ESSAY

THE INEVITABILITY AND DESIRABILITY OF THE CORPORATE DISCRETION TO ADVANCE STAKEHOLDER INTERESTS

Einer Elhauge†

† Petrie Professor of Law, Harvard Law School. I am grateful for summer research funding from Harvard Law School and the Petrie-Flom Center.

INTRODUCTION

In *The Illusory Promise of Stakeholder Governance,* Lucian Bebchuk and Roberto Tallarita offer a vigorous defense of the view that corporate leaders should have a legal duty to maximize only shareholder value.[1] They define "stakeholders" as "all non-shareholder constituencies of the corporation—including employees, customers, suppliers, communities, and the environment."[2] They criticize the alternative of "stakeholderism", which they define as "a governance model

---

1 Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020). They define "corporate leaders" as "those individuals, both directors and top executives, who make important corporate decisions." *Id.* at 94.

2 *Id.* at 93.

that encourages and relies on corporate leaders to serve the interests of stakeholders and not *only* those of shareholders."[3] Although they sometimes call their position "shareholder primacy", that term is a misnomer because they favor more than a legal duty to *primarily* advance shareholder interests.[4] They favor what I will call "shareholder exclusivity", a legal duty to *exclusively* maximize shareholder interests that forbids corporate leaders from putting any independent weight whatsoever on the interests of non-shareholders.[5]

Their argument is straightforward. First, they argue that stakeholderism is illusory because the incentives and past actions of corporate leaders indicate that they cannot be expected to protect stakeholders beyond what would serve shareholder value.[6] Second, they argue that stakeholderism is undesirable because it makes corporate leaders more insulated from shareholder oversight (thus worsening corporate performance) and because it is less effective than the alternative of protecting stakeholders with legal regulations or taxes.[7]

Among the prior scholarship that they criticize for advocating "stakeholderism" is my own article, *Sacrificing Corporate Profits in the Public Interest*.[8] I myself would not characterize my article as advocating ordinary understandings of stakeholderism, given that my article did not advocate any legal changes to either give stakeholders more power over corporate decisions or require corporate leaders to further stakeholder interests. However, because Bebchuk and Tallarita's sweeping definition of stakeholderism includes any governance model that relies on the fact that corporate leaders already possess *some* discretion to put some independent weight on stakeholder interests, my position counts as "stakeholderism" under their own definition of the term. To keep our terminology consistent, I will use their definition of stakeholderism in this article.

---

3 *Id.* at 91 (emphasis added). *See also id.* at 94 (similar language).

4 *Id.* at 104, 106, 110, 139.

5 *See id.* at 91, 94, 97–98, 110, 114–15, 139 (arguing that the corporate law should allow corporate leaders to consider stakeholder interests only to the extent that doing so would maximize shareholder value and should bar corporate leaders from putting any independent weight on stakeholder interests).

6 *Id.* 91–92, 98–100, 124–58.

7 *Id.* at 92, 94, 100–01, 164–68.

8 *Id.* at 104 (citing Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) [hereinafter, Elhauge, *Sacrificing Corporate Profits*] as one of the notable prior works that has supported the "stakeholderism" position that they critique).

In my prior article, I reached descriptive and normative conclusions that are diametrically opposed to those of Bebchuk and Tallarita. ***First***, I concluded that corporate leaders have never had any legally enforceable duty to exclusively maximize shareholder profits. Indeed, I concluded that *some* discretion to sacrifice corporate profits in the public interest is not only often explicit but *inevitable*, given that, even if corporate law nominally imposed a duty to profit-maximize, "minimizing total agency costs requires giving managers a business judgment rule deference that necessarily confers such profit sacrificing discretion."[9] Thus, contrary to Bebchuk and Tallarita's argument that stakeholderism is "illusory", I argued that it is inevitable.

Second, I argued that the bounded discretion that corporate leaders have to sacrifice corporate profits in the public interest is in fact desirable and socially efficient. One reason is that "even optimal legal sanctions are necessarily imperfect and require supplementation by social and moral sanctions to fully optimize conduct. Accordingly, pure profit-maximization would worsen corporate conduct by overriding these social and moral sanctions."[10] Another reason is that shareholders themselves often place some value on the interests of others affected by their corporations, so a duty to profit maximize would often harm shareholder value as well.[11] Further, shareholders have collective action problems that can prevent them from effectively taking action on their own to further their nonmonetary objectives.[12] A third reason is that, because explicit contracts are rigid in a way that may not properly take into account future contingencies, it is often more efficient for a corporation to empower corporate leaders to enter into legally unenforceable implicit contracts, whereby stakeholders are induced to provide value to the corporation on the understanding the corporate leaders will have discretion to reciprocate later with decisions that reward those efforts.[13] Requiring shareholder profit-maximization at each moment in time would instead dictate that corporate leaders must renege on such legally unenforceable implicit contracts, the prospect of which would inefficiently prevent implicit contracts from inducing stake-

---

9 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 733. *See also id.* at 738–39, 776–79, 783, 810–11, 862. In that prior article, I used "in the public interest" as a catch-all for protecting any non-shareholder interest.

10 *Id.* at 733. *See also id.* at 740, 748–56, 802, 797–805, 814–17.

11 *Id.* at 793, 800–01.

12 *Id.* at 733–34, 740, 742, 759, 792, 799–800, 815–17, 820–25, 827.

13 *Id.* at 739, 779–82.

holders to provide value to corporation, thus having the self-defeating effect of lowering shareholder profits ex ante.[14] Finally, I stressed that the ability of corporate leaders to deviate from shareholder interests is sharply "constrained by product markets, capital markets, labor markets, takeover threats, shareholder voting, and managerial profit-sharing or stock options."[15] Corporate leaders can deviate from shareholder interests only to the extent that those constraints are sufficiently imperfect to give managers some agency slack, but that means that any exercise of that agency slack to advance stakeholder interests is likely to substitute for advancing managerial interests, not shareholder interests.[16]

In short, Bebchuk and Tallarita not only critique my position as stakeholderism, but also reach opposite conclusions on both my descriptive claim that a bounded discretion to advance stakeholder interests is inevitable and my normative claim that such a bounded discretion is desirable. Yet, oddly enough, Bebchuk and Tallarita's article never responds to any of the analysis I offered for my descriptive or normative conclusions. Taking my analysis into account reveals flaws in several of their own arguments. Nor do any of the points they make in their article undercut any of my arguments. Indeed, in several respects, their analysis actually confirms key elements of my own analysis.

To understand why, we first need a more detailed explanation of the analysis I offered for my conclusions, which I provide in Part I. I then explain in Part II why none of the arguments in Bebchuk and Tallarita's article is responsive to my analysis.

Before getting to that more detailed analysis, it is important to clarify my claims to avoid analytical confusion on some important dimensions. First, as I stated in my prior article, "I am not saying that managers have a legally enforceable *duty* to sacrifice corporate profits in the public interest; I am saying that they have *discretion* to do so."[17] Bebchuk and Tallarita are thus mistaken when they claim that I "advocate that corporate leaders *must* aggregate and balance the interests of their multiple constituencies."[18]

Second, as I also stated in my prior article, "I am not denying that managers' *primary* obligation is and should be to make

---

14 *Id.* at 864–65.
15 *Id.* at 741. *See also id.* at 808–10.
16 *Id.* at 740–41, 776–77, 805–07.
17 *Id.* at 743 (emphasis in original). *See also id.* at 744, 805.
18 Bebchuk & Tallarita, *supra* note 1, at 114–15 (emphasis added).

profits, nor am I saying that their discretion to sacrifice profits should be increased, let alone made boundless."[19] Bebchuk and Tallarita are thus mistaken to associate me with the argument that "shareholder primacy" should be abandoned.[20] To the contrary, I expressly acknowledged that shareholders have and should have "primacy over other stakeholders."[21] I instead rejected only "shareholder exclusivity" because I concluded that "this obligation to make profits is not and should not be *exclusive*, but that instead managers do and should have some limited discretion to temper it in order to comply with social and moral norms."[22]

Third, my prior article emphasized I was *not* claiming that this existing "discretion to sacrifice profits should be increased."[23] Accordingly, having classified my position as stakeholderism, Bebchuk and Tallarita are mistaken when they claim that stakeholderism necessarily advocates *increasing* the insulation of corporate leaders.[24] Indeed, I explicitly stressed that "Managers' existing profit-sacrificing discretion is in fact desirable precisely because it is bounded."[25] As I pointed out, the boundaries are set mainly not by law but by market constraints, though corporate law also sets outside limits on this discretion and imposes stricter legal limits during certain situations when those market constraints are weak.[26]

I
WHY A BOUNDED DISCRETION TO SACRIFICE SHAREHOLDER PROFITS TO ADVANCE STAKEHOLDER INTERESTS HAS ALWAYS EXISTED AND IS INEVITABLE AND DESIRABLE

A. The Longstanding Existence and Inevitability of Some Discretion to Sacrifice Shareholder Profits to Further Stakeholder Interests

No corporate statute has ever stated that corporate leaders have a duty to maximize shareholder profits or value.[27] Every corporate statute has, to the contrary, explicitly authorized corporate donations for charitable purposes even when that

---

19 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 745 (emphasis in original).
20 Bebchuk & Tallarita, *supra* note 1, at 104.
21 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 745.
22 *Id.* at 745 (emphasis in original).
23 *Id.* at 745.
24 Bebchuk & Tallarita, *supra* note 1, at 92, 94, 164–65.
25 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 745.
26 *Id.* at 745–46, 808–10.
27 *Id.* at 738, 763.

sacrifices corporate profits.[28] Of the state corporate statutes that have addressed whether corporate leaders can weigh stakeholder interests against shareholder profits when making other corporate decisions, which includes most states, all have expressly authorized doing so.[29] No state corporate statute has ever forbidden corporate leaders from weighing stakeholder interests against shareholder profits to some extent.

Corporate common law is consistent with these statutes. The American Law Institute (ALI) 1994 *Principles of Corporate Governance* explicitly states that, without any corporate statute, the background default common law rule is that corporate leaders can sacrifice shareholder profits to: (1) comply with the law; (2) "take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business"; or (3) devote "a reasonable amount" of corporate resources to "public welfare, humanitarian, educational, and philanthropic purposes."[30]

To elaborate on the ALI's first point, corporate leaders not only may, but *must*, sacrifice shareholder profits to comply with the law, even when noncompliance would be more profitable given expected legal penalties.[31] Under the undisputed law in all the states, including Delaware, failing to sacrifice shareholder profits to comply with the law would violate the fiduciary duty of corporate leaders and make them personally liable to the corporation for any legal penalties, litigation costs, and economic sanctions for the legal violations, without any offset for the additional profits the corporation may have received from the illegal activity.[32] As I pointed out, this doctrine makes sense for the following reasons. To optimally regulate the conduct of ordinary sole proprietor businesses, we rely not only on legal sanctions, but also social and moral sanctions.[33] For corporations, the problem is that corporate leaders are subject to the influence of shareholders who structurally are insulated from social and moral sanctions and who have collective action problems that make them unlikely to act on even the insulated social and moral sanctions that they may feel.[34] Accordingly,

---

28 *Id.* at 738, 763, 767–68.

29 *Id.* at 738, 763, 766–67.

30 *Id.* at 738, 763, 766, 769 (quoting 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2)-(3) & amp; cmt. d (1994)).

31 *Id.* at 757.

32 *Id.* at 758.

33 *Id.* at 747–56.

34 *Id.* at 757–61.

the doctrine imposing a fiduciary duty to avoid profitable legal violations offsets the structural influence of socially-unresponsive shareholders on corporate leaders by concentrating all the corporation's legal and economic sanctions onto those corporate leaders.[35] In any event, as a descriptive matter, the law clearly not only gives corporate leaders discretion to sacrifice shareholder profits in order to comply with laws that protect stakeholders, but a legal duty to do so.

As for the ALI's second point, that corporate leaders can sacrifice corporate profits to take reasonable ethical considerations into account, this gives corporate leader's discretion to avoid any conduct that might unethically harm stakeholders, even if it profits shareholders.[36] This provides ample discretion to weigh stakeholder interests against shareholder profits to a reasonable extent. The ALI's third point might look like it is limited to corporate donations. However, the ALI comments and rules make clear it also authorizes decisions on corporate operations or takeovers that sacrifice shareholder profits in order to advance stakeholder interests.[37] But both the second and third points are subject to reasonableness limits that make clear the primary objective should remain shareholder profits, even though there is some discretion to temper that objective at the margins.

The ALI's statement of corporate principles is supported by ample caselaw, including in Delaware.[38] Even the 1919 *Dodge* case, which is commonly cited as the clearest support for a duty to maximize shareholder profits, instead states only that shareholder profits should be the primary, but not exclusive, goal for corporate leaders.[39] Indeed, the *Dodge* court sustained a corporate expansion decision that the court concluded was based mainly on humanitarian motives, and it also approvingly cited a prior U.S. Supreme Court decision that sustained another corporate decision to give away water to the city for municipal uses because it reciprocated for a past sunk benefit that the city had previously conferred on the corporation.[40] The only corporate decision the *Dodge* court actually invalidated did not involve any sacrifice of corporate profits to advance stakeholder interests, but instead involved a withholding of dividends to force the minority shareholders (the Dodge broth-

35 *Id.* at 761–62.
36 *Id.* at 764.
37 *Id.*
38 *Id.* at 764–66.
39 *Id.* at 772–73.
40 *Id.* at 773–74, 781–82.

ers) to sell their stock to the majority shareholder (Henry Ford), which thus instead raised a conflict of interest that triggered duty of loyalty concerns.[41]

To be sure, there is one limited situation that does trigger an actual duty to profit maximize: a sale of corporate control.[42] But that duty is limited to such situations because they raise last period problems that undermine ordinary market constraints in a way that would (without any such duty) leave corporate leaders with an excessive unbounded discretion to sacrifice shareholder profits to advance other interests.[43]

Some assert that the common law duty of care to act in the "best interests of the corporation" imposes a duty to maximize shareholder profits, but nothing in duty-of-care law ever defines the "best interests of the corporation" to mean solely to "the profits of shareholders."[44] To the contrary, the law discussed above adopts precisely the opposite view: that the best interests of the corporation can include the interests of stakeholders.[45]

In any event, even if one thought (contrary to all the above statutes and caselaw) that the common law duty of care imposed a nominal duty to maximize shareholder profits, the business judgment rule makes clear that it cannot be legally enforced in a way that would bar corporate leaders from exercising a substantial de facto discretion to advance the interests of stakeholders.[46] Under the business judgment rule, whether a business decision is in the best interests of the corporation will not be second-guessed by courts unless the decisionmaker has a financial conflict of interest.[47] Absent such a financial conflict, the courts will sustain business decisions without ever reviewing whether they actually increased corporate profits, were seriously likely to do so, were motivated by increasing corporate profits, or even whether any such profits could be particularized.[48]

As a result, courts have sustained decisions that sacrifice corporate profits to advance stakeholder interests as long as corporate leaders offer some conceivable theory by which doing

41 *Id.* at 774–75.
42 *Id.* at 746, 765–66, 848–52.
43 *Id.*
44 *Id.* at 769.
45 *Id.*
46 *Id.* at 746, 770–71.
47 *Id.* at 770.
48 *Id.* at 770, 772.

so might enhance long-term corporate profits.[49] Such a theory almost always exists because any decision to protect stakeholder interests could be justified on the ground that it helps avoid adverse reactions from consumers, employees, the neighborhood, other businesses, or government regulators.[50] Even simply donating corporate funds to stakeholders can be claimed to enhance corporate reputation in a way that might enhance long-term profitability, and courts have on similar grounds sustained decisions to structure a corporate transaction in a way that created tax disadvantages that were mathematically certain to lower corporate profits.[51]

One could imagine getting rid of the business judgment rule. But the problem is that doing so would be undesirable because it would replace the discretionary business judgment of corporate leaders with the business judgment of episodically invoked courts and juries, which would be less efficient.[52] Indeed, over 90% of Delaware corporations have opted for charter provisions eliminating managerial duty-of-care liability even under the business judgment rule, indicating a widespread desire to avoid any possible risk that a court might actually impose an enforceable duty to profit maximize.[53]

Thus, even staunch supporters of a nominal duty to profit maximize, like Bebchuk and Tallarita, acknowledge that the business judgment rule would have to remain part of the doctrinal landscape.[54] As long as it does so, it necessarily means there is no *enforceable* duty to profit maximize and that corporate leaders thus retain some bounded *de facto* discretion to sacrifice shareholder profits given stakeholder interests. This is the sense in which a bounded discretion to sacrifice shareholder profits to advance stakeholder interests is not only descriptively accurate as a statement of current law, but also *inevitable.* As the next section discusses, such a bounded discretion is also affirmatively desirable.

---

49 *Id.* at 770–72.
50 *Id.* at 772.
51 *Id.* at 771 n.93.
52 *Id.* at 738–39, 776–79, 783, 810–11.
53 *Id.* at 862.
54 Bebchuk & Tallarita, *supra* note 1, at 112–13.

B. The Desirability of a Bounded Discretion to Sacrifice Shareholder Profits to Advance Stakeholder Interests

The prior section established that a bounded discretion to sacrifice shareholder profits to protect stakeholder interests not only has always been the law, but is also inevitable. This section shows it is also affirmatively desirable for several reasons.

1. *A Duty to Profit Maximize Would Override Desirable Social and Moral Sanctions*

A duty to maximize shareholder profits would override the social and moral sanctions that are necessary for the optimal regulation of conduct. The economic analysis of legal regulation makes it clear that legal regulations are inevitably imperfect, not only because imperfect political processes often prevent or delay the adoption of optimal laws, but also because, given inevitable informational uncertainty and adjudicative error, even optimal legal penalties can never deter all undesirable conduct and leave all desirable conduct undeterred.[55] The best the law can do is optimize by minimizing the sum of the harm from legally undeterred undesirable conduct and legally deterred desirable conduct.[56]

As a result, the optimal regulation of conduct has always required supplementing legal sanctions with social and moral sanctions.[57] Social and moral sanctions will often be preferable because they can involve less informational uncertainty or procedural costs than legal sanctions.[58] Indeed, social and moral sanctions are probably more important than legal sanctions for regulating most daily conduct.[59] Would any of us want to deal with individuals who always did whatever maximized their personal profits, net of expected legal penalties, regardless of the effect on others? Hardly, because that is pretty much the definition of a sociopath.

This is a central problem with a corporate duty to maximize shareholder profits. It would not only allow, but *require*, all corporate leaders to behave like corporate sociopaths, doing whatever maximized shareholder profits, regardless of the effects on others and affirmatively ignoring any social or moral

---

55 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 747–49, 802.
56 *Id.* at 748–49, 802.
57 *Id.* at 751–54.
58 *Id.* at 754–55.
59 *Id.* at 753–54.

sanctions designed to protect the interests of those others. Unless we think our social and moral sanctions are so wayward that they are on net harmful, there is no reason to adopt such a change, and if we thought that, the appropriate change would be to impose a duty to profit-maximize on everyone, not just corporate leaders, to override those wayward social and moral sanctions.[60] Assuming we don't think our social and moral sanctions are quite that wayward, a duty to profit maximize (for corporations or anyone else) would result in less optimal conduct because it would override desirable regulation by social and moral sanctions.[61]

2. *Because Shareholders Commonly Place Some Value on Stakeholder Interests, A Duty to Profit Maximize Would Often Harm Shareholder Value*

Even if one thought corporate leaders should have a duty to maximize shareholder value, shareholders frequently place value on the interests of stakeholders affected by their corporations. Indeed, one survey found that 97% of corporate shareholders believed managers should consider stakeholder interests, and 88% believed that corporate leaders considering a profitable move to a new plant should weigh the effects on stakeholders before deciding to move.[62] Shareholders may, for example, care about the environment and thus may suffer a net loss of utility when their corporations take certain actions that maximize shareholder profits but impose excessive environmental costs on stakeholders. A duty to profit maximize would undesirably require managers to undertake such profit-maximizing actions even when it harms shareholder utility.[63]

Further, as I showed in my prior article, collective action problems structurally impede the ability of shareholders from effectively taking action on their own to further their nonmonetary objectives.[64] As a result, shareholders will often need to rely on corporate leaders to further nonmonetary objectives for them.

Suppose, for example, a takeover bidder would, if it succeeds, take actions that will increase corporate profits but impose environmental costs that the existing shareholders would

---

60 *Id.* at 755–56.
61 *Id.* at 797–805, 814–17.
62 *Id.* at 793.
63 *Id.* at 800–01.
64 *Id.* at 740, 742, 759, 792, 799–800, 815–17, 820–25, 827.

find excessive. Because the bidder will increase corporate profits, it can offer a premium over the existing stock price. Even if each shareholder would prefer that the takeover not occur, each shareholder will realize that his individual decision about whether to tender his small portion of shares will have little effect on whether the takeover occurs, but will completely determine whether he gets the takeover premium in a timely fashion.[65] Thus, acting individually, each shareholder will have incentives to tender their shares even if each would prefer that the takeover not succeed given their environment values. This collective action problem provides an explanation for why all states have (via statute or court decisions) given corporate leaders explicit or de facto discretion to weigh stakeholder interests when deciding whether to block hostile takeovers.[66]

The problem is not limited to responding to takeover bids. Shareholders also have collective action problems that can prevent them from taking their nonmonetary objectives into account when they make investment decisions.[67] Suppose a corporation is engaged in antisocial behavior that increases its profits but that imposes a net utility loss on its shareholders given their social objectives. Each shareholder will realize that an individual decision to disinvest will have little effect on whether the corporation continues the antisocial behavior, but will definitely deprive the shareholder of its share of those increased profits. Acting individually, then, shareholders have incentives to invest in corporations that engage in profit-maximizing decisions even when they impose a net harm on shareholder utility. My analysis of the collective action problems that shareholders face in making decisions on takeovers and investments that further their nonmonetary objectives has, since my article, been confirmed by renowned economists Oliver Hart and Luigi Zingales, who make similar points using a general economic model.[68]

One might think that shareholder voting is the natural solution to such collective action problems because voting allows shareholders to act collectively rather than individually. Hart and Zingales themselves take that view.[69] But shareholders cannot feasibly vote on ordinary operational decisions by corporations, which is why corporate law leaves them to mana-

---

65 *Id.* at 742, 820–824.

66 *Id.* at 742, 825, 827–30.

67 *Id.* at 759, 792, 799, 816–18, 824–25.

68 Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 251–52 (2017).

69 *Id.* at 247, 260–61, 270–71.

gerial discretion.[70] Moreover, even to the extent that shareholders could feasibly vote on the relevant issue, shareholders suffer collective action problems that can prevent them from becoming informed enough to further their social objectives when voting.[71] For example, even if a shareholder cares about the environment, incurring the costs of learning about and analyzing the environmental impact of each potential corporation action for every corporation in her portfolio would be individually costly for each shareholder. Further, because each shareholder only has a small share of the votes, she knows that voting her shares in an informed matter will have little effect on whether those corporations engage in conduct that the shareholder would find imposes excessive environmental costs. Thus, even if shareholders care strongly about the environment, collective action problems will impede their ability to become informed enough to exercise their voting power in a way that furthers their environmental objectives.[72]

Since I wrote my prior article, the growing phenomenon of common shareholding across firms has only increased the importance of the concern that shareholders might suffer a net loss in value from profitable corporate action that harms stakeholders. Because investors have largely shifted to investing in funds with widely diversified portfolios, investors are frequently invested not only in the corporation that might engage in some profitable antisocial action, but also in other firms that might be affected by that action. As a result of this growth of common shareholding, from 1980 to 2017, the average weight that the shareholders of any given S&P 500 firm put on the profits of another S&P 500 firm rose from 20% to 70%, and to 75% for

---

70 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 815.

71 *Id.* at 759, 799–800, 816–17, 827. Hart and Zingales ignore these information costs and the collective action problems they create because their economic model assumes shareholders are perfectly informed about the social issues at stake. *See* Hart & Zingales, *supra* note 68, at 253–54.

72 A separate problem with shareholder voting is that, even if shareholders were fully informed, they are largely insulated from the ordinary social or moral sanctions that a sole proprietor would feel. *See* Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 740, 758–59, 798–99, 814–15, 827. The ones who will mainly experience those social and moral sanctions will instead be the corporate leaders, and thus they must be the ones with the discretion for those social and moral sanctions to help regulate corporate conduct. *Id.* at 740, 758–59, 797–805, 814–17. But this is not an issue of profit-maximization interfering with shareholder value. It rather relates to the previously discussed issue of profit-maximization overriding desirable regulation by social and moral sanctions. *See supra* section I.B.1.

another firm in the same industry.[73] This means that if one corporation's action imposes environmental harms on other corporations throughout the economy, shareholders of the first corporation will on average suffer 70% of that harm through their investment in the other corporations. If the action of one corporation harms customers or suppliers in the same industry in some other way, shareholders of the first corporation will on average suffer 75% of that harm as well.

As a result, even if shareholders care only about their own personal financial interests, shareholders of any given corporation increasingly care strongly about corporate actions that harm stakeholders because those shareholders are increasingly invested in those stakeholders as well. Corporate leaders who are responsive to shareholder interests can thus be expected to increasingly consider stakeholder interests because their shareholders are invested in those stakeholders. Consistent with these incentives, empirical evidence indicates that the existence of common shareholders increases the extent to which corporations avoid environmentally harmful actions.[74] A duty to maximize each corporation's profits would prevent this effect, requiring each corporation's leaders to engage in any actions that increase profits for that corporation, even when those increased profits are outweighed by the aggregate environmental harm to other corporations owned by their common shareholders. Overriding shareholder interests in this way seems clearly undesirable, even if one believes corporations should maximize only shareholder interests.

---

73 *See* Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 OHIO ST. L.J. 1, 7–8 (2021). For reviews of the exploding literature on common shareholding and its manifold effects, *see* Martin C. Schmalz, *Common-Ownership Concentration and Corporate Conduct*, 10 ANN. REV. FIN. ECON. 413 (2018); Martin C. Schmalz, *Recent Studies on Common Ownership, Firm Behavior, and Market Outcomes*, 66 ANTITRUST BULL. 12 (2021).

74 *See* Madison Condon, *Externalities and the Common Owner,* 95 WASH. L. REV. 1 (2020); José Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions Around the World*, J. FIN. ECON., Nov. 24, 2020, The effects of common shareholding are not always benign. When common shareholding is across market competitors, it is called horizontal shareholding, and it can have the anticompetitive effect of reducing competition between those competitors. *See* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It,* 10 HARV. BUS. L. REV. 207 (2020). In that situation, the problem is that optimal competitive behavior requires firms to ignore the fact that their competitive conduct harms the profits of rivals. But common shareholding can have salutary effects in other situations when it causes firms to internalize harmful externalities (such as environmental harms) that the firm inflicts on other firms.

3. *Duty to Profit Maximize Would Require Breaching Efficient Implicit Contracts and Thus Harm Ex Ante Corporate Profitability*

The economic literature indicates that it is often efficient and profitable for firms to enter into legally unenforceable implicit contracts.[75] Such implicit contracts can come in two flavors: special and general.

Some implicit contracts reflect a special understanding with stakeholders. Such an implicit contract might induce stakeholders (such as workers or the community) to confer some specific benefit on the corporation (such as harder work or a favorable zoning review) on the understanding that corporate managers will later appropriately reward those efforts or not take actions that harm those stakeholders.[76] For example, such an implicit contract might induce employees to develop skills that make them more valuable to the corporation (but not to other firms) on an understanding that corporate management would later exercise their discretion to avoid cutting their salaries to levels that exclude the value of the employee's firm-specific investments of human capital.[77] Reneging on such an implicit contract later would be profit-maximizing and perfectly legal at time 2, but it would deter stakeholders from entering into implicit contracts with the corporation that were ex ante profit maximizing at time 1. "Lacking legal enforcement, such implicit contracts must owe their enforcement to social or moral sanctions against reneging on such loose understandings, which can only be effective if not overridden by a legal duty."[78]

The economic literature indicates that such implicit contracts are often more efficient and profitable than explicit contracts.[79] The main reason is that it is often too difficult to define the relevant obligations and their conditions, especially given that many will depend on unknown future contingencies. To illustrate, in the above example, the implicit contract is not some simple contract that, if employees hold a job for some set of years, their salaries can never be cut. Instead, the implicit contract requires employees to sufficiently develop their firm-specific skills (and it can be hard to define whether they have done so, especially since the necessary skills may change over

---

75 *See* Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 779–82.
76 *Id.*
77 *Id.* at 779–80.
78 *Id.*
79 *Id.* at 779.

time) and prevents only cuts in salaries that deny those workers the value of their firm-specific investments (which can also be hard to define, especially since many events may cause salary cuts for unrelated reasons).

Suppose a firm could not enter into such an implicit contract because a duty to maximize profits precluded any managerial discretion to honor the implicit contract later when doing so was ex post unprofitable. In that case, the firm would not enter into any explicit contract not to cut salaries, because the relevant obligations and conditions could not be defined well in a written contract, and substituting alternative clearer obligations and conditions (e.g., all employees who work 10 years for the company can never get their salary cut) would be rigid in a way that would create inefficiencies when certain contingencies arose. Instead, it would have no explicit or implicit contract on the topic, and thus the workers would not make some firm-specific investments that enhance shareholder profits ex ante.

Other implicit contracts do not involve any special understanding between the corporation and specific stakeholders, but rather involve the general implicit social contract that everyone will honor normal social and moral norms.[80] Under this general implicit contact, stakeholders may comply with social or moral norms that are beneficial to the corporation only on the expectation that the corporation will comply with social and moral norms that are beneficial to others. If so, the corporate discretion to engage in ex post profit-sacrificing compliance with social and moral norms is ex ante profit-maximizing.

This implicit understanding that corporate managers will retain the discretion to act in an honorable fashion, rather than betray others by reneging on social and moral norms whenever it later becomes profitable to do so, relates to the economic literature showing why having a trustworthy character can be profitable. As that literature shows, a person with a trustworthy character can induce others to enter into efficient transactions with them, making it efficient and ex ante profitable to commit to having such a trustworthy character, even though ex post a person might do better by reneging on that trust.[81] Likewise, a corporation that maintains the discretion of corporate managers to act based on their honorable character, even when it becomes ex post unprofitable, can induce efficient transactions with the corporation that are ex ante profitable to the corporation.

---

80 *Id.* at 780–81.

81 *Id.* at 780 n.125.

Indeed, it turns out that the *Dodge* opinion, which advocates of the duty to profit maximize normally treat as one of their leading cases, approved precisely such a sacrifice of ex post profit-maximization in order to comply with a general implicit social contract to reciprocate for past conferred benefits. The *Dodge* opinion indicated that it agreed with a prior U.S. Supreme Court decision that allowed a corporation to give away the corporation's water to the city for municipal uses in order to reciprocate for the city's prior grant of rights to lay the water pipes.[82] This decision was ex post unprofitable, given that the corporation could have sold the water and the city could not have constitutionally taken away its water rights without just compensation. Nor did the corporation have any specific special implicit understanding that it would give away water to the city in the future. But the court "sustained the corporate conduct as a proper means of reciprocating for the past (and literally sunk) benefits the city had conferred by allowing the underground pipes."[83] In short, the corporate managers had the discretion to sacrifice ex post corporate profits by complying with social and moral norms of gratitude because it was understood that maintaining that discretion was what likely induced the *ex ante* profitable city decision to allow the corporation to lay down water pipes in the first place.

The duty to profit maximize at every moment in time that Bebchuk and Tallarita advocate would force corporate leaders to renege on implicit contracts whenever that became profitable, which would make it impossible for corporations to induce stakeholders to enter into the efficient implicit contracts. By preventing those implicit contracts, a duty to profit maximize would thus reduce corporate efficiency and ex ante profitability in a way that harms shareholders and all stakeholders.

4. *The Bounded Managerial Discretion to Sacrifice Corporate Profits to Protect Stakeholders Reflects an Exercise of a Limited Agency Slack and Thus Likely Substitutes for Decisions that Would Instead Advance Managerial Interests*

Any managerial discretion to sacrifice shareholder interests is tightly constrained because it reflects an exercise of agency slack that is policed by market and legal mechanisms. As my prior article emphasized, the managerial discretion to sacrifice corporate profits is constrained "by product market

---

82 *Id.* at 781.
83 *Id.* at 781.

competition (a firm that takes on excessively high costs cannot survive), labor market discipline (a manager who sacrifices too much in profits will find it harder to get another or better job), and capital markets (the stock and stock options held by managers will be less valuable if they sacrifice profits too much and may even prompt a takeover bid)."[84] Shareholder voting is certainly imperfect given shareholders' rational apathy, but it also imposes an important constraint on managerial decisions to sacrifice shareholder interests.[85] Finally, as I stressed, managerial profit sacrificing is further constrained by executive compensation methods that lower that compensation if corporate profits are lower.[86]

The combination of these market mechanisms is highly constraining, but imperfect.[87] Corporate law provides a backstop to these market constraints. Where corporate law explicitly allows a discretion to sacrifice corporate profits to further stakeholder interests, it imposes a reasonableness constraint that prohibits excessive profit sacrificing.[88] Where corporate law allows a de facto discretion to profit sacrifice by accepting any strained connection to profit maximization, the need to show at least some conceivable link to profits also constrains profit sacrificing.[89] Further, in special circumstances involving the sale of control, when managers have a last period problem because all those market constraints become much less effective, the law does impose an enforceable duty to profit maximize under the *Revlon* doctrine.[90] This combination of market and legal constraints permits only a bounded discretion to sacrifice corporate profits to further stakeholder interests.

Because these market and legal constraints are imperfect, some agency slack to sacrifice shareholder interests will always exist.[91] But these same imperfections are what permit the agency slack to advance the interests of corporate managers themselves. Because the total amount of agency slack left by these imperfect constraints is constant, any profit sacrificing that managers do to advance stakeholder interests is likely to

---

84 *Id.* at 808.

85 *Id.*

86 *Id.* at 808–10.

87 *Id.* at 741, 745–46, 809.

88 *Id.* at 746, 775, 842–48.

89 *Id.* at 746, 777, 842.

90 *Id.* at 746, 765–66, 841–42, 848–52.

91 *Id.* at 776–77, 809–10; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309–10 (1976).

substitute for profit sacrificing that would otherwise advance managerial interests.[92] Moral and social sanctions may persuade corporate managers to sacrifice corporate profits in order to avoid such sanctions, but given the cap on total agency slack, such sacrifices are likely to substitute for other decisions that would have sacrificed corporate profits to advance managerial interests.[93]

II
THE NON-RESPONSIVENESS OF THE BEBCHUK-TALLARITA ARGUMENTS

Although Bebchuk and Tallarita critique my position as stakeholderism,[94] they do not actually respond to any of the analysis I offered on behalf of my position. Nor does any of the affirmative analysis that they offer undermine any of the arguments I offered for my position. To the contrary, much of their analysis actually supports the premises for my position. Further, taking into account my analysis reveals flaws in many of their arguments.

A. It Remains Clear that a Substantial Managerial Discretion to Sacrifice Corporate Profits Has Long Existed

Bebchuk and Tallarita provide no rebuttal to my observation that no corporate statute has ever stated that a duty to profit maximizes exist and that, to the extent corporate statutes have addressed the issue, they have instead specified that corporate managers can weigh the interests of stakeholders.[95] Indeed, Bebchuk and Tallarita acknowledge that 32 states have corporate statutes allowing the consideration of stakeholder interests.[96] Instead, they argue that those corporate statutes should be amended to adopt a duty to profit maximize. But it is important to keep descriptive and analytical claims distinct, and their acknowledgement means that they concede that most states have long rejected a duty to profit maximize.

Bebchuk and Tallarita also do not address any of my analysis showing that, at least as of 2005, corporate common law (including in Delaware) had not adopted a duty to profit maxi-

---

92 *See* Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 740–41, 777, 805–07.

93 *Id.*

94 Bebchuk & Tallarita, *supra* note 1, at 104.

95 *See supra* subpart I.A.

96 Bebchuk & Tallarita, *supra* note 1, at 105, 115–18.

mize, and that the ALI's restatement of common law had long clearly rejected such a duty.[97] Bebchuk and Tallarita do argue that, after my prior article came out, a 2010 decision of the Delaware chancery court decision in the *eBay* case stated that Delaware common law did adopt a duty to profit maximize.[98] This *eBay* decision does not, however, have the implications that Bebchuk and Tallarita draw from it

To begin with, as well-respected as Chancellor William Chandler is, *eBay* is a decision by one trial judge in one case. It is thus not at all clear that it would be taken as a definitive statement of Delaware law.

More important, even if taken as a definitive statement of Delaware law, the *eBay* decision is quite limited. At most, the court holds that it will not uphold a corporate action that "specifically, clearly, and admittedly seeks *not* to maximize" shareholder profits.[99] This confirms, rather than rebuts, my observation that even if we read the common law as imposing a nominal duty to profit maximize, it will not alter the reality that corporate leaders have substantial de facto discretion to sacrifice corporate profits, because under the business judgment rule the courts will not second guess any purported claim that the action was calculated to maximize corporate profits.[100] In some ways, the *eBay* decision only accentuates that point, because it makes clear that decisions will be invalidated only if the corporate leaders not only admit they were sacrificing corporate profits, but go out of their way to do so specifically and clearly. Avoiding such specific, clear admissions is an easy standard to meet and hardly eliminates the de facto discretion to sacrifice profits that I established.

Indeed, it is striking that *eBay* adopts this exceedingly weak limit in a case where it applied a *tougher* standard than ordinary business judgment rule deference. In *eBay*, the stricken corporate decision was to adopt a poison pill that restricted a minority shareholder (eBay) from acquiring additional shares in the corporation (craigslist).[101] The court held that, because this decision was a defensive tactic that could entrench management and prevent a change in control, it should be judged not under the "deferential business judgment

97 *See supra* subpart I.A.

98 Bebchuk & Tallarita, *supra* note 1, at 137 (quoting eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010)).

99 16 A.3d at 34 (emphasis in original).

100 *See supra* subpart I.A.

101 16 A.3d at 6, 28.

standard", but rather under "the intermediate standard of enhanced scrutiny."[102] Under that standard, directors must affirmatively identify the corporate objectives served and prove their actions are reasonable in relation to those objectives.[103] The fact that, even under that heightened standard, the court was willing to strike down only a decision that specifically and clearly admitted to sacrificing corporate profits makes it even less likely that profit-sacrificing decisions would be stricken under the business judgment rule that would apply to the ordinary operational decisions of corporate leaders.[104]

The *eBay* case also involved other special circumstances of the sort that have been the rare triggers for past restrictions on corporate discretion and which do not apply to ordinary exercises of profit-sacrificing discretion. In *eBay*, two shareholders who owned a majority of shares in craigslist objected to the fact that the third shareholder (eBay) had decided to compete with craigslist by launching its own online classified website.[105] In response, the majority shareholders asked eBay to sell its shares, and when it would not, the majority shareholders (acting as directors) decided to punish eBay by adopting a poison pill to prevent eBay from acquiring any shares from their heirs after their deaths.[106] Accordingly, as in *Dodge*, the decision that was stricken involved a conflict between majority and minority shareholders, in which the majority shareholders were using their power over the firm to try to force a sale of shares to them by a minority shareholder who competed with the firm.[107] Such a conflict of interest raises duty-of-loyalty concerns that are not implicated by a decision to sacrifice the profits of all shareholders to protect stakeholders.

Further, *eBay* involved last period issues akin to *Revlon*.[108] The last period issues in *eBay* did not involve the typical one that, at the time of the corporate decision, the decisionmakers are leaving the firm in a way that undermines ordinary market constraints on their discretion. It instead involved the even starker last period problem that the majority shareholders were

---

102 *Id.* at 28.

103 *Id.*

104 *See also id.* at 35 (directors cannot deploy a poison pill "to defend a business strategy that *openly* eschews stockholder wealth maximization") (emphasis added).

105 *Id.* at 6.

106 *Id.* at 6, 32, 34.

107 *See supra* subpart I.A.

108 *See supra* subpart I.A & I.D (explaining that sales of control trigger the special *Revlon* duty because in such cases last period problems undermine ordinary market constraints on managerial discretion).

trying to dictate issues of corporate control and policy after their own deaths. That meant that, at the time the corporate decision would become operative, no market constraints at all could apply, given that the relevant decisionmakers would be dead and ruling from beyond the grave in a way that would bind future corporate managers and stockholders. Concerns about this implication seemed to be part of what drove the *eBay* decision.[109] Such last period and post-death concerns are not raised by ordinary corporate decisions to temper profit maximization to protect stakeholders.

Indeed, the far more important aspect of the *eBay* case is that the court did nothing to constrain the daily reality that, because craigslist's corporation leaders rejected profit maximization, "craigslist largely operates its business as a community service," declining to charge for classified advertising or sell advertising space on their website to third parties.[110] In short, while the court invalidated a poison pill that raised conflict-of-interest and last-period problems, the court left undisturbed the corporate leaders' continued exercise of operational discretion to sacrifice a large amount of corporate profits to benefit the community. The case thus confirms, rather than refutes, the existence of a substantial discretion to sacrifice corporate profits in the public interest.

Accordingly, Bebchuk and Tallarita offer nothing that rebuts my showing that corporate law has never imposed an enforceable duty to maximize profits, but rather has long sustained (either explicitly or implicitly) a substantial discretion to sacrifice corporate profits to protect stakeholder interests. Understanding this baseline accurately is important to assessing other claims by Bebchuk and Tallarita that recent statements disclaiming a duty to profit maximize must have been illusory unless they changed behavior.

B. The Discretion to Sacrifice Corporate Profits to Benefit Stakeholders Remains Inevitable, Not Illusory

1. *Confirmation of the Inevitability of a Discretion to Sacrifice Corporate Profits to Benefit Stakeholders*

As noted above, my prior article argued that a substantial discretion to sacrifice corporate profits has not only long been the law, but also was inevitable because that discretion could not be eliminated without abandoning the business judgment

109 16 A.3d at 32.
110 *Id.* at 8, 34.

rule, which would inflict insuperable inefficiency costs.[111] Have Bebchuk and Tallarita offered any rebuttal to that claim? No. Instead, their analysis instead provides strong confirmation of that claim.

To begin with, Bebchuk and Tallarita stress that as long as corporate leaders are willing to claim that actions that benefit stakeholders contribute to long-term shareholder value, "under the business judgment rule, corporate leaders do not practically face a significant risk of not being able to justify their decision to a reviewing court."[112] Their analysis thus confirms my prior observation that no significant risk exists that corporate leaders would be unable to survive business judgment rule scrutiny by claiming some conceivable link between stakeholders interests and long-term shareholder profits. It thus confirms my point that the business judgment rule necessarily gives corporate leaders a substantial discretion to sacrifice corporate profits to benefit stakeholders.

Likewise, Bebchuk and Tallarita argue that whether a law allows—or instead mandates—directors to weigh stakeholder interests has no practical significance because either way "the business judgment rule prevents courts from second-guessing the decisions of directors . . . . Therefore, even with a rule mandating that directors give weight to stakeholder interests, the extent to which they would do so would ultimately depend on their own discretion."[113] If the business judgment rule would, by preventing judicial second-guessing, make any mandate to *give* weight to stakeholder interests ineffective, it logically would also make any mandate *not* to give weight to stakeholder interests ineffective. Regardless of which was mandated, the business judgment rule would mean that any weight given to shareholder or stakeholder interests would ultimately depend on the discretion of corporate leaders. Which again confirms my point.

To be sure, we could imagine getting rid of the business judgment rule. But Bebchuk and Tallarita do not offer any response to my showing that doing so would be inefficient and harmful to corporate profits.[114] Instead, their analysis throughout assumes that regardless of whether corporate law provided a duty not to weigh stakeholder interests, a duty to weigh stakeholder interests, or discretion to weight stakeholder

---

111 *See supra* subpart I.A.

112 Bebchuk & Tallarita, *supra* note 1, at 112–13.

113 *Id.* at 115.

114 *See supra* subart I.A.

interests, the business judgment rule would be desirable enough that it would remain part of the doctrinal landscape and give business leaders discretion over how much they weigh stakeholder interests.[115]

Given that Bebchuk and Tallarita accordingly do not seem to dispute the practical reality that corporate law will always leave corporate leaders with some discretion to sacrifice corporate profits to benefit stakeholder, their arguments do not support any *enforceable* duty to profit maximize. Their position seems to boil down to a claim that corporate law should state that shareholder profit maximization is the *aspirational* standard, even though it would be unenforceable and have bite only when corporate leaders made the easily avoidable mistake of openly admitting they were sacrificing shareholder profits.

But why would we think that such an unenforceable aspirational standard would have any practical bite, let alone a desirable one? Whether or not profit maximization was the stated unenforceable aspirational standard, corporate leaders would still be subject to market constraints that mainly incline them to maximize corporate profits, but that would be somewhat tempered by social and moral sanctions.[116] Likewise, whatever the aspirational standard, corporate leaders would still be influenced to some extent by the reality that shareholders often care about stakeholder interests (especially because they are often invested in them) and that a discretion to protect stakeholders would often increase ex ante profitability.[117] Given those realities, it is hard to see why insisting on an unenforceable aspirational standard of profit maximization would improve behavior.

Indeed, the main effect of adopting such an unenforceable aspirational standard would seem to be that, instead of openly stating they were weighing stakeholder interests, corporate leaders would have to surreptitiously weigh them by making strained (but practically unreviewable) claims that stakeholder interests were considered only to the extent that doing so would increase long-term shareholder profits. As I pointed out in my prior article, forcing corporate leaders to weigh stakeholder interests surreptitiously rather than openly would only increase agency costs by, at the margin, depriving sharehold-

115 Bebchuk & Tallarita, *supra* note 1, at 102 n.20, 112–13, 115, 122.
116 *See supra* section I.B.1 & 4.
117 *See supra* section I.B.2 & 3.

ers of accurate information about what corporate leaders were actually doing.[118]

2. *Why the Discretion to Sacrifice Corporate Profits to Benefit Stakeholders Is Not Illusory*

Bebchuk and Tallarita also offer various arguments for the claim that a discretion to sacrifice corporate profits is illusory. By "illusory", they do not (given the above) seem to mean that such a discretion does not practically exist. Instead, they seem to mean that corporate managers cannot be expected to exercise that discretion to protect stakeholders. But their arguments for this claim are flawed, mainly because they assume an incorrect baseline.

a. *The 2019 Business Roundtable Statement*

Bebchuk and Tallarita argue that the discretion to sacrifice corporate profits to protect stakeholders must be illusory because the 2019 Business Roundtable statement that embraced that position did not lead to various changes.[119] But their arguments on each point depend on them assuming an incorrect baseline of what pre-existing corporate law provided.

First, Bebchuk and Tallarita point out that the CEOs who signed that statement largely did not seek board approval, suggesting they did not view the new statement as a meaningful change.[120] But this is hardly surprising because the statement was *not* a meaningful change, given that existing corporate law had long confirmed the existence of a corporate discretion to sacrifice corporate profits to protect stakeholders.[121] Bebchuk and Tallarita assume otherwise only because they mistakenly assume that the prior baseline was a duty to profit maximize that in fact never existed.[122] In contrast, the corporations that signed the 2019 statement explained that they thought it was not a meaningful change because it was consistent with their past practices.[123] This was not an ex post rationalization. As I pointed out in my prior article, the Business Roundtable had as early as 1989 already rejected the position that corporate leaders had a duty to maximize profits.[124] To be sure, in 1997

---

118 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 740–41, 795, 807, 811.

119 Bebchuk & Tallarita, *supra* note 1, at 94–95, 98–99, 124–39.

120 *Id.* at 98, 130–33.

121 *See supra* subparts I.A and II.A.

122 Bebchuk & Tallarita, *supra* note 1, at 98, 130–33.

123 *Id.* at 131–32.

124 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 803–04.

the Business Roundtable stated that the primary duty of directors was to shareholders,[125] but that is different from adopting a position of shareholder exclusivity, and thus is consistent with the bounded discretion to sacrifice profits to protect stakeholders that has long existed under corporate law.[126] In short, all the Business Roundtable did in 2019 was correctly state the reality of a discretion to sacrifice profits that it knew had existed for decades. The fact that the CEOs who signed that statement believed that re-affirming this long-existing principle was not a meaningful change requiring board approval hardly shows that this principle confers an illusory discretion.

Second, Bebchuk and Tallarita note that the corporations that signed the 2019 Business Roundtable statement generally did not amend corporate guidelines that stated that the corporation should primarily advance the interests of shareholders.[127] Again, this is hardly surprising because the pre-existing rule was already that, although corporations should primarily advance the interests of shareholders, they could temper the pursuit of profit maximization when it inflicted harms on stakeholders.[128] Bebchuk and Tallarita assume otherwise only because they conflate shareholder primacy with their preferred principle of shareholder exclusivity,[129] which has long been rejected by corporate law.

Third, Bebchuk and Tallarita stress that the 2019 Business Roundtable statement is unclear about whether it favors protecting stakeholders beyond what would indirectly benefit shareholders and that it does not address the possibility that stakeholder and shareholder interests might conflict and explain how to trade off such conflicting interests.[130] But that is not surprising. As discussed above, there is hardly any difference between an express discretion to sacrifice corporate profits to benefit stakeholders and the de facto discretion provided by an ability to do so whenever a conceivable link to long-term shareholder value could be claimed.[131] Given that relying on the former imposes some additional legal risk without meaningfully increasing that discretion, it is hardly surprising that

---

125 Bebchuk & Tallarita, *supra* note 1, at 106.

126 *See supra* Introduction & subpart I.A.

127 Bebchuk & Tallarita, *supra* note 1, at 98, 133–37.

128 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 745; *supra* subpart I.A.

129 Bebchuk & Tallarita, supra note 1, at 91, 94, 97–98, 104, 106, 110, 114–15, 139.

130 *Id.* at 98–99, 127–29.

131 *See supra* subparts I.A & II.A.

the statement (and many corporate guidelines by signing corporations) rely instead on the latter. This provides no evidence that such a discretion is illusory.

Fourth, Bebchuk and Tallarita argue that the 2019 Business Roundtable statement must be illusory because it ignores an alleged conflict with corporate laws that require shareholder profit maximization.[132] Again, their argument mistaken assumed that some state corporate laws impose an enforceable duty to profit maximize, when in fact they do not because they either expressly recognize a discretion to sacrifice corporate profits to benefit stakeholders or implicitly recognize a de facto discretion to do so under the business judgment rule.[133] The 2019 Business Roundtable statement thus correctly ignored the purported conflict because there was none.

b. *The Incentives of Corporate Leaders*

Bebchuk and Tallarita argue that any discretion of corporate leaders to weigh stakeholder interests must be illusory because market constraints (including executive compensation, capital markets, labor markets, and control markets) provide strong incentives for corporate leaders to enhance shareholder value, but little incentive to give independent weight to stakeholder interests.[134] None of these arguments rebut my analysis, which relied on precisely the same market constraints (as well as on product markets and shareholder voting) to explain why any managerial discretion to sacrifice corporate profits would be limited to exercising the residual agency slack that remains because these constraints are necessarily imperfect.[135] As long as this agency slack is not zero, managers will have some discretion to sacrifice corporate profits to further stakeholder interests and thus this discretion will not be illusory.

Bebchuk and Tallarita do not deny that some agency slack inevitably exists. Indeed, they acknowledge that these market constraints are sufficiently imperfect that the agency slack of corporate leaders is "significant".[136] Such significant agency slack means a significant (but bounded) discretion to sacrifice corporate profits in the public interest.

---

132 Bebchuk & Tallarita, *supra* note 1, at 99, 137–39.

133 *See supra* subps I.A & II.A.

134 Bebchuk & Tallarita, *supra* note 1, at 92, 99, 140–55.

135 *See supra* section I.B.4.

136 Bebchuk & Tallarita, *supra* note 1, at 147, 154–55.

Bebchuk and Tallarita argue that corporate leaders cannot be expected to exercise their significant agency slack to advance stakeholder interests (rather than managerial interests) because none of the market constraints provide any affirmative incentive to increase stakeholder welfare.[137] Again, this does not rebut my analysis, but rather confirms my point that there is a fixed agency slack that corporate leaders can exercise either to advance their own interests or stakeholder interests.[138] As I pointed out, this means that any exercise of the discretion to sacrifice corporate profits for stakeholders is likely to substitute for profit sacrificing that would otherwise advance managerial interests.[139] This substitution effect makes the exercise of such discretion to benefit stakeholders more desirable and less harmful to shareholders.

The fact that corporate leaders will have incentives to exercise their agency slack in their self-interest hardly makes their discretion to instead exercise it to advance stakeholder interests illusory. After all, the goal here is simply to make corporations as responsive to social and moral sanctions as sole proprietors of businesses would be.[140] A sole proprietor's financial incentives are solely to do what maximizes her own profits, but sole proprietors also want to avoid the social or moral sanctions they would suffer if they harm others in a way that violates social or moral norms. To some extent, those social or moral sanctions temper the financial incentives to maximize profits that a sole proprietor would otherwise have. Likewise, although corporate leaders have incentives to advance their own financial interests, they too will suffer social and moral sanctions when they engage in profitable actions that harm stakeholders in ways that violate social or moral norms. Sometimes those social or moral sanctions will deter corporate leaders from actions that harm stakeholders.

Moreover, although Bebchuk and Tallarita are correct that the relevant market constraints provide strong incentives to further shareholder interests, they are mistaken in concluding that this necessarily means having little incentive to favor stakeholder interests, given that shareholders themselves often have an interest in favoring those stakeholder interests.[141] Bebchuk and Tallarita reject this argument on the grounds

137 *Id.*
138 *See supra* section I.B.4.
139 *Id.*
140 *See supra* section I.B.1; Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 745.
141 *See supra* sections I.B.2–3.

that the market constraints that they detail encourage corporate leaders to give weight "only to the financial interests of shareholders."[142] But Bebchuk and Tallarita offer no response to my analysis showing that implicit special contracts and the general implicit social contract often mean that sacrificing corporate profits to protect stakeholders increases the ex ante profitability of the corporation.[143] A corporation whose corporate leaders have a trustworthy character and the discretion to comply with that character in ways that predictably will not renege on such implicit contracts will thus be more profitable, meaning increased compensation and increased job prospects at other firms.

Nor are Bebchuk and Tallarita correct that the market constraints that influence corporate leaders are entirely limited to the financial interests of shareholders in the corporation at issue. As they discuss, those market constraints include labor markets and control markets that turn on the willingness of shareholders to retain corporate leaders or the willingness of shareholders at other corporations to hire them.[144] If those shareholders value things other than the profits at the particular corporation at issue, they may not favor retaining or hiring corporate leaders who engage in profitable actions that harm stakeholders that the shareholders value.[145] This is particularly likely given that the explosion in common shareholding means that those shareholders will often be invested in those stakeholders and thus have a financial interest in avoiding harm to such stakeholders.[146] The empirical literature showing that such common shareholding increases the extent to which corporations avoid environmentally harmful actions shows that this effect is far from illusory.[147]

c. *The Dearth of Contractual Protections for Stakeholders in Private Equity Deals*

Bebchuk and Tallarita also argue that the discretion to weigh stakeholder interests must be illusory because when corporate managers negotiate a sale of the corporation to private equity in states with statutes that permit corporate managers to consider stakeholder interests in such deals,

---

142 Bebchuk & Tallarita, *supra* note 1, at 155 n.208.
143 *See supra* section I.B.3.
144 Bebchuk & Tallarita, *supra* note 1, at 143–45.
145 *See supra* section I.B.2.
146 *Id.*
147 *Id.*

managers usually do not bargain for contractual protections for stakeholders.[148] Bebchuk and Tallarita's focus on contractual protections unfortunately misses the point that the very reason to maintain some discretion to protect stakeholders is to deal with situations that cannot effectively or efficiently be dealt with by legal constraints and explicit contractual protections.[149] That is the whole reason to preserve a discretion to respond to social and moral sanctions and to honor either special implicit contracts or the general implicit social contract.[150] In their study, Bebchuk and Tallarita dismiss "soft" commitments because they are not legally enforceable.[151] But such soft commitments are precisely what implicit contracts are, and the literature indicates they can be efficient in situations where explicit enforceable contracts would not be.[152] If explicit contractual protections would be efficient, the corporation would have had every incentive to adopt such explicit contracts before the private equity acquisition, eliminating any need to add an explicit contractual protection as part of the acquisition.

Moreover, Bebchuk and Tallarita explain that they "focused on private equity acquisitions because such acquisitions move assets to the control of managers with powerful incentives to maximize financial returns, and therefore often pose significant risks to stakeholders."[153] That explanation necessarily presumes that, before such acquisitions, the corporations were to some extent sacrificing corporate profits to protect stakeholders: otherwise, giving control to managers with stronger incentives to maximize profits could not pose any significant risk to stakeholders because prior management would already be maximizing profits in a way that imposed the same risk on those stakeholders. Thus, Bebchuk and Tallarita's rationale for focusing on private equity acquisitions itself confirms that a profit-sacrificing discretion to protect stakeholders is being exercised by current corporate leaders and is thus far from illusory.

Bebchuk and Tallarita's logic further assumes not only that private equity owners are more likely to harm stakeholders, but also that the selling corporate leaders know this: otherwise, their failure to negotiate special protections for

148 Bebchuk & Tallarita, *supra* note 1, at 99–100, 155–58.
149 *See supra* section I.B.1 & 3.
150 *Id.*
151 Bebchuk & Tallarita, *supra* note 1, at 156–57.
152 *See supra* section I.B.3.
153 Bebchuk & Tallarita, *supra* note 1, at 156.

stakeholders would have no meaning since the corporate leaders would not know there was any reason to negotiate them. This means that Bebchuk and Tallarita's dataset is a biased selection of firms because it is limited to those corporations whose leaders were willing to sell to private equity owners who are more likely to harm stakeholders. Their dataset necessarily excludes corporate managers who are unwilling to enter into private equity transactions that increase the risk of harm to stakeholders, who will be predictably be those who care more about social and moral sanctions and are thus more likely to exercise profit-sacrificing discretion to benefit stakeholders. The corporate managers who are willing to enter into private equity transactions that increase the risk of harm to shareholders will thus be the corporate managers who care less about avoiding harm to stakeholders, so it is not surprising that they would also be less likely to exercising a profit-sacrificing discretion to protect stakeholders during negotiations with either contractual or soft commitments.

It is also not clear why one would expect private equity owners to pose greater risks to stakeholders. After all, private equity owners also are subject to social and moral sanctions that can temper their profit-maximizing incentives, just as for corporate leaders or sole proprietors.[154] Private equity owners also might want to increase ex ante profits by preserving a discretion to honor enforceable implicit contracts or place value on the interests of other stakeholders, especially if the investors in the private equity funds are also invested in those other stakeholders, which is likely for the diversified institutional investors who typically invest in private equity funds.[155] Private equity funds will also generally have some agency slack, given their ownership by many limited partner investors, so thus have some discretion to sacrifice corporate profits for stakeholders in a way tends to substitute for exercising that agency slack to favor the private equity management.[156] If private equity funds do not pose any greater risk to stakeholders than typical corporate managers, there is no reason to seek any special protection for stakeholders during private equity acquisitions.

Further, the fact that corporate leaders "generally" do not do something to protect stakeholders, which is all Bebchuk

154 *See supra* section I.B.1.

155 *See supra* section I.B.2–3.

156 *See supra* section I.B.4.

and Tallarita claim,[157] does not mean corporate managers never do it. Such evidence is entirely consistent with my view that corporate leaders primarily act in the interests of shareholders, but also retain some bounded discretion to benefit stakeholders.[158] In contrast, such evidence is inconsistent with Bebchuk and Tallarita's view that shareholder exclusivity governs because it means that sometimes corporate managers are protecting stakeholders. Indeed, the fact that, according to Bebchuk and Tallarita, even those corporate managers who *were* willing to sell to private equity owners who posed significant risks to stakeholders do sometimes negotiate special (contractual or soft) protections for stakeholders underscores that there must be powerful social and moral sanctions that sometimes cause corporate managers to exercise their discretion on behalf of stakeholders.

Finally, Bebchuk and Tallarita draw an adverse inference from their observation that the extent to which corporate leaders include stakeholder protections in private equity acquisitions has not increased in recent years, despite recent statements affirming the discretion to sacrifice corporate profits to protect stakeholders.[159] However, the lack of this change over time is not surprising because the discretion to sacrifice corporation profits to protect stakeholders always existed and that has not changed recently.[160]

C. A Bounded Discretion to Sacrifice Corporate Profits on Behalf of Stakeholders Remains Desirable

Bebchuk and Tallarita simply ignore all my arguments for why it is normatively desirable to have a bounded discretion to sacrifice corporate profits on behalf of stakeholders. Considering my normative analysis not only shows why their contrary normative conclusion is mistaken, but also reveals several flaws in their own affirmative analysis.

1. *The Desirability of Having Discretion to Respond to Social and Moral Sanctions*

Bebchuk and Tallarita nowhere address my analysis showing that, given the inevitable over and underdeterrence of even optimal legal sanctions, optimal regulation requires supplementing legal regulations with social and moral sanctions,

---

157 Bebchuk & Tallarita, *supra* note 1, at 99, 156–57.
158 *See supra* Introduction & section I.D.4.
159 Bebchuk & Tallarita, *supra* note 1, at 157.
160 *See supra* subparts I.A & II.A.

which would be undesirably overridden by a duty to profit maximize.[161] Moreover, some of their affirmative normative arguments ignore flaws in their claims that my analysis reveals.

In particular, Bebchuk and Tallarita argue that recognizing the existence of a discretion to sacrifice corporate profits to protect stakeholders is undesirable because it will delay or impede efforts to protect stakeholders with legal regulations or taxes that are more effective.[162] Their argument relies on an assumption that legal regulations or taxes can always eliminate social problems, which ignores the vast literature showing that because of inevitable imprecision in legal rules and adjudication, even the most optimal legal rules leave a lot of overdeterrence and underdeterrence.[163] Their argument also relies on a premise that relying on the discretion to sacrifice profits is an "alternative" strategy to legal regulation and taxes.[164] Instead, the literature shows that optimizing conduct requires *supplementing* those legal regulations and taxes with social and moral sanctions, which can only be effective to the extent that actors have the discretion to respond to those social and moral sanctions.[165] Thus, societies everywhere do not use social or moral sanctions as an alternative strategy to legal regulations or taxes, but rather pursue both strategies. They are complements, not substitutes.

Further, Bebchuk and Tallarita ignore the fact that their duty to profit maximize would affirmatively undermine the effectiveness of legal regulations by overruling the existing doctrine that not only allows, but requires, corporate leaders to comply with legal regulations even when the expected profits of noncompliance would exceed the expected penalties.[166] As noted above, this existing doctrine increases the effectiveness of legal regulations by concentrating legal sanctions on those corporate leaders, so changing this doctrine to instead adopt a duty to profit maximize would render legal regulations less effective.

Nor do Bebchuk and Tallarita provide any evidence that recognizing a discretion to protect stakeholders will delay or discourage legal reforms, let alone evidence for their even bolder claim that stakeholderism seeks to make legal regula-

---

161 *See supra* section I.B.1.

162 Bebchuk & Tallarita, *supra* note 1, at 92, 94, 101, 164, 168–73, 176–77.

163 *See supra* section I.B.1.

164 Bebchuk & Tallarita, *supra* note 1, at 94.

165 *See supra* section I.B.1.

166 *See supra* subpart I.A.

tions unnecessary.[167] I know of no evidence that asking sole proprietors behave in an ethical manner has ever lessened the demand for laws to assure that unethical sole proprietors conform to similar norms, let alone suggested that such laws are unnecessary. Nor do I know of any environmental activists who have ever suggested that, because corporations have discretion to protect the environment, they are not going to press for legal changes to protect the environment or would regard such legal changes as unnecessary.

Indeed, the causal effect is probably in the opposite direction. If even large prominent corporations make efforts to protect the environment, that tends to validate the importance of such environmental protection and make it less controversial, rendering it politically easier to enact legal changes. Further, when large corporations are engaged in some socially responsible conduct but small corporations are not, perhaps because small corporations are less susceptible to social sanctions because they are less well known, then large corporations have affirmative incentives to support legal changes to force their smaller rivals to comply with the same conduct norms.

Consider, for example, what happens when large corporations announce they are reducing carbon emissions to address climate change. That makes it easier to enact laws that reduce carbon emissions, not only because it politically validates the position that climate change is a major problem, but also because the large corporations would prefer a level playing field where less-socially responsible corporations also reduce their carbon missions.

Bebchuk and Tallarita complain that those (like me) who favor a discretion to protect stakeholders have not specified a precise protocol for identifying stakeholder interests and weighing them against shareholder profits.[168] But the social and moral norms that would guide the exercise of profit-sacrificing discretion often do not require any such open-ended balancing of utilities. For example, we all comply with ordinary ethical rules to tell the truth, honor our commitments, and reciprocate benefits without running a full calculation of the utility tradeoffs every time. Even when the relevant social and moral norms do include more open-ended obligations to consider the extent to which our conduct might harm others, those norms need not be precise in order to be desirable. It merely has to be the case that those social and moral norms tend to

167 Bebchuk & Tallarita, *supra* note 1, at 176.
168 *Id.* at 98, 115–23.

move behavior in a desirable direction compared to the alternative of purely pursuing personal self-interest.[169]

Indeed, if we did think we could fashion a rule that would precisely tell businesses how to weigh harms to others, there would be no reason not to do so in a general law that would also apply to noncorporate businesses, rather than in some special duty applicable only to corporate managers.[170] But the reality that there are residual areas beyond the reach of even optimally framed legal duties is precisely what justifies the supplemental strategy of relying on social and moral sanctions that only work if the discretion to respond to them exists.[171]

To be sure, absent precise legal rules, which stakeholder interests to protect and how much to protect them can raise difficult philosophical questions on which we have no consensus. But those issues are unavoidable, and the fact that they are difficult does not mean that the correct answer is (as Bebchuk and Tallarita assume) to impose a duty to profit maximize that affirmatively attaches zero weight to stakeholder interests. After all, no one would think that, just because we have never had universal philosophical consensus about how precisely we should act in every situation where our actions might affect others, each of us should behave like sociopaths who ignore ethical norms, never consider our effects on other people, and just do whatever maximizes our personal interests given the expected legal penalties. Yet that is just what Bebchuk and Tallarita are arguing for corporate conduct.

2. *The Desirability of Recognizing that Shareholders Value Stakeholder Interests*

Bebchuk and Tallarita provide no normative response to my point that a duty to profit maximize would often harm shareholder value because shareholders commonly place some value on stakeholder interests.[172] Rather than address this normative issue, Bebchuk and Tallarita evade it by arguing that it does not matter because, even if this is true, market constraints give corporate leaders incentives to consider only the financial interests of shareholders, and thus it is illusory to think that corporate leaders would ever consider any weight that shareholders might put on stakeholder interests.[173] They

169 Elhauge, *Sacrificing Corporate Profits*, *supra* note 8, at 744, 755, 804–05.
170 *Id.* at 743.
171 *Id.* at 743–44.
172 *See supra* section I.B.2.
173 Bebchuk & Tallarita, *supra* note 1, at 155 n.208.

are mistaken in their claim that the corporate discretion to do so is illusory, for reasons discussed above.[174] In any event, it does not address the normative challenge.

Indeed, it is not clear what Bebchuk and Tallarita's position on the normative question even is. Suppose a profit-maximizing corporate action would harm shareholder value because shareholders put more value on avoiding the harm to stakeholders than on the incremental corporate profits. Do Bebchuk and Tallarita think the duty of corporate leaders is to *take* that action because it would maximize corporate *profits* or to *avoid* that action because it would not maximize shareholder *value*?

The latter answer appears indicated by various passages where Bebchuk and Tallarita describe the duty as a duty to maximize "shareholder value."[175] But if that is the case, then they acknowledge that corporate leaders not only can, but must, consider harms to stakeholders whenever they think their shareholders would care about those harms, which is extremely common and only has gotten more so with increased common shareholding.[176] It would further indicate that, given the collective action problems faced by shareholders, corporate leaders can and must weigh the extent to which they think shareholders care about stakeholder interests for them when deciding whether to block takeover bids.[177] Acknowledging those exceptions would involve precisely the sort of stakeholderism that Bebchuk and Tallarita aim to critique.

The alternative is that Bebchuk and Tallarita instead mean the duty is rather to maximize *stock* value, and thus in such cases corporate leaders would have a duty to take the profit-maximizing action. If so, they are for a duty to take actions that would affirmatively harm shareholders as well as stakeholders. It is hard to see the normative attraction of saying that managers have to do that, but the only way to avoid that normative implication is to instead take the first position and thus adopt a form of stakeholderism.

This deep ambiguity in their normative position cannot properly be evaded by claiming it is not practically significant. After all, because Bebchuk and Tallarita acknowledge that a duty either way would not be practically enforceable, all we are

174 *See supra* subsection II.B.2.b.

175 Bebchuk & Tallarita, *supra* note 1, at 97, 110.

176 *See supra* section I.B.2.

177 *Id.*

really talking about is an aspirational duty.[178] If one is going to have an aspirational duty, one should be able to define just what the aspiration is.

3. *The Desirability of a Discretion to Abide by Efficient Implicit Contracts*

Bebchuk and Tallarita nowhere address my point that a duty to profit maximize would require corporations to renege on unenforceable implicit contracts whenever reneging was profit-maximizing, even though that will deter stakeholders from entering into implicit contracts that are ex ante profitable to the firm.[179] This issue is different from the preceding section's issue of whether shareholders might put some independent value on avoiding harms to stakeholders. Even if shareholders care only about the profits of this particular corporation, they would not want corporate leaders to be obligated to engage in profit-maximizing breaches of implicit contracts. Indeed, shareholders would prefer to restrain their own incentives to renege on such implicit contracts by committing (via corporate law) to a system of management that leaves the discretion to comply with implicit contracts in the hands of corporate managers who are subject to the social and moral sanctions that enforce those implicit contracts.

Because of such implicit contracts, a duty to profit maximize would be normatively undesirable even if all we cared about was shareholder value and even if all shareholders valued was profits. Such a duty would also harm stakeholders both because reneging on such implicit contracts would directly harm them and also because such a duty would prevent would otherwise be mutually advantageous implicit contracts. Given that such a duty would thus harm both shareholders and stakeholders, it seems clearly undesirable.

Taking into account the economic literature on implicit contracts also reveals an error in Bebchuk and Tallarita's argument that there is no real difference between enlightened shareholder value and shareholder value maximization.[180] They argue that if "enlightened" decisions to benefit stakeholders would actually benefit shareholders, then such decisions would be dictated by shareholder value maximization, and thus the two standards would not differ. This would be true in cases where a decision to benefit stakeholders will *later* have

---

178 *See supra* section II.B.1.

179 *See supra* section I.B.3.

180 Bebchuk & Tallarita, *supra* note 1, at 97, 108–10, 139.

effects that increase shareholder profits, because then the decision maximizes shareholder profits and the two standards come out the same. But the temporal issue with implicit contracts is that stakeholders can be induced at time 1 to confer profitable benefits on the corporation only if the corporation maintains a discretion to, at a later time 2, sacrifice profits by honoring that unenforceable implicit contract. The standard of enlightened shareholder value would allow the corporation not to renege on the implicit contract at time 2 because taking into account stakeholder interests in this way is ex ante profitable to shareholders, even though the decision at time 2 itself harms shareholder profits and value. The two standards thus do come to different results when the issue is whether to renege on an implicit contract, and in such cases enlightened shareholder value clearly produces the more normatively desirable result.[181]

4. *The Desirability of Exercising a Limited Agency Slack to Benefit Stakeholders Rather than Managers*

Bebchuk and Tallarita also offer no response to my point that, because market constraints leave corporate managers with a bounded amount of agency slack, any exercise of profit-sacrificing discretion to benefit stakeholders will likely simply substitute for exercises of that discretion that would otherwise benefit corporate managers.[182] Ignoring this analysis leads them to adopt the mistaken argument that stakeholderism must undesirably seek to make corporate leaders more insulated from shareholder oversight in a way that would undesirably worsen corporate performance.[183] At least as reflected in my own arguments for what they call stakeholderism, it does nothing of the sort. My analysis just recognizes the practical reality that the *existing* amount of agency slack already gives corporate managers substantial discretion to sacrifice corporate profits to protect stakeholders. Not only have I never advocated increasing that agency slack by increasing the insulation of corporate managers, but I also expressly rejected that posi-

---

181 Some versions of enlightened shareholder value might also consider the reality that because shareholders commonly place some value on stakeholder interests, considering stakeholder interests might be necessary to avoid profit-maximizing decisions that harm stakeholders in a way that decreases shareholder value. In that case, the standards might also diverge for reasons detailed in *supra* section II.C.2.

182 *See supra* section I.B.4.

183 Bebchuk & Tallarita, *supra* note 1, at 92, 94, 100–01, 164–68.

tion and argued that the bounded nature of that agency slack was part of what made it desirable.[184]

Their argument that stakeholderism would increase managerial insulation also reflects their mistaken assumption that pre-existing corporate law embodies a duty to profit maximize, when in reality it has always embodied a discretion to sacrifice corporate profits to protect stakeholders.[185] Stakeholderism, at least my version of it, is not about increasing the insulation of corporate managers to increase their discretion to protect stakeholders. It is about a clear-headed acceptance of the reality that such a discretion has long existed and a clear-minded analysis of what the normative implications of that existing discretion are.

184 *See* Introduction.
185 *See supra* subparts I.A, II.A.