

LABOR RELATIONS AT THE WOKE CORPORATION

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Almost ten years ago, Whole Foods Market founder and then-CEO John Mackey published a book with economics professor Raj Sisodia entitled *Conscious Capitalism: Liberating the Heroic Spirit of Business*.¹ The idea behind conscious capitalism was the melding of the traditional profit motive with more human notions of serving the greater good. Writing the introduction individually, Mackey explained that the primary purpose of the book was to inspire the creation of “more conscious businesses: businesses galvanized by higher purposes that serve and align the interests of all their major stakeholders; businesses with conscious leaders who exist in service to the company’s purpose, the people it touches, and the planet; and businesses with resilient, caring cultures that make working there a source of great joy and fulfillment.”² Rather than trying to maximize shareholder wealth, conscious capitalism companies were those that instead followed a higher purpose, integrated their stakeholders, and fostered a more conscious culture with more conscious leaders.³ Companies that the authors describe as following the conscious capitalism blueprint included Medtronic, Southwest Airlines, Starbucks, and of course Whole Foods Market.⁴ The book claimed that a “great transition” was underway, and that a more benevolent, caring capitalism was the mode of the future.⁵

Conscious capitalism is only one example from a collection of business theories and practices that have moved away from the prin-

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1. JOHN MACKEY & RAJ SISODIA, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* (2014).

2. *Id.* at 8–9.

3. *Id.* at 33 (describing the four tenets of conscious capitalism). Such businesses are “suffused with higher purpose, leavened with authentic caring, influential and inspirational, egalitarian and committed to excellence, trustworthy and transparent, admired and emulated, loved and respected” *Id.* at 32.

4. *Id.* at 32, 36 & 287–88.

5. *Id.* at 264–65.

ciple of shareholder wealth maximization to the idea that a corporate leader should serve all of the firm's participants, rather than just shareholders. These alternative approaches are sometimes lumped under the umbrella terms of "stakeholderism" and "stakeholder theory."⁶ Stakeholderism has become increasingly popular in both boardrooms and academic circles in the wake of the societal upheavals of the 2008 Financial Crisis, the continuing racial reckoning engendered by killings of Black citizens at the hands of police, the pandemic, and the presidency of Donald Trump.⁷ But there is more going on than simple stakeholderism. It has become increasingly popular to talk of a higher "purpose" of the corporation, and to frame that purpose around lofty societal and ethical goals.⁸ Along with conscious capitalism, we also have such terms as firms of endearment, the purpose economy, evolutionary capitalism, and the broader ideas of environmental, social and governance (ESG) investing as well as corporate social responsibility (CSR).⁹ And as the corporate world has taken a more progressive approach to the political and cultural controversies of our time, there has been a backlash as well: derisive mocking and anger directed at "woke" corporations for taking more overtly ideological stances.¹⁰

These new, enlightened approaches to capitalism seem to feature workers prominently. Employees are one of the core sets of a

6. See RAJ SISODIA, JAG SHETH & DAVID B. WOLFE, *FIRMS OF ENDEARMENT: HOW WORLD CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* 1–2, 34–36 (2014) (discussing stakeholder relationship management and its intellectual origins).

7. Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1181 (2022) ("[I]t is clear that the concept of stakeholderism has captured the attention of the business community, perhaps because they are being embraced by members of the business community who have heretofore been closely aligned with shareholder primacy.").

8. For just a small sampling, see AARON HURST, *THE PURPOSE ECONOMY* 21 (2014) ("The emergence of purpose as the new organizing principle in our economy is a product of our current moment in time."); MACKEY & SISODIA, *supra* note 1, at 48 ("A higher purpose gives great energy and relevance to a company and its brand."); BRIAN J. ROBERTSON, *HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD* 166 (2015) (making the point that the role of the board of directors under holacracy is "expressing the organization's purpose"); ROY M. SPENCE JR., *IT'S NOT WHAT YOU SELL, IT'S WHAT YOU STAND FOR: WHY EVERY EXTRAORDINARY BUSINESS IS DRIVEN BY PURPOSE* (2011).

9. See, e.g., HURST, *supra* note 8; FREDERIC LALOUX, *REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS* 43 (2014) (using terms such as "self-actualizing," "evolutionary," "integral," and "teal"); SISODIA ET AL., *supra* note 6.

10. See VIVEK RAMASWAMY, *WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM* 4 (2021) ("Wokeness has remade American capitalism in its own image.").

corporation's stakeholders, and employees are included within the "social" aspect of ESG.¹¹ The Business Roundtable's 2019 statement on corporate purpose committed to "[i]nvesting in our employees" by "compensating them fairly and providing important benefits," as well as "supporting them through training and education that help develop new skills for a rapidly changing world."¹² Conscious capitalism seeks to turn workers into "passionate, inspired team members" and bemoans the failure of most companies to "create purposeful workplaces in which people are given the opportunity to find meaning, purpose, and happiness in their own lives."¹³ Employees represent one of the bright stars in this new corporate constellation of stakeholders.

Mostly missing from this renaissance in corporate theory, however, are employees' collective representatives: organized labor. Accounts of this new wave of enlightened enterprises generally do not include unions within the set of important stakeholders. With only around six percent of the private-sector workforce having collective representation, it's no surprise that even these "woke" companies are not meeting unions at the bargaining table.¹⁴ But lurking within many of these progressive companies—and the management theories that inspire them—is a hostility towards organized labor. Looking to conscious capitalism as one example, Mackey and Sisodia try to have it both ways. While they counsel company leaders to work with unions if necessary, the authors suggest that it's better to treat your workers so well that they don't even consider unionizing.¹⁵ Happy workers obviate concerns about collective bargaining.

But what if the workers actually want to be represented? The real-life response of CEO Mackey is instructive. In 2002, workers in

11. See Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1903, 1903 n.59 (2021) (noting that the "S" stands for "social," which includes labor issues and other societal concerns); *ESG Investing: Discover Funds that Reflect What Matters Most to You*, VANGUARD, <https://investor.vanguard.com/investing/esg> [<https://perma.cc/V9MT-JC44>] ("Social [includes] [r]elationships with employees, suppliers, clients & communities."). But see Strine, Smith & Steel, *supra*, at 1903 (arguing that under ESG, the interests of employees into the ESG framework are "bur[ied] in the S").

12. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://system.businessroundtable.org/app/uploads/sites/5/2023/02/WSJ_BRT_POC_Ad.pdf [<https://perma.cc/RGG9-HJSU>].

13. MACKEY & SISODIA, *supra* note 1, at 54.

14. News Release, U.S. Dep't of Lab., Union Members – 2022 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/C8UP-V6F3>].

15. MACKEY & SISODIA, *supra* note 1, at 157–59.

the Madison, Wisconsin Whole Foods did in fact vote to join a union.¹⁶ Seeing the vote as “a huge wake-up call for me personally,” Mackey undertook a national listening campaign to find out why workers at stores across the country were unhappy.¹⁷ The company ended up improving its wages and benefits in the other stores, particularly its health insurance coverage.¹⁸ At the Madison location, however, the company refused to come to an agreement with the union.¹⁹ As Mackey and Sisodia relate, “There was actually never a union contract signed for Madison or for any other Whole Foods Market store.”²⁰

This failure to include organized workers within the new socially conscious landscape is discordant with the growing support for labor unions, particularly among younger workers. Surveys show that unions are at their most popular in over fifty years, with Gen Z leading the way in approval rates.²¹ As corporations shift their approaches to other political issues in keeping with generational preferences, the continuing hostility towards collective bargaining stands out. The new corporate “wokeness” does not include labor unions.

This symposium contribution will consider the role of labor relations within the so-called “woke” corporation. Part I will explore the turn in corporate behavior and corporate law theory towards an attention to stakeholders and a larger corporate purpose. Part II examines how this shift in corporate sentiment has not changed the traditional hostility towards the choice of a company’s own workers to unionize. Part III considers how to address this disjunction, both through pressure from the workers themselves and through

16. *Whole Foods Store Votes to Join Union*, PROGRESSIVE GROCER (July 16, 2002), <https://progressivegrocer.com/whole-foods-store-votes-join-union> [<https://perma.cc/9SFF-TDAP>].

17. MACKAY & SISODIA, *supra* note 1, at 160.

18. *Id.*

19. *Id.*

20. *Id.* at 161.

21. See, e.g., Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/47QW-RLW9>] (finding seventy-one percent approval of unions); Aurelia Glass, *The Closing Gender, Education, and Ideological Divides Behind Gen Z’s Union Movement*, CTR. FOR AM. PROGRESS (Oct. 5, 2022), <https://www.americanprogress.org/article/the-closing-gender-education-and-ideological-divides-behind-gen-zs-union-movement/> [[https://perma.cc/3YQ3-2\[XJ\]](https://perma.cc/3YQ3-2[XJ])] (“Gen Zers are the most supportive of unions, with a mean approval rating of 64.3 compared with 60.5 for Millennials, 57.8 for Gen Xers, and 57.2 for Baby Boomers.”).

changes in corporate law, corporate theory, and labor and employment law.

I. THE NEW CORPORATE SOCIAL CONSCIOUSNESS

In 2019, the Business Roundtable issued an extraordinary statement. After many years in which the corporate commitment to maximize shareholder value was taken for granted, the Roundtable provided a “Statement on the Purpose of a Corporation.” In explaining its new approach to corporate purpose, the Roundtable offered that the statement “supersedes previous Business Roundtable statements and more accurately reflects our commitment to a free market economy that serves all Americans.”²² It was signed by the CEOs of 181 influential American companies—Alphabet, Amazon, Apple, Citibank, Comcast, JP Morgan, Microsoft, Salesforce, Starbucks, and many more.²³ Essentially a rejection of the shareholder primacy norm, the statement recited the importance of all of a company’s stakeholders: customers, employees, suppliers, communities, and shareholders (listed last).²⁴ The statement concluded: “Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.”²⁵

The 2019 statement was in some ways a culmination, and in some senses a prelude. The financial crisis of 2008 had dealt a significant blow to the foundations of shareholder capitalism from which it had never quite recovered.²⁶ Although the stock market reached record highs and unemployment reached record lows,²⁷

22. BUS. ROUNDTABLE, *supra* note 12.

23. *Id.*

24. *Id.*

25. *Id.*

26. See, e.g., Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), <https://www.nytimes.com/2008/10/24/business/economy/24panel.html> [<https://perma.cc/KX9M-Q7JR>].

27. See, e.g., Matthew Fox, *Here’s How the Stock Market Performed Under President Donald Trump, and How It Compares to Previous Administrations*, BUS. INSIDER (Jan. 20, 2021, 3:00 PM), <https://markets.businessinsider.com/news/stocks/stock-market-performance-under-president-donald-trump-dow-jones-sp500-2021-1-1029987163> [<https://perma.cc/U9N3-WVRK>] (“During Trump’s presidency, the Dow [Jones Industrial Average] made 126 new all-time highs”); *What Happened to the Economy Under Trump Before Covid and After*, WALL ST. J. NOTED (Oct. 14, 2020, 6:04 PM), <https://www.wsj.com/articles/what-happened-to-the-economy-under-trump-before-covid-and-after-11602713077> [<https://perma.cc/F6QL-KP25>] (noting the lowest unemployment rate in 50 years).

overall wages had remained stagnant.²⁸ Donald Trump's surprise presidential victory in 2016 had awakened a vigorous opposition movement, upping the stakes for political contests.²⁹

In 2018, one CEO wrote a letter to his fellow CEOs that was deemed "likely to cause a firestorm in the corner offices of companies everywhere."³⁰ That year's annual letter from BlackRock's Larry Fink was notable for many reasons. His company had more of an interest in these other companies' financial success, and shareholder wealth maximization more generally, than almost anyone else; at that time BlackRock managed more than \$6 trillion in investments, making it the largest investor in the world.³¹ Nevertheless, in his annual letter to CEOs, he argued: "To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."³² Directing companies to "publicly articulate [their] strategic framework for long-term value creation," he posed the following questions:

Companies must ask themselves: What role do we play in the community? How are we managing our impact on the environ-

28. Elise Gould, *State of Working America Wages 2019: A Story of Slow, Uneven, and Unequal Wage Growth over the Last 40 Years*, ECON. POL'Y INST. (Feb. 20, 2020), <https://www.epi.org/publication/swa-wages-2019/> [<https://perma.cc/2WXM-PM5U>].

29. See generally THE RESISTANCE: THE DAWN OF THE ANTI-TRUMP OPPOSITION MOVEMENT (David S. Meyer & Sidney Tarrow eds., 2018); Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> [<https://perma.cc/KGN4-YG73>]; Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 371 (2019) ("More specifically, social media has served as a central forum for this unprecedented global conversation, where previously silenced voices have been amplified, supporters around the world have been united, and resistance has gained steam."); Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079, 1081 (2019) (noting that "#MeToo largely emanates from the abuse of gendered power in government and business firms").

30. Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html> [<https://perma.cc/SW3C-2LVB>].

31. *Id.*

32. Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), <https://corp.gov.law.harvard.edu/2018/01/17/a-sense-of-purpose/> [<https://perma.cc/6JH9-SPZF>].

ment? Are we working to create a diverse workforce? Are we adapting to technological change? Are we providing the retraining and opportunities that our employees and our business will need to adjust to an increasingly automated world? Are we using behavioral finance and other tools to prepare workers for retirement, so that they invest in a way that that will help them achieve their goals?³³

The letter in many ways set the table for the Business Roundtable's subsequent statement.

Following the Roundtable's statement, however, the forces driving political polarization and generational revolt have only compounded. The novel coronavirus pandemic led to illness, death, and mass unemployment, buffered by the largest federal relief package ever.³⁴ Companies got caught in the politicization of the pandemic, where medically recommended efforts to curb the tide of infection were met with resistance.³⁵ The murder of George Floyd sparked an outpouring of outrage and an urgency for reform and real racial justice.³⁶ In the aftermath of the presidential election, anger over the supposedly stolen election boiled over into the January 6 insurrection, in which the U.S. Capitol was stormed and elected leaders threatened with kidnapping or death.³⁷

This turmoil has forced U.S. corporations to navigate a changed and complicated world in which customers, employees, and investors are expecting more corporate commitment on political and cultural issues. In 2018, Starbucks employees called the police when two Black men asked to use the restroom and then refused to leave when denied.³⁸ After a video of the incident was released on social media, the resulting furor led to an apology from

33. *Id.*

34. See Catie Edmondson, *5 Key Things in the \$2 Trillion Coronavirus Stimulus Package*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/us/politics/whats-in-coronavirus-stimulus-bill.html> [<https://perma.cc/6ZCH-7ZVU>].

35. See Robert Gatter & Seema Mohapatra, *Covid-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17, 18–20 (2020) (noting the political controversy surrounding masking requirements).

36. See Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 817–18 (2021) (discussing the trauma inflicted by the killing and the cross-racial nature of the protests).

37. See, e.g., Aaron C. Davis, *Red Flags*, WASH. POST (Oct. 31, 2021), <https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/> [<https://perma.cc/59CR-WHN6>].

38. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html> [<https://perma.cc/N2JR-R9SK>].

the CEO, who called it “a disheartening situation . . . that led to a reprehensible outcome.”³⁹ That May, the company closed all of its stores to conduct racial bias education for 175,000 employees.⁴⁰ The following year Starbucks hired Covington & Burling LLP to conduct annual civil rights assessments in order to “1) provide[] a factual and honest review of [the company’s] journey in inclusion, diversity and equity, and 2) help[] [Starbucks] track progress over time to drive truly lasting change.”⁴¹

A commitment to racial equity is only one of the ways in which Starbucks is striving to be a more socially conscious company. In 2021, Starbucks committed to coffee-specific sustainability goals for 2030 that include halving their carbon footprint, reaching carbon neutral green coffee, and conserving water usage in green coffee processing by fifty percent.⁴² The company has been known for offering meaningful employee benefits, such as health insurance, tuition stipends, and free online offerings.⁴³ It was cited numerous times in *Conscious Capitalism* as an example of conscious capitalism at work, with then-CEO Howard Schultz praised as a “good example of high-SQ [spiritual intelligence] leadership” for his work “recommit[ing] Starbucks to its core purpose and its sense of authenticity.”⁴⁴

On many of the core issues confronting American politics and society, big brands like Starbucks have taken a more committed stand to support causes that their customers, employees, and inves-

39. *Starbucks CEO: Reprehensible Outcome in Philadelphia Incident*, STARBUCKS STORIES & NEWS (Apr. 14, 2018), <https://stories.starbucks.com/press/2018/starbucks-ceo-reprehensible-outcome-in-philadelphia-incident/> [https://perma.cc/ERG6-FPV5].

40. See Anna Orso, *One Year Later: A Timeline of Controversy and Progress Since the Starbucks Arrests Seen ‘Round the World’*, PHILA. INQUIRER (Apr. 12, 2019), <https://www.inquirer.com/news/starbucks-incident-philadelphia-racial-bias-one-year-anniversary-stutter-dilworth-park-homeless-tables-20190412.html> [https://perma.cc/5PEV-UD6Q].

41. *Starbucks Civil Rights Assessments*, STARBUCKS STORIES & NEWS, <https://stories.starbucks.com/stories/civil-rights-assessments/> [https://perma.cc/GUW5-LG7N].

42. *Starbucks Announces Coffee-Specific Environmental Goals*, STARBUCKS STORIES & NEWS (Mar. 22, 2021), <https://stories.starbucks.com/stories/2021/starbucks-announces-coffee-specific-environmental-goals/> [https://perma.cc/2V23-LGBJ].

43. MACKAY & SISODIA, *supra* note 1, at 287; Dee-Ann Durbin & Anne D’Innocenzio, *Companies Like Starbucks and Chipotle Are Paying Hourly Employees’ College Tuition. One Graduate Keeps Asking, ‘Is This Real?’*, FORTUNE (Oct. 23, 2022), <https://fortune.com/2022/10/23/starbucks-chipotle-free-tuition-employees-benefits-education/> [https://perma.cc/X9YL-RUKD].

44. MACKAY & SISODIA, *supra* note 1, at 32, 185–86.

tors want them to support.⁴⁵ The examples are legion and across all types of industries. Large-scale, seemingly apolitical companies such as AT&T, Comcast, and Blue Cross Blue Shield pledged to withhold all political spending from politicians who claimed that the 2020 presidential election was not legitimate.⁴⁶ Delta and Coca-Cola came out strongly against a restricted voting access bill in their home state of Georgia.⁴⁷ At the 2020 World Economic Forum, Goldman Sachs pledged to only take companies public if they had at least one diverse member of the board.⁴⁸ BlackRock set a goal of having zero carbon emissions for all assets under management by 2050.⁴⁹ In the wake of *Dobbs v. Jackson Women’s Health Organization*,⁵⁰ many companies changed their benefit plans to include reimbursement for travel to a state where abortion was still legal.⁵¹

And when companies have failed to respond to the new corporate environment, they have often been pressured to change course. In early 2022, the Florida legislature was considering the “Parental Rights in Education” bill, labeled the “Don’t Say Gay” law by opponents.⁵² The bill stated that “[c]lassroom instruction by school personnel or third parties on sexual orientation or gender

45. See Fairfax, *supra* note 7, at 1165 (“One of the most significant recent phenomena in corporate governance is the outspoken embrace of the view that corporations should operate in a manner that benefits society and all of the corporations’ stakeholders.”).

46. Alex Isenstadt et al., *Business Titans Pull Back from GOP After Capitol Insurrection*, POLITICO (Jan. 11, 2021, 8:28 PM), <https://www.politico.com/news/2021/01/11/business-titans-gop-capitol-insurrection-457901> [<https://perma.cc/L35C-C7XK>].

47. David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating ‘Crystal Clear’ Opposition*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/business/delta-coca-cola-georgia-voting-law.html> [<https://perma.cc/C6LR-FENW>].

48. RAMASWAMY, *supra* note 10, at 14.

49. Andrew Ross Sorkin, *BlackRock Chief Pushes a Big New Climate Goal for the Corporate World*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/business/dealbook/larry-fink-letter-blackrock-climate.html> [<https://perma.cc/RZ2T-ESAT>].

50. 142 S. Ct. 2228 (2022).

51. See, e.g., Alex Millson & Ella Ceron, *How US Companies Are Supporting Workers on Abortion*, BLOOMBERG (May 3, 2022), <https://www.bloomberg.com/news/articles/2022-05-03/how-u-s-companies-are-supporting-workers-on-abortion> [<https://perma.cc/2GH7-RVYD>].

52. Jaclyn Diaz, *Florida’s Governor Signs Controversial Law Opponents Dubbed ‘Don’t Say Gay’*, NPR (Mar. 28, 2022) <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/C7FN-RKV3>]. The bill was eventually passed and became state law. Florida Parental Rights in Education Act, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (codified at FLA. STAT. § 1001.42(8)(c)(1) (2022)).

identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”⁵³ Critics of the bill argue that it is meant to penalize teachers for talking about LGBTQ+ perspectives and for acknowledging the existence of alternative lifestyles.⁵⁴ Bob Chapek, just two years into serving as CEO at the Walt Disney Company, wrote a memo to employees outlining the company’s desire to avoid taking a stand on the bill.⁵⁵ Arguing against public opposition, Chapek wrote: “[C]orporate statements do very little to change outcomes or minds. Instead, they are often weaponized by one side or the other to further divide and inflame.”⁵⁶ Chapek said that the company should avoid enmeshing itself in the controversy and should instead create “a more inclusive world . . . through the inspiring content we produce.”⁵⁷ But many employees were upset with the silence and challenged Chapek through letters, protests, and statements to the media.⁵⁸ Ultimately, Disney leadership had to change course and come out publicly against the legislation.⁵⁹ Chapek even admitted that “I missed the mark in this case but am an ally you can count on,” noting “we need to use our influence to promote that good by telling inclusive stories, but also by standing up for the rights of all.”⁶⁰ The company pledged to curb donations to the bill’s supporters.⁶¹ Disney’s public opposition to the bill, which was passed and signed into law, led to a

53. See Diaz, *supra* note 52.

54. *Id.*

55. Ethan Shanfeld, *After ‘Don’t Say Gay’ Bill Backlash, Disney CEO Expresses ‘Unwavering Support’ for LGBTQ Community*, VARIETY (Mar. 7, 2022), <https://variety.com/2022/film/news/disney-ceo-bob-chapek-support-lgbtq-1235197938/> [<https://perma.cc/3T3C-K2DR>].

56. *Id.*

57. Jennifer Maas, *Disney CEO Received Letter From LGBTQ Staff Pleading for Support Before ‘Don’t Say Gay’ Bill Passed Florida Senate*, VARIETY (Mar. 10, 2022), <https://variety.com/2022/tv/news/disney-lgbtq-staff-letter-dont-say-gay-bill-bob-chapek-1235200825/> [<https://perma.cc/US2L-JC5X>].

58. *Id.*; Gene Maddaus & Pat Saperstein, *Disney Employees Rally to Protest Fallout from ‘Don’t Say Gay’ Bill: ‘It’s Been Really Painful and Soul-Crushing’*, VARIETY (Mar. 10, 2022), <https://variety.com/2022/film/news/disney-lgbtq-employees-walkouts-dont-say-gay-1235211082/> [<https://perma.cc/RC97-5N2N>].

59. Brooks Barnes, *Disney C.E.O. Says Company Is ‘Opposed’ to Florida’s ‘Don’t Say Gay’ Bill*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/business/disney-ceo-florida-lgbtq-bill.html> [<https://perma.cc/H5CF-6T6U>].

60. Andrew Atterbury, *Disney Pledges to Stop Florida Campaign Donations Over ‘Don’t Say Gay’ Bill*, POLITICO (Mar. 11, 2022), <https://www.politico.com/news/2022/03/11/disney-pledges-to-stop-florida-campaign-donations-dont-say-gay-0016705> [<https://perma.cc/HH3Q-2AUZ>].

61. *Id.*

backlash from conservatives. Calling Disney a “woke” corporation, Governor Ron DeSantis accused Disney of attacking “the parents of my state,”⁶² and the Florida legislature quickly changed the law to allow the governor to end Disney World’s special taxing district.⁶³

As corporations have moved to embrace a new degree of social consciousness, corporate law theory has also shifted away from the pure, distilled focus on shareholder wealth maximization that has characterized the field since the 1980s. Certainly stakeholderism (a.k.a. stakeholder theory) has been around for a long time, with Professor Merrick Dodd arguing (against Adolph Berle) that the corporation must serve its stakeholders across the board, rather than simply shareholders.⁶⁴ But after the advent of the law and economics movement within corporate law, stakeholderism had been at most a consistent but low thrum of dissent.⁶⁵ Now, however, there are clear signs that legal academia is willing to question the consensus on shareholder primacy. The current draft of the American Law Institute’s *Restatement of the Law: Corporate Governance* has a convoluted and uncertain definition of corporate purpose, attempting to maintain shareholder primacy while opening itself up to stakeholder possibilities.⁶⁶ The European Corporate Governance

62. Andrew Atterbury, *DeSantis Revokes Disney’s Special Status After ‘Don’t Say Gay’ Opposition*, POLITICO (Apr. 22, 2022), <https://www.politico.com/news/2022/04/22/desantis-disney-special-status-dont-say-gay-00027302> [<https://perma.cc/7ERF-JGPY>].

63. Lori Rosza, *DeSantis Says Florida May Take Over Disney’s Special District*, WASH. POST (May 16, 2022, 6:15 PM), <https://www.washingtonpost.com/nation/2022/05/16/desantis-says-florida-may-take-over-disneys-special-district/> [<https://perma.cc/W4N2-AJKE>] (noting that the takeover of the district has not yet been implemented). In February 2023, the Florida legislature changed course to continue the special tax district but took away Disney’s power to appoint members of the tax district’s five-member oversight board, giving that power to the governor. Jesus Jiménez & Brooks Barnes, *What We Know About the DeSantis-Disney Dispute*, N.Y. TIMES (May 19, 2023), <https://www.nytimes.com/article/disney-florida-desantis.html> [<https://perma.cc/2PMX-N23T>].

64. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

65. For some of the more important entries in the stakeholder canon, see LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012); PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1996); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 194–95 (1991).

66. Section 2.01(a) states:

(a) The objective of a corporation is to enhance the economic value of the corporation, within the boundaries of the law;

Institute, long a stalwart of the shareholder primacy approach, has created a new “Responsible Capitalism Initiative,” recognizing that “[t]he issues of sustainability, inequality and exclusion create new challenges for capitalism and corporate governance.”⁶⁷ And even a former champion of the primacy norm (in his former positions of power) has now come out in full force in favor of stakeholderism.⁶⁸ In earlier writings, former Delaware Chancellor and Supreme Court Chief Justice Leo Strine had emphasized that Delaware law enforced shareholder primacy, and it was foolish to spend time thinking otherwise.⁶⁹ Writing in 2021, however, Strine said that “the outcomes of a corporate governance system that has increased the power of stockholders, in the form of institutional investors, and decreased the power of workers and other corporate stakeholders are unsustainable, both in terms of their effect on the environment and on the social fabric.”⁷⁰ As for those still clinging to shareholder wealth maximization, Strine provides this withering assessment:

It is the elites in business and in law and economics scholarship who are catching up. They are not in the vanguard; they were slow on the uptake, and the questions being asked are more

(1) in common-law jurisdictions: for the benefit of the corporation’s shareholders. In doing so, a corporation may consider:

- (a) the interests of the corporation’s employees;
 - (b) the desirability of fostering the corporation’s business relationships with suppliers, customers, and others;
 - (c) the impact of the corporation’s operations on the community and the environment; and
 - (d) ethical considerations related to the responsible conduct of business;
- (2) in stakeholder jurisdictions: for the benefit of the corporation’s shareholders and/or, to the extent permitted by state law, for the benefit of employees, suppliers, customers, communities, or any other constituencies.

RESTATEMENT OF CORPORATE GOVERNANCE § 2.01(a) (AM. L. INST. Tentative Draft No. 1, April 2022).

67. *ECGI Responsible Capitalism Initiative*, EUROPEAN CORP. GOVERNANCE INST., <https://ecgi.global/content/ecgi-responsible-capitalism-initiative> [<https://perma.cc/QC74-RAKY>].

68. See Brett McDonnell, *Doctor Leo and Justice Strine*, 24 U. PA. J. BUS. L. 855, 856 (2022) (describing Leo Strine’s changing positions on shareholder primacy).

69. Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) (“Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.”).

70. 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, 399 (2021).

fundamental and involve this: Isn't it time for all societally important business entities—not just public companies, but large private companies and money management firms as well—to have to use their power in a socially responsible manner?⁷¹

Changes in the economy, corporate law theory, and cultural expectations have resulted in a dramatic shift away from the apolitical pursuit of profit to a newly engaged sense of business stewardship. We are entering an age not just of corporate social responsibility, but of corporate social justice.⁷² And these moves have not been without controversy—they are often in conflict with a sizeable portion of the American public. But there has been a real and significant change in the attitudes and perspectives on display from many corporate leaders—away from a shareholder primacy approach to a more holistic, stakeholder-friendly mindset.

II. THE LABOR EXCEPTION

The new landscape of corporate consciousness does not ignore the lot of the workforce. As part of the 2019 Business Roundtable statement, the signatory companies committed to “[i]nvesting in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world.”⁷³ Indeed, many of the signatories are well known for their higher levels of compensation and benefits. Amazon recently increased its average starting wages from \$18 to \$19 per hour, with warehouse and delivery workers earning between \$16 and \$26 per hour depending on their position.⁷⁴ Amazon also sells employees on the promise of a growing career and expanded opportunity, as its benefits include partnerships with over 180 colleges and universities to provide a cost-free college education to its hourly employees.⁷⁵ Many tech companies are known for their un-

71. *Id.*

72. Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), <https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice> [<https://perma.cc/BT5F-9E6E>].

73. BUS. ROUNDTABLE, *supra* note 12.

74. Annie Palmer, *Amazon Hikes Pay for Warehouse and Delivery Workers*, CNBC (Sept. 28, 2022), <https://www.cnbc.com/2022/09/28/amazon-hikes-pay-for-warehouse-and-delivery-workers.html> [<https://perma.cc/B7MW-PX9U>].

75. Sydney Lake, *Amazon Workers Can Now Attend These 180 Colleges for Free*, FORTUNE (Mar. 3, 2022), <https://fortune.com/education/business/articles/2022/03/03/amazon-workers-can-now-attend-these-180-colleges-for-free/> [<https://perma.cc/F222-MQP5>].

sual and generous benefits; Apple, for example, provides six to eighteen weeks of paid parental leave, substantial employee discounts, and an annual “beer bash” featuring celebrity appearances and performances.⁷⁶ Google has a long history of innovative employee perks and generous employee stock options.⁷⁷ Marc Benioff at Salesforce has long been a champion of “Ohana,” a traditional Hawaiian family-oriented approach to their workplace community; in the wake of the pandemic, the company has provided its employees significant choice in deciding between remote work and a return to the office.⁷⁸ Perhaps the undisputed leader in its care and feeding of retail workers is Patagonia, which has long offered good pay, extraordinary flexibility, and perks like on-site childcare and free organic snacks.⁷⁹

What these companies have not had, however—at least not until recently—were unionized employees. Only a small percentage of private-sector workers in the United States are represented by a union—a figure that has been hovering between six and seven percent for some time.⁸⁰ And organizing in the tech industry has been fairly minimal.⁸¹ Silicon Valley has long possessed a strong hostility

76. Aine Cain, *8 of the Flashiest Perks Apple Employees Get, from Discounted iPhones to Maroon 5 Concerts*, BUS. INSIDER (Aug. 2, 2018), <https://www.businessinsider.com/perks-apple-employees-benefits-2017-11> [<https://perma.cc/3EPP-6VH6>]; Mark Gurman, *Apple Ups Benefits for Retail Workers in Tightening Labor Market*, BLOOMBERG (Feb. 8, 2022, 11:52 AM), <https://www.bloomberg.com/news/articles/2022-02-08/apple-ups-benefits-for-retail-workers-in-tightening-labor-market> [<https://perma.cc/Y9XP-NQTZ>].

77. See, e.g., LASZLO BOCK, *WORK RULES!: INSIGHTS FROM INSIDE GOOGLE THAT WILL TRANSFORM HOW YOU LIVE AND LEAD* (2015).

78. Marcel Schwantes, *What Salesforce Does for Its Employees That Makes Other Companies Jealous*, INC. (May 13, 2019), <https://www.inc.com/marcel-schwantes/what-salesforce-does-for-their-employees-that-make-other-companies-jealous.html> [<https://perma.cc/RKH6-3Z2W>]; Jane Thier, *Return-to-Office Orders Are 'Never Going to Work,' Rants Salesforce CEO Marc Benioff*, FORTUNE (June 23, 2022, 3:38 PM), <https://fortune.com/2022/06/23/salesforce-marc-benioff-slams-return-to-office-mandates/> [<https://perma.cc/UM7T-EVHL>]. For a discussion of Benioff’s approach to business as a tool for social progress, see MARC BENIOFF, *TRAILBLAZER: THE POWER OF BUSINESS AS THE GREATEST PLATFORM FOR CHANGE* (2019).

79. Brigid Schulte, *A Company That Profits as it Pampers Workers*, WASH. POST (Oct. 25, 2014), https://www.washingtonpost.com/business/a-company-that-prof-its-as-it-pampers-workers/2014/10/22/d3321b34-4818-11e4-b72e-d60a9229cc10_story.html [<https://perma.cc/J7N8-HS48>].

80. U.S. Dep’t of Lab., *supra* note 14.

81. See, e.g., Mark A. Konkel & Emma C. Kelly, *A Union Strikes a Revolutionary Blow in Tech*, LEXOLOGY (Sept. 30, 2019), <https://www.lexology.com/library/detail.aspx?g=29964796-8292-47f7-9072-2ca006fbc39f> [<https://perma.cc/PR3H-PR65>].

towards unions, and labor has not had much purchase there.⁸² The same is true for national retail brands. Efforts to unionize Walmart stores began in the 1990s but have foundered.⁸³ While workers may organize an occasional store or outlet, such successes have been limited and temporary. The 2002 Whole Foods representation campaign in Madison, Wisconsin, illustrates the pattern. As noted earlier, employees did manage to elect a union by a narrow margin at the one store.⁸⁴ This act of defiance had huge ramifications for employees across the country, as Mackey admits that the company “significantly transformed” the employee health care plan in response to worker dissatisfaction.⁸⁵ But the Madison workers got nothing. Whole Foods did not extend the suite of new benefits, including improved health insurance, to the Madison workers and refused to reach a collective agreement with the union.⁸⁶ A year later, after workers circulated a petition, the union was decertified.⁸⁷

Whole Foods may seem like an extreme case of antiunionism; after all, its founder famously compared organized labor to herpes.⁸⁸ But the Whole Foods response to its lone unionized store in Madison has become something of a playbook for “conscious” companies that want to avoid these solidarity-transmitted diseases. Companies that were previously thought to be forward-thinking, worker-centered, and socially conscious have displayed traditional

82. See, e.g., Gerrit De Vynck, Nitasha Tiku & Jay Greene, *Six Things to Know About the Latest Efforts to Bring Unions to Big Tech*, WASH. POST (Apr. 30, 2021), <https://www.washingtonpost.com/technology/2021/01/26/tech-unions-explainer/> [<https://perma.cc/YRS2-M3JW>].

83. Rick Wartzman, *A Brief History of the Attempts to Unionize Walmart*, LITERARY HUB (Nov. 16, 2022), <https://lithub.com/a-brief-history-of-the-attempts-to-unionize-walmart/> [<https://perma.cc/NL49-SURY>] (“Despite decades of trying—and the filing of 288 unfair labor practice charges against the company between 1998 and 2003 for purportedly surveilling, interrogating, and firing workers who hoped to organize—neither the UFCW nor any other union was ever able to notch a single victory at a Walmart in the United States. Except for once. In February 2000, butchers at a Walmart Supercenter in Jacksonville, Texas, voted seven to three in favor of being represented by the UFCW.”).

84. MACKAY & SISODIA, *supra* note 1, at 160.

85. *Id.*

86. *Id.* at 161.

87. *Id.*

88. Emma G. Keller, *Whole Foods CEO John Mackey Calling Obamacare Fascist Is Tip of the Iceberg*, THE GUARDIAN (Jan. 18, 2013), <https://www.theguardian.com/business/us-news-blog/2013/jan/18/whole-foods-john-mackey-fascist> [<https://perma.cc/B8T6-RNNL>] (quoting Mackey as saying, “[t]he union is like having herpes. It doesn’t kill you, but it’s unpleasant and inconvenient, and it stops a lot of people from becoming your lover”).

anti-union techniques in fighting off their own workers' efforts to secure collective representation.

Starbucks is perhaps the quintessential example of this phenomenon. The Seattle-based coffee chain has long appeared on lists of the "best places to work for" and "most-admired employers."⁸⁹ Its fringe benefits and corporate culture have been selling points for potential employees. Founder and longtime CEO Howard Schultz was seen as the face of this Starbucks approach, drawing accolades in the business press.⁹⁰ But during the pandemic, stories began to appear about worker dissatisfaction with Starbucks' policies. One common refrain was that during the pandemic the company had prioritized customer service over safety and respect for workers.⁹¹ The official company response to these complaints was emblematic:

Our 200,000 partners across the US are the best people in the business, and their experiences are key to helping us make Starbucks a meaningful and inspiring place to work. We offer a world-class benefits program for all part- and full-time partners and continued support for partners during Covid-19 to care for themselves and their families, and we continue to have an industry-leading retention rate.⁹²

When Starbucks Workers United began a representation campaign at stores in Buffalo, New York in 2021, company executives did not embrace this expression of worker sentiment; they instead followed the traditional anti-union playbook. When the union filed representation petitions for three different stores individually, Starbucks insisted that a grouping of all twenty Buffalo stores was

89. See, e.g., Brian Kushida, *Starbucks Ranks High on Fortune's '100 Best Companies to Work For'*, MINN. DAILY (Jan. 24, 2007), <https://mndaily.com/208079/news/world/starbucks-ranks-high-fortunes-100-best-companies-work/> [<https://perma.cc/N98D-GWWC>]; Bonnie Rochman, *What Makes Starbucks One of the World's Top 5 Most Admired Employers? Ask These Partners*, STARBUCKS STORIES & NEWS (Jan. 23, 2018), <https://stories.starbucks.com/stories/2018/starbucks-one-of-the-worlds-top-5-most-admired/> [<https://perma.cc/2442-7X8Y>].

90. See, e.g., Rochman, *supra* note 89.

91. See, e.g., Michael Sainato, 'Coffee-Making Robots': Starbucks Staff Face Intense Work and Customer Abuse, GUARDIAN (May 26, 2021), <https://www.theguardian.com/business/2021/may/26/starbuck-employees-intense-work-customer-abuse-understaffing> [<https://perma.cc/ET6H-26LZ>]; Noam Scheiber, *Starbucks Faces Rare Union Challenge as Buffalo Workers Seek Vote*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/08/30/business/starbucks-coffee-buffalo-union.html> [<https://perma.cc/7UPJ-WD9N>].

92. Sainato, *supra* note 91.

necessary.⁹³ After fighting and losing on that issue at the National Labor Relations Board (NLRB), the company vigorously opposed the union campaigns.⁹⁴ Starbucks executives flooded the Buffalo stores, with seven visits alone from Rossann Williams, Starbucks' president of retail for North America.⁹⁵ Once the union had secured victories at several stores, Starbucks' tactics became even more hardball. Howard Schultz, returning to his role as CEO, implemented a series of improvements in workers' benefits, but then said that unionized workplaces would not enjoy them.⁹⁶ The company has gone on a firing spree, terminating, reassigning, or downgrading employees allegedly because of their union activity.⁹⁷ The scope of the alleged unfair labor practices is staggering, with over twenty complaints alleging hundreds of illegal acts filed against Starbucks as of August 2022—less than a year after the first announced union campaign.⁹⁸ A June 2023 media report tallied nearly 100 NLRB-issued complaints against Starbucks, with Board administrative law judges finding that the company had violated labor law in sixteen out of seventeen adjudicated cases.⁹⁹ To give a

93. Noam Scheiber, *As Starbucks Workers Seek a Union, Company Officials Converge on Stores*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/business/economy/starbucks-union-buffalo.html> [<https://perma.cc/77QF-CYDW>].

94. Mary Meisenzahl, *Starbucks Just Got Closer to Having Its First Unionized Store in the US*, BUS. INSIDER (Oct. 29, 2021, 12:27 AM), <https://www.businessinsider.com/starbucks-union-organizers-in-buffalo-just-got-a-boost-from-the-nlr-2021-10> [<https://perma.cc/TH5Y-PPZ4>].

95. Scheiber, *supra* note 93.

96. *See, e.g.*, Noam Scheiber, *Starbucks Plans Wage Increases That Won't Apply to Unionized Workers*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/2022/05/03/business/economy/starbucks-howard-schultz-union-pay.html> [<https://perma.cc/6H23-CFPL>]; Heather Haddon, *Starbucks Prepares to Expand Worker Benefits That Might Exclude Unionized Staff*, WALL ST. J. (Apr. 13, 2022), <https://www.wsj.com/articles/starbucks-prepares-to-expand-benefits-to-workers-but-could-exclude-unionized-ones-11649869570> [<https://perma.cc/ZB6B-8VLL>].

97. Robert Iafolla & Parker Purifoy, *Starbucks Is Racking Up Labor Law Violations as Rulings Roll in*, BLOOMBERG L. (June 2, 2023, 4:31 AM), <https://news.bloomberglaw.com/daily-labor-report/starbucks-is-racking-up-labor-law-violations-as-rulings-roll-in> [<https://perma.cc/ML39-9DU3>]; Kate Rogers, *Starbucks Hit with Sweeping Labor Complaint Including Over 200 Alleged Violations*, CNBC (May 6, 2022, 7:46 PM), <https://www.cnbc.com/2022/05/06/starbucks-accused-of-more-than-200-labor-violations-in-nlr-complaint.html> [<https://perma.cc/AY65-N6K2>].

98. *See, e.g.*, Dee-Ann Durbin, *Labor Board Files Complaint Against Starbucks for Withholding Raises from Unionized Stores*, PBS NEWSHOUR (Aug. 25, 2022, 7:29 PM), <https://www.pbs.org/newshour/economy/labor-board-files-complaint-against-starbucks-for-withholding-raises-from-unionized-stores> [<https://perma.cc/FM9W-6TVV>].

99. Iafolla & Purifoy, *supra* note 97.

taste of the organized onslaught against workers: the initial NLRB complaint in the Buffalo regional office accused Starbucks of “firing employees because they supported the union; promising benefits to workers as a way to discourage them from unionizing; intimidating workers who sought to unionize by subjecting them to surveillance; and other illegal behavior.”¹⁰⁰ Soon thereafter, the Board amended its complaint to seek to require Starbucks to recognize a union under an imposed bargaining order.¹⁰¹ The Board has already secured the reinstatement of seven employees in Memphis through an extraordinary injunction and is seeking nation-wide injunctions against the company in a number of cases.¹⁰²

While the breadth and depth of the Starbucks response is extraordinary, it is not alone amongst the more enlightened enterprises in its scorched-earth response to unionization efforts. When workers at Chipotle stores began to organize at stores in Maine and Michigan, the restaurant chain followed the Starbucks playbook, bringing in managers from across the country as well as an anti-union consultant.¹⁰³ Soon after the organizing began, Chipotle shut down the Maine location, claiming that the decision was based on staffing issues; the NLRB filed a complaint alleging that the shutdown was retaliatory¹⁰⁴ and eventually reached a \$240,000 set-

100. Noam Scheiber, *Labor Board Seeks Unionization at Starbucks Where Union Lost Election*, N.Y. TIMES (May 20, 2022), <https://www.nytimes.com/2022/05/20/business/starbucks-union-buffalo.html> [<https://perma.cc/C2TM-QVGX>].

101. *Id.*

102. Press Release, NLRB Off. of Pub. Affs., NLRB Region-15 Wins Injunction Requiring Starbucks to Rehire Seven Unlawfully Fired Workers, Post the Court’s Order, and Cease and Desist from Unlawful Activities (Aug. 18, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-region-15-wins-injunction-requiring-starbucks-to-rehire-seven> [<https://perma.cc/2Z49-ABU3>]; Robert Iafolla, *Starbucks Faces Labor Board Bid for Nationwide Court Order*, BLOOMBERG (Nov. 15, 2022), <https://news.bloomberglaw.com/daily-labor-report/starbucks-faces-labor-board-request-for-nationwide-court-order> [<https://perma.cc/EWJ6-VMQV>].

103. Lauren Kaori Gurley, *Michigan Chipotle Outlet the Chain’s First to Unionize*, WASH. POST (Aug. 25, 2022, 6:57 PM), <https://www.washingtonpost.com/business/2022/08/25/chipotle-union-victory-fastfood-michigan/> [<https://perma.cc/F58Y-SZ25>].

104. Josh Eidelson, *Chipotle Shut Down Maine Restaurant to Defeat Union, Labor Board Alleges*, BLOOMBERG (Nov. 3, 2022, 5:18 PM), <https://www.bloomberg.com/news/articles/2022-11-03/chipotle-shut-restaurant-because-workers-organized-nlr-alleges#xj4y7vzkg> [<https://perma.cc/UL6A-38Z5>]. Pro-union workers from the closed location alleged that they are blacklisted within the company. Meaghan Bellavance, *Chipotle Reportedly Blacklists Augusta Employees Who Filed to Unionize*, NEWS CTR. ME. (Aug. 8, 2022, 6:30 PM), <https://www.newscentermaine.com/article/money/business/chipotle-blacklists-augusta-maine-employees-who-filed-for-union->

tlement with the company.¹⁰⁵ Chipotle has a record of violating labor and employment laws; summer 2022 saw the company agree to a settlement with New York City potentially worth more than \$20 million for violating the city’s worker protection laws.¹⁰⁶

Apple has long been considered one of the premier retail establishments in the country, with workers at the “Genius Bar” afforded strong benefits and ethereal workplaces.¹⁰⁷ But a shift in corporate culture has allegedly had workers maximizing sales with pressure tactics, leading to an interest in unionization.¹⁰⁸ Two retail stores have voted for union representation, with workers at other stores considering the possibility.¹⁰⁹ Apple has responded with an increase in health and education benefits—but not for the unionized stores.¹¹⁰ In Atlanta, the Communications Workers of America withdrew its election petition after concluding that “Apple’s repeated violations of the National Labor Relations Act have made a free and fair election impossible.”¹¹¹ The union claims that Apple is

food-business/97-ed587a53-0828-425a-8922-7585a579b341 [https://perma.cc/J6VL-4VAL].

105. Press Release, NLRB Off. of Pub. Affs., NLRB Region 1-Boston Obtains Settlement with Chipotle with \$240,000 in Backpay and Front Pay, Preferential Hiring, and Notice Posting in 40 Stores (Apr. 5, 2023), <https://www.nlr.gov/news-outreach/region-01-boston/nlr-region-1-boston-obtains-settlement-with-chipotle-with-240000-in> [https://perma.cc/9VC5-HLL8].

106. The settlement was “the largest settlement of its kind in the city’s history.” Noam Scheiber, *Chipotle Agrees to Pay Over \$20 Million to Settle New York City Workplace Case*, N.Y. TIMES (Aug. 9, 2022), <https://www.nytimes.com/2022/08/09/business/economy/chipotle-labor-nyc.html> [https://perma.cc/UN92-VFC6].

107. As Josh Eidelson reported: “Apple Store workers say the jobs were plum by retail standards until this transition, and for many they were dream jobs: getting paid to use their geekery for good. The money was decent (it’s now \$22 an hour in the US, minimum), the benefits were strong (health insurance, pet-sitting help), and some of the perks matched the ones enjoyed by their white-collar counterparts (discounts on Apple products, occasional trips to the corporate headquarters in Cupertino).” Josh Eidelson, *How Apple Stores Went from Geek Paradise to Union Front Line*, BLOOMBERG (Nov. 14, 2022, 4:00 AM), <https://www.bloomberg.com/news/features/2022-11-14/apple-appl-stores-join-us-retail-union-fight#xj4y7vzkq> [https://perma.cc/5P34-ZEPZ].

108. *Id.* (“Increasingly, workers have concluded that the only way to regain the Apple experience they signed up for, and hold the company to the values it preaches, is to unionize.”).

109. *Id.*

110. Mitchell Clark, *Apple’s First Unionized Workers Say the Company Is Withholding New Benefits*, THE VERGE (Oct. 28, 2022, 5:51 PM), <https://www.theverge.com/2022/10/28/23427577/apple-union-maryland-letter-benefits-contract> [https://perma.cc/AB2W-4V6E].

111. Mitchell Clark, *Atlanta Apple Store Workers Say ‘Intimidation’ Has Made a Fair Union Vote Impossible*, THE VERGE (May 27, 2022, 6:52 PM), <https://www.theverge.com/2022/5/27/23111111/atlanta-apple-store-workers-say-intimidation-has-made-a-fair-union-vote-impossible>.

playing out of the same anti-union playbook: hiring anti-union lawyers, circulating anti-union messages, and holding captive-audience meetings.¹¹² In October 2022, the NLRB filed unfair labor practice charges against Apple, alleging that the employer interrogated workers about their union support and prevented pro-labor flyers from being distributed in a break room.¹¹³ In January 2023, the NLRB issued a statement finding merit to allegations that top executives at Apple had improperly imposed rules on employees restricting their ability to engage in protected concerted activity.¹¹⁴ Other union charges are still under investigation.¹¹⁵

Trader Joe's has cultivated an offbeat, relaxed vibe at its stores, with a focus on stakeholders and a progressive image.¹¹⁶ However, the company has followed the conventional management path in its approach to unionization—fighting it vigorously.¹¹⁷ The company has hired the law firm of Littler Mendelson to carry on an anti-union campaign at its stores; like Starbucks and others, it has allegedly changed terms and conditions in the midst of an organizing drive, retaliated against union supporters at its stores, and closed a store to discourage unionization.¹¹⁸ Two Trader Joe's stores have organized while one has rejected unionization; in the stores that have organized, Trader Joe's United has accused the employer of bad-faith bargaining.¹¹⁹

www.theverge.com/2022/5/27/23145034/apple-atlanta-retail-store-union-election-canceled-intimidation [<https://perma.cc/9FZY-EMDZ>].

112. *Id.*

113. See, e.g., Tripp Mickle, *N.L.R.B. Issues Complaint Against Apple*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/business/apple-store-nlr-ruling.html> [<https://perma.cc/ZP7G-ZCM9>].

114. Josh Eidelson, *Apple Executives Violated Worker Rights, Labor Officials Say*, BLOOMBERG (Jan. 30, 2023, 4:09 PM), <https://www.bloomberg.com/news/articles/2023-01-30/apple-executives-violated-worker-rights-us-labor-officials-say> [<https://perma.cc/73DL-DNB9>].

115. *Id.*

116. Jonah Furman, *Trader Joe's Union Campaign Takes Two Steps Forward, One Step Back*, LAB. NOTES (Aug. 25, 2022), <https://labornotes.org/2022/08/trader-joes-union-campaign-takes-two-steps-forward-one-step-back> [<https://perma.cc/534S-Z44J>].

117. *Id.* (“It seems that Trader Joe's management is considering becoming the next Starbucks in a different sense: closing stores and harassing workers out of union drives.”).

118. See Michael Sainato, *Trader Joe's Broke Labor Laws in Effort to Stop Stores Unionizing, Workers Say*, THE GUARDIAN (Sept. 4, 2022), <https://www.theguardian.com/us-news/2022/sep/04/trader-joes-union-workers-labor-law> [<https://perma.cc/QEH2-53L2>].

119. See, e.g., Catherine Douglas Moran, *Trader Joe's Accused of Bad Faith Bargaining by Union*, GROCERY DIVE (Nov. 8, 2022), <https://www.grocerydive.com/>

It's hard to say for sure, of course, but there is a case to be made that no other company has devoted as many resources to anti-unionization as Amazon. Prior to 2022, the company had succeeded in keeping unions out of its workforce.¹²⁰ The company's workplace surveillance is notorious amongst its employees, deploying an array of electronic wizardry that some workers compare to prison.¹²¹ The monitoring also discourages concerted activity among employees, as they fear being overheard or even identified as congregating together by the company's tracking systems.¹²² The company also held hundreds of meetings with employees to convince them not to join the union; these small-group meetings, sometimes called "training," were hosted by up to twenty-nine employee relations officials and up to nine outside consultants.¹²³ The union's loss in the 2021 representation election at the Bessemer, Alabama warehouse seemed to foretell continued difficulties for organizing at the company.¹²⁴ But the NLRB ordered the election to be held again, as it found that the company had a "flagrant disre-

news/trader-joes-unfair-labor-practice-charges-union/635972/ [https://perma.cc/DU6D-QFG4]; Noam Scheiber, *Workers at Trader Joe's in Brooklyn Reject Union*, N.Y. TIMES, (Oct. 28, 2022), <https://www.nytimes.com/2022/10/28/business/economy/trader-joes-brooklyn-union.html> [https://perma.cc/9A4G-UPJ8].

120. Noam Scheiber, *Mandatory Meetings Reveal Amazon's Approach to Resisting Unions*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html> [https://perma.cc/MS7A-6XRL].

121. See, e.g., Jay Greene, *Amazon's Employee Surveillance Fuels Unionization Efforts: 'It's Not Prison, It's Work'*, WASH. POST (Dec. 2, 2021, 7:00 AM), <https://www.washingtonpost.com/technology/2021/12/02/amazon-workplace-monitoring-unions/> [https://perma.cc/LE8W-CFN8].

122. See, e.g., Annie Palmer, *How Amazon Keeps a Close Eye on Employee Activism to Head Off Unions*, CNBC (Oct. 24, 2020, 10:30 AM), <https://www.cnbc.com/2020/10/24/how-amazon-prevents-unions-by-surveilling-employee-activism.html> [https://perma.cc/5NC9-VTUV]; Jo Constantz, *Inside the Secretive World of Union Busting: How Employers Use Technology to Defeat Unions*, CAPITAL & MAIN (Dec. 9, 2021), <https://capitalandmain.com/inside-the-secretive-world-of-union-busting-how-employers-use-technology-to-defeat-unions> [https://perma.cc/UCP8-M4JA]. Internal memos showed that Whole Foods stores were using heat-mapping technology to identify where workers were congregating and assigning each location a score of their likelihood to unionize. Hayley Peterson, *Amazon-Owned Whole Foods Is Quietly Tracking its Employees with a Heat Map Tool That Ranks Which Stores Are Most at Risk of Unionizing*, BUS. INSIDER (Apr. 20, 2020, 10:52 AM), <https://www.businessinsider.com/whole-foods-tracks-unionization-risk-with-heat-map-2020-1> [https://perma.cc/5R4D-XT4L].

123. Constantz, *supra* note 122; Scheiber, *supra* note 120.

124. See, e.g., Karen Weise & Michael Corkery, *Amazon Workers Vote Down Union Drive at Alabama Warehouse*, N.Y. TIMES (Apr. 9, 2021), <https://www.nytimes.com/2021/04/09/technology/amazon-defeats-union.html> [https://perma.cc/ZWM3-F7NF].

gard” for agency election procedures and had “essentially hijacked the process and [given] a strong impression that it controlled the process.”¹²⁵ A year later, workers at a Staten Island warehouse voted for representation from the Amazon Labor Union (ALU), a stand-alone union newly created to serve Amazon workers.¹²⁶ Amazon has since been accused of violating federal labor law in its enforcement rules about non-working areas, and the ALU has lost two subsequent elections at different warehouse locations.¹²⁷

It should be noted that many of the alleged unfair labor practices from the last year are, to date, either from union charges or NLRB complaints, and that the employers have vigorously contested the facts on many of these claims. But some of the facts are undisputed, many have been held to be violations in administrative hearings, and the breadth and depth of the alleged illegality are breathtaking. Moreover, these companies all could have taken a neutral or even welcoming stance towards their employees’ decision to unionize.¹²⁸ They could have not advocated for a “no” vote on the representation question; they could have refrained from opposition through internal messaging, captive-audience meetings, and public statements; they could have recognized the union voluntarily when the union demonstrated proof of majority support; they could have undertaken bargaining with an eye to resolving differences and reaching a collective agreement. None of this has happened. Instead, these companies have pushed their anti-union positions to the full extent of the law—and well beyond, as seems fairly (if only allegedly) clear at this point.

It is difficult to harmonize these consistently hostile responses to unionization, including widespread alleged illegal activity, with the new corporate culture of social consciousness and responsible stewardship. All of these companies have enjoyed relatively positive

125. Jay Greene, *Labor Board Calls for Revote at Amazon Warehouse in Alabama in Major Victory for Union*, WASH. POST (Nov. 29, 2021, 5:41 PM), <https://www.washingtonpost.com/technology/2021/11/29/amazon-warehouse-union-revote/> [<https://perma.cc/7W2T-GRJZ>] (quoting from the opinion of NLRB Regional Director Lisa Henderson).

126. See Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html> [<https://perma.cc/2J2J-DL28>].

127. Karen Weise & Noam Scheiber, *Amazon Labor Union Loses Election at Warehouse Near Albany*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/technology/amazon-labor-union-alb1.html> [<https://perma.cc/554Q-7S4H>].

128. For a discussion of card check and neutrality agreements, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

public images and are seen as employers that offer more generous benefits, more positive working environments, and more accepting corporate cultures. Despite demonstrations through union cards and NLRB elections that their workers want representation, managers have fought tooth-and-nail to prevent their workers from securing collective representation. And in an era where stakeholder theory and ESG investing are asking companies to go beyond the requirements of the law to serve customers, workers, the environment, and communities, these employers are alleged to have repeatedly violated the law in their desperation to stave off collective representation.

Corporate attitudes have changed dramatically over this period of significant social change. Unfortunately, traditional animus towards labor remains firmly locked in place. But it is not too late for that to change. It is time to extend the principles of stakeholderism and socially conscious capitalism to the concept of collective worker power in a way that truly offers meaningful participation to this critical set of stakeholders.

III.

A CREDIBLE COMMITMENT TO WORKERS

In her article *Stakeholderism, Corporate Purpose, and Credible Commitment*, Professor Lisa Fairfax notes that there are reasons to be skeptical about the new corporate commitment to broader interests within society.¹²⁹ Stakeholder interests have come to the fore before, and business rhetoric often has not matched the reality.¹³⁰ But Fairfax also notes reasons for optimism, citing to new sets of powerful supporting voices, new forms of pressure to apply, and a new public environment demanding greater accountability.¹³¹ To take advantage of the moment, she counsels that companies must “make a credible commitment to ensuring that corporations will focus on other stakeholders” so that the moment “translates into a genuine shift in corporate attitude and behavior, particularly in the medium and long-term.”¹³²

Corporations across the spectrum are looking to display fidelity to the governing principle of stakeholderism as part of a new approach to corporate purpose and responsibility. It is time for these corporations to make a credible commitment to their workers and

129. Fairfax, *supra* note 7, at 1163–64.

130. *See id.* at 1176–81.

131. *Id.* at 1181–86.

132. *Id.* at 1168.

to the organizations that represent their workers collectively. Any business that embraces stakeholderism—at a minimum, the 181 signatories to the Business Roundtable statement—must change its behavior to comport with those principles. That means new thinking about the company’s relationship to labor law, the company’s approach to collective worker power, and the company’s willingness to give workers the right to participate in company governance.

First, companies must commit to stop violating labor law. The allegations and, in many cases, administrative findings of rampant illegality on display from companies like Starbucks, Amazon, and Chipotle would not be tolerated by investors or activist groups for almost any other type of legal breach. Part of the problem is the lackluster enforcement regime for labor law violations. Remedies for unfair labor practices under the National Labor Relations Act are notoriously weak,¹³³ and federal officials should be in a better position to enforce labor law through swift actions and meaningful penalties like those proposed in the Protecting the Right to Organize (PRO) Act.¹³⁴ But societal acceptance of these gross violations of law is an important factor in their proliferation. Stakeholders must come together to punish companies that fail to abide by the basic assumptions of lawfulness. Investors should refuse to consider labor law violators as worthy of “ESG” or “sustainable” status, no matter their other contributions.¹³⁵ Governments should strike

133. See, e.g., Joseph E. Slater, *The “American Rule” That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53, 110 (2007); Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787–91 (1983); Robert M. Worster, III, *If It’s Hardly Worth Doing, It’s Hardly Worth Doing Right: How the NLRA’s Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1077–88 (2004).

134. The PRO Act would require the NLRB to pursue preliminary injunctions for certain categories of employer unfair labor practices (including many of those alleged against these companies), as well as civil penalties of \$50,000 per violation and up to \$100,000 for repeat offenders, along with compensatory damages. See Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021); Ben Penn et al., *Democrats’ Budget Deal Seeks to Penalize Labor Law Violators*, BLOOMBERG L. (July 14, 2021, 5:47 PM), <https://news.bloomberglaw.com/daily-labor-report/democrats-budget-deal-seeks-to-penalize-labor-law-violators> [https://perma.cc/E68E-AY5J].

135. Legal behavior is often assumed as a threshold requirement for ESG. Mark S. Goldstein & Amanda E. Brown, *How ESG is Changing the Landscape in Labor and Employment Law*, REUTERS (Mar. 3, 2022, 10:46 AM), <https://www.reuters.com/legal/legalindustry/how-esg-is-changing-landscape-labor-employment-law-2022-03-03/> [https://perma.cc/WL3E-F79Z] (“With the increased focus on ESG, companies are increasingly seeking to be more than merely legally compliant and are wanting to go further to demonstrate their progressive positions with respect to ESG.”). Responses to worker activism are seen as important but are often left unde-

companies from the list of contractors if they have been found to have committed unfair labor practices.¹³⁶ And workers across the company—including executives and managers—must not tolerate a culture of lawlessness, even if it doesn’t affect them directly.

It is worth noting that notions of labor law “legality” encompass areas where the boundaries may not be crisply drawn. The line between, for example, an illegal threat against union activity and a lawful prediction of unionization consequences can be difficult to discern.¹³⁷ The concept of “good-faith bargaining” is notoriously slippery, without clear markers to determine when hard negotiating crosses the line into an unfair labor practice.¹³⁸ These uncertainties could seem to excuse some degree of noncompliance. But they could instead counsel companies to steer clear of the line in their behavior. A stakeholder-supporting approach would support a “legality-plus” outlook, where companies give wide berth to questionable actions by adhering to a gold-star standard.¹³⁹

fined. *Id.* (“For worker activism, companies would be well-served to partner with labor and employment counsel to understand the nuances of how to effectively respond to an organizing campaign and, potentially, even a union election and contract negotiation. The past year has already seen an increase in the number of organizing campaigns, and the Biden administration has indicated its strong support for such efforts. Accordingly, this area should be a key focus for ESG programs.”).

136. A recent study found that contractors who violated labor law were more likely to violate other laws and perform poorly. Karla Walter, Divya Vijay & Malkie Wall, *Federal Contractors Are Violating Workers’ Rights and Harming the U.S. Government*, CTR. FOR AM. PROGRESS ACTION (Jan. 21, 2022), <https://www.americanprogressaction.org/article/federal-contractors-violating-workers-rights-harming-us-government/> [<https://perma.cc/647U-DTJP>].

137. See SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 115 (2d ed. 2020) (“A difficult line is maintained between threats, which are prohibited, and predictions of adverse consequences of unionization, which are protected [under labor law] . . .”).

138. See *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 466 (2d Cir. 1973) (“We recognize of course that a company’s ‘entire course of conduct’ or ‘the totality of the circumstances’ may show a lack of good faith in violation of § 8(a)(5), although none of its specific acts amounted to proscribed conduct.”); Bryan M. O’Keefe, *The Employee Free Choice Act’s Interest Arbitration Provision: In Whose Best Interest?*, 115 PENN ST. L. REV. 211, 250 (2010) (“Whether bargaining is in good faith or bad faith is highly subjective.”).

139. As one Starbucks employee put it: “Now we want to say to Starbucks: This is not who you are. This is not who we are. Union-busting is not this company. We are this company.” Joanna Robin, *The Pandemic Pushed These Amazon and Starbucks Workers to the Brink. Now, They Are Forming Unions and Pushing Back*, ABC NEWS (Dec. 15, 2021, 1:05 AM), <https://www.abc.net.au/news/2021-12-13/the-tipping-point-for-amazon-and-starbucks-workers/100648814> [<https://perma.cc/658R-NVGR>].

Moving up a level of “consciousness,” companies could of course give their workers free and unfettered choice in choosing a representative. A company can commit to this course of action through a neutrality agreement, in which the company pledges to remain silent during the representation campaign.¹⁴⁰ A card check agreement binds the employer to recognize the union if a majority of the bargaining unit signs a card or petition agreeing to be represented by the union.¹⁴¹ Card check and neutrality agreements were popular tools for certain unions in organizing campaigns in the late 1990s and early 2000s.¹⁴² There’s nothing to prevent a stakeholder-oriented corporation from signing such an agreement at the beginning of the campaign.¹⁴³ In fact, Microsoft recently agreed to a card check and neutrality agreement with the Communications Workers of America as part of its proposed acquisition of Activision.¹⁴⁴ Its decision may have been motivated in part by antitrust concerns, but the company nevertheless came to the table and took a much more open approach to employees’ choice of representation.¹⁴⁵ As Microsoft President Brad Smith stated, “We will respect the fact that our employees are capable of making decisions for themselves and they have a right to do that.”¹⁴⁶

The primary legal mechanism for worker participation in the United States is collective bargaining through union representation. But there are other ways for companies to provide workers with participation in the governance of the firm. A constellation of participatory management systems such as holacracy, works councils, and total quality management include employees within the

140. ESTREICHER & BODIE, *supra* note 137, at 125.

141. *Id.*

142. Brudney, *supra* note 128, at 825.

143. Employers may want to require some form of union information disclosure to employees as part of the agreement, in order to ensure that employees are properly informed in their choices, especially if more than one union is involved. See Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1135 (2011) (“[L]abor law reforms that diminish coercive election practices while increasing the flow of information and the opportunity for discourse will both enhance individual choice and increase the amount and quality of collective action.”).

144. Noam Scheiber & Karen Weise, *Microsoft Pledges Neutrality in Union Campaigns at Activision*, N.Y. TIMES (June 13, 2022), <https://www.nytimes.com/2022/06/13/business/economy/microsoft-activision-union.html> [<https://perma.cc/2BV3-8WCQ>].

145. *Id.*

146. *Id.*

firm's internal governance structures.¹⁴⁷ Workers need not bargain with management for their terms and conditions of employment; instead, they can work within the overall governance structure to manage the affairs of the firm. In the United States, these systems are largely a product of private decisions made by company leaders, with little in the way of binding commitment to the system.¹⁴⁸ Some organizational forms, such as the cooperative or the employee stock ownership plan (ESOP), invest employees with actual ownership rights.¹⁴⁹ In many European countries, codetermination provides workers with seats on the company's board of directors—the ultimate position of power within the corporation.¹⁵⁰ These corporate forms vary in the extent to which they offer employees access to control and to financial dividends; ESOPs have been criticized, for example, for divesting employees of much of the governance power and handing it over to a trustee.¹⁵¹ But they are at least efforts—large and small—to bring employees into governance and establish meaningful power sharing.

It is time to consider meaningful change in corporate governance to establish real power-sharing amongst stakeholders. Stakeholder theorists have—puzzlingly—generally failed to diagram a change in the corporate power structure as part of their reforms, instead remaining content to ask existing boards to contemplate the good of all stakeholders (even though they are elected by shareholders alone).¹⁵² There are many different possibilities for implementing stakeholderism through corporate governance. With respect to employees, it makes sense to move away from share-

147. LALOUX, *supra* note 9; ROBERTSON, *supra* note 8; Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 986–90 (1998) (providing a taxonomy); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993). For a critique of participatory management, see Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657 (1996).

148. *But see* ROBERTSON, *supra* note 8, at 21 (describing the binding nature of the constitution within holacracy).

149. *See, e.g.*, Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs, and "Ownership Societies"*, 92 CORNELL L. REV. 865 (2007).

150. Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 324 (2021).

151. *See* Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other "Survivalists"*, 67 FORDHAM L. REV. 957, 960 (1998) (discussing the power of the trustee within the ESOP).

152. Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2113 (2010).

holder-only governance and consider power-sharing in the form of worker board representation.¹⁵³ Legislation to this effect has been proposed in Congress.¹⁵⁴ Worker representation in firm governance offers power and participation without some of the limitations of collective bargaining, such as the inherently limited nature of bargaining as a right.¹⁵⁵ In any event, the point applies more broadly: for stakeholder governance to be real—for companies to make a credible commitment to that effect—stakeholders must have governance power to exercise.

IV. CONCLUSION

The pandemic brought into sharper relief the disconnect between employer rhetoric and employee reality at the workplace. After the first frantic and terrifying weeks of quarantine and isolation—and for some workers, even during this period—the return to work meant dangerous exposure to the virus, angry customers and coworkers, and a realization that “essential” did not mean essential as to respect and compensation.¹⁵⁶ Many workers have attributed the uptick in unionization to the wave of powerlessness that swept over them as part of the pandemic.¹⁵⁷ To a great extent, their concerns echoed the concerns of workers well before the pan-

153. For an extended discussion, see GRANT M. HAYDEN & MATTHEW T. BODIE, *RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE* (2021).

154. See, e.g., Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Reward Work Act, H.R. 3355, 116th Cong. (2019); Teamwork for Employees and Managers (TEAM) Act of 2022, S. 3585, 117th Cong. (2022).

155. See Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1136 (2019) (noting the inherent weaknesses of collective bargaining).

156. See, e.g., Ruqaiyah Yearby, *Lack of Enforcement, Political Influence, and Meat and Poultry Processing Workers' Disproportionate Rates of Covid-19 Infections and Deaths*, 35 ABA J. LAB. & EMP. L. 41 (2020); Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html> [<https://perma.cc/X7ZW-HTEN>]; Molly Kinder & Laura Stateler, *Frontline Workers Were Excluded from Companies' Pandemic Windfalls. No Wonder So Many Are Forming Unions*, BROOKINGS (May 4, 2022), <https://www.brookings.edu/blog/the-avenue/2022/05/04/frontline-workers-were-excluded-from-companies-pandemic-windfalls-no-wonder-so-many-are-forming-unions/> [<https://perma.cc/3ZD9-EW7K>].

157. See Kinder & Stateler, *supra* note 157; Ian Prasad Philbrick, *Why Union Drives Are Succeeding*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/briefing/union-drives-college-graduates.html> [<https://perma.cc/BG5H-FES8>].

demic, going back to the beginning of the Post-Industrial Age.¹⁵⁸ But the threat of death, present in many jobs as never before, highlighted their lack of power over basic workplace decisions, including to what extent workplace dangers would be managed or tolerated.

Corporate leaders like John Mackey and Howard Schultz see themselves as managing their companies in the right way, but they are unwilling to cede any meaningful control over the workplace to their employees and the unions that represent them.¹⁵⁹ The newly conscious corporation needs a sense of self-awareness and deference, and an interest in bringing all stakeholders into the fold. And that includes worker empowerment.

158. For a discussion of employee organizing in tech companies prior to the pandemic, see Kate Conger & Noam Scheiber, *Employee Activism Is Alive in Tech. It Stops Short of Organizing Unions.*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/technology/tech-companies-union-organizing.html> [<https://perma.cc/JG9E-RSZL>].

159. See Jeff Steen, *In 14 Words, Starbucks CEO Howard Schultz Shows Why So Many Employees Don't Trust Their Leaders*, INC. (Mar. 24, 2022), <https://www.inc.com/jeff-steen/in-14-words-starbucks-ceo-howard-schultz-shows-why-so-many-employees-dont-trust-their-leaders.html> [<https://perma.cc/ZZ5M-JQMD>] (citing to Schultz's statement: "If they had faith in me and my motives, they wouldn't need a union").

