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For Whom Corporate Leaders Bargain

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Abstract

There is currently a fundamental and heated debate over what purposes and goals corporations should serve. According to the increasingly influential “stakeholderism” view, giving corporate leaders the discretionary power to serve all stakeholders, and not just shareholders, would address growing concerns about the impact of corporations on society and the environment. In contrast, critics of stakeholderism object arguing that corporate leaders should not be expected to use such expanded discretion to benefit stakeholders. This Article presents empirical evidence that can contribute to resolving this key debate.

During the hostile takeovers era, stakeholderist arguments contributed to the adoption of constituency statutes by more than thirty states. These statutes authorized corporate leaders to give weight to stakeholder interests when considering the sale of the company. We study how corporate leaders did, in fact, use the discretion that constituency statutes provided them. In particular, using hand-collected data, we analyze the contractual terms that corporate leaders have attained in over one hundred sales of public companies to private equity buyers over the past two decades.

We find that corporate leaders have used their bargaining power to attain gains for shareholders, executives, and directors. However, despite the prospects of possible adverse effects on stakeholders, corporate leaders have made very little use of their bargaining power to protect the interests of stakeholders and have obtained no or only cosmetic protections for them. We conclude that constituency statutes have failed to deliver the benefits to stakeholders that they were intended to produce.

Our findings have important implications for the fundamental 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. We discuss several possible causes for the failure of constituency statutes and conclude that the most plausible cause is that corporate leaders have incentives not to protect stakeholders beyond a level that would serve shareholder interests. Therefore, we argue that stakeholderism should be expected to fail to deliver, as have constituency statutes, and should not be supported, even by those who deeply care about stakeholder interests.

Keywords: corporate purpose, stakeholders, stakeholderism, stakeholder governance, stakeholder capitalism, constituency statutes, corporate social responsibility, corporate governance, agency costs, entrenchment, accountability, 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

“*We commit to deliver value to all stakeholders . . .* ”

— Business Roundtable Statement on the Purpose of a Corporation, August 19, 2019

“*Those who cannot remember the past are condemned to repeat it*.”

—George Santanyana, The Life of Reason (1905)

# Introduction

In the face of growing concerns about the effects of corporate decisions on non-shareholder constituencies, there has been increasing support for “stakeholderism.”[[4]](#footnote-5) Stakeholderism refers to the position that corporate leaders should be allowed to use their discretion to serve stakeholders and not just shareholders.[[5]](#footnote-6) Throughout this Article, the term stakeholders refers to all non-shareholder constituencies, such as employees, customers, creditors, suppliers, local communities, the environment, and society at large.

Stakeholderism has received 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 Corporate Purpose, committing to deliver value to all stakeholders.[[6]](#footnote-7) The World Economic Forum also published a manifesto that urged companies to move from the traditional model of “shareholder capitalism” to a model of “stakeholder capitalism.”[[7]](#footnote-8)

Critics and skeptics, however, worry that corporate leaders do not have incentives, and therefore should not be expected, to use this expanded discretion to benefit stakeholders.[[8]](#footnote-9) They are concerned that, rather than protecting stakeholders, acceptance of stakeholderism would be counterproductive. According to this view, stakeholderism would serve the private interests of corporate leaders, 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 advocate, will they indeed use this power to serve the interests and improve the welfare of stakeholders? In this Article, we put forward novel empirical evidence that can contribute to answering this question, and thus to advancing the ongoing debate on stakeholderism.

Although stakeholderism has come to enjoy unprecedented levels of support only 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.[[9]](#footnote-10) Proposed as a remedy to eliminate or mitigate 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 (and not just shareholders) when considering the sale of their company. Given this large-scale experiment in stakeholderism, we argue, the current debate should be informed by the lessons that can be gained from the results it produced.

We therefore set out to examine empirically whether constituency statutes actually delivered protections for stakeholders as was intended. Although constituency statutes have long been a topic commonly found in corporate law treatises,[[10]](#footnote-11) as well as the focus of many law review articles,[[11]](#footnote-12) thus far, there has been no direct study of the terms of acquisition agreements negotiated in the shadow of constituency statutes.[[12]](#footnote-13) Using hand-collected data on a large sample of such agreements from the past two decades, we present 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 consider 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 the merits of 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 to serve as stakeholderism advocates and to address concerns about the adverse effects of corporations on their stakeholders.

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 briefly describe the positions of stakeholderists and their critics, and discuss how their disagreement is grounded in different expectations as to whether corporate leaders are likely to use discretionary power 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. It also surveys the landscape of constituency statutes and their main features. Finally, this Part explains why, in examining the performance of constituency statutes in protecting stakeholders, it is valuable to study private equity acquisitions of public companies. Because these transactions move assets to the hands of managers with powerful incentives to maximize financial returns, such transactions often pose risks to stakeholders, which corporate leaders who care about stakeholders may seek to address.

Part IV presents our empirical analysis. We focused on the twenty-year period of 2000 through 2019, examining all private equity acquisitions of significant size in which the target was a public company incorporated in a state with a constituency statute in force. Our sample included 105 acquisitions of companies incorporated in 18 different states with constituency statutes. For each of these transactions, we hand-collected and analyzed detailed information about the process leading to the transactions and the full sets of terms negotiated by the parties.

Examining various dimensions of the process leading to the acquisition agreements, we found that these agreements were often a product of a long bargaining process, which produced substantial benefits for shareholders and corporate leaders. Shareholders enjoyed sizable premiums over the pre-deal stock price. Corporate leaders, in addition to the gains made on their own equity holdings, commonly secured additional payments, and, in many cases, received commitments for continued employment after the acquisition.

At the same time, however, corporate leaders made little use of their bargaining power to attain any constraints on the ability of the private equity buyer to impose adverse effects on stakeholders. For example, although concerns about layoffs and downsizing induced labor unions to support constituency statutes,[[13]](#footnote-14) we found that in over 95% of the cases, corporate leaders did not negotiate any restrictions on the freedom of the private equity buyers to fire employees. Even in the handful of cases in which any such restrictions were included, the contractual clauses were narrow and vague and, in any event, did not provide employees with enforceable rights.

Furthermore, we found that corporate leaders generally did not negotiate any constraints on the buyer’s post-deal business decisions that could pose risks to consumers, suppliers, creditors, or the environment. In a very small minority of cases, we found buyer commitments to retain the location of company headquarters or to continue some local investments or philanthropy. But our analysis of the legal details indicates that these rare commitments were still rather “soft.” Unlike commitments to shareholders or corporate leaders, they were vague, under-specified and did not provide beneficiaries with any enforceable rights.

Finally, Part V discusses the conclusions and implications of our empirical analysis and findings. We first explain that the evidence we have assembled clearly establishes that constituency statutes failed to address concerns about the adverse effects of acquisitions on stakeholders and to deliver the promised and hoped-for benefits for stakeholders.

We then proceed to discuss the implications of our findings for the stakeholderism debate. Because constituency statutes had stakeholderist justifications and goals, all involved in the debate should seek to learn from assessing the success of these statutes in protecting stakeholders from being adversely affected by acquisitions. In particular, stakeholderists must address the failures of the statutes, identify the causes of these failures, and examine whether these factors would also undermine the effectiveness of their current proposals.

Part V then discusses several possible explanations for the failure of constituency statutes to deliver stakeholder protections, including the uncertainty about what the statutes authorized, the potential applicability of *Revlon* duties to maximize sale price, the need to obtain shareholder approval, and the influence of the shareholder-centric norms on corporate leaders. Our discussion indicates that these explanations are unlikely to account for our findings.

We suggest that the most plausible explanation for the failure of these statutes 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 nonetheless robustly linked to them. The design of executive and director compensation, and the dynamics of the labor and control markets, provide executives and directors with substantial incentives to increase 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 meaningful stakeholder protections would constrain and thus be costly to the buyer, their inclusion in the deal could result in somewhat lower gains for the shareholders and/or the corporate leaders. Thus, corporate leaders had no incentives to use their bargaining power— and, indeed, had incentives not to use their bargaining power—for the purpose of negotiating protections for stakeholders.

Our findings caution that the incentives of corporate leaders should be taken seriously when assessing the promise of stakeholderism. Like the supporters of constituency statutes, supporters of stakeholderism have commonly assumed that corporate leaders would use their enhanced discretion to protect stakeholders. In the case of constituency statutes, this assumption has been proven unwarranted. Stakeholderists, and all those concerned about stakeholders, should be wary of using it in the current debate on stakeholderism.

# The Stakeholderism Debate

## A Critical Juncture

A central debate in corporate governance is whether corporate leaders—directors and top executives— 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), when making business decisions. On an abstract level, some versions of stakeholderism are merely aspirational, claiming that it is incontrovertible that corporations’ role in the economy should be beneficial to society as a whole. However, on the prescriptive, operational level, advocates of stakeholderism concretely 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 the viability of this particular approach.

Since the early twentieth century, a copious body of literature on the stakeholderism debate has developed.[[14]](#footnote-15) However, despite powerful defenses of stakeholderism having been proposed by many prominent legal scholars[[15]](#footnote-16) as well as by economics and business scholars,[[16]](#footnote-17) the shareholder primacy view has generally been more prevalent among academics and practitioners.[[17]](#footnote-18) 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,”[[18]](#footnote-19) and to “deliver value” not just to shareholders, but also to employees, customers, suppliers, and communities.[[19]](#footnote-20) This 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.[[20]](#footnote-21)

Subsequently, a manifesto published by the World Economic Forum urged companies to move from the traditional model of “shareholder capitalism” to the model of “stakeholder capitalism.”[[21]](#footnote-22) In addition, the Reporter and advisors for the ongoing project for a *Restatement of Corporate Law* are considering the introduction of stakeholderist elements into the Restatement.[[22]](#footnote-23) These developments led observers to view 2019 as a “watershed year in the evolution of corporate governance” due to the “advent of stakeholder governance,”[[23]](#footnote-24) and 2020 as a “decisive inflection point” in the stakeholderism debate.[[24]](#footnote-25)

## Stakeholderism

The stakeholderism view holds that the welfare of each group of corporate stakeholders is relevant and valuable, and independent from its effect on the welfare of shareholders. Therefore, corporate leaders should serve not only shareholders, but also a plurality of independent constituencies, and should weigh and balance a plurality of autonomous objectives.[[25]](#footnote-26) An important corollary of the fact that the relevance of the welfare of shareholders and the welfare of stakeholders are independent factors, is that there could be cases in which corporate leaders would choose a stakeholder-friendly course of action even if would prove costly to shareholders. Applying a stakeholderist approach could, in theory, result in stakeholders receiving a larger share of the value created by the corporation than they would by the application of a shareholder primacy approach. Indeed, this is 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, on matters of job security, health and safety, or environmental issues), and how to resolve such trade-offs.

For example, the 2019 statement of the Business Roundtable is a commitment of the signatory CEOs to “deliver value” to all stakeholders. The statement does not provide details on how this should be done, nor does it propose mechanisms that constrain the ability of CEOs to make decisions.[[26]](#footnote-27) Another example, to be examined in detail in Part III, involves the constituency statutes adopted by U.S. states authorizing directors to consider the interests of certain groups of stakeholders, without specifying how to resolve conflicts or trade-offs between them.[[27]](#footnote-28) 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.[[28]](#footnote-29)

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.[[29]](#footnote-30) Colin Mayer refers to “intrinsic trusteeship” (that is, the role of directors as trustees for all corporate constituents) as a substitute for “extrinsic regulation” to improve societal welfare.[[30]](#footnote-31) 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 a different, “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.[[31]](#footnote-32) We believe that this approach is conceptually and practically indistinguishable from that of the traditional shareholder value approach. If corporate leaders provide benefits to stakeholders only when doing so is good for shareholders, then stakeholders should not expect to receive any more benefits than they would receive 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.

## 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.[[32]](#footnote-33) According to this competing 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 underlying goals of 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 compensation is in substantial part linked to the financial performance of the company,[[33]](#footnote-34) 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.[[34]](#footnote-35) 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 actually use this power to advance the interests and improve the welfare of stakeholders? In this Article, we seek to answer this question by observing the choices made by corporate leaders of companies subject to statutory rules that closely resemble those advocated by stakeholderists.

# Towards an Empirical Test of Stakeholderism

In Part IV, we present an empirical analysis of the contractual terms of private equity acquisitions from 2000 through 2019 made by public companies incorporated in states with a constituency statute. In this Part, we discuss the motivation for the study and how this research 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 in which stakeholder-oriented corporate leaders should be expected to be particularly active.

## Constituency Statutes

### The Promise of Constituency Statutes

From the mid-1980s to the early 1990s, responding 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.[[35]](#footnote-36)

This Article focuses 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.[[36]](#footnote-37) Many statutes went even further and authorized directors to consider the interests of stakeholders with respect to any kind of decisions.[[37]](#footnote-38) Although Delaware, the most influential state in terms of corporate governance,[[38]](#footnote-39) 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 to protect 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,[[39]](#footnote-40) welcomed the adoption of constituency statutes as a way for directors to protect non-shareholder constituencies.[[40]](#footnote-41)

Steven Wallman, another prominent lawyer and drafter of the Pennsylvania constituency statute, observed that many takeovers resulted in a transfer of wealth from stakeholders to shareholders, and the constituency statutes allowed directors to reject those deals, thus benefitting employees and other stakeholders who cannot easily protect themselves.[[41]](#footnote-42) The perception of the policy rationale behind the constituency statutes and other anti-takeover laws was summarized during the wave of enactments by Lyman Johnson and David Millon:

[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.[[42]](#footnote-43)

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.[[43]](#footnote-44) 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,[[44]](#footnote-45) 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.[[45]](#footnote-46) 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.[[46]](#footnote-47)

The legislative history of constituency statutes shows that the expressed intent of the legislators was consistent with this view of the economy-wide impact of hostile takeovers. Hostile takeovers were seen as a threat to workers, suppliers, and local economies, and the expanded discretion granted to corporate leaders was meant as a tool for enabling managers to mitigate or avoid those negative effects. For example, the memorandum accompanying the New York bill mentioned the state’s “desire to avoid the disruptive effects of takeovers on target company employees and local communities in which target do business.”[[47]](#footnote-48) 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.[[48]](#footnote-49)

The theory that constituency statutes would protect employees and local communities was subscribed to by major unions. In fact, although legislative initiatives were commonly propelled by business interests, and sometimes even directly by the managements of corporations under attack,[[49]](#footnote-50) 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 takeover bids.[[50]](#footnote-51) When state legislators started discussing constituency and other anti-takeover statutes, unions sided with management.[[51]](#footnote-52) 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 legislation because it would protect “constituents [who] work in the factories owned by big businesses.”[[52]](#footnote-53) 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.”[[53]](#footnote-54)

While much of the discussion around these statutes focused on the tools they provided to resist hostile bids—that is, to reject the acquisition offer and keep the company independent—the expansion of managerial discretion was also thought to strengthen managers’ bargaining power in a negotiated sale. If the course 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 for long been a recurring argument supporting takeover defenses.[[54]](#footnote-55)

In a shareholder-value framework, which is the one typically referred to 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.[[55]](#footnote-56) 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.[[56]](#footnote-57)

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

### 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.[[57]](#footnote-58) Of these 33 statutes, four allow individual corporations to choose whether they want to opt in (Georgia, Maryland, and Tennessee) or opt out of the statute (Arizona).[[58]](#footnote-59) To ensure that the transactions examined are governed by a constituency statute, we focus exclusively on target companies incorporated in any of the 29 states with statutes that do not contain opt-in or opt-out mechanisms. While all these statutes authorize directors to give weight to stakeholder interests, there are some differences worth noting:

*(a) Scope*. All the statutes apply to public companies and to their decisions in the face of an acquisition offer; many of them also apply to private companies and/or to other kinds of corporate decisions. We focus our empirical analysis on the sale of public companies, for which we have access to publicly available documents filed with the Securities and Exchange Commission (SEC) that 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 them through an opt-in or opt-out mechanism. Our empirical analysis excludes 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 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.”[[59]](#footnote-60) 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 permissive only.[[60]](#footnote-61)

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 does 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 the terms of this transaction are consistent with the rest of the transactions under study.[[61]](#footnote-62)

*(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. Notably, 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 unspecified stakeholder groups and interests. Table 8 in Part IV reports in detail which state statutes refer to which stakeholder interests.

### 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.[[62]](#footnote-63) In fact, many statutes even give directors the freedom to decide which individuals or groups should be considered stakeholders of the corporation.[[63]](#footnote-64)

This grant of discretion to take stakeholders’ interests into account during takeover situations was viewed as a radical departure from the traditional view that directors should evaluate acquisition offers on the basis of whether or not they maximize value for shareholders. For example, in 1990, a prominent scholar and former Commissioner of the Securities and Exchange Commission observed that the new legislation espoused an “idea . . . that [was] novel” and “contrary to long standing legal principles.”[[64]](#footnote-65) In the absence of any specified weighing criteria, such a novel idea meant that directors had been granted the power to negotiate terms with respect to benefits and protections for stakeholders with potential acquirer even if this course could prove costly to shareholders. For example, corporate leaders may potentially reject 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 approach, directors may give weight to the interests of stakeholders only to the extent they are instrumentally related to those of shareholders. Therefore, directors may not favor stakeholders at the expense of shareholders, as presented in the aforementioned examples. This line of 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.”[[65]](#footnote-66)

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 the 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.”[[66]](#footnote-67) New York provides that directors have no obligation to “consider or afford any particular weight” to any shareholder or stakeholder factors.[[67]](#footnote-68) 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.”[[68]](#footnote-69) 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,[[69]](#footnote-70) and the Georgia statute states that no corporate constituency (arguably, including shareholders) has a right to be preferred over others.[[70]](#footnote-71)

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.”[[71]](#footnote-72) 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, albeit only for public corporations).[[72]](#footnote-73)

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 also represents a bad deal for shareholders. However, if this was indeed the correct meaning of these statutes, the powerful political coalition of business leaders and organized labor would have obtained nothing more than what was already available under the pre-existing shareholder primacy principle. Likewise, the rich literature debating the desirability of the constituency statutes would not make sense, as these statutes would have simply codified something that was already permissible under the previous law.

As explained in section III.A.1 above, the explicit policy goal of these statutes was to protect stakeholders against hostile takeovers. If the statutes did not give directors the power to block offers that would harm stakeholders but might have been accepted by shareholders, then their policy goal would be entirely frustrated. This interpretation is widely shared among some of the most influential authors writing on this issue, both supporters and critics of stakeholderism.[[73]](#footnote-74)

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.

## Private Equity Deals

Our empirical analysis will focus on acquisitions of public companies by private equity firms. Private equity deals provide an optimal context for this study, as such deals 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 public companies 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 and the powerful financial incentives that the managers of the private equity buyer typically have,[[74]](#footnote-75) as well as by the powerful financial incentives that private equity groups provide to the managers of companies they own.[[75]](#footnote-76) Thus, to the extent that the deal terms do not constrain the private equity buyer from doing so, the buyer would have strong post-deal incentives to maximize financial returns, even when doing so would substantially come at the expense of stakeholders.

Indeed, there is robust empirical evidence that private equity acquisitions result in employee terminations and thus impose costs on some employees. For example, a recent study shows that private equity acquisitions reduce employment in target companies by 13% over the two-year period following the transaction.[[76]](#footnote-77) Earlier studies have also documented that there are declines in employee compensation following a private equity acquisition.[[77]](#footnote-78)

Concerns about how private equity acquisitions affect stakeholders, and employees and communities in particular, have also 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 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.[[78]](#footnote-79) Indeed, in the 2012 presidential campaign, Mitt Romney’s past association with a private equity group seemed to be a liability due to claims that the group’s acquisitions had had adverse effects on employees.[[79]](#footnote-80)

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, and even if private equity deals are on the whole socially desirable, there is a good basis for believing that unless private equity deals are accompanied by adequate protections for employees, such deals present heightened risks of adverse effects for stakeholders such as employees, communities, suppliers, and so forth. Thus, if corporate leaders did wish to use the discretionary power under the constituency statutes, they should have been expected to seek protections for stakeholders that would have eliminated or reduced the risks raised by a private equity takeover.

# Empirical Analysis

## Universe of Cases

### Data Collection

In this Part, we turn to investigate empirically the question that stands at the heart of our article: should corporate leaders have discretion, and can they be relied upon, to protect stakeholder interests? To that end, we examine how corporate leaders have used the expansive discretion that was provided to them by constituency statutes adopted by a number of U.S. states, to protect stakeholder interests in M&A transactions.

We use the FactSet M&A database and extract from it a sample of transactions based on four main criteria. First, we focus on acquisitions made or sponsored by a private equity firm, using the definition of private equity acquisition used by FactSet.[[80]](#footnote-81) As we have explained above, such transactions provide a natural setting for our study, because they move companies into the hands of private equity managers with strong incentives to cut costs and maximize shareholder value, thus posing potential risks to stakeholders. Under such circumstances, corporate leaders authorized to protect stakeholders have good reasons to negotiate protections that would mitigate such risks.

Second, we review acquisitions of companies incorporated in states that had a constituency statute in force at the date of signing and closing.[[81]](#footnote-82) We focus on the large majority of states in which these statutes did not allow companies to opt in or out, in order to make sure that the transactions were governed by these statutes. To this end, we excluded from the sample transactions that involved targets incorporated in the four states that had opt-in or opt-out mechanisms.

Third, we limit our study to transactions that took place in the past two decades, from January 1, 2000 to December 31, 2019. Focusing on a recent time frame provided us relatively good data availability. It also increased our confidence that the constituency statutes have been incorporated into practice.

Fourth, we excluded acquisitions of small companies (transaction value of less than $50 million in January 2020 dollars). Throughout our study, we adjust all dollar figures (including transaction values and monetary benefits afforded to insiders or stakeholders) using CPI to account for inflation during that 20-year period and to facilitate comparability. All dollar figures stated below are in January 2020 dollars.

We were able to identify 105 transactions that comply with all four criteria mentioned above. We then hand collected data on each transaction in the resulting sample. In particular, we reviewed all the proxy statements filed with the Securities and Exchange Commission (SEC) in connection with the approval of the mergers, as well as the merger agreements attached to them. We collected and analyzed large amount of information regarding the evolution of the transactions and their final contractual terms, and coded this information along multiple dimensions, including the length and outcome of the bargaining process; the benefits for shareholders; the benefits for executives and directors; and commitments in favor of stakeholders.

To determine the length and other characteristics of the bargaining process, including the participation of multiple bidders and the negotiation outcome, we relied on the proxy statement’s narrative section that describes the background of the transaction. To identify the benefits obtained by executive and directors, we reviewed the section of the proxy statements disclosing the interests of the target’s directors and executives in the merger, and the provisions of the merger agreement referring to directors and officers. To identify the benefits obtained by stakeholders, we reviewed any relevant reference in the proxy statement and merger agreement. Data on transaction values and premia are collected from FactSet.

### Deal Characteristics

Our final dataset contains 105 acquisitions made or sponsored by a private equity firm over a sixteen-year period commencing in 2004.[[82]](#footnote-83) During this period, we had three or more transactions in each year, with an average of 6.6 transactions per year. Table 1 below reports the distribution of the transactions by year in our entire sample.

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** |
|  |  |  |  |  |

The deal values range between $51.80 million and $70.15 billion, with a mean of $3.05 billion and a median of $395.26 million. Five transactions have a deal value greater than $10 billion: EMC ($70.15 billion); TXU ($56.36 billion); Heinz ($30.19 billion); Clear Channel ($33.21 billion); and Biomet ($14.59 billion). Additionally, there are four transactions with a value between $5-10 billion; 26 transactions with a value between $1-5 billion; 11 transactions with a value between $0.5-1 billion; and 59 transactions valued at less than $500 million. Table 2 below shows the distribution of the transactions by deal value in our entire sample.

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%** |

### States of Incorporation

The target companies in our sample were incorporated in eighteen different states. Table 3 below lists all the states for which we have identified deals that match our criteria. For each state, it reports the number of the matching deals. There are nine states that are represented with five or more deals: 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).

We also provide in Table 3 the year in which each state has adopted its constituency statute. In all of the states except two, the constituency statutes were in force throughout the entire period of our study, and therefore applied to all the acquisitions of companies in these states. The exceptions to this are Louisiana, which repealed its constituency statute in 2015, and Texas, which adopted its constituency statute only in 2006. We therefore only included in the sample acquisitions of Louisiana companies completed prior to 2015, as well as acquisitions of Texas companies signed and closed in or after 2006.

In the Table, we also indicate the attitude of each state towards *Revlon*, the Delaware case that establishes that when a sale of a company becomes “inevitable,” the duty of the board of directors is to maximize shareholder value.[[83]](#footnote-84) It might be argued that the acceptance of this doctrine by a state might limit the extent to which corporate leaders are willing to use their power to protect stakeholders. As we will discuss in Part V, and as the empirical analysis of Part IV will show, Revlon does not seem to affect the extent to which corporate leaders protect stakeholders; for completeness, however, we take this into account in our analysis.

To determine the applicability of Revlon in states outside Delaware, we rely on the study by Matthew Cain, Stephen McKeon, and Steven Davidoff Solomon.[[84]](#footnote-85) In six of the states represented in our dataset, the Revlon doctrine was rejected by an explicit court decision. In nine states, no court opined on this issue, and therefore there is no indication about its applicability in these jurisdictions. Only in three states, which represent about 12% of the deals in our sample, the Revlon doctrine was explicitly adopted by a judicial ruling.

To examine whether our results are affected by the potential presence of Revlon, we report separately for the deals in states that explicitly rejected Revlon (“ERR deals”), and the other deals (“Non-ERR deals”).

Table 3. Revlon and Constituency Statutes Across States

|  |  |  |
| --- | --- | --- |
| ***State*** | ***Number of Deals*** | ***CS Adoption Year*** |
| Indiana | 4 | 1986 |
| Nevada | 12 | 1991 |
| New York | 7 | 1987 |
| Ohio | 10 | 1984 |
| Pennsylvania | 12 | 1990 |
| Wisconsin | 8 | 1991 |
| ***Total (ERR States)*** | **53** | **-** |
| *No Judicial Ruling* |  |  |
| Connecticut | 2 | 1988 |
| Florida | 13 | 1989 |
| Kentucky | 2 | 1988 |
| Louisiana | 1 | 1988 |
| Massachusetts | 10 | 1989 |
| New Jersey | 1 | 1987 |
| North Dakota | 1 | 1993 |
| Oregon | 1 | 1989 |
| Texas | 8 | 2006 |
| *Judicial Ruling Adopting Revlon* |  |
| Illinois | 3 | 1985 |
| Minnesota | 6 | 1987 |
| Missouri | 4 | 1986 |
| ***Total (Non-ERR States)*** | **52** | - |

As Table 3 shows, half of the target companies in the sample were incorporated in ERR states. Of the other companies in the dataset, the large majority were incorporated in states where there is no case adopting or rejecting Revlon, and the minority, in states that explicitly rejected Revlon.

\*\*\*

With the sample defined and data collected, we proceeded to conduct our empirical analysis. Below we describe our empirical analysis with respect to the process leading to the acquisition agreement and the bargaining involved in it (Section B); what shareholders got as a result of this process (Section C); what corporate leaders got (Section D); what stakeholders got (Section E). To illustrate our results, we provide in each Section Tables with detailed findings for each of 24 large transactions – the 12 largest transactions in ERR states and the 12 largest transactions in Non-ERR states. We also report our overall results for the sample of 105 transactions; the specific findings for each of the 81 smaller transactions on which these overall results are based are provided in the Online Appendix.[[85]](#footnote-86)

## Bargaining

Before we proceed to examine what benefits corporate leaders bargain for, we would like to assess the characteristics of the bargaining process. As this Section documents, there are various dimensions of the pre-deal process that are described in the proxy statement and that indicate the presence of substantial negotiations and bargaining.[[86]](#footnote-87) Table 4 reports data on five dimensions of the bargaining process for the 12 largest ERR and the 12 largest Non-ERR deals in our sample.

*Length of the Process.* We first quantified the length of time from the first interaction of target leaders with the eventual buyer and the signing of the deal, as a measure of the time that the parties invested in negotiating the terms of the deal. As Table 4 shows, the parties typically invest a substantial amount of time in the bargaining process. The average (median) duration of the bargaining process for the largest ERR transactions is 164 (166) days, and for the largest Non-ERR transactions 134 (99) days.

*Discussions with Other Parties.* We also documented whether additional parties expressed an interest in acquiring the target without eventually submitting an offer (a situation which in itself can give the target some extra negotiation leverage). Our analysis shows that the target held discussion with other parties, either prior to or following the initial contact with the eventual acquirer, in 75% of the largest ERR and 92% of the largest Non-ERR transactions.

*Offers by other Parties*. We then examined whether there were other potential buyers who submitted offers. For this purpose, we defined a “potential buyer” as a party which expressed initial interest in the target and also entered into a non-disclosure agreement, conducted due diligence and submitted an offer. In 50% of both the top ERR and Non-ERR transactions, the bargaining process with one or more of the other interested parties advanced beyond the due diligence process and resulted in an offer submitted by that party.

*Multiple Offers by the Buyer*. Another dimension that we examined is whether the target received more than one offer from the eventual acquirer. As Table 4 shows, in 92% of the largest ERR and Non-ERR transactions, the acquirer submitted more than one offer during the bargaining process.

*Improvement in Initial Deal Terms.* Lastly, we also documented whether the final merger consideration was higher than either the initial offer or, if the initial offer was reduced following due diligence, the first offer that was submitted after the completion of the due diligence process. We find that in 100% of the largest ERR deals, and in 92% of their Non-ERR counterparts, the bargaining process resulted in an improved outcome for the target.

Table 4. Bargaining Process

|  |
| --- |
| **ERR Deals** |
| ***Target*** | ***Length of Process With Buyer (Days)*** | ***Discussions With Other Parties*** | ***Offers By Other Parties*** | ***Multiple Offers By Buyer*** | ***Deal Terms Improved?*** |
| *Heinz* | 34 | No | No | Yes | Yes |
| *Biomet* | 200 | Yes | Yes | Yes | Yes |
| *Station Casinos* | 137 | Yes | No | Yes | Yes |
| *Bausch & Lomb* | 319 | Yes | Yes | Yes | Yes |
| *Education Management* | 42 | Yes | Yes | Yes | Yes |
| *Duquesne Light* | 230 | No | No | Yes | Yes |
| *Reynolds & Reynolds* | 300 | Yes | No | No | Yes |
| *ClubCorp* | 241 | Yes | Yes | Yes | Yes |
| *Multi-Color* | 95 | Yes | No | Yes | Yes |
| *The Jones Group* | 195 | Yes | Yes | Yes | Yes |
| *Genesis HealthCare* | 66 | Yes | Yes | Yes | Yes |
| *Jo-Ann Stores* | 115 | No | No | Yes | Yes |
| **Mean** | 164 | - | - | - | - |
| **Median** | 166 | - | - | - | - |
| **% of Yes** | - | 75% | 50% | 92% | 100% |
| **Non-ERR Deals** |
| *EMC* | 362 | Yes | No | Yes | Yes |
| *TXU* | 90 | Yes | No | Yes | Yes |
| *Clear Channel* | 36 | Yes | Yes | Yes | Yes |
| *Kinetic Concepts* | 109 | Yes | No | Yes | Yes |
| *Parexel* | 74 | Yes | Yes | Yes | Yes |
| *Florida East Coast* | 82 | Yes | No | Yes | Yes |
| *Claire’s Stores* | 160 | Yes | Yes | No | No |
| *Crescent* | 77 | Yes | No | Yes | Yes |
| *EGL* | 121 | Yes | Yes | Yes | Yes |
| *CDW* | 84 | Yes | Yes | Yes | Yes |
| *Life Time Fitness* | 160 | Yes | Yes | Yes | Yes |
| *Buffalo Wild Wings* | 263 | No | No | Yes | Yes |
| **Mean** | 134 | - | - | - | - |
| **Median** | 99 | - | - | - | - |
| **% of Yes** | - | 92% | 50% | 92% | 92% |

Our findings for the largest transactions also hold when we review all 105 deals in our sample. We find that on average, the bargaining process between the target and the buyer lasted 193 days. Additionally, discussions of the target with additional parties were documented in 92% of the transactions, resulting in an offer by an additional party in 45% of the transactions. Lastly, in 88% of the transactions, the target received more than one offer from the buyer, resulting in an improved outcome for the target in 79% of the transactions. When we separate the ERR and Non-ERR deals, the findings remain qualitatively similar.

Our analysis, therefore, shows that in the vast majority of the transactions, the target company’s leaders engaged in robust negotiations, which not only spanned over a significant period of time, but also involved multiple interested parties, and were often competitive enough to produce improved financial and contractual terms for the target.

## What Did Shareholders Get?

Having seen that target corporate leaders bargained extensively and successfully in the vast majority of cases, we turn to examine what they were able to obtain and in favor of which group of corporate constituents. We begin with shareholders. Table 5 reports our findings on deal premia for the 12 largest ERR and Non-ERR transactions in the sample. The premium that shareholders receive over the target’s stock price typically represents the gains they derive from the acquisition transactions. To determine the deal premium, we used the “unaffected premium” reported by FactSet, which represents the premium compared to the unaffected stock price before the deal was announced.[[87]](#footnote-88)

Table 5. Gains to Shareholders

|  |  |  |
| --- | --- | --- |
| **ERR Deals** |  | **Non-ERR Deals** |
| ***Target*** | ***Premium (%)[[88]](#footnote-89)*** |  | ***Target*** | ***Premium (%)*** |
| *Heinz* | 20 |  | *EMC* | 23 |
| *Biomet* | 10 |  | *TXU* | 15 |
| *Station Casinos* | 30 |  | *Clear Channel* | 6 |
| *Bausch & Lomb* | 6 |  | *Kinetic Concepts* | 6 |
| *Education Management* | 16 |  | *Parexel* | 28 |
| *Duquesne Light* | 22 |  | *Florida East Coast* | 13 |
| *Reynolds & Reynolds* | 14 |  | *Claire’s Stores* | 7 |
| *ClubCorp* | 31 |  | *Crescent* | 5 |
| *Multi-Color* | 16 |  | *EGL* | 16 |
| *The Jones Group* | 3 |  | *CDW* | 73 |
| *Genesis HealthCare* | 31 |  | *Life Time Fitness* | 32 |
| *Jo-Ann Stores* | 34 |  | *Buffalo Wild Wings* | 16 |
| **Mean**  | 19 |  | **Mean**  | 24 |
| **Median** | 18 |  | **Median** | 16 |

As Table 5 demonstrates, shareholders derived significant monetary benefits from these 24 transactions: In the largest ERR and Non-ERR deals, the premia that shareholders received over the unaffected stock price of the target company before the deal was announced had a mean of 19% and 24%, and a median of 18% and 16%, respectively.[[89]](#footnote-90) These findings, coupled with the high percentage of transactions in which the bargaining process resulted in an improved outcome for the target company compared to previous stages of negotiations, suggest that corporate leaders generally succeed in leveraging their bargaining power to extract substantial gains for shareholders.[[90]](#footnote-91)

Table A1 in the Online Appendix provides substantially similar results with respect to all 105 transactions in our sample. We find that the unaffected premia that shareholders received had a mean (median) of 31% (25%). When we separate the ERR and Non-ERR deals, the findings remain qualitatively similar.

Our results for this aspect of the transactions suggest that corporate leaders exploit their substantial bargaining power to generate meaningful gains for shareholders. Are they able to generate similar gains for themselves, and more importantly, for other stakeholders? We will turn to examine this question now.

## What Did Corporate Leaders Get?

We now turn to examine what gains corporate leaders captured from the reviewed transactions. Below we consider, in turn, the gains to executives and the gains to non-executive directors.[[91]](#footnote-92)

### Gains to Executives

The benefits secured for target’s executive officers can generally be divided into three different categories.

*Payments Qua Shareholders.* This category includes monetary benefits that executives gained in their capacity as shareholders, by virtue of the target’s shares they own. The most obvious example of this category is the merger consideration paid by the buyer to corporate leaders in exchange for their shares, but we also included in it the gains that corporate leaders realize by exercising their vested stock options.

*Payments Qua Executives.* Monetary gains for executives may also result from certain hardwired provisions of their compensation arrangements, triggered by the completion of the merger. For example, executives may receive severance payments, excise-tax reimbursement or cashing-out of unvested equity awards due to the completion of the transactions.

One could argue that such payments do not reflect an additional benefit provided to executives in the course of the negotiation, but rather a simple triggering of existing provisions in the compensation agreements of the executives. However, these payments still represent some additional benefits that the executives gain due to the transaction, and beyond what regular shareholders gain. Additionally, these agreements could be bargained, or amended, in anticipation of a takeover, and therefore should be considered bargained-for benefits. To assess the extent to which executives bargained for these additional benefits prior to the transactions, we have collected additional information indicating whether employment agreements with the executive officers were amended during the negotiations or in connection with the merger in a way that changed their compensation.

In addition to triggering certain hardwired provisions, corporate leaders could also negotiate for other compensatory arrangements with the buyer as a part of the deal. For example, they could bargain for special payments or closing bonuses in connection with the completion of the merger.

Also in this case, it might be argued that these payments are part of a package intended to retain executives in their positions, which is often necessary for a transaction to take place. However, continuing executives are likely to receive new compensation packages in addition to the payments we report below. Moreover, the Payment Qua Executives are payments that executives would get just by virtue of their current positions at the target, even if they resign from these positions immediately after the closing. Furthermore, some of those payments were to executives that held positions pre transaction, but according to disclosures, were not planned to remain in the target following the transaction.

*Retention of Executives.* Corporate leaders may benefit from continued employment in the surviving company following the acquisition, which entitles them to compensation packages consisting of different elements (salary, bonus, stock-based pay, retirement benefits, etc.). In order to examine the prospect of receiving such benefits, we checked whether the company CEO or other top executives were retained by the acquirers. While executive arrangements with the surviving entities, which are private entities, are not publicly available, executives who are retained by private equity firms are expected to receive the same compensation they had prior to the acquisition. This assumption is supported by empirical evidence showing that the level of CEO pay in companies owned by private equity firms is substantially similar to the level of pay in comparable public companies.[[92]](#footnote-93) Table 6 below reports our findings for the 12 largest ERR transactions and 12 largest Non-ERR transactions in the sample.

Table 6. Gains to Executives

|  |
| --- |
| **ERR Deals** |
| ***Target*** | ***Payment Qua Shareholders (Millions)[[93]](#footnote-94)*** | ***Payment Qua Executives (Millions)*** | ***CEO Retained?*** | ***No. of Other Top Executives Retained*** | ***Announced Plan to Retain Additional Executives?*** |
| *Heinz* | $214.34 | $179.23 | No | 9 | Yes |
| *Biomet* | $80.79 | $31.58 | Yes | 2 | Yes |
| *Station Casinos* | $333.15 | $273.82 | Yes | 1 | Yes |
| *Bausch & Lomb* | $30.39 | $85.85 | No | - | Yes |
| *Education Management* | $60.55 | $7.02 | No | - | Yes |
| *Duquesne Light* | $3.42 | $1.36 | Yes | - | Yes |
| *Reynolds & Reynolds* | $15.31 | $30.24 | Yes | - | No |
| *ClubCorp* | $24.34 | $28.45 | No | - | Yes |
| *Multi-Color* | $23.22 | $5.61 | No | - | No |
| *The Jones Group* | $11.51 | $59.11 | No | - | Yes |
| *Genesis HealthCare* | $2.74 | $4.59 | No | - | Yes |
| *Jo-Ann Stores* | $5.17 | $55.32 | Yes | 1 | Yes |
| **Mean** | $67.08 | $63.51 | - | - | - |
| **Median** | $23.78 | $30.91 | - | - | - |
| **% of Yes** | - | - | 42% | 33% | 83% |
| **Non-ERR Deals** |
| *EMC* | $112.80 | $167.88 | No | 6 | No |
| *TXU* | $147.37 | $530.78 | No | - | Yes |
| *Clear Channel* | $143.77 | $40.37 | Yes | 2 | No |
| *Kinetic Concepts* | $58.69 | $75.93 | No | - | No |
| *Parexel* | $77.41 | $41.39 | No | - | Yes |
| *Florida East Coast* | $326.38 | $63.60 | No | - | No |
| *Claire’s Stores* | $235.29 | $27.64 | No | - | Yes |
| *Crescent* | $226.15 | $77.53 | No | - | Yes |
| *EGL* | $430.47 | $19.60 | No | 5 | Yes |
| *CDW* | $1448.34 | $60.17 | No | - | Yes |
| *Life Time Fitness* | $225.06 | $52.99 | Yes | - | No |
| *Buffalo Wild Wings* | $23.84 | $13.80 | No | - | No |
| **Mean** | $287.97 | $97.64 | - | - | - |
| **Median** | $186.22 | $56.58 | - | - | - |
| **% of Yes** | - | - | 17% | 25% | 50% |

We find that in all of the largest transactions, executives owned equity interests in the target company (through common stock or vested stock options), and therefore benefitted as shareholders from the deal premium. The average aggregate amount of these Payments Qua Shareholders for largest ERR and Non-ERR deals is $67.1 million and $287.0 million, and the median is $23.8 million and $186.2 million, respectively. Corporate leaders also received some sort of Payments Qua Executives as a result of the merger. The most common examples are cash-out of unvested stock options or equity awards, severance payments, and tax gross-up payments. The mean aggregate amount of these payments for largest ERR and Non-ERR deals is $63.5 million and $97.6 million, and the median is $30.9 million and $56.6 million, respectively.[[94]](#footnote-95)

It should be noted that in 50% of the top ERR transactions and in 58% of the Non-ERR transactions, the target had amended or replaced its employment agreements with one or more of its executives in connection with the merger during the negotiation period. This suggests that some of the benefits afforded to executives were negotiated in anticipation of the upcoming acquisition and were not the result of pre-existing contractual terms. In addition, we find that in a few cases, 17% of the largest ERR transactions and 25% of the largest Non-ERR transactions, the target’s executives received closing bonuses or other special cash payments in connection to the merger, with an average aggregate amount of $5.1 and $12.2 million, and a median of $5.1 and $12.4 million, respectively.

Finally, we documented explicit commitments to retain the target’s CEO or other executives following the completion of the merger. In particular, we have found that in50% of the top ERR transactions and in 33% of the top Non-ERR transactions, the proxy statement expressly states that the target’s CEO or other top executives will be employed in the surviving company.[[95]](#footnote-96)

We also collected data on “softer” commitments, where the retention of members of the target’s management team is only expressed in the proxy statement as a preliminary and non-binding intention.[[96]](#footnote-97) These commitments were given to certain executives who did not receive the firm commitments discussed above. We find these soft commitments in 83% of the largest ERR transactions and in 50% of the largest Non-ERR transactions. Although they are not legally binding, these soft commitments are worth noting for the sake of completeness. Also, private equity buyers have strong reputational incentives to carry out plans noted in the proxy statements, even if they are non-binding, as the successful completion of their future acquisitions depends on the cooperation of target corporate leaders. A systematic failure to successfully complete their preliminary negotiations with target management would have adverse effects on the success of future deals.[[97]](#footnote-98)

Table A2 in the Online Appendix reports the results with respect to all 105 transactions in our sample. In particular, we find that the average (median) Payment Qua Shareholders received by the target’s executives is $67.2 ($13.6) million, the average (median) Payment Qua Executives is $27.7 ($8.6) million, and the average (median) closing bonus is $2.9 ($0.9) million.

We also find that in 25% of all transactions the target had amended its employment agreements with one or more of its executives in connection with the merger. Additionally, in 30% of all transactions, the proxy statement expressly stated that the target’s CEO or other top executives will be employed in the surviving company. In 49% of all transactions, the possibility of future employment was expressed in a “softer” manner—that is, with a preliminary and non-binding language—to executives who did not receive firm commitments. When we separate the ERR and Non-ERR deals, the findings remain qualitatively similar, though we document slightly higher gains and executive retention rates for all Non-ERR transactions.[[98]](#footnote-99)

### Gains to Non-Executive Directors

Corporate directors receive meaningful benefits as well. We find that the average (median) amount of Payment Qua Shareholders for Top ERR and Non-ERR transactions is $107.8 ($9.8) million and $299.0 ($38.0) million, respectively. Directors received Payment Qua Directors of any sort in the majority of these cases, with an average (median) aggregate amount of $2.7 ($2.5) million for Top ERR transactions and $4.1 ($3.6) for Top Non-ERR transactions. Directors were assigned seats on the board of the surviving company in 25% of Top ERR transactions and 17% of the Top Non-ERR transactions.[[99]](#footnote-100)

To illustrate, Table 7 reports our findings for the 12 largest ERR deals and the 12 largest non-ERR deals.

Table 7. Gains to Non-Executive Directors

|  |
| --- |
| **ERR Deals** |
| ***Target*** | ***Payment Qua Shareholders (Millions)*** | ***Payment Qua Directors (Millions)*** | ***No. of Directors Retained*** |
| *Heinz* | $20.45 | - | - |
| *Biomet* | $634.32 | $0.20 | 1 |
| *Station Casinos* | $8.37 | $4.56 | 2 |
| *Bausch & Lomb* | $4.96 | $6.39 | - |
| *Education Management* | $62.03 | $3.74 | - |
| *Duquesne Light* | $5.92 | $1.52 | - |
| *Reynolds & Reynolds* | $9.36 | Not Quantified | - |
| *ClubCorp* | $3.79 | $0.69 | - |
| *Multi-Color* | $479.76 | $0.88 | - |
| *The Jones Group* | $10.29 | - | - |
| *Genesis HealthCare* | $2.12 | Not Quantified | - |
| *Jo-Ann Stores* | $52.73 | $3.53 | 2 |
| **Mean** | $107.84  | $2.69 | - |
| **Median** | $9.83 | $2.53 | - |
| **% of Yes** | - | - | 25% |
| **Non-ERR Deals** |
| *EMC* | $53.69 | - | - |
| *TXU* | $10.93 | $9.67 | - |
| *Clear Channel* | $1626.55 | $6.06 | 3 |
| *Kinetic Concepts* | $668.73 | $8.68 | - |
| *Parexel* | $22.27 | - | - |
| *Florida East Coast* | $7.27 | $0.19 | - |
| *Claire’s Stores* | $7.91 | $0.75 | 1 |
| *Crescent* | $802.39 | - | - |
| *EGL* | $12.41 | $0.09 | - |
| *CDW* | $182.83 | $4.79 | - |
| *Life Time Fitness* | $17.26 | $2.51 | - |
| *Buffalo Wild Wings* | $164.72 | - | - |
| **Mean** | $298.08 | $4.09 | - |
| **Median** | $37.98 | $3.65 | - |
| **% of Yes** | - | - | 17% |

Here, again, as evident from Table A3 of the Online Appendix, the findings continue to hold when we examine all 105 deals in our sample. The average (median) payment Qua Shareholders to directors is $27.37 ($6.45) million. Directors received Payments Qua Directors of any sort in 61% of the transactions, with an average (median) aggregate amount of $1.34 ($0.6) million. Directors were assigned seats at the board of the surviving company in 5% of all transactions. When we separate the ERR and Non-ERR deals, the findings remain qualitatively similar, though we document slightly higher gains and retention rates for all Non-ERR transactions.

As this Section demonstrates, corporate leaders used their power and leveraged the extensive negotiations with the acquirers to extract significant benefits for themselves. A large fraction of these benefits is attributed to Payment Qua Shareholders. Thus, target leaders’ success in extracting gains for shareholders translates into benefits for themselves. Target leaders are also able to extract meaningful Payments Qua Executives/Directors and bonus payments, which are not shared equally with other shareholders. Finally, in a significant number of cases, CEOs and other executives are able to secure their future employment in the surviving company, or at the very least to receive some “soft” commitment in this regard from the buyer.

## What Did Stakeholders Get?

We now turn to the crucial part of our inquiry: examining whether, and to what extent, corporate leaders bargained for stakeholders. Stakeholders, of course, are the purported beneficiaries of the constituency statutes. Our review attempted to analyze separately the presence of protections for each of the stakeholder groups that are identified in the constituency statutes and in the accompanying literature.

Table 8 below reports all the stakeholder groups identified in the various constituency statutes in force as of December 2019. For each stakeholder group, the Table lists the states with a constituency statute that identifies it, and presents the total percentage of transactions governed by such constituency statutes. Note that several statutes contain a “catch-all” clause that allows directors to identify other groups or factors to be taken into account when evaluating a sale of the company.

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% |

We would like to stress that many stakeholders, such as employees, customers, suppliers, and creditors, typically have contractual arrangements with the target. These contractual arrangements might already provide them with some protection in the event of a private equity acquisition, even if the corporate leaders negotiating the deal with the private equity buyer do not bargain for incorporating stakeholder protections as part of the acquisition agreements. Thus, for example, employment agreements might give some employees rights to some benefits in the event of termination, and supply agreements might give some suppliers certain benefits in the event of termination of the supply relationship.

However, the premise of constituency statutes, as well as of the current stakeholderism, is that the contractual arrangements of employees, customers, suppliers and creditors do not generally protect them from adverse effects that raise substantial social and policy concerns. Constituency statutes, therefore, authorize corporate leaders to seek additional protections for stakeholders from some potential adverse effects, which would not be precluded by contractual agreements already in place. For this reason, our focus below is only on whether corporate leaders negotiating in the shadow of constituency statutes indeed secured meaningful incidence of such protections.

Below we will discuss the presence of protections with respect to each of the groups that were noted in the above Table.

### Employees

Employees are noted explicitly in constituency statutes of 17 different states, which govern a large majority (92%) of the deals in our sample. Moreover, as discussed in Part III, concerns about the adverse effects of takeovers on employees played an important role in the legislative history of the constituency statutes and in articles advocating for stakeholderism.[[100]](#footnote-101) We therefore start our examination from this stakeholder group.

The benefits that we have identified in our study can be generally divided into two different categories. The first category includes commitments regarding the future employment of the target’s employees in the surviving company, such as commitments to employ some or all of the employees, to maintain certain headcount levels or to retain certain benefit or compensation levels for continuing employees. The second category includes various sorts of payments made to employees in connection with the merger, such as retention or bonus payments.

Another aspect is whether these commitments are directly enforceable by employees, as third-party beneficiaries.[[101]](#footnote-102) Since employees have the strongest incentives to enforce these commitments, their ability to bring action in cases of breach of contract is a key factor to assess the extent to which these commitments are effectively enforceable, as well as the probability that the promised benefits will eventually be delivered.

Consistent with the way we present our findings regarding other aspects of the transactions, we first show the results of our analysis for the 12 largest ERR and 12 largest Non-ERR transactions, and then discuss the summary statistics for our sample as a whole.

Table 9. Protections for Employees

|  |
| --- |
| **ERR Deals** |
| ***Target*** | ***Limits on Firing*** | ***Length of Transition Period for Retained Employees*** | ***Commitments Enforceable by Beneficiaries?*** |
| *Heinz* | No | 12 | No |
| *Biomet* | No | 15 | No |
| *Station Casinos* | No | 12 | No |
| *Bausch & Lomb* | No | 12 | No |
| *Education Management* | No | 18 | No |
| *Duquesne Light* | No | 12 | No |
| *Reynolds & Reynolds* | No | 12 | No |
| *ClubCorp* | No | 12 | No |
| *Multi-Color* | No | 12 | No |
| *The Jones Group* | No | 12 | No |
| *Genesis HealthCare* | No | 12 | No |
| *Jo-Ann Stores* | No | 12 | No |
| **Mean** | - | 12.75 | - |
| **Median** | - | 12.00 | - |
| **% of Yes** | 0% | 100% | 0% |
| **Non-ERR Deals** |
| *Dell EMC* | No | 12 | No |
| *TXU* | No | 15 | No |
| *Clear Channel* | No | 12 | No |
| *Kinetic Concepts* | No | 12 | No |
| *Parexel* | No | 18 | No |
| *Florida East Coast* | No | 0 | No |
| *Claire’s Stores* | No | 18 | No |
| *Crescent* | No | 12 | No |
| *EGL* | No | 12 | No |
| *CDW* | No | 14 | No |
| *Life Time Fitness* | No | 12 | No |
| *Buffalo Wild Wings* | No | 11 | No |
| **Mean** | - | 13.30 | - |
| **Median** | - | 12.00 | - |
| **% of Yes** | 0% | 92% | 0% |

The data set forth in Table 9 reveals that in both the largest ERR and Non-ERR subsamples, the merger agreements fail to provide adequate protections for the target’s employees. First, we find that employees’ most crucial interest in keeping their jobs receives no protection: the top ERR and Non-ERR transactions contain no evidence of commitment or expressed intention to retain any of the target’s employees, or even to maintain certain aggregate levels of employment (a more relaxed commitment due to its general and impersonal nature).

For those employees who will eventually continue with the surviving company after the merger (again, without any firm commitment by the acquirers to do so), all of the top ERR and nearly all of the top Non-ERR transactions contain a commitment to maintain the levels of compensation and benefits for a limited period, averaging 12.7 and 13.3 months, respectively. One of the Non-ERR transactions, however, only goes as far as committing to recognize employees’ seniority in the target company and waiving preexisting conditions for the benefit and retirement plans offered by the acquirer.

Additionally, we find that in four of the largest ERR and four of the largest Non-ERR deals (which represent 33% of these subsamples), some or all employees received some sort of additional payments as a result of the merger. However, in half of these deals, the proxy statement and merger agreement did not include specific figures, and in the rest of the deals, the payments were very modest compared to the size of the transactions and to benefits that corporate leaders extract for themselves or for shareholders. For example, in the top ERR subsample, a bonus of $740,000 and $1.3 million were offered in deals with a value of $2.7 billion and $2.2 billion, respectively. The average and median aggregate amount of such payments for the top ERR and non-ERR subsamples is $1.0 million and $13.0 million, respectively.

Lastly, regardless of the size of these benefits, it is important to examine whether employees are able to enforce the relevant commitments. Our analysis shows that in all of the top ERR and Non-ERR transactions, the merger agreement expressly excludes the possibility of third parties in general, or in some cases employees specifically, to enforce any rights conferred upon them. The legal implication of these provisions is that even if the deal includes some commitments in favor of employees or other stakeholders, they are effectively unenforceable due to the stakeholders’ inability to bring action if they are breached. It is worth emphasizing that none of the transactions which recognize the target’s employees as third-party beneficiaries include commitments to retain employment or make direct payments of any sort.[[102]](#footnote-103)

Table A4 of the Online Appendix shows that these results hold for all 105 transactions in our sample. Commitments to retain the target’s employees in the surviving company were only documented in 5% of the transactions. A textual assessment of these commitments suggests that not only do they appear very sparsely throughout the sample, but they also fall short in terms of quality. Except for the “NCO Group” acquisition, in which the buyer committed to retain 25 specific “Tier 2 employees,” these clauses are quite vague and narrow in nature. They do not specify until when employees must be retained, and the company maintains the right to terminate the employment of any employee after the merger.[[103]](#footnote-104)

A commitment to maintain certain aggregate levels of employment was only documented in the “Michael Baker Corp” acquisition. This specific commitment was equipped with an enforcement mechanism, requiring continuing directors selected from the target’s previous board to approve any decision that would be inconsistent with it. However, this commitment is limited to a period of three years and, by definition, allows the acquirer to terminate specific employees and replace them with new ones. This commitment is also subject to a vague qualifier (“to the extent commercially reasonable”), which leaves a significant amount of uncertainty as to the circumstances under which it can be avoided.[[104]](#footnote-105)

Additionally, commitments to maintain the levels of compensation and benefits for continuing employees (without a commitment to retain their employment) were documented in only 72% of transactions in the sample, and were typically limited to a time period averaging 12 months. The remaining transactions offered either lesser protections for employees or none at all. Employees received additional payments in 16% of all transactions, with an average (median) amount of $3.6 ($0.7) million; and explicit rejection of third-party beneficiary rights to employees was documented in 94% of the transactions.[[105]](#footnote-106) When we separate the ERR and Non-ERR deals, the findings remain qualitatively similar.[[106]](#footnote-107)

### Customers, Suppliers, and Creditors

We now turn to look at three other groups which are explicitly noted in the constituency statutes that govern a substantial majority of the transactions in our sample. As Table 8 above shows, customers were explicitly mentioned in 17 constituency statutes, which governed over 90% of the transactions in the sample; suppliers were explicitly mentioned in 14 constituency statutes, which governed over 80% of the transactions in the sample; and creditors were explicitly noted in 12 constituency statutes, which governed 65% of the transactions. However, as Table 10 reports, none of the 12 largest ERR and 12 largest Non-ERR transactions include protections for these three groups of stakeholders.

Table 10. Protections for Customers, Suppliers, and Creditors

|  |
| --- |
| **ERR Deals** |
| ***Target*** | ***Customers***  | ***Suppliers*** | ***Creditors*** |
| *Heinz* | No | No | No |
| *Biomet* | No | No | No |
| *Station Casinos* | No | No | No |
| *Bausch & Lomb* | No | No | No |
| *Education Management* | No | No | No |
| *Duquesne Light* | No | No | No |
| *Reynolds & Reynolds* | No | No | No |
| *ClubCorp* | No | No | No |
| *Multi-Color* | No | No | No |
| *The Jones Group* | No | No | No |
| *Genesis HealthCare* | No | No | No |
| *Jo-Ann Stores* | No | No | No |
| **Mean** | - | - | - |
| **Median** | - | - | - |
| **% of Yes** | 0% | 0% | 0% |
| **Non-ERR Deals** |
| *Dell EMC* | No | No | No |
| *TXU* | No | No | No |
| *Clear Channel* | No | No | No |
| *Kinetic Concepts* | No | No | No |
| *Parexel* | No | No | No |
| *Florida East Coast* | No | No | No |
| *Claire’s Stores* | No | No | No |
| *Crescent* | No | No | No |
| *EGL* | No | No | No |
| *CDW* | No | No | No |
| *Life Time Fitness* | No | No | No |
| *Buffalo Wild Wings* | No | No | No |
| **Mean** | - | - | - |
| **Median** | - | - | - |
| **% of Yes** | 0% | 0% | 0% |

Table A5 in the Online Appendix provides substantially similar results for all transactions in our sample: while noneof the transactions offered protections for the target’s suppliers or creditors, the only transaction that contained a commitment somewhat in favor of the target’s customers is the “Gevity HR” acquisition. Under the terms of this deal, the acquirer must not violate the privacy policy previously set by the target and its subsidiaries regarding the collection, use and disclosure of customer information.

It might be argued that private equity buyers have an interest in treating customers, suppliers, and creditors well after the deal even in the absence of contractual obligations. However, there is no guarantee that this will always be the case. In many situations it might be profit maximizing for the private equity buyer to pursue strategies that would have adverse effects on customers, suppliers or creditors. Indeed, the concerns of adverse effects on these groups was the reason why they were explicitly referenced in so many of the constituency statutes. Our findings show, however, that the constituency statutes produced no protection whatsoever to customers, suppliers, or creditors in the overwhelming majority of the 105 transactions in our sample.

### Communities, Environment and Other Stakeholders

We now expand our analysis beyond the four main stakeholder groups and turn to examine contractual protections secured for local communities, the environment, and other stakeholders. Communities or local communities are explicitly mentioned in 11 statutes governing over 50% of the deals in the sample.[[107]](#footnote-108) The environment is explicitly mentioned only in one statute, covering 8% of the reviewed deals, but it is a factor that has been increasingly playing a central role in the stakeholderism debate.[[108]](#footnote-109) Lastly, we consider other stakeholder groups and factors, namely society at large, which is referred to in 9 statutes; the economy, which is mentioned in 7 statutes; and other unenumerated stakeholder groups and interests, which directors can elect to take into account under the “catch-all” clause included in 8 statutes.

Table 11 reports our findings for the 12 largest ERR deals and the 12 largest non-ERR deals in our sample.

Table 11. Protections for Communities, Environment and Other Stakeholders

|  |
| --- |
| **ERR Deals** |
| ***Target*** | ***Length of Commitment to Retain HQ Location (Months)*** | ***Continuation of Local Investments / Philanthropy*** | ***Environment*** | ***Other*** |
| *Heinz* | Unspecified | Yes | No | No |
| *Biomet* | 0 | No | No | No |
| *Station Casinos* | 0 | No | No | No |
| *Bausch & Lomb* | 0 | No | No | No |
| *Education Management* | 0 | No | No | No |
| *Duquesne Light* | 60 | Yes | No | No |
| *Reynolds & Reynolds* | 0 | No | No | No |
| *ClubCorp* | 0 | No | No | No |
| *Multi-Color* | 0 | No | No | No |
| *The Jones Group* | 0 | No | No | No |
| *Genesis HealthCare* | 0 | No | No | No |
| *Jo-Ann Stores* | 0 | No | No | No |
| **Mean** | 60.00 | - | - | - |
| **Median** | 60.00 | - | - | - |
| **% of Yes** | 17% | 17% | 0% | 0% |
| **Non-ERR Deals** |
| *Dell EMC* | 120 | No | No | No |
| *TXU* | 0 | No | No | No |
| *Clear Channel* | 0 | No | No | No |
| *Kinetic Concepts* | 0 | No | No | No |
| *Parexel* | 0 | No | No | No |
| *Florida East Coast* | 0 | No | No | No |
| *Claire’s Stores* | 0 | No | No | No |
| *Crescent* | 0 | No | No | No |
| *EGL* | 0 | No | No | No |
| *CDW* | 0 | No | No | No |
| *Life Time Fitness* | 0 | No | No | No |
| *Buffalo Wild Wings* | 0 | No | No | No |
| **Mean** | 120.0 | - | - | - |
| **Median** | 120.0 | - | - | - |
| **% of Yes** | 8% | 0% | 0% | 0% |

Table 11 shows that these additional stakeholder interests hardly received any protection. First, as far as local communities are concerned, we find that commitments to retain the location of the target company’s headquarters appeared in only two of the largest ERR transactions and one of the Non-ERR transactions. While one of the ERR examples was not limited to a specific time period, the remaining ERR example and its Non-ERR counterpart were limited to 60 and 120 months, respectively. Commitments to invest or to retain existing investments in local communities, philanthropy or charitable organizations were documented only in 17% the largest ERR deals and 8% of the top Non-ERR deals.[[109]](#footnote-110)

As Table A6 of the Online Appendix shows, the findings continue to hold when we examine all 105 deals in our sample. We find a commitment to retain the location of the target company’s headquarters in only 9% of all transactions, for an average period of 49 months. Additionally, only 4% of the transactions contained commitments to invest in local communities, philanthropy, or charitable organizations. When we separate the ERR and Non-ERR deals, the findings remain qualitatively similar.[[110]](#footnote-111)

It should be emphasized that these provisions are often very short and underspecified. Commitments related to the retention of the target’s headquarters were often vague and offered no contractual definition of “headquarters” nor a detailed specification of what minimum assets, employees, or operations must be maintained in order to satisfy the commitment. The same goes for commitments revolving around philanthropy or community involvement: although some of these commitments require the buyer to operate in a manner consistent with the target’s “past practice” or “historic levels”, none of them specify the amount of money that will satisfy the commitment. In any event, none of these commitments are enforceable by the potential beneficiaries.

Additionally, throughout our sample, we find no protection whatsoever for the environment. Apparently, despite the prominent role played by environmental issues in the stakeholderism debate, corporate leaders refrained from exercising their power to negotiate environmental safeguards or commitments. The abstract factors of “economy” and “society” merited no better treatment—none of the deals in our sample contained any specific provisions on the grounds that they would be beneficial to the economy or society at large. Lastly, corporate leaders have made no use of the discretion arising from the statutes’ “catch-all” provision—we found no protection for stakeholder groups not explicitly mentioned in the constituency statutes.

# Implications and Conclusions

## Did Constituency Statutes Deliver?

More than 30 states adopted constituency statutes with the “chief purpose to protect nonshareholders” from the effects of takeovers.[[111]](#footnote-112) The philosophy and goal of these statutes have been the subject of a heated debate since the time of adoption. Their departure from the well-established principle of shareholder primacy was viewed by some as an unwarranted novelty,[[112]](#footnote-113) and by others as an appropriate protection for stakeholders.[[113]](#footnote-114) In this Article, we asked a different question: taking as given the desirability of protecting stakeholders from the disruptive impact of acquisitions, we sought to assess whether the constituency statutes delivered on their promise.

Our analysis has provided a direct test of this question and a clear answer. We have examined all private equity acquisitions of public companies of significant size governed by constituency statutes that took place in the past two decades. Private equity acquisitions provide a good test case because they create significant risks for stakeholders, and therefore are clear instances of the potential disruptive impact that the statutes aimed at eliminating or at least curtailing. Our findings clearly indicate that the constituency statutes did not deliver their purported benefits.

Using hand-collected data, we documented a substantial amount of bargaining between corporate leaders and private equity buyers, and we identified what corporate leaders bargained for. Corporate leaders obtained significant benefits for stockholders and for themselves, but they obtained very little for stakeholders. Our review of the contractual terms of these deals finds very little protection from the risks posed to stakeholders by private equity control. In particular, in the vast majority of cases, corporate leaders have not obtained any limitation on the freedom of private equity buyers to fire employees and reduce employment levels. Furthermore, we find no protections for consumers, suppliers, creditors, the environment, communities, or other stakeholder groups, except for some rare and mostly cosmetic protection for the communities in which the target’s headquarters was located.

Moreover, a study of the legal details of these terms reveals that the limited stakeholder protections that are occasionally found in private equity deals are even weaker than they seem at first look. While contractual provisions designed to protect executives are typically well-specified, contractual provisions in favor of stakeholders are commonly under-specified, and therefore difficult to monitor and enforce. Furthermore, while the former provisions can be enforced by their beneficiaries, the latter protections cannot be enforced by stakeholders.

What makes our findings so telling is how few stakeholder benefits corporate leaders delivered. Had substantial protections been obtained in a significant number of cases, it would have been difficult to assess how well corporate leaders had carried out the role of stakeholder guardians entrusted to them by constituency statutes. With the clear patterns that our analysis identifies, however, clear conclusions are possible. Constituency statutes failed to deliver the benefits to stakeholders that were promised or hoped for in the push for the adoption of these statutes.

## Can Stakeholderism Deliver?

Stakeholderists argue that corporate leaders should be allowed to take the interests of stakeholders into account, and believe that doing so would address the externalities that companies impose on employees and other stakeholder groups.[[114]](#footnote-115) Stakeholderists rely on managerial discretion to balance the interests of stakeholders and shareholders in a socially desirable way.

But modern stakeholderists have paid little attention to the three-decade experiment of constituency statutes. Constituency statutes were motivated by a similar philosophy to that of modern stakeholderism – to harness the discretion of corporate leaders in order to protect stakeholders. Before embracing stakeholderism, it is necessary to pause and examine whether constituency statutes delivered on their promise and what lessons we can learn from the experience accumulated since their adoption.

### *Uncertainty regarding what the Statutes Authorized*

The first possible explanation for the failure of the constituency statutes is that the statutes authorized corporate leaders, or could be interpreted by corporate leaders as possibly authorizing them, to take stakeholder interests into account only to the extent that doing so would serve shareholder value. According to this explanation, corporate leaders are reluctant to bargain for costly stakeholder protections because of their perception that the statutes might have authorized them to protect stakeholders only when it would also be useful for shareholder value, but not when it is costly for shareholders—that is, the constituency statutes are interpreted by corporate leaders according to an “enlightened shareholder value” approach.

If this explanation is correct, we cannot infer from this experiment that a pluralistic stakeholderism, which treats stakeholder welfare as an end in itself rather than a mere means, cannot deliver protections to stakeholders. Instead, all we can infer is that that “stakeholderism-lite version” of enlightened shareholder value cannot be expected to deliver meaningful stakeholder protections. However, even in this case, it would be a meaningful and important conclusion for the current discourse.

The “enlightened shareholder value” approach has high-profile advocates. For example, the Reporters of the ongoing project for the American Law Institute’s Restatement of Corporate Law are now considering adopting this approach.[[115]](#footnote-116) The theory behind this proposal is that once the connection between the interests of shareholders and stakeholders is codified and made more salient, corporate leaders will be more likely to pay attention to it and make decisions that benefit stakeholders. However, this view overlooks the fact that many situations are not win-win, but rather involve significant trade-offs between the interests of some stakeholders and long-term shareholder value.

In the case of private equity deals, corporate leaders could bargain for protection to employees, consumers, suppliers, creditors, the environment, communities, or other stakeholder groups, but this might reduce the gains that the private equity buyer will be willing to provide to the selling shareholders or to corporate leaders themselves. If the reason why the constituency statutes have failed to produce meaningful protections for stakeholders is the (real or perceived) “enlightened shareholder value” approach of these statutes, then we should not expect this “soft” approach to produce more meaningful benefits to stakeholders in the future.

Furthermore, and importantly, we do not think that this explanation regarding the uncertainty of the statutes’ authorization is plausible and can explain the robust results of our study. As Section III.A.3 shows, the reasonable and most widely accepted view of the constituency statutes is that they allow corporate leaders to trade off the interests of stakeholders and shareholders. However, even if we limit our analysis to the acquisitions of companies incorporated in states that explicitly reject the priority of shareholders over other constituencies (Iowa, New York, Pennsylvania, and Nevada), we do not find stakeholder protections more meaningful than in the other states.

### *Shadow of Revlon*

Another possible explanation is that, in some states, corporate leaders were influenced by the applicability or potential applicability of *Revlon v. MacAndrews & Forbes Holdings*.[[116]](#footnote-117) Under this Delaware standard, once there is a decision to sell the company, corporate leaders have a duty to obtain the highest price for shareholders.[[117]](#footnote-118) As was noted in Section IV.A.3, there are only 13 deals (out of 105 deals in our sample) in states that explicitly adopted Revlon and an additional 39 deals in states that did not explicitly reject or adopt Revlon. It might be argued that corporate leaders of targets incorporated in these states saw themselves constrained in their ability to provide protections to stakeholders.

We believe, however, that this explanation does not persuasively make sense of our findings. First of all, even if Revlon duties applied or had some probability of applying, corporate leaders would not be subject to them unless the sale of the company becomes “inevitable.”[[118]](#footnote-119) Therefore, it is plausible that corporate leaders can take the position that they would consider a sale of the company only if there are certain protections for stakeholders and, subject to the existence of these protections, seek the buyer that would offer the highest price. However, we did not find evidence that this kind of process was even attempted.

Second, in about half of the deals examined in our sample state law had explicitly rejected Revlon. Nonetheless, these deals have no better protection for stakeholders than deals subject to the law of other states.

Third, and most importantly, even allowing for some substantial degree of legal uncertainty with respect to the co-existence of constituency statutes and Revlon or Revlon-like duties to shareholders, we would expect corporate leaders, based on their own beliefs and on the specific circumstances of the deal, to take different stances on this issue. Therefore, we would expect to find at least several deals with very strong stakeholder protections and many with good protections. In contrast, we did not find a single deal containing meaningful benefits for stakeholders. Thus, the shadow of Revlon cannot adequately explain our findings.

### Need for Shareholder Approval

It might be argued that even if corporate leaders were interested in providing protections for stakeholders, they would not be at liberty to do so, because these deals need shareholder approval. On this view, corporate leaders might believe that if they had bargained for some stakeholder protections in exchange for a somewhat lower deal premium, shareholders would not have approved the transaction. In our view, however, the need for shareholder approval could not explain the practical absence of stakeholder protections from the negotiated deals.

To begin with, since shareholders commonly received a substantial premium relative to the pre-announcement stock price, and thus relative to what they would likely have received had they voted the transaction down, it would have been in the interest of shareholders to vote for the transaction even with a somewhat lower, but still significant, premium.[[119]](#footnote-120) Indeed, the high support rate for deals commonly approved by shareholders indicates that an amended deal with some protections for stakeholders and a somewhat lower premium for shareholders would still have passed.[[120]](#footnote-121)

This explanation could have played a role if corporate leaders had secured meaningful protections for stakeholders in many cases with somewhat low premiums for shareholders. In that case, it could have been argued that seeking additional protections and lowering the premiums further would have prevented the transaction altogether. But the virtual absence of stakeholder protections is hard to explain in this way.

Indeed, even if hypothetically corporate leaders were willing to sacrifice stakeholder interests in order to close a profitable deal for shareholders and themselves, this would still suggest that the constituency statutes failed to deliver on their promise. At least some of the support for these statutes was motivated by the hope that they would prevent or curtail deals that enrich shareholders and corporate leaders but come at the expense of stakeholders.[[121]](#footnote-122)

Finally, although we do not view the need to obtain shareholder approval as a main driver of our results, we think that the discussion of it carries some lessons for supporters of stakeholderism. Stakeholderists largely advocate for providing corporate leaders with discretion to protect stakeholder interests and rely on such discretion to produce stakeholder-favoring results, without any other changes to corporate law. In particular, prominent stakeholderists accept that shareholders alone should elect directors and do not wish to revise this crucial aspect of corporate governance.[[122]](#footnote-123) However, the discussion in this Section highlights that the exclusive voting power of shareholders might be in tension, or even contradiction, with the desire to induce corporate leaders to serve all stakeholders.

The explanation under discussion suggests that the voting rights of shareholders might give corporate leaders strong incentives, or indeed force them, to avoid bargaining for stakeholder protections. As we explained above, this explanation does not seem plausible. However, the general point that incentives matter is correct, and we will return to it below. Stakeholderists need to take the incentives of corporate leaders seriously before suggesting that the discretion of corporate leaders can be readily harnessed to protect stakeholders.

### Corporate Leader Norms

An alternative explanation of our findings, and of the failure of constituency statutes, is to blame the shareholder-centric norms that dominated boardrooms and executive suites in the past. These norms, it might be argued, shaped how corporate leaders used their discretion. This explanation accepts that constituency statutes failed to protect stakeholders due to the prevailing norms. However, in this view, stakeholderism can still deliver substantial stakeholder protections in the future.

Rising concerns about corporate externalities in general and changes in social views and attitudes have been affecting the norms in boardrooms and executive suites, and can be expected to continue to do so.[[123]](#footnote-124) Indeed, the embrace of stakeholderism can further contribute to the strengthening of pro-stakeholder norms, which in turn might make stakeholderism more likely to be impactful.

To examine the force of this explanation, we considered separately the deals from the preceding seven, five, and three years to see whether we can identify any trend in the data that reflects growing pro-stakeholder norms. We have found that the practical absence of meaningful stakeholder protections is also present when it comes to very recent deals, which take place in a period in which stakeholder rhetoric has been extensively used by management and its advisors.

Thus, at least at the current time, the evidence is inconsistent with the presence of significant pro-stakeholder norms that can be relied on to induce corporate leaders to use their discretion to benefit stakeholders beyond what would serve shareholder value. To be sure, stakeholderists might argue in response that such norms can develop in the future. However, the fact that thus far they have not registered any meaningful impact suggests at a minimum that we should be cautious about relying on such predictions. This is especially the case because, as we now turn to discuss, following such norms would be in tension with the significant incentives that corporate leaders have.

### Incentives

We now turn to incentives. In our view, this is the most important factor in explaining our results, and it carries substantial lessons for stakeholderists. Incentives matter, and what corporate leaders have bargained for is consistent with, and can be explained by, the incentives that corporate leaders have.

To be sure, management and its advisors had a clear interest in pushing for the adoption of constituency statutes. These statutes enhanced the power of corporate leaders to veto acquisitions, but the increased bargaining power could be used discretionarily to obtain benefits for shareholders, stakeholders, or themselves. In other words, 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, they did not constrain managerial discretion in a way that made benefits for specific constituencies more likely or richer. This convincingly explains the strong support that the new legislation 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 interest of shareholders, are robustly linked to them. As discussed in the theoretical and empirical literature on corporate governance, shareholder legal rights, the structure of director and executive compensation, and the dynamics of the labor and control markets provide directors and top executives with incentives to increase shareholder value.[[124]](#footnote-125) By contrast, there is no significant link between the interests of corporate leaders selling their companies and the post-sale interests of stakeholders.

As we document, 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 significant profits. In addition, the agreements that corporate leaders negotiated 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), that would have been contrary to their 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. To the contrary, such an 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.

## Going Forward

Three decades after the passage of constituency statutes, our analysis of hand-collected data enables reaching a clear verdict on their success in addressing concerns about the effects of acquisitions on corporate stakeholders. Constituency statutes were at least partly justified on the basis of their promise for addressing concerns related to stakeholders. This promise enabled corporate leaders to join forces with labor representatives and other groups to obtain support for the legislation of the constituency statutes. But the statutes failed to deliver on this promise.

Even more important than the implications of our analysis for an assessment of constituency statutes are its implications for the influential current movement in support of stakeholderism. Stakeholderism has been garnering increasing support and offered as a major remedy for growing concerns about the adverse effects of companies on their stakeholders. Our findings should serve as a warning for advocates of stakeholderism and for the many who find the promise of stakeholderism alluring. In our view, they should recognize that the incentive systems of corporate leaders have prevented constituency statutes from protecting stakeholders. Such findings should similarly raise doubt over the broader approach that stakeholderism benefits stakeholders. At a minimum, our clear findings should give stakeholderists pause and force them to come to terms and wrestle with these findings before continuing with their advocacy.

1. \* James Barr Ames Professor of Law, Economics, and Finance, and Director of the Program on Corporate Governance, Harvard Law School. [↑](#footnote-ref-2)
2. \*\* Assistant Professor, Tel Aviv University Faculty of Law; Research Fellow, Program on Corporate Governance, Harvard Law School. [↑](#footnote-ref-3)
3. \*\*\* Terence M. Considine Fellow in Law and Economics, and Associate Director and Research Fellow of the Program on Corporate Governance, Harvard Law School.

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4. See section II.A infra. [↑](#footnote-ref-5)
5. *See* sources in Section II.B. [↑](#footnote-ref-6)
6. *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. [↑](#footnote-ref-7)
7. 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/. [↑](#footnote-ref-8)
8. For articles expressing such concerns, *see* the sources cited in *infra* note 28. [↑](#footnote-ref-9)
9. For an account and discussion of the statutes that are the focus of this paragraph, *see* sources noted in *infra* notes 31-32. [↑](#footnote-ref-10)
10. *See* e.g, James D. Cox & Thomas Lee Hazen, 1 Treatise on the Law of Corporations § 4:10 (3d ed. 2013). [↑](#footnote-ref-11)
11. *See* articles cited in *infra* notes 32, 37, and 46. [↑](#footnote-ref-12)
12. 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. [↑](#footnote-ref-13)
13. See sources noted in *infra* notes 48-51. [↑](#footnote-ref-14)
14. 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”). [↑](#footnote-ref-15)
15. 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). [↑](#footnote-ref-16)
16. 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). [↑](#footnote-ref-17)
17. *See, e.g.*, Stout, *supra* note 11, 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”). [↑](#footnote-ref-18)
18. 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>. [↑](#footnote-ref-19)
19. Business Roundtable, *Statement on the Purpose of a Corporation*, *supra* note 2. [↑](#footnote-ref-20)
20. *See, e.g.*, Alan Murray, *A New Purpose for the Corporation*, Fortune (Sept. 2019), <https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/> (“the [Business Roundtable] announced a new purpose for the corporation and tossed the old one into the dustbin”); David Gelles & David Yaffe-Befany, *Feeling Heat, C.E.O.s Pledge New Priorities*, N.Y. Times, Aug. 19, 2019 at A1 (stating that the new statement “break[s] with decades of long-held corporate orthodoxy”). A more skeptical view regarding the significance of the Business Roundtable statement is offered in a recent Wall Street Journal op-ed by two of us. *See* Lucian Bebchuk & Roberto Tallarita, *Stakeholder Capitalism Seems to be Mostly for Show*, Wall. St. J., August 7, 2020. [↑](#footnote-ref-21)
21. Davos Manifesto, *supra* note 3 (“[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…”). [↑](#footnote-ref-22)
22. The Reporter discussed this possibility in an NYU roundtable on December 6, 2019. [↑](#footnote-ref-23)
23. 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/>. [↑](#footnote-ref-24)
24. *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/. [↑](#footnote-ref-25)
25. For a recent defense of stakeholderism, *see* Mayer, *supra* note 12, at 39. [↑](#footnote-ref-26)
26. Business Roundtable, *Statement*, *supra* note 2. [↑](#footnote-ref-27)
27. *See* *infra* section III.A. [↑](#footnote-ref-28)
28. *See infra* note 65 and accompanying text. [↑](#footnote-ref-29)
29. 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.”). [↑](#footnote-ref-30)
30. 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>. [↑](#footnote-ref-31)
31. 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). [↑](#footnote-ref-32)
32. *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). [↑](#footnote-ref-33)
33. *See, e.g.,* Equilar, *CEO Pay Trends* 18 (2018); Meridian Compensation Partners, *Trends and Development in Executive Compensation* 21 (2018). [↑](#footnote-ref-34)
34. *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). [↑](#footnote-ref-35)
35. For a discussion of state anti-takeover laws, *see* Michal Barzuza, *The State of State Antitakeover Law*, 95 Va. L. Rev. 1973 (2009). [↑](#footnote-ref-36)
36. 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.” [↑](#footnote-ref-37)
37. For the different structures and provisions of the constituency statutes, *see infra* section III.A.2. [↑](#footnote-ref-38)
38. *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 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”). [↑](#footnote-ref-39)
39. 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”). [↑](#footnote-ref-40)
40. Martin Lipton, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. Chi. L. Rev. 187 (1991). [↑](#footnote-ref-41)
41. Steven M.H. Wallman, *Corporate Constituency Statutes: Placing the Corporation's Interests First*, 11 Bus. Law. Update 1, 2 (1990). [↑](#footnote-ref-42)
42. *See, e.g.* Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 Mich. L. Rev. 846, 848 (1989). [↑](#footnote-ref-43)
43. 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). [↑](#footnote-ref-44)
44. *See, e.g.,* Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. Fin. Econ. 5 (1983). [↑](#footnote-ref-45)
45. Andrei Schleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers ,* in Corporate Takeovers: Causes and Consequences (Alan J. Auerbach ed. 1988). [↑](#footnote-ref-46)
46. *Id.* at 53. *See also* Coffee, *supra* note 39, at 440 (“[some] stakeholders… are in a poor position to bargain. Having sunk substantial investments in the firm, they are exposed…to shareholder opportunism”). [↑](#footnote-ref-47)
47. Johnson & Million, *supra* note 38, at 850. [↑](#footnote-ref-48)
48. Minutes of the Nevada State Legislature, Assembly Committee on Judiciary, May 21, 1991, p. 12-15. [↑](#footnote-ref-49)
49. 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.). [↑](#footnote-ref-50)
50. *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”). [↑](#footnote-ref-51)
51. *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). [↑](#footnote-ref-52)
52. Commonwealth of Pennsylvania, Legislative Journal, Dec. 6, 1983, at 1431, 1436, *quoted in* Orts *supra* note 32, ft. 47. [↑](#footnote-ref-53)
53. 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). [↑](#footnote-ref-54)
54. *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”). [↑](#footnote-ref-55)
55. For a discussion of the bargaining power hypothesis from shareholder value maximization perspective, *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). [↑](#footnote-ref-56)
56. *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 32, at 1020-1022. [↑](#footnote-ref-57)
57. 2014 La. ALS 328 (enacting the new Louisiana Business Corporation Act, effective January 1, 2015, which does not include a constituency statute). [↑](#footnote-ref-58)
58. 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. [↑](#footnote-ref-59)
59. Conn. Gen. Stat. § 33-756 (1990). [↑](#footnote-ref-60)
60. HB 5530, 2010 ALS 35 (Conn. 2010). [↑](#footnote-ref-61)
61. See Tables A1-A6 to the Online Appendix, in which the MacDermid acquisition appears. [↑](#footnote-ref-62)
62. Four states (Mississippi, New Mexico, Ohio, and Wyoming) oblige directors to consider the interests of shareholders. Therefore, while directors may or may not, in their discretion, consider the interests of stakeholders (and could 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. [↑](#footnote-ref-63)
63. *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. [↑](#footnote-ref-64)
64. Karmel, *supra* note 46, at 96. [↑](#footnote-ref-65)
65. American Bar Association, *supra* note 32, 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) (“while 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”). [↑](#footnote-ref-66)
66. Iowa Code § 490.1108A. [↑](#footnote-ref-67)
67. N.Y. Bus. Corp. Law § 717. [↑](#footnote-ref-68)
68. 15 Pa. Cons. Stat. § 1715. [↑](#footnote-ref-69)
69. 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”). [↑](#footnote-ref-70)
70. *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 empirical analysis. [↑](#footnote-ref-71)
71. Tenn. Code § 48-103-204. The Tennessee constituency statute has an opt-in mechanism and therefore is not included in our empirical analysis. [↑](#footnote-ref-72)
72. Vt. Stat. tit. 11A, § 8-30. [↑](#footnote-ref-73)
73. *See, e.g.*, Blair & Stout, *supra* note 11, at 253 (“mentioning state constituency statutes as an example of legislation that weakens shareholders’ control over directors”); Hansmann & Kraakman, *supra* note 13, 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 32, 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 6 (“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”). [↑](#footnote-ref-74)
74. *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); 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). [↑](#footnote-ref-75)
75. *See* Robert J. Jackson Jr., *Private Equity and Executive Compensation*, 60 Ucla L. Rev. 638 (2013) (analyzing how executive compensation in companies owned by private equity firms differs from executive compensation in public companies, and concluding that private equity investors tie CEO pay much more closely to performance than do the boards of directors of otherwise similar public companies); Kaplan & Stömberg, *id*, at 130-131 (observing that private equity firms “pay careful attention to management incentives in their portfolio companies” and that “[t]hey 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”). [↑](#footnote-ref-76)
76. 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). [↑](#footnote-ref-77)
77. 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). [↑](#footnote-ref-78)
78. 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](https://medium.com/%40teamwarren/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/>. [↑](#footnote-ref-79)
79. *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> [↑](#footnote-ref-80)
80. 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%. [↑](#footnote-ref-81)
81. 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. [↑](#footnote-ref-82)
82. No transactions satisfying the sample selection criteria were found between 2000 and 2003. [↑](#footnote-ref-83)
83. Revlon, *supra* note 61, at 182 (“The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit”). The duties to maximize shareholder value in an “inevitable” sale of the company came to be known as “Revlon duties.” [↑](#footnote-ref-84)
84. Cain, McKeon, & Davidoff Solomon, *supra* note 77. [↑](#footnote-ref-85)
85. The Online Appendix is available at [**XXX**] (the "Online Appendix"). [↑](#footnote-ref-86)
86. As mentioned above, we relied on the 'Background of the Merger' section in the proxy statements as the primary source for the data regarding the bargaining process. [↑](#footnote-ref-87)
87. We examined the unaffected premium provided by FactSet for a random sample of deals and found that it is consistent with the information provided in the proxy materials. [↑](#footnote-ref-88)
88. 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. [↑](#footnote-ref-89)
89. Gains to shareholders are slightly higher in the 81 smaller transactions in our sample. The unaffected premium had a mean (median) of 31% (25%) in the smaller ERR deals; and 38% (30%) in the smaller ERR deals. *See* Table A1 in the Online Appendix. [↑](#footnote-ref-90)
90. *See* *supra* Table 4. [↑](#footnote-ref-91)
91. We collected data on commitments give in favor of all executives and directors that were mentioned in the proxy statements. [↑](#footnote-ref-92)
92. *See* Jackson, *supra* note 71 (finding that the level of CEO pay in companies owned by private equity firms is statistically indistinguishable from the level of pay in similar public companies. However, private equity investors tie CEO pay much more closely to performance than do the boards of directors of otherwise similar public companies). [↑](#footnote-ref-93)
93. 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. [↑](#footnote-ref-94)
94. The Online Appendix reports substantially similar results with respect to the 81 smaller deals in our sample. We find that for the smaller ERR transactions, the average (median) amount of payment that target's executives receive Qua Shareholders is $26.1 ($11.2) million, the Payment Qua Executives is $6.5 ($3.3) million. Higher gains were documented for the smaller Non-ERR transactions, with the average (median) amount of Payment Qua Shareholders being $40.7 ($10.8) million, and Payment Qua Executives being $15.0 ($11.5) million. [↑](#footnote-ref-95)
95. These numbers combine (i) percentage of deals in which the buyer committed to retain the target's CEO (42% of the top ERR and 17% for the top Non-ERR deals), and (ii) the percentage of deals in which other executives received such a commitment (33% of the top ERR and 25% for the top Non-ERR deals), while counting only once deals that fall within these two categories. [↑](#footnote-ref-96)
96. Some representative examples are: (1) “It is *possible* that some or all of our executive officers may discuss or enter into agreements with parent regarding their continuing employment”; (2) “Acquirer has *expressed its intention* to cause the surviving corporation to enter into agreements with other members of our management team”; and even (3) “Parent has *engaged in initial conversations* with certain members of management” (Regarding employment arrangements with the surviving company). [↑](#footnote-ref-97)
97. The Online Appendix reports substantially similar results with respect to the 81 smaller deals in our sample. In 22% of the smaller ERR deals and 33% of the Non-ERR deals, the proxy statement expressly states that the target's CEO or other top executives will be employed in the surviving company. “Softer” commitments were documented in 54% of the smaller ERR transactions and in 33% of Non-ERR transactions. [↑](#footnote-ref-98)
98. *See* Table A2 of the Online Appendix. [↑](#footnote-ref-99)
99. As Table A3 of the Online Appendix shows, the findings also hold when we examine the 81 smaller deals in our sample. The average (median) amount of payments that directors received Qua Shareholders for the smaller ERR and Non-ERR transactions is $27.3 ($6.4) million and $28.9 ($5.4), respectively. Directors received Payments Qua Directors of any sort in 61% of the smaller ERR transactions and 58% of the Non-ERR transactions, with an average (median) aggregate amount of $1.3 ($0.6) million and $1.2 ($1.1) million, respectively. Directors were assigned board seats at the surviving company in 5% of the smaller ERR transactions and in 13% of the smaller Non-ERR transactions. [↑](#footnote-ref-100)
100. See *supra* notes 43-48, and accompanying text. [↑](#footnote-ref-101)
101. To determine the value of this dimension, we looked for exclusions of enforceability in the clauses containing the documented commitments, as well as for general “No Third-Party Beneficiaries” clauses in the miscellanea of the merger agreements. Clauses of the latter type were reviewed in search of exceptions that expressly allow employees to enforce their rights. [↑](#footnote-ref-102)
102. As Table A4 of the Online Appendix shows, these results also hold as we examine when we examine the 81 smaller deals in our sample. Commitments to retain target's employees in the surviving company were only documented in five of these transactions. Additionally, commitments to maintain the levels of compensation and benefits for continuing employees (without a commitment to retain their employment) were documented only in 63% of the smaller ERR and 68% of the smaller Non-ERR transactions, and were typically limited to a time period averaging 11.00 and 12.50 months, respectively. Employees received additional payments in 10% of the smaller ERR transactions and in 13% of the smaller Non-ERR transactions, with an average amount of $0.2 million and $1.3 million, respectively; and explicit rejection of third-party beneficiary rights to employees was documented in 93% of the smaller ERR transactions and 92% of the Non-ERR transactions. [↑](#footnote-ref-103)
103. For representative examples of such commitment see the 'White River Capital' merger agreement, stating that: “Immediately after the effective time of the merger, the surviving corporation and Coastal Credit will continue to employ all employees, *on an 'at-will' basis*”; as well as in the ' Silverleaf Resorts' merger agreement, which stipulates that: “As of the Closing Date, Parent shall cause the Company to continue to employ each employee of the Company [...] *Nothing in this provision precludes the Company from terminating an Employee’s employment for any reason at any time following the Closing Date.*” [↑](#footnote-ref-104)
104. The relevant covenant in the merger agreement states that: “For three years (or five years in the instance specified below), a majority of the Continuing Directors must approve any decision by IMS that is inconsistent with certain commitments made under the Merger Agreement, which include: to the extent commercially reasonable, maintaining Baker’s current staffing levels at its business locations”. [↑](#footnote-ref-105)
105. *See* Table A4 of the Online Appendix. [↑](#footnote-ref-106)
106. *Id*. [↑](#footnote-ref-107)
107. *See supra* Table 8. [↑](#footnote-ref-108)
108. *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/. [↑](#footnote-ref-109)
109. As Table A6 of the Online Appendix shows, shifting our view to the 81 smaller transactions in our samples yields even more significant results. Only 7% of the smaller ERR transactions and 8% of the smaller Non-ERR transactions contained a commitment to retain the target's headquarters for an average period of 24 and 33 months, respectively. Additionally, only 2% of the smaller ERR transactions and 3% of the smaller Non-ERR transactions contained commitments to investment in local communities or philanthropy. [↑](#footnote-ref-110)
110. See Table A6 of the Online Appendix. [↑](#footnote-ref-111)
111. Johnson & Millon, *supra* note 38, at 848. [↑](#footnote-ref-112)
112. *See, e.g.*, *supra* note 4 and the discussion in Section II.C. [↑](#footnote-ref-113)
113. *See, e.g.*, *supra* notes 11-12, and 25-26. [↑](#footnote-ref-114)
114. 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>. [↑](#footnote-ref-115)
115. The Reporter discussed this possibility in an NYU roundtable on December 6, 2019. [↑](#footnote-ref-116)
116. Revlon, *supra* note 61. [↑](#footnote-ref-117)
117. *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”). [↑](#footnote-ref-118)
118. *Id.*, at 184. [↑](#footnote-ref-119)
119. *See, e.g.,* Matthew D. Cain, Sean J. Griffith, Roberto J. Jackson & Steven Davidoff Solomon, *Does Revlon Matter? An Empirical and Theoretical Study* 1, 4-5 (ECGI Working Paper, 2020), available at [https://ssrn.com/abstract=3418499](https://ssrn.com/abstract%3D3418499) (providing evidence on the magnitude of deal premium in1,913 transactions from 2003-2017)*.* [↑](#footnote-ref-120)
120. *See, e.g.,* 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). [↑](#footnote-ref-121)
121. *See supra* notes 35-39, 41-52, and accompanying text. [↑](#footnote-ref-122)
122. *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”). [↑](#footnote-ref-123)
123. For discussions of such problems and externalities, see *supra* note 109. For examples as to how these social views affected the boardroom discussion, *see* *supra* notes 19-20, 103. [↑](#footnote-ref-124)
124. For a discussion of corporate leaders’ incentives, *see* Bebchuk & Tallarita, *supra* note 28, at 29-40; Fisch & Davidoff Solomon, supra note 28. [↑](#footnote-ref-125)