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FOR WHOM CORPORATE LEADERS BARGAIN

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ABSTRACT

At the center of a fundamental and heated debate about the purpose that corporations should serve, 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 object 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.

During the hostile takeover era of the 1980s, stakeholderist arguments contributed to the adoption of constituency statutes by more than thirty states. These statutes authorize corporate leaders to give weight to stakeholder interests when considering a sale of their company. We study how corporate leaders in fact used the power awarded to them by these statutes in the past two decades. In particular, using hand-collected data, we analyze in detail more than a hundred cases governed by constituency statutes in which corporate leaders negotiated a sale of their company to a private equity buyer.

We find that corporate leaders have used their bargaining power to obtain gains for shareholders, executives, and directors. However, despite the risks that private equity acquisitions posed for stakeholders, corporate leaders made very little use of their power to negotiate for stakeholder protections. Furthermore, in cases in which some protections were included, they were practically inconsequential or cosmetic. We conclude that constituency statutes failed to deliver the benefits to stakeholders that they were supposed to produce.

Beyond their implications for the long-standing debate on constituency statutes, our findings also provide important lessons for the ongoing debate on stakeholderism. At a minimum, stakeholderists should identify the causes for the failure of constituency statutes and examine whether the adoption of their proposals would not suffer a similar fate. After examining several possible explanations for the failure of constituency statutes, we conclude that the most plausible explanation is that corporate leaders have incentives not to protect stakeholders beyond what would serve shareholder value. The evidence we present indicates that stakeholderism should be expected to fail to deliver, as have constituency statutes. Stakeholderism therefore should not be supported, 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.
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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] Stakeholderism refers to the view that 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]

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 this view, acceptance of stakeholderism would be

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[1] See section II.A infra.

[2] *See* sources 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-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 in *infra* note 29.

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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.

A key question in the debate over stakeholderism is an empirical one: If corporate leaders are given the power to take into account the interests of stakeholders, as proponents of stakeholderism suggest, will such leaders indeed use this power 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 on stakeholderism.

Although stakeholderism has enjoyed unprecedented levels of support in recent years, during the era of hostile takeovers many states already adopted "constituency statutes" that embraced an approach similar to that advocated by modern stakeholderists.[6] Proposed as a remedy to eliminate or reduce the adverse effects of acquisitions on employees and other stakeholders, these statutes accorded corporate leaders the power to give weight to the interests of stakeholders when considering a sale of their companies. The current debate 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 as was hoped for. Although constituency statutes have long been a common topic in corporate law textbooks,[7] as well as the focus of many law review articles,[8] thus far there has been no direct study of the terms of acquisition agreements negotiated in the shadow of such statutes.[9] Using hand-collected data on a large sample of such agreements from the past two decades, we put forward novel empirical evidence on the subject.

We document that corporate leaders selling their companies to private equity buyers obtained substantial benefits for their shareholders as well as for themselves. By contrast, corporate leaders made little use of their power to give weight to the interests of stakeholders. Our review of the contractual terms of these deals finds very little protection provided to stakeholders from the risks posed by private equity control.

We conclude that constituency statutes have failed to deliver their promised 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.

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[6] For an account and discussion of the statutes that are the focus of this paragraph, *see* sources noted in *infra* notes 32-33.

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

[8] *See* articles cited in *infra* notes 33, 38, and 47.

[9] 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 focusses on variables available in standard financial datasets, and no attempt has been done to conduct a comprehensive review of all the merger agreements and proxy statements for a large sample of transactions.

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Our analysis is organized as follows. Part II discusses the importance of the debate on stakeholderism. We explain that the debate seems to have reached a critical juncture. We then briefly describe the positions of stakeholderists and their critics. In particular, we explain how the disagreement between them arises from their different expectations as to how corporate leaders are likely to use discretion to give independent weight to stakeholder interests.

Part III sets the stage for our empirical analysis by discussing how stakeholderist concerns played a key role in the passage of constituency statutes. We overview the landscape of constituency statutes and their main features. We also explain why, in examining the performance of constituency statutes in protecting stakeholders, private equity acquisitions of public companies are worth studying. Because these transactions move assets to the hands of managers with powerful incentives to maximize financial returns, such transactions often pose significant risks to stakeholders that corporate leaders who care about stakeholders may seek to address.

Part IV presents our empirical analysis. We focus on the 20-year period of 2000 through 2019, examining all private equity acquisitions of public companies of significant size that were incorporated in a state with a constituency statute in force. Our sample includes 105 acquisitions of companies incorporated in 18 states with constituency statutes. For each of these transactions, we hand-collected and analyzed detailed information about the process leading to the transaction and the full set of terms negotiated by the parties.

We find that the acquisitions were commonly the product of a long negotiation process that produced substantial benefits for both shareholders and corporate leaders. Shareholders enjoyed 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.

At the same time, however, corporate leaders made little use of their bargaining power to negotiate for any constraints on the power of the private equity buyer to make choices that would adversely impact stakeholders. In particular, although concerns about layoffs and downsizing induced labor unions to support constituency statutes,[10] we document that in 95% of cases corporate leaders did not negotiate for any restrictions to the freedom of the private equity buyers to fire employees, and that even in the handful of cases in which such restrictions were found, the deal terms denied employees any power to enforce these constraints.

Furthermore, we find that corporate leaders generally did not negotiate any constraints on buyers' post-deal choices that could pose risks to several other notable stakeholder groups – consumers, suppliers, creditors, or the environment. In a very small minority of cases, we found buyer pledges to retain the location of company headquarters or to continue some local investments or philanthropy, but our analysis of the legal terms indicates that these rare pledges were rather "soft": unlike commitments to shareholders or corporate leaders, these pledges were vague and under-specified and, importantly, denied potential beneficiaries any

[10] See sources noted in *infra* notes 47-50.

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enforcement rights.

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.

However, the premise of 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 protect them sufficiently from being adversely affected by 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 power to obtain such stakeholder protections, and it concludes that they did not.

Finally, Part V discusses the implications of our empirical analysis and findings. We first explain that the evidence we have put together enables reaching 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 this failure, 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 evidence in order to evaluate these explanations. Our analysis indicates four explanations that might be suggested for the failure of constituency statutes that are unlikely to drive our findings: uncertainty about what the statutes authorized; 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.

Our analysis leads us to conclude that the most plausible explanation can be found in the incentives of corporate leaders. Although the interests of corporate leaders do not perfectly align with the interest of shareholders, they are substantially linked to them. Because of the pay arrangements of executives and directors, and the dynamics of the labor and control markets, corporate leaders often benefit when they enhance shareholder value.

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

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lower gains for the shareholders and/or the corporate leaders. Thus, corporate leaders had no incentives to use their bargaining power—and indeed had incentives *not* to use their bargaining power—for the purpose of negotiating protections for stakeholders.

The conclusions of our analysis indicate that considering the incentives of corporate leaders is crucial for assessing the promise of stakeholderism. As the supporters of constituency statutes, supporters of stakeholderism have commonly assumed that corporate leaders would substantially use discretion to protect stakeholders for this purpose. Our evidence indicates that, in the case of constituency statutes, this assumption was unwarranted. All those participating in the current debate on stakeholderism should be wary of relying on such an assumption. The evidence thus casts substantial doubt on whether stakeholderism should be expected to deliver its purported benefits for stakeholders.

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.

Since the early twentieth century, a copious literature has developed on the stakeholderism debate.[11] Though many prominent legal scholars,[12] as well as economics and business scholars,[13] have proposed powerful defenses of

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[11] Traditionally, the origin of the stakeholderism debate is taken to be a 1932 paper by Merrick Dodd in response to an article by Adolf Berle published the previous year, as well as Berle's subsequent rejoinder. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931)(defending the view that "all powers granted to a corporation or to the management of the corporation… are necessarily and at all times exercisable only for the ratable benefit of all the shareholders"); E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); (suggesting that corporate law could experiment with some form of stakeholderism); and Adolf A. Berle, Jr., *For Whom Are Corporate Managers Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (objecting that "[w]hen the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute").

[12] 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).

[13] 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).

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stakeholderism, the shareholder primacy view has commonly been more prevalent among academics and practitioners.[14] 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 companies to the benefit of all stakeholders,"[15] and to "deliver value" not just to shareholders but also to employees, customers, suppliers, and communities.[16] 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.[17]

The World Economic Forum urged companies to move from the traditional model of "shareholder capitalism" to the model of "stakeholder capitalism."[18] 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.[19] These developments led observers to view 2019 as a "watershed year in the evolution of corporate governance" due to the "advent of stakeholder governance,"[20] and 2020 as a "decisive inflection point" in the stakeholderism debate.[21]

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[14] *See, e.g.*, STOUT, *supra* note 12, 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").

[15] 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.

[16] Business Roundtable, *Statement on the Purpose of a Corporation*, *supra* note 3.

[17] *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. Lucian Bebchuk & Roberto Tallarita, *Stakeholder Capitalism Seems Mostly for Show*, WALL. ST. J., August 7, 2020.

[18] 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…").

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

[20] 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/.

[21] *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/.

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B. 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.[22] An important corollary of the fact that the welfare of shareholders and the welfare of stakeholders are independent factors is that there 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, as noted in the previous section, 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.[23] 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.[24] 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.[25]

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.[26] Colin Mayer refers to "intrinsic trusteeship" (that is, the role of directors as trustees for all corporate constituents) as a substitute for "extrinsic

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[22] For a recent defense of stakeholderism, *see* MAYER, *supra* note 13, at 39.

[23] Business Roundtable, *Statement*, *supra* note 3.

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

[25] *See infra* note 66 and accompanying text.

[26] 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.").

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regulation" to improve societal welfare.[27] 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 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.[28] We believe this approach is conceptually and practically indistinguishable from traditional shareholder value approach. 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 explore what benefits stakeholders should expect from the more meaningful, "pluralistic" version of stakeholderism. Part V will nonetheless comment on the "enlightened shareholder value" approach and its predictable implications.

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.[29] 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, 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

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[27] 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.

[28] 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).

[29] *See, e.g.,* 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; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. (forthcoming 2020).

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compensation is in substantial part linked to the financial performance of the company,[30] 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.[31] 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 stakeholders' welfare? 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 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

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

[31] *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).

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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.[32]

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.[33] Many statutes went even further and authorized directors to consider the interests of stakeholders with respect to any kind of decisions.[34] Although Delaware, the most influential state for corporate governance,[35] 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[36]—welcomed the adoption of constituency

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

[33] 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, *id*. Other labels that have been used for these statutes are "other constituencies statutes" and "stakeholder statutes."

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

[35] *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").

[36] 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").

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statutes as a way for directors to protect non-shareholder constituencies.[37]

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.[38] 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.[39]

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.[40] By allowing corporate decision-makers to consider the effects of an acquisition on employees, suppliers, and the local 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,[41] 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.[42] 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.[43]

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

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[37] Lipton & Rosenblum, *supra* note 35.

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

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

[40] 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).

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

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

[43] *Id.* at 53. *See also* Coffee, *supra* note 40, at 440 ("[some] stakeholders… are in a poor position to bargain. Having sunk substantial investments in the firm, they are exposed…to shareholder opportunism").

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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."[44] 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.[45]

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,[46] unions and political forces close to labor interests often backed these efforts. Organized labor had already played an important role in helping management defend against hostile bids.[47] When state legislators started discussing constituency and other anti-takeover statutes, unions sided with management.[48] 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."[49] 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." [50]

While much of the discussion around these statutes focused on the tools they

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[44] Johnson & Million, *supra* note 39, at 850.

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

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

[47] *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").

[48] *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).

[49] Commonwealth of Pennsylvania, Legislative Journal, Dec. 6, 1983, at 1431, 1436, *quoted in* Orts *supra* note 33, ft. 47.

[50] 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).

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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.[51]

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 perspective.[52] 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.[53]

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 the Constituency Statutes*

During the period examined in this Article (2000-2019), 33 states had constituency statutes in force, one of them (Louisiana) only until the end of 2014.[54] 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).[55] 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

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[51] *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").

[52] 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).

[53] *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 33, at 1020-1022.

[54] 2014 La. ALS 328 (enacting the new Louisiana Business Corporation Act, effective January 1, 2015, which does not include a constituency statute).

[55] 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.

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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.

(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."[56] 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.[57]

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.[58]

(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.

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

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3. *The Discretionary Power to Protect Stakeholders*

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 no criteria, metrics, or even generic guidance on how directors are expected to use this discretionary power.[59] In fact, many statutes even give directors the freedom to decide which individuals or groups should be considered stakeholders of the corporation.[60]

This crucial aspect 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 "novel" idea that was "contrary to long standing legal principles."[61] In the absence of any specified weighing criteria, such a novel idea meant that directors had been granted the power to negotiate benefits and protections for stakeholders with the acquirer even if this could prove costly to shareholders. For example, corporate leaders may potentially turn down an acquisition offer that is profitable for shareholders, on the grounds that it would result in an unacceptable loss of local jobs. Similarly, they may bargain to obtain the acquirer's commitment not to close the local plant for a given period, even if this would result in a lower premium.

Some commentators believe that the constituency statutes should be interpreted narrowly, in a merely "instrumental" way. According to this 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. Therefore, directors may not favor stakeholders at the expense of shareholders, as presented in the aforementioned examples. This interpretation was proposed, most notably, by the American Bar Association (ABA), which recommended that these statutes be read as a codification of existing common law; namely that directors may give consideration to the interests of stakeholders as long as there is a "rationally related benefit to shareholders."[62]

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[59] 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.

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

[61] Karmel, *supra* note 47, at 96.

[62] American Bar Association, *supra* note 33, 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").

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As explained below, however, this position does not represent a plausible interpretation of these statutes. First, 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."[63] New York provides that directors have no obligation to "consider or afford any particular weight" to any shareholder or stakeholder factors.[64] 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."[65] 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.[66] And the Georgia statute states that no corporate constituency (arguably, including shareholders) has a right to be preferred over others.[67]

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."[68] 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).[69]

Second, 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 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

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[63] Iowa Code § 490.1108A.

[64] N.Y. Bus. Corp. Law § 717.

[65] 15 Pa. Cons. Stat. § 1715.

[66] 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").

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

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

[69] Vt. Stat. tit. 11A, § 8-30.

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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. This interpretation is widely shared among some of the most influential authors writing on this issue, both supporters and critics of stakeholderism.[70]

While 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, in Part V we will discuss this issue and demonstrate 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-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,[71] as well as by the compensation structure of both private equity managers and the managers of portfolio companies.[72] Thus, to the extent that the

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[70] *See, e.g.*, Blair & Stout, *supra* note 12, at 253 ("mentioning state constituency statutes as an example of legislation that weakens shareholders' control over directors"); Hansmann & Kraakman, *supra* note 14, 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"); 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 33, at 995 ("If the statutes are to have any meaning, they must permit directors to make some trade-offs between their various constituencies"); COX & HAZEN, *supra* note 7 ("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").

[71] *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);

[72] *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

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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.[73] Earlier studies have also documented declines in employee compensation following a private equity acquisition.[74]

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.[75] 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.[76]

Much of the debate surrounding private equity focuses on the question of whether private equity deals are on the whole 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

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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").

[73] 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).

[74] 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).

[75] 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.

[76] *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.

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should have been expected to seek protections for stakeholders that would have eliminated or reduced the risks raised by a private equity takeover.

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.[77] 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.[78] 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.

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 105 transactions that met all four criteria mentioned

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[77] 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%.

[78] 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.

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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.[79] We augmented the data we obtained from our document review with transaction data collected from the FactSet database.

2. *Deal Time and Value*

We found no transactions satisfying the sample selection criteria in the period between 2000 and 2003, therefore the 105 acquisitions in our sample were all announced during the sixteen-year period between 2004 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 6.6 transactions per year.

Table 1. Transaction Years

Year	*Number of Deals*	*Year*	*Number of Deals*
2004	1	*2012*	6
2005	10	*2013*	8
2006	16	*2014*	4
2007	15	*2015*	5
2008	3	*2016*	3
2009	2	*2017*	8
2010	5	*2018*	5
2011	11	*2019*	3
Total		105	

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), Heinz ($30.2 billion), Clear Channel ($33.2 billion), and Biomet ($14.6 billion). Additionally, there were four deals with a value between $5 and $10 billion, 26 deals with a value between $1 and $5 billion, 11 deals with a value between $0.5 and $1 billion, and 59 deals valued at less than $500 million.

[79] 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.

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Table 2. Transaction Values

Value Range	*Number of Transactions*	*% of Transactions*
>$10 billion	5	5%
$5-10 billion	4	4%
$1-5 billion	26	25%
$0.5-1 billion	11	10%
<$500m	59	56%
Total	105	100%

3. *States of Incorporation*

The acquired companies in our sample were incorporated in 18 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 (12 deals), Pennsylvania (12 deals), Massachusetts (10 deals), Ohio (10 deals), Texas (8 deals), Wisconsin (8 deals), New York (7 deals), and Minnesota (6 deals).

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Table 3. Constituency Statutes Across States

State	*Number of Deals*	*CS Adoption Year*
Connecticut	2	1988
Florida	13	1989
Illinois	3	1985
Indiana	4	1986
Kentucky	2	1988
Louisiana	1	1988
Massachusetts	10	1989
Minnesota	6	1987
Missouri	4	1986
Nevada	12	1991
New Jersey	1	1987
New York	7	1987
North Dakota	1	1993
Ohio	10	1984
Oregon	1	1989
Pennsylvania	12	1990
Texas	8	2006
Wisconsin	8	1991

***

Below we proceed to describe how we analyzed each of the 105 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 Sections of this Part below 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 85 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 105 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

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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 entire105-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.

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	-	45%	92%	88%	79%
Mean	193.12	-	-	-	-
Median	177.00	-	-	-	-
Results for the Top-20 Subsample					
% of Yes	-	50%	85%	90%	95%
Mean	156.05	-	-	-	-
Median	129	-	-	-	-
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
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
Station Casinos	137	No	Yes	Yes	Yes
TXU	90	No	Yes	Yes	Yes

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

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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 193.1 (177) days for the entire sample, and 156.1 (129) 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 45% of the deals in the entire sample, and in 50% of the top-20 deals, another party made an offer.

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 92% of the deals in the entire sample and in 85% 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 88% 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 79% 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”

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reported by FactSet, which is defined as the premium compared to the unaffected stock price before the deal was announced.[80] Table 5 reports our findings.

Table 5. Gains to Shareholders

Target	Premium (%)[81]	Target	Premium (%)
Findings for Each of the Top-20 Deals			
Bausch & Lomb	6	*EGL*	16
Biomet	10	*EMC*	23
Buffalo Wild Wings	73	*Florida East Coast*	13
CDW	16	*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	*Station Casinos*	30
Education Management	16	*TXU*	15
Results for the Top-20 Subsample			
Mean (%)		22	
Median (%)		16	
Results for the Entire Sample			
Mean (%)		31	
Median (%)		25	

As Table 5 shows, shareholders obtained substantial monetary payoffs from the transactions under study. For the full 105-deal sample, the premium received by shareholders had a mean of 31% 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 22% 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.

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.

[80] 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.

[81] 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.

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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.

Table 6. Gains to Executives

Target	*Payment Qua Shareholders (Millions)*[82]	*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	-	-	25%	23%	49%
Mean	$67.29	$27.73	-	-	-
Median	$13.64	$8.63	-	-	-
Results for the Top-20 Subsample					
% of Yes	-	-	30%	30%	65%
Mean	$210.89	$90.46	-	-	-
Median	$128.29	$47.19	-	-	-
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
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
Station Casinos	$333.15	$273.82	Yes	1	Yes
TXU	$147.37	$530.78	No	-	Yes

[82] 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.

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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 $67.3 million ($13.6 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 $210.9 million ($128.3 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 25% 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 $27.7 million ($8.6 million) for the entire sample, and a mean (median) of $90.5 million ($47.2 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 24% of all transactions in our entire sample, with a mean (median) of $2.9 million ($1 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 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

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packages offered to executives by private equity buyers.[83] 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 25% 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 23% of all the deals in our sample, and in 30% 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 30% 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.[84] As Table 6 reports, such soft commitments were found in 49% 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 our findings.

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[83] *See* Jackson, *supra* note 72 (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).

[84] 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).

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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	-	-	12%
Mean	$69.47	$1.82	-
Median	$9.76	$1.07	-
Results for the Top-20 Subsample			
% of Yes	-	-	20%
Mean	$216.31	$3.56	-
Median	$18.85	$3.13	-
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	-
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	-
Station Casinos	$8.37	$4.56	2
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 $69.5 million ($9.8 million) in our entire sample, and a mean (median) of $216.3 million ($18.9 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 $1.82 million ($1.1 million) in the entire sample and a mean (median) of $3.6

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million ($3.1 million) in the top-20 subsample. Furthermore, directors were assigned post-deal board seats in 12% of all transactions and in 20% 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 52% 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. 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 constituency statutes was that such contractual protections are generally not sufficient to protect stakeholders, and that it is therefore desirable to enable corporate leaders to seek stakeholder protections that could address remaining concerns. 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.

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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, NJ, NY, ND, OH, OR, PA, WI	92%
Customers	CT, FL, IL, IN, KY, LA, MA, MN, MO, NV, NJ, NY, ND, OH, OR, PA, WI	92%
Suppliers	CT, FL, IL, IN, KY, MA, MN, NV, NJ, ND, OH, OR, PA, WI	81%
Creditors	CT, KY, LA, MA, MN, MO, NV, NJ, NY, ND, OH, PA	65%
Local community	CT, FL, IL, IN, LA, MO, NJ, NY, OR, PA, WI	53%
Society	CT, KY, MA, MN, NV, ND, OH, OR, TX	50%
Economy of the state / nation	FL, KY, MA, MN, NV, ND, OH	51%
Environment	TX	8%
Other	MO (“similar contractual relations”), NY (retired employees and other benefit recipients)	10%
Catch-all	CT, FL, IL, IN, NV, OR, PA, WI	52%

1. *Employees*

Employees are referred to explicitly in the constituency statutes of 17 states, which govern a large majority (92%) 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).[85] 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.

[85] See *supra* notes 44-49, and accompanying text.

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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	5%	72%	6%
Mean	-	12.10	-
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
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
Station Casinos	No	12	No
TXU	No	15	No

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

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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 incentives to enforce it, the provision loses much of its practical significance.

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 95% 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]."[86]

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 70% 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 12.1 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 provision 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 17 constituency statutes, which governed over 90% of the transactions in the sample; suppliers were explicitly noted by 14 constituency statutes, which

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

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governed over 80% of the transactions in the sample; and creditors were explicitly noted in 12 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.

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 104 out of the 105 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
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
Station Casinos	No	No	No
TXU	No	No	No

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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, 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 11 statutes, which governed over 50% of the deals in the sample.[87] The environment was explicitly mentioned only in one statute, which governed 8% of the deals, but it is a stakeholder that has been receiving increasing attention over the past decade.[88]

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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[87] *See supra* Table 8.

[88] *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/.

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Table 11. Protections for Communities, Environment and Other Stakeholders

Target	*Commitment to Retain HQ Location*	*Continuation of Local Investments / Philanthropy*	*Environment*	*Other*
Results for the Entire Sample				
% of Yes	9%	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
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
Station Casinos	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 the Table indicates, pledges to retain the location of headquarters were found in 9% of all transactions in our sample and 10% 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,

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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.[89] 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.[90] 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 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

[89] Johnson & Millon, *supra* note 39, at 848.
[90] *See, e.g.*, *supra* notes 12-13, and the discussion in Section II.C.

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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. Can Stakeholderism 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.[91] 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. We evaluate the plausibility of each explanation, including empirical evidence that can assist with this evaluation. The analysis below indicates that the most

[91] 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.

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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 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 Nevada) explicitly reject giving shareholders priority over other constituencies. Examining the subset of 31 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.[92] Indeed, the ongoing project of the American Law Institute's *Restatement of Corporate Governance* is now considering adopting this approach.[93]

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.

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[92] As noted in *supra* note 28, this approach was codified in the 2006 UK Companies Act.

[93] See *supra* note 19.

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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 substantial premiums made the obtaining of shareholder approval very likely.[94] 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.

Furthermore, to shed additional empirical light on this issue, we examined all the transactions in our sample in which the shareholder voting 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 stakeholder protections. Thus, to the extent that the need for shareholder approval was a key driver for the absence of stakeholder protections, we should expect to find substantially more stakeholder protections in deals that were approved by a large wide margin. However, this pattern is not found in the data.

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 that 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 these statutes would nonetheless produce protections for stakeholders.[95] 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

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[94] *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).

[95] *See supra* notes 36-40, 42-53, and accompanying text.

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stakeholderists accept that shareholders alone should elect directors and do not seek to revise this key aspect of corporate governance.[96] 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. *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*.[97] Under the Delaware *Revlon* doctrine, once corporate leaders reach a decision to sell the company, they have a duty to obtain the highest price for shareholders.[98]

Of the 18 states with constituency statutes that apply to companies in our sample, there were judicial decisions that expressly rejected *Revlon* in six states governing 53 transactions (about half of our sample). There were no judicial rulings on the subject in nine states whose constituency statutes applied to 39 transactions (about four-tenths of our sample). There were judicial rulings explicitly following *Revlon* in only three states whose constituency statutes applied to 13 transactions.[99] 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.[100]

However, the evidence is inconsistent with this hypothesis. As noted above, about 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 53 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 53 transactions in non-*Revlon* states, we found no limitations on the buyer's freedom to fire employees in 93% of the cases, no

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[96] *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").

[97] *Revlon*, *supra* note 62.

[98] *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").

[99] *See supra* note 78.

[100] 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.

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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 7% and 2% of the cases, respectively. The *Revlon* explanation is thus also not a major driver of the patterns we identified.[101]

4. Corporate Leader 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.[102]

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 deals that took place from 2017 through 2019 and that were among the 20 largest deals in our 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

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[101] 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.

[102] For discussions suggesting that attitudes more favorable to stakeholders have been growing in corporate boardrooms and executive suites, *see supra* notes 20-21, 88.

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evolution of such norms to provide a basis for stakeholderism. This is especially the case because, as we now turn to discuss, 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 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.[103] 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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[103] For a discussion of corporate leaders' incentives, *see* Bebchuk & Tallarita, *supra* note 29, at 29-40; Fisch & Davidoff Solomon, *supra* note 29.

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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 that supports a clear verdict on the success of these statutes. Advocates of adopting these statutes touted their promise for addressing concerns related to stakeholders, and this promise enabled corporate leaders to obtain the support of labor and other stakeholder groups for the legislation. The statutes, however, 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 current and increasingly influential movement in support of stakeholderism. Our findings should serve as a warning both for advocates of stakeholderism and for those concerned about the effects of corporate decisions on stakeholders. Both groups should recognize that the incentive systems of corporate leaders have prevented constituency statutes from protecting stakeholders, and both should draw lessons from this failure.

Learning from this experience 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 causes the failure of constituency statutes 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."[104]

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

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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 85 transactions with smaller deal value that we analyzed. These findings were incorporated in the overall results for our 105-transaction sample, which we reported in Part IV. In particular, for each of the 85 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).

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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
Applica	96	Yes	Yes	No	No
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
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
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
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
Hollywood Entertainment	75	Yes	Yes	Yes	Yes
Insurance Auto Auctions	99	Yes	Yes	Yes	Yes
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

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Table A1. Bargaining Process (continued)

Manchester Technologies	296	No	Yes	No	No
Marsh	188	Yes	Yes	Yes	Yes
Mediware	138	No	Yes	Yes	Yes
Metrologic Instruments	342	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
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
Res-Care	279	No	Yes	Yes	Yes
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	-	44%	94%	87%	75%
Mean	201.85	-	-	-	-
Median	188.00	-	-	-	-

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Table A2. Gains to Shareholders

Target	*Premium (%)*	*Target*	*Premium (%)*
AGL	34	*Kronos*	18
American Railcar	51	*Ladenburg Thalmann*	55
Analogic	25	*Lifecore Biomedical*	32
Anaren	40	*MacDermid*	21
APAC Customer Service	57	*Manchester Technologies*	36
Applica	138	*Marsh*	5
ARI	2	*Mediware*	40
Assisted Living Concepts	25	*Metrologic Instruments*	5
Bankrate	16	*Michael Baker*	93
Blackwater Midstream	21	*MicroFinancial*	23
Bravo Brio	17	*Midwest*	87
Brooktrout	38	*Multi-Color*	16
Caribou Coffee	30	*National Dentex*	70
CDI	33	*NCO*	44
ChyronHego	4	*NTS*	27
CompuDyne	32	*NuCo2*	25
Connecture	117	*NYMAGIC*	24
CPAC	10	*OMNI Energy Services*	30
CRT Properties	15	*Outlook Group*	18
Cyber Supply	Not Reported	*Overhill Farms*	15
CyberGuard	12	*Penn-America Group*	10
Dave & Buster's	18	*PHC*	-3
Deb	2	*Populus*	14
Delta Natural Gas	17	*Quality Distribution*	62
Diversified Restaurant Holdings	123	*R.G. Barry*	-1
EDAC Technologies	8	*Radiation Therapy Services*	51
Edelman	43	*Renaissance*	31
Emergent Group	40	*Res-Care*	31
EPIQ	45	*ShopKo*	26
Exactech	54	*Silverleaf Resorts*	72
Friendly Ice Cream	8	*Sparton*	41
Frisch's Restaurants	21	*Stonegate Mortgage*	34
Genesis HealthCare	31	*The Jones Group*	3
Gerber Scientific	35	*The Oilgear*	41
Gevity HR	97	*The Yankee Candle*	21
Global Traffic Network	20	*Tollgrade*	0
Haggar	25	*Transport America*	25
Hearthstone Utilities	71	*Valley National Gases*	0
Hollywood Entertainment	24	*White River Capital*	0
Insurance Auto Auctions	26	*Winn-Dixie*	75
Interactive Intelligence	6	*XRS*	85
Jo-Ann Stores	34	*Young Innovations*	9
Kendle	54		
Mean (%)		26	
Median (%)		34	

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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
Applica	$3.64	$6.14	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
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
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
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	-	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
Hollywood Entertainment	$116.34	Not Quantified	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

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Table A3. Gains to Executives (continued)

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
Metrologic Instruments	$218.37	Not Quantified	Yes	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	-	No
National Dentex	$4.26	$7.93	No	0	No
NCO	94.89	9.00	Yes	8	Yes
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
Res-Care	Not Reported	$7.91	Yes	4	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	-	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
% of Yes	-	-	24%	21%	45%
Mean	$32.27	$11.85	-	-	-
Median	$11.02	$6.74	-	-	-

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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	-
APAC Customer Service	$155.29	-	0
Applica	$19.11	-	0
ARI	$2.74	$0.84	-
Assisted Living Concepts	$1.03	-	-
Bankrate	$160.28	-	0
Blackwater Midstream	$6.45	-	-
Bravo Brio	$16.44	$0.10	-
Brooktrout	$1.10	-	0
Caribou Coffee	$3.93	$0.45	0
CDI	$14.23	$1.95	-
ChyronHego	$11.36	-	-
CompuDyne	$0.19	$0.15	-
Connecture	$0.21	$0.05	3
CPAC	$1.29	-	-
CRT Properties	$18.97	-	0
Cyber Supply	Not Reported	-	-
CyberGuard	$86.63	-	1
Dave & Buster's	$7.21	$0.98	0
Deb	$87.68	-	-
Delta Natural Gas	$3.07	-	0
Diversified Restaurant Holdings	$0.77	$0.25	-
EDAC Technologies	$9.86	$0.55	-
Edelman	$1.91	$0.17	1
Emergent Group	$5.08	$2.97	-
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	-	-
Genesis HealthCare	$2.12	Not Quantified	-
Gerber Scientific	$14.34	-	1
Gevity HR	$0.64	$0.47	0
Global Traffic Network	$34.84	$7.06	-
Haggar	$39.52	$1.71	-
Hearthstone Utilities	$0.66	-	-
Hollywood Entertainment	$6.76	-	0
Insurance Auto Auctions	$133.16	$2.56	0
Interactive Intelligence	$16.07	$1.39	-
Jo-Ann Stores	$52.73	$3.53	2
Kendle	$2.00	-	-
Kronos	$4.94	$2.20	0
Ladenburg Thalmann	$56.87	$1.10	0
Lifecore Biomedical	$3.86	-	0
MacDermid	$20.45	$1.92	0
Manchester Technologies	$5.30	$0.13	-
Marsh	$0.91	-	-

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

Mediware	$63.65	$0.56	-
Metrologic Instruments	$3.31	-	0
Michael Baker	$5.30	$2.35	-
MicroFinancial	$56.19	-	0
Midwest	$1.36	$1.27	-
Multi-Color	$479.76	$0.88	-
National Dentex	$2.37	$0.21	0
NCO	$3.11	$0.60	1
NTS	$18.39	-	-
NuCo2	$5.93	$0.24	0
NYMAGIC	$60.70	$5.06	-
OMNI Energy Services	$22.72	-	0
Outlook Group	$1.70	$0.07	-
Overhill Farms	$6.40	-	-
Penn-America Group	Not Reported	$0.11	-
PHC	Not Reported	Not Quantified	2
Populus	$50.86	$1.14	0
Quality Distribution	$3.80	$0.49	0
R.G. Barry	$9.76	-	-
Radiation Therapy Services	$0.86	-	3
Renaissance	$266.35	$2.90	-
Res-Care	Not Reported	$1.30	0
ShopKo	$10.62	$1.19	-
Silverleaf Resorts	$30.89	-	0
Sparton	$2.67	-	-
Stonegate Mortgage	$82.97	-	-
The Jones Group	$10.29	-	-
The Oilgear	$0.34	$0.57	-
The Yankee Candle	$3.29	$1.53	0
Tollgrade	$26.30	$1.04	-
Transport America	$2.01	-	0
Valley National Gases	$222.76	-	-
White River Capital	$10.25	$0.09	-
Winn-Dixie	$3.20	$1.37	0
XRS	$111.17	-	0
Young Innovations	$53.03	$0.11	0
% of Yes	-	-	9%
Mean	$33.22	$1.31	-
Median	$6.45	$0.93	-

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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
Applica	No	Unspecified	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
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
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
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
Hollywood Entertainment	No	0	No
Insurance Auto Auctions	No	0	No
Interactive Intelligence	No	6	No
Jo-Ann Stores	No	12	No
Kendle	No	0	No
Kronos	No	12	No
Ladenburg Thalmann	No	12	No
Lifecore Biomedical	No	12	No

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Table A5. Protections for Employees

MacDermid	No	24	No
Manchester Technologies	No	12	No
Marsh	No	3	No
Mediware	No	12	No
Metrologic Instruments	No	0	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
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
Res-Care	Yes	Unspecified	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	6%	-	7%
Mean	-	11.79	-
Median	-	12.00	-

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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
Applica	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
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
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
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
Hollywood Entertainment	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
Lifecore Biomedical	No	No	No
MacDermid	No	No	No
Manchester Technologies	No	No	No
Marsh	No	No	No

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

Mediware	No	No	No
Metrologic Instruments	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
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
Res-Care	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	-	-	-

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Table A7. Protections for Communities, 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
Applica	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
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
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
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
Hollywood Entertainment	No	No	No	No
Insurance Auto Auctions	No	No	No	No
Interactive Intelligence	No	No	No	No
Jo-Ann Stores	No	No	No	No

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

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
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
Res-Care	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
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	-	-	-	-

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