

[FN154]. See Meese, supra note 145, 1631 (the author, in conformity with a nexus of contracts theory, goes on to observe that "[b]ecause [shareholders] hold an exclusive property right in the firm's residual, it is said, shareholders will internalize the costs and benefits of the firm's actions." The author later notes that, under this theory, "shareholders employ directors to oversee managers, and both are duty-bound to deploy the firm's resources in a manner that maximizes shareholder welfare."). Id. at 1639.

[FN155]. See Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 442 (2001) ("Of course, asserting the primacy of shareholder interests in corporate law does not imply that the interests of corporate stakeholders must or should go unprotected. It merely indicates that the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies--or at least all constituencies other than creditors--lie outside of corporate law. For workers, this includes the law of labor contracting, pension law, health and safety law, and antidiscrimination law. For consumers, it includes product safety regulation, warranty law, tort law governing product liability, antitrust law, and mandatory disclosure of product contents and characteristics. For the public at large, it includes environmental law and the law of nuisance and mass torts."); Stephen M. Bainbridge, The Case for Limited Shareholder Voting Rights, 53 UCLA. L. Rev. 601, 614-15 (2006) (workers are protected by the labor market, collective bargaining, severance pay, etc.).

[FN156]. It could easily be argued, of course, that such "market mechanisms" also exist to protect shareholders, e.g., incentive-based executive pay (stock options), the market for corporate control, and the "Wall Street walk."

[FN157]. Meese, supra note 145, at 1655.

[FN158]. Id.

[FN159]. Mitchell et al., supra note 140, at 429.

[FN160]. Meese, supra note 145, at 1656.

[FN161]. See, e.g., Litowitz, supra note 132, at 502 (Corporate law serves to mediate, i.e., paper-over, "smoldering contradictions in American culture and by lending a veneer of legitimacy to the structural inequalities of the marketplace.").

[FN162]. See, e.g., Mitchell et al., supra note 140, at 432.

[FN163]. Margaret M. Blair & Lynn A. Stout, Specific Investment: Explaining Anomalies in Corporate Law, 31

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J. Corp. L. 719, at 722 (2005).

[FN164]. A conservative political movement, coinciding with the Reagan administration, coupled with a new neoclassical economic consensus among American academia. See Tsuk, supra note 48, at 209-11.

[FN165]. E.g., id. at 209-10; Dinh, supra note 3, at 985 ("contractarians view the corporation as a conceptual and legal fiction--shorthand for the bundle of contracts that define the rights and obligations of those who participate in the economic enterprise.").

[FN166]. E.g., Baums & Scott, supra note 150, at 3 ("[S]takeholders (managers, employees, customers, suppliers, lenders) have as their primary concern their individual transactions with the firm, which are usually well defined and enforced through contract law; normally they do not, and need not, depend on the institutions of corporate governance."). For example, workers would be adequately protected through private and collective bargaining. Dinh, supra note 3, at 977. Indeed, even labor law academics focused on exogenous labor laws and ignored worker protections via endogenous corporate laws. Id.

[FN167]. Dinh, supra note 3, at 985. The cavalier indifference of "tortious externalities and insistence of contract as the means of engagement by outsiders are tolerated only because outside regulation makes significant adjustments to ameliorate "them." Bratton, supra note 146, at 72. Therefore, "the system is fully defensible in theory only on the assumption that the backstop regulations adequately protect the public interest." Id.

[FN168]. See generally, e.g., Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 212 (1991).

[FN169]. A residual claim is poorly defined, and does not lend itself to easy enforcement via contract law. The claim is to whatever is left over after all prior claims are paid, including lenders' interest, employee wages, supplier invoices and taxes. E.g., Baums & Scott, supra note 150, at 2; Dinh, supra note 3, at 987 (residual claimant is one "who receives profits of the enterprise or bears its losses after expenses are paid from revenues.").

[FN170]. See, e.g., Meese, supra note 145, at 1641.

[FN171]. E.g., Dinh, supra note 3, at 987 ("Residual claimants have the greatest incentive to maximize net returns to the corporate enterprise and thus should be given the control rights to do so.").

[FN172]. Dinh, supra note 3, at 987.

[FN173]. Baums & Scott, supra note 150, at 3 ("Social welfare in a competitive environment is served by maximizing firm value, thereby in general advancing economic efficiency and increasing social wealth."). Of course, "[t]here is no indication ... of the extent to which the delivery of shareholder value might involve enhancing the welfare of other corporate stakeholders." Mitchell et al., supra note 140, at 429. This assumption, moreover, erroneously assumes that social welfare is always maximized if firm value is increased. Successful firms may create negative externalities, e.g., pollution and anticompetitive monopolistic conduct. Fisch, supra note 144, at 660.

[FN174]. See, e.g., Anderson & Gupta, supra note 127, at 13 (using Tobin's Q, a ratio of market and book value of assets, where market value of assets is the sum of the book value of assets and market value of equity, less the book value of equity and deferred taxes). The use of share price as a proxy for firm wealth is not without its critics. See Fisch, supra note 144, at 643. For example, stock prices will reflect bubbles manipulative accounting

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devices meant to artificially inflate the price. Id. at 672-73. This method became popular, however, because of the inherent difficulty in measuring firm value. Id. at 672; see also Stephen M. Bainbridge, Unocal at 20: Director Primacy in Corporate Takeovers, 31 Del. J. Corp. L. 769, 822 (2006) (share price could depress not because of mismanagement, but because of exogenous shocks).

[FN175]. Dinh, supra note 3, at 985.

[FN176]. Tsuk, supra note 48, at 210-11; See, e.g., Mitchell et al., supra note 140, at 424; Fisch, supra note 144, at 639.

[FN177]. E.g., Dinh, supra note 3, at 988 ("Within the contractarian framework, residual claimants are simply those parties to the corporate contract who have agreed to receive residual profits of the enterprise or to bear its losses.... [T]hose who contract for the residual risk are contributors of equity capital, but they need not be."); See, e.g., Mitchell et al., supra note 140, at 427-28; See, e.g., Columbo, supra note 77 at 257; See, e.g., Fisch, supra note 144, at 657.

[FN178]. See, e.g., Dinh, supra note 3, at 992; Mitchell et al., supra note 140, at 459-60 ("[F]rom a labor law perspective, to conceive of employment contracts as basically the same as other commercial contracts is a fundamental misunderstanding. They are not 'spot' contracts .... Employers are usually uncertain at the time of the formation of an open-ended employment contract about the precise nature, quantity, intensity, and timing of particular types of work required by the business. As a result, employment contracts are largely incomplete or open ended .... [M]anagement [retains] considerable discretion to direct labor as it sees fit ... [therefore] shareholders are clearly not the only corporate stakeholder whose contractual relations with the company are so incomplete as to require a supplemental governance structure or other regulatory safeguards"). See also Fisch, supra note 144, at 659 (the assumption that stakeholders are adequately protected by contract is deficient. Their contracts are incomplete, illiquid and imperfectly priced, and employees lack hedging mechanisms, like insurance, to protect against risk). The team theory of the corporation, discussed infra, explores this concept further.

[FN179]. Mitchell et al., supra note 140, at 462.

[FN180]. Fisch, supra note 144, at 644.

[FN181]. Eg., Dinh, supra note 3, at 992 (the author also queries "[u]nder what circumstances is codetermination a preferable mechanism to compensate employees for their investment in the corporation?").

[FN182]. See Bainbridge, supra note 155, at 601 (The "director primacy-based system of U.S. corporate governance has served investors and society well. This record of success occurred not in spite of the separation of ownership and control, but because of that separation."); Id. at 606-08 (because efficient participatory democracy requires all decisionmakers to have equal information, and because, in reality, corporate stakeholders do not have equal information, the director-primacy model is an efficient solution); Bainbridge, supra note 174, at 779-81 (because of the incompleteness of contracts, corporate governance by fiat by a board of directors reduces transaction costs).

[FN183]. Bainbridge, supra note 155, at 603.

[FN184]. Christopher M. Bruner, Power and Purpose in the 'Anglo-American' Corporation, 50 Va. J. Int'l L. 579, 601 (2010) (referring to the work of Prof. Stephen Bainbridge).

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[FN185]. Mitchell et al., supra note 140, at 427; Bainbridge, supra note 155, at 624.

[FN186]. Bratton, supra note 146, at 65.

[FN187]. Id. at 68-69.

[FN188]. See, e.g., Greenfield, supra note 88, at 8-9. However, it is argued that is origins began in the 1930s, during the famous debate between Merrick Dodd and Adolf Berle. Fisch, supra note 144, at 647.

[FN189]. Fisch, supra note 144, at 637 (The shareholder primacy norm defines the objective of the corporation as the maximization of shareholder wealth.).

[FN190]. See generally, e.g., Hansmann & Kraakman, supra note 155; Easterbrook & Fischel, supra note 168; Julian Velasco, Shareholder Ownership and Primacy, 2010 U. Ill. L. Rev. 897 (2010); Fisch, supra note 144, at 648-49 (also noting that the notion of “ownership” is a powerful rhetorical device that supports the theory).

[FN191]. See, e.g., Meese, supra note 145, at 1669.

[FN192]. Owen, et al., supra note 16, at 6; see also Allen et al., supra note 140, at 1075.

[FN193]. Owen, et al., supra note 16, at 18-19.

[FN194]. Id. at 21; Mitchell et al., supra note 140, at 431 (equity market pressures and the market for corporate control will “enhance shareholder value in the short-term” but will also “tend to focus on the reduction of labor costs” because, for example, “corporate raiders often recoup the high cost of high takeover premiums through subsequent downsizing.”); Greenfield, supra note 88, at 10; Strine, Fundamental Question, supra note 140, at 10.

[FN195]. Owen et al., supra note 16, at 21-22.

[FN196]. See Columbo, supra note 77, at 269 (realistically, shareholders do not seek profit at all costs).

[FN197]. Mitchell et al., supra note 140, at 431.

[FN198]. This theory is traditionally attributed to corporate law scholars Margaret Blair and Lynn Stout, although their theories derive from earlier work by economic scholars like Oliver Hart. See Blair & Stout, supra note 163, at 735.

[FN199]. Incorporated business entities allow investors, equity and nonequity, to contribute their resources irretrievably. This model is good for industries with high sunk costs, where each individual asset is worth less than all contributors' assets combined together. Lynn A. Stout, On the Nature of Corporations, 2005 U. Ill. L. R. 253, 254-55 (2005).

[FN200]. Blair & Stout, supra note 163, at 735-36.

[FN201]. Stout, supra note 199, at 261.

[FN202]. Blair & Stout, supra note 163, at 737.

[FN203]. Id.

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[FN204]. Stout, supra note 199, at 265.

[FN205]. Meese, supra note 145, at 1667.

[FN206]. Blair & Stout, supra note 163, at 728.

[FN207]. See Steven H. Kropp, Corporate Governance, Executive Compensation, Corporate Performance, and Worker Rights in Bankruptcy: Some Lessons form Game Theory, 57 DePaul L. Rev. 1, 42 (2007) (when a firm fails, employees lose their jobs and their pensions).

[FN208]. Dinh, supra note 3, at 992.

[FN209]. See Blair & Stout, supra note 163, at 729.

[FN210]. Id.

[FN211]. See, e.g., Dinh, supra note 3, at 990 (the theory "relies on heroic levels of faithfulness to fiduciary duties among corporate directors ... [it] leads to the obvious question of who is watching the watchers"). Proponents of the theory counter that normative ethical guidelines and legal sanctions may adequately curtail the bad behavior of mediating hierarchs, as they do the bad behavior of any social actor. Id.

[FN212]. See Meese, supra note 145, 1635 ("a mediating hierarch approach would undermine the shareholders' role as the primary monitors of firm activity and thus severely attenuate the incentives of directors to maximize anything other than their own welfare"). The author goes on to argue that managers in shareholder-oriented models have every incentive to encourage team-specific investment by curbing against opportunism, because such investment increases shareholder wealth. Id. at 1636. See also id. at 1665-66 (Blair and Stout "have failed to describe any plausible mechanism that will encourage directors who act as mediating hierarchs to pursue their duties in a conscientious manner. Such hierarchs would not hold residual claims; nor would they be legally accountable to anyone who does. Moreover, Blair and Stout have not identified any legal or market mechanisms that cause mediating hierarchs to maximize the welfare of the team. Indeed, as Blair and Stout see things, the greatest virtue possessed by such hierarchs is their independence from any such influence.").

[FN213]. See Meese, supra note 145, at 1641, 1669 ("there is no need to monitor the monitor if he or she possesses a property right to the team's residual product and can sell that right and associated control if necessary to someone who is able to do a better job. In these circumstances, it might be said, the monitor will take care of itself."). Of course, while mediating hierarchs may be susceptible to opportunism on all fronts, they, without being beholden to shareholders' residual claims, are free to distribute profits to other corporate stakeholders. Moreover, legal mechanisms--like a director's traditional fiduciary duties of care and loyalty--could be used to encourage mediating hierarchs to maximize team value.

[FN214]. Id. at 1667 ("because no constituency would be entitled to any particular share of the residual, none would have the incentive or the ability to monitor directors' actions as they related to the joint product of the entire team. Because the fruits of this monitoring would become common property, no constituency could capture more than a fraction of the benefits of such monitoring, and efforts to produce such monitoring would be beset by free riding."). The author goes on to describe potential credibility problems: corporate constituents would have no reason to believe that managers would even seek maximization of team wealth. Id. at 1668.

[FN215]. See id.

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[FN216]. Blair & Stout, supra note 163, at 726.

[FN217]. Id.

[FN218]. See Luis A. Aguilar, Comm'r, S.E.C., Address at the SAIS Center for Transatlantic Studies, Diversity in the Boardroom is Important and, Unfortunately, Still Rare (Sept. 16, 2010), available at http://www.sec.gov/news/speech/2010/spch091610laa.htm.

[FN219]. For example, in 2007, the top 1% of American earners received 23.5% of the nation's pretax income, up from less than 9% in 1976. At the same time, the median income for working householders went down and the poverty rate rose. Frank Rich, Who Will Stand Up to the Superrich?, N.Y. Times, Nov. 14, 2010, http://www.nytimes.com/2010/11/14/opinion/14rich.html?hp.

[FN220]. See Bruner, supra note 184, at 600 (the amount of discretion afforded directors under the team theory allows them to ignore stakeholder interests, regardless of any social costs).

[FN221]. See, e.g., Del. Code. Ann. 8 § 141 (West 2010) (board of directors has original, undelegated power to manage the corporation, including decisions to relocate factories and offices abroad, to cut benefits, to layoff workers, etc.). Moreover, the "business judgment rule," a judicially created standard of review for board behavior, protects directors from liability arising from their decisions unless such decisions create a clear conflict of interest with shareholders or are the result of gross negligence. Combined with their statutory authority, the business judgment rule allows boards of directors to manage American public companies as they see fit. See, e.g., Baums & Scott, supra note 150, at 6. The demand requirement, moreover, requires shareholder to either ask the board to sue itself first or explain why the board lacks the requisite independence to make such a determination. E.g., Fed. R. Civ. P. 23.1; Ch. Ct. R. 23.1; Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993). The demand requirement, therefore, significantly limits shareholder power to police management through litigation. See, e.g., Baums & Scott, supra note 150, at 9.

[FN222]. See, e.g., Baums & Scott, supra note 150, at 1 (The Delaware Supreme Court "has constructed an elaborate theology of deference to board decisions, with but casual regard to maximizing shareholder welfare."); see also, e.g., Francis X. Pileggi, Corporate Social Responsibility and Shareholder Primacy--Delaware and Taiwan, Del. Corp. & Com. Litig. Blog (Dec. 5, 2010), http://www.delawarelitigation.com ("Justice Holland [of the Delaware Supreme Court] noted [during a conference between jurists of Delaware and Taiwan] that [stakeholder-friendly theories] emerged as the winner of [the shareholder primacy debate] as supported by Delaware's judicial decisions which differentiate between three different scenarios: (i) the day-to-day operations of a corporation; (ii) the hostile takeover situation and (iii) and the sale of the corporation. In the day-to-day operations, Delaware corporate law (and in particular the business judgment rule) allows directors to make decisions deviating from short-term profit maximization and redirect some resources from shareholders to other stakeholders. In the hostile takeover situation, under Unocal, in analyzing the effect of an imminent takeover on the "corporate enterprise," directors may consider the "impact on constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally").).

[FN223]. For example, for workers subject to substandard working conditions at the hands of a multinational enterprise, the problem is not management underperforming, but over-performing--reaping too many profits for shareholders, at the expense of workers. See Branson, supra note 8, at 361.

[FN224]. Fisch, supra note 144, at 650-53; Baums & Scott, supra note 150, at 1 (citing L. Bebchuk & A. Ferrell,

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Federalism and Corporate Law: The Race to Protect Managers from Takeovers," 99 Colum L. Rev. 1168 (1999)
); Baums & Scott, supra note 150, at 11 ("the board should see itself as 'balancing' the interests of everyone significantly affected by the firm's actions").

[FN225]. For example, so-called "entrenchment devices," e.g., poison pills and shareholder rights plans, which protect boards from the "market for corporate control," are often justified in terms of their benefit to the long-term viability of the corporation itself, including all of its stakeholders. See, e.g., Höpner, supra note 12, at 18 ("[C]orporations in systems enabling hostile takeovers pay more value added to their shareholders, pay less value added as wages and are less growth-oriented.").

It should be noted that such discretion is not afforded boards of directors in the U.K., which has a similar corporate governance regime. Some scholars explain this difference by the existence of greater exogenous protections to stakeholder interests that already exist, i.e., more social safety net programs like unemployment benefits and free universal healthcare. This phenomenon is discussed in greater detail infra.

[FN226]. Backer, supra note 1, at 296-97 ("Corporate boards were permitted some flexibility.... First, corporations were permitted to distribute corporate property for charitable or other eleemosynary purposes within certain clearly defined limits. Second, corporate boards of directors were given some flexibility when they sought to serve other constituencies, to the extent that such service was consonant with their primary missions. After the merger manias of the 1970s and 1980s, such flexibility was sometimes memorialized in so-called "other constituency" statutes."); Baums & Strauss, supra note 150, at 1 (more than half the states have adopted "stakeholder statutes" that allow boards to take into consideration a variety of non-stockholder interests); Id. at 11. See, e.g., 15 Pa. Cons. Stat. Ann. § 511(d) (West 2005).

[FN227]. Allen et al., supra note 140, at 1084 (it should be noted that this essay was authored by three of Delaware's most eminent jurists, hailing from the State Supreme Court and the Delaware Court of Chancery).

[FN228]. Id. at 1084. The authors go on to query "[w]hy should the corporate governance system be structured to allow the equity holders' interests to prevail at the expense of other constituencies when the directors who were elected by the stockholders themselves do not believe that the stockholders' preferred outcome is desirable?" Id.

[FN229]. Fisch, supra note 144, at 650. See also Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173, 176 (Del. 1986) (While "concern for various corporate constituencies is proper when addressing a takeover threat, that that principle is limited by the requirement that there be some rationally related benefit accruing to the shareholders.").

[FN230]. See, e.g., Del. Code. Ann. 8 § 144, (West 2010); Fleiger v. Lawrence, 361 A.2d 218, 221 (Del. 1976); Marciano v. Nakash, 535 A.2d 400, 403-04 (Del. 1987).

[FN231]. This tendency is enhanced by incentive compensation schemes, e.g., those that distribute stock options that align director interests with shareholder interests. It is argued, moreover, that such schemes render directors too focused on short term shareholder profits, thereby encouraging them to take risky--and sometimes fraudulent--steps.

[FN232]. In sales of corporate control, directors face an inherent conflict: they risk losing their jobs should the new shareholders elect different directors. Accordingly, Delaware courts subject such transactions to heightened scrutiny. See generally Unocal Corp. v. Mesa Petroleium Co., 493 A.2d 946 (Del. 1985); see also Unitrin, Inc. v.

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American General Corp., 651 A.2d 1361 (Del. 1995).

[FN233]. See Unitrin, 651 A.2d at 1390-91 (entrenchment devices only available to protect shareholders if Board determines that tender offer is inadequate).

[FN234]. Revlon, 506 A.2d at 184. This duty to maximize share value, however, is not triggered unless the Board determines to sell a controlling block of shares and not, for example, on the open market. Id. Moreover, in sale of control transactions, when directors have a specific fiduciary duty to maximize shareholder wealth, they can exercise their discretion to sell control for a lower price if doing so presents less of a business risk. See In re Cogent, Inc. S'holder Litig., 7 A.3d 487, 516 (Del. Ch. 2010) (upholding a board of directors determination to reject a competing tender offer with a higher price because of the contingent nature of the competing offer); In re Lear Corp. S'holder Litig., 926 A.2d 94, 118-19 (Del. Ch. 2007) (board allowed to select a lower price because of bidder's iconic status and the length of time the company had been on the auction block). It is easy to imagine a situation where a board justifies protection of stakeholders as a lesser "business risk" than alternative decisions. See also Bainbridge, supra note 174, at 802 (in Revlon, the directors were not required to focus only on share price, but could also consider tax, regulatory, financing, and timing issues).

[FN235]. See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Unitrin, Inc. v. America General Corp., 651 A.2d 1361 (Del. 1995).

[FN236]. Fisch, supra note 144, at 653.

[FN237]. Bruner, supra note 184, at 602; Bainbridge, supra note 155, at 602 (citing Blasius Indus. Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988)).

[FN238]. See, e.g., Bruner, supra note 184, at 594-99 (Delaware corporate law takes an ambiguous approach to shareholder and stakeholder interests, reflected in, for example, policies that allow directors to block tender offers in order to defend corporate policy). Moreover, "Delaware has long adhered to the view that management owes fiduciary duties of care and loyalty 'to the corporation and its stockholders' simultaneously, a formulation reflecting a studied ambiguity regarding whose interests should prevail when push comes to shove." Id. at 598. See also Allen et al., supra note 140, at 1067, 1072-73; see generally Bainbridge, supra note 174.

Many commentators argue that Delaware law favors managers and directors over shareholders by giving them undelegated discretion to manage the affairs of the corporation according to their business judgment. Recently, Delaware courts have also impeded shareholders' ability to amend corporate bylaws or to otherwise affect corporate policy. See CA, Inc. v. AFSCME Emp. Pension Plan, 953 A.2d 227, 238-39 (Del. 2008). Nevertheless, Delaware law does give some rights and protections to shareholders; it gives none to other corporate constituencies. See Revlon, 506 A.2d at 182.

[FN239]. See Fisch, supra note 144, at 653 (Delaware rejects fiduciary duties to non-shareholder stakeholders).

[FN240]. Id.

[FN241]. See Strine, supra note 96, at 16.

[FN242]. E.g., Baums & Scott, supra note 150, at 8; see Securities Act of 1933 (the "1933 Act" or "Securities Act"), 15 U.S.C. §§ 77(k), 77(l)(a)(1) thru (2) (2006); see The Securities and Exchange Act of 1934 ("1934 Act" or "Exchange Act"), 15 U.S.C. § 78 (2006); see Rule 10b-5, 17 C.F.R. § 240.10b-5 (2010); see 17 C.F.R. §

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240.14A-9 (2010); see also Cort v. Ash, 422 U.S. 66, 78 (1975) (implied right of action).

[FN243]. The 1933 Act regulates disclosure requirements for prospectuses, issued in conjunction with initial public offerings. The 1934 Act regulates disclosures in the secondary market. Both the 1933 Act and 1934 Acts regulate misstatements, manipulations and fraud in conjunction with such disclosures. See, e.g., Baums & Scott, supra note 150, at 7.

[FN244]. See, e.g., id. at 8. The 1933 Act creates explicit private rights of action for misstatements; courts have inferred such rights of action in the ‘34 Act (from Section 10(b) and Rule 10b-5).

[FN245]. E.g., Luca Enriques & Paolo Volpin, Corporate Governance Reforms in Continental Europe, 21 J. of Econ. Perspectives 117, 127 (Winter 2007).

[FN246]. E.g., Baums & Scott, supra note 150, at 7-8.

[FN247]. E.g., Smith, supra note 71, at 190-07.

[FN248]. See generally, Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 8 (5th ed. 2004); Louis D. Brandeis, Other People's Money and How the Bankers Use It 62 (2d ed. 1933) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”); S. Rep. No. 73-47 at 1 (1933) (“The purpose of this bill is to protect the investing public.... The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; ... to restore the confidence of the prospective investor in his ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.”).

[FN249]. See Strine, supra note 96, at 16,

[FN250]. See generally Rule 14a-8, 17 C.F.R. § 240.14a-8 (2008); Smith, supra note 71, at 207-08.

[FN251]. See, e.g., Bainbridge, supra note 155, at 603.

[FN252]. See id.

[FN253]. NYSE Rule 452 (2010).

[FN254]. See, supra note 155, at 603 (describing such reforms before promulgated by the SEC). By allowing certain shareholders access to corporate proxy materials, the costs of waging a proxy campaign are significantly diminished.

[FN255]. Dodd-Frank Act, Pub. L. No. 111-203, § 951 (requiring (1) a non-binding shareholder vote on executive compensation, (2) a non-binding vote on the frequency of the say-on-pay vote, (3) disclosure of “golden parachute” arrangements in connection with specified change in control transactions, and (4) a nonbinding shareholder vote on golden parachute arrangements in connection with these change in control transactions).

[FN256]. See Andrew K. Prevost, Ramesh P. Rao & Melissa A. Williams, Labor Unions as Shareholder Activists: Champions or Detractors? 17 (Ohio University, Working Paper Feb. 9, 2009), available at ht-

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tp://ssrn.com/abstract=1119328.

[FN257]. See Mitchell et al., supra note 140, at 427.

[FN258]. Assuming, of course, that Delaware and other state corporate law allows them to do so. See CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 239-40 (Del. 2008). Here, the Delaware Supreme Court held that a stockholder proposed bylaw that would require the company to reimburse a stockholder's reasonable proxy expenses in event that the stockholder succeeded in having at leastone director elected pursuant to a proposed short slate would violate Delaware law. Id. But Amendments to Rule 14a-8 of the 1934 Act would allow shareholders to include in a company's proxy materials a proposal to amend the company's bylaws to provide for proxy access, arguably usurping state law. Dodd-Frank Act, Pub. L. No. 111-203, § 971.

[FN259]. Tsuk, supra note 22, at 1861 ("American corporate law ignores workers. They don't figure into the structure of the corporation or its legal duties."). It is argued that stakeholder concerns are better protected by exogenous legislation rather than by endogenous corporate governance laws: "it is not clear why and how a firm can serve society better by introducing a new set of social and environmental goals (which are not determined in a political process and do not necessarily reflect the will of society as a whole) rather than by maximising profits within the normal framework of laws and norms"). However, in an environment where exogenous regulation is difficult to implement and to enforce, i.e., one of regulatory arbitrate, the argument holds less water.

[FN260]. In contrast, the notion of "industrial citizenship," whereby employees have managerial rights in the corporate enterprise, is inherent in European company laws. See, e.g., Krešimir Piršl, Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s), 14 Colum. J. Eur. L. 277, 323-24 (2008).

[FN261]. See, e.g., Branson, supra note 8, at 352-55 (the growing irrelevancy and impotency of the nation-state, economic imperialism and regulatory arbitrate lead to environmental degradation and plantation production); Strine, supra note 96, at 9 ("The hurly-burly of capitalism has globalized. But something else has not." Mainly, protections for stakeholders.).

[FN262]. See Bratton, supra note 153, at 72 ("[T]he system is fully defensible in theory only on the assumption that the backstop regulations adequately protect the public interest.").

[FN263]. Dinh, supra note 3, at 984. The author further observes that "[o]ur national labor policy is focused on providing parity in bargaining power by facilitating collective bargaining by unions in order to offset the collective action problem inherent in coordinating employee interests. The structural relationship between shareholders and managers on the one hand, and labor on the other, contemplate arms length dealing, if not outright conflict, as opposed to the comparatively cooperative relationship among the three groups under the German approach." Id. (internal quote omitted). The German approached is address infra.

[FN264]. See Dinh, supra note 3, at 992.

[FN265]. Id. at 977.

[FN266]. Mitchell et al., supra note 140, at 418.

[FN267]. O'Melinn, supra note 20, at 257.

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[FN268]. See, e.g., Branson, supra note 8, at 352.

[FN269]. Id.

[FN270]. See, e.g., James Salzman, Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development, 21 Mich. J. Int'l L. 769, 771-72 (2000).

[FN271]. Bantekas, supra note 1, at 315 ("MNEs substantially outstrip LDCs in financial and technological terms, and as a result ... they are able to influence the policy and practice of LDCs."); Branson, supra note 8, at 131-32; see James Harrison, Human Rights and Transnational Corporations: Can More Meaningful International Obligations be Established?, in International Law, Economic Globalisation and Developing Countries 2-3 (Edward Elgar ed., 2010).

[FN272]. See history discussion, supra.

[FN273]. Ward, supra note 1, at 819; see also Strine, supra note 96, at 9-10.

[FN274]. Berle and Means, of course, assumed that large and powerful corporations operated, by and large, subject to the dictates of a single nation-state which, in theory, possesses sufficient power to regulate should it desire to do so. Branson, supra note 8, at 356.

[FN275]. For example, the various human rights treaties emanating from the United Nations, the 1998 International Labor Organization on Fundamental Principles and Rights at Work; and United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights (resulting in a nonbinding guidelines commonly known as the "Ruggie Framework").

[FN276]. See, e.g., Jürgen Odenius, Germany's Corporate Governance Reforms: Has the System Become Flexible Enough? 3 (IMF, Working Paper WP/08/179 2008) ("Corporate governance in Anglo-Saxon countries aims to maximize shareholder value, while in many other countries, including in Europe and Asia, it continues to target stakeholder value.").

[FN277]. See, e.g., David Jolly, German Business Confidence Jumps, N.Y. Times, Nov. 24, 2010, http://www.nytimes.com/2010/11/25/business/global/25euecon.html?_r=1&ref=business (the German economy is driving the financial crisis recovery in the Euro Zone, surpassing the U.K., in growth and exports).

[FN278]. See Eric Nowack, Recent Developments in German Capital Markets and Corporate Governance, 14 J. Applied Corp. Fin. 35, 35 (2001) ("[E]conomists continue to point to Germany as a relatively successful model of a bank-centered economy.").

[FN279]. See Odenius, supra note 276, at 3 ("The stakeholder--and shareholder--oriented corporate governance systems are deeply rooted in countries' distinct traditions and ownership structures.").

[FN280]. See Jacoby, supra note 9, at 13.

[FN281]. See Armour et al., supra note 13, at 2. More precisely, the "legal origins" theory of corporate governance postulates that different legal systems influenced the creation of different kinds of financial and capital markets. See generally La Porta, Lopez-de-Silanes, Shleifer and Vishny, Law and Finance, 106 J. Pol. Econ. 1113 (1998). For example, La Porta et al. explain the existence financial systems characterized by large share-

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holder blocks and debt based finance by pointing to a lack of minority shareholder protections and voting rights. La Porta, Lopez-de-Silanes, Shleifer and Vishny, Law and Finance, 106 J. Pol. Econ. 1113, 1117 (1998).

[FN282]. Owen et al., supra note 16, at 13.

[FN283]. See id. ("[g]iven these different histories, it is not surprising that only partial convergence has taken place between national corporate governance systems").

[FN284]. Harald Baum, Change of Governance in Historic Perspective: The German Experience 5, (Max Planck Institute for Private Law and the European Corporate Governance Institute, Law Working Paper No. 28, Mar. 2005).

[FN285]. Id.

[FN286]. Nowack, supra note 278, at 35.

[FN287]. Eric Nowak, Investor Protection and Capital Market Regulation in Germany, in The German Financial System 426 (Jan Pieter Krahnen & Reinhard H. Schmidt eds., Oxford 2004) (also noting that from 1905 to 1914, Germany had 300 initial public offerings ("IPOs")); see also Nowack, supra note 278, at 35 ("Although there are now only about 750 companies listed on German stock exchanges, in 1914 there were almost 1200 (as compared to only about 600 stocks listed on the New York Stock Exchange.").

[FN288]. Owen et al., supra note 16, at 12 (also noting that the number of publicly quoted companies were similar in the U.K. and Germany before the First World War).

[FN289]. See Jose M. Magone, Contemporary European Politics: A Comparative Introduction, 47 (2011).

[FN290]. Baum, supra note 284, at 6; Shawn Donnelly, The Public Interest and the Company in Germany, in The Political Economy of the Company 85 (John Parkinson, Andrew Gamble & Gavin Kelly, eds., Oxford 2000).

[FN291]. Jacoby, supra note 9, at 10.

[FN292]. Jacoby, supra note 9, at 10.

[FN293]. Donnelly, supra note 290, at 85.

[FN294]. Jacoby, supra note 9, at 10.

[FN295]. Dinh, supra note 3, at 980.

[FN296]. Donnelly, supra note 290, at 90.

[FN297]. John Maynard Keynes, for example, predicted that severe inflation and unfavorable treaty terms to Germany following the First World War would render Europe ripe for instability. See generally John Maynard Keynes, The Economic Consequences of the Peace (Harcourt Brace 1920).

[FN298]. Owen et al., supra note 16, at 12.

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[FN299]. An international body established in 1949 by the Allied powers to control coal and steel industries in post-war Germany. See, e.g., Amos Yoder, The Ruhr Authority and the German Problem, 17 The Review of Politics 345-58 (Jul. 1955). It was later abolished by the Treaty of Paris, which substituted the regulatory authority the European Coal and Steel Community, a precursor to the modern-day European Union.

[FN300]. Zumbansen & Saam, supra note 129, at 9.

[FN301]. See Zumbansen & Saam, supra note 129, 13.

[FN302]. Donnelly, supra note 290, at 91.

[FN303]. Owen et al., supra note 16, at 12.

[FN304]. Odenius, supra note 276, at 7 ("The elevated role of lenders is a reflection of the continued heavy, albeit declining, reliance on bank financing over capital market financing.").

[FN305]. Owen et al., supra note 16, at 12; Baums & Scott, supra note 150, at 5.

[FN306]. "Harmonization" is "a rapprochement among state laws, in which those laws come to resemble each other within a federal system, while retaining their identity of state law. The objective of harmonization is not unification, but the achievement of a common rather than a single legal system .... As a result of the attempt to find common solutions, the harmonization process leads to the 'convergence' of national legal rules." Piršl, supra note 260, at 290.

[FN307]. For example, Article 56 of the Treaty of the European Community ("EC Treaty") guarantees the free movement of capital. Accordingly, EU countries are attempting to harmonize their laws and to remove restrictions that impeded capital flows. See Zumbansen & Saam, supra note 129, at i ("member states, the Commission, and the [International Court of Justice] have been finding themselves in an ongoing negotiation and contestation of historically grown company law regimes and the pressures of globalizing capital markets").

[FN308]. See, e.g., Nowak, supra note 278, at 40.

[FN309]. Nowak, supra note 287, at 427.

[FN310]. Owen et al., supra note 16, at 7 ("[i]nstitutional investors have long been dominant in the UK and US, and are becoming increasingly important in Continental Europe").

[FN311]. Nowak, supra note 287, at 427. However, following the corporate scandals of the early 2000s and the 2008 capital markets crisis, Germany, along with many other continental European countries, began to have second thoughts about the American model--especially when the "concept of shareholder value maximization did not fit easily with long-established habits and attitudes." Owen et al., supra note 16, at 6.

[FN312]. Donnelly, supra note 290, at 85.

[FN313]. See Jolly, supra note 277 (Germany leading the Euro Zone recovery and leads in European exports).

[FN314]. Nowak, supra note 287, at 425.

[FN315]. E.g., Baums & Scott, supra note 150, at 5.

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[FN316]. E.g., Enriques & Volpin, supra note 245, at 122 (A "controlling family is likely to commit more human capital to the firm and to care more about its long-run value." The authors also observe that can abuse their power to usurp corporate assets and opportunities for themselves, i.e., "self-dealing" or "tunneling."). At the same time, such financing is criticized as being unfriendly to start-ups, as it does not provide adequate venture capital. See also, e.g., Mitchell et al., supra note 14, at 419-20 ("Rhineland capitalism" based on "bank-based debt, intertwining debt and equity ownership, inter-corporate shareholders" encourages direct and long-term monitoring of corporate performance by capital providers and cooperative relations between employers and employees that have a long-term payoff.").

[FN317]. While their shares are listed on public exchanges, these companies do not resemble the typical diversified American public company. These firms often have controlling shareholders, and often those shareholders are not themselves public companies. Ekkehart Boehmer, Corporate Governance in Germany: Institutional Background and Empirical Results, in Corporate Governance and Economic Performance 3 (K. Gugler, ed., 2002. ("[S]everal listed firms are nested into a group structure that may involve several different types of companies, each subject to different requirements regarding disclosure and accounting. Without a sound understanding of each part of the group, it is difficult to appropriately value the listed corporation").

[FN318]. Dinh, supra note 3, at 982; Baums & Scott, supra note 150, at 5. For example, a study shows that of all listed public companies, 82% have a large blockholder controlling more than 25% of voting rights, and half of those have a holder holding more than 50% of equity. Likewise, only four percent of GmbH entities have dispersed ownership. Goergen, Manjon & Renneboog, Recent Developments in German Corporate Governance, 28 Int'l Rev. L. & Econ. 175, 177 (2008).

[FN319]. Boehmer, supra note 117, at 2.

[FN320]. See Baums & Scott, supra note 150, at 13.

[FN321]. This overlap leads to conflict of interest concerns familiar to students of U.S. corporate law, e.g., when setting executive compensation. Insider directors, it is moreover argued, do not have adequate motivation or incentive to police the wrongdoing or shirking of management.

[FN322]. E.g., Enriques & Volpin, supra note 245, at 128.

[FN323]. E.g., Smith, supra note 71, at 179; Baums & Scott, supra note 150, at 5.

[FN324]. Aktiengesetz [AtkG] [Corporate Law Code] § 105 (2010).

[FN325]. Baums & Scott, supra note 150, at 11.

[FN326]. Id.

[FN327]. Id. at 5. The supervisory boards serves as a rough equivalent to the U.S. "outside" directors and the managing board, the "insider" directors. Id. For example, the supervisory board will approve "material" related party transactions attempted by the management board. Id. at 6.

[FN328]. See, e.g., Smith, supra note 71, at 179.

[FN329]. Smith, supra note 71, at 179; Baums & Scott, supra note 150, at 2 (board tasked to promote the in-

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terests of the firm, not shareholders (Unternehmensinteresse).

[FN330]. Baums & Scott, supra note 150, at 5.

[FN331]. Dinh, supra note 3, at 982.; Baums & Scott, supra note 150, at 5.

[FN332]. Boehmer, supra note 317, at 2.

[FN333]. Baums & Scott, supra note 150, at 14.

[FN334]. Although some German corporations are widely diversified, they are few and far between. Most firms, even if publicly traded, are dominated by a single large blockholder. See discussion, supra note 316.

[FN335]. See, e.g., Höpner, supra note 12, at 9; Enriques & Volpin, supra note 245, at 117 (in Continental Europe, "few listed companies are widely held. Instead, the typical firm in stock exchanges around the world has a dominant shareholder, usually an individual or a family, who controls the majority of votes."). In Germany, recent studies show that only 50% of public corporations are widely held; ten percent are under family control, and 20% are controlled by a unitary pyramidal structure. In contrast, in the U.S., 80% of public corporations are widely held, and 20% are under family control. Even more of a contrast, 100% of public corporations in the U.K. are widely held. Enriques & Volpin, supra note 245, at 119.

[FN336]. Boehmer, supra note 317, at 11.

[FN337]. Id.

[FN338]. Id.

[FN339]. E.g., Enriques & Volpin, supra note 245, at 117 (pyramidal ownerships, shareholder agreements, dual classes of shares).

[FN340]. Boehmer, supra note 317, at 6.

[FN341]. As explained infra, changes in law and market pressures are transforming the role played by the German hausbank in German firm leadership.

[FN342]. Boehmer, supra note 317, at 7.

[FN343]. Höpner, supra note 12, at 7. It is argued that since coordinated market economies involved long-term investment decisions, financing must be long-term. To convince banks to invest long-term, they demand relatively higher monitoring powers.

[FN344]. Baums & Scott, supra note 150, at 5.

[FN345]. See discussion on costs, infra section c and e.

[FN346]. Jacoby, supra note 9, at 23.

[FN347]. Höpner, supra note 12, at 56; Enriques & Volpin, supra note 245, at 117 ("dominant shareholders have both the incentive and the power to discipline management."); Id. at 122 (family controlled firms in continental

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Europe generally have a better share price-to-asset replacement value ratio (i.e., Tobin's Q). These authors also note, however, that "concentrated ownership can create conditions for a new agency problem, because the interests of controlling and minority shareholders are not aligned." Id. at 117. This controlling shareholder agency problem is address briefly, infra.

[FN348]. Höpner, supra note 12, at 6.

[FN349]. See discussion supra pt. I.A.7.

[FN350]. Owen et al., supra note 16, at 12 (concentrated ownership "is one of the reasons why hostile takeovers have been so rare in both Germany and Continental Europe"); Odenius, supra note 276, at 13-14.

[FN351]. Nowak, supra note 287, at 441.

[FN352]. Id. at 443 (citing the Übernahmekodex [Takeover Code], a voluntary guideline that was introduced in 1995).

[FN353]. Boehmer, supra note 317, at 9-10.; Höpner, supra note 12, at 17 ("[c]ompanies with a high percentage of state, family or company ownership are sheltered from takeovers").

[FN354]. Nevertheless, some commentators argue that the product market disciplines management: a competitor will eat up a company's market share if management is shirking. Höpner, supra note 12, at 15. As a corollary, such discipline does not exist in sheltered sectors, where firms enjoy quasi-monopoly status. Id.

[FN355]. Some critics, for example, argue that the product market adequately disciplines management into good behavior. See discussion on product market competition infra.

[FN356]. Jacoby, supra note 9, at 19.

[FN357]. Anderson & Gupta, supra note 127, at 20.

[FN358]. Smith, supra note 71, at 180-81 (Noting that "[a] bank voting shares which it does not own may be more included to vote for the maintenance of the status quo especially if, as is often the case, the bank is represented on the supervisory board of the company in question and if such bank at the same time is a lender to the company.") (internal quotation omitted).

[FN359]. See id. at 159-60 (For example, "[i]nstitutional investors who hold large blocks of stock are less able to sell their shares on the open market and must take a more long-term view that may conflict with the interests of small shareholders, who can sell their stock at any time .... If institutional investors' exercise of influence over corporate governance rises to the level of 'control,' superseding the control exercised by management, then the principal-agent problem has merely been shifted from management to the institutional investor.").

[FN360]. See, e.g., Anderson & Gupta, supra note 127, at 10 ("banks are capable of acquiring information about firms and managers in a way that makes the need for open market disclosure of a firm's 'decision and control rights' less meaningful"). For example, banks, during due diligence leading up to a loan agreement, can access a firm's projections, ability to meet revenue targets, reliability of competence of its workforce. Such information is not available to minority investors. Id. at 20. "This continuing ability of the bank to extract, at will, non-public information from the borrower insulates the bank to some extent from the risk of expropriation by the owners,

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which in turn relegates the need for the firm to institute costly governance mechanisms." Id.

[FN361]. For example, "[i]t is widely known that decisions maximizing the value of loans often reduce the market value of equity. The same argument holds for fee-maximizing decisions. Therefore, the objective of the banks should be to balance decisions increasing the value of debt versus those increasing the value of equity. Given the substantially larger size of the debt portfolio, it is rational, legal, and fully ethical for banks to act as debtors in all respects." Boehmer, supra note 317, at 12; see also Höpner, supra note 12, at 11.

[FN362]. Boehmer, supra note 317, at 11-12; see also Smith, supra note 71, at 190 (as creditors, banks' interests may align more with management than outside shareholders).

[FN363]. For example, the disclosure requirements are less stringent than their U.S. counterpart. Baums & Scott, supra note 150, at 8. In addition, they are more difficult to enforce through shareholder private rights of action. Id. at 8 (unlike the U.S. regime, German shareholders must prove causation instead of relying on, for example, the common-law "efficient capital markets hypothesis"); Id. at 10 ("German law placed even higher hurdles in the way of a shareholder's successful prosecution of an enforcement action against management board and supervisory board members than those found in the U.S."). See generally Aktiengesetz [AtkG] [Corporate Law Code] §§ 93, 116 (2010). Moreover, and importantly, German plaintiffs' lawyers cannot seek fees on a contingency basis, thereby taking the teeth out of the plaintiffs' bar. Baums & Scott, supra note 150, at 11.

[FN364]. Boehmer, supra note 317, at 7.

[FN365]. Owen et al., supra note 16, at 10.

[FN366]. Jacoby, supra note 9, at 23.

[FN367]. Höpner, supra note 12, at 10.

[FN368]. E.g., insider trading; supra pt. II.B.5.

[FN369]. E.g., Odenius, supra note 276, at 13; Enriques & Volpin, supra note 245, at 137.

[FN370]. Baums & Scott, supra note 150, at 17. Until 2002, German law "contained no requirement that all shareholders be offered the right to sell their shares at an appraised price in case of a change of control." Id. The changes after 2002 are discussed briefly infra.

[FN371]. Del. Code Ann. tit. 8, § 262 (2010) (statutory appraisal rights for fair value following merger). See also Weinberger v. U.O.P., Inc., 457 A.2d 701, 711 (Del. 1981) (board must exhibit fair dealing and achieve a fair price in minority shareholder freezeouts).

[FN372]. Jacoby, supra note 9, at 23.

[FN373]. Odenius, supra note 276, at 13.

[FN374]. Boehmer, supra note 317, at 10 ("Large blockholders have incentives to maximize the value of their shares. Whether this involves maximizing firm value depends on the degree to which they can extract transfers from small shareholders.")

[FN375]. Enriques & Volpin, supra note 245, at 122.

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[FN376]. Id.

[FN377]. Boehmer, supra note 276, at 11.

[FN378]. Odenius, supra note 276, at 12.

[FN379]. E.g., Dinh, supra note 3, at 978.

[FN380]. But see Bainbridge, supra note 155, at 608 ("Empirical evidence ... suggests that codetermination does not lead to efficiency or productivity gains.").

[FN381]. They are mandated for all German firms with five or more employees. Dinh, supra note 3, at 980 (citing the 1952 Labor-Management Relations Act, as amended by the Betriebsverfassungsgesetz 1972 [Works Council Act], 1972).

[FN382]. Dinh, supra note 3, at 979.

[FN383]. Id. at 979-80.

[FN384]. Id. at 980.

[FN385]. E.g., Enriques & Volpin, supra note 245, at 128. Banks often dominate this shareholder half, by virtue of their roles as shareholder and as proxy for other shareholders. Id.; Boehmer, supra note 317, at 11; Dinh, supra note 3, at 981 (citing Mitbestimmungesetz [Co-determination Act], 1976). For companies in the iron, coal and steel industries, only 1,000 employees are needed before their representatives will occupy half of the seats of a supervisory board. E.g., Odenius, supra note 276, at 9.

[FN386]. E.g., Zumbansen & Saam, supra note 129, at 27; Baums & Scott, supra note 150, at 5.

[FN387]. Dinh, supra note 3, at 981; Baums & Scott, supra note 150, at 12 (can appoint up to three officers on a supervisory board).

[FN388]. Id.

[FN389]. Owen et al., supra note 16, at 9; Hopt, supra note 151, at 454 ("the German supervisory board continues to be a rather ineffective monitor, where as the U.K. board has not only taken on the monitoring task formally but is better placed to discharge it effectively in practice").

[FN390]. Dinh, supra note 3, at 981-82.

[FN391]. Id. at 982.

[FN392]. Donnelly, supra note 290, at 92.

[FN393]. See, e.g., Bainbridge, supra note 155, at 608 (Note, however, that the "empirical evidence" of such inefficiencies are cited by the author by reference to another article by the same author dated in 1996. An example described by the author posits that employee representatives on the board will extract higher wages from firm profits and therefore make the firm "less profitable." Id. at 609. This definition of profitability, of course, is from the shareholder's perspective).

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[FN394]. See, e.g., id. at 608. Of course, while Germany may not have received the benefit of stock market bubbles of the turn of the century, it can be said to have weathered the ensuing financial crises better than equity-based economies. Some may attribute this relative success to the long-term vision engendered by, inter alia, worker involvement in corporate decision-making.

[FN395]. Dinh, supra note 3, at 987; Odenius, supra note 276, at 9 ("labor representatives tend to stress the advantages of creating a wider acceptance of managerial decisions and resolving conflicts better, resulting in fewer labor disputes").

[FN396]. Dinh, supra note 3, at 982; Donnelly, supra note 290, at 99.

[FN397]. Höpner, supra note 12, at 32 (noting also that "codetermination seems to have committed itself to being a cooperative process. Both sides see themselves as partners, not as opponents in class confrontation."). Id.

[FN398]. Dinh, supra note 3, at 979 (works councils are responsible for implementing the union agreement, and also bargain over specific terms for specific companies).

[FN399]. Id. at 978-79 (also noting that, for example, sixteen leading unions are organized into the Deutschen Gewerkshaftsbundes federation).

[FN400]. Id. at 979.

[FN401]. Id. at 980. Dinh explains, "the union is somewhat akin to a national political organization concerned with matters within a given industry. The works council is somewhat analogous to a parliament, with the union support its active members for seats on the works council." Id. (citing Janice R. Bellace, The Role of Law in Supporting Cooperative Employee Representation Systems, 15 Comp. Lab. L.J. 441, 444 (1994)).

[FN402]. Nowak, supra note 287, at 428 (going on to explain that "[b]efore then, rules and regulations concerning the issuance and trading of securities were to be found in various parts of the law, particularly in stock corporation law, securities exchange law, and banking law").

[FN403]. Germany's corporate governance reforms were set in motion in the early 1990s. Odenius, supra note 276, at 7.

[FN404]. See, e.g., Zumbansen & Saam, supra note 129, at 8 ("there is wide agreement that these [Continental European] national systems are under severe and growing pressure to converge").

[FN405]. See, e.g., Owen et al., supra note 16, at 6 ("During the 1990s ... the focus on shareholder value as the principal measure of a company's performance was seen to be a powerful force for concentrating the minds of managers on making their business more efficient and more profitable. The apparent superiority of the American system encouraged other countries to look for ways of injecting greater dynamism into their financial markets. This meant, among other things, upgrading the importance of shareholder value and embracing, at least partially, the market for corporate control as a means of imposing discipline on publicly quoted companies."). Additional pressure came for the "Americanization" of corporate governance came from institutional investors, especially following the U.S. dot-com crash and the Enron and Worldcom corporate scandals. Id.; see also Donnelly, supra note 290, at 86-90.

[FN406]. Nowak, supra note 287, at 426 ("What seems clear ... is that the formal legal developments--driven by

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the European Union and designed to meet the international appetite for investor protection--have led to a shift in the foundations of German equity markets.").

[FN407]. For example, efforts by the EU to reduce unemployment via early retirement and to harmonize retirement laws lead to a growing emphasis on private pension systems. The private pension funds created need, of course, a place to park their money. See Jacoby, supra note 9, at 15; Zumbansen & Saam, supra note 129, at 8 ("The privatization of public welfare systems and the increased tendency to base pension and retirement financing on the capital market have coincided with a worldwide competition for stock market investments.").

[FN408]. Enriques & Volpin, supra note 245, at 128.

[FN409]. Branson, supra note 8, at 329 (citing John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications, 93 Nw. U. L. Rev. 641 (1999)); Nowak, supra note 278, at 40 ("At the same time the German stock exchange began to modernize, German issuers also went 'global' by raising equity in sock markets abroad. The listing of Daimler-Benz AG on the New York Stock Exchange on October 5, 1993 was part of a comprehensive financing strategy designed to end the company's reliance on domestic providers of capital. It made Daimler the first German company to reconcile its financial statements with U.S. GAAP.") See also John Ammer et al., Look at Me Now: The Role of Cross-Listing in Attracting U.S. Investors (Board of Governors of the Federal Reserve System, International Finance Discussion Paper No. 815, 2004), available at http:// www.federalreserve.gov/pubs/ifdp/2004/815/default.htm (using a 1997 survey to demonstrate U.S. investors' preference for cross-listed foreign equities and finding differences based on the country of origin).

[FN410]. Such protections are seen to facilitate capital market development because they assure investors "that in addition to their original investment more of the firm's profits will come back to them as dividends and interests, and this assurance motivates them to pay more for financial assets." . Anderson & Gupta, supra note 127, at 9.

[FN411]. In 1990, Germany promulgated the Verkaufsprospektgesetz [Prospectus Act], analogous to the Securities Act of 1933, which governs the prospectus requirements for initially offered securities. Nowak, supra note 287, at 428. In 1994, Germany passed the Zweites Finanzmarketförderungsgesetz [Second Financial Market Promotion Act] ("FFT II") that, inter alia, delineated periodic reporting requirements analogous to those required by the Securities Exchange Act of 1934. Id. at 429-30. In 1995, issues of securities have been required to make ad hoc disclosures of certain events that directly impact share value. Id. at 432 (citing Section 15 of the Securities Trading Act (1995)).

[FN412]. The Fourth Financial Market Promotion Act ("FFG IV") created an option for shareholders to privately sue issuers for making untimely, false, or misleading statements as well as for non-disclosure of material information. Nowak, supra note 287, at 440. (citing the Wertpapierbandelsgesetz [WpHG] [Securities Trading Act], § 37b). Moreover, several German law firms have begun to specialize in US-style securities litigation. Id. at 439.

[FN413]. Enriques & Volpin, supra note 245, at 132-33.

[FN414]. The Federal Securities Supervisory Office was created in 1995. Nowak, supra note 287, at 430. Later, in 2002, it was consolidated with banking, insurance regulators into the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) ("BaFin"). Id. (citing the Gesetz über die integrierte Finanza-

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ufsicht [Law on Integrated Financial Services Supervision] ("FinDAG").

[FN415]. Id. at 435 (citing the 1998 Corporation Control and Transparency Act ("KonTraG").

[FN416]. Such harmonization, it is argued, is desirable because it facilitates trade, the movement of business and capital, and thus renders it easier for firms to adjust to other markets and is economically efficient. Piršl, supra note 260 at 290-92. In the European Community, harmonization arose primarily from Community legislation, or "Directives," which member states would incorporate into their own laws. Id. at 291.

[FN417]. This reform was seen as important because companies could cover up unprofitable times by dispersing such retained earnings. Enriques & Volpin, supra note 245, at 136 ("As a consequence, investors should be better able to understand whether companies retain excessive cash in the effort to maximize the size of the firm and the private benefits that size can bring.").

[FN418]. Id. at 134.

[FN419]. Id. at 135. However, German companies, upon a vote of shareholders, may opt out of this requirement until 2011. Id. at 136.

[FN420]. Id. at 136 (supervisory agency can review company's financial reports; increased public oversight of auditors via a PCAOB equivalent).

[FN421]. Jacoby, supra note 9, at 15.

[FN422]. Höpner, supra note 12, at 26. For example, Deutsche Bank "has nearly halved its supervisory board chairs in German companies." Id.

[FN423]. Nowak, supra note 287, at 436 (citing the KonTraG) (must also disclose when bank shareholdings exceed five percent of voting rights and must submit proposals as to how to exercise the proxy voting rights of their customers).

[FN424]. Donnelly, supra note 290, at 86.

[FN425]. For a detailed summary of the decrease in equity ownership concentration, see Dariusz Wojcik, Change in the German Model of Corporate Governance: Evidence from Blockholders, 1997-2001 (Oxford 2001), available at http://ssrn.com/abstract=294459.

[FN426]. Nowak, supra note 287, at 436 (citing the KonTraG).

[FN427]. Id. at 437 (citing Steuererleichterungsgesetz [Tax Reduction Act], 2000).

[FN428]. Höpner, supra note 12, at 26.

[FN429]. Zumbansen & Saam, supra note 129, at 1-2 (citing Volkswagen, Case C-112/21005 (Oct. 23, 2007), an opinion holding unlawful provisions that give minority shareholders (here, a local government) veto power over a takeover that is otherwise approved of by the majority of shareholders).

[FN430]. Negotiations over the SE endured for three decades. Id. at 3.

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[FN431]. Hopt, supra note 151, at 454-55 (citing Council Regulation of 8 October 2001, OJ 294/1, 10.11.2001, Art. 39 et seq. and Art. 43 et seq.); Odenius, supra note 276, at 9-10 ("A conversion to SE status offers significant flexibility in terms of internal controls, including by offering the possibility of moving to a one-tier board, smaller board sizes, and reduced labor participation.").

[FN432]. Nowak, supra note 287, at 444 (citing the Übernahmekodex)

[FN433]. See, e.g., Owen et al., supra note 16, at 15; Baums & Scott, supra note 150, at 17. The proposed E.U. takeover directive resembled in many respects the City Takeover Code of the U.K., addressed infra. See Nowak, supra note 287, at 443. (it would have banned all takeover defenses, e.g., "poison pills" and staggered boards).

[FN434]. This takeover code ("WpÜG") replaced the earlier voluntary takeover code and combines elements of both U.S. and U.K. takeover laws. Odenius, supra note 276, at 14.

[FN435]. Although U.S. style poison-pills and other pre-offer protective devices are unlawful, German boards may decide to sell certain essential assets or issue new shares to a third party. Baums & Scott, supra note 150, at 17.

[FN436]. Nowak, supra note 287, at 444 (citing the Wertpapiererwerbsund Übernahmegesetz [German Takeover Act], 2002).

[FN437]. Odenius, supra note 276, at 14.

[FN438]. Höpner, supra note 12, at 19.

[FN439]. Investments in equities in France, Germany and Japan were, in 2000, allocated as follows: 67.2% was made by U.K. institutional investors, followed by U.S. institutions at 40.3%, French institutions at 25.8%, Japanese institutions at 20.6%, and German institutions at only 14%. Carolyn Brancato & Michael Price, The Institutional Investor's Goals For Corporate Law in the Twenty-First Century, 25 Del. J. Corp. L. 35, 41 (2000).

[FN440]. Höpner, supra note 12, at 14-15 (noting that Calpers published its Corporate Governance Principles for Germany in 1999, describing its stance on issues arising by virtue of its role as a shareholder and voter); Baums & Scott, supra note 150, at 12.

[FN441]. E.g., Enriques & Volpin, supra note 245, at 138. It is argued, also, that Germany's co-determination law "has upheld progress in European company law harmonization for decades and has led to an uneasy compromise in the regulation of the European Company." Hopt, supra note 151, at 453.

[FN442]. See, e.g., Owen et al., supra note 16, at 7 ("The U.S. model of corporate governance lost much of its appeal, especially in those Continental countries where the concept of shareholder value maximization did not fit easily with long-established habits and attitudes.").

[FN443]. See Branson, supra note 8, at 348 ("[T]he market individualism of market leaning economies is simply intolerable in many societies. The economy is embedded in the social order and social cohesion, not rugged individualism."); Id. at 351-52; see also Columbo, supra note 77, at 285-87 (after the various corporate scandals at the turn of the century, faith in the free market has waned).

[FN444]. See Wojcik, supra note 425, at 2-3 (citing Bebchuk & Roe, A Theory of Path Dependence in Corporate

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Governance and Ownership, 52 Stan. L. Rev. 127 (1999)). According to path dependence, changes in economic infrastructures will occur only if the benefits of change are sufficiently great to overcome the costs of such change.

[FN445]. The German reforms did not, after all, seek to replicate the U.S. model. Rather, they strived for a hybrid system, with corporate governance to rely upon both insiders and outsiders. Odenius, supra note 276, at 7 (internal citation omitted). The result of German reforms was that the control of outsiders, e.g., minority shareholders, has increased and insider control has been reigned in. Id. at 15.

[FN446]. Donnelly, supra note 290, at 99.

[FN447]. See Baums & Scott, supra note 150, at 12. Although increasingly active, however, such investors have yet to become a powerful determinant of board behavior. Id. at 13.

[FN448]. Id. at 18.

[FN449]. Höpner, supra note 12, at 5-6.

[FN450]. Id. at 6 ("The varieties approach describes production systems as configurations of institutional arrangements at the national level. One decisive assumption is that institutional arrangements in different domains of the productive systems [e.g., labor, capital, intercompany relations, competition, government regulation] are in balanced positions to each other."); Owen, et al., supra note 16, at 7.

[FN451]. Höpner, supra note 12, at 6.

[FN452]. Jacoby, supra note 9, at 9 (For example, the Glass-Steagall Act, eventually repealed in the 1990s, prevented the combination of both investment and commercial banking); Smith, supra note 71, at 152 ("Professor Roe notes that these more centralized foreign structures [in Germany and Japan] would be illegal in the United States. He discusses as examples of legal barriers preventing more concentrated ownership in the United States various financial regulations including the Bank Holding Company Act, the Glass-Steagall Act, and the McFadden Act that prevent the development of German or Japanese-style systems in the United States.") (citing Roe, supra note 71, at 94-96, 98-99, 170-71).

[FN453]. Mizruchi & Hirshman, supra note 31, at 1073 (citing Clayton Act of 1914 § 8, 15 U.S.C. § 19 (2010)).

[FN454]. Smith, supra note 71, at 15253.

[FN455]. See Branson, supra note 8, at 332.

[FN456]. Id. at 347.

[FN457]. Branson, supra note 8, at 331.

[FN458]. Dinh, supra note 3, at 993 (internal quotation omitted); Jacoby, supra note 9, at 30 ("[E]mployees are an important (though imperfectly measured) source of capital to the enterprise. And, while shareholders are protected through limited liability and portfolio diversification, employees have neither of these risk-reducing shields.").

[FN459]. Jacoby, supra note 9, at 19. The author goes on to argue that "these commitments promote extensive

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firm-specific training systems because employees require assurances that the returns on their training investments will be fairly divided and ultimately paid. Id.

[FN460]. See id. at 20 (long-term employees can be well known and trusted by the firm's various long-term stakeholders, including banks, customers, and suppliers).

[FN461]. See Höpner, supra note 12, at 7 (employees receive the benefits of co-determination, works councils and job security; investors receive monitoring capabilities, access to information, and protection from minority shareholder pressures).

[FN462]. See Höpner, supra note 12, at 32.

[FN463]. See Jacoby, supra note 9, at 19-20 ("In the United States, by contrast, employer training investments are much lower than in Germany or Japan, employees are more mobile ... and there are few examples of employees having a role in corporate governance except in unionized firms.").

[FN464]. Höpner, supra note 12, at 22.

[FN465]. Id.; Jacoby, supra note 9, at 19-20.

[FN466]. Höpner, supra note 12, at 22.

[FN467]. Jacoby, supra note 9, at 21.

[FN468]. E.g., Höpner, supra note 12, at 17.

[FN469]. Höpner, supra note 12, at 15; see also Bainbridge, supra note 174, at 784; see generally Jens Koke & Luc Renneboog, Do Corporate Control and Product Market Competition Lead to Stronger Productivit Growth? Evidence from Market-Oriented and Blockholder-Based Governance Regimes, 48 J. L. & Econ. 475 (2005).

[FN470]. Höpner, supra note 12, at 17 ("Multiple regression shows that both the institutionalization of ownership structure and the competition with foreign goods have significant effects on shareholder orientation.").

[FN471]. Id. at 15 ("the product market plays the role of the (restricted) market for corporate control: in the case of opportunistic managers, a firm with a stronger management team will capture the product market from the firm with the weaker management team").

[FN472]. Höpner, supra note 12, at 16 (but also noting that only industries subject to such competition will have their agency costs thus reduced; sheltered industries will avoid the disciplining mechanism).

[FN473]. Id. at 7 (citing Soskice/Hank).

[FN474]. Id. ("pressures associated with the internationalization of finance, both direct investments and portfolio investments ... puts pressure on the institutions of coordinated market economy ... [which] could lead to companies developing shareholder value strategies.").

[FN475]. The involvement of such investors grew dramatically in the 1990s. For example, in 1999, 40% of Mannesmann equity was held by U.S. and U.K. investors; 31% of DaimlerChrysler, and 27.5% of Deutsche Telekom. Id. at 14.

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[FN476]. Höpner, supra note 12, at 13; see also Strine, Fundamental Question, supra note 141, at 10-11 (describing impact on short-term prices by institutional investor activity).

[FN477]. Id. at 11 ("Shareholder oriented companies are supposed to publish annual reports of high quality. In the late 1990s, several companies made progress in transparency by using the International Accounting Standards or the General Accepted Accounting Principles [GAAP] instead of the insider-oriented accounting rules of the Handelsgesetzbuch.").

[FN478]. Id. at 11 (e.g., organization and informational meetings with institutional investors, publishing reports, and the establishment of investor relations departments, all of which reduce agency costs).

[FN479]. Id. at 12 (e.g., stock options). It should be noted, moreover, that embracing a shareholder-value theory of corporate governance legitimizes increasing management remuneration. Id. at 24.

[FN480]. Höpner, supra note 12, at 14.

[FN481]. Id. at 15.

[FN482]. See discussion of the changing takeover environment supra.

[FN483]. Höpner, supra note 12, at 19.

[FN484]. This theory is presented briefly supra.

[FN485]. Höpner, supra note 12, at 7.

[FN486]. See Smith, supra note 71, at 156-57 ("[A]s Professor Roe admits, there is evidence that the corporate governance structures in Germany, Japan and the United States are converging. For example, banks in the United States are increasingly sponsoring mutual funds. Furthermore, institutional investors have threatened to become more active in corporate governance, increasing the size of their equity holdings in U.S. corporations. These trends may be evidence that the structure of U.S. corporations is moving.").

[FN487]. Höpner, supra note 12, at 27 ("Unions recognize that international accounting standards, wither IAS or US-GAAP, seem to be, at first sight, investor oriented. In effect, they are viewed as being employee oriented, too. Trade unionists argue that they have called for company transparency all along, because they need accurate information to achieve the goal of codetermination: to monitor economic power.").

[FN488]. See, e.g., Hopt, supra note 151, at 461 ([W]eakening the voice of employees on supervisory boards would be "even worse for the shareholders because ... employees ... know the company best and have a keen interest in its prosperity, for the sake of their own jobs and salaries.").

[FN489]. Höpner, supra note 12, at 28.

[FN490]. Id. ("Just like shareholder activists, unions criticize the trend towards escalating salaries."); Strine, supra note 96, at 16.

[FN491]. Höpner, supra note 12, at 32.

[FN492]. The U.K. regime is not based on state law that provides "default" rules that apply absent a contractual

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arrangement otherwise (e.g., in a corporate charter of bylaws). Instead, it derives from a "comply or explain" regime based upon a code of behavior. See Financial Reporting Council, The Combined Code on Corporate Governance 1 (2003), available at http:// www.frc.org.uk/documents/pdf/combinedcodefinal.pdf.

[FN493]. For instance:

British corporate law values and corporate governance structures continue to be aligned with their American counterparts.... [They] share a pattern of widely dispersed share ownership, in contrast to Europe and Japan, where more companies are family-owned, otherwise have a dominant shareholder, or exhibit patterns of concentrated bank share-ownership or cross-shareholding between bank and industry .... Both countries have well-developed securities markets, and both depend upon similar mechanisms to promote managerial accountability, including financial transparency, stock market valuations, and the market for corporate control. Moreover, the United States and the UK both exhibit a form of shareholder capitalism, under which the purpose of the corporation is to maximize shareholder wealth, in contrast to the European stakeholder view, according to which managers need to balance the interests of multiple constituencies when making decisions.

Cynthia A. Williams & John M. Conley, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, 38 Cornell Int'l L. J. 493, 498 (2005). Britain, for example, strenuously opposed a proposed mandated labor participation in governance during EU governance reform negotiations. Branson, supra note 8, at 337.

[FN494]. Owen et al., supra note 16, at 7, 19.

[FN495]. Bruner, supra note 184, at 605.

[FN496]. Owen et al., supra note 16, at 19.

[FN497]. Id.

[FN498]. Odenius, supra note 276, at 14; Bruner, supra note 184, at 605-06.

[FN499]. See Bruner, supra note 184, at 632-33.

[FN500]. Id. at 624.

[FN501]. Id. at 586.

[FN502]. Id. at 583-84.

[FN503]. Id. at 585-86. While the U.K. Takeover Code is decidedly shareholder-centric, it does toss a few crumbs at stakeholders. For example, employee representatives may consult with target boards during hostile tender offer bidding and present their views during the tender offer proposal process. Recent proposed changes to the Code would likewise require bidders to disclose more information on their financial wherewithal so that employees, concerned shareholders and other stakeholders can better understand the impact of the deal on their interests. See Eduardo Gallardo, Protectionism and Paternalism at the UK Panel on Takeovers and Mergers, Harvard Law School Forum on Corporate Governance and Financial Regulation (Dec. 11, 2010), http:// blogs.law.harvard.edu/corpgov/2010/12/11/protectionism-and-paternalism-at-the-uk-panel-on-takeovers-and-mergers/#more-14391.

[FN504]. Bruner, supra note 184, at 617.

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[FN505]. See generally Ben Clift, Andrew Gamble & Michael Harris, The Labour Party and The Company, in The Political Economy of the Company 30 (Andrew Gamble, Gavin Kelly & John Parkinson, eds. Oxford 2000). Labor leadership felt, inter alia, that "excessive collusion" would "lead to unions becoming implicated in management decision-making processes which could compromise their rights to free collective bargaining." Id. at 67.

[FN506]. Bruner, supra note 184, at 594-98.

[FN507]. Owen, et al., supra note 16, at 7.

[FN508]. Id.

[FN509]. Bruner, supra note 184, at 633; Allen et al., supra note 140, at 1076-77. See also generally Shlensky v. Wrigley, 237 N.E. 2d 776 (Ill. 1969) (a famous American corporate law opinion that held that a board of directors could choose not to install nighttime lighting in a baseball stadium, against the wishes of shareholders, because protecting community concerns could benefit the business in the long-term).

[FN510]. For example, socially responsible pension funds, like those of union members, and insurance companies are more popular in the U.K. than in the U.S. In tandem, socially responsible investment advisory services like Hermes EOS are more popular in the U.K. See, e.g., generally, UK Sustainable Investment and Finance, Responsible Business: Sustainable Pension (2009), available at http://www.uksif.org/cmsfiles/281411/Sustainable_Pensions_Report_ 2009.pdf; see also generally, Social Investment Forum, 2010 Report on Socially Responsible Investing Trends in the United States (2010), available at http:// www.socialinvest.org/resources/pubs/trends/documents/2010TrendsES.pdf.

[FN511]. Williams & Conley, supra note 113, at 499.

[FN512]. Id. at 503-04 ("For example, France, Belgium, Germany, and the UK have passed laws that require pension funds to disclose the extent to which they take ethical, social, and environmental information into account in constructing their investment portfolios."); Bantekas, supra note 1, at 326.

[FN513]. See Williams & Conley, supra note 113, at 504 ("The thinking behind [laws requiring investors to divulge their SRI practices] is that as pension fund managers start to ask companies for information on these issues, the companies will respond by making the information more generally available.").

[FN514]. See generally Marco Ventoruzzo, Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe, 11 U. Pa. J. Bus. & Emp. L. 135 (2008).

[FN515]. See discussion, supra note 98

[FN516]. See Gilson, supra note 98, at 47-48; Deakin, supra note 98, at 977.

[FN517]. See Strine, supra note 96, at 13 ("Management and labor have legitimate reasons to distrust activist short-term investors who seek to influence corporate policy.... [T]hat investor is accountable to no one if the corporation later falters .... The company's long-term investors, management and labor are left eating the activists' cooking."). See also Bainbridge, supra note 155, at 623 (shareholders themselves have very diverse interests: short-term v. long-term, diversified or not, inside versus outside, social versus economic, hedged v. unhedged.). The motivations and desires of these different kinds of investors may not align with stakeholder interests. To il-

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lustrate: a hedged investor may actually profit poor firm performance, and short-term shareholders may advocate firm liquidation or the shedding of jobs to cut costs to increase stock prices in the short-term.

[FN518]. Pierre Habbard, The Stewardship of European Workers' Capital in Times of Crisis, 17 Transfer: Eur. Rev. of Lab. and Res. 59, *7 (2011).

[FN519]. See, e.g., Mitchell et al., supra note 140, at 458,

[FN520]. See discussion regarding “enhanced shareholder value,” supra pt. I.A.5.

[FN521]. Kropp, supra note 207, at 2.

[FN522]. Columbo, supra note 77, at 270.

[FN523]. Strine, supra note 96, at 4.

[FN524]. See Leo E. Strine, Jr., Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward, 63 Bus. L. J. 1079, 1082 (2008) (“As these forced capitalists face the insecurities and instability arising out of our nation's struggle to remain competitive in the face of globalized product and capital markets--think downsizings, more frequent job changes, and benefit cuts--it is unsurprising that they would give voice to concerns about CEO compensation, stock options fraud, and other hot button issues.”).

[FN525]. In the international trade union movement, for example, efforts are made to advance worker rights by increasing the power of unions as well as the power of union pension funds. See discussion, infra.

[FN526]. Habbard, supra note 518, at 7.

[FN527]. See, e.g., Int'l Labour Organization [ILO], Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th ed. 2006); see also Organization for Economic Cooperation and Development [OECD], Guidelines for Multinational Enterprises (2008).

[FN528]. Habbard, supra note 518, at 7.

[FN529]. See Bainbridge, supra note 155, at 630 (most shareholder activism in the U.S. is done by public and union pension funds).

[FN530]. Owen et al., supra note 16, at 20.

[FN531]. The PSLRA was intended to eliminate shareholder “strike” suits by, inter alia, imposing heightened pleadings standards. Instead, it empowered institutional investors by allowing them to more easily become “lead plaintiffs.” See, e.g., In re St. Jude Medical, Inc. Sec. Litig., 629 F.Supp.2d 915, 920 (D.Minn. 2009); Steven Serajeddini, Loss Causation and Class Certification, 108 Mich. L.R. 255, 267 (2009); Matthew O'Brien, Choice of Forum in Securities Class Actions: Confronting ‘Reform’ of the Securities Act of 1933, 28 Rev. Litig. 845, 857-58 (2009); Joshua D. Fulop, Agency Costs and the Strike Suit: Reducing Frivolous Litigation Through Empowerment of Shareholders, 7 J. Bus. & Sec. L. 213 (2007).

[FN532]. Elliott J. Weiss, The Lead Plaintiff Provisions of the PSLRA After a Decade, or Look What's Happened to My Baby, 61 Vand. L. Rev. 543, 547 (2008) (purpose of encouraging institutional investors to

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serve as plead plaintiffs was to give a powerful party "economic incentive to retain and to monitor class counsel so as to reduce substantially the agency costs associated with securities class action litigation"); Amy M. Koopmann, A Necessary Gatekeeper: The Fiduciary Duties of the Lead Plaintiff in Shareholder Derivative Litigation, 34 J. Corp. L. 895, 911 (2009).

[FN533]. For example, the SEC suggested that corporations have a duty to disclose the environmental impact of their operations. See Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61469, 75 Fed. Reg. 6290 (Feb. 8, 2010). Stakeholder-shareholders can use securities lawsuits to pressure management to make sure such disclosures are made in required filings. See Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61469, 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010).

[FN534]. Mitchell et al., supra note 140, at 458-59.

[FN535]. Id. at 457.

[FN536]. Bainbridge, supra note 155, at 631.

[FN537]. See id. at 619 ("Many investors, especially institutions, rationally prefer liquidity to activism."); id. at 631 (many institutional investors will prefer liquidity to activism).

[FN538]. Bainbridge, supra note 155, at 631.

[FN539]. Strine, Fundamental Question, supra note 96, at 10-13.

[FN540]. Ward, supra note 202, at 821-22; Picciotto, supra note 112, at 142 (describing selective enforcement and haphazard content, and identifies studies performed by the ILO and OECD that show that corporate codes of conduct often fail to include provisions for basic labor rights); Harrison, supra note 271, at 7 (selective and weak implementation of CSR, combined with reporting consisting of only "anecdotal descriptions of isolated projects and philanthropic activity," while only divulging positive (and never negative) events undermines the usefulness of CSR and SRI). Many company codes, for example, do not contain any allowances for collective bargaining or rights of association for workers--both found in the ILO Declaration. Blackett, supra note 116, at 411-12.

[FN541]. Bantekas, supra note 1, at 323 (not subject to government or private enforcement unless they are built into contractual terms or used successfully in a false advertising suit); see also Ward, supra note 202, at 822; see also Piciotto, supra note 112, at 146.

[FN542]. Androniki Apostolakou & Gregory Jackson, Corporate Social Responsibility in Western Europe: An Institutional Mirror or a Substitute? 20 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341591.

[FN543]. See CSR Europe, supra note 112, at 2 (the CSR movement is confined to large companies, "[y]et 99% of European companies are small and medium-sized enterprises (SMEs), and about two-thirds of jobs in the private sector are in SMEs."); Ward, supra note 202, at 822 ("market-based drivers of responsible business behavior that take the form of consumer demand, or investor pressure, or campaign activity by non-governmental organizations, cannot reach all businesses in the same way").

[FN544]. See Harrison, supra note 271, at 7 (noting that (1) consumers may have a difficult time assessing the

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universe of corporate conduct codes; and (2) the auditors that review company reports are generally not human rights experts and may have conflicts of interest).

[FN545]. Ward, supra note 202, at 823 (observing that businesses may be constrained, because of their legal fiduciary duties, to adopt CSR at the expense of shareholder value).

[FN546]. OECD Steering Group, supra note 122, at 24, 27 ("[i]n some instances shareholders have been equally concerned with short-termism as have managers and traders, neglecting the effect of excessive risk taking policies"); Zumbansen, supra note 103, at 33; see also Strine, Fundamental Question, supra note 96, at 7-8 ("But in corporate polities, unlike nation-states, the citizenry can easily depart and not 'eat their own cooking.' As a result, there is a danger that activist stockholders will make proposals motivated by interests other than maximizing the long-term, sustainable profitability of the corporation.").

[FN547]. See Williams & Conley, supra note 113, at 501-02 ("Notwithstanding the developments [regarding CSR and SRI], there are clearly shareholder value pressures at work in the UK, and we do not mean to suggest otherwise. The mergers and acquisitions culture, the financial press, financial globalization, and managerial self-interest are powerful incentives for companies to focus on short-term stock valuations.").

[FN548]. See, e.g., Columbo, supra note 77, at 277.

[FN549]. See Allen et al., supra note 140, at 1073, 1099 (voting rights that afford "stockholders who are genuinely long-term, active investors an opportunity to ensure that corporate boards will consist of persons stockholders believe will be diligent creators and maintainers of shareholder value."); Strine, Fundamental Question, supra note 96, at 23 (the author suggests raising the filing fee for Rule 14a-8 proposals and allowing stockholder proposal powers only to long-term investors).

[FN550]. Strine, Fundamental Question, supra note 96, at 17.

[FN551]. Shareholder securities lawsuits in the U.S. are generally led by public employee pension funds. See Bainbridge, supra note 155, at 630; Prevost, Rao & Williams, supra note 256, at 1-2. Currently, the Taft-Hartley Act requires employees to share control over worker pension funds with employers. 28 U.S.C. § 186(c) (2010). These funds, representing over 6% of all pension fund assets and comprising over 420 billion dollars worth of investment capital, if Taft-Hartley is repealed, can become a significant stakeholder voice in corporate governance. See James Heinsman, What are Taft-Harley Pension Funds?, Entrust Capital (June 8, 2009), available at http:// www.hedgecrunch.com/what-are-taft-hartley-pension-funds.

[FN552]. See Stone, supra note 88, at 14, 16 (describing how the new flexible and short-term employment relationship is antithetical to the American union structure and that, at any rate, collective bargaining laws do not apply to "independent contractors" and temp workers.). Allowing industry-wide unionization, like that found in Germany, would perhaps provide more fertile ground.

[FN553]. Strine, supra note 96, at 16.

[FN554]. See Greenfield, supra note 88, at 23-24 (suggesting that corporate fiduciaries owe their duties to the corporation as a whole). This will, of course, involve overcoming issues of vagueness and ambiguity. These obstacles should not, however, prove insurmountable. After all, the U.S. has effectively regulated "pornography" with no definition better than "I know it when I see it." See Jacobellis v. Ohio, 378 U.S. 184, 197

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(1964) (Stewart, J., concurring).
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