THE NEW CORPORATE SOCIAL RESPONSIBILITY

Robert Allan Oakes, IV[*]

I. INTRODUCTION ... 273
II. WHAT DOES CORPORATE SOCIAL RESPONSIBILITY LOOK LIKE TODAY? 275
 A. Cars, Coffee, and CSR. ... *276*
III. EMPLOYEES: THE VULNERABLE PARTY ... 277
 B. The Problems Created by Citizens United ... *281*
 C. The Problems That Hobby Lobby Creates, and the Return to the "Ford's Feudal System" That It Initiates. ... *283*
IV. EMPLOYEE-FOCUSED CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE ... 287
 D. Why Employee-Focused Corporate Social Responsibility Is Ideal ... *288*
  1. Shareholder Primacy ... 290
  2. Director Primacy ... 292
  3. Employee Corporate Governance ... 294
  4. Can Labor Use Its Capital to Take Advantage of Shareholder Primacy? ... 295
V. CONCLUSION ... 299

I. INTRODUCTION

Former Delaware Supreme Court Justice Leo Strine Jr. proposed an ethically, morally, and legally challenging question in his 2002 speech at the University of Southern California.[1] He asked, what would happen if the board of a closely held corporation chose to act in accordance with the long-term health of the company when considering purchase offers for the company?[2] In this hypothetical, the board's interest in accepting

---

[*] The author is an associate attorney with Winston & Strawn LLP whose practice focuses on capital markets, including public company reporting and corporate governance. The author is grateful to his wife, Gaby Gonzalez, and his friends and colleagues Austin Turman and Michael Holmes for their help and tireless support. The author is especially thankful to Professor James Nelson for his incredible feedback and guidance in writing this paper.

1. Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transaction: Is There any "There" There?*, 75 S. CAL. L. REV. 1169, 1169–71 (2002).

2. I*d.* at 1171–1174.

a lower price—which would result in the better long-term health of the company, the community around it, its consumers, and its employees—was weighed against the short-term interests of the company's outstanding shareholders.[3] And, the outstanding shareholders included institutional investors, principally the employees' pension fund, who argued that the board should accept a higher share price out of its fiduciary duty to its shareholders.[4] The pension fund also advised the employees to vote against their long-term interest, and their community's interest, to oppose the board's choice.[5] Strine withheld his own personal views,[6] but created the question how far should shareholder primacy go, whose interest is the primary interest, and to what end can boards adequately engage in socially responsible corporate endeavors?[7] He was clever to place his hypothetical at the apex of a structural game-ending change, but the issue remains the same outside of this structure: whose voice decides when a company tries to take a socially responsible action?[8] Removing the hypothetical from "Revlon-land,"[9] the issues of interpreting non-constituent shareholder statutes[10] raise more fundamental and practical questions like, who should look out for employee interests, especially when a board may be punished for actively considering their long-term well-being at the cost of immediate shareholder wealth.

This paper seeks to justify such employee-focused corporate social responsibility and introduce it as a valid alternative to traditional environmental sustainability initiatives. This paper argues that corporate social responsibility efforts should be directed at employees' wages, workforce diversity, transparency (regarding wages, promotions, etc.), job security, training, and firm-specific skills because employees are the most vulnerable group among corporate stakeholders. Additionally, this concept of corporate social responsibility will hold regardless of which corporate governance theory is applied: shareholder primacy, director primacy, or employee corporate governance.

---

3. *Id.* at 1179–84.
4. *Id.* at 1182–84.
5. *Id.* at 1182–85.
6. *Id.* at 1186.
7. *See* Strine *supra* note 1, at 1182–87.
8. *Id.* at 1176.
9. *See generally* Revlon, Inc. v. MacAndrews & Forbes, Inc., 506 A.2d 173 *passim* (Del. 1986)(using "Revlon-land" to refer to the situation/idea that a corporate board's duty, when the sale of a company is occurring, changes from preservation of the company to maximization of the value of the company for the biggest profit for shareholder).
10. *See generally* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992) (explaining the debate around the corporate social responsibility and the issues of non-shareholder constituency statues).

The first part of this article will discuss recent instantiations of corporate social responsibility.[11] It will specifically analyze and categorize corporate social responsibility into two groups: customer-side and supplier-side. The second part of this paper will address employee vulnerability within the corporate structure and why employee-directed corporate social responsibility is supported under major theories of corporate governance. Specifically, part two will address shareholder primacy, director primacy, and modern theories of employee corporate governance. Part three will address why corporate social responsibility should be directed at employees, specifically why employees are a better recipient than other stakeholders. Part four will conclude this paper.

II. WHAT DOES CORPORATE SOCIAL RESPONSIBILITY LOOK LIKE TODAY?

What does corporate social responsibility look like in the current and post COVID-19 economy? Should corporate social responsibility and its image change from prior conceptions? Facebook pledged $100 million in aid to small businesses and gave employees $1000 bonuses in response to the COVID-19 pandemic.[12] Google and its parent company—Alphabet—pledged nearly $800 million in COVID-19 aid.[13] Additionally, Brooks Brothers produced face masks,[14] and Dyson produced ventilators.[15] At the same time, other companies simply operated as normal, opting to increase production[16] or even went so far as to increase wages and hire tens of thousands of employees.[17]

These modern actions show a keen awareness of corporate action in this digital age. Few would not commend Facebook for its efforts, which undoubtedly purchased large amounts of public goodwill. But

---

11. This paper will not go into definitions of corporate social responsibility *per se*, but it is worth noting that the term, corporate social responsibility (often termed "CSR") is generally interchangeable with Environmental, Social and Governance (ESG), the latter being the newer term. In this case, corporate social responsibility is a more descriptive term that better describes what this article is arguing.

12. Christine Fisher, *Facebook Pledges $100 Million To Small Businesses Impacted By Coronavirus*, ENTREPRENEUR (Mar. 18, 2020), https://www.entrepreneur.com/article/347797.

13. Hugh Langley, *Google Pledges to Donate $800 Million and 3 Million Face Masks In an Effort to Combat the Coronavirus*, BUSINESS INSIDER (Mar. 27, 2020, 1:20 PM), https://www.businessinsider.com/coronavirus-google-donates-800-million-fight-covid19-face-masks-2020-3.

14. Rachel Tashjian, *Brooks Brothers Says It Will Manufacture 150,000 Masks Per Day*, GQ (Mar. 30, 2020), https://www.gq.com/story/brooks-brothers-medical-masks.

15. *See, e.g.,* David Dawkins, *Billionaire Dyson's 10,000 Ventilators Risk Missing Coronavirus 'Peak Week' In U.K. Hospitals*, FORBES (Apr. 8, 2020, 9:44 AM), https://www.forbes.com/sites/daviddawkins/2020/04/08/billionaire-dysons-10000-ventilators-are-not-yet-delivered-and-risk-missing-peak-week-hour-of-their-greatest-need.

16. Mike Roman, *Putting Healthcare Workers First During the Coronavirus Outbreak*, 3M (Mar. 22, 2020), https://news.3m.com/blog/3m-stories/3m-responds-2019-novel-coronavirus.

17. Bethany Biron, *CVS, Walmart, and 17 Other 'Essential' Businesses That Are Desperate for Workers Right Now*, BUSINESS INSIDER (Apr. 6, 2020, 10:32 AM), https://www.businessinsider.com/retailers-hiring-people-coronavirus-demand-2020-3.

Facebook's, and its peers', actions were in direct response to an existential threat. Traditional forms of corporate social responsibility often take a different appearance, such as philanthropic endeavors.[18] In Strine's article, *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There and "There" There?*, he posits that in a game-ending decision, the fictional board's choice to prioritize employees, the duration of the company, the company's reputation, and the health and well-being of the community surrounding would be a socially responsible decision.[19] This action directly opposed shareholder interests but would only result in a modicum difference of price per share.[20] This example is emblematic of a more traditional form of corporate social responsibility.

A. Cars, Coffee, and CSR.

In their 2009 article, Professors M. Todd Henderson and Anup Malani describe two key, traditional examples of corporations' social responsibility: Starbucks coffee and the Toyota Prius.[21] The Toyota Prius is an example of *customer-side* corporate social responsibility; an externally focused, stakeholder model of corporate social responsibility, where a corporation focuses on customers by giving them an option to purchase a sustainable good and actively give back to the environment.[22] As such, the customer is summarily rewarded by taking advantage of the company's corporate social responsibility offerings: enjoying better gas mileage, engaging in environmentally friendly practices, personal vindication for doing a good deed, and funding new technology.[23] The customer is simply the target and endpoint of Toyota's corporate social responsibility; they receive the benefits of their responsible decision, and Toyota receives goodwill.

Compared to Toyota, Starbucks engages in fair-trade practices while passing the cost onto consumers by responsibly sourcing its coffee.[24] While the customer may choose Starbucks for their responsible practices, the benefits of Starbucks' corporate social responsibility initiatives (its coffee-related practices and its premiums) are carried back to its suppliers, teaching coffee bean farmers better farming

---

18. M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 577 (2009).

19. Strine *supra* note 1, at 1180–87.

20. *Id.*

21. *See generally* Henderson & Malani, *supra* note 18, at 572–76 (Henderson and Malani's approach discuses Starbucks's and Toyota's approaches of engaging in efficient corporate social responsibility that verges on corporate altruism). *See id.* at 575–618. This paper will not delve into the intricacies of this argument, but it does provide relevant background and competing theories.

22. *See id.* at 590–595, 614–619.

23. *See id.* at 583, 594–606.

24. *See id. at* 594; STARBUCKS, 2019 GLOBAL SOCIAL IMPACT REPORT (2020) https://stories.starbucks.com/uploads/2020/06/2019-Starbucks-Global-Social-Impact-Report.pdf.

techniques and giving them new technology to improve their efficiency.[25] This form of corporate social responsibility is integrated into the corporation's extant business practices and rewards those within the supply chain. As such, Starbucks' model is best characterized as the supplier-side model of corporate social responsibility.[26]

It would be fair to mention that comparing cars and coffee is equivalent to comparing apples to oranges. However, this is not an apples-to-oranges comparison, because the key difference between the two organizations is who benefits from the corporation's socially responsible efforts. Both products have corporate social responsibility built into the price of the good, both goods could be chosen for their responsible, sustainable sourcing, and both charge a premium for the added dose of corporate social responsibility (compared to other comparable products).[27] However, Prius purchasers benefit from Toyota's corporate social responsibility, while coffee farmers (Starbucks' suppliers) benefit from Starbucks' corporate social responsibility.

Employee-focused corporate social responsibility neatly fits into the supplier-side model of corporate social responsibility, yet it places employees in a distinctly vulnerable position within the corporate hierarchy. Employees are inherently dependent on the market-at-large, the goodwill of managers, and shareholders' human capital management concerns.

III. EMPLOYEES: THE VULNERABLE PARTY

Employees are the most vulnerable party within corporate governance;[28] few would take issue with this contention.[29] To this end, wages account for—on average—the largest percentage of the average American's income.[30] Specifically, "[f]or the middle and upper-middle class . . . wages compris[e] 70% or more of income . . . and those in the 95th to 99th percentiles still get over 60% from their [l]abor."[31] Most Americans are inherently wage dependent and face the vulnerability of depending on their job to pay their bills.[32]

---

25. STARBUCKS, *supra* note 24.

26. It would be hard to argue that altruistic behavior does not necessarily count as corporate social responsibility. The inverse is not true, however.

27. *See* Henderson & Malani, *supra* note 18, at 616–18

28. *See* Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 284–86 (1998).

29. *C.f.* DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S BEST WEAPON, xii–xv (2018).

30. Leo E. Strine, Jr., *Towards Fair and Sustainable Capitalism* 2 (Roosevelt Inst., Working Paper, 2020) [hereinafter *Sustainable Capitalism*] https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf.

31. *Id.* at 2.

32. *See Id.*

In Professor Kent Greenfield's article, *The Place of Workers in Corporate Law*, Kent argues that a corporation's workers are the weakest party within the corporate structure yet are largely ignored by corporate law.[33] As such, they deserve a more significant role within a corporation's governance.[34] He argues that they do not enjoy legal protections under corporate law since they cannot effectively contract with the company to determine the terms of their labor; they can be fired at will, they have no direct way to voice their concerns to the board of directors, and they are ignored by corporate law in general.[35] He further argues that, while shareholders can readily exit the firm if they dislike how it is managed by simply selling their shares, employees develop firm-specific skills that are non-transferable.[36] While there is always a way to re-invest funds into another profitable company, there is not always another job or willing employer.[37] Professor Greenfield additionally argues that workers become inherently conjoined with a company through their "sweat equity" and develop a stronger residual claim upon the corporation's assets than shareholders.[38]

One of the largest critiques to Professor Greenfield's work (and an argument against employee-based corporate social responsibility) is that workers have the ultimate ability to decide to work with an employer and that they are able to contract with their employer.[39] However, the idea that an individual employee can effectively negotiate a non-boilerplate contract with a large corporation is about as likely as a corporation getting a one hundred percent participation rate from its shareholders in an annual shareholder's meeting.[40] In other words, very unlikely. Recent scholarship from Professors Naidu, Posner, and Weyl supports this point. Their article, *Antitrust Remedies for Labor Market Power,* argues that employers engage in monopolistic labor practices[41] without any substantial consequences or avenues of employee

33. Greenfield, *supra* note 28, at 284–88.

34. *Id.*

35. *See id.* at 284, 300–03, 318–21.

36. *See id.* at 302–03.

37. *See id.*at 318–21. *Compare* Patricia Cohen & Tiffany Hsu, *'Sudden Black Hole' for the Economy with Millions More Unemployed*, N.Y. TIMES (Apr. 9, 2020) https://www.nytimes.com/2020/04/09/business/economy/unemployment-claim-numbers-coronavirus.html *with* Rita Nazareth & Vildana Hajric, *Stocks Surge on Virus Signs with Earnings in Focus: Markets Wrap*, BLOOMBERG (Apr. 13, 2020, 6:00 PM) https://www.bloomberg.com/news/articles/2020-04-13/asia-stocks-set-for-mixed-start-ahead-of-earnings-markets-wrap.

38. *See* Greenfield, *supra* note 28, at 305–11.

39. *See* Stephen Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1443–44 (1993).

40. *See, e.g.*, Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, *passim* (2018) (arguing that the labor market is a monopsony where employers are omnipotent, and employees are powerless).

41. Monopolistic labor practices include entering into anti-poaching agreements with other companies, universally (and artificially) driving down labor wages due to low labor elasticity, and pressuring employees to enter into (largely unenforceable) non-compete agreements to scare them from moving firms.

pushback.[42] They illustrate that, while anti-trust law could potentially be an answer to the power imbalance between employees and employers (employees could file an anti-trust claim to prevent such an imbalance), this option is only theoretical because employees cannot afford to pursue the claim individually, they lack typicality to pursue the claim as a class action, and regardless, any possible treble damages received would be insufficient to cover employee legal expenses.[43] As such—absent a labor union to negotiate terms as a class—employees are as powerful as dispersed shareholders.[44]

A good critique of Professor Greenfield's work is that drafting unique contracts is expensive and impractical,[45] but a better critique is that workers have a legal right to wages resulting from their efforts.[46] While there is no easy way to answer the agency cost problem associated with corporate contracting,[47] the argument that employees have a legal right to their wages is becoming more nebulous as the Supreme Court hands down decisions in line with *Burwell v. Hobby Lobby*,[48] as discussed later in this article.[49] Additionally, shareholders have other abilities[50] that give them far greater power than is customarily acknowledged.[51] Aside from agency costs associated with mass-contracting, there are not many effective critiques to Professor Greenfield's points, and even he acknowledges the agency cost problem in his work.[52] However, worker problems have only grown since Professor Greenfield's 1998 article.

Professor James Nelson cleverly points out that "modern businesses have come to view employees less as team members and more as labor costs," and that many companies use "a variety of downsizing strategies . . . to achieve cost-cutting and efficiency goals regardless of whether business is declining or expanding."[53] This focus on cost-cutting principles at the expense of employee morale has

---

42. Naidu et al., *supra* note 40 at 564–65, 571.

43. Naidu et al., *supra* note 40, at 572–73.

44. *Id.* at 600–01 (illustrating that employers can easily collude on wage levels, lessening the amount of bargaining that can occur between employees and employers—especially with employers that are extremely powerful).

45. *See* Greenfield, *supra* note 28, at 316.

46. Leo E. Strine, Jr., *A Job Is Not A Hobby; The Judicial Revival of Corporate Paternalism and its Problematic Implications*, 41 J. CORP. L. 71, 71–74 (2015) [hereinafter *A Job Is Not A Hobby*].

47. *See* Greenfield, *supra* note 28, at 316–21.

48. *A Job Is Not A Hobby*, *supra* note 46, at 114.

49. *See infra* Section B.

50. Shareholder abilities include their voice on the board, their ability to direct the corporation, and their ability to leave a corporation anytime they wish.

51. See Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1901 (2017) [hereinafter *Who Bleeds When the Wolves Bite*] (illustrating that even Apple has been pressured into a stock buyback to inflate stock prices by shareholders, specifically Carl Icahn).

52. *See* Greenfield, *supra* note 28, at 313–21.

53. James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1603 (2013).

inherently led employees to (i) seek to develop non-firm-specific skills, (ii) become rationally detached from their firms, and (iii) experience decreased morale; all of which, consequently, increase long-term agency costs.[54] One example of this is an increase in employee mobility. While older, better-established employees tend to spend (on average) 4.2 years at any given job, employees between the ages of 25 and 34 only spend an average of 2.8 years with one employer.[55] Some might argue that employee-exit problems are not an issue, yet this data does not reflect the amount of time employees spend unemployed or the number of times they are laid off. Instead, it supports the argument that mistreating the workforce with prophylactic layoffs, reduced wages, or reduced benefits actually *increases* agency costs for each worker.[56]

Professor Greenfield's arguments have not dulled with age, but Martin Lipton's are only several months old.[57] Lipton's current (and genuine)[58] question is how boards and shareholders should embrace stakeholder theory, yet the answer is simple. Embrace social responsibility measures that focus on taking care of the corporation's most vulnerable stakeholders by investing in increased employee benefits and wages while providing them with increased job security. These measures may be a hit to a current corporate treasury but would overall reduce long-term agency costs and increase long-term corporate stability.[59]

In this context, *Citizens United* and *Hobby Lobby* legitimize employee-focused corporate social responsibility by showing corporate wrongs that have impacted employees.[60] Both cases also show the impact that directors and shareholders can have on a corporation's chosen corporate social responsibility and demonstrate why the superior approach to corporate social responsibility should center benefits around employees. Further, this type of supplier-side corporate

---

54. *Id.* at 1603–04; *see also* Roderick D. Iverson & Christopher D. Zatzick, *The Effects of Downsizing on Labor Productivity: The Value of Showing Consideration for Employees' Morale and Welfare in High-Performance Work Systems*, 50 HUM. RES. MGMT. 29, 39–40 (2011).

55. U.S. BUREAU OF LAB. STAT., MEDIAN YEARS OF TENURE WITH CURRENT EMPLOYER FOR EMPLOYED WAGE AND SALARY WORKERS BY AGE AND SEX, SELECTED YEARS, 2010–2020 (Sept. 22, 2020), https://www.bls.gov/news.release/tenure.t01.htm.

56. *See* Nelson, *supra* note 53, at 1603–05.

57. *See* Martin Lipton et al., *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/.

58. *See* Adolf A. Berle, Jr., Note, *For Whom Corporate Managers Are Trustees*, 45 HARV. L. REV. 1365, 1366–72 (1932).

59. *See* Nelson, *supra* note 53, at 1602–05 (addressing how companies should embrace an expanded notion of stakeholder interests that encompass shareholders, employees, the economy, and society as a whole); Lipton et al., *supra* note 57.

60. *See generally A Job Is Not A Hobby*, *supra* note 46 (addressing how, in the aftermath of *Burwell v. Hobby Lobby*, corporate paternalism extended into employee health care coverage); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015).

social responsibility directly impacts communities surrounding the corporation, increasing the welfare of communities in which the corporation operates.[61]

B. The Problems Created by Citizens United

Citizens United presents unique issues to employees and shareholders because it allows corporations and their managers to effectively use the corporate treasury to fund whichever political cause most piques their interest.[62] While *Abood v. Detroit Board of Education* established that unions could not use employees' union dues to fund political outlets (including lobbying),[63] *Citizens United* allowed a corporation to use its shareholders' funds to pay for political speech, no matter how scurrilous, aberrant, or extreme.[64] This is especially troublesome because Justice Kennedy's opinion was premised on the concept that "shareholders possess far greater freedom because of competitive markets: They can easily shift their funds to other companies if they disapprove of policies, whereas the rank and file members of unions" cannot.[65] Leo Strine and Nicholas Walter address this inequity in their work *Conservatism Collision Course: The Tension Between Conservative Corporate Law Theory and Citizens United*. Strine and Walter explain that the foundational reasoning in *Citizens United*—that shareholders ultimately may sell their shares if they do not like the way that a corporation is heading—is an anachronistic view that expired in the 1980s.[66] They argue that this viewpoint fails to consider the modern truth that the majority of stockholders' participation in the stock market is in arm's length transactions (terming this "the separation of ownership from ownership") and that most investors are really in positions more akin to the union employees in *Abood v. Detroit Board of Education*.[67] Realistically, most Americans have little say in how their money is invested, or even which mutual fund their money is invested in, because most Americans invest in the stock market through company-sponsored 401(k) plans that are subject to a draconian ten percent penalty tax upon early withdrawal.[68] As stated by Strine and

---

61. *See* Henderson & Malani, *supra* note 18, at 591–92 (addressing how Starbucks' fair-trade activities increase the social standing of the community in which they do business).

62. Strine & Walter, *supra* note 60, at 340.

63. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241-42(1977) (holding that organizations must finance political union expenditures using charges, dues, or assessments paid by employees who do not object to advancing those ideas).

64. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361, 468 (2010); Strine & Walter, *supra* note 60, at 340.

65. Strine & Walter, *supra* note 60, at 369 (quoting Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 1000 n.232 (1984)).

66. *See id.* at 367–68.

67. *Id.* at 376–77*; see also Abood,* 431 U.S. at 209.

68. The early withdrawal penalty for 401(k) applies to withdrawals made before the holder turns fifty-nine.

Walter: "*Citizens United* arguably exposes American investors to the same constitutional harm found extant in *Abood*, which is the same harm that conservative corporate theory views as occurring when corporate managers spend funds for social purposes."[69] As such, many workers are exposed to a potential corporate harm for which there is no current compensation.[70] While some could argue that the employer's matching contribution to a 401(k) retirement account is a form of compensation for this potential harm, employers have a vested tax interest to contribute to these accounts, and they have been doing so long before the Supreme Court's 2010 *Citizen's United* decision.[71]

In reality, "it is arguably easier for Americans to find a job in a non-union workplace than to avoid entrusting their funds to institutional investors to save for retirement and to pay for their children's education."[72] While this statement almost comes off as trite, it reflects how institutional investors account for an overwhelming majority of stock market trading and stock ownership.[73] *Citizens United* potentially harms employees and workers *because* American workers are forced into the market if they responsibly wish to save for major life events. *Citizens United* creates a potential justification for greater employee-focused corporate social responsibility since workers are now exposed to a risk which they did not contract for, and they deserve compensation for that risk exposure.[74] After all, companies regularly compensate employees for the risk they undertake in furtherance of the corporation. Named executive officers take on tremendous personal risks in their capacity as executive officers. As officers, they face the risks of criminal charges and Securities and Exchange Commission (SEC) fines, as well as risks associated with public figure-hood, yet officers are compensated for these risks at rates hundreds of times higher than the average employee.[75] While an increase in employee compensation may increase

---

69. Strine & Walter, *supra* note 60, at 376. Note that Stephen Bainbridge critiqued Strine and Walter in his article *Corporate Social Responsibility in the Night-Watchman State*, claiming that their use of the term conservative corporate theory was too broad to have any real meaning. *See generally* Stephen Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 COLUM. L. REV. SIDEBAR 39. However, his argument is more of a complaint about the label and definition used than about the actual substance of the article. Here, a clear response is that the term points to classical, Chicago-school-style shareholder primacy norms that are largely concerned with reducing agency costs and maximizing shareholder profit. *See id.* at 42.

70. It is even arguable that there is no monetary compensation for this harm outside of equity since the investor is, under this argument, deprived of a fundamental right.

71. I.R.C. §§ 401(a)(1), (k) (West 2020).

72. Strine & Walter, *supra* note 60, at 376 & n.176 (citing Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 839–40 (2012); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 537 (2011)).

73. *See Sustainable Capitalism*, *supra* note 30, at 6.

74. There is an argument that *Citizens United* strengthens the argument for stakeholder governance, but that is outside the scope of this paper. Strine & Walter, *supra* note 60, at 390.

75. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in A More Rational System of Corporate Governance*, 33 J.

compensation expenses, increasing employee-focused social responsibility programs would likely overall benefit the corporation, as these programs would likely create a much better public perception of the corporation than spending the same amount of money on political endorsements.[76]

C. The Problems That Hobby Lobby Creates, and the Return to the "Ford's Feudal System" That It Initiates. [77]

In 2005, then-Chancellors Leo Strine and William Allen ironically observed that, if Martin Lipton could succeed in persuading institutional investors to adopt long-term thinking, then corporate constituencies could benefit from increased board freedom "to formulate investment strategies designed to make their corporations durable, profit-generating, employment-creating, and charitable-donating, [*sic*] taxpaying institutions for decades to come." [78] Since then, Lipton may well have succeeded,[79] but any success may be limited to widely held corporations.

Where *Citizens United* detailed the shortcomings that managers can inflict on employees and shareholders, *Hobby Lobby* directly increased both shareholder and director power over rank-and-file employees in a closely held corporation.[80] In his article, *A Job Is Not A Hobby: The Judicial Review of Corporate Paternalism and Its Problematic Implications*, Strine argues, inter alia, that the *Hobby Lobby* opinion walked back centuries of employment law to the point of nearly returning to the scrip payments of the nineteenth and twentieth centuries by allowing employers to subject American workers to employers' religious judgments and moral views.[81] Strine argues that, in

---

CORP. L. 1, 10–11 (2007); Press Release, AFL-CIO, *Average S&P 500 Company CEO-to-Worker Pay Ratio Rises to 299-to-1 in 2020*(July 14, 2021) https://aflcio.org/press/releases/average-sp-500-company-ceo-worker-pay-ratio-rises-299-1-2020.

76. *Compare* Kerri Anne Renzulli, *The Fifteen Best Tech Companies to Work for in 2019, According to Glassdoor*, CNBC (Jan. 24, 2019), https://www.cnbc.com/2019/01/07/glassdoor-best-tech-companies-to-work-for-in-2019.html (ranking Google as the fifth best technology company to work for due to employee treatment), *with* Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J. ONLINE (Aug. 6, 2010) https://www.wsj.com/articles/SB10001424052748703988304575413650676561696 (discussing how Target was boycotted en masse after it funded a political group that supported pro-business candidates, including a gubernatorial candidate who opposed same-sex marriage).

77. *A Job Is Not A Hobby*, *supra* note 466, at 81.

78. William T. Allen & Leo E. Strine Jr., *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law*, 60 BUS. LAW. 1383, 1397 (2005).

79. *See* Lipton et al., *supra* note 57.

80. *A Job Is Not A Hobby*, *supra* note 466, at 110, 114. Note that closely held corporations account for roughly sixty six percent of employment opportunities in the private sector. *Id.* at 97 & n.182 (citing John Asker et al., *Corporate Investment and Stock Market Listing: A Puzzle?*, 28 REV. FIN. STUD. 342, 347 (2014) (estimating that private U.S. firms accounted for 68.7% of private-sector employment in 2010)).

81. *Id.* at 98.

an already burdened employment milieu where workers suffer a lower standard of privacy (having their phone usage monitored and being subjected to drug and nicotine tests), *Hobby Lobby* opens endless possibilities for employers to object to medical treatments and further intrude into their employee's freedoms, making medical and moral decisions for them.[82] Strine further takes the Court's reasoning to its logical conclusion, nearly coming across as glib. He argues that the Court's failure to separate the for-profit nature of the corporation from the religious views of its owners[83] will potentially allow controlling religious shareholders or managers of closely held corporations to claim religious exemptions from having to pay for medical insurance coverage for procedures or objected practices that fall outside the boundaries of that controller's morals or religion. Such objected practices could deny essential procedures like blood transfusions or could extend to religious sanitary or dietary restriction requirements, such as insisting on adherence to halal or kosher standards for employees during hospital stays. Under this kind of thinking, these controllers could purchase cheaper insurance that is unnecessarily restrictive or that does not cover essential procedures and leaves the employees without essential services.[84]

While compensation is a viable solution to the problems of *Citizens United*, at best, it provides limited succor.[85] By cataloging an abridged history of employees' methods of payment, from corporate serfdom to *Hobby Lobby*, Strine parallels the current state of the law with Ford's Industrial American "feudal system." Henry Ford, the inventor of the American assembly line, had also attempted to streamline his employees' personal lives by paternalistically incentivizing his workers to regularly attend church, marry, and have children in exchange for double the average employee's wage.[86] Modern sensibilities would certainly call Ford's practice significantly more invasive than what any modern corporate employee endures, but perhaps not by much. The average new corporate employee undergoes a physical, a drug test, and possibly a nicotine test before starting a new position (and periodically throughout their employment). During work hours, the corporation monitors each employee's working data, monitors their social media both during and after work, and subjects employees to many other scrutinies that are less apparent but also somewhat invasive.[87] While modern corporations may not take note of employee's church

---

82. *See id.* at 75, 98.

83. The Green family were all controlling shareholders of the Hobby Lobby Corporation.

84. *A Job Is Not A Hobby*, *supra* note 466, *id.* at 95 (quoting Ginsburg's dissent in Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2787 (2014)).

85. *Id.* at 82 (observing that many of Ford's employees would rather take personal privacy instead of double wages).

86. *Id.* at 81-82, 81 n.54.

87. *A Job Is Not A Hobby*, *supra* note 466, at 75.

attendance records or monitor employees "to ensure that workers did 'not debauch the additional money'" earned,[88] *Hobby Lobby* has effectively allowed for-profit corporations—legal entities that lack a religious persona—to engage in similar actions, justifying these practices as the exercise of the *religious freedom* of their controllers.[89] Professor Nelson does mention that this exaggerated result may not be as realistic as Strine and Walter portray, yet the logic of *Hobby Lobby* still poses this threat, especially if the Supreme Court continues down this employer-gratifying path with additional decisions along the same lines as *Citizens United* or *Hobby Lobby*.[90]

While employees are currently more motivated by money than before,[91] Henry Ford's experience shows that, although the extra pay was tempting for some, "[e]mployees usually preferred to take charge of their own lives and found paternalism intrinsically demeaning. By regarding himself as a father to his employees and acting accordingly, an employer unavoidably relegated them to an inferior, childlike position."[92] With both frightening irony and coincidence, Hobby Lobby (the company), in 2014, similarly paid its full-time workers nearly twice what the minimum wage was per hour.[93] However, Strine points out that while the wage was more than the minimum, it still placed a family of five at the poverty line.[94] And even if money was not an issue, an employer's religious impositions effectively alienate workers who do not meet managerial religious expectations.[95]

While the average American will move jobs regularly, *Hobby Lobby* effectively allows an employer to force employees to conform to a corporation's controller's religious identity for the duration of the employee's tenure.[96] Even though Americans are likely to move jobs regularly,[97] this restriction on employees' personal freedom of religion

---

88. *Id.* at 81 & n.55 (quoting M. Todd Henderson, *The Story of Dodge v. Ford Motor Company*, in Corporate L. Stories 37, 51 (J. Mark Ramseyer ed., 2009) (omissions retained)).

89. *See id.* at 110. *But see* James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 20–22 (2019) [hereinafter *Corporate Disestablishment*] (arguing that such a result may not be inexorable, drawing on caselaw under Title VII and state employment discrimination laws).

90. *See* Strine & Walter, *supra* note 60, at 335, 340–345 (arguing that *Citizens United* upset and overruled relatively settled law, the McCain-Feingold Act and precedent dependent on it)*; A Job Is Not A Hobby*, *supra* note 466, at 76 (arguing that "*Hobby Lobby* combines with *Citizens United* to put pressure on corporate law.")

91. Nelson, *supra* note 53, at 1602.

92. *A Job Is Not A Hobby*, *supra* note 466, at 82, 82 nn.06–61 (quoting Stuart D. Brandes, *American Welfare Capitalism*, 140–41 (1976)).

93. Leonardo Blair, *Hobby Lobby Raises Minimum Wage to $14 for Full-Time Employees*, CHRISTIAN POST (Apr. 18, 2013), http://www.christianpost.com/news/hobby-lobby-raises-minimum-wage-to-14-for-full-time-employees-94233/.

94. *A Job Is Not A Hobby*, *supra* note 466, at 101 & n.212 (citing U.S. DEP'T OF HEALTH & HUM. SERVS., *2014 Poverty Guidelines* (Dec. 1, 2014), http://aspe.hhs.gov/poverty/14poverty.cfm).

95. James D. Nelson, *The Trouble with Corporate Conscience*, 71 VAND. L. REV. 1655, 1680–81 (2018).

96. *See A Job Is Not A Hobby*, *supra* note 466, at 110–11.

97. *See* U.S. BUREAU OF LAB. STAT., *supra* note 55.

is still a problem, especially when faced with situations like the COVID-19 pandemic or even the Great Recession of 2008, that may cause employees to tolerate uncomfortable religious restrictions due to their reliance on steady wages in uncertain times.[98] The argument that employees can leave a job in a closely held corporation if they disagree with the paternalistic views of its management exists in a vacuum that does not recognize the stark reality that externalities can force desperate employees to submit to views and practices with which they disagree. Additionally, Professor Nelson notes in his article, *The Trouble With Corporate Conscience*, that "[i]f most Americans—including most corporate managers—are religious people, and if managers are supposed to manage corporations in accord with their religious beliefs, then there is no guarantee that employee exit from one job will ensure new employment in a religiously neutral environment."[99] This additional consideration (directly mentioned in *Hobby Lobby)* further defeats the ideal of a free exit from unpreferred working conditions. While investors may leave the corporation at will if they do not agree with management, employees are not as free to do so.[100] Therefore, *Hobby Lobby* directly impacts employees' ability to work in a neutral, secular environment.

While money is a universal motivator—and for some, a universal salve—*Hobby Lobby* demonstrates that employee-focused corporate social responsibility can take forms other than compensation. In many cases, money is likely not sufficient compensation to the modern employee for the risks and realities of the modern milieu of corporate surveillance, let alone compensation for the idea that their investment in a closely held corporation may be used for a religious purpose or used as unsupported political speech through donations to a contrary candidate. Although the majority may have attempted to limit their holding to closely held corporations, the holding exposes nearly two-thirds of private-sector workers to the religious and moral views of the controllers of closely held corporations.[101]

As was addressed under *Citizens United*, modern corporate employees are becoming rationally apathetic employees, knowing that they will move jobs frequently throughout the entirety of their career, that corporate entities are willing to prophylactically downsize to reduce labor costs and increase profits for the quarter, and that their long-term wealth investment vehicles are locked in—regardless of their

---

98. On April 12, 2020, the New York Times reported that roughly 16.8 million employees were laid off in three weeks due to the COVID-19 outbreak. *See* Cohen & Hsu, *supra* note 377.

99. *Corporate Disestablishment*, *supra* note 95, at 1682; *see A Job Is Not A Hobby*, *supra* note 466, at 103–04.

100. *See A Job Is Not A Hobby*, *supra* note 466, at 104–05.

101. *See id.* at 97.

actions.[102] *Hobby Lobby* amplifies those harms by allowing closely held corporations to paternalistically subject their employees to the moral and religious views of that corporation's controlling party.[103] In response to the logical threat that *Hobby Lobby* poses, corporations should enact employee-focused corporate social responsibility that equitably preserves employee privacy and respects their inherent, individual rights. Whereas it is too costly to negotiate and uniquely draft each employment contract, a corporation can—and should—consider the law as it has been modified by *Citizens United* and *Hobby Lobby,* and act to cultivate a positive, religion-neutral, corporate culture as a type of employee-focused corporate social responsibility.

IV. EMPLOYEE-FOCUSED CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE.

Employee-focused corporate social responsibility in the form of human capital management is one the largest hot-button issues facing corporate governance and investors. And, in response to this and investor interest, the SEC has recently amended Regulation S-K[104] to require securities registrants "to provide a description of the registrant's human capital resources, including in such description any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the registrant's business taken as a whole."[105] While this new disclosure requirement is principles-based, per the SEC's statements,[106] it is a significant step, acknowledging investor interest in, and value regarding, employee management practices. State Street has even gone so far as to "*ask* companies in [its] investment portfolio to articulate their risks, goals and strategy as related to racial and ethnic diversity, and to make relevant disclosure available to shareholders."[107] While this new disclosure could be interpreted to highlight diversity disclosures, it is sufficiently broad to include additional disclosures. Overall, this measure is a step in the right direction, as it is an employee-focused movement with nothing to suggest that it will stop at diversity,

---

102. *See* Nelson, *supra* note 5353, at 1603–04.

103. *See A Job Is Not A Hobby*, *supra* note 466, at 110. *But see Corporate Disestablishment*, *supra* note 899, at 648–49.

104. Regulation S-K is the main body of law that regulates corporate disclosures made on the annual Form 10-K.

105. Modernization of Regulation S-K Items 101, 103, and 105, 44 Fed. Reg. 3235 (Aug. 26, 2020) (codified at §§ 229.10–229.105).

106. *Id.*

107. Letter from Richard F. Lacaille, Glob. CIO, State Street Global Advisors, to Boards of Directors (Aug. 27, 2020), (available at https://www.ssga.com/library-content/pdfs/global/letterhead_racial_equity_guidance.pdf) (emphasis added).

and, given employee vulnerabilities, it is already starting to become a conscious social goal.[108]

Some companies, like Timberland Co., admit that they engage in corporate social responsibility not only for sustainability's sake, but also because socially responsible actions can create a culture that attracts and retains greater talent.[109] Google has successfully (and famously) attracted great talent through employee-focused corporate social responsibility by providing free food and numerous other services to its employees.[110] As a result, jobs at Google are highly valued, such that the company can afford to be selective with applicants—only 0.2% of the people who apply for a job with Google receive a position, while it also maintains an immensely profitable business.[111] Ultimately, employee-focused corporate social responsibility has the potential to attract capital,[112] promote the development of firm-specific skills,[113] and increase the long-term value of a company,[114] all for a relatively low cost.[115] Furthermore, employee-focused corporate social responsibility avoids political and religious issues.

D. Why Employee-Focused Corporate Social Responsibility Is Ideal

According to Martin Lipton, "[a]t this point, much of the focus on stakeholder governance has shifted from the question of *whether* a board of directors should take into account the interests of other stakeholders, to *how* a board should do so."[116] Martin Lipton distinctly takes the opposite approach as Harvard Professor Lucian Bebchuk,[117]

---

108. *See ESG, Capital Access, and the Future of the Oil & Gas Industry*, WINSTON & STRAWN LLP (Apr. 23, 2020), https://www.winston.com/en/thought-leadership/esg-capital-access-and-the-future-of-the-oil-and-gas-industry.html (identifying human capital—and its retention—as an integral component of success and attracting capital).

109. WILLIAM T. ALLEN & REINER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 287 (5th ed. 2016) (identifying Timberland Co. as a company well known for their corporate altruism used as a tactic to lure in talented individuals and endear them to the company through socially responsible corporate practices).

110. Jillian D'Onfro & Lucy England, *An Inside Look at Google's Best Employee Perks*, INC. (Sept. 21, 2015), https://www.inc.com/business-insider/best-google-benefits.html.

111. *See* Ty Haqqi, *10 Most Profitable Companies in America in 2020,* YAHOO! (Aug. 3, 2020), https://www.yahoo.com/now/10-most-profitable-companies-america-215951022.html (noting that Google's parent company, Alphabet, was the fourth most profitable company in 2020 mostly due to Google's profits); Tom Popomaronis, *Here's How Many Google Interviews it Takes to Hire a Googler*, CNBC, https://www.cnbc.com/2019/04/17/heres-how-many-google-job-interviews-it-takes-to-hire-a-googler.html (last updated Apr. 17, 2019, 10:18 AM).

112. See *ESG, Capital Access, and the Future of the Oil & Gas Industry*, *supra* note 108.

113. *See generally* WEBBER, *supra* note 29, at 102–03.

114. *See id.*

115. Assuming the corporation applies the Starbucks supplier-side model by including the cost in the final product.

116. Lipton et al., *supra* note 57.

117. *Compare id.* (contending that a board of directors can effectively govern stakeholder interests while promoting the interests)*, with* Lucian Bebchuk, *The Case for Increasing Shareholder*

yet here there is a prescient point that even Strine and Allen acknowledged.[118] In 2005, Allen and Strine presaged this evolution in an article touting Martin Lipton's views on corporate governance, which they label as the "Institutionalist View."[119] They explain that this view

> sees business corporations as social institutions authorized by law in order to facilitate improvements in public welfare. The corporation . . . is seen as but a part of a larger economic and social policy that sought and seeks to promote wealth creation, not simply for the benefit of stockholders and managers, but more generally for the benefit of a nation that . . . envisioned that economic progress meant not only profits, but as importantly, the humane treatment of workers, an improved environment, vigorous competition among firms for the benefit of consumers, and ethical behavior by corporations at home and abroad.[120]

The institutionalist view matches Lipton's current observations that stakeholder governance is taking a prominent position amongst boards.[121] While scholars Hansmann and Kraakman may have characterized the start of the 21st century by the dominance of shareholder primacy, Lipton's view has become the norm, evidenced by (i) institutional shareholders (including BlackRock, State Street, and Vanguard) becoming proponents of stakeholder governance, and (ii) by the release of a widely-accepted Business Roundtable statement embracing stakeholder governance.[122] So the question now becomes, what is the best method of implementing stakeholder-focused corporate responsibility?[123]

Power, 118 HARV. L. REV. 833, 850–51 (2005) (arguing that the interests of management do not overlap with shareholder interests and that management cannot be trusted to promote shareholder interests).

118. *See* Allen & Strine, *supra* note 78, at 1383–85.

119. *Id.* at 1385.

120. *Id.*

121. *Compare id., with* Lipton et al., *supra* note 57 ("Directors must meet this challenge by focusing not just on profits, but also on the corporation's broader purpose and role in the economic and societal ecosystem in order to build a sustainable and long-term value proposition.").

122. Lipton et al., *supra* note 57. (explaining that the Business Roundtable statement was "signed by 181 high-profile CEOs.").

123. *See id. But see*, Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 96–99 (Dec. 2020) (arguing that the Business Roundtable statement is a paper tiger, disingenuous, and at worst harmful to stakeholders).

1. Shareholder Primacy

Shareholder primacy has been both declared dead and as reigning supreme.[124] It is the anthem of conservative corporate theory and the progenitor of some of the most damaging environmental accidents.[125] However, one of the key questions that is rarely asked is who does the term "shareholder" refer to? Does it refer to the institutional investors who actually own shares or to the individual who invests with the institutional investor who invests the individual's money in a diversified portfolio of stocks?

In any given law school business organizations course, the general foundational concept is that shareholders are rationally apathetic, dispersed, and generally powerless. However, in *Who Bleeds When the Wolves Bite: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, Strine observes that shareholders are often institutional investors, while the individuals' whose money is really in play are merely investors owning stock. Strine describes this situation as a "separation of ownership from ownership."[126] His article argues against the practice of activist hedge funds, with mutual fund backing, making large plays to acquire a corporation's stock (usually with inside information). This informs other active hedge funds of the move who join in on the large play. Due to antiquated SEC rules, the hedge funds appear to own controlling stakes in the corporation overnight.[127] The hedge funds will then demand, as a group, that the corporation take actions to increase its share price at the cost of the actual health of the business.[128] Furthermore, hedge funds will target underperforming, healthy companies because of their growth potential.[129] Strine argues that the real investors, those saving for major life events, are truly interested in long-term, durable wealth generation and growth.[130] Because most wealth is generated from employment,[131] the stock market is a way to profit from that initial generation and not a game which the flesh-and-blood investor would like to see played for short-term gain.[132] Further,

---

124. *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 27–29, 27 n.50 (2012) (quoting Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 440–41 (2001)).

125. *See id.* at 10; *see also A Job Is Not A Hobby*, *supra* note 46, at 1871–72.

126. *Who Bleeds When the Wolves Bite*, *supra* note 5151, at 1872–73, 73 n.2 (citing Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 6 –7 (2007)).

127. *Id.* at 1896–97.

128. *Id.* at 1900–01.

129. *See id.* at 1890–91.

130. *See id.* at 1879–83.

131. *Sustainable Capitalism*, *supra* note 30, at 3.

132. *See A Job Is Not A Hobby*, *supra* note 46, at 1876, 1879.

as was illustrated in Strine's speech to the University of Southern California, shareholder primacy can have the effect of hurting flesh-and-blood investors, due to a fiduciary duty, for a short-term gain.[133]

Professor Lynn Stout further addresses the pains of shareholder primacy in her swan-song work, *The Shareholder Value Myth*.[134] She observes that this type of short-sighted profit-maximizing investing was partially responsible for Beyond (formerly British) Petroleum's 2010 environmental disaster, and wholly responsible for the corporation's subsequent asset selloff to maintain dividend payouts to U.K. pensioners, in effect hamstringing the corporation's future growth and profitability.[135] Without addressing whether one model is correct or better, they highlight the need for a middle-ground, shareholder primacy-based justification for employee-focused corporate social responsibility.

Lucian Bebchuk and Robert Tallarita highlight that stakeholder primacy is untenable as a main corporate governance theory absent stakeholder protections in the form of regulations and politics.[136] However, they illustrate that incentives do play a large role in corporate decision-making.[137]

All of the above discussions are entirely premised on a traditional view of shareholder primacy: that shareholders are entitled to their power because of their vulnerability.[138] In his work *The Case for Increasing Shareholder Power*, Lucian Bebchuk argues that shareholders are vulnerable because they lack the control held by firm management. After all, shareholders' primary powers are the ability to amend a corporation's bylaws or veto a rules-of-the-game or game-ending decision.[139] Without the ability to exercise their due control, shareholders are effectively sidelined from most major corporate decisions. Shareholders do have a limited ability to initiate major decisions outside of shareholder resolutions or the proxy access rule, but both require broad shareholder support.[140] However, while shareholders may be vulnerable—and this paper is not arguing otherwise—employees are far more vulnerable. Employees cannot effectively contract with their employer,[141] fear profit-driven

---

133. *See* Strine, *supra* note 1, at 1182–85.

134. *See generally* STOUT, *supra* note 124, *passim*.

135. *See id.* at 55. It is worth noting that both Professor Stout's and Justice Strine's articles were written before Martin Lipton's recent article that espoused that major index funds and CEOs have come out *en masse* for stakeholder governance, but there is still rational skepticism as to whether CEOs and major index funds are using Orwellian doublespeak.

136. *See* Bebchuk & Tallarita, *supra* note 123, at 157–58.

137. *See id.* at 99.

138. *See* Bebchuk, *supra* note 117, at 844–48.

139. *Id.*

140. *See id.* at 846, 848*; see also* WEBBER, *supra* note 29, at 48–55.

141. *See* Greenfield, *supra* note 28, at 314–22.

prophylactic layoffs,[142] and, as demonstrated in *Citizens United*[143] and *Hobby Lobby,*[144] employees face permissible constitutional harms from corporate management.

While Strine and Stout argue that shareholder primacy—and those that take advantage of it—have effectively harmed the prospect of firm-driven long-term wealth creation, substantial firm investment in research and development, and ultimately support employee-focused corporate social responsibility; Mark Roe and Jonathan Macey argue that shareholder primacy and the corporate environment are functioning and healthy.[145] Roe and Macey largely arrive at similar conclusions: because market data is signaling that firms and their investors are functioning normally, and these firms are also engaging in regular research and development, the employee-focused harms and short-term investing are ultimately the result of technological advances and globalization.[146] While it could be fair to counter that employees have rights to their pay and have the ability to leave their job if the working conditions are intolerable, shareholders also receive income in the form of dividends and have the ability to leave by selling their shares.[147] Ultimately, as the average American is so dependent on their work's wages for their livelihood,[148] it would be a total folly to compare a shareholder's ability to sell their shares with an employee's ability to find a new job.[149] Under the traditional vulnerability argument for shareholder primacy, employees could arguably have the greatest right to corporate power. As such, taking an employee-focused directive towards corporate social responsibility is more than legitimized.

2. Director Primacy

Directory primacy is the corporate governance theory that posits that directors have the ultimate ability to make zero-sum decisions to direct a corporation because they are effectively insulated by the business judgment rule and by year-long term appointments.[150] In his 2003 article, *Director Primacy: The Means and Ends of Corporate Governance,* Professor Bainbridge establishes two core questions used

---

142. *See* Nelson, *supra* note 53, at 1603.

143. *See* Strine & Walter, *supra* note 60, at 340, 369.

144. *See A Job Is Not A Hobby*, *supra* note 466, at 110, 114.

145. *See* Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71, 73–77 (2020); *see also* Jonathan Macey, *Their Bark is Bigger Than Their Bite: An Essay on Who Bleeds When the Wolves Bite*, 126 YALE L. J. F. 526, 535 (2017).

146. *See* Roe, *supra* note 145, at 73–76; Macey, *supra* note 145, at 527.

147. It is worth noting that, when discussing shareholders' ability to sell shares, this comment is only directed at funds and shareholders' ability to edit their portfolio at will.

148. *See Sustainable Capitalism*, *supra* note 30, at 2.

149. *See supra* text accompanying notes 96–99.

150. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 N.W. U. L. REV. 547, 605 (2003).

to determine governance superiority: (1) Who is entrusted to make zero-sum decisions for the company? (2) Whose interests prevail in making those decisions?[151] While there is credence to the argument that directors enjoy great latitude under the business judgment rule, the focus of this section is to show why it is advantageous for directors to engage in employee-focused corporate social responsibility.

Corporations generally pay directors using either stock options or restricted stock units or both in addition to a base salary in order to reduce corporate agency costs and to goad directors towards profit maximization.[152] This highly-prevalent compensation method inherently links director interests to their corporation's stock value, regardless of the reigning corporate governance model.[153] However, directors must also inherently balance long-term profitability interests with shareholder demands.[154] Furthermore, discounting shareholder power is foolhardy. Even Apple was forced to submit to Carl Icahn and his interests.[155] This balance stems from a director's interest in maintaining a long-term position with the corporation. As such, a director's stock holdings should inherently produce long-term incentive alignment. With the current demoralization of workers and their dearth of firm-specific skill development, a director will be interested in finding skilled employees who can operate a position at its highest efficiency, as agency costs are increased due to sub-optimal efficiency and rational apathy.[156] While money is a motivator, it will only fix some problems.[157]

Corporations and their directors have started dealing with this problem in a different context: by working to retain female employees after their maternity leave has ended by creating female-targeted benefits.[158] Google, Facebook, and LinkedIn have recognized that, if they do not provide employee-focused non-monetary benefits (such as childcare), they lose productivity, efficiency, quality, diversity, and other intangible costs associated with employee turnover.[159] While Silicon Valley is a unique market, the need for skilled employees at intermediate and senior levels is not.

---

151. *Id.* at 605.

152. *See* STOUT, *supra* note 124, at 19.

153. *See* Bainbridge, *supra* note 150, at 562.

154. *See* STOUT, *supra* note 124, at 55. The BP pensioner example represents a general failure of this balancing act since directors sacrificed long-term profitability and took an additional, unnecessary loss to satisfy shareholder demands.

155. *See Who Bleeds When the Wolves Bite*, *supra* note 51, at 1901.

156. *See* Nelson, *supra* note 5353, at 1603–04.

157. *See id.* at 1602.

158. Stephanie Bevegni, *Extraordinary Benefits That Are Keeping Women in the Workforce*, LINKEDIN: TALENT BLOG (Apr. 8, 2015), https://business.linkedin.com/talent-solutions/blog/2015/04/extraordinary-benefits-that-are-keeping-women-in-the-workforce.

159. *See id.* (providing these kinds of benefits demonstrates that Facebook, LinkedIn, and Google understand the importance of offering maternity leave in their benefits packages).

Expanding the Silicon Valley model, companies generally could help keep women in the workplace and further create (and develop) company loyalty. As such, companies would see less turnover and greater long-term growth. This model is a form of corporate social responsibility because the employer does not need to provide childcare, as providing childcare arguably conflicts with shareholder profit maximization desires, yet providing childcare creates more durable wealth generation over a longer period of time, and results in greater overall profit generation through increased employee retention.[160] Engaging in the action is totally optional, yet in doing so, the corporation does good for its employees when it is only required to provide a basic wage. These additional benefits and wages that take on this form of corporate social responsibility further promote the corporation's interests, as shown above, by attracting better talent and indirectly infusing wealth into communities surrounding the corporation. As such, employee-focused corporate social responsibility is in corporate directors' best interests and therefore is a legitimate business end to pursue, protected by the business judgment rule.[161]

3. Employee Corporate Governance

An important critique of employee-focused corporate social responsibility is that, absent real employee power among directors, this avenue of corporate social responsibility is unlikely to gain long-term support and is predictably mercurial depending on the economy and a company's directors. Some would argue that a better solution to the problems espoused above is employee-centered corporate governance. Notably, Matthew Bodie makes a Coasian argument for employee-centered corporate governance in his work, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*.[162] He argues that employee-centered corporate governance is necessary to prevent employer opportunism, especially when the primary contracting parties within a firm are managers and employees.[163] Bodie additionally argues that employees have a greater stake in seeing that assets are fairly apportioned throughout a firm and are more deserving of a say since "[t]he firm's reason for existing outside the market is the relationship between the entrepreneur-coordinator and the employee."[164]

---

160. *See* Strine & Walter, *supra* note 60, at 357.

161. *See* Bainbridge, *supra* note 150, at 600–02. Note that under the business judgment rule, directors are given wide freedom to engage in whatever actions they deem in their best business judgment essentially so long as the actions do not constitute corporate waste.

162. *See generally* Matthew Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033 (2012) (identifying the importance of employee-centered corporate governance).

163. *Id.* at 1040–42.

164. *Id.* at 1053–55.

Bodie's argument is important but largely aspirational on this point. Directors, regardless of whether they are employees or a named executive officer, are answerable to shareholders and have incentives to keep their position, and directors as a class obtain the greatest personal benefit from increasing shareholder wealth since a majority of director compensation comes from performance-dependent compensation.[165] As such, absent a fundamental change in regulations or laws on a national scale, there is little to suggest that employee corporate governance would be successful or that it would be undertaken willfully.[166] Despite many chief executive officers of major corporations announcing their support of the Business Roundtable's stakeholder endorsement, few companies (if any) have made any formal change in their corporate governance systems to account for it.[167] Furthermore, directors already have the ability to consider employee-centered corporate governance under the business judgment rule, yet the reality of director incentives precludes this.[168]

Employees already suffer from a submissive bargaining position[169] and generally lack the funds necessary to launch a successful proxy contest to obtain a minority of board seats.[170] Even if employees could manage to obtain a majority of seats on the board through a union-backed proxy fight, those directors would still be answerable to shareholders under current law, the proxy system, and shareholder-aligning incentives, which actively align director interests with those of shareholders.[171] Ultimately, this avenue of activist, employee-centered corporate governance creates a Sisyphean issue under the current legal and economic regime. While it has its moral and theoretical justifications, the issue returns to a legally entrenched requirement that shareholders elect the board of directors.

4. Can Labor Use Its Capital to Take Advantage of Shareholder Primacy?

An employee primacy argument—and even the potential institution of employee corporate governance—could be justified under shareholder primacy's vulnerability argument.[172] However, a more durable solution, which does not rely on corporate goodwill, could be for employees to use their capital as shareholders to direct a corporation. Aside from collective action issues, a pension fund (as

---

165. *See* Bebchuk & Tallarita, *supra* note 123, at 126–41.
166. *See id.* at 157–58.
167. *See id.* at 128.
168. *See id.* at 112–13.
169. *See* Naidu et al., *supra* note 40, at 564–65, 571.
170. *See id.* at 572–73.
171. *See* Bebchuk & Tallarita, *supra* note 123 at 147.
172. *See* Bebchuk, *supra* note 138, at 844–848.

opposed to a mutual, hedge or index fund) could wield considerable power if it were employed in employee interests.[173] In his work, *The Rise of the Working-Class Shareholder: Labor's Last Best Weapon*, David Webber illustrates the track record of pension funds' efficacy in targeting corporations for change and the considerable power that working-class shareholders can wield through a pension fund.[174] He does so by recounting pension fund successes against Safeway in gaining mass adoption of the proxy access rule, board declassification, and proxy fights.[175] Webber also identifies pension funds as some of the largest and most successful forces of corporate change in both proxy fights and bringing shareholder derivative suits. Since pension funds, unlike mutual funds, do not "face several conflicts of interest . . . one of [mutual funds'] most important businesses is managing the 401(k) retirement funds of the employees of large, publicly held companies" and yet, "[c]orporate management selects which mutual funds it offers to its employees," therefore limiting employee's ability to wield this power.[176] Webber's arguments are well founded, yet open to two critiques: (1) pension fund (private and public) membership and assets under management are small in comparison to private sector funds and their membership and (2) the rise of the "'returns-only' view of [a pension fund trustee's] fiduciary duty" effectively harms pension members—both retirees and employees—for the benefit of the plan.[177]

There are two primary forms of retirement savings plans in the U.S., "defined benefit" and "defined contribution plans."[178] Defined benefit plans are commonly known as pension plans, where employees contribute a portion of their earnings into an investment fund that is then managed by a trustee, or a board of trustees.[179] While the pensioner will contribute a portion of their wage, their benefits are a defined payout amount when they retire.[180] In contrast, one of the most common examples of defined contribution plans is a 401(k) retirement savings plan.[181] With this plan, "the employee *asks* for a salary reduction that the employer then 'contributes' to an individual retirement account; the contributed amount is not taxed as current income to the employee, and

---

173. *See generally* WEBBER, *supra* note 29, at xii–xv (discussing the need for organized labor to amass capital to overcome the power of entrenched capitalists).

174. *Id.*

175. *See id. passim* (explaining how an employee pension fund can exert power over a corporation). Note that this is a compression of a complex argument and large work.

176. *Id.* at 169.

177. WEBBER, *supra* note 29, at 185.

178. Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1520–21.

179. *Id.*

180. *Id.* at 1521. Please note that this discussion is somewhat simplified for the purposed of this paper to provide a brief background. *See id.* at 1519–23, 1541–58 (discussing defined contribution and defined benefit plans in depth).

181. *Id.* at 1546.

. . . compounds tax free until withdrawal."[182] While there are two forms of retirement saving plans, only a modicum of employees have access to defined contribution plans.[183] No one doubts the weight that CalPERS and NYPERS have,[184] especially with respective assets under management reported at $389 billion[185] and $221 billion,[186] yet both combined funds equal less than a tenth of BlackRock's total assets[187] and less than twenty percent of State Street's $3.05 trillion.[188] State Street has publicly notified boards of its expectations regarding human capital management disclosures and its *encouragement* of certain business practices. Subsequently, State Street carries a far bigger stick than either CalPERS or NYPERS.[189] While Webber argues that both pension funds are responsible for more substantive change than large institutional shareholders,[190] this argument is partially stale in light of Blackrock's recent voting against boards that failed to adopt sufficient sustainability initiatives (and subsequent shaming of corporations and voting action)[191] and State Street's recent letter to board chairs.[192] The SEC's recent amendments to Regulation S-K further demonstrate institutional shareholders' increased interests in analyzing corporate social responsibility and human capital management disclosures as investment metrics.[193] While the aforementioned size differential is an issue, it is emblematic of the U.S. shift to defined contribution plans.

---

182. *Id.* at 1548 (emphasis added).

183. *Compare* U.S. BUREAU OF LAB. STAT., *Employment By Major Industry Sector* (*last modified* Sept. 1, 2020), https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm, *with*, *51 Percent of Private Industry Workers Had Access to Only Defined Contribution Retirement Plans*, U.S. BUREAU OF LAB. STAT. (Oct. 2, 2018), https://www.bls.gov/opub/ted/2018/51-percent-of-private-industry-workers-had-access-to-only-defined-contribution-retirement-plans-march-2018.htm.

184. *See* WEBBER, *supra* note 29 at 7–12 (discussing CalPERS, NYPERS and their investing weight).

185. *CalPERS Reports Preliminary 4.7% Investment Return for Fiscal Year 2019-20*, CALPERS (last updated Aug. 20, 2020), https://www.calpers.ca.gov/page/newsroom/calpers-news/2020/calpers-preliminary-investment-return-2019-20.

186. *Pension / Investment Management Asset Allocation Chart*, N.Y.C CITY COMPTROLLER, (July 2020), https://comptroller.nyc.gov/services/financial-matters/pension/asset-allocation/.

187. *See Who We Are*, BLACKROCK (December 31, 2020), https://www.blackrock.com/sg/en/about-us. (explaining that Blackrock Assets totaled $8.68 trillion as of December 31, 2020).

188. *See* Press Release, State Street Reports Second-Quarter 2020 Financial Results (July 17, 2020), https://investors.statestreet.com/investor-news-events/press-releases/news-details/2020/State-Street-Reports-Second-Quarter-2020-Financial-Results/default.aspx.

189. *See* Lacaille, *supra* note 107.

190. *See generally* WEBBER, *supra* note 29, *passim* (arguing that pension funds are a large source of power or "capital" for labor to use in pursuit of its interests).

191. BLACKROCK, OUR APPROACH TO SUSTAINABILITY: BLACKROCK INVESTMENT STEWARDSHIP (2020), https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-full-report.pdf.

192. *See* Lacaille, *supra* note 107.

193. *See* Modernization of Regulation S-K Items, 17 C.F.R. §§ 229, 239, 240 (2020) (emphasizing a principle-based disclosure approach wherein human capital disclosures are important metrics for investors).

However, there is still a more pervasive, insidious issue regarding pension funds themselves.

Interpretations of a pension funds' fiduciary duties constitute a far more surreptitious danger concerning labor's capital.[194] A common—and justified—view is that pension funds "must maximize returns at the expense of all other considerations."[195] Strine posed this problem from a board's perspective: that pension funds take a ruthless shareholder wealth-maximizing view towards their funds (instead of looking towards the broader interests of employees and retirees) out of fear of "being sued for breach of fiduciary duty."[196] Webber acknowledges this issue, but his argument focuses on explaining why this view is wrong, despite its prevalence.[197] His argument is well made but utopian, because a risk adverse fund would take a shareholder maximizing view of its fiduciary duties.[198] That the foremost judicial expert in this field would mark such a concern is telling of the issue's prominence. As even Webber acknowledges, there is a consistent record of funds using this interpretation to the detriment of their shareholders.[199] Under President Bush, the Department of Labor issued an interpretive bulletin for pension funds that "emphasized that fiduciary consideration of 'non-economic' factors should be rare."[200] While Webber makes an impassioned argument, he whistles against the wind of interpretive guidance,[201] substantial precedent,[202] and risk-averse pension fund trustees. Under such strong precedent, all but the largest pension funds would be bold enough to take such a risk.[203] While some funds have enacted policies that seek to mitigate harms caused by privatization,

---

194. *See* WEBBER, *supra* note 29, at 184–89; *see also* David Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. Rev. 2106, 2108–12 (2014) [hereinafter *The Use and Abuse of Labor's Capital*].

195. WEBBER, *supra* note 29, at 184–87 (explaining the history, ERISA intricacies, and the method of coming to this interpretation).

196. Strine, *supra* note 1, at 1182, 1182 n.29; Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1358 n.49 (1997) (citing to federal authority warning pension fund trustees to consider asset value maximization instead of unrelated objectives, such as employment of beneficiaries).

197. *See* WEBBER, *supra* note 29, at 184–205.

198. Strine, *supra* note 1, at 1182–83.

199. *The Use and Abuse of Labor's Capital*, *supra* note 194, at 2108–2112 (explaining that the Massachusetts Pension Reserves Investment Trust and the Teachers' Retirement System of Louisiana invested in Aramak Corp., a private service provider, that subsequently usurped member employee jobs and cut pay).

200. *Id.* at 2124 (citing Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734 (Oct. 17, 2008) (to be codified at 29 C.F.R. pt. 2509)) (parenthetical omitted).

201. Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734, 61,735 (Oct. 17, 2008) (to be codified at 29 C.F.R. pt. 2509).

202. WEBBER, *supra* note 29, at 306 n.16.

203. *Id.* at 306–07 nn.17–19 (explaining that pension funds for New York City, Ohio, and California have adopted policies stating that the funds will act to limit circumstances where privatization could harm the funds and their members).

these are few in number.[204] As such, Strine's scenario—where an employee's pension fund instructs its members to vote for a wealth maximizing option at the cost of job security and long-term fund security—is all the more prescient.[205]

Webber's theory is persuasive, but impractical. Reframing corporate social responsibility, in comparison, offers corporations a unique option. Boards can either provide employees benefits, job security, or increased pay. The corporation could in turn disclose the action as an ESG initiative under the now-required human capital management disclosure,[206] attract and retain highly qualified personnel,[207] and potentially take a tax deduction under the IRS Code (as long as the salary is under $1 million) as a business expense.[208] As was highlighted by the COVID-19 pandemic, investors and shareholders quickly focused on how companies were protecting the health and well-being of their respective workforces.[209] By engaging in employee-focused corporate social responsibility, companies can highlight their positive human capital management practices to investors, highlighting the strength of the firm and the morale of employees in the midst of a pandemic.[210]

This change can be readily implemented within the existing corporate structure by adding additional responsibilities to compensation committees, requiring they manage employee-focused corporate social responsibility and create appropriate programs for each company and its employees. Furthermore, because employee-focused corporate social responsibility is a supplier-side corporate social responsibility initiative, the cost of additional benefit programs can be transferred to end-line consumers similarly to how Starbucks justifies its sustainable coffee sourcing methods.[211]

V. CONCLUSION

Corporate social responsibility has an integral place in modern corporations, and corporate employees are set up to be prime

---

204. *See id.*

205. Strine, *supra* note 1, at 1182–85.

206. *See* 17 C.F.R. §§ 229, 239, 240.

207. *See, e.g.*, Bevegni, *supra* note 158.

208. I.R.C. § 162(m); It is worth noting that certain expenses (such as meals provided to employees) are not deductible under some circumstances. Reasonable employee salaries and wages are always deductable. *See* I.R.C. § 274; Professors Malani and Henderson argue that this is a failure of the tax system, and that all corporate altruism (or social responsibility) should receive similar tax breaks. *See* Henderson & Malani, *supra* note 18 at 609–11; For example, buying a cup of fair-trade coffee should theoretically equate to a two-dollar tax deduction similar to the current electric vehicle tax credit which is offered to purchasers of Tesla automobiles. *See id.*

209. *Corporate Governance Q&A*, LIGHTHOUSE (Sept. 2020) https://morrowsodali.com/uploads/insights/attachments/e2949465f9b055bc243a2e7695d1a11f.pdf.

210. *Id.* at 6.

211. *See* STARBUCKS, *supra* note 24.

recipients. If corporate social responsibility actions and directives are focused on employees, corporations stand to see the most efficient dollar-for-dollar return through goodwill, employee morale, employee loyalty, and quality applications. As Professor Greenfield acknowledged, employees are inherently unable to individually contract on equal footing with their employer, and they totally lack corporate law protections. Whereas other stakeholders, namely creditors, have the ability to negotiate risk, employees lack that ability.[212] As such, creditors and other stakeholders are far more protected than employees who lack the residual claimant position that shareholders have, and the debt priority of creditors. Because employees are currently seen as a form of agency cost or as a labor cost, creating and implementing benefit programs, wage incentives, and personal rights protections must take the form of corporate social responsibility in order to be palatable to shareholders and build social capital between the public, employees, managers, and shareholders.

212. *See* Greenfield, *supra* note 28, at 284, 300–03, 318–21.