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LAW AND SOCIAL JUSTICE: OPERATIONALIZING STAKEHOLDER THEORY IN GOVERNMENTAL REGULATIONS AND CORPORATE DECISION-MAKING FOR SOCIAL AND ECONOMIC SUSTAINABILITY, RESILIENCE, AND DEMOCRACY

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LAW AND SOCIAL JUSTICE: OPERATIONALIZING STAKEHOLDER THEORY IN GOVERNMENTAL REGULATIONS AND CORPORATE DECISION-MAKING FOR SOCIAL AND ECONOMIC SUSTAINABILITY, RESILIENCE, AND DEMOCRACY

Daniel Herron*
Laura Powell*

ABSTRACT

It is time to shed the twentieth century capitalistic ways of shareholder maximization. It is time to fashion a “new” capitalism which retains the competitive dynamic but redefines its force to create a more socially just society. That is a huge order, to say the least. But, there is a path to that end. The 2019 U.S. Business Roundtable’s announcement, the creation of the Benefit Corporation, and the United Kingdom’s 2006 Companies Act began that process.¹ These developments are enabling the beginning of the redefining of one of the bedrocks of capitalism: fiduciary

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obligation. The methodology of these developments is the stakeholder theory of corporate and governmental decision-making. Drawing on concepts such as utilitarian philosophy, social justice, and democratic principles, this paper explores the realities and potential of stakeholder corporate governance on concepts of corporate governance.

The stakeholder approach to corporate and governmental decision-making affects all aspects of society. However, it requires a paradigm shift in our thinking to shape a holistic, comprehensive, and sustainable perspective. Those who are affected by market decisions have a fundamental right to have their interests considered, whether it be through corporate decision-making or governmental regulations. Stakeholder theory may take many forms in its application to a capitalistic market. It shares two basic concepts with democracy: equity and sustainability—equity because it is fair and brings all parties “[to] the table” and sustainable because all parties are invested and heard.

Keywords
stakeholder theory, nobles oblige, game theory, fiduciary duty, Companies Act § 172, international law

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3 Id. (arguing that implementation of a stakeholder governance model rebalances corporate power and ensures all stakeholders in the economy—such as workers and communities—benefit).
5 Damini Singh Chauhan, Paradigm Shift From Shareholder’s to Stakeholder’s Primacy Model, O.P. JINDAL GLOB. UNIV. 1, 6-7 (Jul. 11, 2022) (discussing the need to change old governance frameworks by considering past failures, advances in information, and the U.N.’s Global Compact to move towards sustainable companies and stakeholders).
6 See, e.g., Consumer Bill of Rights, OFF. OF CONSUMER AFF. & BUS. REG., https://www.mass.gov/info-details/consumer-bill-of-rights (last visited Jan. 10, 2024) (showing that consumers have fundamental rights which companies must take into account when making decisions).
7 Remaking Corporate Law, supra note 2, at 13 (discussing how stakeholder theory brings underrepresented groups to the bargaining table).
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“But even more will be demanded from the one to whom much has been entrusted.”

The Western concept of trust and obligation evolved over time and manifested itself in the concept of fiduciary responsibilities. In the broadest sense, the concept evolves from the idea that those with power have a duty to protect, aid, and act in the best interest of those without power. In business contexts, this broad notion developed into the legally enforceable duties a fiduciary owes to his/her principal. This conclusion raises a number of questions, not the least of which is who exactly are the principals to whom such duties are owed.

It is also not a stretch to identify that those who are in charge of someone else's money must exercise a degree of reasonable care to protect that investment and to act in a way that benefits the owner of the funds. Of course, what comes to mind are financial trustees. But, we see instances of this concept in common law. For example, in cases involving property bailment, the bailees have varying degrees of “trust” to hold the property for the benefit of the bailor, especially in gratuitous bailments.

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13 See Adam Barone, What is a Trustee? Definition, Role, and Duties, INVESTOPEDIA (Sept. 18, 2022), https://www.investopedia.com/terms/t/trustee.asp (defining financial trustees as a “person or firm that holds and administers property or assets for the benefit of a third party”).
The third-party holding property or money for someone else must act in a way to protect the interest of the party whose property is being held.\textsuperscript{15} The interesting issue, however, is when the third party’s actions affect other parties. In a familiar context, is the third party responsible for “collateral damage”?\textsuperscript{16}

I. FIDUCIARY DUTY, NOBLESSE OBLIGE, AND CORPORATE GOVERNANCE

The very first articulation of the concept of noblesse oblige is noted in the French novel “Le Lys Dans La Vallée” (The Lily of the Valley) in 1835 by Honoré de Balzac.\textsuperscript{17} Andrew Carnegie echoed this sentiment in “The Gospel of Wealth.”

This, then, is held to be the duty of the man of wealth: First, to set an example of modest, unostentatious living, shunning display or extravagance; to provide moderately for the legitimate wants of those dependent on him; and, after doing so to consider all surplus revenues which come to him simply as trust funds, which he is called upon to administer, and strictly bound as a matter of duty to administer in the manner which, in his judgment, is best calculated to produce the most beneficial results for the community—the man of wealth thus becoming the mere agent and trustee for his poorer brethren, bringing to their service his superior wisdom, experience, and ability to administer, doing for them better than they would or could do for themselves.\textsuperscript{18}

The concept of noblesse oblige is mistakenly attributed to having originated and applied in medieval European feudal society.\textsuperscript{19} The application of this concept clearly predates the middle ages as evidenced in biblical references and examples.\textsuperscript{20} Influenced by de Blazac, Alexis de

\begin{itemize}
  \item \textsuperscript{15} Id.; see also Barone, supra note 13 (using trustees as an example of the standard of care in protecting assets for the benefit of a third party).
  \item \textsuperscript{16} See Harold R. Weinberg, Secured Party’s Right to Sue Third Persons for Damage to or Defects in Collateral, 81 Com. L. J. 445, 445 (1976) for a detailed discussion on whether a third party can be liable for damage or defects to collateral.
  \item \textsuperscript{17} HONORÉ DE BALZAC, HONORE, THE LILY OF THE VALLEY (Katharine Prescott Worneley trans., 1835).
  \item \textsuperscript{18} Andrew Carnegie, The Gospel of Wealth, Tae N. Am. Rev. at 12 (1889).
  \item \textsuperscript{19} Kate Konzen, Student Briefing Paper, Noblesse Oblige, LEARNING TO GIVE (2019), https://www.learningtogive.org/resources/noblesse-oblige (providing historical information about the term noblesse oblige).
  \item \textsuperscript{20} See Luke 12:48, supra note 8.
\end{itemize}
Tocqueville comments, in his book “Democracy in America,” that “specialization in the age of the Industrial Revolution leads to increasing power and wealth imbalances.”\textsuperscript{21} The Industrial Revolution’s business aristocracy got steadily wealthier while factories created more jobs for the poorer classes.\textsuperscript{22} In his writings, Tocqueville urged this new class of wealthy businesspeople to assume the duty of noblesse oblige in response to his anxieties and concerns for American laborers working in appalling conditions.\textsuperscript{23} He thought the “new rich were [underestimating] their own direct role in creating and compounding workers’ sufferings,” and that these prosperous businessmen had a “duty to share at least some of their fortunes.”\textsuperscript{24}

This concept, so characterized by de Tocqueville and practiced by Andrew Carnegie,\textsuperscript{25} resulted in an upsurge of philanthropy in the mid and late nineteenth century as evidenced with the publication of Charles Dickens’ “A Christmas Carol”\textsuperscript{26} in 1843. Its publication resulted in a surge of holiday charitable giving which never truly abated even to this day.\textsuperscript{27} Carnegie provides the bridge between the Dickensian charitable generosity and de Tocqueville’s capitalism admonition that “successful businesses have a duty to share some of their fortunes.”\textsuperscript{28} Carnegie and his ilk gave rise to what has now been identified as “philanthrocapitalism.”\textsuperscript{29} Philanthrocapitalism is defined “in two keyways, [first,] it is upheld as ‘a new way of doing philanthropy, which

\textsuperscript{21} Konzen, supra note 19.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id. (quoting Linsey McGoey & Thiel Darren, Charismatic violence and the sanctification of the super-rich, 47 Eco & Soc’y (2018)).
\textsuperscript{26} CHARLES DICKENS, A CHRISTMAS CAROL (Chapman & Hall eds., 1st ed. 1843).
\textsuperscript{27} Id. at Stave 1: Marley’s Ghost (“Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were all my business’’); see also Philanthropy in a Christmas Carol, LEARNING TO GIVE (Oct. 8, 2023 6:37 PM), https://www.learningtogive.org/units/bridging-gap/philanthropy-christmas-carol (guiding teachers to encourage students to discuss philanthropy in A Christmas Carol).
\textsuperscript{28} Konzen, supra note 19 (quoting Linsey McGoey & Thiel Darren, Charismatic violence and the sanctification of the super-rich, 47 Eco & Soc’y (2018)).
\textsuperscript{29} MATHEW BISHOP & MICHAEL F. GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD 146 (2008).
mirrors the way business is done in the for-profit capitalist world.'\textsuperscript{30} Secondly, the notion is seen as encapsulating the belief that ‘capitalism itself can be philanthropic, working for the good of mankind.”’ Arguably philanthrocapitalism is the new \textit{noblesse oblige}.

For many there remains a chasm between philanthropy/noblesse oblige and capitalism which need bridging. Let’s use Dickens’ “A Christmas Carol” for illustrative purposes. After Ebenezer Scrooge is “converted” by the haunting of the three spirits, “he became as good a friend, as good a master, and as good a man, as the good old city knew . . .”\textsuperscript{31} Does this mean he became a poor businessman? Does it mean he no longer cared about shrewd deals and profit? No, he remained as sharp a businessman as ever. But, he then knew, through his Christmas Eve epiphany, and understood, and appreciated the context of what and how profit may be used: for the benefit of mankind.\textsuperscript{32} We see this theme reflected in current twenty-first century business literature such as John Mackey’s, co-founder and co-CEO of Whole Foods Market, and Raj Sisodia’s remarkable book “Conscious Capitalism.”\textsuperscript{33} From the Conscious Capitalism Credo:

\begin{quote}
We believe that business is good because it creates value, it is ethical because it is based on voluntary exchange, it is noble because it can elevate our existence, and it is heroic because it lifts people out of poverty and creates prosperity. Free enterprise capitalism is the most powerful system for social cooperation and human progress ever conceived. It is one of the most compelling ideas we humans have ever had. But we can aspire to even more.\textsuperscript{34}

Three intertwining concepts bring the issue of modern \textit{noblesse oblige} to the forefront: fiduciary duties, corporate social responsibility (CSR), and globalization.\textsuperscript{35} These can be encapsulated in the
\end{quote}

\textsuperscript{30} Konzen, supra note 19 (quoting Linsey McGoey & Thiel Darren, \textit{Charismatic violence and the sanctification of the super-rich}, 47 Eco & Soc’y (2018)).

\textsuperscript{31} DICKENS, supra note 26, at Stave V.

\textsuperscript{32} Id.


philosophical notion of an almost-Kantian imperative leading to a utilitarian result: those who have the power are obligated to utilize that power for the greatest good. All three of these concepts integrate “relationships.” Fiduciary duties focus on the relationship between principal and the fiduciary; CSR on the relationship of the business with society; globalization on the relationship of the corporation with other corporations in the context of the world economy and society at large. Utilitarianism as a philosophy is about results, result among all entities, “the greatest good for the greatest number . . . .” The Kantian imperative is the driver to that utilitarian result. This blending of Kantian imperative with utilitarian results in the context of relationships can be seen in formulating corporate social responsibility strategy.

Whether it is embedded in a Kantian line of thought or in a utilitarian one, relational anthropology defines human relationships as the substance of human identity: being is relational and a flourishing human life is experienced in autonomy and interdependence. With this conceptual background we can define relational capability as a core human function and then show how this perspective can be applied to the definition of CSR toward society.

In a more applied explanation, global businesses with economic wealth and power have the moral duty to translate and use such attributes

37 See Black, supra note 35, at 392 (discussing how corporate responsibility incorporates relationships).
38 Carla Tardi, Utilitarianism: What It Is, Founders, and Main Principles, Investopedia (Apr. 27, 2023); see, e.g., JEREMY BENTHAM & JOHN STUART MILL, THE UTILITARIANS: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, UTILITARIANISM, AND ON LIBERTY (Dolphin Book 1961).
39 Cecile Renouard, Corporate Social Responsibility, Utilitarianism, and the Capabilities Approach, J. OF BUS. ETHICS 1, 4 (2010) (arguing relational anthropology present in Kant’s work can also be found in utilitarian works).
40 Id.
41 Id. at 5-6.
politically for the benefit of society. That duty becomes part and parcel of corporate social responsibility. That responsibility is translated via fiduciary principles and obligations. To this end, fiduciary obligations need reformation from the classic Friedman-esque mantra of “maximization of shareholder wealth.” That reformation can be guided by the application of stakeholder theory.

II. STAKEHOLDER THEORY

The mechanism for this transformation of profit to “conscious capitalism” is stakeholder theory, a decision-making strategy firmly based in ethical theory and practice. Stakeholder theory first definitively articulated in 1984 by Edward Freeman, is in direct opposition to Milton Friedman’s maxim that the maximization of shareholder wealth is the only legitimate goal of corporate social

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44 See id. (explaining how social responsibility is a type of corporate self regulation aiming to hold corporations socially responsible).


48 MACKY ET AL., supra note 33; see also Jose G. Vargas-Hernandez & David Casillas Gonzalez, The Discussion on Stakeholders in Contrast with the Shareholders Theory: Reconciliation to a Conscious Capitalism, 14 SIBM Pune Rsch. 55-57 (2017).

Supporting the latter, ethicists Tom Donaldson, Kenneth Goodpaster and others argue that all stakeholders affected by business decision-making must have their interests incorporated into the decision-making process.\textsuperscript{51} Characterizing Milton Friedman’s approach as reflected in the University of Chicago School of Economics, the only fiduciary duty a business has is to ensure the maximization of profit or maximum return on investment for its investors subject to the condition or constraint of obeying the law.\textsuperscript{52} Here we see the introduction of a crucial element of this paper: fiduciary duty. In contrast, Edward Freeman et al., propose a redefining of that fiduciary duty to duties extending to all “stakeholders” of the business.\textsuperscript{53} As Donaldson and Dunfee note, “[t]he concept of corporate obligations to stakeholders has been a major theme in Western business ethics for several decades . . . the nature and scope of corporate obligations to stakeholders is one of the most important and extensive components of the modern literature on business ethics.”\textsuperscript{54}

Further, stakeholder theory is not only relational but premised on social contract theory.\textsuperscript{55} The seismic shift from Friedman’s “maximization of shareholder wealth” mandate governing corporate

\textsuperscript{50} See Friedman, supra note 46.

\textsuperscript{51} Compare Thomas Donaldson & Lee E. Preston, The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications, 20 ACAD. MGMT. REV. 65, 67 (1995) (stating the interests of all stakeholders are of intrinsic value and merit consideration), with Friedman, supra note 46 (stating that the primary responsibility of a manager, as an agent, is to the individuals who own the corporation).

\textsuperscript{52} See Asher Schecter et al., It’s time to Rethink Milton Friedman’s ‘Shareholder Value’ Argument, CHICAGO BOOTH REVIEW (Dec. 7, 2017), https://www.chicagobooth.edu/review/its-time-rethink-milton-friedmans-shareholder-value-argument (distilling Milton Friedman’s views of fiduciary duty as: conducting business according to the shareholders’ desires, and to do so in conformity to the basic rules of society—which includes law and ethical custom).

\textsuperscript{53} Edward Freeman et al., Stakeholder Theory and the Resource-Based View of the Firm, 47 J. MGMT. 1757, 1761 (2021) (integrating societal values, norms, and ethics into fiduciary duties).

\textsuperscript{54} Herron, supra note 36, at 95 (citing Thomas Donaldson & Thomas W. Dunfee, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 236 (Harvard Bus. School Press eds., 1999)).

\textsuperscript{55} Davide Secchi, Utilitarian, managerial and relational theories of corporate social responsibility, 9 INT’L J. MGMT. REV. 347, 363 (2007) (explaining how social contract theory serves as the basis for the stakeholder theory by relating moral ethics to business ethics).
fiduciary obligations came in 2019 with the Business Roundtable’s proclamation that corporations owed duties to all stakeholders not just exclusively to investors.\textsuperscript{56}

Agreeing with Milton Friedman’s pronouncement that maximization of wealth is the corporation’s social responsibility,\textsuperscript{57} the Business Roundtable,\textsuperscript{58} an influential group of corporate CEOs, has reversed its course and has adopted an approach to corporate decision making in which it proposes a broader responsibility to society if the corporation considers all stakeholders in its business decisions.\textsuperscript{59}

This seismic shift simply was following the law as “[i]n the 1990’s, the legislatures of many states enacted statutes that allow the [corporate] board to consider nonshareholder interests.”\textsuperscript{60} With this development, it is now recognized that the sole focus on profits for shareholders is no longer defensible and additional variables such as; “delivering value to customers, investing in employees, dealing fairly and honestly with suppliers, supporting communities and protecting the environment should be considered.”\textsuperscript{61} Further the practice in the market as characterized by the Business Roundtable’s pronouncement acknowledges a need to balance between shareholders interests as well as that of all of the companies stakeholders.\textsuperscript{62} The question thus raised is how do we define and


\textsuperscript{58} BUSINESS ROUNDTABLE, https://www.businessroundtable.org/about-us (last visited Jan. 4, 2023).


\textsuperscript{62} \textit{Id.}
characterize the interrelationship of fiduciary obligation (including \textit{noblesse oblige}), ethics, corporate decision making, and sustainability.

III. FIDUCIARY OBLIGATIONS AND STAKEHOLDER THEORY: AN ETHICAL CONSTRUCT

Beginning with Adam Smith and evolving into twentieth century economics with Milton Friedman, the maxim of maximization of shareholder wealth emanates from the underlying ethical component of fiduciary duty.\(^{63}\) When a person invests money, the recipient has the moral and economic duty to manage that money in a way that best suits the investor.\(^{64}\) That is the key element relating back to fiduciary obligations: the agent must act in the best interest of the principal. Fiduciary duties are thought to be legally codified in statutory and case law.\(^{65}\)

However, a great deal of discretion is permitted in the so-called obligatory nature of such duties.\(^{66}\) There is no question that the standard agency law duties of loyalty, obedience, reasonable care, accounting and notification have been reaffirmed again and again in case law.\(^{67}\) But the actual operationalization of these discrete duties is open to wide application, oftentimes requiring a showing of bad faith for the ultimate decision-making process to be found in violation of fiduciary principles and incumbent obligations.\(^{68}\)

The fallacy upon which “maximization of shareholder wealth” is premised is that only capital investment, whether it be actual monetary investment or even sweat equity, is the only investment worthy of

\(^{63}\) MERTENS, \textit{supra} note 57, at 5.


\(^{65}\) Id.; see Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) for a more liberal interpretation of the business judgment rule.


\(^{68}\) In re Citigroup Inc. S’holder Derivative Litig., 964 A.2d 106, 111 (Del. Ch. 2009) (dismissing fiduciary breach claims due to conclusory allegations that lacked factual particularity).
“maximization.”

Moreover, the strict legal requirement that corporate fiduciaries only have an obligation to maximize shareholder wealth or investment to the exclusion of other stakeholders is now relaxed, if non-existent. As we look at other potential “investors,” we see rationalizations for excusing them from the maximization construct.

Employees get paid a wage therefore they are not investors; customers receive goods or services therefore they are not investors; the supply-chain creates accounts receivable/payable therefore they are not investors; society receives tax benefits as well as job creation therefore it is not an investor. However, the traditional monetary investor receives a return on investment, so why the “special treatment” of maximization of that wealth? Several reasons are evident. To spur capital investment, this approach provides the catalyst for actual investment. However, is there also a view that those who invest are in a closed-club of mutually beneficial actors, looking to enhance their own financial position through the exclusion of others?

What is missing in this scenario is that these stakeholders want more than just the wages, the goods, the orders, the taxes; they want an investment. Employees want job security, benefits, reasonable working conditions in addition to wages. Customers want more than just the ability to buy goods; they want quality, warranties, a steady supply; in fact,
they often want to be loyal to their seller.75 The supply chain wants more than just sales; it wants customer loyalty through predictability.76 In other words, these stakeholders want more than just a transactional event with the business. They want a relationship, a relationship in the form of an investment.77 Therefore, the corporation’s management is obligated to fulfill additional fiduciary duties to all stakeholders, including treating them impartially and fairly balancing their interests.78 This means the “stakeholder approach implies a shift in the definition of the fiduciary duties of the management: from a mono-stakeholder perspective (where only the interest of the shareholders is to be taken into consideration) to a multi-stakeholder perspective, where all the corporate stakeholders are relevant to identify the management’s fiduciary duties.”79 In order to achieve this shift, a deeper dive into the nature of fiduciary relationships is required.

IV. FIDUCIARY RELATIONSHIPS AND DUTIES

According to President of the Ford Foundation, Darren Walker, “it is more critical than ever that businesses in the 21st century are focused on generating long-term value for all stakeholders and addressing the challenges we face, which will result in shared prosperity and sustainability for both business and society.”80

75 Hossain Uzir et al., Does quality stimulate customer satisfaction where perceived value mediates and the usage of social media moderates?, 6 HELIYON, Dec. 2020, at 1, 34 (arguing that companies who offer functional quality products with added serviceability enhance customer value).

76 Vito Calabretta, Predictability Is the Key to Supply Chain Sustainability, SUPPLY & DEMAND CHAIN EXEC. (Sept. 25, 2019), https://www.sdcexec.com/sustainability/article/21086880/tecsys-predictability-is-the-key-to-supply-chain-sustainability (explaining how the rise in consumer expectations increases the importance of supply chain predictability).

77 See Simone de Colle, A stakeholder management model for ethical decision making, 6 INT’L. J. OF MGMT. AND DECISION MAKING 299, 301-02 (Jan. 2005) (discussing various stakeholder groups and the relationships they seek from a company).

78 Id. at 301.

79 Id.

A. What is a Fiduciary Duty

"The concept of fiduciary duty is organic, not static. It will continue to evolve as society changes, not least in response to the urgent need for us to move towards an environmentally, economically, and socially sustainable financial system." This was argued by the sustainable finance veteran, Paul Watchman. One definition of fiduciary duty is that the fiduciary is epitomized by the duty of “loyalty, good faith, and honesty.” That obligation of loyalty and faith is one of the highest duties under the law. It allows no room for conflict of interest, requires full disclosure and honesty, and must avoid harming the interests of the beneficiary. The fiduciary is the one who owes the duty to the beneficiary. This corporate doctrine, which holds that officers and directors of the corporation are under obligation to the shareholders, is the basis for corporate law. Other duties are a duty of care, while not as central to the relationship requires the fiduciary to exercise a degree of skill when acting, competence, and diligence.

At first glance, this seems to follow quite logically. The shareholders, not the corporate officers, are the legal owners of the corporation. The shareholders are the investors for whom the officers and directors manage the assets for their benefit, with the shedding of any self interest in favor of the interests of the shareholders. While the fiduciary may appear to behave faithfully towards the beneficiary, this is often not the case hence why fiduciaries are often subject to checks. “Th[e] doctrine is [mere] fiction, the emperor wears no clothes.”

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82 Id.
84 Id.
85 Id.
86 Id.
87 Kelli A. Alces, Debunking the Corporate Fiduciary Myth, 35 THE J. OF CORP. L. 239, 250 (2009) [hereinafter Debunking the Fiduciary Myth].
88 Id.
89 Id. (explaining the role of corporate officers and directors, which involves managing a corporation’s assets to aid its investors).
90 Id. at 245.
91 Id. at 240-41.
92 Debunking the Fiduciary Myth, supra note 87, at 240.
Fiduciary duties are often the means to fix a standard of behavior. As such, they discipline and monitor the behavior of corporate officers and directors.\textsuperscript{93} Fiduciary duties separate ownership from control, to “prevent the fiduciary from using the property entrusted to them for their personal benefit.”\textsuperscript{94} So why become a fiduciary? The entrustment theory aims to encourage parties to enter into vulnerable transactions from which they would have otherwise abstained.\textsuperscript{95} This relationship instills the trust necessary to enter into relationships and transactions.\textsuperscript{96}

V. EXTENDING FIDUCIARY DUTIES TO ALL STAKEHOLDERS

A. Shareholder Primacy

Under shareholder primacy, the corporate officers owe the “fiduciary duties exclusively to shareholders, meaning that the board[’s] . . . decisions [are] solely accountable to shareholders,”\textsuperscript{97} This theory holds that a corporation’s purpose is singular—the maximization of shareholder profit.\textsuperscript{98} What this narrow approach does not take into account are important areas of business such as societal responsibilities, innovation, worker investment and long-term growth and sustainability of the corporation.\textsuperscript{99}

Today, board decisions are legally viewed according to the “business judgment rule,” where courts consider the process rather than the outcome of board and management decisions, taking into consideration the interests of their shareholders.\textsuperscript{100} An expansion of shareholder duty, through the consideration of all stakeholders in any decision making, would require that boards consider the interests of all the stakeholders.\textsuperscript{101}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{93} Id. at 243.
  \item \textsuperscript{94} Kelli A. Alces, Larry Ribstein's Fiduciary Duties, 2014 U. ILL. L. REV. 1765, 1768 (2014).
  \item \textsuperscript{95} Id. at 1769.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Remaking Corporate Law, supra note 2, at 3.
  \item \textsuperscript{98} Id. at 1.
  \item \textsuperscript{99} See id. at 1-4 (detailing the losses and problems of a corporation holding a shareholder primacy framework).
  \item \textsuperscript{100} Id. at 8.
  \item \textsuperscript{101} Id.
\end{itemize}
\end{footnotesize}
B. Accountable Capitalism

One could make a case for stakeholder accountability by expanding the fiduciary duty’s scope to include non-investor stakeholders.\textsuperscript{102} This ensures that all stakeholders, who contribute to corporate success, have a role in corporate governance.\textsuperscript{103} Fiduciary duty should apply to all stakeholders, not just shareholders, such as employees, customers, suppliers, creditors, and taxpayers. This is because all “have a stake in corporate productivity and are deeply impacted by the decisions made by the board of directors.”\textsuperscript{104}

For example, the decision to cut costs or merge with another company is felt more deeply on the employees than on its shareholders, who typically hold broadly diversified investment portfolios.\textsuperscript{105} “It is much easier to sell shares than to be laid off.”\textsuperscript{106}

A rationale for shareholder primacy is often stated under contract law theory, where it is highlighted that shareholders are disadvantaged by not sharing in the firm profit or by not being protected by contracts like other stakeholders are.\textsuperscript{107} Contrary to this theory, most employees are not bound by employment contracts, but are employees-at-will.\textsuperscript{108} In addition, contractual protections are not afforded to the public or customers.\textsuperscript{109}

Oversimplifying the shareholder primacy theory brings about another issue. The issue of economic inequality and static wages (while executive compensation rises).\textsuperscript{110} Economic inequality drives down all costs at the expense of better compensation and stronger investments—needed for company growth and sustainability.\textsuperscript{111}

Where are we now? In order to counter this fissure in the workplace, we must extend fiduciary duties and invite corporate governance duties to multiple stakeholders, which would include employees, management, shareholders, customers, suppliers, creditors, and the public. What this would look like is the corporation fostering accountability to all that contribute to its success. Senator Warren (D-MA) proposed a solution in

\textsuperscript{102} Remaking Corporate Law, supra note 2, at 8.
\textsuperscript{103} Id. (explaining how the expansion of fiduciary liability to include all corporate stakeholders would benefit corporate success).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 4.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Remaking Corporate Law, supra note 2, at 4.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
the Accountable Capitalism Act. The Act proposed a solution to economic equality that affords non-shareholders the opportunity to “gain bargaining power over the allocation of corporate profits” that they helped to create.

It is important to note that stakeholders also invest in corporations. For example, employees may take on varying levels of risk to improve productivity, but if these efforts fail they may be laid off; so, they are dependent on corporate success. As are taxpayers who invest in the innovation and research of the corporation through the “provisioning of public goods utilized by the corporation.” Accountable capitalism allows previously disenfranchised stakeholders to weigh in on the decision-making process. This would afford workers the chance to set executive compensation and lobby for their own raises. Under an expansion of stakeholder inclusiveness, corporate decisions including bankruptcy and outsourcing would most likely be made with the consideration of the impact on workers in addition to stock price. If the Accountable Capitalism Act became law, corporations may not become suddenly benevolent, but they would finally be held responsible for more than making money.

Fiduciary duties should be extended to all stakeholders, yet at the moment the legal standards of loyalty and care are applicable only to the shareholders, requiring that decisions only reflect the impact on the shareholders. In the Business Roundtables Statement on the Purpose of

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112 Id. at 5.
113 Id.
114 See Remaking Corporate Law, supra note 2, at 4 (elaborating on the fact that customers and employees also make investments in corporations); Amitai Etzioni, A Communitarian Note on Stakeholder Theory, 8 BUS. ETHICS Q. 679, 683 (1998).
115 Remaking Corporate Law, supra note 2; see also Etzioni, supra note 116, at 683-4, (explaining that employees are invested in their company’s success because the “viability of the corporation” impacts their job security).
116 Remaking Corporate Law, supra note 2.
117 See Press Release, Elizabeth Warren, Warren Introduces Accountable Capitalism Act (Aug. 15, 2018) (on file with author) (discussing how Elizabeth Warren’s Accountable Capitalism Act requires “company directors to consider the interest of all corporate stakeholders” such as shareholders, workers, and buyers by allowing “substantial employee participation”).
118 Remaking Corporate Law, supra note 2, at 6.
119 Id.
a Corporation, 181 CEO’s committed “to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders.”

The focus was on the long-term value of a corporation that would better serve the needs of all their stakeholders. How, by putting customers first, valuing their employees, dealing ethically with suppliers, and supporting the community as a whole.

This achieves a broader corporate goal of long-term growth, innovation, and corporate sustainability, which in turn generates value for all.

VI. LEGAL DUTIES UNDER EXPANDED FIDUCIARY DUTIES

Managers are likely to agree that a company cannot afford to indefinitely disregard or neglect its employees, customers, or suppliers without facing adverse consequences. The question then arises as to whether they should bear fiduciary responsibilities towards these stakeholders in conjunction with adhering to their statutory and regulatory obligations. The stakeholder theory is gaining momentum in the corporate world and has become the legal standard in numerous states.

A number of states’ legislative acts give corporations the option to extend fiduciary duties to multiple stakeholders as well as a requirement to show how the corporations positively benefit society. This is anecdotal evidence that shows how corporations are beneficial with multiple stakeholders.

Directors under the state benefit corporation, in

https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors/ (describing that if fiduciary duties were extended to all stakeholders, workers’ interests would be reflected in corporate decisions and employees could serve as a check on corporate choices).


123 Id.

124 Id.

125 Id.


127 Id.

128 Id. (stating in footnote 105 that “[t]he following states have some form of constituency statute: Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Wyoming . . .”).

129 Remaking Corporate Law, supra note 2, at 6.

130 Id.
addition to managing the business affairs of the corporation, also look to create a general public benefit, that will balance the “pecuniary interests of the shareholders with the best interests of persons that are materially affected by the conduct of the corporation.”

Those additional stakeholders include “employees, customers, communities, the environment, and the short-and long-term interests of the corporation.”

Senator Elizabeth Warren’s Accountable Capitalism Act is a proposal to federalize Corporate Governance which would advance stakeholder governance by establishing federal chartering for large corporations with gross revenues over 1 billion dollars. This would require the largest companies in America to get a federal charter. A corporation’s ability to receive a charter is conditioned on recognizing their obligations to society. It has a mandatory provision—that the purpose of the company is to create a general public benefit. “The idea is as simple as the lesson from Spiderman: with great power comes great responsibility.” Often the biggest and most effective ways in which corporations use their power to exacerbate economic inequality is by stacking the deck in favor of the powerful—jeopardizing the well-being of workers. Absent this legislation, competition among jurisdictions with business-friendly corporate laws will most likely continue with the shareholder primacy enabled by a state-driven incorporation model. For example Delaware, due to its lax corporate laws, has established 66% of Fortune 500 corporations.

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132 Id.
133 Id.
135 Posner, supra note 131.
136 Id.
137 Sitaraman, supra note 134.
138 Id.
139 Remaking Corporate Law, supra note 2, at 9.
140 Id.; see also Charlotte Morabito, Here’s why more than 60% of Fortune 500 companies are incorporated in Delaware, CNBC, (Mar. 13, 2020), https://www.cnbc.com/2023/03/13/why-more-than-60percent-of-fortune-500-companies-incorporated-in-delaware.html.
Other industrialized economies have a more balanced corporate governance model.\textsuperscript{141} Many have workers with a role on corporate boards.\textsuperscript{142} The stakeholder model in Germany is composed of workers on boards and work councils.\textsuperscript{143} European countries like Germany, typically have a worker representation requirement where worker representatives must make up half the board for any corporation over 2000 employees.\textsuperscript{144}

What are the challenges? “The ‘value’ created by stakeholder capitalism is difficult to measure, and this could limit its operational effectiveness.”\textsuperscript{145} This requires an expansion of fiduciary duties to all stakeholders despite no legal requirements on the board.\textsuperscript{146} Another criticism is the fear that a departure from the shareholder model will reduce investor’s investment.\textsuperscript{147} An argument to address this is that the stakeholder model “broadens the table to the stakeholders,” but does not reduce the investor’s role in corporate governance.\textsuperscript{148}

One concern is that competing fiduciary interests will make it difficult for boards to accomplish goals.\textsuperscript{149} “However, humans are adept at balancing competing claims, as any parent of two children can explain.”\textsuperscript{150} Employee health, cybersecurity, and business continuity were highlighted at the height of the Covid-19 pandemic.\textsuperscript{151} We are now acutely aware of the need to give rise to the concept of stakeholder value.\textsuperscript{152}

VII. A Call for the “Expanded” Fiduciary Duties

While not specifically detailed, laws governing the fiduciary duties of agent to principal have been clear: the agent must act in the best interest

\textsuperscript{141} Remaking Corporate Law, supra note 2, at 11.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Remaking Corporate Law, supra note 2, at 12.
\textsuperscript{147} Id. at 13.
\textsuperscript{148} Id. at 14.
\textsuperscript{149} Id. at 14.
\textsuperscript{150} Id.
\textsuperscript{151} Wilkins, supra note 145 (referring to the global Covid-19 pandemic also known as the Coronavirus Pandemic of 2019).
\textsuperscript{152} Id.
of the principal. How that is operationalized is subject to much debate both in the marketplace and in courts. Often it is left to judicial interpretation if the mandate is being satisfied, as demonstrated in the seminal case of Dodge v. Ford Motor Company. Further, the requirement is mitigated by the broad discretionary latitude of the business judgment rule. Regardless, the rule states that boards of directors and managers of businesses must act in the best interest of the investor or be subject to both direct or derivative actions by shareholders. With this said, as with most legislation governing corporate behavior, the right to sue serves more as a guideline compelling corporate compliance rather than as an invitation for litigation. Corporate board composition may be legally mandated to incorporate stakeholder representation, much like the evolving literature on corporate governance in areas of shareholder rights and stakeholder rights, or much like negotiated contractual rights between labor and management. As one commentator notes however, if such governmental regulation occurs, “the organization will have to oblige and conform to the rules. However, by recognizing the various stakeholders’ groups present, the organization can eliminate the excess cost of regulations and benefit from a higher rating by society, perhaps in the form of profits.”


155 Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (holding that Ford Motor Co. had to operate in the best interests of its shareholders, not its employees or customers).


157 Id.

158 See Albert Alschuler, Two Ways to Think about the Punishment of Corporations, in Faculty Working Papers, Northwestern Univ. Sch. of L. 1, 3 (2009) (explaining how corporate criminal liability is a device used to persuade people within the organization to monitor each other).


160 Id. at 108-09.
A. The “Benefit” or B-Corp

In April of 2013 Maryland passed the first benefit corporation law allowing companies to organize as a “B-Corp” vis-à-vis a “C-Corp.”\(^{161}\) Thirty-seven states have since adopted similar legislation.\(^{162}\)

A benefit corporation is a type of for-profit corporate entity. In addition to earning a profit, it takes society, workers, the community, and the environment into consideration before making business decisions. Originally implemented in Maryland in 2010, benefit corporations are considered a new type of business structure.

Filing the articles of incorporation will form a benefit corporation. Along with the typical fields found in the standard articles of incorporation, a benefit corporation will need to state that the formation of the business is reliant on providing a public benefit. A benefit corporation allows the organization’s executives to balance stockholder profits with public benefits. Additionally, directors are responsible for making decisions that aren't geared towards larger profits.\(^{163}\)[emphasis added]

An interesting commentary on benefit corporations notes, “[t]he takeaway is that the existing traditional for-profit legal framework provides for all of the benefits of social enterprise without introducing the slew of problems associated with the fledgling benefit corporation.”\(^{164}\) This statement naively presupposes that corporations will voluntarily adopt a decision-making matrix which treats all stakeholders as if they are shareholders.\(^{165}\) Clearly, the option is there in states recognizing the benefit corporation but it is hardly a tsunami of companies adopting this form. The time has now indeed arrived for other stakeholders to be placed into that category of “investor,” in that category that requires corporate

\(^{161}\) Corporations-Benefit Corporation, H.R. 1009 (Md. 2013).
\(^{163}\) B Corp States, supra note 162.
\(^{165}\) Id. at 154.
decision-makers to act in the best interest of all identified stakeholders. This can and should be accomplished both by de facto and de jure pronouncements. It is often argued that such a requirement is unwieldy, cumbersome and unworkable. Yet, we are seeing it done on a growing level in large, global companies. We are further seeing it done in the United States with the benefit corporation. The legislative mandate has taken the form of permitting discretion by a corporate board to take into account the interests of non-shareholder stakeholders. However, this discretion must now become a de jure mandate.

VIII. A PROPOSED REGULATORY SCHEME

Many defenders of the shareholder system, i.e., the maximization of shareholder wealth a la Milton Friedman, fall back on the Churchillian comment, paraphrased here, on democracy to defend the shareholder approach to corporate decision-making: it may be an imperfect system, but it is the best society has. This is simply not true. When we look at libertarian capitalism, we see a history of huge wealth disparity with the amount of poverty staggering. We see third world labor exploitation.

166 See id. at 155 (highlighting new research that shows social enterprise and profitability are not mutually exclusive concepts, therefore stakeholders should be deemed “investors” having their best-interests considered in corporate decision making).

167 See Marc S. Gerber, et al., Putting to Test the Debate Between Corporate Social Responsibility and Current Corporate Law, Skadden (Aug. 27, 2019), https://www.skadden.com/insights/publications/2019/08/putting-to-rest-the-debate (arguing for-profit corporations are “not precluded from taking social issues into account in the conduct of its business, so long as the corporation’s consideration of those social issues has a sufficient nexus to shareholder welfare and value enhancement or protection.”).

168 Id.

169 Id.

170 With special permission from author Daniel J. Herron and publisher Journal of Business Law and Ethics Pedagogy, all charts, some text, and their accompanying footnotes in Section IX are reprinted in Daniel J. Herron, A Unified Approach to Corporate Collaborative Decision-Making: Why Adopt It and How to Operationalize It 2 J. OF BUS. L. ETHICS & PEDAGOGY.

171 The Worst Form of Government, INT’L CHURCHILL SOC’Y, https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/ (Feb. 25, 2016) (quoting Winston S. Churchill on Nov. 11, 1947, “[m]any forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time . . . .”).

172 See A Guide to Economic Inequality, AMERICAN COMPASS (Apr. 27, 2021), https://americancompass.org/economic-inequality-
We see natural resources ravaged. While innovation, market wealth, and quality of life for some exploded during the 19th and 20th centuries, the question on the table is whether that innovation and wealth creation was worth it? Could it be maintained in another way, a more equitable and ethical way?

“Stakeholder pluralism” presents a reciprocal model: those who contribute to the financial success of a business should benefit. The corporate directors, and by extension the corporate managers, are responsible not only to ensure profits but to balance the interests of all the various stakeholders in corporate decision-making. How can this consideration be ensured? We’ve learned that change and subsequent compliance can be affected by a carrot-stick approach. The stick is often governmental regulations from which the threat of litigation, either from the private sector or the governmental sector, is a powerful compliance incentive. The cost of litigation alone promotes the notions of collaboration and accommodation.

In supporting a regulatory scheme such as what is proposed here, Eric Posner opines in his essay “Milton guide/?gad_source=1&gclid=Cj0KCQiA4YsBhC6ARIsAGXF1g7Lly6is_A4yrTwtlX2Jv97rTTfrbQ6oy_VY2eoqRaD1pvIRI_LcaAgZmEALw_wcB (explaining the increase in wealth disparity in the United States).

173 See Douglas Litowitz, The Corporation as God, 30 J. OF CORP. L. 501, 508 (2005) (discussing inequalities within corporate law which “ratifies, enables, and sanctifies a corporate system of property holdings which leads to vast . . . power and shocking concentrations of capital in a few hands”); see also Herron, supra note 36, at 92 (discussing the history of economic systems and its inequality).


175 See R. Edward Freeman, A Stakeholder Theory of the Modern Corporation, in ETHICAL THEORY & BUS. 125, 126 (2001) (discussing how the firm has a fiduciary obligation to conduct its “affairs” in the interest of stockholders); see also R. Edward Freeman, The Politics of Stakeholder Theory: Some Future Directions, in 4 BUS. ETHICS Q. 409, 415-416 (1994) (discussing fairness among stakeholders).

176 See Lisa Lai, Motivating Employees Is Not About Carrots Or Sticks, HARV. BUS. REV. (June 27, 2017), https://hbr.org/2017/06/motivating-employees-is-not-about-carrots-or-sticks#:~:text=Leaders%20are%20also%20encouraged%20to,is%20a%20consequence %20of%20noncompliance (discussing the carrot and stick concept in business where the “carrot is a reward for compliance and the stick is a consequence for noncompliance.”).

177 See, e.g., Gerrit De Geest & Guiseppe Dari-Mattiacci, The Rise of Carrots and the Decline of Sticks, 80 U. CHI. L. REV. 341, 361 (discussing how carrots incentivize by rewarding, while sticks incentivize by threatening).

178 Id. at 343-345.
Friedman was wrong.179 Friedman’s strongest point was that business leaders are rarely qualified to determine the best public use for corporate funds.180 That is why a switch to a ‘stakeholder’ theory is hardly a guarantee that corporations will now act responsibly.181 The only proven way to stop corporations from polluting, defrauding, and monopolizing is to punish them through the law.182

If we can codify fiduciary obligations to stakeholders in corporate decision-making and provide those stakeholders with a cause of action, the deterrence that such potential litigation provides may compel compliance.183 As the law now stands, the only legal obligation of corporate decision-makers is to take into consideration the fiduciary obligation to monetary investors.184 Of course, these decisions are subject to the business judgment rule and absent an egregious breach of fiduciary obligation, courts will not intercede.185

Essentially, the current state of the law, subject again to the “business judgment rule” discretion, provides a two variable Friedman-esque matrix for corporate decision-making: 1) maximize shareholder wealth; 2) obey

180 Id.
181 Id.
182 Id.
It is daunting at first glance, but upon reflection, this matrix can be changed with the force of regulatory law. Managers and corporate directors may alter or enact their respective decision-making process with the following steps or protocols. Donaldson and Dunfee propose seven steps in the initial process:

1) Identify the full range of stakeholders for a given firm and decision;  
2) Identify the stakes at issue in the decision;  
3) Assess the legitimacy of the stakes;  
4) Allocate priority among conflicting stakeholder claims;  
5) Identify strategic options for responding to the legitimate stakes having priority;  
6) Assess the viability of the options within the framework of corporate governance, including any special considerations to be given to the interests of the stakeholders; and  
7) Make a final decision.

To this basic framework, a number of decision-making mitigations may be applied. For example, for each possible solution, there may be an analysis of how that discrete solution advances the corporate mission and value statements. Another example is the requirement that all stakeholders approve or buy-into the proposed solution. This approach might present in the following graph.

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186 See FRIEDMAN, supra note 46, at 133.  
187 Posner, supra note 179 (stating that the only way to “force corporations to act in the public interest is to subject them to legal regulation”).  
188 Herron, supra note 36 at (citing THOMAS DONALDSON & THOMAS DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 236 (1999)).  
189 Herron, supra note 36, at 101 (illustrating the idea that this flexible framework allows for each solution to be used to advance the corporation’s mission and value statements); see also de Colle, supra note 77 (describing management tools for ethical decision making).  
190 Herron supra note 36 (citing Simone de Colle, A stakeholder management model for ethical decision making, 6 INT’L. J. OF MGMT. AND DECISION MAKING 299, 301-02 (Jan. 2005)).
The empty cells show the effects on each stakeholder from each perspective.

One scholar suggests the following approach which would augment the Donaldson and Dunfee list of seven questions.\footnote{Herron, supra note 36 (citing Shannon K. Orr, Environment Policymaking and Stakeholder Collaboration: Theory and Practice 128 (1st ed. 2013)).}

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Group name/Representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest</td>
<td>List specific interests</td>
</tr>
<tr>
<td>Level of interest</td>
<td>Estimate level of interest (e.g. low to high)</td>
</tr>
<tr>
<td>Resources available</td>
<td>What can the stakeholder bring to the process (e.g., legitimacy, financial support, volunteers)?</td>
</tr>
<tr>
<td>Who does the stakeholder represent?</td>
<td>For example, citizens, business interests</td>
</tr>
<tr>
<td>What does the stakeholder want?</td>
<td>Protect interests, gather information, and so on</td>
</tr>
<tr>
<td>Type of stakeholder</td>
<td>Player, would-be player, curious, defensive monitor, opportunist</td>
</tr>
<tr>
<td>Issue position</td>
<td>Supportive, mixed, antagonistic, unclear, etc.</td>
</tr>
<tr>
<td>Preferred form of communication</td>
<td>For example, e-mail, social networking, postal, telephone</td>
</tr>
</tbody>
</table>

The model does not assign weight nor emphasis on any given stakeholder. Instead, it compels the decision-maker to consider all stakeholder interests in the decision-making dynamic.\footnote{Herron, supra note 36, at 20.} However, the focus is on how these interests are evaluated. The field of mathematics...
has proposed a number of game theory models useful to business decision makers. The “win-win” model in one such theory which reflects the possible outcome of two competing stakeholder interests as a four axis matrix labeled as “win-win,” “win-lose,” “lose-win,” “lose-lose.” The contents of the “win-win” cell being the optimal goal of the decision-maker. Prioritization of conflicting stakeholder interest and majority rule among the recognized stakeholders are examples of other models.

Another approach or perspective is through evolutionary game theory. There are a number of classic game theory dilemmas—the Prisoners’ Dilemma or the Stag Hunt—where the focus of the dilemma is predicting what the opposing player or players will do and how that subsequently affects your position. However, complete information must be available in collaborative models.

This collaboration must be cooperative rather than non-cooperative. Consider the following:

Three players each have four choices: A, B, C, or D. “A” provides players #1 and #2 with 100% of what they want, but gives player #3 0%. “B” gives everyone 30% of what they want. “C” gives player #3 100% of what she wants but gives 0% to players #1 and #2. “D” gives #3 60% but only gives players #1 and #2 30% each.

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193 Alexis Rodrigo, What is Game Theory (Win-Win, Win-Lose Scenarios, & More), EnvatoTuts+ (Feb. 20, 2023), https://business.tutsplus.com/tutorials/what-is-game-theory--cms-41726 (describing game theory as the “framework for understanding situations involving competition or strategic interaction).  


195 Id. at 931.  

196 Id. at 926; see also Shannon K. Orr, Environment Policymaking and Stakeholder Collaboration: Theory and Practice 127 (1st ed. 2013) (providing a comprehensive articulation of various strategies and descriptions for collaborative models).  


198 Id. (providing a situation in which the Prisoners’ Dilemma is played out).  

199 Herron supra note 36, at 104; see Abbass F. Alkiafaji, A Stakeholder Approach To Corporate Governance: Managing in a Dynamic Environment 108 (1989) (explaining that the stakeholder model offers varied perspectives to business where decisions harm or benefit a number of parties).  

200 Herron, supra note 36, at 105 (citing Abbass F. Alkiafaji, A Stakeholder Approach To Corporate Governance: Managing in a Dynamic Environment 204 (1989)).
If “D” is selected, do players #1 and #2 feel cheated since player #3 gets twice the return as they do? Yet, under solution “B” players #1 and #2 receive no more nor less than “D.” This difference may be called the cost of “social justice.”

However, the needs of social justice will be met if the collaborative culture can foster the idea that everyone should gain the maximum benefit without lowering the maximum return of another person. Proportional balance is the key idea here.

This does not account for models with zero sum outcomes, in which case the total return is always 100% and each return is based on a comparison to the positions of the other players. Consequently, we could picture an issue presented as:

<table>
<thead>
<tr>
<th>Solutions =&gt;</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Players</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>#1</td>
<td>50</td>
<td>40</td>
<td>-0-</td>
<td>35</td>
</tr>
<tr>
<td>#2</td>
<td>50</td>
<td>30</td>
<td>-0-</td>
<td>35</td>
</tr>
<tr>
<td>#3</td>
<td>-0-</td>
<td>30</td>
<td>100</td>
<td>30</td>
</tr>
<tr>
<td>TOTAL RETURN</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

Here, player #1 would advocate for the “B” solution since “A” and “C” are once again eliminated due to the 0% for one
or more players. Player #3 likely doesn’t care if the option chosen is “B” or “D” since she receives 30% under either solution. Player #2 of course advocates for solution “D” since “D” gives her 5% more than “B.”

So, the problem is that we may not be able to reach a consensus in this circumstance. The maxim that “everyone should get the maximum possible without reducing the maximum return of another player, unless a reduction reduces the difference between the largest and smallest return,” can be modified though. From these three threshold assumptions, we draw that, “1) parties agree in advance that the solution selected should provide the maximum return for each player; 2) all implications of the proposed solutions must be fully disclosed; 3) the difference between the highest return and the lowest return is as minimal as possible.” The need for trust, honesty, and a sense of equality—or at the very least, some type of equity—are therefore essential. This approach is applicable to business decision making. It can also be included in the text of legislative regulations. A good example is the United Kingdom’s legislative strategy from 2006.

IX. THE APPROACH THE UNITED KINGDOM: SECTION 172 OF THE 2006 COMPANIES ACT

Legislation in the United Kingdom from over seventeen years ago appears—the operative verb here is “appears”—to give credence to the conclusion that stakeholder governance is overcoming the laissez-faire Friedman-esque shareholder exclusivity theory of corporate governance. The language is straightforward:

(1) A director of a company must act in the way he considers, in good faith, would be most likely to

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206 Heron, supra note 36, at 105 (ABBASS F. ALKHAFAJI, A STAKEHOLDER APPROACH TO CORPORATE GOVERNANCE: MANAGING IN A DYNAMIC ENVIRONMENT 108 (1989)).
207 Id.
208 Id.
209 Id.
211 See Heron, supra note 36, at 107 (stating the importance of a change in statutory and common law approach to stakeholder theory).
212 The Companies Act, 2006, c. 46 (Eng.).
promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.\(^\text{213}\)

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.\(^\text{214}\)

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.\(^\text{215}\)

\(^{213}\) Id. § 172(1).

\(^{214}\) Id. § 172(2).

\(^{215}\) Id. § 172(3).
This legislation lays out very clearly the goals of stakeholder corporate governance.\textsuperscript{216} It indeed serves as a legislative model.\textsuperscript{217} However, it lacks two significant component parts: how to do it and how to enforce the legislation.\textsuperscript{218} A background issue here is that it seems that the impetus for the U.K. to legislatively adopt Section 172 was pressure from the European Union.\textsuperscript{219}

What often escapes the attention of participants in discussions surrounding section 172 of the Companies Act 2006, is the limitations of the section, not so much in terms of it prioritising the interests of shareholders over the interests of other constituencies, but regarding its enforcement and overall utility.\textsuperscript{220}

It has been suggested that the operational inadequacies may be addressed, at least initially, by requiring an active participation or input into corporate decision-making with the following guideline or requirement:

There should be a dialogue with stakeholders based on the mutual understanding of objectives. The board as a whole, has responsibility for ensuring that a satisfactory dialogue with stakeholders takes place and that during the board’s decision-making process the board has regard (amongst other matters) to:

\begin{itemize}
\item The Companies Act, 2006, c. 46 (Eng.) (detailing objectives to promote the success of a company, such as the consequences of decisions regarding impacts to company employees and business relationships with entities like suppliers and the surrounding community).
\item Id.
\item Georgina Tsagas, Section 172 of the UK Companies Act 2006: Desperate Times Call for Soft Law Measures, OXFORD BUS. LAW BLOG. (Sept. 1, 2017), https://blogs.law.ox.ac.uk/business-law-blog/blog/2017/09/section-172-uk-companies-act-2006-desperate-times-call-soft-law (arguing that Section 172 gives the illusion that steps are being taken to acknowledge stakeholders’ interests in corporate decision-making, however such is not the case).
\item Id.; Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity 132 (Nina Boeger & Charlotte Villiers eds., 2018) [hereinafter Shaping the Corporate Landscape].
\item Tsagas, supra note 218; Shaping the Corporate Landscape, supra note 219, at 132.
\end{itemize}
(a) the likely consequences of any decision in the long term,

(b) the interests of the company’s employees,

(c) the need to foster the company’s business relationships with suppliers, customers and others,

(d) the impact of the company’s operations on the community and the environment,

(e) the impact of the company’s operations on social and human rights issues,

(f) the desirability of the company maintaining a reputation for high standards of business conduct.\(^\text{221}\)

This is similar to the matrix proposed earlier in this paper. How can this “dialogue” as noted above take place? Perhaps representation of the various stakeholders must have a seat at the corporate directorship table? We already see public and civic figures seated on corporate boards: college presidents, celebrities, sports figures. Plus, we are now seeing representatives of DEI interests—(diversity, equity, and inclusion)—being placed in advisory roles or even voting members of boards of directors.\(^\text{222}\)

\(^\text{221}\) Tsagas, supra note 218.

\(^\text{222}\) See George Anderson & Katherine Moos, Stakeholder Voices in the Boardroom, SPENCER STUART (July 2021), https://www.spencerstuart.com/research-and-insight/stakeholder-voices-in-the-boardroom (explaining that “As boards recognize the value of listening to stakeholders—and the risks of not doing so—they are choosing to spend more time with management discussing how to balance shareholder interests with those of other stakeholders. There will be times when these interests collide, leading to uncomfortable trade-offs. We believe that the more diverse the board, the more thoughtful and effective it will be in weighing competing interests. And there’s no question that boards are becoming more diverse. Research for the 2021 U.S. Spencer Stuart Board Index, for example, has found that nearly three-quarters of new directors appointed to S&P 500 boards are women and/or belong to a historically underrepresented racial or ethnic group, up from 31% a decade ago. Having a range of backgrounds and experiences around the table is bound to enhance the board’s ability to anticipate the financial and non-financial consequences of its decisions. In an era of activism covering everything from racial equity
X. ARTIFICIAL INTELLIGENCE AND CORPORATE FIDUCIARY DUTY

Is there a duty to implement the expansion of corporate fiduciary duties in light of technology? In today’s society, time is critical and the decision-making process moves quickly.223 Artificial Intelligence is utilized in businesses to accelerate the decision-making process in order to keep up with the pace of commercial life.224 This computer system can learn and make decisions independently.225 It can do this by analyzing data and recognizing patterns or by using algorithms to make decisions.226 Algorithms are important for artificial intelligence because they allow it to learn and improve its performance.227 As such it will have a profound impact on fiduciary law.

How will Artificial Intelligence change fiduciary duties? The utilization of these tools will make the corporate fiduciary’s job easier, more efficient and perhaps more accurate.228 In the beginning, this may appear to reduce the fiduciary’s exposure to claims of breaching those duties, but don’t be misled this could be a double-edged sword to those fiduciaries who are delegating their duties to artificial intelligence tools.229

to decarbonization to biodiversity, boards must seek out people with different mindsets who can represent changing views about the role of business in society. But equally important, boards must first ensure that the mechanisms are in place to bring stakeholder voices into boardroom debate.”).

223 See Alfred R. Cowger Jr., Corporate Fiduciary Duty in the Age of Algorithms, 14 CASE W. RES. J. TECH. & INTERNET, 138, 157 (2023) (expressing the concern that boards and corporate leadership may not be able to keep up with the rate of technological change and the significant increase in technology, making machines necessary in the boardroom for quick decision-making).

224 See id. at 158 (arguing that AI will make corporate decision-making more efficient and accurate by quickly analyzing large sets of data to draw important conclusions with less bias).

225 See Fred Tabsharani, Types of AI algorithms and how they work, ENTERPRISE AI (May 5, 2023), https://www.techtarget.com/searchenterpriseai/tip/Types-of-AI-algorithms-and-how-thework#:~:text=AI%20algorithms%20are%20set,%2Dsolving%20and%20decisio n%20making (describing how AI algorithms perform functions similar to humans such as recognizing patterns, understanding natural language, solving problems, and making decisions).

226 Id.

227 Id.

228 See Muzaffer Eroğlu & Meltem Karatepe Kaya, Impact of Artificial Intelligence on Corporate Board Diversity Policies and Regulations, 23 EUR. BUS. ORG. L. REV. 541, 543 (2022) (describing how the utilization of Artificial Intelligence will allow corporate fiduciaries to work more efficiently and accurately).

229 See id. at 544 (discussing how the use of AI in corporations can have both positive and negative impacts).
One way to reduce those risks is to understand, to modernize and to define fiduciary duties and obligations.\textsuperscript{230} As we near the future, the impact of artificial intelligence requires the need to shift our perspective in corporate governance. It highlights the importance of stakeholder theory in corporate decision making in order to achieve a moral, ethical, and a more sustainable model of corporate governance.

CONCLUSION

This paper lays out just one example of how the operationalization of mandated stakeholder analysis might be utilized. The unanswered question is how capitalism, and particularly global capitalism, with its emphasis on efficiency and profit, can be reconciled with our fundamental beliefs of justice, equality, and a socially responsible market? Can we combine the fundamental democratic and humanistic principles of our society with the capitalistic economic dynamic? How can we then involve business in using cooperative and democratic methods to aid, if not lead, the resolution of global issues?\textsuperscript{231}

It has been argued that there must be a certain amount of state attention to ensure that corporations are working at a certain level of CSR.\textsuperscript{232} It has been suggested that the government can act as a sort of arbiter in those situations.\textsuperscript{233} It is generally accepted by society that it is better that corporations carry out their CSR out of goodwill and a sense of responsibility without the intervention of governmental forces.\textsuperscript{234} However, situations arise when the government must intervene to answer

\textsuperscript{230} Cowger, supra note 223, at 192.

\textsuperscript{231} See Alice A. Korngold, A Better World Inc.: How Companies Profit By Solving Global Problems . . . Where Governments Cannot (Palgrave Macmillan ed., 2014) (presenting a detailed analysis of why the most serious issues can only be solved with businesses leading the way); see also Alice A. Korngold, Business can do what governments can’t: solve the world’s biggest problems, The Guardian (Jan. 7, 2014), https://www.theguardian.com/sustainable-business/business-government-world-problems-davos-multinational (pointing out that companies are realizing that social, economic, and environmental responsibility is expected of them by customers, employees, and investors, and therefore required in order for them to succeed).


\textsuperscript{234} Id.
and bring a solution to major problems of CSR issues.\textsuperscript{235} “This is because CSR falls within the domain of public policy which is also the concern of the government.”\textsuperscript{236}

This paper argues that incorporation of stakeholder theory, which is founded on a renewed sense of \textit{noblesse oblige}, into an international corporate decision-making process is an easily accessible way to reconcile democracy and capitalism. However, it seems we are at the point where governments must take the lead on this cultural shift by mandating some degree of change in perspective. Relying on the enlightenment of large global corporations has not and will not work on a comprehensive scale. Some catalyst is needed. For this catalyst to work on both the governmental and market level, there must be a required commitment from the global market, political resolve, and an understanding that our democratic and capitalistic values are the bedrock of our society, our entire society, not just our political environment.

\textsuperscript{235} \textit{Id.}
\textsuperscript{236} Muhammad Waakid Allybocus, From Voluntary to Mandatory Corporate Social Responsibility: A Legal Introspective in Modern Corporate (Sept. 21, 2016) (LLM dissertation, Univ. of Middlesex).