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THE PERILS OF A STAKEHOLDERIST CORPORATE LAW REFORM: A REPLY TO PROFESSOR KOVVALI

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We analyze whether non-shareholder constituencies are better protected with internal corporate law reform or with external regulation. We reply to Professor Aneil Kovvali's article, Stark Choices for Corporate Reform*, that criticizes some of our previous output, in which we warned that a stakeholderist corporate law reform would stymie efforts to achieve effective stakeholder protections with external regulation. In his article, Kovvali attacks our work for imposing a "stark choice" on policymakers (that is, that reformers would face a mutually exclusive choice between two types of reform, internal and external), and for our view that stakeholderism should not be embraced because it would give directors renewed powers to lobby more forcefully for reforms they like and against reforms they dislike. Kovvali argues that while internal and external reforms are not incompatible, internal reform is more realistic and might pave the way to external reform.*

Contrary to Kovvali's characterization, we do not object to voluntary corporate actions that improve stakeholder welfare and that can happen without statutory corporate law changes. Moreover, we do not think internal and external reforms are inherently incompatible; rather, reformers would prioritize internal reform, give the opportunity for executives to cherry-pick the changes they want, and jeopardize reform attempts that would truly benefit weaker constituencies. While Kovvali's support for stakeholderism revolves around its feasibility, he does not show how an internal corporate law reform capable of shifting power and resources to stakeholders (one that is mandatory, specific, and enforceable) would be any more feasible than external regulation.

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INTRODUCTION

The debate on corporate purpose is more vibrant than ever. While at the turn of the century authoritative scholarship declared the shareholder-centric model victorious,[1] more recently many voices, from academics to executives, politicians, and lobbying groups, have called for broadening the corporate purpose to embrace stakeholderism.[2] Under a stakeholder approach, directors and managers of corporations are charged with (and held responsible for) creating value for all stakeholders of the

1. See Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 468 (2001).

2. See generally Colin Mayer, Firm Commitment: Why the Corporation Is Failing Us and How to Restore Trust in It 167 (2013) ("Shareholder value is an outcome, not an objective. It should not drive corporate policy but be treated as a product of it."); Colin Mayer, Prosperity: Better Business Makes the Greater Good (2018) (arguing that corporations accumulate wealth from actions that impact various stakeholders, so their purpose should be to generate prosperity for those stakeholders); Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999) (explaining that a team production theory of corporation law accounts for the obligations corporations have to a variety of stakeholders); Leo E. Strine, Jr., Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock, 76 Bus. Law. 397 (2021) (arguing that corporations should balance stakeholder interests with shareholder interests). The stakeholderist approach has been famously endorsed by diverse characters, ranging from progressives like Senators Elizabeth Warren and Bernie Senders to high-profile capitalists such as the CEO of BlackRock and the Business Roundtable (the lobbying group made up of CEOs of large American corporations). Compare Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018) (imposing a duty on companies to create a general public benefit and requiring company directors to balance shareholder interests with the interests of those affected by the company), and Corporate Accountability and Democracy Plan, BernieSanders.com, https://berniesanders.com/issues/corporate-accountability-and-democracy [https://perma.cc/EF45-BPGV] (last visited Oct. 31, 2020) (advocating to give workers an ownership stake in the companies they work for), with Larry Fink, 2018 Letter to CEOs: A Sense of Purpose, BlackRock (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/3YYU-MAEL] (arguing that a company's ability to respond to stakeholders and "manage environmental, social, and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth"), and Press Release, Bus. Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans' (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/9NSR-P859] (outlining several "fundamental commitment[s]" to all stakeholders, including "delivering value" to customers, "investing in employees," and "dealing fairly" with suppliers). Even the current draft of Restatement of the Law of Corporate Governance by the American Law Institute includes significant new language regarding the objective of a corporation that moves in a stakeholderist direction. Restatement of the Law: Corporate Governance § 2.01 cmt.b (Am. L. Inst., Tentative Draft No. 1, 2022) ("In all jurisdictions, the core objective of a corporation is to enhance the economic value of the corporation. Where the jurisdictions differ is on whether this is understood to be 'for the benefit of the shareholders' alone or whether the intended beneficiaries may be a broader group of 'stakeholders' . . . .").

corporation, including employees, customers, suppliers, and local communities.[3]

In his 2023 article in the *Columbia Law Review*, *Stark Choices for Corporate Reform*, Professor Aneil Kovvali offers a bold defense of stakeholder governance against what he labels as the "stark choice" critique,[4] in which he includes two of our articles: one from 2020, *Can a Broader Corporate Purpose Redress Inequality?: The Stakeholder Approach Chimera*,[5] and the other from 2021, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*.[6] In our articles, which criticize stakeholderism from a variety of angles,[7] we argue that while in the best-case scenario such an approach would be innocuous, in the worst case it would be detrimental for weaker constituencies.[8] We warn that stakeholderism might do more harm than good in seeking the social goals it purports to achieve because it would further empower executives—the very actors who have created the problems that well-intentioned proponents of stakeholderism seek to solve.[9] On the one hand, executives can use stakeholderism aggressively "by justifying more expansive lobbying efforts as part of their mission to consider all constituents" because having to cater to a broader set of constituencies would significantly expand corporations' political leverage.[10] On the other hand, "executives can deploy stakeholderism defensively—by accepting a nominal change they

3. See, e.g., Blair & Stout, supra note 2, at 280–81 ("[T]he directors are trustees *for the corporation itself*—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.").

4. Aneil Kovvali, Stark Choices for Corporate Reform, 123 Colum. L. Rev. 693, 696–704 (2023).

5. Matteo Gatti & Chrystin Ondersma, Can a Broader Corporate Purpose Redress Inequality?: The Stakeholder Approach Chimera, 46 J. Corp. L. 1 (2020) [hereinafter Gatti & Ondersma, Stakeholder Approach Chimera].

6. Matteo Gatti & Chrystin Ondersma, Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?, 100 N.C. L. Rev. 167 (2021) [hereinafter Gatti & Ondersma, Stakeholder Syndrome].

7. First, requiring directors to cater to too many stakeholders might generate confusion and confer excessive discretion on executives. See Gatti & Ondersma, Stakeholder Approach Chimera, supra note 5, at 19–20. Second, the business judgment rule makes the change to stakeholderism largely irrelevant, whereas abandoning such a rule would be overkill. See id. at 20–21. Third, directors and managers generally respond to incentives other than the shareholder litigation—that is, how they get elected and paid aligns them more to shareholder interest than the fear of being sued for breach of fiduciary duties. See id. at 18–22. Fourth, there are other, better avenues of reform for weaker constituencies, namely labor, environmental, antitrust, and tax reforms. See id. at 22–23; see also Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 173.

8. See Gatti & Ondersma, Stakeholder Approach Chimera, supra note 5, at 9.

9. See id.

10. Id.; see also id. at 64–67 (discussing how corporations already act against the interests of their constituencies, particularly in the context of unionization and arguing that a broader stakeholder environment would exacerbate the issue).

can preempt direct regulation that could truly shift power and resources to weaker constituents."[11] As a result, we emphasize the risks "that disproportionate political capital" would "be depleted, leaving insufficient time and resources to devote to precisely the regulatory changes most likely to" protect stakeholders.[12] It's this set of arguments that Kovvali criticizes in his *Stark Choices* article.[13]

With this Piece, we intend to address Kovvali's criticism and clarify our positions. Part I describes the various critiques leveled by Kovvali. We first describe Kovvali's argument that internal and external reforms should not be considered mutually exclusive, his juxtaposition between alleged constraints faced by reformers, and his realism as to which reform is achievable and which is not. We then survey Kovvali's examples of reforms operating on dual tracks, one track being internal corporate law and the other external reform. Further, we illustrate the advantages of internal reform according to Kovvali: On the one hand, internal reform is considered feasible as opposed to most of the attempts to attain external reform, which are destined to fail given resistance from conservatives; on the other hand, pro-stakeholder internal reform may pave the way toward finally achieving external reform. After offering some real-world applications of Kovvali's preferred approach, Part I concludes with Kovvali's response to the objection that an empowered board would offer more lobbying resistance: essentially, that directors are already lobbying, and we should not expect any increased effort on that front.

In Part II, we clarify two of our positions that are mischaracterized in *Stark Choices*. First, contrary to Kovvali's interpretation, we have not endorsed shareholder primacy. Our critique of stakeholderism is independent from a defense of the virtues of a shareholder-centric model. Second, and more importantly, our work does not criticize any stakeholder-friendly initiative a board might voluntarily take, but rather expresses concerns toward statutory or regulatory interventions that broaden the beneficiaries of director fiduciary duties.

In Part III, we explain, defend, and expand on the idea that stakeholderism is a risky approach to achieve a reform that can truly benefit weaker constituencies. First, we explain that Kovvali's characterization of our work as imposing a "stark choice" is far-fetched because we reckon different reforms can be pursued at the same time. What worries us regarding a stakeholder reform, however, is prioritization, cherry-picking, and reform jeopardy. We then discount Kovvali's examples of dual-track reforms, noting that none of them come from Congress or a

11. Id. at 10; see also id. at 67–69 ("[A] stakeholder approach would, to embrace an expression one of us used in previous work, occupy an outsized portion of legislative and regulatory space, which can thwart real reform.").

12. Id. at 10. For a description of the reforms that would shift power and resources to workers, see generally Gatti & Ondersma, Stakeholder Syndrome, supra note 6.

13. Kovvali, supra note 4, at 702–04.

federal regulator (the only meaningful sources of reform to benefit weaker constituencies, especially workers). In Part III, we also critically analyze what Kovvali—quite correctly—considers one of the main features of a stakeholderist reform: its feasibility. While we concur with him that a stakeholderist reform is in fact more achievable, we reiterate that feasibility alone is not only unimportant but would also put us on a slippery slope. Further, we take on the argument that a stakeholderist internal reform would be conducive to external reform, and note that what Kovvali describes are, again, private initiatives by corporations and not formal reform. Finally, we rebuke Kovvali's dismissal of enhanced lobbying risk in connection with a stakeholder reform by arguing that institutionalizing a broadened scope of director duties would bolster their clout in advancing a corporate-friendly regulatory agenda.

I. PROFESSOR KOVVALI'S "STARK CHOICE" CRITIQUE

A. *The Stark Choice Hypothesis*

In *Stark Choices*, Professor Kovvali critically describes "escalated . . . attacks" on stakeholder governance by "[s]hareholder primacy theorists" who suggest "that adopting corporate governance measures to promote stakeholder interests could 'derail,' 'crowd out,' 'impede,' 'cannibalize,' or otherwise prevent governmental reforms and regulations that would do more to advance stakeholders' interests."[14] To Kovvali, "[t]he hypothesis that reformers face a stark choice between internal corporate governance reforms and external regulations plays an important role in the case against stakeholder governance" because "[i]t is . . . one of the few arguments for shareholder primacy that would resonate with people focused on stakeholder interests."[15]

In order "to explain why stakeholder governance should not be pursued, shareholder primacy theorists must argue that it would be risky to try. The stark choice hypothesis plays that necessary role in the rhetoric of shareholder primacy theorists."[16]

Kovvali addresses our scholarship directly:

> In an article asserting that stakeholder governance would do little to address wealth inequality, Professors Matteo Gatti and Chrystin Ondersma provide a[n] . . . argument for the stark choice hypothesis, based on two mechanisms: (1) Corporations may be able to lobby more effectively on behalf of their shareholders or managers if they can claim to be acting on behalf of a broader range of social stakeholders, and (2) the internal

14. Id. at 694–95 & n.1.
15. Id. at 696.
16. Id. at 697.

> stakeholder governance approach could consume political capital and attention that would otherwise be used for external reforms.[17]

B. *The Critique*

Kovvali attacks this approach because in his view there is "no reason to believe that the choices are *mutually exclusive*."[18] He adds that "there is little reason to assume that reformers are *biased or naive* in their expectations,"[19] given that "[r]eformers are . . . sophisticated to the point of cynicism and are unlikely to overestimate the value of an internal reform or to trade away an achievable external reform that would be more effective."[20] In his view, "[i]nternal reforms could reshape the way that corporations use their formidable political capital with respect to external reforms, making external reforms more likely."[21]

1. *Reformer Constraints Versus Reformer Realism.* — Kovvali suggests that "stark choice" theorists share an "underlying assumption that reformers and the political process can only produce a limited amount of reform" and that "[s]ome constraint—limited political capital, limited time and attention by key players, or limited capacity to tolerate large amounts of change—is thought to make it necessary for reformers to choose between different options."[22] Otherwise, Kovvali continues, "there would be no need to choose between internal and external strategies."[23] Kovvali does not think "key players will fail to properly evaluate reforms" or that they will "settle for weak internal reforms when strong external reforms [are] obtainable."[24] Instead, he posits that "weak reforms will only be adopted if stronger measures could not be pushed through."[25] "Instead of wrestling with a dynamic process, in which reforms impact the feasibility of further reforms, [stark choice proponents] treat the issue as a simple one-time choice with two options available."[26]

2. *Instances of Dual-Track Reforms.* — Crucially, in support of his critique, Kovvali offers real-world examples that he believes show that reforms can run on parallel tracks: "[S]tates that adopt stakeholder-

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17. Id. at 702 (citing Gatti & Ondersma, Stakeholder Approach Chimera, supra note 5, at 63–64, 67–68).

18. Id. at 697 (adding that "[n]o clear constraint forces a choice between the internal and external paths").

19. Id.

20. Id. at 697–98.

21. Id. at 698.

22. See id. at 703.

23. Id.

24. Id.

25. Id. at 704.

26. Id.

oriented internal corporate governance reforms are often willing to defend stakeholder interests through external reforms as well."[27] To wit, he mentions that states like New York have taken a multifaceted approach. On one hand, they have adopted "constituency statutes," which allow corporate directors and officers to consider the wellbeing of groups like workers.[28] On the other hand, they have also implemented policies such as raising the minimum wage above the federal standard and enacting stricter employment discrimination laws.[29] Meanwhile, California has pursued a different strategy to enhance women's recognition in the workforce.[30] California's approach includes corporate law reforms requiring minimum female representation on corporate boards and a comprehensive package of external regulations targeting issues like sexual assault, harassment, and employment discrimination.[31] Finally, Kovvali cites regulators' efforts to both penalize and prevent misconduct, which involve imposing substantial fines and mandating the implementation of compliance programs.[32]

3. *Advantages of Internal Reform: Possibility Versus Impossibility.* — In addition, Kovvali underscores the virtues of internal reform, because it "can be pursued by a much broader set of actors, including in the private sector."[33] An internal reform can take place "even where external regulators are satisfied or have exhausted their political capital."[34] In his view, this advantage is particularly important because of the well-known difficulties faced by the federal legislature attempting to pass reform.[35] And in describing such difficulties he suggests that passing internal reform on governance issues is still easier than external reform given the roles of the SEC, of other quasi-governmental entities such as FINRA, and of stock exchanges and other actors (like proxy advisors or large asset managers), as formal or de facto rulemakers who can work on certain corporate governance issues on separate tracks.[36] In Kovvali's view, "much of the demand for internal corporate change has been prompted by reasonable

27. Id. at 707.

28. See id. at 708–09, 711.

29. See id. at 709–11.

30. See id. at 713–15.

31. See id.

32. Id. at 715–17.

33. Id. at 717.

34. Id.

35. Id. (describing the federal legislative process as characterized by inertia and requiring "an unusually broad national coalition to achieve success").

36. Id. at 719–23 (pointing to the current SEC power to require environmental, social, and governance disclosures, and to initiatives such as putting more women and minorities on boards, destaggering boards, and reclassification of dual class share structures).

frustration at the processes and prospects for external regulation."[37] Hence, a "blocked path to external reform[] lead[s] to demand for progress along a relatively open path to internal reform."[38]

He adds that internal reform is more likely to garner bipartisan support because of conservatives' general preference for private ordering, whereby "parties are empowered to 'make tradeoffs tailored to their circumstances and preferences, rendering much bureaucratic oversight superfluous.'"[39] Because conservatives are generally opposed to external reform but potentially open to internal reform, Kovvali yields to the idea that the latter is ultimately more feasible and faster.[40]

4. *Advantages of Internal Reform: Helping With Future External Reform.* — Kovvali posits that a "more stakeholder-focused model for corporate decisionmaking can make external reforms more likely by reducing corporate opposition to external reform and causing some corporations to actively support external reform."[41] In his view, "softer internal changes can have an impact on the way that corporations engage with the political process."[42] He adds that "corporations can affect external regulatory processes if internal mechanisms cause them to do so."[43]

In addition, he argues that voters trust business leaders more than politicians on certain issues and can be better persuaded by private actors that a reform is necessary.[44] For example, voters who fundamentally oppose a governmental solution may accept that there is a societal problem that requires fixing once they see a private solution proposed by businesses.[45] Kovvali concedes that, despite being persuaded that there is a problem that can be addressed at an acceptable cost, voters still may object to government action if they are satisfied with the private solution

37. Id. at 726 ("[O]ne reason there is so much mounting pressure for corporations to take action today is that government has failed to act in many areas that people care about, often by overwhelming margins." (internal quotation marks omitted) (quoting Tim Wu, The Goals of the Corporation and the Limits of the Law, CLS Blue Sky Blog (Sept. 3, 2019), https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law [https://perma.cc/95W4-JQ2U])).

38. Id. at 728.

39. Id. (quoting Jonathan Berry, Oren Cass, Kirk Doran, William J. Kilberg, G. Roger King, Eli Lehrer, Yuval Levin, Marco Rubio, Terry Schilling, Richard Schubert, Jeff Sessions, Michael Toscano & J.D. Vance, Conservatives Should Ensure Workers a Seat at the Table, Am. Compass (Sept. 6, 2020), https://americancompass.org/essays/conservatives-should-ensure-workers-a-seat-at-the-table [https://perma.cc/YD84-KLU7]).

40. See id. at 728–29 (arguing that "conservative opposition to external reform and openness to internal reform may make the difference between impossibility and possibility").

41. Id. at 729.

42. Id. at 730.

43. Id. at 731.

44. See id. at 734.

45. Id.

offered by businesses.[46] Yet he believes that such an "effect is not assured, particularly for low-salience issues."[47]

Furthermore, helping stakeholders changes the factual background in ways that in his view affect the likelihood of regulation. He cites two examples to support this claim: one on the environmental front and the other relating to the workforce.[48] A company voluntarily and proactively bearing costs to bring its emissions significantly below existing legal standards will make it easier for a regulator to pass more stringent standards, and the "firm itself would also have an economic incentive to encourage regulators to take action because it would force competitors to make similar costly investments."[49] With regard to workforce protections, he mentions, without much elaboration, that "external reforms to empower unions or force companies to disclose information on worker issues may not have the maximum effect if workers are not able to use that power and information to press for change within the corporation."[50]

To wit, in the final part of his article, Kovvali offers a series of examples purporting to show how internal reforms are already making a difference in protecting stakeholders. He cites corporate initiatives in connection with race, social justice, and climate change as proof of the effectiveness of internal reform.[51] Examples in the racial justice context include Nike's campaign featuring Colin Kaepernick and Delta's statement that it lobbied against voter suppression bills.[52] In the climate context, Kovvali offers the example of activist hedge fund Engine No. 1 replacing Exxon board members with candidates focused on cleaner technology.[53]

5. *Rebutting the Risk of Corporate Lobbying.* — In addressing some possible counterarguments, Kovvali engages with some of the risks we raised in our prior work about how internal changes may increase the lobbying clout of corporations.[54] Kovvali points out that corporations can already adopt this strategy and in fact regularly lobby against external

46. Id. at 735.

47. Id.

48. See id. at 735–36 ("When a firm takes steps to help stakeholders, it changes facts on the ground in a way that affects the potential for future external regulation.").

49. Id. at 735.

50. Id. at 736.

51. See id. at 737–54.

52. For the background surrounding Nike's promotional video with Colin Kaepernick and Delta Airline's statement that it lobbied against voter suppression, see id. at 742–44.

53. For the background on the Exxon example, see id. at 748.

54. See Gatti & Ondersma, Stakeholder Approach Chimera, supra note 5, at 10, 66–68 (noting that stakeholderism would give corporations an increased clout that could be deployed to defeat meaningful reforms for stakeholders, a phenomenon we labeled as the "defensive feature" of stakeholderism); Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 216 (noting that corporations "spend substantial sums each year to preserve and increase their share of resources and their influence on matters in which they perceive their interests and their employees' interests as adversarial").

regulation, warning about potential job losses that come with it.[55] In other words, corporations "position[] themselves as acting on behalf of employees or potential employees instead of shareholders."[56] For Kovvali, internal reforms would represent an obstacle "if political actors became too credulous about the impact of internal changes."[57]

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The remainder of this Piece critically assesses Kovvali's contribution. In Part II, we address some possible misconceptions of our scholarship on shareholder primacy and on what type of stakeholderism we are critical of. Part III addresses Kovvali's main arguments in *Stark Choices*.

II. ON SHAREHOLDER PRIMACY AND STAKEHOLDERIST REFORM

To start, a couple of clarifications are in good order. While for the most part this Piece refrains from indulging in correcting the record on every mischaracterization of our work, we intend to elucidate our position on shareholder primacy and what we mean by stakeholder reform.

Contrary to Professor Kovvali's characterization of our work, we are not "defenders of the status quo,"[58] let alone adherents to shareholder primacy.[59] Neither *Stakeholder Approach Chimera* nor *Stakeholder Syndrome* attacks stakeholderism on the grounds that shareholder primacy is a superior approach. While we may have a view on shareholder wealth maximization, our arguments do not require us to take a stand on whether such a norm intrinsically promotes a preferable set of values.[60]

In our articles, we are critical of stakeholderism for two main reasons. First, we believe it would not bring positive impact to weaker corporate constituencies (such as workers and customers) any more than the current regime, which already allows directors to take actions that cater to those constituencies' interests. The business judgment rule already awards ample discretion to directors: Outside of the rare scenarios, like company sales, breakups, or changes in control, in which the law prioritizes shareholder wealth maximization, director actions are generally not second-guessed by judges so long as the actions are disinterested,

55. See Kovvali, supra note 4, at 732 (claiming that corporations already leverage their clout to "lobby against external regulations by saying that they will destroy jobs").

56. Id.

57. Id. at 733.

58. See id. at 694 (asserting that the majority of corporate law academics seek to maintain a status quo of "shareholder primacy" and implying we are among them).

59. See id. at 694–97, 700–02 (equating what he labels as "stark choice" proponents to shareholder primacy theorists).

60. Cf. Stephen M. Bainbridge, The Profit Motive: Defending Shareholder Value Maximization 1 (2023) (arguing that shareholder value maximization is what corporate law does and should require).

informed, and rational.[61] Thus, embracing stakeholderism as opposed to shareholder primacy is for the most part irrelevant in terms of what a director will or will not do for fear of being sued. Of course, things would change if incentives were somehow shifted by altering certain features of the internal design, such as director elections, executive compensation, and so forth. Yet, the bulk of the debate on stakeholderism has been on fiduciary duties,[62] as the ensuing paragraph clarifies.

Second, and more importantly, Kovvali's rebuttal of our ideas is based on a misconstrued description of our scholarship. Throughout his article, Kovvali juxtaposes internal and external reform—but what he really means by the former has nothing to do with our criticism toward stakeholderism. What he labels as internal reforms are really actions, initiatives, or practices that corporations *voluntarily* undertake within the existing framework of corporate law and governance and that foster other stakeholders' interests.[63] Indeed, the tentative draft of the American Law Institute's Restatement of the Law of Corporate Governance explicitly describes existing corporate governance common law as permitting the corporation to "devote a reasonable amount of resources to public-welfare, humanitarian, educational, and philanthropic purposes, whether or not doing so enhances the economic value of the corporation."[64]

To be clear, we absolutely have no qualms with those initiatives, actions, or practices. In fact, we approve of them, and we say that much in our work.[65] We do believe that corporations have wide discretion under the business judgment rule to operate in such direction.[66] Very few would

61. See Principles of Corporate Governance: Analysis and Recommendations § 4.02(c) (Am. L. Inst. 1994) (exploring how the business judgment rule and other corporate law provisions limit liability for corporate officers and directors).

62. There are some notable exceptions. See, e.g., Grant M. Hayden & Matthew T. Bodie, Reconstructing the Corporation: From Shareholder Primacy to Shared Governance 188 (2020) (advocating for codetermination); Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance, 106 Minn. L. Rev. 1325, 1394 (2022) (same).

63. See Kovvali, supra note 4, at 717–19, 735, 743, 745, 754.

64. Restatement of the Law: Corporate Governance § 2.01(b) (Am. L. Inst., Tentative Draft No. 1, 2022). But see Stephen M. Bainbridge, A Critique of the American Law Institute's Draft Restatement of the Corporate Objective, 2 Chi. Bus. L. Rev. 1, 20 (2023) (criticizing the draft Restatement for not accurately describing where current law stands on the subject).

65. Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 234.

66. For a similar conclusion, see Lynn A. Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public 32 (2012); Blair & Stout, supra note 2, at 252; Einer Elhauge, The Inevitability and Desirability of the Corporate Discretion to Advance Stakeholder Interests, 106 Cornell L. Rev. 1819, 1822, 1842 (2022); Ann M. Lipton, What We Talk About When We Talk About Shareholder Primacy, 69 Case W. Rsrv. L. Rev. 863, 882 (2019); Matteo Gatti, Corporate Governing: Promises and Risks of Corporations as Socio-Economic Reformers 31–34 (Eur. Corp. Governance Inst.,

dispute that, from a legal standpoint, the actions described by Kovvali are invalid or likely to generate director liability. Indeed, the internal reforms Kovvali refers to are already happening within the current status quo. Take the examples of Nike, Delta, and Exxon to which he points.[67] If firms can already act privately, we are somewhat lost as to why there is an ongoing debate on stakeholderism, unless of course its proponents are dissatisfied with what Kovvali depicts as current reforms.

At any rate, while we sympathize with most of the initiatives Kovvali mentions, we still wonder if those private initiatives by corporations are widespread or isolated, sincere or mere virtue-signaling actions to score points with some investors, parts of the customer base, and public opinion in general. Also, we worry about stakeholders of companies that do not embark on such initiatives and about stakeholders of private firms or other businesses, which are typically neglected in the debate on *corporate* purpose. In fact, as we emphasized in our prior work, because such actions, initiatives, or practices are optional, they may leave a potentially massive sphere of stakeholders unprotected,[68] which in turn can contribute to even *more* economic inequality (because, as economists point out, inequality in this era is more across firms than within firms).[69]

In any event, these interventions are not what we are skeptical of. Our concern with stakeholderism relates to potential *formal* changes to existing law to expand the breadth of fiduciary duties. We were specific in defining what we meant by stakeholderism: "[S]takeholderism—a term which we

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Working Paper No. 730, 2023), https://papers.ssrn.com/abstract=4530776 [https://perma.cc/243F-G2SY]. But see Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761, 763 (2015) ("[A]dvocates for corporate social responsibility pretend that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion, under the law of the most important American jurisdiction—Delaware."). For a recent analysis of how shareholder primacy might limit managerial discretion, see Bainbridge, supra note 60, at 13–15.

67. See supra notes 52–53 and accompanying text. Note that, incidentally, less than 10% of Nike's over 300 vice presidents are Black, none of Delta's eleven top executives are Black, and only two of its twelve board members are Black, although the company indicated it would look into adding Black board members "over the next couple of years." Fernando Duarte, Black Lives Matter: Do Companies Really Support the Cause?, BBC: Worklife (June 12, 2020), https://www.bbc.com/worklife/article/20200612-black-lives-matter-do-companies-really-support-the-cause [https://perma.cc/8XYM-UR6G]; Jackie Wattles, Delta to Appoint More Black Board Members 'Over the Next Couple of Years,' CEO Says, CNN Bus. (July 14, 2020), https://www.cnn.com/2020/07/14/business/delta-ceo-diversity-race-board-members/index.html [https://perma.cc/5BMW-UK9Z].

68. Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 223.

69. Gatti & Ondersma, Stakeholder Approach Chimera, supra note 5, at 38 (citing Erling Barth, Alex Bryson, James C. Davis & Richard B. Freeman, It's Where You Work: Increases in the Dispersion of Earnings Across Establishments and Individuals in the United States, 34 J. Lab. Econ. (Special Issue) S67, S68 (2016)).

use in our earlier work and throughout [our] [a]rticle primarily to describe a corporate law reform expanding director duties . . . ."[70] And we added:

> Our critique of stakeholderism is circumscribed to the proposed shift in fiduciary duties. It does not mean we oppose *any* corporate law and governance changes: [H]ere, we simply do not take a position on such other changes. . . . [Our] [a]rticle does not imply that we do not welcome cultural changes in the C-suite aimed at "growing the pie" in ways that favor a broader range of constituencies. . . . Yet, for the reasons highlighted throughout this Article, we do not believe any such cultural movement alone could fix the ails of American capitalism without bold structural policy interventions.[71]

III. TACKLING KOVVALI'S ARGUMENTS

Our main aim here is to clarify, defend, and expand the idea that expanding director duties is a risky way to achieve a reform that can truly benefit weaker constituencies.

A. *"Stark Choice" Versus Prioritization, Cherry Picking, and Jeopardy*

To begin, Professor Kovvali characterized our work as imposing a "stark choice" on a reformer. The stark choice he describes is between internal and an external reform: that is, between a reform that alters the governance rules of the corporations for the benefits of various stakeholders versus one that directly promotes the interests of weaker constituencies via labor, antitrust, tax, or environmental law, and so forth.[72] In contrast, Kovvali responds that reform is not necessarily constrained and policymakers do not have to choose between different types. In his view, key players, such as politicians, businesses, media, and public opinion, understand the breadth and potential of reforms quite well; such players will not "settle for weak internal reforms when strong external reforms [are] *obtainable*."[73] In other words, because external reforms are seldom feasible, internal reform is likely the best we can get.

First off, characterizing our contributions as setting a "stark choice" for reformers misconstrues our work. Nowhere in our writings did we state that stakeholderism and external reform are inherently incompatible, either on technical or practical grounds. In the abstract, policymakers can pursue both as they have done in the past and likely will do in the future. We do, however, argue that there are tradeoffs to pursuing external and internal reform simultaneously. It's the results of such pursuit that are perplexing, especially because internal reform seems much more

70. Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 170.
71. Id. at 170 n.8.
72. Kovvali, supra note 4, at 700–01.
73. Id. at 703 (emphasis added).

achievable. Rather than relying on the abstract incompatibility between two policy strategies, our reservations about a stakeholderist reform revolve around risks that we describe below as prioritization, cherry picking, and jeopardy.

While these are all interconnected issues, by *prioritization* we mean that policymakers will first pursue a stakeholderist reform and put the rest on the back burner because, as Kovvali himself admonishes, achieving external reform is considered more difficult.

Cherry picking means that policymakers will pursue only reforms considered harmless to management and shareholders and leave out those with a distributional impact that could have benefited weaker constituencies. As we pointed out in our previous work, corporate advocates of stakeholderism expressly admit as much: "[C]orporations and investors should band together to resist legislation and regulation that may discourage long-term investment or that presumes that the long-term health of society is not aligned with the long-term interests of business."[74]

Furthermore, stakeholderism would put meaningful reforms in *jeopardy*. Emboldened by a stakeholder approach, directors and managers will assert themselves as the main interlocutors for reforming laws and regulations affecting weaker constituencies in ways that will be seen as more credible by the media and public opinion. With this increased power, they will sink pro-stakeholder reforms they perceive as against their interests, like those that would relax restrictions on worker unionization efforts. In fact, U.S. companies continue to oppose such efforts. U.S. employers are charged with deploying illegal tactics in 41.5% of all union election campaigns.[75] An NLRB judge recently ruled that Apple interfered with employees' organizing efforts at its World Trade Center store in New York City.[76] Amazon has continuously fought workers' efforts to unionize, most recently stating that it intends to appeal the NLRB decision certifying the unionization of Amazon's Staten Island warehouse.[77] Moreover, U.S.

74. Martin Lipton, Corporate Governance: The New Paradigm, Harv. L. Sch. F. on Corp. Governance (Jan. 11, 2017), https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/#1 [https://perma.cc/D686-D7GK].

75. Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, Unlawful: U.S. Employers Are Charged With Violating Federal Law in 41.5% of All Union Election Campaigns 2 (2019), https://files.epi.org/pdf/179315.pdf [https://perma.cc/LD5D-G3DA].

76. Josh Eidelson, Apple Illegally Interrogated Staff About Union, Judge Rules, Bloomberg (June 20, 2023), https://www.bloomberg.com/news/articles/2023-06-21/apple-illegally-interrogated-staff-about-union-judge-rules (on file with the *Columbia Law Review*) (reporting that the NLRB judge ordered Apple to cease and desist from coercively interrogating employees regarding their protected concerted activities and pro-union sympathies).

77. Annie Palmer, Amazon Union Victory at Staten Island Warehouse Upheld by Federal Labor Board, CNBC (Jan. 11, 2023),

corporations spend massive amounts to prevent their employees from unionizing—nearly $340 million per year according to Department of Labor reports.[78] Google only ended mandatory arbitration in response to worker walkouts,[79] which alone suggests that robust collective bargaining protections would be more effective than expansion of corporate purpose. It is no surprise, then, that companies devote so many resources to thwarting collective action.

B. *Current Instances of Dual-Track Reforms Are Not Poignant*

To bolster his criticism, Kovvali presents examples of dual-track reforms (internal *and* external), but none of them is satisfactory. He cites constituency statutes and worker protections in New York, women on corporate boards and antidiscrimination laws in California, and prosecutors seeking to prevent future misconduct by promoting compliance programs.[80]

The first two examples come from the two largest blue states in the United States, where achieving external reform has never been too problematic. But to better protect weaker constituencies such as workers, external reforms ought to be federal. Otherwise, in the best case, the beneficiaries will be only those who live in a liberal or progressive state, and, in the worst case, a race to the bottom will ensue. At a time when many businesses are migrating to Texas precisely to enjoy a more business-friendly environment,[81] citing New York and California as examples of

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https://www.cnbc.com/2023/01/11/amazon-union-victory-at-new-york-warehouse-upheld-by-labor-board.html [https://perma.cc/Q5T7-QN4U].

78. See McNicholas et al., supra note 75, at 8 n.14 ("Estimate based on . . . analysis of LM-20 and LM-21 reports filed with the U.S. Department of Labor Office of Labor-Management Standards between 2014 and 2018 and the findings of a 2011 DOL report on underreporting by consultants.").

79. Alexia Fernández Campbell, Google Employees Fought for Their Right to Sue the Company—and Won, Vox (Feb. 22, 2019), https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees [https://perma.cc/2A7R-SX6U].

80. See supra section I.B.2.

81. See, e.g., Adam A. Millsap, Businesses Are Fleeing California Along With Its Residents, and President Biden Should Pay Attention, Forbes (Aug. 27, 2021), https://www.forbes.com/sites/adammillsap/2021/08/27/businesses-are-fleeing-california-along-with-its-residents-and-president-biden-should-pay-attention/?sh=1d8aea262327 [https://perma.cc/G2Z2-JWNX] (reporting on a study finding that companies are moving their headquarters out of California to more affordable states with fewer regulations on employers, in particular Texas (citing Joseph Vranich & Lee E. Ohanian, Why Company Headquarters Are Leaving California in Unprecedented Numbers (Hoover Inst., Econ. Working Paper No. 21117, 2022))); Katie Tarasov, How Texas Is Luring Big Businesses and Billionaires Away From California, CNBC (Mar. 20, 2021), https://www.cnbc.com/2021/03/20/how-texas-attracts-big-businesses-billionaires-from-california.html [https://perma.cc/Z3PY-72C6] (reporting on the trend of businesses and residents moving to Texas in greater numbers).

external reformers should not offer much comfort to weaker stakeholders.[82]

Moreover, the New York constituency statute simply gives the board the *option* to consider interests other than shareholders. This can hardly be the internal reform Kovvali has in mind: Constituency statutes of that sort have been around for years with no discernable success.[83] Besides, if such statutes really did the trick, why would stakeholderists press for more internal reforms?[84] Furthermore, to state the obvious, constituency statutes are also state law and thus subject to well-known race-to-the-bottom pressures (so one should not expect states to enact a bold stakeholderist reform that could alienate management).[85]

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82. As this Piece was being finalized, the California legislature passed two important climate disclosure bills (Senate Bills Nos. 253 and 261) imposing rigorous climate-related reporting requirements on large public and private corporations doing business in the state. See generally Gibson Dunn, California Passes Climate Disclosure Legislation 1 (2023), https://www.gibsondunn.com/wp-content/uploads/2023/09/california-passes-climate-disclosure-legislation.pdf [https://perma.cc/3UZT-VBGT]. Importantly, the bills apply to any company that is organized in the United States, does business in California, and has revenue exceeding a certain threshold. Id. at 1, 3. We reckon that this potential extraterritorial reach, which essentially follows the playbook European regulators have used to impose hefty rules on data privacy and other sensitive fields on U.S. corporations that do business in the EU, see Anu Bradford, The Brussels Effect: How the European Union Rules the World 26–28 (2020), has the potential of altering the typical state–federal regulatory dichotomy we are used to. Large businesses that do not want to comply with the new rules can either abandon the state—but then forego generating revenue in the world's fifth largest economy, see Ryan A. Hughes, If California Were a Country, Bull Oak Cap.: Blog (June 8, 2023), https://bulloakcapital.com/blog/if-california-were-a-country/ [https://perma.cc/EPY4-XTLX]—or face steep penalties. It is too early to say whether this type of state law initiative will survive constitutionality challenges that will likely be brought by recalcitrant pro-business groups. Also, it is doubtful that analogous reforms can be replicated in the labor or consumer field (say, to protect workers employed in other states). Nevertheless, this type of legislative initiative represents an innovative way to override the gridlock in Washington, both at the legislative and at the regulatory level. It's important to note, however, that state legislators, not corporate directors or managers, accomplished this change. Further, the reporting requirements in question are mandatory, specific, and enforceable. See Gibson Dunn, supra, at 1–4 (describing the requirements that the bills impose on covered entities).

83. See Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, For Whom Corporate Leaders Bargain, 94 S. Cal. L. Rev. 1467, 1485, 1524 (2021) (concluding that constituency statutes passed in a substantial majority of states, beginning in the mid-1980s, did not deliver their purported benefits).

84. See Gatti & Ondersma, Stakeholder Approach Chimera, supra note 5, at 69 n.401 (describing stakeholderists' view that constituency statutes are unable to protect constituencies).

85. See generally Lucian A. Bebchuk & Allen Ferrell, Federalism and Corporate Law: The Race to Protect Managers From Takeovers, 99 Colum. L. Rev. 1168 (1999) (critiquing corporate protections in state law that consistently favor protecting incumbent managers with respect to takeovers).

Finally, the compliance programs Kovvali cites[86] as dual-track reforms are not examples of statutory reform but rather stem from prosecutorial actions and Delaware case law[87]—not the type of reform worker and environmental activists are currently seeking.

C. *Reformer Realism Versus the Limited Mileage of Feasibility*

Kovvali ascribes to our scholarship the premise, which he ultimately criticizes, that reformers will fail to properly evaluate the effectiveness of internal reforms or the potential for achieving preferable external reforms.[88] To be sure, such premise is neither part of nor instrumental to our work, but the themes are very much worth exploring.

As mentioned earlier, one of Kovvali's main tenets is that the key players involved in the reform process will not "settle for weak internal reforms when strong external reforms [are] obtainable."[89] Kovvali's view is that neither reformers nor public opinion will trade achievable good reforms for bad ones.[90] We reckon this is Kovvali's strongest argument, yet it suffers from a somewhat idealized image of reformers and public opinion. More importantly, the argument ultimately collapses the true value of stakeholderism into feasibility, which is something that necessitates further exploration, as this section illustrates.

Kovvali's rebuttal that policymakers are "sophisticated to the point of cynicism"[91] is correct, but he does not take it to its logical conclusion. True, policymakers are not naïve and do not clumsily pursue subpar reforms when there are better ones available and achievable. Yet, policymakers[92] are for the most part politicians who are elected to, and must run for, office on an ongoing basis and are judged on their legislative record in passing reform. Showing and selling *some* reform to media, public opinion, and, ultimately, their electorate is more important than fighting for harder or *better-tailored* goals. In some ways, they face the same agency costs as a realtor who, when there is a decent deal at hand, will not spend extra time and effort to secure a better home sale for the client. This is true cynicism. Besides, some politicians may approve a reform for the sake of passing

86. Kovvali, supra note 4, at 707–08, 715, 717.

87. See id. at 715, 717.

88. See supra section I.B.

89. Kovvali, supra note 4, at 703.

90. Id.

91. Id. at 697.

92. To be sure, we are focusing on lawmakers here because of the limited potential of a regulatory reform from the administrative state. First, especially in an era in which the Roberts Supreme Court holds the major questions doctrine in high regard, regulatory action is constrained by the narrow margins of an existing legislation, which we (and, it seems, Kovvali) deem insufficient to protect weaker constituencies. Second, and relatedly, regulation is potentially unstable: While enforcers and administrators can exercise available discretion to protect weaker constituencies, their ability to do so depends on the whim of the administration in power.

something without fully vetting all its unintended consequences. And what about public opinion? Kovvali does not analyze in depth public opinion's perception—while public opinion may not be fooled by blatant expressions of greenwashing, one wonders how many voters realize that internal reform has limited mileage. Does Kovvali expect voters to get all nuances of the scholarly debate we are involved in? For example, does the public realize that the reforms on the table are for the most part optional, unenforceable, and generic?

True, Kovvali himself posits that the external reforms we are getting are only those that seem most feasible to policymakers, and, for the rest, we should appreciate the opportunity to get some internal reform. Indeed, the bulk of his argument focuses on the *feasibility* quality of stakeholderism. He acknowledges this when he notes that "the demand for internal corporate change has been prompted by reasonable frustration at the processes and prospects for external regulation."[93] There are parts of his article that indicate skepticism about the government's ability to intervene in distributive justice issues: "[E]ven if a benevolent social planner could theoretically separate and separately optimize measures directed at redistribution and efficiency, actual governments do not do so."[94] If this is true, why are we supposed to believe that management will pick up the slack? Moreover, returning to our cherry picking and jeopardy remarks, if governments and legislatures fail to intervene directly on labor, environment, and other issues, how can we expect they will pass the right corporate law reforms to achieve redistributive goals?

In *Stakeholder Syndrome*, we explained why we should not fall for feasibility: A feasible internal reform is not a positive per se.[95] One has first to evaluate whether such a reform could act as a substitute for, or at least be conducive to, the reforms weaker constituents need.[96] We argued that "to meaningfully improve workers' positions, a stakeholderist proposal must be mandatory, enforceable, and specific."[97] Very little of this is present in the current stakeholderist proposals (consider those advanced by Senators Elizabeth Warren and Bernie Sanders in the past), especially with respect to enforceability and specificity of what stakeholder-minded directors are expected to do.[98] Nor is it clear from Kovvali's article what

93. Kovvali, supra note 4, at 726. He adds that internal reform could still happen "even where external regulators are satisfied or have exhausted their political capital." Id. at 717.

94. Id. at 706.

95. See Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 222–23.

96. See infra section III.D.

97. See Gatti & Ondersma, Stakeholder Syndrome, supra note 6, at 223–26 (noting that whenever a reform can meet such requirements, it becomes illogical to seek to achieve them via an expansion of fiduciary duties rather than direct regulation).

98. See Corporate Accountability and Democracy Plan, supra note 2 ("This new federal charter will require corporate boards to consider the interests of all of the stakeholders in a company—including workers, customers, shareholders, and the

type of meaningful internal governance reform he considers feasible and thus worth pursuing. A mere expansion of fiduciary duties without creating brand new classes of plaintiffs among weaker constituencies would do just as much as the constituency statutes passed as antitakeover legislation some decades ago: close to nothing.[99]

Besides, the recent conservative backlash against ESG and stakeholder capitalism[100] and accounts suggesting that corporations are among the causes of gridlock are signs that stakeholderism itself may not be as feasible as Kovvali believes.[101] As opposing forces have intervened to stymie the stakeholder capitalism movement, the debate on any possible external reform appears in jeopardy: Currently, attention and energy are devoted to fending off the conservative counternarrative, not to discussing, let alone implementing, actual measures to help weaker constituencies. Instead of discussing initiatives to improve the plight of, say, workers, the policy debate is *still* stuck with themes such as whether directors and managers should run the business for the exclusive benefit of shareholders or for more constituencies. All the while, such constituencies remain unprotected. To be sure, this is yet further proof of how not being strategic on reform priorities might lead to debacles, which is exactly what we predicted in our prior work.

D. *Is Stakeholderism Conducive to Reform?*

In Kovvali's view, internal reform creates better premises for external reforms by limiting opposition to external reform, thus making it more likely.[102] But, as we pointed out in Part II, the type of internal reform Kovvali seems to have in mind is private corporate initiatives improving the welfare of stakeholders, not corporate law reform. Thus, under the narrow assumption that corporations independently take up stakeholderist

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communities in which the corporation operates."); Empowering Workers Through Accountable Capitalism, Warren for Senate, https://elizabethwarren.com/plans/accountable-capitalism [https://perma.cc/77HB-2F45] (last visited Sept. 15, 2023) ("[Senator Warren's Accountable Capitalism plan] [r]equires very large American corporations to obtain a federal charter as a 'United States corporation,' which obligates company directors to consider the interests of all corporate stakeholders, not just shareholders.").

99. For these reasons, we are not intrinsically opposed to tailored and specific expansions of fiduciary duties that have dedicated rules of enforcement.

100. For an account of such backlash, see Saura Masconale & Simone M. Sepe, Citizen Corp.—Corporate Activism and Democracy, 100 Wash. U. L. Rev. 257, 260, 278–81 (2022) ("[A] growing chorus of skeptics is labeling [corporate activism] a 'scam'—a mix of CEO opportunism, left-wing elitism, and radical ideology.").

101. Gatti, supra note 66, at 2–4, 44–45, 59.

102. See Kovvali, supra note 4, at 729 ("A more stakeholder-focused model for corporate decisionmaking can make external reforms more likely by reducing corporate opposition to external reform and causing some corporations to actively support external reform.").

reforms, we would agree with his suggestion that there would be less opposition to external reform, since the cohort of those who privately chose more stakeholder-friendly governance has possibly more progressive views on regulation. Things would be rather different, however, if stakeholder governance is imposed top-down by a legislator or a regulator. In such a case, many firms may be displeased with the change or even more pressured by shareholders to present solid financial results—not an ideal environment to push for *more* stakeholder protection via external regulation.

We note that Kovvali suggests that "[c]orporations can affect external regulatory process if internal mechanisms cause them to do so,"[103] but it is unclear what type of mechanisms he has in mind, given that, again, his premise is that internal reform is a voluntary choice by certain corporations.

E. *Is Enhanced Lobbying Risk Truly Negligible?*

Critics of stakeholderism like us warn about the enhanced lobbying risk that a broader agenda brings along: Directors can pursue lobbying battles of their liking based on some constituency's interest and, more worryingly, can oppose reforms that would ultimately benefit some constituencies on the grounds that businesses know better than politicians how to cater to the relevant constituency.[104]

Kovvali dismisses these concerns. Though he acknowledges that the broader clout of directors can be deployed to thwart external reforms, he replies that corporations are already allowed to do that and that most of them in fact do: "Corporate leaders regularly lobby against external regulations by saying that they will destroy jobs, positioning themselves as acting on behalf of employees or potential employees instead of shareholders."[105]

Kovvali's response is sensible: Executives do use this type of narrative. Instead of dismissing the concern about stakeholderism, however, his response confirms the original suspicion. Executives can claim it's about job loss, for example, like McDonald's does with respect to increases to the minimum wage,[106] but what really motivates them is profitability and the impact of external reform on it. In other words, positioning themselves as protectors of the stakeholders is just posturing for narrative purposes. For this reason, considering that directors are already playing this game, one can only expect they will beef up their efforts once legal reform formally

103. Id. at 731.

104. See supra notes 8–12 and accompanying text.

105. Kovvali, supra note 4, at 732.

106. See Grace Dean, A $15 Minimum Wage Would Cause Fast-Food Chains to Raise Prices or Put Workers Out of Jobs, a Former McDonald's CEO Said, Bus. Insider (June 8, 2021), https://www.businessinsider.com/15-minimum-wage-mcdonalds-raise-prices-lose-cut-job-food-2021-6 [http://perma.cc/M6JP-THS5].

makes them fiduciaries of, say, workers. An expanded agenda will likely encourage executives to portray themselves as the experts on the underlying issue—making the case that they know more about how to achieve stakeholder goals than legislators and regulators. This is especially true in distributional reforms in which directors and management—who, given their compensation packages, are very much aligned with shareholders on bottom-line issues—face penalizing tradeoffs between stakeholder and shareholder wellbeing on issues such as worker empowerment via unions, minimum wage, mandatory arbitration, and so forth.

True, Kovvali has a point when he says that "[i]nternal reforms would only increase the effectiveness of these lobbying tactics if corporations actually began to advocate on behalf of their stakeholders, or if political actors became too credulous about the impact of internal changes."[107] This is, however, not only a binary issue (lobbying versus non-lobbying) but also an intensity issue: Post internal reform, executives' claims would become more credible vis-à-vis public opinion because the law itself would entrust them with a fiduciary duty for the benefit of the weaker constituency. It would be naïve to dismiss the risk of executives taking advantage of a new, legislatively sanctioned, stakeholder-centric environment, especially given how much businesses care about optics in connection with their legislative efforts.[108] While executives may tolerate some bland incremental reform, they will likely oppose any substantial gamechanger.

CONCLUSION

Professor Kovvali conducts an impassioned defense of stakeholder governance against what he labels as the "stark choice" critique; that is, that reformers face a choice between two types of reform (internal and external) and that stakeholderism should not be embraced because it would give directors renewed powers to lobby more forcefully for reforms they like and against reforms they dislike. Kovvali argues that internal and external reforms are not incompatible, but internal reform is ultimately more realistic and might pave the way to external reform.

In this Piece, we rebutted Kovvali's arguments, with the concession that on one point he is right: Internal reform is easier to achieve than external reform. Yet, we reject the implication that because internal

107. Kovvali, supra note 4, at 732–33.

108. Political scientist Alexander Hertel-Fernandez points out that firms routinely mobilize—sometimes in coercive ways—their workforce to lobby for business or political causes that employers, but not necessarily workers, care about. See Alexander Hertel-Fernandez, Politics at Work: How Companies Turn Their Workers Into Lobbyists 118 (2018). Legislative staffers find it helpful "especially when it involves having employees express their support for or opposition to particular policy proposals." Id. at 164; see also id. at 163–72 (examining how employer mobilization affects congressional decisionmaking).

reform is feasible, we should just take it. Kovvali himself does not disclaim that the substance of internal reform will never equate what stakeholder champions have been seeking to achieve with labor, environmental, antitrust, and tax reforms. If there is no political way to achieve external regulation, there is no basis to believe reformers can then slip in an internal reform that has the same potential to truly protect weaker constituencies. Instead, Kovvali is essentially saying to take now the internal reform because it's the best we will ever get and hope that, if it works out, maybe one day enlightened boards will give a green light to legislators for a more wholesome external reform. This is not only sobering but also unsatisfactory: What exactly shall we expect from internal reform? Because depending on how mandatory, enforceable, and specific it will be, we can then start building expectations for external reform as a second step. If internal reform does not have these characteristics, all we are doing is further empowering executives. To be sure, current use of lobbying powers by corporations tells us a story that is opposite to Kovvali's prediction. In fact, businesses and executives lobby fiercely against opposing interests: labor protections,[109] bolder antitrust review and enforcement,[110] a fairer tax system,[111] ESG disclosures,[112] and so forth. It is unclear how to expect improvements on those fronts once the same executives are given a broader mandate in which they become fiduciary of more constituencies.

With all this said, Kovvali's piece represents a valuable contribution to the debate. Ultimately, the goal of our efforts in our prior work was to refocus scholars' attention to what really matters for stakeholder protection. We think we succeeded at that because, even in corporate law circles, we are now talking not only about the importance of external reform but also about the types of reforms—leaving our disagreements aside, Kovvali's scholarship helps move in that direction.[113] Yet, while the road ahead is undoubtedly bumpy, we do not want to join the club of those wearing the pragmatist jacket because that jacket covers resignation. Instead, we refrain from falling back to second-best routes simply because

109. See supra notes 75–79 and accompanying text.

110. See, e.g., Emily Birnbaum, How Big Tech Defeated the Biggest Antitrust Push in Decades on Capitol Hill, L.A. Times (Dec. 20, 2022), https://www.latimes.com/business/technology/story/2022-12-20/how-big-tech-defeated-the-biggest-antitrust-push-in-decades-on-capitol-hill (on file with the *Columbia Law Review*).

111. See, e.g., Alan Rappaport, How a Last-Minute Lobbying Blitz Watered Down a Climate Tax Bill, N.Y. Times (Aug. 8, 2022), https://www.nytimes.com/2022/08/08/business/corporate-minimum-tax-private-equity.html (on file with the *Columbia Law Review*).

112. See, e.g., Eric Rosenbaum, There's an ESG Backlash Inside the Executive Ranks at Top Corporations, CNBC (Sept. 29, 2022), https://www.cnbc.com/2022/09/29/the-esg-backlash-inside-the-executive-ranks-at-top-corporations.html [http://perma.cc/RMD3-F3RH].

113. See generally Aneil Kovvali, Stakeholderism Silo Busting, 90 U. Chi. L. Rev. 203 (2023) (arguing that stakeholderism breaks down reforming silos).

the best course of action is currently considered too hard to attain. It is preferable to argue for the best policy and, if hard to attain, dissect why it is so. Thanks to Kovvali's impassioned defense of pro-stakeholder internal reforms, in this Piece we show that the merits of stakeholderism lie primarily, if not exclusively, on its alleged feasibility qualities. But as we explain, reform for reform's sake is a tenuous case for pursuing a stakeholderist agenda, especially given its inherent risks.