#  Implications and Objections

In this Part we examine the implications of our findings, and we address several potential objections to our conclusions. The main implication of our study, we argue, is that we should not rely upon the use of managerial discretion to mitigate corporate externalities. We also discuss several objections regarding characteristics of our sample or alternative justifications for the decisions made by corporate leaders, and we explain why we believe that these objections do not succeed in challenging our main conclusions.

## Implications: What Corporate Leaders Can Be Expected to Do

Having ruled out, in Part VI, several potential alternative explanations, we concluded that the most likely driver of our findings is that corporate leaders lack incentives to deliver value to stakeholders at the expense of shareholders.[[1]](#footnote-2) In fact, given the design of their compensation arrangements, the structure of the labor market and the corporate control market, and the other incentives they face, corporate leaders have incentives not to deliver value to stakeholders beyond what is instrumentally useful to increase shareholder value. This fact conflicts with the belief of stakeholderism advocates, who expect corporate leaders to give weight to the interests and welfare of stakeholders, either because doing so is part of the purpose of the corporation (purpose-based theory) or because they implicitly promised to do so in order to induce stakeholders to invest their skills into the company (implicit promise and team production theories).[[2]](#footnote-3)

The main implication of this fact is that we should not expect corporate leaders to use their discretion to reduce corporate externalities. A central claim of stakeholderism is that corporate social responsibility can be an effective tool to address pressing social problems, such as climate change, economic inequality, or discrimination of minorities.[[3]](#footnote-4) For example, a large number of major companies have been issuing pledges and statements in which they commit to reduce their carbon emissions to zero within a certain timeframe,[[4]](#footnote-5) and some experts believe that such private-ordering solutions to climate change are more promising than climate regulation.[[5]](#footnote-6)

Yet, if corporate leaders choose not to protect the environment, employees, or other stakeholders in a moment when stakeholders needed extraordinary protection and shareholders enjoyed a booming market, we cannot expect them to protect stakeholders in normal times. Thus, our findings warn policymakers and concerned citizens not to rely on the discretion of corporate leaders and to pursue instead, with a renewed sense of urgency, regulatory solution to climate change and other pressing social problems.

## Objections

We now turn to examine several potential objections to our conclusions above. Some of these objections question the characteristics of our sample, others provide justifications for our findings that do not imply the general unreliability of managerial discretion to benefit stakeholders. However, none of these objections, we argue, refute our main conclusions.

### Acquired Companies Are Different?

It might be argued that stakeholder-oriented corporate leaders would simply reject acquisition offers and would instead retain long-term independence precisely because an independent company is a more favorable scenario for employees, local communities, local suppliers, and other stakeholders. According to this view, our sample, which consists of affirmative decisions to sell the company, will be disproportionately composed by corporate leaders with little regard for stakeholders. This theory suggests that our finding cannot be generalized to all corporate leaders and therefore we cannot conclude that corporate leaders are not stakeholder-oriented, because the vast majority of stakeholder-oriented corporate leaders can be found outside our sample, among those who choose not to sell their companies.

However, this theory does not persuasively explain why stakeholder-oriented corporate leaders would refuse to sign a deal that produces a significant surplus and keep the company independent rather than sell the company and distribute part of that surplus to stakeholders. Indeed, whenever a sale entails a large surplus, like in most of the deals in our sample, it is plausibly in the best interests of stakeholders to complete the sale and allocate to them part of the surplus rather than to keep the company independent and forgo any surplus.[[6]](#footnote-7)

Thus, if many corporate leaders were stakeholder-oriented, as this theory suggests, one would expect to find many completed sales producing significant surplus and providing, at the same time, significant protections to stakeholders. The fact that we largely do not find such deals is strong evidence against such alternative hypothesis.

### Prohibitive Costs of Contractual Protections?

It might be argued that including stakeholder protections in the merger agreement is prohibitively costly and therefore the absence of such protections does not imply that corporate leaders do not deliver other, less expensive, benefits to stakeholders. This argument is based, in particular, on the observation that a prohibition to lay off employees or to relocate the company headquarters create constraints that may potentially have huge efficiency losses in the future. Therefore, the cost of obtaining such protections from a buyer is exceedingly large.

In this hypothesis, stakeholderism is perhaps unable to provide contractual protections in an acquisition but could nonetheless provide many other forms of protections in the ordinary course of business. According to this view, the conclusions of our study cannot be generalized beyond the specific context of corporate acquisitions.

The objection is unconvincing. To begin with, as explained in Section II.B.4, the transactions examined in our study are of significance economic relevance, and therefore even if our conclusions were not generalizable, our findings would still be a serious indictment for stakeholderism.

Furthermore, the assertion that contractual protections for stakeholders are exceedingly costly is unsubstantiated. Protections for some stakeholders—for example, employees—may be provided in ways that do not limit the buyer’s freedom to make efficient business decisions, but rather impose pre-determined costs. For example, instead of a prohibition to lay off employees, corporate leaders could have bargained for a cash payment to be paid to each laid-off employee. The absence of these kinds of protections with predictable, pre-quantified costs suggest that the above argument is not a relevant factor driving our findings.

### Stakeholders Were Still Made Better Off by the Acquisition?

It might be argued that, despite the absence of contractual provisions in favor of stakeholders, stakeholders were still made better off by the acquisition, either through soft pledges that cannot be observed in the transaction documents or through the selection of a stakeholder-friendly buyer.

*Soft Pledges*. One version of this theory is that corporate leaders might have negotiated informal commitments in favor of stakeholders. On this view, contractual protections are hard to specify, and therefore stakeholder-oriented corporate leaders decide to protect stakeholders through unobservable soft pledges.

It is not clear, though, why corporate leaders are able to design formal contractual protections for shareholders, directors, and executives but not for employees and other stakeholders. For example, an extraordinary severance payment for laid-off employees is relatively easy to specify and formalize, and there is no plausible reason why corporate leaders would prefer a “soft pledge” to such a simple and effective protection, other than the reluctance to reallocate value from shareholders to employees.

Furthermore, even if corporate leaders did obtain soft pledges from the buyer, it is debatable whether stakeholders would receive any meaningful benefits from them. Typically, soft pledges are so vague that holding someone accountable for them is extremely difficult. Also, even if the scope of the pledge were sufficiently defined, there is no enforcement mechanism that can ensure that stakeholders receive the promised benefit. In particular, in addition to the absence of formal enforcement mechanisms, the individuals who have negotiated the soft pledges might have well left the company by the time the pledge must be enforced. These obvious problems are probably the reason why corporate leaders typically make sure that their own benefits and rights are documented in formal agreements.

*Stakeholder-Friendly Buyer.* Another version of this theory is that corporate leaders might benefit stakeholders through the choice of a stakeholder-friendly buyer and the rejection of potential buyers that would be hostile to stakeholders. On this account, stakeholder-oriented corporate leaders accepted the offers of buyers that would not pose major risks to stakeholders and rejected (or would have rejected) the offers of alternative, less stakeholder-friendly bidders, even if such alternative offers included a higher premium. Since we only observe the offers that have been accepted, we cannot identify all the cases in which corporate leaders, in order to protect stakeholders, rejected acquisition offers favorable to shareholders, our study cannot rule out the possibility that corporate leaders did in fact deliver significant value to stakeholders.

However, this objection ignores the simple fact that corporate leaders can negotiate stakeholder protections at no additional cost for the buyer, but in exchange for a reduced premium. Therefore, there is no systematic reason why corporate leaders, in order to protect stakeholders, should reject a high-premium deal that creates risks for stakeholders rather than negotiating explicit protections for stakeholders for a somewhat lower premium.

Furthermore, as we documented in Section V.A., in many of the deals in our sample, corporate leaders were aware, at the time of entering into the deal, that the merger would produce adverse consequences for stakeholders. In all those cases, the hypothesis of a stakeholder-friendly buyer cannot explain the lack of explicit protections.

### Stakeholders Protected by Their Own Contracts?

It might be argued that explicit stakeholder protections are unnecessary because stakeholders are sufficiently protected by the terms of their own contracts with the company. Employees, for example, might not need job protections because of severance payments included in their contracts. Therefore, the reason why we do not find stakeholder protections is not because corporate leaders do not give weight to stakeholder interests but because these protections are already included in the regular contracts with stakeholders.

This argument, however, is hardly persuasive. To begin with, employees of U.S. companies enjoy an unusually limited set of statutory protections, compared to other OECD countries.[[7]](#footnote-8) For example, unlike in most other developed economies, severance pay in case of individual dismissals or mass layoffs is not mandated by the law, and therefore is a matter of individual agreements between employers and employees.[[8]](#footnote-9) Furthermore, the vast majority of U.S. workers do not belong to a labor union and do not have an employment contract, and therefore they are typically not entitled to any severance payments.[[9]](#footnote-10) Finally, even those employees who do receive a severance payment typically receive a quite limited sum, between one and two weeks for each year of service.[[10]](#footnote-11)

Most importantly, one of the central rationales for stakeholderism is precisely that contractual protections do not sufficiently address stakeholder risks. Indeed, the argument that stakeholders can take care of themselves through their contracts with the company is the standard argument used by contractarians and laissez-faire advocates to argue against stakeholderism, not in favor of it.[[11]](#footnote-12) If stakeholderism does not deliver benefits to stakeholders in addition to their contractual protections, it means that it has failed to deliver on one of its central promises.

### Design Conventions and Inertia?

A further possible objection is that stakeholder protections in merger agreements are simply unconventional and against market practice, and therefore even corporate leaders who give substantial weight to stakeholder interests find it difficult to change the way things are usually done. On this view, much of M&A contractual practice is driven by conventions and standardized models, and stakeholder protections would be a radical innovation, therefore difficult to implement.[[12]](#footnote-13)

However, this objection seems to ignore the sophistication of the actors involved. The deals in our samples were designed by highly skilled, highly paid experts who are perfectly capable to devise and implement contractual innovations. In fact, they often do so to adapt standard terms to deal-specific circumstances or to respond to legal or business changes.[[13]](#footnote-14)

Therefore, if corporate leaders (perhaps as a consequence of the alleged move away from shareholder primacy towards stakeholderism) truly had incentives to provide protections for stakeholders, their skilled advisors would certainly find a way to design adequate contractual solutions to that end.

### End-Period Exceptionalism?

A final possible objection to our conclusions is that our findings are valid only with respect to end-period decisions, such as the sale of the company, but non with respect to ongoing business decisions. On this view, the decisions made by corporate leaders when selling the company are different from other kinds of decisions made during the regular life of the company, because after the sale the company ceases to exist as an independent entity and corporate leaders leave their position and are no longer in the same relationship with shareholders and stakeholders.[[14]](#footnote-15)

Although it is true that end-period decisions present peculiar characteristics and may systematically differ from ongoing business decisions, acquisitions are corporate transactions of huge economic value, and therefore even if our findings were valid solely within this context, they would still reveal a major failure of stakeholderism. Furthermore, it is not clear why corporate leaders should be expected to be less stakeholder-friendly in end-period decisions than in ongoing business decisions. Indeed, during the regular life of the company, corporate leaders need to be more, not less, responsive to the interests of shareholders, as they have to win their favor for subsequent reelections. In fact, in the corporate governance literature, end-period decisions are considered to be at risk of being less aligned with shareholder interests.

Therefore, one could plausibly argue that corporate leaders willing to benefit stakeholders enjoy more freedom to do so in an end period, such as the sale of the company, precisely because they can sacrifice shareholder value with less fear of consequences. On this alternative view, our findings are even more telling, since stakeholder-oriented corporate leaders should be expected to be more, not less, inclined to bargain for stakeholder protections in a merger agreement rather than in an ongoing business agreement.

# Conclusion

Focusing on the large wave of corporate deals taking place during the Covid pandemic, this Article investigated the extent to which corporate choices delivered value to corporate stakeholders. The time of Covid was a period that was accompanied by peak support for stakeholderism from corporate leaders, heightened concerns about the plight of stakeholders, and propensity for shareholders generated by booming stock markets. Nonetheless, we find that, although corporate leaders negotiated for substantial gains for shareholders and the private interests of corporate leaders, corporate leaders did little to negotiate for protections for employees or any other stakeholder groups. Stakeholder capitalism failed to deliver in the time of Covid.

Our findings support the view that corporate leaders have incentives not to serve the interests of stakeholders beyond what would b, not to attach independent weight to such interests as element of corporate purpose, and not to act in ways that reflect alleged implicit promises to treat stakeholder well in an acquisition. These findings have implications for ongoing debate on stakeholderism, and they caution against accepting or relying on the claims made by its supporters.

Corporate leaders, our findings suggest, should not be expected to deliver value to stakeholders even if and when they employ stakeholderist rhetoric. Those who take stakeholder concerns seriously, as we do, should thus seek not rely on corporate leaders’ addressing these concerns on their own, but rather focus on seeking governmental reforms that would protect stakeholders in a wide range of areas. In particular, those concerned about climate change risks should recognize that corporate rhetoric on the subject cannot be expected to contribute meaningfully to addressing such risks, and should focus on facilitating the major governmental actions (such as carbon taxes) that would be essential to meeting the challenges posed by climate risks.

1. *See supra* Part VI. [↑](#footnote-ref-2)
2. *See supra* Section II.A. [↑](#footnote-ref-3)
3. *See, e.g.,* Aneil Kovvali & William Savitt, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita* (manuscript at 7-8) (on file with authors). [↑](#footnote-ref-4)
4. *See, e.g.*, Renee Cho, *Net Zero Pledges: Can They Get Us Where We Need to Go?*, State of the Planet, Dec. 16, 2021, https://news.climate.columbia.edu/2021/12/16/net-zero-pledges-can-they-get-us-where-we-need-to-go/ (“Of the 2,000 largest public companies in the world, 622 have net zero strategies. In addition, over 450 financial firms pledged $130 trillion in private capital to help reach net zero by 2050.”). [↑](#footnote-ref-5)
5. *See, e.g.*, Michael P Vandenbergh & Jonathan M Gilligan, Beyond Politics: The Private Governance Response to Climate Change (2017). [↑](#footnote-ref-6)
6. To illustrate, compare the following three scenarios among which directors of the hypothetical Alpha, Inc. must choose: (a) selling the company to buyer Beta, Inc. for a premium of $100 million and accepting that Beta would lay off 300 employees; (b) keeping the company independent, thus avoiding the layoff of 300 employees and giving up the $100 million premium for shareholders; (c) selling the company to Beta conditional on Beta committing to pay $50,000 to each laid-off employee, thus securing a $95 million premium for shareholders and a $5 million relief for employees. The objection discussed in Subsection VII.B.1 suggests that virtually all directors would choose Scenario (b) to protect employees, and this is the reason why we do not observe stakeholder protections in merger agreements. However, there is no reason why directors facing a deal proposal that poses significant risks to employees, such as the example discussed above, would not choose Scenario (c), which preserves the creation of a large surplus but provides considerable protections for stakeholders. [↑](#footnote-ref-7)
7. *See* generally OECD, OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis 179-181 (2020). [↑](#footnote-ref-8)
8. *Id.* at 180. [↑](#footnote-ref-9)
9. Drew Desilver, *10 Facts About American Workers*, PewResearch.org, Aug. 29, 2019, <https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/>. [↑](#footnote-ref-10)
10. Deborah Acosta, *Severance Pay: What It Is and Why You Should Negotiate a Package Before Accepting a Job*, Wall St. J., Apr. 2, 2021, <https://www.wsj.com/articles/severance-pay-what-it-is-and-why-you-should-negotiate-a-package-before-accepting-a-job-11608152200>. [↑](#footnote-ref-11)
11. For a well-known early work taking this view, see frank h. Easterbrook & Daniel R. Fischel, The Economic Structure Of Corporate Law 37 (1991). [↑](#footnote-ref-12)
12. For a discussion of the use of precedents in M&A legal drafting, see generally *Robert Anderson & Jeffrey Manns, The Inefficient Evolution of Merger Agreements*, 85 G.W. L. Rev. 57, 64-65 (2017). [↑](#footnote-ref-13)
13. *See, e.g.*, John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice*, in Research Handbook on Mergers and Acquisitions 35 (Claire A. Hill & Steven Davidoff Solomon eds. 2016) (arguing that a small, but positive, fraction of a M&A contract consists of “truly unique terms that could not be found in another contract” and that market practice “changes over time in response to legal and business shocks”). [↑](#footnote-ref-14)
14. For a general discussion of the “last period problem” in the sale of a company, see for example Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 Fordham L. Rev. 1899, 1941-1947 (2003). [↑](#footnote-ref-15)