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FOR WHOM CORPORATE LEADERS BARGAIN

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ABSTRACT

At the center of a fundamental and heated debate about corporate purpose, an increasingly influential "stakeholderism" view advocates giving corporate leaders the discretionary power to serve all stakeholders and not just shareholders. Supporters of stakeholderism argue that its application would address growing concerns about the impact of corporations on society and the environment. By contrast, critics of stakeholderism argue that corporate leaders should not be expected to use expanded discretion to benefit stakeholders. This Article presents novel empirical evidence that can contribute to resolving this key debate.

Stakeholderist arguments regarding the potential stakeholder effects of hostile takeovers contributed to the adoption of constituency statutes by more than thirty U.S. states. These statutes, which remain in place and continue to govern corporate transactions, authorize corporate leaders to give weight to stakeholder interests when considering a sale of their company. We study how corporate leaders in fact used their discretion in transactions governed by such statutes in the past two decades. In particular, using hand-collected data, we provide a detailed analysis of more than one hundred cases governed by such statutes in which corporate leaders negotiated a company sale to a private equity buyer.

We find that corporate leaders have used their discretion to obtain gains for shareholders, executives, and directors. However, despite the clear risks that private equity acquisitions often posed for stakeholders, corporate leaders generally did not use their discretion to negotiate for any stakeholder protections. Indeed, in the small minority of cases in which some stakeholder protections were formally included, they were generally cosmetic and practically inconsequential.

Beyond the implications of our findings for the long-standing debate on constituency statutes, these findings also provide important lessons for the ongoing debate on stakeholderism. At a minimum, stakeholderists should identify the causes for constituency statutes' failure to deliver stakeholder benefits in the analyzed cases, and examine whether embracing stakeholderism would not similarly fail to produce such benefits. After examining alternative explanations for our findings, we conclude that the most plausible explanation lies in corporate leaders' incentives not to protect stakeholders beyond what would serve shareholder value. Our findings thus indicate that stakeholderism cannot be relied on to produce its purported benefits for stakeholders. Stakeholderism therefore should not be supported as an effective way for protecting stakeholder interests, even by those who deeply care about stakeholders.

Keywords: corporate purpose, stakeholders, stakeholder governance, stakeholder capitalism, constituency statutes, corporate social responsibility, entrenchment, managerialism, private equity, mergers & acquisitions.

JEL Classification: D21, G32, G34, G38, K22.

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"*Directors . . . may, in considering the best interests of the corporation, consider . . . the effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors . . . and upon communities*"
—Pennsylvania 1990 Constituency Statute, 15 Pa.C.S. § 1715

"*Each of our stakeholders is essential*. *We commit to deliver value to all of them*"
— Business Roundtable Statement on the Purpose of a Corporation, August 19, 2019

"*Those who cannot remember the past are condemned to repeat it*."
—George Santayana, THE LIFE OF REASON (1905)

I. INTRODUCTION

In the face of growing concerns about the effects of corporate decisions on non-shareholder constituencies, there has been increasing support for "stakeholderism."[1] By stakeholderism we refer to the view, which has also been labeled "stakeholder governance" or "stakeholder capitalism," according to which corporate leaders should be given discretion to serve non-shareholder constituencies, not just shareholders.[2] The term stakeholders refers throughout this Article to all non-shareholder constituencies, including employees, customers, creditors, suppliers, local communities, the environment, and society at large.

Stakeholderism has been attracting increasing support not only from reformers concerned about stakeholders, but also from business leaders and corporate advisors. In August 2019, the chief executive officers (CEOs) of over 180 major public companies, which together have a market capitalization exceeding $13 trillion, issued the Business Roundtable Statement on the Purpose of a Corporation, committing to deliver value to all stakeholders.[3] The World Economic Forum subsequently published a manifesto urging companies to move from the traditional model of "shareholder capitalism" to a model of "stakeholder capitalism."[4]

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[1] See section II.A infra.

[2] *See* sources cited in Section II.B.

[3] *See* Business Roundtable, Statement on the Purpose of a Corporation (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-onthe-Purpose-of-a-Corporation-with-Signatures.pdf. Market capitalization of the public companies led by the signatories of the BRT statement, is based on data collected from Compustat.

[4] Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-

Critics, however, worry that corporate leaders do not have incentives to use discretion to protect stakeholders for this purpose, and therefore should not be expected to do so.[5] In particular, a companion article by two of us published last year provides a detailed agency critique of stakeholderism that is based on an analysis of the array of incentives that corporate leaders face.[6] This analysis concludes that corporate leaders have incentives *not* to protect stakeholders beyond what would serve shareholder value. In this view, acceptance of stakeholderism would be counterproductive: rather than protecting stakeholders, stakeholderism would serve the private interests of corporate leaders by increasing their insulation from shareholder oversight and would raise illusory hopes that could deflect pressures to adopt stakeholder-protecting laws and regulations.

In the debate between the stakeholderism view and the agency critique of this view, a key question is empirical: If corporate leaders are authorized and encouraged to protect stakeholder interests, as proponents of stakeholderism advocate, will such leaders use their discretion to protect stakeholder interests? In this Article we put forward novel empirical evidence that can contribute to answering this question, and thus to advancing the ongoing critical debate.

Although stakeholderism has enjoyed unprecedented levels of support in recent years, many states already adopted during the era of hostile takeovers "constituency statutes" that embraced an approach similar to that advocated by modern stakeholderists.[7] Proposed as a remedy to address the adverse effects of acquisitions on employees and other stakeholders, these statutes authorized corporate leaders to give weight to the interests of stakeholders when considering a sale of their companies. The current debate on stakeholderism should be informed, we argue, by the lessons that can be learned from the results produced by this large-scale experiment in stakeholderism.

We therefore set out to investigate empirically whether constituency statutes actually delivered protections for stakeholders. Although constituency statutes have long been a common topic in corporate law textbooks,[8] as well as the focus of many law review articles,[9] there has been thus far no direct study of the terms

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universal-purpose-of-a-company-in-the-fourth-industrial-revolution/. *See also* Why We Need the 'Davos Manifesto' for a Better Kind of Capitalism (Dec. 1, 2019), https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/.

[5] For articles expressing such concerns, *see* the sources cited *infra* note 35.

[6] Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

[7] For an account and discussion of the statutes that are the focus of this paragraph, *see* sources cited *infra* notes 38-39.

[8] *See e.g.*, JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS § 4:10 (3d ed. 2013).

[9] *See* articles cited *infra,* notes 39, 44, and 53.

of acquisition agreements negotiated in the shadow of such statutes.[10] Using hand-collected data on a large sample of such agreements from the past two decades, we empirically study the subject by conducting a detailed analysis of the agreements and the acquisitions governed by them.

We document that corporate leaders selling their companies to private equity buyers commonly engage in substantial bargaining. We then turn to examine in detail for whom corporate leaders bargain and do not bargain. We find that they negotiate for and obtain substantial benefits for their shareholders as well as for themselves. By contrast, corporate leaders generally do not use their discretion to negotiate for any stakeholder benefits. In particular, despite the clear risks to stakeholders that private equity acquisitions commonly pose, corporate leaders generally do not bargain for any protections to stakeholders from such risks.

We conclude that in the large sample of analyzed cases constituency statutes have failed to deliver their purported benefits. These conclusions have implications not only for the long-standing debate on constituency statutes but also for the general debate on stakeholder capitalism. Our findings cast substantial doubt on the wisdom of relying on the discretion of corporate leaders, as stakeholderism advocates, to address concerns about the adverse effects of corporations on their stakeholders.

We turn now to provide an overview of the elements of our analysis and the conceptual choices and challenges we faced. In Part II, we begin by discussing the importance of the debate on stakeholderism. We explain that the debate seems to have reached a critical juncture and briefly describe the positions of stakeholderists and their critics. In particular, we explain how the disagreement between them is substantially driven by their different expectations as to whether and to what extent corporate leaders would use their discretion to protect stakeholder interests.

Part III sets the stage for our empirical analysis. We first discuss how stakeholderist concerns played a key role in the adoption of constituency statutes. We also overview the landscape and main features of constituency statutes.

We then explain why private equity acquisitions of public companies provide a good setting for our empirical investigation. Because they move assets into the hands of managers with powerful incentives to maximize financial returns, these transactions often pose risks to stakeholders. Indeed, as we discuss, there is evidence that private equity acquisitions often have adverse effects on employees. Thus, corporate leaders who are willing to use their discretion to protect

[10] For a review of the existing empirical evidence on the effects of constituency statutes, *see* Jonathan M. Karpoff & Michael D. Wittry, *Institutional and Legal Context in Natural Experiments: The Case of State Antitakeover Laws*, 73 J. FIN. 657 (2018). However, existing studies have largely focused on variables available in standard financial datasets, and have generally not conducted a comprehensive review of all acquisitions agreements and proxy statements for a large sample of transactions.

stakeholders should be especially likely to do so with substantial frequency in the context of private equity acquisitions, given the risks to stakeholders that such acquisitions create.[11]

Part IV presents our empirical analysis. We first discuss in Section A our data collection effort and the universe of cases that we study. We focus on the 20-year period of 2000 through 2019, and we examine all transactions during this period in which a private equity buyer acquired a public company of significant size that was incorporated in a state with a constituency statute. Our sample includes 110 acquisitions of companies incorporated in 17 states with a constituency statute. Using hand-collected information, we provide a detailed analysis of each of these cases.

Section B examines several dimensions of the bargaining process and shows that the terms of the acquisition agreement were generally the result of substantial negotiations. Section C and D examine what the negotiations obtained for shareholders and corporate leaders, respectively. Shareholders received substantial financial gains, enjoying sizable premiums over the pre-deal stock price. In addition to the gains made on their own equity holdings, corporate leaders also frequently secured additional payments in connection with the transactions, and often obtained commitments for continued employment after the acquisition.

While we document that corporate leaders obtained substantial benefits, we do not examine the extent to which these benefits came at the expense of shareholders. This question concerns the standard agency problem between corporate leaders and shareholders, and some researchers have found evidence that corporate leaders negotiating a sale might sometimes be willing to accept a lower premium in order to enhance their own private benefits.[12] In addition, some scholars suggest that many shareholders are interested not only in financial payoffs but also in stakeholder welfare;[13] on this view, corporate leaders' failure

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[11] We note that, in the course of our work on this Article, we also collected a large sample of sales to strategic acquirers, and our analysis of these cases found that corporate leaders generally did not negotiate for stakeholder protections also in these acquisitions. However, upon reflection, we concluded that sales to private equity buyers are on average more likely to pose substantial risks to stakeholders than sales to strategic buyers. Thus, the absence of stakeholder protections in the sample of sales to strategic buyers we found is less telling, we believe, than the absence of such protections in the sample of sales to private equity buyers. And we therefore decided to focus this Article on the latter sample.

[12] *See e.g.*, Jay C. Hartzell, Eli Ofek, & David Yermack, *What's in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37 (2004).

[13] For scholars expressing such views, see, e.g., Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACCT. 247 (2017); Eleonora Broccardo, Oliver Hart, & Luigi Zingales, *Exit vs. Voice*, ECGI Finance Working Paper No. 694/2000, https://ssrn.com/abstract=3671918; Michal Barzuza, Quinn Curtis and David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

to negotiate for stakeholder protection would fail to satisfy the stakeholder-oriented preferences of these shareholders. In any event, we put aside these issues because, having concluded that shareholders do obtain a substantial fraction of the gains produced by the transactions, our focus in on whether stakeholders get to participate in these gains as well. Given this focus, the question of how corporate leaders choose to allocate the gains between shareholders and the corporate leaders themselves is not one we need to consider for our central inquiry.

In Section E of Part IV, we take up the central question of what corporate leaders obtained for stakeholders. We document that, despite the clear risks to stakeholders posed by the expected transfer of control to a private equity buyer, corporate leaders generally did not negotiate for any stakeholder benefits or any constraints on the post-deal power of the private equity buyer to make choices that would adversely affect stakeholders. Labor unions were induced to support constituency statutes as an instrument for addressing concerns about layoffs and reduced employment,[14] and the evidence indicates that private equity buyers often reduce employment.[15] Nonetheless, we document that corporate leaders did not negotiate for any restrictions on post-deal layoffs in the vast majority of the cases in our sample. Furthermore, in the tiny number of cases in which we found such restrictions, their presence was largely cosmetic because the terms of the acquisition agreement chose to deny employees any power to enforce these constraints.

In addition to finding that corporate leaders generally chose not to negotiate for any protections for employees, we document the general absence of protections for other notable stakeholder groups – customers, suppliers, creditors, communities, and the environment. Again, in a very small minority of cases we found pledges made by buyers to retain the location of company headquarters or to continue local investments or philanthropy. However, our analysis of these cases indicates that these rare pledges were rather "soft": unlike commitments to shareholders or corporate leaders, these pledges were vague, under-specified and, importantly, accompanied by explicit denial of any enforcement rights by potential beneficiaries.

To be sure, many stakeholders, such as employees, customers, suppliers, and creditors, typically have contractual arrangements with the company. These contractual arrangements might provide them with some protection in the event of an acquisition even if the corporate leaders negotiating the deal with the private equity buyer do not bargain for stakeholder protections during the negotiations over the acquisition. Thus, for example, employment agreements might entitle some employees to certain benefits if they are fired, and supply agreements might entitle some suppliers to specified benefits in the event the company terminates the supply relationship.

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[14] *See* sources cited *infra* notes 53-56.

[15] *See* evidence cited *infra* notes80-81.

However, the premise of the constituency statutes was (as the premise of modern stakeholderism currently is) that the contractual arrangements of some stakeholders, such as employees, customers, and suppliers, do not offer them sufficient protection from the adverse effects of acquisitions. Constituency statutes therefore sought to enable corporate leaders to seek stakeholder protections that could address the remaining concerns. For this reason, the analysis of Part IV focuses on whether corporate leaders negotiating in the shadow of constituency statutes used their discretion to obtain such stakeholder protections, and it concludes that they did not.

To reach our conclusions regarding the effects of constituency statutes on the examined transactions (or lack thereof), we do not need to compare the terms of the transactions we study with those of similar transactions in states without such statutes. To confirm the hypothesis that constituency statutes produced benefits for stakeholders, it is necessary to show *both* that (i) corporate leaders obtained significant benefits for stakeholders in cases governed by constituency statutes, and (ii) such benefits are greater than those found in similar transactions not governed by constituency statutes. Our finding that (i) does not hold leads to a rejection of the hypothesis without need for checking the validity of (ii). That is, given the general lack of stakeholder protections in cases governed by constituency statues, one can conclude that the statutes failed to produce such protections, as this conclusion holds regardless of whether such protections were also lacking in cases not governed by such statutes.

Finally, Part V discusses the implications of our empirical analysis and findings. We first explain that the evidence we present enables us to reach a clear conclusion on the performance of constituency statutes: they failed to deliver the promised and hoped-for benefits for stakeholders.

We then proceed to discuss the implications of our findings for the broad stakeholderism debate. Because constituency statutes had stakeholderist justifications and goals, all involved in the ongoing stakeholderism debate should seek to learn from the experience with these statutes. In particular, stakeholderists must wrestle with the failure of these statutes, identify the factors that caused it, and examine whether these factors would also undermine their current proposals.

Part V then discusses several possible explanations for the failure of constituency statutes to deliver stakeholder protections, and we extend our empirical analysis in order to evaluate these explanations. In particular, we show, our findings cannot be driven by four potential explanations that could be put forward: uncertainty about the interpretation of the statutes; the shadow of the Delaware *Revlon* doctrine; the need to obtain shareholder approval for the acquisition; and the influence of shareholder-centric norms on corporate leaders.

The most plausible explanation, we show, lies in the incentives of corporate leaders. Although the interests of corporate leaders do not perfectly align with the interest of shareholders, the interests of corporate leaders and shareholders are substantially linked.[16] By contrast, there is no significant link between the interests of corporate leaders selling their companies and the post-sale interests of stakeholders. In fact, to the extent that stakeholder protections would constrain the buyer and thus be costly to it, the inclusion of such protections in the deal could result in somewhat lower gains for the shareholders and/or the corporate leaders. Thus, corporate leaders had no incentives to use their negotiating power—and indeed had incentives *not* to use this power—for the purpose of negotiating protections for stakeholders.

It might be argued that, although we do not detect any material concerns for stakeholder interests in the universe of analyzed cases, such concerns might have motivated corporate leaders to decline some opportunities to sell the company to a private equity buyer. In particular, it might be hypothesized that, encouraged by the presence of a constituency statute, corporate leaders declined in many cases an opportunity to sell to a private equity buyer because of their concern that the acquisition would make some stakeholders worse off. However, our findings suggest that this hypothesis is implausible.

If a potential private equity acquisition would produce overall efficiency gains but make some stakeholders worse off, stakeholder-oriented directors can negotiate for stakeholder protections rather than give up the potential acquisition gains altogether. In this way, those directors can secure the gains of the acquisition and make both shareholders and stakeholders better off. Thus, if corporate leaders were often motivated by concerns that potential acquisitions could make some stakeholders worse off, we should expect to observe a significant number of cases in which the acquisition does take place but with stakeholder protections that ensure that no stakeholders are made worse off. The lack of such protections in our universe of cases is thus inconsistent with the hypothetical material concerns of corporate leaders about allowing an acquisition that would make stakeholders worse off.

Thus, the empirical findings of this Article highlight that considering the incentives of corporate leaders is critical for assessing the promise of stakeholderism. Stakeholderism is based on the premise that corporate leaders would substantially use their discretion to serve stakeholder interests. Our evidence indicates that, in the case of constituency statutes, this assumption was unwarranted. All those participating in the current debate on stakeholderism should therefore be wary of relying on such an assumption. Our findings thus casts doubt on whether stakeholderism should be expected to deliver its purported benefits for stakeholders.

[16] For a detailed analysis of the array of incentives and market forces that align the interests of corporate leaders and shareholders, see Bebchuk & Tallarita, *supra* note 6, sections IV.A and IV.B.

II. THE STAKEHOLDERISM DEBATE

A. A Critical Juncture

A central debate in corporate governance is whether corporate leaders—directors and top executives—when making business decisions, should consider only the interests and welfare of shareholders (shareholder primacy) or should also consider the interests of non-shareholder constituents, such as employees, customers, suppliers, local communities, and society at large (stakeholderism). On an abstract level, some versions of stakeholderism are merely aspirational: they hold that corporations' role in our economy should be beneficial to society as a whole. But on a prescriptive, operational level, advocates of stakeholderism propose that corporate leaders should be given broad discretion to decide whether, when, and how stakeholder interests should be taken into consideration. Thus, stakeholderism and its ability to improve the welfare of stakeholders rely heavily on an expansion of managerial discretion. In this Article, we seek to test this specific proposal.

The stakeholderism debate has been taking place since at least the classic exchange on the subject in the 1930 between Adolf Berle and Merrick Dodd.[17] Support for stakeholderism has over time been expressed by many prominent legal scholars,[18] and economics and business scholars.[19] Nonetheless, until recently, the shareholder primacy view has commonly been more prevalent among both academics and practitioners.[20] Recently, however, stakeholderism has returned to the center of the corporate governance discourse, and the debate seems to have reached a critical juncture.

In August 2019, the Business Roundtable—an influential association of corporate chief executive officers (CEOs)—issued a statement, signed by the CEOs of 187 major public companies, in which they committed to "lead their

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[17] For the articles in this exchange, see Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolf A. Berle, Jr., *For Whom Are Corporate Managers Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

[18] S*ee, e.g.,* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH 1 (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

[19] S*ee, e.g.,* COLIN MAYER, PROSPERITY (2018). The seminal defense of stakeholderism in management literature is R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 1 (1984).

[20] *See, e.g.*, STOUT, *supra* note 18, at 21 ("by the close of the millennium [… m]ost scholars, regulators and business leaders accepted without question that shareholder wealth maximization was the only proper goal of corporate governance"); *and* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 440 (2001) ("there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests").

companies to the benefit of all stakeholders," and to "deliver value" not just to shareholders but also to employees, customers, suppliers, and communities.[21] The statement has been hailed by many commentators as a radical change in the conception of corporate purpose and the harbinger of a major transformation in corporate governance practices.[22]

The World Economic Forum similarly urged companies to move from the traditional model of "shareholder capitalism" to the model of "stakeholder capitalism."[23] In addition, the Reporter and advisors for the American Law Institute are considering the introduction of stakeholderist elements into its ongoing *Restatement of Corporate Law* project.[24] These developments led observers to view 2019 as a "watershed year in the evolution of corporate governance" due to the "advent of stakeholder governance,"[25] and 2020 as a "decisive inflection point" in the stakeholderism debate.[26]

B. The Support for Stakeholderism

The stakeholderism view holds that the welfare of each group of corporate stakeholders is relevant and valuable independent of its effect on the welfare of shareholders. Therefore, corporate leaders should serve not only shareholders but a plurality of independent constituencies and should weigh and balance a plurality of autonomous ends.[27] An important corollary of the fact that the welfare of shareholders and the welfare of stakeholders are independent factors is that there

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[21] Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans; Business Roundtable, *Statement on the Purpose of a Corporation*, *supra* note 3.

[22] *See, e.g.*, Alan Murray, *A New Purpose for the Corporation*, FORTUNE (Sept. 2019), https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/ ("the [Business Roundtable] announced a new purpose for the corporation and tossed the old one into the dustbin"); David Gelles & David Yaffe-Befany, *Feeling Heat, C.E.O.s Pledge New Priorities*, N.Y. TIMES, Aug. 19, 2019 at A1 (stating that the new statement "break[s] with decades of long-held corporate orthodoxy"). A more skeptical view regarding the significance of the Business Roundtable statement is offered in a recent Wall Street Journal op-ed by two of us. *See* Lucian Bebchuk & Roberto Tallarita, *Stakeholder Capitalism Seems Mostly for Show*, WALL. ST. J., August 7, 2020.

[23] Davos Manifesto, *supra* note 4 ("[t]he purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders…").

[24] The Reporter discussed this possibility in an NYU roundtable on December 6, 2019.

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

[26] *See* Martin Lipton, *Spotlight on Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jul. 18, 2020), https://corpgov.law.harvard.edu/2020/07/18/spotlight-on-boards-7/.

[27] For a recent defense of stakeholderism, *see* MAYER, *supra* note 19, at 39.

could be cases in which corporate leaders may choose a stakeholder-friendly course of action even if it would prove costly to shareholders. With a stakeholderist approach, stakeholders could in theory receive a larger share of the value created by the corporation than with a shareholder primacy approach. This is, in fact, the goal of stakeholderism.

In practice, stakeholderist proposals rely on the discretionary judgment of corporate leaders. It is up to directors and top executives to determine which groups should be considered stakeholders of the corporation, when a situation involves a potential trade-off between shareholders and some group of stakeholders, how to quantify and weigh the respective welfare gains or losses (especially when they are not immediately or easily monetized, such as, for example, matters of job security, health and safety, or environmental issues), and how to resolve such trade-offs.

For example, the 2019 Business Roundtable statement is a commitment of the signatory CEOs to "deliver value" to all stakeholders, but it does not provide details on how this should be done, nor does it propose mechanisms that constrain the ability of CEOs to make decisions.[28] Another example, which we will examine in detail in Part III, is the adoption of the state constituency statutes, which authorize directors to consider the interests of certain groups of stakeholders, but do not specify how to resolve conflicts or trade-offs between them.[29] In fact, some statutes explicitly state that no one stakeholder group has any dominant weight over the others, thus leaving it to directors to decide how to balance the various interests at stake.[30]

Similarly, academic defenses of stakeholderism entrust corporate leaders with the task of mediating between the various groups of stakeholders and balancing their conflicting interests. Margaret Blair and Lynn Stout, for example, argue that directors should play the role of "mediating hierarchs," determining how to allocate the value created by the corporation between shareholders and stakeholders.[31] Colin Mayer refers to "intrinsic trusteeship" (that is, the role of directors as trustees for all corporate constituents) as a substitute for "extrinsic regulation" to improve societal welfare.[32] According to this view, self-organized managerial arrangements can effectively replace regulation and other external constraints as a method for improving stakeholder welfare. Thus, even with this

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[28] Business Roundtable, *Statement*, *supra* note 3. For a detailed critique of the Business Roundtable statement, see Bebchuk & Tallarita, *supra* note 6, at 124-139.

[29] *See infra* section III.A.

[30] *See infra* note 74 and accompanying text.

[31] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 251 (1999) (arguing that the board of directors should "coordinate the activities of the team members [that is, shareholders and various groups of stakeholders], allocate the resulting production, and mediate disputes among team members over that allocation.").

[32] Colin Mayer, *Ownership, Agency, and Trusteeship*, ECGI Law Working Paper No. 488 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3522269.

approach, stakeholderism relies on the use of managerial discretion for the benefit of stakeholders.

It is worth noting that there is also a "lite" version of stakeholderism, which contends that treating stakeholders well is beneficial to the long-term interests of shareholders. According to this view, which promotes what is often called "enlightened shareholder value," stakeholder interests are simply a means to the end of shareholder value maximization.[33] We believe this approach is conceptually and practically indistinguishable from traditional shareholder value approach.[34] If corporate leaders provide benefits to stakeholders only insofar as doing so is good for shareholders, then stakeholders should not expect to receive any more benefits than they would under the traditional shareholder value approach. In this Article, we will therefore focus on exploring what benefits stakeholders should expect from the more meaningful, "pluralistic" version of stakeholderism. Of course, if the more meaningful pluralistic version of stakeholderism should not be expected to produce benefits for stakeholders, as Part IV will suggest, then the 'lite" version of enlightened shareholder value should not be expected to produce such benefits either.

C. The Agency Critique of Stakeholderism

Critics of stakeholderism have argued that expanding the discretion of corporate directors should not be expected to produce material benefits for stakeholders.[35] According to this view, corporate leaders have strong incentives to give substantial weight to the interests of shareholders and to their own interests but have no incentive to advance the interests of stakeholders beyond what is instrumentally beneficial to shareholders.

This critique of stakeholderism reflects an agency view that stresses that the behavior and choices of corporate leaders might be substantially influenced by their incentives and not just by the aspirations behind legal rules and principles. According to the agency view, at least under the existing structure of incentives,

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[33] For example, the 2006 UK Companies Act lists some stakeholder-related factors that directors should consider for the success of the company and the interests of its shareholders. Companies Act (UK) §172(1).

[34] see Bebchuk & Tallarita, *supra* note 6, at 108-114.

[35] For an article attempting to put forward a comprehensive case for this view, *See generally* Bebchuk & Tallarita, *supra* note 6. For other writings that stress the problem of incentives, *see, e.g., Lucian Arye Bebchuk, The Case for Increasing Shareholder Power, 118 Harv. L. Rev. 833, 908–13 (2005); Lucian A. Bebchuk, The Myth of the Shareholder Franchise, 93 Va. L. Rev. 675, 729–32 (2007); Robert C. Clark, Harmony or Dissonance? The Good Governance Ideas of Academics and Worldly Players, 70 Bus. Law. 321, 338 (2015);* Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations have a Purpose?* 101, 123-27 (ECGI working paper, 2020), available at https://ssrn.com/abstract=3561164.

corporate leaders are unlikely to use the broad discretion that would be granted to them in a stakeholderist arrangement in a way that would materially improve the welfare of stakeholders. Even supposing that directors and CEOs were allowed to balance and trade off the interests of stakeholders with those of shareholders, why would they ever use this power in a way that would redistribute value from shareholders to one or more group of stakeholders?

Such a choice would be a strategic mistake for corporate leaders, whose compensation is in substantial part linked to the financial performance of the company,[36] and whose prospects in the job market (i.e., the likelihood of retaining their position or finding an equivalent or better position in another company) heavily depend on the company's performance in terms of shareholder value.[37] Redistribution in favor of stakeholders would also, by definition, be harmful for shareholders, who are the only constituents legally empowered to appoint and replace directors, and therefore the only parties who can directly reward or punish directors for their decisions. Therefore, corporate leaders who would choose to benefit stakeholders at the expense of their own or their shareholders' interests would be more likely to find themselves jobless. Hence, corporate leaders have no reason to favor stakeholders at the expense of shareholders, and shareholders have no reason to encourage this kind of choice.

The point of contention between stakeholderists and their critics is based on differing analyses of the forces that shape corporate decision-making. At the core of the dispute, however, lies a simple empirical question: If directors and executives are given the power to take into account the interests of stakeholders, as proponents of stakeholderism advocate, will these corporate leaders use this power to advance the interests and improve the welfare of stakeholders? In this Article, we seek to answer this question by observing the choices made by corporate leaders of companies subject to statutory rules that closely resemble those advocated by stakeholderists.

III. TOWARDS AN EMPIRICAL TEST OF STAKEHOLDERISM

In Part IV, we present an empirical analysis of the contractual terms of private equity acquisitions of public companies incorporated in states with a constituency statute, from 2000 through 2019. In this Part, we discuss the motivation for the study and how it can help resolve important questions about stakeholderism, past and future.

Section A examines the constituency statutes adopted by U.S. states. We

[36] *See, e.g.,* Equilar, *CEO Pay Trends* 18 (2018); Meridian Compensation Partners, *Trends and Development in Executive Compensation* 21 (2018).

[37] *See, e.g.,* Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed?*, 12 INT'L. REV. FIN. 57 (2012); Dirk Jenter & Fadi Kanaan, *CEO Turnover and Relative Performance Evaluation: CEO Turnover and Relative Performance Evaluation*, 70 J. FIN. 2155 (2015).

begin by explaining the promise and purported goals of these statutes. Just as modern stakeholderism seeks to address the externalities companies impose on stakeholders, constituency statutes have sought to address the adverse effect of takeovers on stakeholders, or at least have been partially justified on this basis. Thus, studying whether the constituency statutes have succeeded in delivering benefits to stakeholders is useful for understanding both whether this experiment in stakeholderism has been successful in delivering on its promise, and for determining whether stakeholderism in general can be expected to produce benefits for stakeholders.

Section B discusses why examining private equity deals is especially valuable for testing the promise of constituency statutes. Sales to private equity firms pose substantial risks for some groups of stakeholders and therefore serve as a context in which stakeholder-oriented corporate leaders should be expected to be particularly active.

A. Constituency Statutes

1. The Promise of Constituency Statutes

From the mid-1980s to the early 1990s, in response to a massive increase in hostile corporate takeovers, many U.S. states adopted statutes that strengthened the power of directors to fend off bidders. These anti-takeover laws included statutes that explicitly permitted the use of "poison pills" against unwanted suitors; statutes preventing freeze-out mergers for a certain period after the acquisition of a significant stake in the company; and statutes requiring bidders to pay a "fair price" in the second part of a two-tier merger.[38]

In this Article, we will focus on a specific type of anti-takeover legislation that took the form of an explicit experiment in stakeholderism. These statutes—often referred to as "constituency statutes"— authorized directors to consider the interests of employees and other stakeholders when assessing the merits of an acquisition offer.[39] Many statutes went even further and authorized directors to consider the interests of stakeholders with respect to any kind of decisions.[40]

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[38] For a discussion of state anti-takeover laws, *see* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973 (2009).

[39] For a general overview of these statutes, *see* American Bar Association Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999); Barzuza, *supra* note 38. Other labels that have been used for these statutes are "other constituencies statutes" and "stakeholder statutes."

[40] For the various structures and provisions of the constituency statutes, *see infra* section III.A.2.

Although Delaware, the most influential state for corporate governance,[41] retained a shareholder-centric view of corporate purpose, a substantial majority of states adopted constituency statutes.

The purported motivation for such a remarkable legal innovation was the protection of employees, local communities, and possibly the economy at large, from the adverse effects of hostile acquisitions. This theory occupied a central place in the contemporaneous works of lawyers and academics. Martin Lipton, for example—who very early on contended that takeovers threatened the welfare of stakeholders and that directors should be able to reject a takeover offer on the grounds of concern for stakeholders[42]—welcomed the adoption of constituency statutes as a way for directors to protect non-shareholder constituencies.[43]

Steven Wallman, another prominent lawyer and a drafter of the Pennsylvania constituency statute, observed that many takeovers resulted in a transfer of wealth from stakeholders to shareholders, and that constituency statutes allowed directors to reject those deals, thus benefitting employees and other stakeholders who cannot easily protect themselves.[44] The perception of the policy rationale behind the constituency statutes and other anti-takeover laws was summarized by Lyman Johnson and David Millon during the wave of enactments:

> [State anti-takeover laws'] chief purpose is to protect non-shareholders from the disruptive impact of the corporate restructurings that are thought typically to result from hostile takeovers. Rightly or wrongly, state legislators perceive that hostile takeovers cause lost jobs, destruction of established supplier and customer relationships, and loss of tax revenues and charitable contributions.[45]

At the very least, hostile acquisitions were thought to be causing a geographical redistribution of wealth away from areas of the country traditionally dependent on manufacturing jobs.[46] By allowing corporate decision-makers to consider the effects of an acquisition on employees, suppliers, and the local

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[41] *See* Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, nt. 6 (1991) ("Because about 50 percent of the major public companies are incorporated in Delaware, the Delaware courts, more than any others, have been compelled to be the judicial arbiters of the corporate governance debate").

[42] Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 122 (1979) ("It is reasonable for the directors of a target to reject a takeover on… [the grounds that it would have an] adverse impact on constituencies other than shareholders").

[43] Lipton & Rosenblum, *supra* note 41.

[44] Steven M.H. Wallman, *Corporate Constituency Statutes: Placing the Corporation's Interests First*, 11 Bus. Law. Update 1, 2 (1990).

[45] *See, e.g.* Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 848 (1989).

[46] Perhaps for this reason, while some "states—particularly those in the 'Rustbelt' extending through New York, Pennsylvania, Ohio, Indiana, Wisconsin and Minnesota—have become protective havens for target corporations… Congress has tended more towards neutrality." John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 436 (1988).

community, constituency statutes explicitly sought to mitigate or eliminate the effects of takeovers that posed a threat to local jobs.

The view that takeovers often damaged stakeholders found some support in the economic literature. While the increasingly predominant theory was that takeovers were socially desirable in that they reduced waste, disciplined management, and reallocated resources from less productive to more productive uses,[47] a competing view held that takeovers could, and often did, merely redistribute wealth from stakeholders to shareholders. According to this view, by enabling such redistribution, hostile takeovers violated an implicit contract between shareholders and stakeholders, which was based on the trustworthiness of managers.[48] In the long run, this theory argued, hostile takeovers would render the implicit promises to stakeholders unreliable, thus producing a net loss for the economy at large.[49]

The legislative history of constituency statutes shows that the expressed intent of the legislators was consistent with this view. Hostile takeovers were seen as a threat to workers, suppliers, and local economies, and the expanded discretion granted to corporate leaders was meant as a tool for enabling managers to mitigate or avoid those negative effects. For example, the memorandum accompanying the New York bill mentioned the state's "desire to avoid the disruptive effects of takeovers on target company employees and local communities in which target do business."[50] Similarly, during the legislative debate on the Nevada bill, the proposed constituency statute was advocated on the grounds that it would allow directors to block takeovers that could result in the closing of a plant and the layoff of local employees.[51]

The theory that constituency statutes would protect employees and local communities was supported by major unions. In fact, although legislative initiatives were commonly propelled by business interests, and sometimes even directly by the management of corporations under attack,[52] unions and political

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[47] *See, e.g.,* Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983).

[48] Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers,* in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES (Alan J. Auerbach ed. 1988).

[49] *Id.* at 53. *See also* Coffee, *supra* note 46, at 440 ("[some] stakeholders… are in a poor position to bargain. Having sunk substantial investments in the firm, they are exposed…to shareholder opportunism").

[50] Johnson & Million, *supra* note 45, at 850.

[51] Minutes of the Nevada State Legislature, Assembly Committee on Judiciary, May 21, 1991, p. 12-15.

[52] For the role of corporate managers and their lobbyist in the enactment of state takeover laws, *see* Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987). For the role of individual corporations targeted by corporate raiders, *see, e.g,* Virginia Inman, *Pennsylvania Senate Is Seen Near Vote on Bill that May Deter Dissident Investors*, WALL ST. J., Dec. 6, 1983, at 12 (reporting that an anti-takeover bill was drafted the Chamber of

forces close to labor interests often backed these efforts. Organized labor had already played an important role in helping management defend against hostile bids.[53] When state legislators started discussing constituency and other anti-takeover statutes, unions sided with management.[54] As a Democratic state senator put it during the debate on the first legislative proposal for a constituency statute in Pennsylvania, while the proposed bill was "big business legislation," at the same time, it should also be considered progressive because it would protect "constituents [who] work in the factories owned by big businesses."[55] Another observer of the legislative process in Pennsylvania commented that "[m]any of the state's major corporations… have teamed up with its most powerful unions, among them the United Steelworkers and AFL-CIO." [56]

While much of the discussion around these statutes focused on the tools they provided to resist hostile bids—that is, to reject the acquisition offer and keep the company independent—the expansion of managerial discretion was also thought to strengthen managers' bargaining power in a negotiated sale. If the route of a hostile takeover becomes more difficult, it was claimed, bidders have stronger incentives to negotiate, and target company leaders have more power to obtain favorable terms. This "bargaining power hypothesis" has long been a recurring argument in favor of takeover defenses.[57]

In a shareholder-value framework, which is the one typically adopted in the corporate governance and finance literature, the bargaining power hypothesis is commonly used to justify the desirability of takeover defenses from a shareholder

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Commerce and backed by Scott Paper Co., at the time the target of a takeover bid by the Canadian investment firm Brascan Ltd.).

[53] *See, e.g.*, Roberta S. Karmel, *The Duty of Directors to Non-Shareholder Constituencies in Control Transactions-A Comparison of US and UK Law,* 61 WAKE FOREST L. REV. 25, 96 (1990) ("In some change of control situations, unions have played a key role in assisting management in either restructuring or resisting a hostile bid. Employee stock ownership plans have been utilized as a takeover defense mechanism. Some unions have inserted anti-takeover devices in collective bargaining agreements").

[54] *See, e.g.* Leslie Wayne, *Takeovers Face New Obstacles: Pennsylvania Effort Raises Broad Issues*, N.Y. Times, Apr. 19, 1990, at D1 (quoting William M. George, secretary-treasurer of Pennsylvania A.F.L.-C.I.O., in support of the proposed anti-takeover bill, which strengthened the constituency statute).

[55] Commonwealth of Pennsylvania, Legislative Journal, Dec. 6, 1983, at 1431, 1436, *quoted in* Orts *supra* note 39, ft. 47.

[56] S*ee* Milo Geyelin & Vindu P. Goel, *Pennsylvania Legislators Gird to Battle Over Bill that Could Become Stiffest Anti-Takeover Law*, Wall St. J., Dec. 20, 1989, at A16. For a classic discussion of the political alliance between business interests and labor against finance interests, *see* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991).

[57] *See* Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621 (2003) ("This hypothesis states that a target with strong takeover defenses will extract more in a negotiated acquisition than a target with weaker takeover defenses, because of the acquirer's no-deal alternative, to make a hostile bid, is less attractive against a strong-defense target").

perspective.[58] The promise of constituency statutes, however, was that directors would become guardians of the interests of all constituencies, and that corporations' increased bargaining power could be used to obtain protections and favorable terms for employees and other stakeholders and not just for shareholders. For the supporters of stakeholderism, this outcome is precisely the *raison d'être* of takeover defenses: not only blocking deals that are considered harmful but also negotiating friendly deals with more favorable terms for stakeholders.[59]

In conclusion, the promise of constituency statutes was that corporate leaders would deliver change of control deals with substantial protections and benefits for stakeholders. In Part IV, we will examine whether and to what extent corporate leaders actually did so.

2. Variations in Constituency Statutes

During the two-decade period examined by this Article (2000-2019), 33 states had a constituency statute in place, one of them (Louisiana) only until the end of 2014.[60] Of these 33 statutes, three allow individual corporations to choose whether they want to opt in the statute (Georgia, Maryland, and Tennessee) and one allows to opt out of the statute (Arizona).[61] To make sure that the transactions examined are governed by a constituency statute, we focus exclusively on target companies incorporated in the 29 states with statutes that do not contain opt-in or opt-out mechanisms. While all these statutes authorize directors to give weight to stakeholder interests, there are some differences worth noting:

(a) Scope. All the statutes apply to public companies and to their decisions in the face of an acquisition offer; many of them also apply to private companies and/or to other kinds of corporate decisions. We focus our empirical analysis on the sale of public companies, for which we have access to publicly available merger documents filed with the Securities and Exchange Commission (SEC), which allow us to learn about the bargaining process and its outcome.

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[58] For a discussion of the bargaining power hypothesis from the perspective of shareholder value maximization, *see, e.g.*, Dale Arthur Oesterle, *Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 CORNELL L. REV. 117 (1986-1987) *and* Rene N. Stulz, *Managerial control of voting rights: Financing policies and the market for corporate control*, 20 J. FIN. ECON. 25 (1988).

[59] *See, e.g.,* Lynn A. Stout, *The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance*, 152 U. PA. L. REV. 667 (2003)(arguing that companies adopt takeover defenses to give directors the power to advance the interests of stakeholders at the expense of shareholders, when appropriate). For the role of constituency statutes in negotiated acquisitions, *see, e.g.,* Bainbridge, *supra* note 39, at 1020-1022.

[60] 2014 La. ALS 328 (enacting the new Louisiana Business Corporation Act, effective January 1, 2015, which does not include a constituency statute).

[61] Ariz. Rev. Stat. § 10-830; Ga. Code Ann. § 14-2-202; Md. Code Ann., Corps. & Ass'ns § 2-104; Tenn. Code Ann. § 48-103-204.

(b) Optional or mandatory application. As explained above, only a small minority of statutes allow individual corporations to choose whether or not they want to be subject to the statutes, through an opt-in or opt-out mechanism. We exclude from our empirical analysis the acquisition of companies incorporated in states with opt-in or opt-out mechanisms.

(c) Permissive or mandatory consideration of stakeholder interests. All constituency statutes other than that adopted by Connecticut in 1990 are permissive in nature, providing that directors may consider the effect of the decision on stakeholders but not mandating that they to do so. Connecticut's original statute provided that directors "shall consider . . . the interests of the corporation's employees, customers, creditors, and suppliers, and . . . community and societal considerations."[62] However, in 2010 the state legislature amended the aforementioned provision by replacing "shall" with "may." As a result, as of October 1, 2010, all constituency statutes in force are merely permissive.[63]

From a practical standpoint, we believe that the distinction between a permissive and a mandatory constituency statute is not significant. Given that these statutes do not provide directors with any criteria on how to measure, weigh, or balance the various interests at stake, an obligation to "consider" the interests of stakeholders do not effectively restrict directors' freedom. Therefore, both in permissive and mandatory statutes, directors can use their discretion when determining the outcome of their assessment. In our dataset, however, only one transaction was subject to a mandatory constituency statute, and its terms are in line with the rest of the transactions under study.[64]

(d) Stakeholder interests. Statutory language varies significantly with respect to the non-shareholder interests that directors may take into account. Almost all statutes mention employees, customers, and suppliers; most mention creditors and communities; and many mention society, the economy of the state, or the economy of the nation. Only two—Arizona and Texas—explicitly mention the environment. Interestingly, however, 14 statutes contain a catch-all phrase allowing directors to take into account other interests or other factors, thus extending the protection of the statute to unenumerated stakeholder groups and interests. Table 8 in Part IV reports in detail which state statutes refer to which stakeholder interests.

3. *Reliance on the Discretion of Corporate Leaders*

While constituency statutes enable directors to give weight to the interests of stakeholders, all of them are silent on the crucial question of how directors should weigh and balance the interests of shareholders and stakeholders. They provide

[62] Conn. Gen. Stat. § 33-756 (1990).
[63] HB 5530, 2010 ALS 35 (Conn. 2010).
[64] See Tables A1-A6 in the Appendix, in which the MacDermid acquisition appears.

no criteria, metrics, or even generic guidance on how directors are expected to use this discretionary power.[65] In fact, many statutes even give directors the freedom to decide which individuals or groups should be considered stakeholders of the corporation.[66]

This authorization was viewed as a radical departure from the traditional notion that directors should evaluate acquisition offers on the basis of whether or not they maximize value for shareholders. For example, in 1990 Roberta Karmel, a prominent scholar and former SEC Commissioner, observed that the new legislation espoused a "novel" idea that was "contrary to long standing legal principles."[67] The novel idea was to authorize corporate leaders considering a sale of the company to look after the interests of stakeholders even if doing do would not serve the interests of shareholders. Corporate leaders could serve stakeholder interests at the expense of shareholders by turning down an acquisition offer that would be profitable for shareholders but would impose losses on stakeholders, or by bargaining with the acquirer to obtain post-acquisition protections for stakeholders even if this would result in a lower premium for shareholders.

It might be argued that the constituency statutes should be interpreted narrowly in a merely "instrumental" way. According to this instrumental interpretation, directors are allowed to give weight to the interests of stakeholders only to the extent they are instrumentally related to the interests of shareholders, and directors thus may not seek to protect stakeholders at the expense of shareholders in the ways discussed in the preceding paragraph. At the time that states began adopting constituency statues, a committee of the American Bar Association (ABA) urged interpreting them as if they were meant to merely codify existing common law and to authorize directors to serve stakeholder interests only as long as there is a "rationally related benefit to shareholders."[68]

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[65] Four states (Mississippi, New Mexico, Ohio, and Wyoming) oblige directors to consider the interests of shareholders. Therefore, while directors may, at their discretion, consider the interests of stakeholders (or may legitimately decide to ignore them), they must always consider the effect of their decisions on shareholders. Miss. Code § 79-4-8.30; N.M. Stat. § 53-11-35; Ohio Rev. Code § 1701.59; Wyo. Stat. § 17-16-830. We believe that the practical consequences of this alternative wording are not significant. The fact that directors must consider the interests of shareholders does not imply that they cannot, after due consideration, favor stakeholders at the expense of shareholders. In all these cases, directors have the broadest discretion to balance shareholder and stakeholder interests in the way they see fit, without any real constraint.

[66] *See infra* Part IV, Table 8. Eight statutes contain a catch-all provision that enables directors to extend the protection of the constituency statute to unenumerated stakeholder interests.

[67] Karmel, *supra* note 53, at 96.

[68] American Bar Association, *supra* note 39, at 2269. The phrase "rationally related benefit to shareholders" echoes the one used by the Delaware Supreme Court in *Revlon*. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986) ("[W]hile concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders").

The ABA committee, however, seemed to focus on making a normative argument concerning the desirable design of constituency statutes, rather than a positive argument regarding what existing statutes were intended to prescribe. In the subsequent three decades, many prominent scholars writing on this issue, including both supporters and critics of stakeholderism, generally adopted a "pluralistic" interpretation under which constituency statutes allow corporate directors to attach independent weight to stakeholder interests and thus sometimes serve such interests even when doing so would not be best for shareholders.[69] The instrumental interpretation fail to get support not only from the scholarly literature but also from judicial decisions; while there are not many courts decisions on the subject, some decisions clearly indicate that shareholder value maximization is

[69] *See, e.g.*, William T. Allen, *A Glimpse at the Struggle for Board Autonomy in American Corporation Law*, Remarks at Stanford Law School 23 (Apr. 5, 1990), quoted in James J. Hanks Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97, 106-107 (1991) (arguing that the ABA committee's position is a "dubious interpretation"); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 606 (2003) (arguing that constituency statutes authorized "the board to make tradeoffs between shareholder and stakeholder interests"); Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, *supra* note 39, at 995 ("If the statutes are to have any meaning, they must permit directors to make some trade-offs between their various constituencies"); Blair & Stout, *supra* note 18, at 253 ("mentioning state constituency statutes as an example of legislation that weakens shareholders' control over directors"); COX & HAZEN, *supra* note 8 ("Other-constituencies statutes invite not simply a kinder, gentler standard, but the unbridled discretion of management to choose when to favor stockholders and when to favor workers or bondholders"); Hansmann & Kraakman, *supra* note 20, at 447 (referring to constituency statutes as an example of what they term "fiduciary model" of stakeholder protection, "in which the board of directors functions as a neutral coordinator of the contributions and returns of all stakeholders in the firm").

Other works endorsing a pluralistic interpretation are James J. Hanks Jr., *Non-Stockholder Constituency Statutes: An Idea Whose Time Should Never Have Come*, 3 INSIGHTS No. 3, p.20 (Dec. 1989) ("the real purpose of non-stockholder constituency statutes must be to enable directors to provide benefits to non-stockholder groups even when doing so would not benefit the stockholders"); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 277 (1991) (arguing that constituency statutes abrogated the long-standing shareholder primacy principle); Orts, *supra* note 39, at 85 ("[n]arrow interpretive strategies, such as those recommended by the ABA's Committee on Corporate Law, violate the plain language of the statutes and the legislative intent behind their enactment"); and A. A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. LAW 33, 43 (1991) (" it may be reasonably concluded that the legislature intended to do something common law did not do in affording directors flexibility in fending off a hostile tender offer – namely, in favor of non-shareholders over shareholders").

By contrast, we have found support for an instrumental interpretation only in two articles and two student notes; *see* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 465 (2006); George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. Rev. 1319, 1360 (2017); Anthony Bisconti, Note: *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land*, 42 Loy. L.A. L. Rev. 765, 790 (2009) *and* Spencer J. Hazan, Note, *Considering Stakeholders in M&A*, 16 NYU J. Law & Bus. 749 (2020).

not the sole factor that directors should consider under a constituency statute, and we have found no decision that limits the consideration of stakeholder interests to be a mere means for shareholder value maximization.[70]

It might be worth briefly explaining why adopting a narrow instrumental interpretation of constituency statutes is indeed not plausible. To begin, this position is inconsistent with the explicit language of several constituency statutes. Some states (Georgia, Iowa, Nevada, New York, and Pennsylvania) expressly reject the idea that any one constituency may have a dominant weight over others. In particular, Iowa expressly provides that directors are allowed to conclude that one or more stakeholder factors outweigh "the financial or other benefits to the corporation or a shareholder or group of shareholders."[71] New York provides that directors have no obligation to "consider or afford any particular weight" to any group (arguably, including shareholders).[72] Similarly, Pennsylvania states that directors are not required "to regard any corporate interest or the interests of any particular group . . . as a dominant or controlling interest or factor."[73] The Nevada statute expressly grants directors the power to decide which weight the interest of a given person or group should be accorded in a particular deliberation.[74] And the Georgia statute states that no corporate constituency has a right to be preferred over others.[75]

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[70] *See* Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 697 (E.D. Pa. 1986) ("[under Pennsylvania's constituency statute] directors are obliged to oppose tender offers deemed to be detrimental to the well-being of the corporation even if that [opposition] is at the expense of the short-term interests of the individual shareholders"); Safety-Kleen Corp. v. Laidlaw Envtl. Servs., Inc., No. 97 C 8003, 1999 WL 601039, at *10 (N.D. Ill. Feb. 4, 1998)("[T]he court is persuaded … that Wisconsin law permits the board of directors of a public company to look at factors other than simply enhancing shareholder value in evaluating takeover proposals"); Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1013 (E.D. Wis.), aff'd, 877 F.2d 496 (7th Cir. 1989) ("[under Wisconsin law] [t]he board has the responsibility to exercise its business judgment in accord with the best interests of the shareholders, the company, and the other constituencies"); Dixon v. Ladish Co., 785 F. Supp. 2d 746, 753 (E.D. Wis. 2011), *aff'd sub nom.* Dixon v. ATI Ladish LLC, 667 F.3d 891 (7th Cir. 2012) ("[Wisconsin's constituency statute] specifically authorizes corporate directors to consider more than just shareholders in executing their duties. Such a provision is in direct conflict with a rule that would require directors to focus solely on maximizing value for the benefit of shareholders"). One Nevada case held that the interests of stakeholders yield to the right of shareholders to vote at an annual meeting but does not mention any primacy of shareholder financial interests when directors consider the sale of the company. Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1351 (D. Nev. 1997).

[71] Iowa Code § 490.1108A.

[72] N.Y. Bus. Corp. Law § 717.

[73] 15 Pa. Cons. Stat. § 1715.

[74] Nev. Rev. Stat. § 78.138 ("Directors and officers… may… consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies").

[75] *See* Ga. Code § 14-2-202 ("any such provision shall be deemed solely to grant discretionary authority to the directors and shall not be deemed to provide to any constituency any right to be

Furthermore, the Tennessee statute specifically provides that directors cannot be held liable if they reject an acquisition offer on the grounds that it "would adversely affect the resident domestic corporation's employees, customers, suppliers, [or] the communities in which [. . . they] operate."[76] And the Vermont statute, which applies only to public companies, states that the statute does not change the interests that directors of private companies may consider (a clarification that would be hard to explain if the statute did not mean to amend the existing law, although only for public corporations).[77]

Moreover, if the constituency statutes simply represented a way to codify the existing common law without altering the principle of shareholder primacy, the lobbying efforts made by business interests and unions—and the heated debate surrounding the approval of the statutes—would be baffling. The instrumental interpretation proposed by the ABA committee implies that directors may not reject an offer that would adversely impact the company's employees, unless the offer is also a bad deal for shareholders. However, if this was indeed the correct meaning of these statutes, the powerful political coalition of business leaders and organized labor would have obtained nothing more than what was already available under the pre-existing shareholder primacy principle. Likewise, the rich literature debating the desirability of the constituency statutes would not make sense, as these statutes would have simply codified something that was already permissible under the previous law. As explained in section III.A.1 above, the explicit policy goal of these statutes was to protect stakeholders against hostile takeovers. If the statutes did not give directors the power to block offers that would harm stakeholders but might have been accepted by shareholders, then their policy goal would be entirely frustrated.

In conclusion, the possibility that some decision-makers might have thought that an instrumental interpretation was the correct view of the constituency statutes does not seem plausible to us. However, in Part V we will discuss this issue and show that this alternative assumption does not significantly change the interpretation of our findings.

B. Private Equity Deals

Our empirical analysis focuses on acquisitions of public companies by private equity firms. Private equity deals provide a good setting for this study because they present situations that involve significant risks of adverse effects on stakeholders. These risks may not necessarily materialize, but stakeholder-

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considered"). The Georgia constituency statute has an opt-in mechanism and therefore is not included in our analysis.

[76] Tenn. Code § 48-103-204. The Tennessee constituency statute has an opt-in mechanism and therefore is not included in our empirical analysis.

[77] Vt. Stat. tit. 11A, § 8-30.

regarding corporate leaders should be expected to take them into account and seek to limit them.

Private equity acquisitions of a public company typically transfer control to buyers with strong incentives to maximize financial returns. These strong incentives are usually generated by the heavy reliance on debt for financing the acquisition,[78] as well as by the compensation structure of both private equity managers and the managers of portfolio companies.[79] Thus, to the extent that the deal terms do not constrain the private equity buyer from doing so, the buyer would have strong post-deal incentives to maximize financial returns even when doing so would substantially come at the expense of stakeholders.

Indeed, there is robust empirical evidence that private equity acquisitions result in employee terminations and thus impose costs on some employees. For example, a recent study shows that private equity acquisitions reduce employment in target companies by 13% over the two-year period following the transaction.[80] Earlier studies have also documented declines in employee compensation following a private equity acquisition.[81]

To illustrate the risk raised by private equity takeovers on corporate stakeholders, we examined the ten largest private equity acquisitions in the past

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[78] *See* Steven N. Kaplan & Per Stömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSP. 121, 124-125 (2009) (stating that private equity acquisitions are typically financed with 60 to 90 percent debt);

[79] *See* JOSH LERNER ET AL., VENTURE CAPITAL & PRIVATE EQUITY: A CASEBOOK 69-75 (3d ed. 2005) (discussing trends in compensation structure of private equity funds); Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 5-7 (2008) (discussing the organizational structure and compensation practices of private equity funds); Robert J. Jackson Jr., *Private Equity and Executive Compensation*, 60 UCLA L. REV. 638 (2013) (analyzing how executive compensation in companies owned by private equity firms differs from executive compensation in public companies, and concluding that private equity investors tie CEO pay much more closely to performance than do the boards of directors of otherwise similar public companies); Kaplan & Stömberg, *supra* note 71, at 130-131 (observing that private equity firms "pay careful attention to management incentives in their portfolio companies" and that they "typically give the management team a large equity upside through stock and options", while maintaining a significant downside by "require[ing] management to make a meaningful investment in the company").

[80] Steven J. Davis et al., *The Economic Effects of Private Equity Buyouts*, NBER Working Paper 26370 (October 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465723 (examining thousands of U.S. private equity buyouts from 1980 to 2013, and finding that employment at target firms shrinks 13% over two years in buyouts of publicly listed firms relative to controlled firms, and average earnings per worker fall by 1.7% at target firms after buyouts, largely erasing a pre-buyout wage premium relative to controls).

[81] Frank Lichtenberg & Donald Siegel, *The Effects of Leveraged Buyouts on Productivity and Related Aspects of Firm Behavior*, 27 J. FIN. ECON. 165 (1990). Some view private equity's heavy reliance on debt financing and intense focus on investor returns as having negative effects on firm performance, employment, and wages. See, e.g., EILEEN APPELBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 1 (2014); LUDOVIC PHALIPPOU, PRIVATE EQUITY LAID BARE 1 (2017).

20 years that took place in states with a constituency statute,[82] reviewing company press releases and media coverage following each of the acquisitions. The results of our review provide a vivid illustration of the substantial adverse effect that the acquisitions had on employees and local communities in the long run. Moreover, our findings only represent a subset of this effect, as acquired companies, which are no longer subject to mandatory reporting obligations after becoming private, select to report only some of the events concerning their operations (this is particularly true for events with negative effects). In total, we have found that in 6 out of the 10 cases reviewed, the merger was followed by layoffs, a removal or relocation of the target's headquarters, or both.

For example, in the EMC acquisition, the combined company confirmed layoffs of employees one month after closing.[83] Although the exact number of jobs to be eliminated was not disclosed, it was expected to be between 2000-3000.[84] In the Heinz acquisition, the combined company announced its plan to eliminate 600 jobs across the U.S. and in Canada (including 350 in Pittsburgh, which was designated as "global home of the 'Heinz' brand" in the proxy statement) two months after the closing.[85] Similarly, in the Clear Channel acquisition, the combined company laid off 1,850 employees, which constitute approximately 9% of a total workforce of 20,500 employees, less than a year after the merger.[86] In the Bausch & Laumb acquisition, the surviving company eliminated 400 jobs six years after the merger.[87] Additionally, the company's press releases reveal a decrease in the target's headcount from 13,000 employees[88] to 11,000-12,000 employees[89] within the six year period following the merger.

There were also a few cases in which the acquiring company moved the target's headquarters to a different location or opened an additional facility whose operation overlapped with the original facility's operation. For example, following

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[82] We provide a detailed account of our selection criteria for the sample in *infra* Chapter IV.

[83] Jonathan Vanian, *Dell Technologies Is Laying Off Employees,* FORTUNE (Oct. 7, 2016), https://fortune.com/2016/10/07/dell-layoffs-emc.

[84] Dina Bass & Brian Womack, *Dell Technologies to Cut at Least 2,000 Jobs After EMC Deal*, BLOOMBERG (Sep. 8, 2016), https://www.bloomberg.com/news/articles/2016-09-08/dell-technologies-said-to-cut-at-least-2-000-jobs-after-emc-deal.

[85] CNBC.com, *Buffett's Recent Buy Heinz Squeezes Out 600 Employees,* CNBC (Aug. 14, 2013), https://www.cnbc.com/id/100962421.

[86] Geraldine Fabrikant, *Radio Giant Faces Crisis in Cash Flow,* THE NEW YORK TIMES (Apr. 29, 2009), https://www.nytimes.com/2009/04/30/business/media/30clear.html.

[87] Tom Tobin, *Bausch + Lomb cutting 400 jobs in N.Y.*, USA TODAY (Aug. 6, 2013), https://www.usatoday.com/story/money/business/2013/08/06/bausch-lomb-job-cuts/2625889.

[88] *Bausch & Lomb Names Gerald M. Ostrov Chairman and Chief Executive Officer*, BUSINESS WIRE (Jan. 23, 2008), https://www.businesswire.com/news/home/20080123005614/en/Bausch-Lomb-Names-Gerald-M.-Ostrov-Chairman-and-Chief-Executive-Officer.

[89] *Bausch & Lomb new world headquarters will be near its current Madison location*, NJ.COM (Mar. 30, 2019), https://www.nj.com/business/2013/07/bausch_lomb_new_world_headquar.html.

the Bausch & Laumb acquisition, the target's global headquarters was moved to a different state two years after closing.[90] Following the TXU acquisition, the target was split into three distinct businesses, one of which was moved from Dallas to Irving.[91] In the Parexel acquisition, a second US headquarters was opened in Durham, NC – in addition to the HQ in Waltham, MA – following the merger.[92]

Concerns about how private equity acquisitions affect stakeholders—and employees and communities in particular—have long received significant attention from public officials, the media, and the public. For example, the "Stop Wall Street Looting Act" was introduced in the Senate in 2019 to regulate the private equity industry, with the rationale that private equity controllers have forced many companies to cut costs and lay off workers, and that many private equity deals result in transfers of wealth from workers, suppliers, and consumers to private equity funds.[93] And in the 2012 presidential campaign, Mitt Romney's past association with a private equity group seemed to be a liability largely due to claims that the group's acquisitions had had adverse effects on employees.[94]

Much of the debate surrounding private equity focuses on the question of whether private equity deals are overall socially desirable. However, regardless of the answer to this question, there is a good basis for believing that without adequate protections, such deals present heightened risks of adverse effects for stakeholders. Thus, if corporate leaders did wish to use their discretionary power under the constituency statutes to benefit stakeholders, they should have been expected to seek protections for stakeholders that would have eliminated or reduced the risks raised by a private equity takeover.

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[90] *Id.*

[91] TXU's Schedule 14A filing of Feb. 28, 2007, *available at* https://www.sec.gov/Archives/edgar/data/1023291/000095013407004408/d44016defa14a.htm; *TXU Energy moving HQ to Irving*, DALLAS BUSINESS JOURNAL (Nov. 26, 2007) https://www.bizjournals.com/dallas/stories/2007/11/26/daily6.html.

[92] Zachery Eanes, *Clinical research company moving part of its HQ to Durham after getting incentives,* *THE NEWS & OBSERVER* (May 30, 2019) https://www.newsobserver.com/news/business/article230980063.html.

[93] Stop Wall Street Looting Act, H.R. 3848, 116th Cong. (2019); *See also* Elizabeth Warren, *End Wall Street's Stranglehold On Our Economy* (Jul. 18, 2019), https://medium.com/@teamwarren/end-wall-streets-stranglehold-on-our-economy-70cf038bac76 *and* Economic Policy Institute, Written Testimony in Support of the 'Stop Wall Street Looting Act of 2019 (Nov. 18, 2019), https://www.epi.org/publication/written-testimony-private-equity-nov-2019.

[94] *See* Suzy Khimm, *The Two Faces of Mitt Romney and Bain Capital*, Wash. Post, Jan. 10, 2012, https://www.washingtonpost.com/blogs/ezra-klein/post/the-two-faces-of-mitt-romney-and-bain-capital/2012/01/10/gIQArYmRoP_blog.html.

IV. EMPIRICAL ANALYSIS

A. Universe of Cases

1. Data Collection

In this Part we empirically investigate the results produced by constituency statutes. In particular, we analyze how corporate leaders used the discretion that the statutes granted them to protect stakeholder interests when considering and negotiating a sale of the company.

We used the FactSet M&A database to gather a substantial sample of transactions based on four selection criteria. First, we focused on acquisitions made or sponsored by a private equity firm, using the definition of private equity acquisition used by FactSet.[95] We limited our study to acquisitions in which the private equity firms' equity stake in the target company prior to the acquisition was lower than 20%, as a holder of 20% or more of the company equity stake could exercise effective control over the firm. As explained above, these transactions provide a good setting for this study: they move companies into the hands of private equity managers with strong incentives to maximize financial returns post-acquisition, thereby posing significant risks to stakeholders. Therefore, in such transactions, corporate leaders seeking to use the power given to them to protect stakeholders from being adversely affected by acquisitions could have been expected to negotiate protections that would mitigate such risks.

Second, we focused on acquisitions of companies incorporated in states that had a constituency statute in force at the time of signing and closing.[96] To make sure that the transactions we examined were indeed governed by a constituency statute, we excluded from the sample acquisitions of target companies incorporated in the small number of states that allowed companies to opt in or opt out.

Third, we limited our analysis to transactions announced between January 1, 2000 and December 31, 2019. To ensure good data availability and that the corporate leaders negotiating the transactions had ample time to absorb and internalize the stakeholderist prescriptions of the statutes, we did not examine early transactions occurring prior to 2000.

[95] The FactSet M&A dataset defines a private equity acquisition as any acquisition by a private equity firm or by a buyer backed up by a private equity sponsor owning an interest in the acquirer of at least 20%.

[96] We obtained the list of states with constituency statutes and the year of their adoption from Matthew D. Cain, Stephen B. McKeon, & Steven Davidoff Solomon, *Do takeover laws matter? Evidence from five decades of hostile takeovers*, 124 J. FIN. ECON. 464 (2017). However, we manually verified the correctness of the data with primary legislative sources (currently in force and historical versions). We were not able to verify the existence of constituency statutes in North Carolina and Virginia, and we therefore excluded these states from our study.

Fourth, we excluded "small" deals with a transaction value below $50 million. We note that, to facilitate comparability, we adjusted for inflation all dollar figures (including transaction values and payments to executives) using the Consumer Price Index. Thus, all dollar figures stated below are in January 2020 dollars.

We were able to identify 110 transactions that met all four criteria mentioned above. We then hand collected detailed information on each transaction in this sample. Specifically, we reviewed all the proxy statements filed with the Securities and Exchange Commission (SEC) in connection with the shareholder approval of the transactions, as well as the acquisition agreements attached to these proxy statements. Based on these documents, we collected and analyzed information regarding both the process leading to the sale and its final contractual terms.[97] We augmented the data we obtained from our document review with transaction data collected from the FactSet database.

2. Deal Time and Value

The 110 acquisitions in our sample were announced during the twenty-year period between 2000 and 2019. Table 1 below reports the distribution of the transactions by year during this period. There were three or more transactions in most years, with an average of 5.5 transactions per year.

[97] For our analysis of the process leading to the acquisition, we mainly used information in the proxy statement's narrative section about the background of the transaction. Our analysis of the benefits obtained by executives and directors made significant use of the section of the proxy statement that discloses the interests of the target's directors and executives in the merger, as well as the provisions of the merger agreement referring to directors and executives. To identify any protections for stakeholders that might have been negotiated, we reviewed fully both the proxy statement and the merger agreement.

Table 1. Transaction Years

Year	Number of Deals	Year	Number of Deals
2000	3	2010	4
2001	1	2011	12
2002	2	2012	6
2003	2	2013	8
2004	1	2014	4
2005	10	2015	5
2006	14	2016	3
2007	14	2017	8
2008	3	2018	5
2009	2	2019	3
Total		110	

Table 2 below shows the distribution of deals by transaction value. Five deals had a transaction value exceeding $10 billion: EMC ($70.2 billion), TXU ($56.4 billion), Clear Channel ($33.2 billion), Heinz ($30.2 billion), and Biomet ($14.6 billion). Additionally, there were three deals with a value between $5 and $10 billion, 28 deals with a value between $1 and $5 billion, 12 deals with a value between $0.5 and $1 billion, and 62 deals valued at less than $500 million.

Table 2. Transaction Values

Value Range	Number of Transactions	% of Transactions
>$10 billion	5	5%
$5-10 billion	3	3%
$1-5 billion	28	25%
$0.5-1 billion	12	11%
<$500m	62	56%
Total	110	100%

3. States of Incorporation

The acquired companies in our sample were incorporated in 17 different states. Table 3 below lists the states for which there are deals in our sample and reports the year in which each state's statute was adopted and the number or deals governed by the state's constituency statute.

As the Table indicates, in all but two states, the constituency statutes were in effect throughout the last two decades, the period on which our study focuses. The exceptions are Louisiana, which repealed its constituency statute in 2015, and Texas, which adopted its constituency statute only in 2006. Because we included in our universe of cases only deals governed by a constituency statute, our sample included only acquisitions of Louisiana companies and Texas companies that took place when the constituency statute was in force in the state.

As the Table also shows, there are nine states in our sample with more than five deals. These states are: Florida (13 deals), Nevada (13 deals), Pennsylvania (13 deals), Ohio (11 deals), Massachusetts (10 deals), New York (9 deals), Texas (8 deals), Wisconsin (8 deals), and Minnesota (7 deals).

Table 3. Constituency Statutes Across States

State	*Number of Deals*	*CS Adoption Year*
Connecticut	2	1988
Florida	13	1989
Illinois	4	1985
Indiana	4	1986
Kentucky	1	1988
Louisiana	1	1988
Massachusetts	10	1989
Minnesota	7	1987
Missouri	4	1986
Nevada	13	1991
New York	9	1987
North Dakota	1	1993
Ohio	11	1984
Oregon	1	1989
Pennsylvania	13	1990
Texas	8	2006
Wisconsin	8	1991

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Below we proceed to describe how we analyzed each of the 110 cases and the findings we obtained. We consider in turn our analysis of the process leading to the acquisition agreement (Section B); what benefits shareholders got as a result of this process (Section C); what benefits corporate leaders got (Section D); and what benefits stakeholders got (Section E).

We divide the reporting of our detailed findings with respect to each transaction between the following Sections of this Part and the Appendix. The Sections below detail our findings for each of the top-20 deals, and the Appendix details our findings for each of the 90 smaller transactions.

The Sections below also report overall results that aggregate the findings we obtained for all the deals. In particular, we provide overall results for both the full sample of 110 deals and the subsample of the top-20 transactions. Because the patterns we found in the full sample and the top-20 subsample are similar, the findings with respect to each of the top-20 deals detailed below in this Part illustrate well the findings with respect to the other companies in the sample that are detailed in the Appendix.

B. Bargaining

Before considering the outcomes of the bargaining process leading to the deal, this Section examines the nature and character of this process. As discussed below, our document review enabled us to identify the presence or absence of several dimensions that reflect substantial negotiations and bargaining.

Table 4 reports our findings with respect to five dimensions of the process that we analyzed. As in all subsequent tables, the Table first reports summary results for the entire 110-deal sample in the top rows of the table, then reports summary results for the subsample of the top-20 deals, and finally details the findings for each of the top-20 deals. Each of the columns focuses on a different dimension of the process. The results obtained for each of the dimensions are discussed below.

Length of the Process. For each case, we identified the length of the period (in days) from the first interaction corporate leaders had with the buyer to the signing of the acquisition agreement. The longer this period lasts, the more time is potentially available for negotiations and bargaining.

As Table 4 indicates, the deals in our sample were commonly a product of a process that took place over a substantial period. The mean (median) length of this period was 194.58 (172.5) days for the entire sample, and 153.70 (115) days for the top-20 subsample. Some of the top-20 deals illustrate well how lengthy the period sometimes was, lasting 300 days or more in the case of the sales of Bausch & Lomb, EMC, and Reynolds & Reynolds, and 200 days or more in the case of four other deals.

Offers by Other Parties. For each case, we also examined whether other potential buyers submitted an offer during the process. A case was defined as having an offer by another party if there was another potential buyer that expressed interest in the target, entered into a non-disclosure agreement, conducted due diligence, and submitted an offer. Clearly, the presence of an offer by another potential buyer strengthens the bargaining position of the target company leaders and their ability to obtain more favorable terms. We have found that in 44% of the deals in the entire sample, and in 50% of the top-20 deals, another party made an offer.

Table 4. Bargaining Process

Target	*Length of Process with Buyer (Days)*	*Offers by Other Parties*	*Discussions with Other Parties*	*Multiple Offers by Buyer*	*Deal Terms Improved?*
Results for the Entire Sample					
% of Yes	-	44%	89%	89%	78%
Mean	194.58	-	-	-	-
Median	172.50	-	-	-	-
Results for the Top-20 Subsample					
% of Yes	-	50%	80%	90%	95%
Mean	153.70	-	-	-	-
Median	115	-	-	-	-
Findings for Each of the Top-20 Deals					
Bausch & Lomb	319	Yes	Yes	Yes	Yes
Biomet	200	Yes	Yes	Yes	Yes
Buffalo Wild Wings	263	No	No	Yes	Yes
CDW	84	Yes	Yes	Yes	Yes
Citadel	90	No	No	Yes	Yes
Claire's Stores	160	Yes	Yes	No	No
Clear Channel	36	Yes	Yes	Yes	Yes
ClubCorp	241	Yes	Yes	Yes	Yes
Crescent	77	No	Yes	Yes	Yes
Duquesne Light	230	No	No	Yes	Yes
Education Management	42	Yes	Yes	Yes	Yes
EGL	121	Yes	Yes	Yes	Yes
EMC	362	No	Yes	Yes	Yes
Florida East Coast	82	No	Yes	Yes	Yes
Heinz	34	No	No	Yes	Yes
Kinetic Concepts	109	No	Yes	Yes	Yes
Life Time Fitness	160	Yes	Yes	Yes	Yes
Parexel	74	Yes	Yes	Yes	Yes
Reynolds & Reynolds	300	No	Yes	No	Yes
TXU	90	No	Yes	Yes	Yes

Discussions with Other Parties. For each case, we also identified whether any potential buyer expressed an interest in acquiring the company without ultimately submitting an offer. The presence of such a potential buyer is also a factor that is likely to strengthen the bargaining position of the negotiating corporate leaders. As Table 4 indicates, such discussions with other potential buyers took place in 89% of the deals in the entire sample and in 80% of the top-20 deals.

Multiple Offers by the Buyer. Another dimension that we examined is whether the target received more than one formal offer from the buyer to which the company was eventually sold. The presence of multiple offers is likely to be a product of a bargaining process in which corporate leaders seek to obtain improved terms. As Table 4 reports, multiple offers were present in 89% of the transactions in the entire sample and in 90% of the top-20 deals.

Deal Terms Improvement. Lastly, we examined whether the final price was higher than either the initial offer made by the buyer or, if the initial offer was reduced following due diligence, the first offer that was made after the completion of the due diligence process. Such improvement in the deal terms is likely to reflect a successful bargaining process conducted by the target leaders. We found that in 78% of the deals in our entire sample, and in 95% of the top-20 deals, the bargaining process resulted in an improved outcome for the target.

Thus, our analysis of each of the five dimensions, both individually and in combinations, indicates that the deals we examined were largely the product of a long process in which the selling corporate leaders had a bargaining position and used it in negotiating the transactions. We now turn to examine which groups benefitted from the bargaining process and negotiations.

C. What Did Shareholders Get?

We begin with shareholders. The gains that shareholders derive from the sale of their company are typically represented by the premium they receive over the stock price. To determine the deal premium, we used the "unaffected premium" reported by FactSet, which is defined as the premium compared to the unaffected stock price before the deal was announced.[98] Table 5 reports our findings.

As Table 5 shows, shareholders obtained substantial monetary payoffs from the transactions under study. For the full 110-deal sample, the premium received by shareholders had a mean of 30% and a median of 25%. Premiums were also large (though somewhat lower than for the entire sample) in the top-20 subsample, with a mean of 23% and median of 16%.

Thus, corporate leaders clearly negotiated to obtain substantial monetary gains for shareholders. Were they also able to obtain benefits for others? We will turn to examine this question in Sections D and E below.

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[98] We compared the unaffected premium reported by FactSet for a random sample of deals and found that it was consistent with the information provided in the proxy materials.

Table 5. Gains to Shareholders

Target	Premium (%)[99]	Target	Premium (%)
Findings for Each of the Top-20 Deals			
Bausch & Lomb	6	*Education Management*	16
Biomet	10	*EGL*	16
Buffalo Wild Wings	73	*EMC*	23
CDW	16	*Florida East Coast*	13
Citadel	49	*Heinz*	20
Claire's Stores	7	*Kinetic Concepts*	6
Clear Channel	6	*Life Time Fitness*	32
ClubCorp	31	*Parexel*	28
Crescent	5	*Reynolds & Reynolds*	14
Duquesne Light	22	*TXU*	15
Results for the Top-20 Subsample			
Mean (%)		23	
Median (%)		16	
Results for the Entire Sample			
Mean (%)		30	
Median (%)		25	

D. What Did Corporate Leaders Get?

We begin by examining whether the transactions in our sample also benefitted the corporate leaders themselves. Below we consider, in turn, the gains to (top) executives and the gains to non-executive directors.

1. Gains to Executives

Top executives play an important role in the process leading to a sale. Table 6 below reports our findings regarding the benefits that executives obtained as a result of the transactions examined. Each of the five columns in Table 6 represents one source of gains to executives, and we discuss each of them in turn below.

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[99] When "Unaffected Premium" was unavailable, we used the premium over the closing price of the target's share one day prior to the announcement of the merger agreement.

Table 6. Gains to Executives

Target	*Payment Qua Shareholders (Millions)*[100]	*Payment Qua Executives (Millions)*	*CEO Retained?*	*No. of Other Top Executives Retained*	*Announced Plan to Retain Additional Executives?*
Results for the Entire Sample					
% of Yes	-	-	27%	25%	47%
Mean	$60.63	$24.48	-	-	-
Median	$13.05	$8.05	-	-	-
Results for the Top-20 Subsample					
% of Yes	-	-	30%	25%	65%
Mean	$199.93	$76.79	-	-	-
Median	$113.29	$40.88	-	-	-
Findings for Each of the Top-20 Deals					
Bausch & Lomb	$30.39	$85.85	No	-	Yes
Biomet	$80.79	$31.58	Yes	2	Yes
Buffalo Wild Wings	$23.84	$13.80	No	-	No
CDW	$1448.34	$60.17	No	-	Yes
Citadel	$113.77	$0.35	Yes	-	Yes
Claire's Stores	$235.29	$27.64	No	-	Yes
Clear Channel	$143.77	$40.37	Yes	2	No
ClubCorp	$24.34	$28.45	No	-	Yes
Crescent	$226.15	$77.53	No	-	Yes
Duquesne Light	$3.42	$1.36	Yes	-	Yes
Education Management	$60.55	$7.02	No	-	Yes
EGL	$430.47	$19.60	No	5	Yes
EMC	$112.80	$167.88	No	6	No
Florida East Coast	$326.38	$63.60	No	-	No
Heinz	$214.34	$179.23	No	9	Yes
Kinetic Concepts	$58.69	$75.93	No	-	No
Life Time Fitness	$225.06	$52.99	Yes	-	No
Parexel	$77.41	$41.39	No	-	Yes
Reynolds & Reynolds	$15.31	$30.24	Yes	-	No
TXU	$147.37	$530.78	No	-	Yes

[100] In some cases, the proxy statements did not provide a quantification for all or certain parts of the payment. In cases where other components of the payment were quantified, we recorded the minimal amount presented in the proxy statement.

Payments Qua Shareholders. Executives usually have equity holdings in the companies they lead and, in their capacity as shareholders, they thereby obtain monetary gains from sales offering a premium. We included in this category both monetary gains that executives made on shares they owned prior to the transactions, and gains that corporate leaders made on shares obtained through their exercise of vested stock options.

We found that in the overwhelming majority of cases, executives obtained significant monetary gains from this source. The mean (median) amount of these monetary gains *qua* shareholders was $60.63 million ($13.05 million) for the entire sample. For the top-20 subsample, monetary gains to executives in this category were substantially larger, with a sizable mean (median) of $199.93 million ($113.29 million).

Payments Qua Executives. Monetary gains for executives also resulted from additional payments that they got in connection with their compensation. Examples include cash-outs of unvested stock options or equity awards, severance payments, and tax gross-up payments.

Some of these payments were triggered by pre-existing provisions placed in compensation agreements by corporate leaders prior to the start of the sale process in anticipation of a future deal. However, a substantial fraction of such payments resulted from amendments to existing compensation arrangements that were made in connection with the sale. In particular, our document review indicates that such amendments were made in connection with 42% of the deals in the entire sample and 60% of the top-20 deals.

As Table 6 shows, corporate leaders received significant payments of this type. The aggregate amount of such payments to the company's team of executives had a mean (median) of $24.48 million ($8.05 million) for the entire sample, and a mean (median) of $76.79 million ($40.88 million) for the top-20 deals.

In addition, we found that in many cases corporate leaders also negotiated for additional compensation-like payments from the buyer, such as closing bonuses. Such payments were found in 25% of all transactions in our entire sample, with a mean (median) of $2.46 million ($0.7 million). In the top-20 subsample, such payments were found in 25% of the transactions, and had a mean (median) of $9.3 million ($7.6 million).

It might be argued that these payments are part of a package intended to retain target executives, which is arguably essential for the private equity buyer. However, continuing executives are likely to receive new compensation packages in addition to the payments discussed in this Section. The payments from the buyer under discussion here were ones that executives were entitled to keep regardless of whether they would continue working at the acquired target and event it they would resign from their positions immediately after the closing. Furthermore, some of those payments were made by the buyer to executives who held positions prior to the transaction but, according to the proxy disclosures, were not expected to remain after the sale.

Retention of Executives. Another frequent source of gains to executives comes from the prospect of their continued employment at the target after the sale, which would enable the continuing executives to benefit from the post-deal compensation packages offered to executives by private equity buyers.[101] In order to examine the prospect of receiving such benefits, we examined whether deal proxy materials contained disclosures regarding the retention of the company CEO or other top executives by the private equity buyer. As Table 6 indicates, in 27% of all the deals in our sample, and in 30% of the top-20 deals, prior to the acquisition the buyer expressly committed to retain the target's CEO following the acquisition. In addition, in 25% of all the deals in our sample, and in 25% of the top-20 deals, the buyer expressly made such retention commitments to top executives other than the CEO. Combining these two types of commitments, we find that the buyer expressly committed to retain the CEO and/or some other executives prior to the acquisition in 33% of all deals in our sample and in 45% of the top-20 deals.

Announced Plan to Retain Additional Executives. Our document review identified a significant number of cases with "softer" commitments in which the proxy materials disclosed a plan to retain members of the company's executive team that was characterized as still preliminary and non-binding.[102] As Table 6 reports, such soft commitments were found in 47% of all transactions and in 65% of the top-20 subsample.

Although these plans were not legally binding, they are worth noting for the purpose of obtaining a complete picture of the potential benefits for executives. In this connection, it should be noted that private equity buyers have strong reputational incentives to substantially carry out plans to retain executives disclosed in the proxy statements. The future success of private equity buyers depends on the cooperation of target corporate leaders and carrying through on announced plans to retain executives is likely to encourage such cooperation.

2. *Gains to Non-Executive Directors*

Having documented several sources of meaningful gains obtained for executives, we now turn to what non-executive directors obtained. Table 7 reports

[101] *See* Jackson, *supra* note 79 (finding that the level of CEO pay in companies owned by private equity firms is similar in magnitude to that paid by comparable public firms).

[102] Some representative examples of such disclosures are: (i) "It is *possible* that some or all of our executive officers may discuss or enter into agreements with parent regarding their continuing employment"; (ii) "Acquirer has *expressed its intention* to cause the surviving corporation to enter into agreements with other members of our management team"; and (iii) "Parent has *engaged in initial conversations* with certain members of management" (regarding post-acquisition employment arrangements).

our findings.

Table 7. Gains to Non-Executive Directors

Target	*Payment Qua Shareholders (Millions)*	*Payment Qua Directors (Millions)*	*No. of Directors Retained*
Results for the Entire Sample			
% of Yes	-	-	16%
Mean	$65.87	$1.76	-
Median	$8.12	$0.98	-
Results for the Top-20 Subsample			
% of Yes	-	-	15%
Mean	$216.50	$3.48	-
Median	$18.85	$2.51	-
Findings for Each of the Top-20 Deals			
Bausch & Lomb	$4.96	$6.39	-
Biomet	$634.32	$0.20	1
Buffalo Wild Wings	$164.72	-	-
CDW	$182.83	$4.79	-
Citadel	$12.14	Not Quantified	-
Claire's Stores	$7.91	$0.75	1
Clear Channel	$1626.55	$6.06	3
ClubCorp	$3.79	$0.69	-
Crescent	$802.39	-	-
Duquesne Light	$5.92	$1.52	-
Education Management	$62.03	$3.74	-
EGL	$12.41	$0.09	-
EMC	$53.69	-	-
Florida East Coast	$7.27	$0.19	-
Heinz	$20.45	-	-
Kinetic Concepts	$668.73	$8.68	-
Life Time Fitness	$17.26	$2.51	-
Parexel	$22.27	-	-
Reynolds & Reynolds	$9.36	Not Quantified	-
TXU	$10.93	$9.67	-

As Table 7 shows, non-executive directors also obtained benefits from the transactions. To begin with, directors typically own shares and/or vested options in their company and therefore they obtain monetary gains as "shareholders," as a result of the premium negotiated with the buyer. As the first column of the Table indicates, the aggregate monetary benefit to the team of non-executive directors as shareholders were considerable, with a mean (median) of $65.87 million ($8.12 million) in our entire sample, and a mean (median) of $216.5 million ($18.85 million) in the top-20 subsample.

In addition, we found that directors received additional payments *qua* directors in the majority of cases in both the entire sample and in the top-20 subsample. The value of such aggregate payments had a mean (median) value of $1.76 million ($0.98 million) in the entire sample and a mean (median) of $3.48 million ($2.51 million) in the top-20 subsample. Furthermore, directors were assigned post-deal board seats in 16% of all transactions and in 15% of the top-20 subsample.

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We conclude that corporate leaders themselves, both executives and non-executives, benefitted substantially from the terms of the deals they negotiated. The issue that remains to be explored is the benefits, if any, obtained by stakeholders.

E. What Did Stakeholders Get?

We now turn to the most critical part of our inquiry: examining whether, and to what extent, corporate leaders negotiated and bargained for protections for stakeholders, the purported beneficiaries of constituency statutes. We examine this question with respect to each of the stakeholder groups that were identified in the constituency statutes. To this end, Table 8 below reports all the stakeholder groups noted in the various constituency statutes that governed deals included in our sample.

For each stakeholder group, the Table lists the states with a constituency statute that refers to it explicitly. The Table also reports the total percentage of transactions governed by constituency statutes explicitly referring to this particular stakeholder group. Note that eight statutes, governing 53% of the deals in our sample, contain a "catch-all" clause that allows directors to take into account the interests of additional, unspecified stakeholder groups. In the subsections below we discuss the presence of protections with respect to each of the groups enumerated in the Table.

Table 8. Stakeholder Groups Specified in Constituency Statutes

Group / Factor	*States*	*Percent of Transactions Covered*
Employees	CT, FL, IL, IN, KY, LA, MA, MN, MO, NV, NY, ND, OH, OR, PA, WI	93%
Customers	CT, FL, IL, IN, KY, LA, MA, MN, MO, NV, NY, ND, OH, OR, PA, WI	93%
Suppliers	CT, FL, IL, IN, KY, MA, MN, NV, ND, OH, OR, PA, WI	80%
Creditors	CT, KY, LA, MA, MN, MO, NV, NY, ND, OH, PA	65%
Local community	CT, FL, IL, IN, LA, MO, NY, OR, PA, WI	54%
Society	CT, KY, MA, MN, NV, ND, OH, OR, TX	49%
Economy of the state / nation	FL, KY, MA, MN, NV, ND, OH	51%
Environment	TX	7%
Other	MO ("similar contractual relations"), NY (retired employees and other benefit recipients)	12%
Catch-all	CT, FL, IL, IN, NV, OR, PA, WI	53%

As discussed in the Introduction, some stakeholders might have had contractual arrangements with the company that provided them with some protection from adverse effects in the event of an acquisition. However, the premise of the constituency statutes was that such contractual protections are generally not sufficient, and that it is therefore desirable to enable corporate leaders to seek additional stakeholder protections. For this reason, the empirical analysis below focuses on determining whether corporate leaders negotiating in the shadow of constituency statutes indeed used their power to obtain such stakeholder protections.

Another point that may be raised is that the lack of stakeholder protections in the merger agreement does not necessarily suggest that such protections were not negotiated by the involved parties. It is possible that the parties obtained soft commitments not to harm employees, local communities or other stakeholders post transaction. We have substantial doubts whether such soft commitments can be effective. The reason for this is that many of the corporate leaders who are involved in the sale of the company will be out of the picture by the time such soft commitments are expected to be honored, and thus will have limited interest or ability to enforce them. Even if such corporate leaders remain in the company and continue to serve the buyer, it is questionable whether they will have incentives to insist down the road on extracting benefits for stakeholders that would be costly to the buyer as well as to their own compensation, which will then be tied to the financial payout of the buyer.[103]

1. Employees

Employees are referred to explicitly in the constituency statutes of 16 states, which govern a large majority (93%) of the deals in our sample. Moreover, as discussed in Part III, concerns about adverse effects of private equity acquisitions on employees played an important role in the adoption of the constituency statutes (as they do in current writings in support of stakeholderism).[104] We therefore start our analysis of stakeholder protections with employees.

Table 9 reports our findings regarding protections for employees. As in the other tables, we first report summary results for the entire sample, then present summary results for the top-20 subsample, and finally provide detailed findings for each of the 20 transactions in this subsample. Each of the columns in Table 9 focuses on one dimension of employee protections.

Enforceability. Before discussing the limited substantive protections for employees found in the data, it would be useful to focus first on the dimension of enforceability. The practical significance of any given employee-protecting provision found in an acquisition agreement depends on whether the employees who are its intended beneficiaries have a right to enforce the provision. We therefore carefully examined the language regarding the rights of "third-party beneficiaries" in all the agreements. We found that the designers of these agreements generally elected to explicitly deny third-party beneficiaries, including employees, any power to enforce provisions that purportedly protect them.

As the third column of Table 9 shows, in 94% of all transactions in our sample, and 100% of the transactions in the top-20 subsample, the acquisition agreement expressly excludes the possibility of third parties including employees to enforce any provisions that would benefit them. When no enforcement power with respect to an employee-protecting provision is granted to the employees that have a significant incentive to enforce it, the provision loses much of its practical significance.

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[103] As discussed in Section III.B *supra*, empirical evidence suggests that there is indeed a substantial post-transaction adverse effect for stakeholders.

[104] See *supra* notes 50-55, and accompanying text.

Table 9. Protections for Employees

Target	*Limits on Firing*	*Length of Transition Period for Retained Employees*	*Commitments Enforceable by Beneficiaries?*
Results for the Entire Sample			
% of Yes	3%	68%	6%
Mean	-	12.00	-
Median	-	12.00	-
Results for the Top-20 Subsample			
% of Yes	0%	90%	0%
Mean	-	13.00	-
Median	-	12.00	-
Findings for Each of the Top-20 Deals			
Bausch & Lomb	No	12	No
Biomet	No	15	No
Buffalo Wild Wings	No	11	No
CDW	No	14	No
Citadel	No	12	No
Claire's Stores	No	18	No
Clear Channel	No	12	No
ClubCorp	No	12	No
Crescent	No	12	No
Duquesne Light	No	12	No
Education Management	No	18	No
EGL	No	12	No
EMC	No	12	No
Florida East Coast	No	0	No
Heinz	No	12	No
Kinetic Concepts	No	12	No
Life Time Fitness	No	12	No
Parexel	No	18	No
Reynolds & Reynolds	No	12	No
TXU	No	15	No

Limits on Firing. Probably the most serious concern regarding employees, and one that supporters of constituency statutes expressed, is the prospect that the buyer would reduce employment and fire some of the current employees post-deal. The first column of Table 9 reports whether corporate leaders negotiated for any constraints on the buyer's post-deal freedom to reduce employment.

There is very little presence of any such negotiated constraints. In particular, in 97% of the transactions in the entire sample, and in 100% of the transactions in the top-20 subsample, corporate leaders did not negotiate for any limits on the post-deal freedom of the buyer to fire employees and reduce employment. Indeed, some of the acquisition agreements explicitly endorse this unlimited post-deal freedom to fire by stating, for example, that the agreement does not "preclude the [acquired company] from terminating an [employee's] employment for any reason at any time following the [closing date]."[105]

Furthermore, even in the small minority of cases (five deals) in which we found provisions concerning post-deal employment, the provisions seemed to be of limited practical significance. In particular, in each of these five cases, the acquisition agreement explicitly denied employees the power to enforce the provision and obtain its benefits.

Transition Period for Retained Employees. One provision that is found frequently in the data, but that does not appear to be consequential, concerns the compensation of any employees whom the buyer chooses to retain during a limited transition period. As the second column of Table 9 indicates, we found such a provision in 68% of all transactions in our sample and in 90% of the top-20 subsample. The standard provision promises to maintain the levels of compensation and benefits for a limited period.

These provisions are nonetheless of limited practical significance for two reasons. First, the transition period specified in such provisions is generally not long, with a mean of 12 months for the entire sample and a mean of 13 months for the top-20 subsample, with the buyer left completely free to reduce compensation and benefits in any way that the buyer chooses after this short transition period. Furthermore, these provisions were generally ones that employees did not have the power to enforce due to the exclusion of such enforcement rights in the acquisition agreement.

2. *Customers, Suppliers, and Creditors*

We now turn to three other stakeholder groups that were explicitly noted in many constituency statutes. As Table 8 above showed, customers were explicitly noted by 16 constituency statutes, which governed over 90% of the transactions in the sample; suppliers were explicitly noted by 13 constituency statutes, which governed 80% of the transactions in the sample; and creditors were explicitly noted in 11 constituency statutes, which governed 65% of the transactions.

Table 10 reports our findings regarding the incidence of protections for each of the above three stakeholder groups. As the Table clearly indicates, corporate leaders negotiated for practically no post-deal constraints on the freedom of the buyers with respect to any decisions they would make that would have an effect on these stakeholder groups.

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[105] See acquisition agreement in the case of *Silverleaf Resorts*.

As the second column of the Table shows, corporate leaders did not negotiate for such protections regarding suppliers in *any* of the examined deals. As the third column indicates, corporate leaders also did not negotiate for such protections regarding creditors in *any* of the examined deals. Finally, as the Table reports, corporate leaders did not negotiate for protections regarding customers in 109 out of the 110 examined transactions; the only exception is the *Gevity HR* acquisition (belonging to the subsample of smaller deals) in which the acquirer committed not to violate the company's pre-deal privacy policy.

Table 10. Protections for Customers, Suppliers, and Creditors

Target	*Customers*	*Suppliers*	*Creditors*
Results for the Entire Sample			
% of Yes	1%	0%	0%
Mean	-	-	-
Median	-	-	-
Results for the Top-20 Subsample			
% of Yes	0%	0%	0%
Mean	-	-	-
Median	-	-	-
Findings for Each of the Top-20 Deals			
Bausch & Lomb	No	No	No
Biomet	No	No	No
Buffalo Wild Wings	No	No	No
CDW	No	No	No
Citadel	No	No	No
Claire's Stores	No	No	No
Clear Channel	No	No	No
ClubCorp	No	No	No
Crescent	No	No	No
Duquesne Light	No	No	No
Education Management	No	No	No
EGL	No	No	No
EMC	No	No	No
Florida East Coast	No	No	No
Heinz	No	No	No
Kinetic Concepts	No	No	No
Life Time Fitness	No	No	No
Parexel	No	No	No
Reynolds & Reynolds	No	No	No
TXU	No	No	No

It could be argued that acquirers might have an interest in treating customers, suppliers, and creditors well post-deal even in the absence of any negotiated constraints. However, in many cases, the buyer might conclude post-deal that it would be profit-maximizing to pursue strategies, such as switching suppliers, raising leverage, or raising the prices of goods and services, that could have adverse effects on customers, suppliers or creditors. Indeed, concerns about the potential adverse effects of acquisitions on these groups were the reason why they were explicitly referenced in so many of the constituency statutes. Our findings indicate that, notwithstanding the concerns motivating such statutes, corporate leaders did not use their power to negotiate any protections for customers, suppliers, or creditors.

3. Communities, the Environment and Other Stakeholders

Finally, looking beyond the four stakeholder groups most often noted explicitly by the statutes, we examine whether corporate leaders obtained protections for local communities, the environment, or other stakeholders. Communities or local communities were explicitly mentioned in 10 statutes, which governed over 50% of the deals in the sample.[106] The environment was explicitly mentioned only in one statute, which governed 7% of the deals, but it is a stakeholder that has been receiving increasing attention over the past decade.[107]

We also looked for protections for any other stakeholder group. In a large fraction of the examined deals, the governing statute provided corporate leaders with expansive discretion to determine additional stakeholders whose interests they could take into account. In particular, 9 statutes referred to "society" as a stakeholder that could be taken into account, and 7 statutes referred to the "economy" as a factor that could be considered. In both cases, these terms are sufficiently broad to include many additional stakeholder groups. In addition, 8 statutes included a "catch-all" clause that allowed corporate leaders to add any stakeholder group they choose to their considerations.

Table 11 reports our findings with respect to negotiated protections for local communities, the environment, and any other stakeholders. As the Table and the discussion below show, corporate leaders rarely negotiated for any protection for any of these stakeholders.

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[106] *See supra* Table 8.

[107] *See, e.g.,* Martin Lipton et al., *A Framework for Management and Board of Directors Consideration of ESG and Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jun. 5, 2020), https://corpgov.law.harvard.edu/2020/06/05/a-framework-for-management-and-board-of-directors-consideration-of-esg-and-stakeholder-governance/; Martin Lipton, *Purpose, Stakeholders, ESG and Sustainable Long-Term Investment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 24, 2019), https://corpgov.law.harvard.edu/2019/12/24/purpose-stakeholders-esg-and-sustainable-long-term-investment/.

Table 11. Protections for Communities, the Environment and Other Stakeholders

Target	*Commitment to Retain HQ Location*	*Continuation of Local Investments / Philanthropy*	*Environment*	*Other*
Results for the Entire Sample				
% of Yes	8%	4%	0%	0%
Mean	-	-	-	-
Median	-	-	-	-
Results for the Top-20 Subsample				
% of Yes	15%	10%	0%	0%
Mean	-	-	-	-
Median	-	-	-	-
Findings for Each of the Top-20 Deals				
Bausch & Lomb	No	No	No	No
Biomet	No	No	No	No
Buffalo Wild Wings	No	No	No	No
CDW	No	No	No	No
Citadel	No	No	No	No
Claire's Stores	No	No	No	No
Clear Channel	No	No	No	No
ClubCorp	No	No	No	No
Crescent	No	No	No	No
Duquesne Light	Yes	Yes	No	No
Education Management	No	No	No	No
EGL	No	No	No	No
EMC	Yes	No	No	No
Florida East Coast	No	No	No	No
Heinz	Yes	Yes	No	No
Kinetic Concepts	No	No	No	No
Life Time Fitness	No	No	No	No
Parexel	No	No	No	No
Reynolds & Reynolds	No	No	No	No
TXU	No	No	No	No

With regard to local communities, we found soft commitments to retain the location of headquarters or to continue local investments or philanthropy in a small minority of cases. As the first column of Table 11 indicates, pledges to retain the location of headquarters were found in 8% of all transactions in our sample and 15% of the top-20 subsample. As the second column shows, pledges to continue local investments or local philanthropy were observed in 4% of the deals in the entire sample and in 10% of the deals in the top-20 subsample.

We refer to the above pledges as "soft commitments" because the language describing them is generally short, vague, and underspecified. In particular, the language of pledges to retain headquarters' locations did not specify what assets, employees, or operations would have to be retained in order to satisfy the pledge. Similarly, for pledges to continue the "past practice" or "historic levels" of the company's local investments or philanthropy, there was no language specifying clearly what the pledge would require. Most importantly, however, is that in all the cases in which such commitments regarding local communities were found in the acquisition agreements, the agreement chose to explicitly deny "third-party beneficiaries" any right to enforce any provisions, and thus the pledges could not have been enforced by potential beneficiaries.

With regard to the environment, the third column indicates that corporate leaders did not negotiate for any post-deal constraints on the choices that the buyer would make that would affect the environment. Apparently, notwithstanding the substantial discussion of environmental effects by business leaders and their advisors during the past decade, corporate leaders disregarded these concerns when negotiating sales of their companies in the shadow of constituency statutes.

Finally, as the fourth column shows, we found no negotiated protections for any stakeholder not already discussed above. Many constituency statutes sought to vest in corporate leaders the authority to add additional stakeholder groups they deemed relevant to their considerations. The above evidence, however, clearly indicates that the corporate leaders elected not to make any use of this discretion to identify and protect additional stakeholder groups.

V. Learning from the Constituency Statutes Experiment

A. Have Constituency Statutes Delivered?

More than 30 states have adopted constituency statutes with the "chief purpose to protect nonshareholders" from the effects of takeovers.[108] Because these statutes departed from the well-established principle of shareholder primacy, scholars have long debated the merits of the statutes' goal of protecting stakeholders.[109] In this Article, however, we have taken as given the goal of protecting stakeholders from the adverse effects of corporate acquisitions, and have sought to assess whether the constituency statutes have actually delivered on their promise.

Our analysis has provided a direct test of this question as well as a clear answer. As explained in Section III.B., private equity acquisitions provide a good

[108] Johnson & Millon, *supra* note 45, at 848.
[109] *See, e.g.*, *supra* notes 18-19, and the discussion in Section II.C.

setting. Based on an examination of all the private equity acquisitions of companies of significant size during the past two decades, our findings clearly indicate that the constituency statutes have not delivered their purported benefits.

The findings reported in Part IV document extended negotiations and bargaining between corporate leaders and private equity buyers during the process leading to the sale. Furthermore, these findings paint a clear picture of for what and whom corporate leaders bargained. Corporate leaders used their power to obtain significant benefits for stockholders and for themselves but made little use of this power to obtain stakeholder protections.

In particular, in the vast majority of cases, despite the presence of risks to employment, corporate leaders did not negotiate for any limitation on the freedom of private equity buyers to lay off employees and thereby reduce employment levels. Furthermore, our detailed analysis of all acquisitions found no constraints on the buyer designed to protect consumers, suppliers, creditors, and the environment. We have identified in a small minority of cases provisions that seemingly protected communities in which the target's headquarters was located, but these were both rare and largely cosmetic.

Moreover, our review of the legal details of deal terms indicates that the limited stakeholder protections that were found in private equity deals were even weaker than they seem at first look. Contractual provisions designed to protect shareholders and corporate leaders were typically well-specified and effectively enforceable. By contrast, provisions in favor of stakeholders were usually under-specified and vague. Most importantly, although these provisions were supposed to protect stakeholders, stakeholders' ability to enforce them was generally explicitly excluded by the acquisition agreement.

What makes our findings so telling is how few stakeholder protections were negotiated by corporate leaders. The patterns of our analysis clearly indicates that corporate leaders did not meaningfully carry out the role of stakeholder guardians vested in them by constituency statutes. Constituency statutes failed to deliver the benefits to stakeholders that were promised or hoped for in the push for the adoption of these statutes.

B. Explaining the Statutes' Failure to Deliver

What we have learned from the failure of the constituency statutes experiment should inform our consideration of whether stakeholderism would be able to deliver in the future. Stakeholderists support granting corporate leaders vast discretion to give weight to the interests of stakeholders and believe that doing so would address concerns about the externalities that companies impose on their stakeholders.[110] But modern stakeholderists have paid little attention to the three-decade-long experience we have had with constituency statutes. Constituency statutes represented a similar approach to that of modern stakeholderism – to harness the discretion of corporate leaders in order to protect stakeholders.

Before embracing stakeholderism, it is therefore necessary to examine why constituency statutes failed to deliver on their promise and what lessons can be learned from this failure. We identify and discuss below five possible explanations to the failure of constituency statutes to produce stakeholder protections and one additional possible explanation of why our data might not have captured the protections produced by the constituency statutes. We evaluate the plausibility of each explanation, including empirical evidence that can assist with this evaluation. The analysis below indicates that the most plausible explanation is the one we discuss last: that is, that corporate leaders do not have any incentives to seek any benefits and protections for stakeholders beyond those that would serve shareholder interests.

1. *Uncertainty Regarding What the Statutes Authorized?*

One explanation that might be suggested for the failure of constituency statutes is that they authorized corporate leaders or could be interpreted by corporate leaders as authorizing them, to take stakeholder interests into account only to the extent that doing so would serve shareholder value. According to this view, the statutes provided only the stakeholderism-lite prescription of "enlightened shareholder value." Therefore, given that shareholders were expected to sell their shares and have no financial interest in how stakeholders would be treated post-deal, corporate leaders believed that they were not authorized, or could have been considered as not authorized, to bargain for post-deal protections for stakeholders.

This interpretation of what the statutes authorized, however, is not plausible. As Section III.A.3 explains, the reasonable view of the constituency statutes is that they allow corporate leaders to balance and trade off the interests of stakeholders and shareholders.

Furthermore, the statutes of four states (Iowa, New York, Pennsylvania, and

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[110] For discussions of such problems and externalities, *see, e.g.*, the papers presented at the conference "A New Deal for this New Century: Making Our Economy Work for All", October 3-4, 2019, available at https://www.law.nyu.edu/centers/icgf/events/newdeal-new-century; Jeffrey N. Gordon, *Addressing Economic Insecurity: Why Social Insurance Is Better Than Corporate Governance Reform*, CLS BLUE SKY BLOG, (August 21, 2019), https://clsbluesky.law.columbia.edu/2019/08/21/addressing-economic-insecuritywhy-social-insurance-isbetter-than-corporate-governance-reform; and Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera* (unpublished working paper) (April 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547791.

Nevada) explicitly reject giving shareholders priority over other constituencies. Examining the subset of 37 cases of companies in our sample that were incorporated in one of these four states, we find outcomes that are qualitatively similar to the outcomes in the sample as a whole, with few stakeholder protections negotiated by corporate leaders. Thus, the data does not support this explanation.

Finally, even if this interpretation of constituency statutes were hypothetically plausible, the failure of these statutes to deliver stakeholder protections would only imply that the "stakeholderism-lite version" of enlightened shareholder value cannot be expected to deliver such protections. But although we have focused on the meaningful version of stakeholderism which views stakeholder interests as an independent end, the "enlightened shareholder value" approach also has high-profile and influential advocates.[111] Indeed, the ongoing project of the American Law Institute's *Restatement of Corporate Governance* is now considering adopting this approach.[112]

Supporters of enlightened shareholder value believe that reminding corporate leaders of the importance of treating stakeholders well from the perspective of shareholder value, coupled with the vast discretion they have to make any reasonable business choice they see fit, would increase the likelihood that corporate leaders would make stakeholder-favoring choices. However, to the extent that the failures of constituency statutes were driven by perceptions that constituency statutes might have authorized only enlightened stakeholder value, our evidence indicates that this approach should not be expected to induce corporate leaders to be more likely to protect stakeholder interests.

2. *Need for Shareholder Approval?*

It might be argued that even if corporate leaders were interested in obtaining benefits for stakeholders, they were prevented from doing so by the need to obtain shareholder approval for the deal. According to this view, corporate leaders might have believed that shareholders would not have approved the transaction if the leaders had bargained for any meaningful stakeholder protections and a somewhat lower deal premium. As explained below, however, this explanation is also unlikely to be a substantial driver of our findings.

To begin with, as Table 5 and Table A2 of the Appendix show, a majority of the transactions in our sample provided shareholders with a substantial premium relative to the pre-announcement stock price (and thus relative to what they would likely end up with in the event of failure to obtain shareholder approval). These

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[111] As noted in *supra* note 33, this approach was codified in the 2006 UK Companies Act.

[112] See *supra* note 24.

substantial premiums made the obtaining of shareholder approval very likely.[113] Importantly, given the substantial premiums, it is highly likely that shareholders would have approved a transaction even with a somewhat lower premium. Thus, the need for shareholder approval cannot adequately explain the general lack of any meaningful stakeholder protections.

To shed additional empirical light on this issue, we focused on a subset of situations in which corporate leaders could clearly have shifted some of the surplus generated by the transaction to corporate stakeholders without jeopardizing the chances of obtaining shareholder vote of approval. To this end, we examined all the transactions in our sample in which shareholders were offered a significant premium, and the votes to approve the transaction exceeded the required threshold by a wide margin. In these cases, it was likely that corporate leaders would have still been able to obtain shareholder approval, had they chosen to accept a somewhat lower premium in order to obtain some meaningful protections to certain stakeholder groups. However, this pattern is not found in the data.

To conduct this inquiry, we collected data on the outcome of shareholder votes related to mergers from the ISS Voting Analytics Database and supplemented it with search on EDGAR of company disclosures. We were able to obtain such data on the majority of the transactions included in our sample (about 55% of transactions).[114] We, then, focused on a subset of transactions in which the deal terms included a premium exceeding 25% over the pre-deal stock price, and obtained support in the vote from more than 70% of the outstanding shares, and examined whether in such deals corporate leaders managed to obtain some meaningful protections for stakeholders.

Focusing first on the Top-20 transactions in our dataset, we find that five out of the 12 of the deals for which we obtained data on vote outcomes meet our criteria. These transactions are: Buffalo Wild Wings, ClubCorp, EGL, Life Time Fitness and Parexel. Our analysis shows that although each of these deals afforded corporate leaders some room for bargaining for stakeholder protections while still maintaining a high probability of obtaining shareholder approval, none of them offered any protections to stakeholders.[115]

Examining the whole sample, we find that 30 (or 50%) of the deals for which we have data on vote outcomes meet our criteria regarding deal premium and vote outcome. The overwhelming majority of these transactions contained no protections to stakeholders. The exception to this is the Hearthstone Utilities

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[113] *Cf.* James D. Cox, Tomas Mondino & Randall S. Thomas, *Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals*, 69 DUKE L. J. 504, 511-13 (2019) (surveying evidence which shows that shareholders rarely vote down mergers).

[114] The transactions for which we were unable to obtain data on the vote outcome were mostly early transactions or transactions with relatively small value.

[115] *See* Tables Table 9Table 11 in Part IV.

acquisition, which contained a soft commitment by the buyer to retain the location of the Target's Headquarters "to the extent commercially reasonable" for one year following the merger. Another exception is the NCO acquisition, in which the buyer committed to retain 25 specific employees in the surviving company following the merger.

Thus, the need for shareholder approval does not seem to be a key driver for the documented lack of stakeholder protections. Even if the need for shareholder approval were such a driver, this would not undermine our conclusion that the constituency statutes failed to deliver on their promise. At the time the constituency statutes were adopted, the need for shareholder approval was a long-standing feature of state corporate law that these statutes and their supporters did not seek to eliminate. Supporters of the statutes still justified them on the grounds that they would nonetheless produce protections for stakeholders.[116] However, our evidence indicates that this did not happen.

Finally, to the extent that the failure of constituency statutes was hypothetically due to the need to obtain shareholder approval, and the resulting incentives and constraints, this failure would still have substantial implications for the current debate on stakeholderism. Stakeholderists largely advocate providing corporate leaders with discretion to protect stakeholder interests and relying on this discretion to produce stakeholder-favoring results, without supporting any other changes to corporate law. In particular, prominent stakeholderists accept that shareholders alone should elect directors and do not seek to revise this key aspect of corporate governance.[117] However, the discussion in this Section highlights that the exclusive voting power of shareholders might reinforce the incentives of corporate leaders to serve shareholders rather than stakeholders. Thus, the discussion of shareholder voting power highlights that stakeholderists need to take the incentives of corporate leaders seriously. We will return to this key point in Section 5 below.

3. *Prospect of Judicial Following of Revlon?*

Yet another explanation that might be put forward is that corporate leaders were influenced by concerns that a state court reviewing their decision could follow the Delaware case of *Revlon v. MacAndrews & Forbes Holdings*.[118] Under the Delaware *Revlon* doctrine, once corporate leaders reach a decision to sell the

[116] *See supra* notes 42-46, 48-59, and accompanying text.

[117] *See, e.g.,* Lipton et al., *On the Purpose and Objective of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2020), https://corpgov.law.harvard.edu/2020/08/05/on-the-purpose-and-objective-of-the-corporation/ (claiming that the purpose of the corporation, which require the consideration of stakeholders interest, should be determined "by the corporation and the board of directors using its business judgment and with regular engagement with shareholders, who are essential partners in supporting the corporation's pursuit of this mission").

[118] *Revlon*, *supra* note 68.

company, they have a duty to obtain the highest price for shareholders.[119]

Of the 17 states with constituency statutes that apply to companies in our sample, there were judicial decisions that expressly rejected *Revlon* in six states governing 58 transactions (a little more than a half of our sample). There were no judicial rulings on the subject in eight states whose constituency statutes applied to 37 transactions (about a third of our sample). There were judicial rulings explicitly following *Revlon* in only three states whose constituency statutes applied to 15 transactions.[120] Thus, the argument to consider is that our findings could be driven by the 52 deals in which there was some possibility that a subsequent judicial review would apply the *Revlon* doctrine.[121]

However, the evidence is inconsistent with this hypothesis. As noted above, a little more than a half of the transactions we reviewed were incorporated in states with judicial decisions that explicitly rejected *Revlon*. To the extent that our findings regarding the significant lack of stakeholder protections was driven by the *Revlon* doctrine, such stakeholder protections should be expected to have substantially higher presence in the subsample of 58 transactions in non-*Revlon* states. However, our analysis of each of the deals in the sample indicates that the results in the subsample of deals in clearly non-*Revlon* states are generally similar to those in the subsample of transactions in other states.

In particular, in the 58 transactions in non-*Revlon* states, we found no limitations on the buyer's freedom to fire employees in 95% of the cases, no limitations on the buyer's post-deal freedom to make any choices with respect to customers, suppliers, creditors and the environment in 100% of the cases, and soft pledges regarding retention of headquarters or local philanthropy in only 9% and 5% of the cases, respectively. The *Revlon* explanation is thus also not a major driver of the patterns we identified.[122]

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[119] *Id.*, at 182 ("The duty of the board [changes] from the preservation of *Revlon* as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit").

[120] *See supra* note 96.

[121] Of the 20 largest transactions which we used for illustration purposes throughout, eight involved targets incorporated in states that have expressly rejected *Revlon*; Nine involved targets incorporated in states with no judicial rulings on *Revlon*; and three involved targets incorporated in states in which *Revlon* was explicitly adopted by a judicial ruling.

[122] It could be argued that, although *Revlon* could not explain the lack of stakeholder protections in the subsample of deals in non-*Revlon* states, it could explain this pattern in the subsample of other deals. However, even if *Revlon* could have been viewed as potentially applicable to a given transaction, corporate leaders would have been subject to it only after a sale of the company became "inevitable." *Id.*, at 184. Therefore, corporate leaders interested in following the prescription of the applicable constituency statute to take stakeholder interests into account that had not yet decided to sell could have entered into negotiations over a sale with any buyer only if the buyer would be willing to offer provisions that would eliminate or curtail adverse effects on stakeholders.

4. Shareholder-centric Norms?

An alternative explanation for the failure of constituency statutes to deliver stakeholder protections is related to shareholder-centric norms that dominated boardrooms and executive suites in the past. According to this view, while then-prevailing norms encouraged corporate leaders to focus on shareholders, stakeholderism can still deliver substantial stakeholder protections now and in the future. In particular, supporters of this view could argue that stakeholderist attitudes have been influencing the norms in boardrooms and executive suites in recent years and can be expected to continue doing so.[123]

To examine the plausibility of this explanation empirically, we considered the outcomes of deals from the last three years separately. Our sample for this analysis included 16 deals that took place from 2017 through 2019. We found that the lack of any significant stakeholder protections was also present in these recent deals that took place during a period in which stakeholder rhetoric was much used by corporate leaders and their advisors.

Consider for example the three largest deals that took place from 2017 through 2019, which were also among the 20 largest deals in our whole sample – the acquisitions of *Parexel*, *Buffalo Wild Wings* and *ClubCorp*. In each of these three deals, corporate leaders obtained little protection for stakeholders. In particular, none of these three deals included limitations on the buyer's freedom to fire employees, to make any choices with respect to customers, suppliers or creditors, or the environment, or to move headquarters or major operations at the expense of local communities.

Thus, at least to date, there has not been an evolution of pro-stakeholder norms sufficiently influential to induce corporate leaders to seek meaningful stakeholder protections. To be sure, stakeholderists might argue in response that such norms could well evolve in the future, and that embracing stakeholderism would likely contribute much to such evolution. However, the extensive use of stakeholder rhetoric by corporate leaders and management advisors in recent years, and the stakeholder-oriented pledges they have made, have thus far not produced pro-stakeholder protections. This conclusion suggests, at a minimum, that much caution is warranted prior to placing any reliance on the future evolution of such norms to provide a basis for stakeholderism. This is especially the case because, as we discuss below, adopting and following such norms would be contrary to the significant incentives of corporate leaders.

5. It's the Incentives, Stupid

We now turn to incentives. In our view, this is the most important factor in

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[123] For discussions suggesting that attitudes more favorable to stakeholders have been growing in corporate boardrooms and executive suites, *see supra* notes 25-26, 107.

explaining our results, and the significance of this factor has substantial implications for stakeholderists. Incentives matter, and what corporate leaders have bargained for is consistent with, and can be explained by, their incentives.

To be sure, corporate leaders and their advisors had a clear interest in pushing for the adoption of constituency statutes. These statutes enhanced the power of corporate leaders to veto a sale, but the increased bargaining power granted them could be used according to their discretion to obtain benefits for shareholders, stakeholders, or themselves. In essence, constituency statutes allowed corporate leaders to reject offers that were detrimental to their own interests and to bargain for better contractual terms for themselves. At the same time, these statutes did not constrain managerial discretion. This unconstrained discretion might have at least partly explained the strong support that the constituency statutes received from business interest groups.

Once the statutes were in place, however, corporate leaders did not have an incentive to use them to produce the stakeholder benefits promised by the supporters of the statutes. The interests of corporate leaders, while not perfectly aligned with the interests of shareholders, are robustly linked to them. As discussed in the theoretical and empirical literature on corporate governance, shareholder legal rights, the structure of director and executive compensation, and the dynamics of the labor and control markets provide directors and top executives with incentives to increase shareholder value.[124] By contrast, there is no significant link between the interests of corporate leaders selling their companies and the post-sale interests of stakeholders.

The private equity deals that we examined provided significant gains to the corporate leaders who negotiated the transactions. As a result of their significant equity holdings (designed for the very purpose of aligning the interests of corporate leaders and shareholders), corporate leaders made substantial profits. The agreements that corporate leaders negotiated also contained additional payments as well as continuing employment for some of them.

At the same time, the lack of stakeholder protections we documented did not adversely affect the interests of corporate leaders. Obtaining stakeholder protections would not have improved the position of directors and executives. In fact, to the extent that meaningful stakeholder protections are costly and therefore would have resulted in smaller gains available for shareholders (and corporate leaders in their capacity as equity holders), negotiating for such protections would have been contrary to the corporate leaders' own interests. Considering the above incentive analysis, it is not surprising that corporate leaders negotiating a sale to a private equity buyer did not bargain for stakeholder protections. Indeed, this

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[124] For a discussion of corporate leaders' incentives, *see* Robert C. Clark, *Harmony or Dissonance - The Good Governance Ideas of Academics and Worldly Players*, 70 BUS. LAW. 321 (2015); Bebchuk & Tallarita, *supra* note 35, at 139-155; Fisch & Davidoff Solomon, *supra* note 35.

outcome is what should have been expected.

Our findings warn stakeholderists that they need to take incentives seriously. Like the supporters of constituency statutes, supporters of stakeholderism have commonly assumed that corporate leaders would use their enhanced discretion to protect stakeholders, only because it would be socially desirable to do so. This assumption has proved unrealistic in the case of constituency statutes and should not be relied on in assessing the promise of modern stakeholderism.

VI. GOING FORWARD

Our empirical analysis of over one hundred private equity acquisitions governed by constituency statutes provides novel evidence on whether corporate leaders can be expected to use their discretion to protect stakeholders when authorized to do so. Advocates of these statutes touted their promise for stakeholders and secured, on this basis, the support of labor and other stakeholder groups. In the important set of cases that we examined, however, the statutes have failed to deliver on this promise.

Our empirical analysis has important implications for assessing the constituency statutes that have been in place for three decades. More importantly, however, this analysis has clear implications for the increasingly influential movement in support of stakeholderism. Our findings warn against expecting that authorizing and encouraging corporate leaders to serve stakeholders would lead them to do so.

Learning from our experience with constituency statutes requires supporters of stakeholderism to reconsider their positions. At a minimum, our findings should give stakeholderists pause and require them to examine the factors that caused the failure of constituency statutes in the cases we considered and whether these factors would not similarly undermine stakeholderism.

In the meantime, all those who care deeply about protecting stakeholders should resist the superficial appeal of stakeholderism. They should recognize that the available evidence does not provide a basis for expecting stakeholderism to work to the benefit of stakeholders. The promises accompanying current stakeholderist proposals could well be as illusory as those that accompanied the passage of constituency statutes. As George Santayana warned a century ago, "[t]hose who cannot remember the past are condemned to repeat it."[125]

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[125] George Santayana, THE LIFE OF REASON (1905).

APPENDIX

Part IV detailed our findings with respect to the negotiation process and outcomes in each of the 20 largest transactions in our sample by deal value. This Appendix details our findings regarding process and outcome in each of the other 90 transactions with smaller deal value that we analyzed. These findings were incorporated in the overall results for our 110-transaction sample, which we reported in Part IV. In particular, for each of the 90 transactions, we report below our findings concerning:

- The process leading to the deal (Table A1);
- Gains to shareholders (Table A2);
- Gains to executives (Table A3);
- Gains to non-executive directors (Table A4);
- Protections obtained for employees (Table A5);
- Protections obtained for customers, suppliers, and creditors (Table A6);
- Protections for communities, the environment and other stakeholders (Table A7).

Table A1. Bargaining Process

Target	Length of Process with Buyer (Days)	Offers by Other Parties	Discussions with Other Parties	Multiple Offers by Buyer	Deal Terms Improved?
AGL	225	Yes	Yes	Yes	No
American Railcar	354	No	No	No	No
Analogic	221	Yes	Yes	Yes	Yes
Anaren	160	Yes	Yes	Yes	Yes
APAC Customer Service	91	Yes	Yes	Yes	Yes
ARI	124	No	Yes	No	No
Assisted Living Concepts	472	Yes	Yes	Yes	Yes
Bankrate	84	No	Yes	Yes	No
Blackwater Midstream	180	No	Yes	No	No
Bravo Brio	131	Yes	Yes	Yes	Yes
Brooktrout	170	Yes	Yes	Yes	Yes
Buffets	110	Yes	Yes	Yes	Yes
Caribou Coffee	12	No	Yes	Yes	Yes
CDI	159	Yes	Yes	Yes	Yes
ChyronHego	289	No	Yes	Yes	Yes
CompuDyne	209	No	Yes	Yes	No
Connecture	52	No	Yes	Yes	Yes
CPAC	204	No	Yes	Yes	No
CRT Properties	63	Yes	Yes	Yes	Yes
Cyber Supply	394	No	Yes	Yes	Yes
CyberGuard	92	No	Yes	No	No
Dave & Buster's	83	No	No	Yes	Yes
Dayton Superior	171	No	Yes	Yes	Yes
Deb	206	No	Yes	Yes	Yes
Delta Natural Gas	237	Yes	Yes	Yes	Yes
Diversified Restaurant Holdings	340	Yes	Yes	Yes	Yes
EDAC Technologies	75	Yes	Yes	Yes	Yes
Edelman	320	No	Yes	Yes	Yes
Emergent Group	69	No	Yes	Yes	Yes
Encompass	119	No	No	Yes	Unknown
EPIQ	588	Yes	Yes	Yes	Yes
Exactech	123	Yes	Yes	Yes	Yes
Friendly Ice Cream	95	Yes	Yes	Yes	Yes
Frisch's Restaurants	283	Yes	Yes	Yes	Yes
Genesis HealthCare	66	Yes	Yes	Yes	Yes
Gerber Scientific	246	No	No	Yes	Yes
Gevity HR	307	Yes	Yes	Yes	Yes
Global Traffic Network	246	No	Yes	Yes	Yes
Haggar	118	Yes	Yes	Yes	Yes
Hearthstone Utilities	233	No	Yes	Yes	Yes
Herbalife	309	Yes	Yes	Yes	Yes
Hollywood Entertainment	75	Yes	Yes	Yes	Yes
Hunt	68	No	No	Yes	No
Insurance Auto Auctions	99	Yes	Yes	Yes	Yes

Table A1. Bargaining Process (continued)

Interactive Intelligence	296	No	Yes	Yes	Yes
Jo-Ann Stores	115	No	No	Yes	Yes
Kendle	98	No	Yes	Yes	Yes
Kronos	66	Yes	Yes	Yes	Yes
Ladenburg Thalmann	66	Yes	Yes	Yes	Yes
Lifecore Biomedical	116	No	Yes	Yes	Yes
MacDermid	106	Yes	Yes	Yes	Yes
Manchester Technologies	296	No	Yes	No	No
Marsh	188	Yes	Yes	Yes	Yes
Mediware	138	No	Yes	Yes	Yes
Michael Baker	222	Yes	Yes	Yes	Yes
MicroFinancial	195	No	Yes	Yes	Yes
Midwest	55	Yes	Yes	Yes	Yes
Multi-Color	95	No	Yes	Yes	Yes
National Dentex	772	Yes	Yes	Yes	Yes
NCO	323	No	Yes	No	No
NMHC	98	No	Yes	Yes	Yes
NTS	220	No	Yes	No	No
NuCo2	242	No	Yes	Yes	Yes
NYMAGIC	136	No	Yes	Yes	No
OMNI Energy Services	177	No	Yes	Yes	Yes
Outlook Group	323	No	Yes	Yes	Yes
Overhill Farms	425	Yes	Yes	Yes	No
Penn-America Group	166	No	Yes	Yes	No
PHC	112	No	No	No	No
Populus	174	No	Yes	Yes	Yes
Quality Distribution	386	No	Yes	Yes	Yes
R.G. Barry	232	Yes	Yes	Yes	No
Radiation Therapy Services	201	No	Yes	Yes	Yes
Renaissance	257	No	Yes	Yes	Yes
Seminis	728	No	Yes	Yes	Yes
Serengeti Eyewear	287	No	No	Yes	No
ShopKo	18	Yes	Yes	Yes	Yes
Silverleaf Resorts	186	No	Yes	No	No
Sparton	280	No	Yes	Yes	No
Stonegate Mortgage	322	No	Yes	Yes	Yes
The Jones Group	195	Yes	Yes	Yes	Yes
The Oilgear	239	No	Yes	Yes	Yes
The Yankee Candle	90	Yes	Yes	Yes	Yes
Tollgrade	143	Yes	Yes	Yes	Yes
Transport America	191	No	Yes	No	No
Valley National Gases	135	Yes	Yes	Yes	Yes
White River Capital	241	Yes	Yes	Yes	No
Winn-Dixie	296	No	Yes	Yes	Yes
XRS	240	No	Yes	Yes	Yes
Young Innovations	171	No	Yes	Yes	Yes
% of Yes	-	42%	91%	89%	74%
Mean	203.67	-	-	-	-
Median	183.00	-	-	-	-

Table A2. Gains to Shareholders

Target	Premium (%)	Target	Premium (%)
AGL	34	*Jo-Ann Stores*	34
American Railcar	51	*Kendle*	54
Analogic	25	*Kronos*	18
Anaren	40	*Ladenburg Thalmann*	55
APAC Customer Service	57	*Lifecore Biomedical*	32
ARI	2	*MacDermid*	21
Assisted Living Concepts	25	*Manchester Technologies*	36
Bankrate	16	*Marsh*	5
Blackwater Midstream	21	*Mediware*	40
Bravo Brio	17	*Michael Baker*	93
Brooktrout	38	*MicroFinancial*	23
Buffets	14	*Midwest*	87
Caribou Coffee	30	*Multi-Color*	16
CDI	33	*National Dentex*	70
ChyronHego	4	*NCO*	44
CompuDyne	32	*NMHC*	16
Connecture	117	*NTS*	27
CPAC	10	*NuCo2*	25
CRT Properties	15	*NYMAGIC*	24
Cyber Supply	Not Reported	*OMNI Energy Services*	30
CyberGuard	12	*Outlook Group*	18
Dave & Buster’s	18	*Overhill Farms*	15
Dayton Superior	46	*Penn-America Group*	10
Deb	2	*PHC*	-3
Delta Natural Gas	17	*Populus*	14
Diversified Restaurant Holdings	123	*Quality Distribution*	62
EDAC Technologies	8	*R.G. Barry*	-1
Edelman	43	*Radiation Therapy Services*	51
Emergent Group	40	*Renaissance*	31
Encompass	Not Reported	*Seminis*	-9
EPIQ	45	*Serengeti Eyewear*	37
Exactech	54	*ShopKo*	26
Friendly Ice Cream	8	*Silverleaf Resorts*	72
Frisch's Restaurants	21	*Sparton*	41
Genesis HealthCare	31	*Stonegate Mortgage*	34
Gerber Scientific	35	*The Jones Group*	3
Gevity HR	97	*The Oilgear*	41
Global Traffic Network	20	*The Yankee Candle*	21
Haggar	25	*Tollgrade*	0
Hearthstone Utilities	71	*Transport America*	25
Herbalife	34	*Valley National Gases*	0
Hollywood Entertainment	24	*White River Capital*	0
Hunt	32	*Winn-Dixie*	75

Table A2. Gains to Shareholders (continued)

Insurance Auto Auctions	26	*XRS*	85
Interactive Intelligence	6	*Young Innovations*	9
Mean (%)		26	
Median (%)		32	

Table A3. Gains to Executives

Target	*Payment Qua Shareholders (Millions)*	*Payment Qua Executives (Millions)*	*CEO Retained*	*No. of Other Top Executives Retained*	*Announced Plan to Retain Executives?*
AGL	$2.11	$8.63	Yes	2	Yes
American Railcar	$0.00	Not Quantified	No	0	No
Analogic	$6.49	$11.33	No	0	No
Anaren	$37.22	$16.75	No	0	Yes
APAC Customer Service	$31.74	$16.21	No	0	No
ARI	$2.00	$6.32	No	0	Yes
Assisted Living Concepts	$0.31	$1.56	No	0	No
Bankrate	$25.64	$11.50	Yes	7	Yes
Blackwater Midstream	$6.01	$5.44	Yes	3	No
Bravo Brio	$0.75	$2.02	No	0	No
Brooktrout	$27.45	$3.02	No	0	No
Buffets	$48.99	$1.50	Yes	11	No
Caribou Coffee	$12.98	$7.86	No	0	No
CDI	$0.40	$2.48	No	0	No
ChyronHego	$24.09	$1.75	No	0	Yes
CompuDyne	$11.19	$1.51	No	0	No
Connecture	$0.10	$0.47	No	0	Yes
CPAC	$4.72	$3.46	No	0	No
CRT Properties	$29.58	$37.80	No	0	No
Cyber Supply	Not Reported	$2.97	No	0	No
CyberGuard	$3.26	$1.75	No	0	No
Dave & Buster's	$58.99	$29.89	No	0	No
Dayton Superior	$6.80	Not Quantified	Yes	8	No
Deb	$227.20	$0.31	Yes	1	Yes
Delta Natural Gas	$6.67	$15.57	No	0	No
Diversified Restaurant Holdings	$11.53	$0.70	No	0	No
EDAC Technologies	$16.96	$3.66	No	0	No
Edelman	$67.94	$68.51	Yes	5	Yes
Emergent Group	$23.76	$2.97	No	0	Yes
Encompass	$0.00	$0.00	Yes	0	No
EPIQ	$50.71	$35.59	No	0	No
Exactech	$209.17	$13.81	No	0	Yes
Friendly Ice Cream	$2.23	$8.05	No	0	No
Frisch's Restaurants	$31.46	$0.20	No	0	Yes
Genesis HealthCare	$2.74	$4.59	No	0	Yes
Gerber Scientific	$5.60	$18.74	No	2	Yes
Gevity HR	$0.87	$17.96	No	0	No
Global Traffic Network	$26.25	$6.60	Yes	0	Yes
Haggar	$28.81	$35.20	No	0	Yes
Hearthstone Utilities	$0.58	$3.37	No	0	No
Herbalife	$34.33	$10.83	Yes	3	No
Hollywood Entertainment	$116.34	Not Quantified	No	0	No

Table A3. Gains to Executives (continued)

Hunt	$0.43	$0.00	No	0	No
Insurance Auto Auctions	$6.46	$22.33	No	0	No
Interactive Intelligence	$266.70	$22.49	No	0	Yes
Jo-Ann Stores	$5.17	$55.32	Yes	1	Yes
Kendle	$13.13	$6.74	No	0	No
Kronos	$32.98	$32.60	No	0	Yes
Ladenburg Thalmann	$35.20	$19.16	No	0	No
Lifecore Biomedical	$1.16	$1.83	No	0	No
MacDermid	$126.56	$21.73	No	0	Yes
Manchester Technologies	$40.30	$1.39	No	1	No
Marsh	$16.10	$17.45	No	0	No
Mediware	$14.16	$3.34	No	0	Yes
Michael Baker	$3.64	$7.73	No	0	No
MicroFinancial	$10.85	$4.89	Yes	2	No
Midwest	$11.35	$26.85	No	0	Yes
Multi-Color	$23.22	$5.61	No	0	No
National Dentex	$4.26	$7.93	No	0	No
NCO	$94.89	$9.00	Yes	8	Yes
NMHC	$22.80	$2.73	Yes	3	No
NTS	$11.27	$0.19	No	0	Yes
NuCo2	$14.91	$1.96	Yes	3	No
NYMAGIC	$34.24	$9.99	No	3	Yes
OMNI Energy Services	$1.18	$2.25	Yes	7	Yes
Outlook Group	$2.36	Not Quantified	No	0	Yes
Overhill Farms	$2.59	$0.33	Yes	0	Yes
Penn-America Group	Not Reported	$0.16	Yes	7	No
PHC	$5.37	$2.74	Yes	1	No
Populus	$7.88	$19.96	Yes	0	No
Quality Distribution	$11.28	$26.04	No	0	No
R.G. Barry	$4.34	$7.48	No	0	Yes
Radiation Therapy Services	$383.99	$7.41	Yes	3	Yes
Renaissance	$1.34	$3.02	No	0	Yes
Seminis	$3.57	Not Quantified	Yes	6	Yes
Serengeti Eyewear	$8.12	Not Quantified	No	0	No
ShopKo	$5.91	$17.09	No	0	No
Silverleaf Resorts	$30.89	Not Quantified	No	0	No
Sparton	$2.88	$3.29	No	0	Yes
Stonegate Mortgage	$4.99	$5.10	No	0	No
The Jones Group	$11.51	$59.11	No	0	Yes
The Oilgear	$17.62	$2.45	Yes	0	Yes
The Yankee Candle	$11.89	$22.63	No	0	Yes
Tollgrade	$1.10	$10.41	No	0	No
Transport America	$2.20	$0.58	No	0	No
Valley National Gases	$7.68	Not Quantified	No	0	Yes
White River Capital	$7.28	$0.53	No	0	No
Winn-Dixie	$5.37	$24.92	Yes	2	Yes
XRS	$7.44	$4.56	No	0	Yes
Young Innovations	$6.69	$14.83	No	0	No

Table A3. Gains to Executives (continued)

% of Yes	-	-	27%	24%	43%
Mean	$28.97	$11.57	-	-	-
Median	$9.49	$6.60	-	-	-

Table A4. Gains to Non-Executive Directors

Target	*Payment Qua Shareholders (Millions)*	*Payment Qua Directors (Millions)*	*No. of Directors Retained*
AGL	$2.74	$0.58	0
American Railcar	$0.29	Not Quantified	0
Analogic	$1.54	$4.84	0
Anaren	$5.53	$0.44	0
APAC Customer Service	$155.29	-	0
ARI	$2.74	$0.84	0
Assisted Living Concepts	$1.03	-	0
Bankrate	$160.28	-	0
Blackwater Midstream	$6.45	-	0
Bravo Brio	$16.44	$0.10	0
Brooktrout	$1.10	-	0
Buffets	$6.43	Not Quantified	3
Caribou Coffee	$3.93	$0.45	0
CDI	$14.23	$1.95	0
ChyronHego	$11.36	-	0
CompuDyne	$0.19	$0.15	0
Connecture	$0.21	$0.05	3
CPAC	$1.29	-	0
CRT Properties	$18.97	-	0
Cyber Supply	Not Reported	-	0
CyberGuard	$86.63	-	1
Dave & Buster's	$7.21	$0.98	0
Dayton Superior	$6.19	Not Quantified	1
Deb	$87.68	-	0
Delta Natural Gas	$3.07	-	0
Diversified Restaurant Holdings	$0.77	$0.25	0
EDAC Technologies	$9.86	$0.55	0
Edelman	$1.91	$0.17	1
Emergent Group	$5.08	$2.97	0
Encompass	$0.00	$0.00	0
EPIQ	$2.52	$1.39	0
Exactech	$2.93	$0.63	0
Friendly Ice Cream	$20.31	$1.42	0
Frisch's Restaurants	$12.58	-	0
Genesis HealthCare	$2.12	Not Quantified	0
Gerber Scientific	$14.34	-	1
Gevity HR	$0.64	$0.47	0
Global Traffic Network	$34.84	$7.06	0
Haggar	$39.52	$1.71	0
Hearthstone Utilities	$0.66	-	0
Herbalife	$4.63	Not Quantified	1
Hollywood Entertainment	$6.76	-	0
Hunt	$12.01	Not Quantified	2
Insurance Auto Auctions	$133.16	$2.56	0
Interactive Intelligence	$16.07	$1.39	0
Jo-Ann Stores	$52.73	$3.53	2
Kendle	$2.00	-	-0
Kronos	$4.94	$2.20	0
Ladenburg Thalmann	$56.87	$1.10	0

Table A4. Gains to Non-Executive Directors (continued)

Lifecore Biomedical	$3.86	-	0
MacDermid	$20.45	$1.92	0
Manchester Technologies	$5.30	$0.13	0
Marsh	$0.91	-	0
Mediware	$63.65	$0.56	0
Michael Baker	$5.30	$2.35	0
MicroFinancial	$56.19	-	0
Midwest	$1.36	$1.27	0
Multi-Color	$479.76	$0.88	0
National Dentex	$2.37	$0.21	0
NCO	$3.11	$0.60	1
NMHC	$4.88	$0.50	4
NTS	$18.39	-	0
NuCo2	$5.93	$0.24	0
NYMAGIC	$60.70	$5.06	0
OMNI Energy Services	$22.72	-	0
Outlook Group	$1.70	$0.07	0
Overhill Farms	$6.40	-	0
Penn-America Group	Not Reported	$0.11	0
PHC	Not Reported	Not Quantified	2
Populus	$50.86	$1.14	0
Quality Distribution	$3.80	$0.49	0
R.G. Barry	$9.76	-	0
Radiation Therapy Services	$0.86	-	3
Renaissance	$266.35	$2.90	0
Seminis	$7.82	Not Quantified	1
Serengeti Eyewear	$8.12	Not Quantified	0
ShopKo	$10.62	$1.19	0
Silverleaf Resorts	$30.89	-	0
Sparton	$2.67	-	0
Stonegate Mortgage	$82.97	-	0
The Jones Group	$10.29	-	0
The Oilgear	$0.34	$0.57	0
The Yankee Candle	$3.29	$1.53	0
Tollgrade	$26.30	$1.04	0
Transport America	$2.01	-	0
Valley National Gases	$222.76	-	0
White River Capital	$10.25	$0.09	0
Winn-Dixie	$3.20	$1.37	0
XRS	$111.17	-	0
Young Innovations	$53.03	$0.11	0
% of Yes	-	-	16%
Mean	$31.25	$1.29	-
Median	$6.43	$0.86	-

Table A5. Protections for Employees

Target	Limits on Firing	Length of Transition Period for Retained Employees	Commitments Enforceable by Beneficiaries?
AGL	No	12	No
American Railcar	No	6	No
Analogic	No	12	No
Anaren	No	Unspecified	No
APAC Customer Service	No	12	No
ARI	No	12	No
Assisted Living Concepts	No	12	No
Bankrate	No	0	No
Blackwater Midstream	No	12	No
Bravo Brio	No	12	No
Brooktrout	No	12	Yes
Buffets	No	12	Yes
Caribou Coffee	No	12	No
CDI	No	12	Yes
ChyronHego	No	12	No
CompuDyne	No	0	No
Connecture	No	12	No
CPAC	No	0	No
CRT Properties	No	12	Yes
Cyber Supply	No	0	No
CyberGuard	No	0	No
Dave & Buster's	No	0	No
Dayton Superior	No	12	No
Deb	No	12	No
Delta Natural Gas	No	12	No
Diversified Restaurant Holdings	No	12	No
EDAC Technologies	No	7	No
Edelman	No	12	No
Emergent Group	No	0	No
Encompass	No	0	No
EPIQ	No	Unspecified	No
Exactech	No	0	No
Friendly Ice Cream	No	12	No
Frisch's Restaurants	Yes	6	No
Genesis HealthCare	No	12	No
Gerber Scientific	No	8	No
Gevity HR	No	12	No
Global Traffic Network	No	Unspecified	No
Haggar	No	12	Yes
Hearthstone Utilities	No	12	No
Herbalife	No	3	No
Hollywood Entertainment	No	0	No
Hunt	No	12	No
Insurance Auto Auctions	No	0	No
Interactive Intelligence	No	6	No
Jo-Ann Stores	No	12	No
Kendle	No	0	No

Table A5. Protections for Employees (continued)

Kronos	No	12	No
Ladenburg Thalmann	No	12	No
Lifecore Biomedical	No	12	No
MacDermid	No	24	No
Manchester Technologies	No	12	No
Marsh	No	3	No
Mediware	No	12	No
Michael Baker	No	12	No
MicroFinancial	No	0	No
Midwest	No	12	No
Multi-Color	No	12	No
National Dentex	No	12	No
NCO	Yes	Unspecified	No
NMHC	No	0	No
NTS	No	0	No
NuCo2	No	12	Yes
NYMAGIC	No	0	No
OMNI Energy Services	No	12	No
Outlook Group	No	12	No
Overhill Farms	No	12	No
Penn-America Group	No	12	No
PHC	No	0	No
Populus	No	12	No
Quality Distribution	No	12	No
R.G. Barry	No	0	No
Radiation Therapy Services	No	12	No
Renaissance	No	12	No
Seminis	No	12	No
Serengeti Eyewear	No	0	No
ShopKo	No	12	Yes
Silverleaf Resorts	Yes	12	No
Sparton	No	12	No
Stonegate Mortgage	No	12	No
The Jones Group	No	12	No
The Oilgear	No	0	No
The Yankee Candle	No	24	No
Tollgrade	No	0	No
Transport America	No	12	No
Valley National Gases	No	0	No
White River Capital	Yes	Unspecified	No
Winn-Dixie	No	12	No
XRS	No	12	No
Young Innovations	No	12	No
% of Yes	3%	-	8%
Mean	-	11.67	-
Median	-	12.00	-

Table A6. Protections for Customers, Suppliers, and Creditors

Target	*Customers*	*Suppliers*	*Creditors*
AGL	No	No	No
American Railcar	No	No	No
Analogic	No	No	No
Anaren	No	No	No
APAC Customer Service	No	No	No
ARI	No	No	No
Assisted Living Concepts	No	No	No
Bankrate	No	No	No
Blackwater Midstream	No	No	No
Bravo Brio	No	No	No
Brooktrout	No	No	No
Buffets	No	No	No
Caribou Coffee	No	No	No
CDI	No	No	No
ChyronHego	No	No	No
CompuDyne	No	No	No
Connecture	No	No	No
CPAC	No	No	No
CRT Properties	No	No	No
Cyber Supply	No	No	No
CyberGuard	No	No	No
Dave & Buster's	No	No	No
Dayton Superior	No	No	No
Deb	No	No	No
Delta Natural Gas	No	No	No
Diversified Restaurant Holdings	No	No	No
EDAC Technologies	No	No	No
Edelman	No	No	No
Emergent Group	No	No	No
Encompass	No	No	No
EPIQ	No	No	No
Exactech	No	No	No
Friendly Ice Cream	No	No	No
Frisch's Restaurants	No	No	No
Genesis HealthCare	No	No	No
Gerber Scientific	No	No	No
Gevity HR	Yes	No	No
Global Traffic Network	No	No	No
Haggar	No	No	No
Hearthstone Utilities	No	No	No
Herbalife	No	No	No
Hollywood Entertainment	No	No	No
Hunt	No	No	No
Insurance Auto Auctions	No	No	No
Interactive Intelligence	No	No	No
Jo-Ann Stores	No	No	No
Kendle	No	No	No
Kronos	No	No	No
Ladenburg Thalmann	No	No	No

Table A6. Protections for Customers, Suppliers, and Creditors (continued)

Lifecore Biomedical	No	No	No
MacDermid	No	No	No
Manchester Technologies	No	No	No
Marsh	No	No	No
Mediware	No	No	No
Michael Baker	No	No	No
MicroFinancial	No	No	No
Midwest	No	No	No
Multi-Color	No	No	No
National Dentex	No	No	No
NCO	No	No	No
NMHC	No	No	No
NTS	No	No	No
NuCo2	No	No	No
NYMAGIC	No	No	No
OMNI Energy Services	No	No	No
Outlook Group	No	No	No
Overhill Farms	No	No	No
Penn-America Group	No	No	No
PHC	No	No	No
Populus	No	No	No
Quality Distribution	No	No	No
R.G. Barry	No	No	No
Radiation Therapy Services	No	No	No
Renaissance	No	No	No
Seminis	No	No	No
Serengeti Eyewear	No	No	No
ShopKo	No	No	No
Silverleaf Resorts	No	No	No
Sparton	No	No	No
Stonegate Mortgage	No	No	No
The Jones Group	No	No	No
The Oilgear	No	No	No
The Yankee Candle	No	No	No
Tollgrade	No	No	No
Transport America	No	No	No
Valley National Gases	No	No	No
White River Capital	No	No	No
Winn-Dixie	No	No	No
XRS	No	No	No
Young Innovations	No	No	No
% of Yes	1%	0%	0%
Mean	-	-	-
Median	-	-	-

Table A7. Protections for Communities, the Environment and Other Stakeholders

Target	*Commitment to Retain HQ Location*	*Continuation of Local Investments / Philanthropy*	*Environment*	*Other*
AGL	No	No	No	No
American Railcar	No	No	No	No
Analogic	No	No	No	No
Anaren	No	No	No	No
APAC Customer Service	No	No	No	No
ARI	No	No	No	No
Assisted Living Concepts	No	No	No	No
Bankrate	No	No	No	No
Blackwater Midstream	No	No	No	No
Bravo Brio	No	No	No	No
Brooktrout	No	No	No	No
Buffets	No	No	No	No
Caribou Coffee	No	No	No	No
CDI	No	No	No	No
ChyronHego	No	No	No	No
CompuDyne	No	No	No	No
Connecture	No	No	No	No
CPAC	No	No	No	No
CRT Properties	No	No	No	No
Cyber Supply	No	No	No	No
CyberGuard	No	No	No	No
Dave & Buster's	No	No	No	No
Dayton Superior	No	No	No	No
Deb	No	No	No	No
Delta Natural Gas	Yes	Yes	No	No
Diversified Restaurant Holdings	No	No	No	No
EDAC Technologies	No	No	No	No
Edelman	No	No	No	No
Emergent Group	No	No	No	No
Encompass	No	No	No	No
EPIQ	No	No	No	No
Exactech	No	No	No	No
Friendly Ice Cream	No	No	No	No
Frisch's Restaurants	No	No	No	No
Genesis HealthCare	No	No	No	No
Gerber Scientific	No	No	No	No
Gevity HR	No	No	No	No
Global Traffic Network	No	No	No	No
Haggar	No	No	No	No
Hearthstone Utilities	Yes	No	No	No
Herbalife	No	No	No	No
Hollywood Entertainment	No	No	No	No

Table A7. Protections for Communities, Environment and Other Stakeholders (continued)

Hunt	No	No	No	No
Insurance Auto Auctions	No	No	No	No
Interactive Intelligence	No	No	No	No
Jo-Ann Stores	No	No	No	No
Kendle	No	No	No	No
Kronos	No	No	No	No
Ladenburg Thalmann	No	No	No	No
Lifecore Biomedical	No	No	No	No
MacDermid	No	No	No	No
Manchester Technologies	No	No	No	No
Marsh	No	No	No	No
Mediware	No	No	No	No
Metrologic Instruments	No	No	No	No
Michael Baker	Yes	Yes	No	No
MicroFinancial	No	No	No	No
Midwest	No	No	No	No
Multi-Color	No	No	No	No
National Dentex	No	No	No	No
NCO	No	No	No	No
NMHC	No	No	No	No
NTS	No	No	No	No
NuCo2	No	No	No	No
NYMAGIC	No	No	No	No
OMNI Energy Services	No	No	No	No
Outlook Group	No	No	No	No
Overhill Farms	No	No	No	No
Penn-America Group	Yes	No	No	No
PHC	Yes	No	No	No
Populus	No	No	No	No
Quality Distribution	No	No	No	No
R.G. Barry	No	No	No	No
Radiation Therapy Services	No	No	No	No
Renaissance	No	No	No	No
Seminis	No	No	No	No
Serengeti Eyewear	No	No	No	No
ShopKo	No	No	No	No
Silverleaf Resorts	No	No	No	No
Sparton	No	No	No	No
Stonegate Mortgage	No	No	No	No
The Jones Group	No	No	No	No
The Oilgear	No	No	No	No
The Yankee Candle	Yes	No	No	No
Tollgrade	No	No	No	No
Transport America	No	No	No	No
Valley National Gases	No	No	No	No
White River Capital	No	No	No	No

Table A7. Protections for Communities, Environment and Other Stakeholders (continued)

Winn-Dixie	No	No	No	No
XRS	No	No	No	No
Young Innovations	No	No	No	No
% of Yes	7%	2%	0%	0%
Mean	-	-	-	-
Median	-	-	-	-