THE SOVIET CONSTITUTION PROBLEM IN COMPARATIVE CORPORATE LAW: TESTING THE PROPOSITION THAT EUROPEAN CORPORATE LAW IS MORE STOCKHOLDER FOCUSED THAN U.S. CORPORATE LAW

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ABSTRACT

This Article addresses the proposition advanced by academic and press commentators that European corporation law promotes stockholder welfare better than its U.S. counterpart. Those who express that view often point to the stronger rights afforded to stockholders under the laws of the European member states, including the non-frustration rule, the ability of stockholders to take direct action by calling a special meeting and replacing directors, and rules that aim to provide equal treatment for all target stockholders. But claiming that stockholders are economically better off as a result of the literal law on the books is akin to judging the Soviet Union's protection of human freedom by reading its constitution. That is, if one looks only at the Soviet Constitution on paper, one might conclude that it was a model of liberalism because it provided for separation between church and state, freedom of speech, freedom of the press, and freedom of assembly. But in reality, the Soviet citizens were unable to exercise any of those rights. In an admittedly far less extreme way, the claim that European corporate law better advances stockholder welfare than the U.S. approach relies upon a similar misplaced emphasis on paper rights. This Article proposes that scholars who tout Europe as a stockholder paradise slight the social and regulatory context in which laws operate, and elide the fact that American corporate law creates a system where directors have an intense focus on generating stockholder profits. Available empirical evidence suggests that U.S. stockholders use their rights to influence corporate policies more effectively than their European counterparts, that there is more merger and acquisition ("M&A") activity in the United States than in Europe, and that U.S. stockholders receive higher takeover premiums. By highlighting the practical ways in which American corporate laws operate compared with those in Europe and observing how that operation affects stockholder value, this Article is intended to contribute to the increasingly global debate about corporate governance. Because policy advocates have argued that E.U. corporate law should inform U.S. policymaking and vice versa, it is critical that there be a clear-eyed understanding of how each system works in actual practice, not just in theory, lest we make policy mistakes.

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INTRODUCTION

For years, sophisticated academic commentators have claimed that European corporation law is more favorable to stockholders than that of the United States.[1] These statements are then parroted by members of the

1. *See, e.g.*, John Armour & Joseph A. McCahery, *Introduction* to AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE US 1, 13 (John Armour & Joseph A. McCahery eds., 2006) (noting the "relatively weaker position of US shareholders"); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 848 (2005) ("[T]he corporate law system of the United States is the one that stands out among the corporate law systems of developed countries in how far it goes to restrict shareholder initiative and intervention."); Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697, 703 (2005) ("[Comparing the United States to Continental Europe] underscores just how few legal powers shareholders have in the United States and how fundamental the distribution of legal powers is in shaping the character of corporate life."); Luca Enriques et al., *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 55, 73 (Reinier Kraakman et al. eds., 2d ed. 2009) ("[C]ontinental European jurisdictions . . . still allow qualified percentages of shareholders to initiate and approve resolutions on a wide range of matters . . . . By contrast, the U.S.—or at least Delaware—law is the least shareholder-centric jurisdiction."); Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations*, 32 FORDHAM INT'L L.J. 587, 612 (2009) ("In Europe, shareholders are generally considered to have more power to act within the shareholder meeting compared to U.S. shareholders and this power relates to the shareholder ability to add to the agenda."). *See also* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE

business press.[2] But how true is this contention?

As this Article explains, the argument that European corporate law is better for stockholders than U.S. corporate law is analogous to the claim that the Soviet Union protected human rights as well as, if not better than, the United States. If one looks only at the Soviet Constitution on paper, one might draw the conclusion that it was a model of liberalism because it provided separation between church and state, freedom of speech, freedom of the press, and freedom of assembly.[3] But the reality was that the paper

POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 37 (2013) ("U.S. shareholders possess surprisingly limited capacity to intervene in corporate affairs, and their interests are not prioritized with anything approaching the clarity and constituency enjoyed by their U.K. counterparts."); LYNN STOUT, THE SHAREHOLDER VALUE MYTH 56 (2012) ("In contrast [to the United States], the United Kingdom seems a shareholder paradise."); Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 134 (2009) ("[S]hareholder influence varies between the United States and the United Kingdom: U.S. corporate and securities law is highly unusual in the extent to which it disenfranchises shareholders from both explicit and implicit influence."); David A Skeel, Jr., *Icarus and American Corporate Regulation*, *in* AFTER ENRON, *supra*, at 129, 147 ("The UK Takeover Code is far more shareholder-oriented than the US approach—target directors are forbidden from using defenses, for instance, and shareholders must be given equal treatment."). *Cf.* 74 Fed. Reg. 29,024, 29,026 (June 18, 2009) (codified at 17 C.F.R. pts. 200, 232, 240, 249, 274) (noting lack of accountability of directors to shareholders in the United States compared with other countries in proposed rules to "remove impediments" to the exercise of shareholders' rights to nominate and elect directors).

2. *See, e.g.*, Gretchen Morgenson, *At U.S. Companies, Time to Coax the Directors into Talking*, N.Y. TIMES, Mar. 28, 2015, at BU1 (arguing that investors in Europe "have far more clout" than investors in the United States); Shayndi Raice, *Global Finance: Advisers Search for Activists—U.S. Banks, Law Firms Open Shop in Europe, Expecting Migration of Proxy Wars*, WALL ST. J., Apr. 28, 2014, at C3 ("Many observers think Europe is ripe for U.S.-style activism . . . . In Europe, by contrast, with its more shareholder-friendly laws, activists rarely take their gripes public, but rather try to work privately with management to achieve their goals."); *Capitalism's Unlikely Heroes: Why Activist Investors Are Good for the Public Company*, ECONOMIST (Feb. 7, 2015), http://econ.st/1I7jOKu ("European . . . shareholders say they do not need activists because they have more power than American investors over managers' pay and appointments. They typically dismiss [famous activist investors] as an American solution to an American problem. And, for cultural reasons, the few European activists tend to be more diplomatic and consultative than their brash cousins."); Juliet Samuel, *American Activist Investors Take Another Charge at Europe*, WALL ST. J. (Apr. 22, 2015, 4:08 PM), http://on.wsj.com/1Ff0Df0 ("Some investors say activism hasn't previously taken off in Europe partly because laws in some European countries give shareholders a bigger voice than they would have in the U.S., making activism less necessary."); Steven Davidoff Solomon, *The Unintended Twist of Tax Inversions*, N.Y. TIMES: DEALBOOK (Apr. 24, 2015), http://nyti.ms/1z2fdp2 (noting that U.S. corporations that flee the United States to avoid high taxes are left more exposed to hostile takeovers and suggesting that the shareholders of such companies "may come out winners" as a result); Jen Wieczner, *Meet Europe's Best Activist Investor*, FORTUNE (Aug. 27, 2015), http://for.tn/1Kry7F5 ("In Europe, shareholders have stronger rights than in the U.S., and it's easier to put your candidates in a board seat, especially if you own a significant amount of stock," according to a major European hedge fund manager and activist investor).

3. *See* KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] chs. 6–7 (Russ.); KONSTITUTSIIA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION] arts. 118–133 (Russ.); Robert G.

Soviet Constitution was not worth anything to Soviet citizens who attempted to exercise those rights, except perhaps to give the bitter fate of being imprisoned for speaking freely an ironic quality.[4]

The claim that European corporate law is more stockholder focused than that of the United States relies upon a similar, if admittedly far less extreme, focus on paper law over how the law actually operates. Scholars fetishize the paper rights of European stockholders, including the non-frustration rule, which prohibits directors in many European nations from acting to block hostile takeovers without stockholder approval; the ability of stockholders to call a special meeting and replace the board; and rules that seek to provide for equal treatment of all target stockholders.[5] These scholars argue that the European model of corporate law embraces more aspects of direct stockholder democracy, and thus, the European system is more favorable to stockholders than the republican model prevalent in the United States.[6] In the latter model, the directors elected by the stockholders are able to pursue business strategies with more insulation during their terms of office than is supposedly possible in the European Union.[7]

But these commentators slight the very different social and regulatory contexts in which these paper rights actually operate. They also ignore the fact that the end result of the American approach to corporate law in operation is a system where centralized management has an intense focus on generating returns for stockholders.[8] The results of this focus are

Simmons, *Do We Want What They Have? A Comparison of American and Soviet Democracy*, 36 A.B.A. J. 909, 910 (1950) (quoting Articles 124 and 125 of the 1936 Soviet Constitution); Thomas E. Towe, *Fundamental Rights in the Soviet Union: A Comparative Approach*, 115 U. PA. L. REV. 1251, 1262 (1967) ("The chapter on fundamental rights in the Soviet Constitution is largely a statement of achievements and intentions. In this regard, its function as propaganda cannot be discounted.").

4. *See* Simmons, *supra* note 3, at 912 (noting that the freedoms identified in the Soviet Constitution could only be exercised in support of the party in power).

5. *See* sources cited *supra* note 1; Enriques et al., *supra* note 1, at 58–59 ("All of our core jurisdictions apart from the U.S. allow shareholders to nominate directors. . . . [T]he statutory default in the U.S. is a 'plurality' voting rule . . . . U.S. shareholders cannot block a company's nominees without waging a costly proxy contest."). *See also* STOUT, *supra* note 1, at 56 ("[T]he United Kingdom seems a shareholder paradise. Directors in U.K. companies cannot reject hostile takeover bids; they must sit back and let the shareholders decide if the firm will be sold to the highest bidder. Shareholders in U.K. companies have the power to call meetings, and to summarily remove uncooperative directors. They even get to vote to approve dividends.").

6. *See, e.g.*, Enriques et al., *supra* note 1, at 61 (comparing "shareholder-centric" jurisdictions like the United Kingdom, France, and Italy with "board-centric" Delaware); Skeel, *supra* note 1, at 147.

7. *See, e.g.*, Cools, *supra* note 1, at 746 (contending that "[e]lection and removal of directors is one of the best examples of shareholder weakness in the United States compared to Continental Europe").

8. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("[In] a for-profit corporate form, the [corporation's] directors are bound by the fiduciary duties and standards that

illustrated by empirical evidence indicating that American stockholders are able to use their supposedly weaker paper rights much more effectively than E.U. stockholders, that the incidence of M&A transactions is higher in the United States than in the European Union,[9] and that U.S. stockholders receive higher takeover premiums.[10]

Put bluntly, rote statements that the European Union is more

accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) [hereinafter Bainbridge, *Director Primacy*] ("[D]irector accountability for maximizing shareholder wealth remains an important component of director primacy."); Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1074 (1993) [hereinafter Bainbridge, *Independent Directors*] (arguing that "shareholders benefit substantially from the system of centralized management provided by the corporate structure"); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 32 (2005) ("In the corporate law academy today in the United States, the dominant view is that corporate law requires managers to pursue a single aim: the maximization of stockholder profits."). *See also* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to . . . other purposes."); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 268 (1992) ("*Dodge v. Ford* . . . reflects as pure an example as exists of the property conception of the corporation. In this conception, the corporation is seen as it is in its nineteenth century roots, as essentially a sort of limited liability partnership. The rights of creditors, employees and others are strictly limited to statutory, contractual, and common law rights. Once the directors have satisfied those legal obligations, they have fully satisfied all claims of these 'constituencies.' This property view of the nature of corporations, and of the duties owed by directors, equates the duty of directors with the duty to maximize profits of the firm for the benefit of the shareholders."). *But see* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165–67 (2008) (arguing that reliance on *Dodge v. Ford* to support the proposition that a corporation's main aim is to maximize stockholders' profit is misplaced because the relevant language is dicta).

9. PEPPER D. CULPEPPER, QUIET POLITICS AND BUSINESS POWER: CORPORATE CONTROL IN EUROPE AND JAPAN 33 tbl.2.3, 34 tbl.2.4 (2011) (finding that hostile takeovers are more common in the United States than in Europe); John C. Coates IV, *M&A Break Fees: U.S. Litigation vs. UK Regulation*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 239, 264 tbl.9.6 (Daniel P. Kessler ed., 2010) (normalized data revealed the rate of control bids in the United Kingdom between 1990 and 2008 to be 77 percent of the U.S. rate); Stefano Rossi & Paolo F. Volpin, *Cross-Country Determinants of Mergers and Acquisitions*, 74 J. FIN. ECON. 277, 281 tbl.1 (2004) (observing that the rate of firms targeted for hostile takeovers in the United States between 1990 and 2002 was 6.44%, the highest in the study, and arguing that more active markets for corporate control are the result of an investor-friendly legal environment; Norway (5.86%), Ireland (4.62%), and the United Kingdom (4.39%) were not far behind, but most European countries had much lower rates, such as France (1.68%) or Germany (0.30%)).

10. *See* Caterina Moschieri & Jose Manuel Campa, *The European M&A Industry: A Market in the Process of Construction*, ACAD. MGMT. PERSP., Nov. 2009, at 71, 83 (noting that "higher premia tend to accrue in countries with better shareholder protection," such as the United States); Rossi & Volpin, *supra* note 9, at 283–84 (finding that better investor protection is associated with higher takeover premiums).

stockholder friendly than the United States reflect a failure to consider how corporation law operates in the real world. Policy discussions about the future direction of corporate law in both jurisdictions should address the practical reality of how the law actually shapes the behavior of corporate managers and produces outcomes for stockholders.

To facilitate that discussion, this Article first takes a close look at the argument that European corporate law is more stockholder friendly than U.S. corporate law. That analysis begins with a consideration that many scholars and commentators ignore, but one that is fundamental: the overall social and regulatory context within which corporate governance operates. Thus, this Article compares the ends that directors are required to pursue when managing corporations under E.U. and American law. It focuses on the question of whether directors are generally instructed by corporation law to focus solely on stockholder welfare within the limits of their legal discretion, or whether they are required to consider the welfare of all corporate constituencies. In doing so, the Article highlights that scholars often fetishize the means of governance—which is commonly a function of direct stockholder democracy—and confuse it with the question of whether a system has as its focus stockholder welfare as the primary end. In this respect, although the U.S. system may use a more republican model than the European Union's, it does so only to best advance the end of stockholder welfare. Relatedly, the Article examines whether corporate constituencies other than stockholders, such as labor, have more or fewer enforceable rights in the European Union compared with the United States, and how the presence of these rights affects how comparatively stockholder friendly the systems are. Next, the Article compares the composition of stockholders at corporations in the European Union and in the United States and discusses how this difference influences the practical operation of the law. Lastly, the Article examines the non-corporate law regulatory framework within which directors in the European Union operate.

After having placed corporate governance within its overall social and regulatory context, the Article then considers the two primary contentions, grounded in the literal terms of European corporate law, on which the claim that the E.U. system is more stockholder friendly rests. These contentions are:

> In comparison with the United States, European corporate codes give stockholders a greater ability to take direct action, such as allowing stockholders to call special meetings to unseat directors and cause the corporation to adopt specific policies the stockholders prefer; and

> In comparison with the United States, Europe is more restrictive of the ability of directors to resist a hostile takeover, and in many European jurisdictions, directors are forbidden from taking any action to frustrate an all-stock, fully financed, unconditional bid.

In considering how the supposedly more powerful rights of E.U. stockholders operate in comparison with the supposedly weaker rights of American stockholders, the Article tests those two primary contentions against the available real world evidence. That analysis has two key dimensions: (1) the extent to which stockholders in the European Union take direct action to influence and change corporate policies; and (2) the frequency with which stockholders in the European Union, in comparison with the United States, act to unseat sitting directors.

The Article concludes by discussing the topic that most obsesses certain scholars: takeover defenses and M&A in general. Does the putative existence of a non-frustration regime in fact give stockholders access to higher takeover premiums and otherwise create more favorable M&A results than those enjoyed by stockholders under the American system? Does the republican model employed in the United States, which allegedly gives directors too much authority and denies stockholders the right to accept takeover bids, really create worse outcomes for stockholders?

In this regard, the Article focuses on a topic that many scholars slight, which is how friendly E.U. and U.S. corporation laws are to bidders in the sense of allowing them to pursue transactions in a low-cost manner that permits them to protect their legitimate interests. The Article also focuses on the effect that the absence of a legal duty on the part of E.U. directors to maximize stockholder value in a change-of-control transaction affects stockholders, especially in an environment in which governmental actors often intervene in the takeover dynamic to advance societal interests entirely unrelated to stockholder welfare.

At each stage of the analysis, an effort is made to focus on available empirical information that sheds light on how E.U. and U.S. corporate law actually influence outcomes for stockholders. The overwhelming weight of this empirical evidence suggests that the American system of corporate law is in reality far more stockholder focused than that of the European Union and that those who contend otherwise are emphasizing aspects of E.U. corporate law set forth on paper and ignoring the more important question of which system most potently advances the end of stockholder welfare.

I. THE SOCIAL AND REGULATORY CONTEXT

Before taking a close look at the corporate laws that supposedly provide superior protection and rights of intervention for stockholders of European companies, it is vital to consider the context in which those laws operate. In so doing, the Article first considers the ends of corporate law in the European Union as compared with the United States, observing that most European countries have corporate laws that obligate managers to consider the interests of a broad range of constituencies other than stockholders when making business decisions. The Article next examines the sources of law that give power to constituencies, such as labor, in the European Union. Finally, the Article describes the nature of the stockholder base of the typical E.U. corporation and how it differs from that of the United States, and also compares the different regulatory environments in which corporate managers operate.

A. THE ENDS OF CORPORATE LAW

An important contextual difference between U.S. and E.U. corporate law that scholars often elide is the extent to which directors are required to focus on promoting stockholder welfare. The scholars who tout Europe as a stockholder nirvana do not mention that most European countries have corporate laws that expressly state that the corporation's managers have a duty to consider all the stakeholders of the corporation, not just stockholders, when managing the enterprise.[11] For example, German corporate law directs managers to attend to the interests of shareholders, employees, and society as a whole.[12] Likewise, in France, corporate

11. *See Index of Codes*, EUR. CORP. GOVERNANCE INST., http://www.ecgi.org/codes/all_codes.php (last visited Aug. 18, 2016) (collecting codes of various E.U. member states); Stephen Davidoff Solomon, *Mylan's Too-Harsh Takeover Defense*, N.Y. TIMES: DEALBOOK (May 8, 2015), http://nyti.ms/1EoTC63 (noting that Mylan's chief executive officer ("CEO") justified her rejection of Teva's unsolicited bid on Dutch law, which dictates that Mylan "'act in the best interests of the company's shareholders, employees, patients, customers, communities and other stakeholders'"). *See generally* HOLLY J. GREGORY & ROBERT T. SIMMELKJAER, II, WEIL, GOTSHAL & MANGES LLP, DISCUSSION OF INDIVIDUAL CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES, ANNEX IV (2002), http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part2_en.pdf (reviewing corporate governance codes of E.U. member states that show that often the managers are required to act in the best interests of the company, taking into consideration the interests of the shareholders, the employees, and sometimes even the general public).

12. *See* Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 52 (1999) ("[C]orporate law in Germany makes it abundantly clear that shareholders are only one of the many stakeholders on whose behalf the managers must operate the firm."); Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84

managers are encouraged to consider the interests of all constituencies in running the corporation.[13] The Netherlands takes a similar approach.[14] Even in the United Kingdom, which is known for its non-frustration regime, the normative duty of corporate directors is to "promote the success of the company," which requires directors to take into account the interests of all constituencies.[15] Additionally, E.U. "harmonization laws"

CORNELL L. REV. 1133, 1157 (1999) ("German law takes more seriously the idea that beneficiaries of directors' duties include corporate constituents other than shareholders . . . ."); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829, 846 (2000) ("German corporate law clearly shows that managers must operate the firm for the benefit of multiple stakeholders, not just shareholders."); Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 208 (1994) ("Maximization of shareholders' wealth has hardly ever been the objective of German stock corporations . . . .").

13. *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 68 (2003) ("Nor has the French corporate law demanded shareholder-wealth maximization; indeed, it is said to encourage managers to run the firm in the general social interest, for all the players in the firm.").

14. Geert Raaijmakers & Jos Beckers, *Netherlands*, *in* THE CORPORATE GOVERNANCE REVIEW 280, 293 (Willem J L Calkoen ed., 5th ed. 2015) ("[T]he Netherlands has traditionally followed the stakeholder model, under which management and supervisory board members are required to take into account the interests of all stakeholders when making decisions and performing their duties. According to Paragraph 7 of its preamble, the Corporate Governance Code is based on the principle that a company is a long-term alliance between the various parties involved in the company, such as employees, shareholders and other investors, suppliers, customers, the public sector and public interest groups. Paragraph 8 of the preamble indicates that corporate social responsibility issues must also be taken into account by the management and supervisory boards.").

15. Section 172 of the Companies Act 2006 imposes a duty on U.K. directors to promote the success of the company:

> (1) A director of a company *must* act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.

Companies Act 2006, c. 46, § 172 (UK) (emphasis added).

There is evidence, however, to suggest that U.K. directors comply with this provision only as a matter of formality but in reality focus on the best interests of the corporation's stockholders. *See* Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation*, 50 VA. J. INT'L L. 579, 608–09 & n.142 (2010) ("Ultimately, however, as a formal matter, [considering other constituencies is] relevant only to the extent that they relate to the actual duty imposed on directors to make a good faith effort to advance the shareholders' interests."); Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'*, 29 SYDNEY L. REV. 577, 578–79, 597 (2007) (observing that U.K. directors' main objective is maximizing shareholder value and suggesting that consideration of other constituencies as a result of the Companies Act will only be incidental to that objective).

that provide for the creation of a "European Company" require such a company to take the interests of creditors, customers, and employees into account when making business decisions.[16]

By contrast, under Delaware law—the American jurisdiction that is the home of over 50 percent of U.S. public companies and 65.6 percent of Fortune 500 firms[17]—directors are required to focus on promoting stockholder welfare.[18] Commentators who dispute this reality ignore both the structure of the Delaware General Corporation Law ("DGCL"), which gives only stockholders the right to elect directors, vote on change-of-control transactions, and sue derivatively, and several consistent decisions of the Delaware Supreme Court and the Court of Chancery.[19] As a result of

16. Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 76 (1995).

The European Company, also known as *Societas Europaea* or SE, refers to a public limited-liability entity governed under the "Statute for a European company," which became effective on October 8, 2014. The European Union also adopted a supplementary measure to address employee rights to participation in European Companies. In fact, an agreement with an employee negotiating body must be reached on employee participation before a European Company can validly exist. *See* Council Directive 2001/86, art. 3, 2001 O.J. (L 294) 22, 24–26 (EC), http://eur-lex.europa.eu/eli/dir/2001/86/oj; Council Regulation 2157/2001, art. 12, 2001 O.J. (L 294) 1, 6 (EC), http://eur-lex.europa.eu/eli/reg/2001/2157/oj. *See also* John Armour & Wolf-Georg Ringe, *European Company Law 1999–2010: Renaissance and Crisis*, 48 COMMON MKT. L. REV. 125, 159–60 (2011) ("Management of pre-SE entities must engage in negotiations with employee representatives with a view to agreeing employee participation rights in relation to the new entity," and "SE formations occur overwhelmingly in countries with worker participation laws, the vast majority being in just two jurisdictions: the Czech Republic and Germany" (citations omitted)).

17. *See, e.g.*, JEFFREY W. BULLOCK, DEL. SEC'Y OF STATE, DELAWARE DIVISION OF CORPORATIONS 2014 ANNUAL REPORT 1 (2015), https://corp.delaware.gov/Corporations_2014%20Annual%20Report.pdf (noting that, as of 2014, "65.6 percent of all Fortune 500 companies are incorporated in Delaware" and that "almost 89 percent of U.S. based Initial Public Offerings in 2014 chose Delaware as their corporate home"); JEFFREY W. BULLOCK, DEL. SEC'Y OF STATE, DELAWARE DIVISION OF CORPORATIONS 2013 ANNUAL REPORT 2 (2014), https://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf (noting that "Delaware remains the chosen home of more than half of all U.S. publicly traded companies" and that, in 2013, "71 venture-backed companies incorporated in the U.S. and 69 of them chose Delaware for their corporate home").

18. *See generally* 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 (2015) (citing the authority for this proposition).

19. *See* N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) ("The directors of Delaware corporations have 'the legal responsibility to manage the business of a corporation for the benefit of its shareholder[] owners.'" (quoting Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998))). *See also* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (clarifying that even though a board of directors may consider the interests of other constituencies, there must always be "rationally related benefits accruing to the stockholders"); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 40–41 (Del. Ch. 2013) ("[T]he standard of conduct for directors requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefits of its residual claimants, the ultimate beneficiaries of the firm's value, not for the benefits of its contractual claimants."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del.

this clear mandate, directors of Delaware companies have greater freedom to pursue stockholder welfare than their counterparts in the European Union. The end result of the predominant American approach to corporate law is a system where centralized management has an intense focus on generating returns for stockholders. It is, of course, true that many American states other than Delaware have corporate laws that permit, but do not require, directors to take into account the interests of other constituencies when responding to a takeover bid.[20] But important states like California lack such a statute, and what matters in corporate law is not the number of states but the number of corporations. And when all states are considered, a large majority of American corporations exist in jurisdictions where there is no constituency statute and stockholders are the predominant focus of corporate law.[21] Indeed, as I next discuss, what is

Ch. 2010) ("I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders."); TW Servs., Inc. v. SWT Acquisition Corp., Nos. 10,427, 10,298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) ("[D]irectors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders."); *In re* J.P. Stevens & Co., Inc. S'holders Litig., 542 A.2d 770, 783 (Del. Ch. 1988) ("In these circumstances, reasonable directors, exercising honest, informed judgment, might differ as to what course of action would most likely maximize shareholder interests. . . . Certainly, the decision to accede to the topping fee in these circumstances does not fall so far afield of the expected range of responses to warrant an inference that the Special Committee must have been motivated by a concern other than maximizing the value of shareholders' interests."); Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders . . . ."); William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 896–97 (1997) ("[I]t can be seen that the proper orientation of corporation law is the *protection of long-term value of capital* committed indefinitely to the firm.").

20. *See, e.g.*, Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73 app. A (2015) (observing that thirty-three states have constituency statutes, but that seventeen states, including Delaware, California, Colorado, Washington, and Virginia, do not have such statutes).

Although a majority of U.S. states have enacted constituency statutes, which enable directors to consider the best interests of other corporate constituencies when conducting a sales process or deciding whether to accept a takeover offer, these statutes only permit—and do not require—directors to take such interests into account. As a result, constituency statutes give little real power to other corporate constituencies at the expense of the stockholders. *See, e.g.*, Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 987 (1992) ("Most [constituency] statutes are permissive. Directors 'may,' but need not, take nonshareholder interests into account. There are no express constraints on the directors' discretion in deciding whether to consider nonshareholder interests and, if they decide to do so, which constituency groups' interests to consider."); Enriques et al., *supra* note 1, at 103 ("[M]any [U.S.] states other than Delaware permit—but do not require—directors to consider the interests of employees and other non-shareholder constituencies in making important decisions, especially in the context of defending against hostile takeovers.").

21. The fact that a majority of U.S. states have a constituency statute does not mean that a

even more important than the nominal duty of directors is the power structure to which they are accountable. In the United States, that structure is one that gives only stockholders clout.

B. PRACTICAL POWER GIVEN TO OTHER CONSTITUENCIES

Not only are managers of companies in the European Union required to promote the interests of constituencies other than stockholders, but also their duty is backed by sources of law that give power to those constituencies to influence company policy. Employee participation in company management is affirmatively required in many E.U. member

majority of U.S. public corporations are governed by such statutes. Delaware is the home of a growing majority of U.S. public companies, which one study found to be 57.75%. California, which has a corporate law that some think gives stockholders even more clout than Delaware's, is home to the second highest percentage of publicly traded corporations, which is only 4.33%. Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 567 tbl.2 (2002). *See also* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1815 fig.2 (2002) (showing that, when measured by number of U.S. companies, 50% were incorporated in Delaware, 4% in California, and 4% in New York, but when measured by net sales of companies, 59% were incorporated in Delaware, 8% in New York, and 1% in California).

In fact, comparing data of states that have enacted constituency statutes with data of the percentage of public and Fortune 500 companies that are incorporated within those states shows that a group of eight states that do not have constituency statutes (California, Colorado, Delaware, Michigan, North Carolina, Utah, Virginia, and Washington) are the places of incorporation of 68.86% of public companies, and a group of seven states that do not have constituency statutes (California, Delaware, Kansas, Michigan, North Carolina, Virginia, and Washington) are the place of incorporation of 67.83% of Fortune 500 companies. And because there are a total of seventeen states that do not have constituency statutes, corporate directors are not able to consider the interests of other constituencies in making business decisions in a supermajority of U.S. public and Fortune 500 companies. *See* Bebchuk & Hamdani, *supra*, at 567 tbl.2 (showing the distribution of public and Fortune 500 companies by state of incorporation); Geczy et al., *supra* note 20, app. A (observing that seventeen U.S. states do not have constituency statutes).

Moreover, some states that have constituency statutes, like New York and Illinois, take an approach to corporate law that is on the whole similar to Delaware's approach. As a result, a strong supermajority of American public corporations are largely subject to the incentive structures set forth in this Article, albeit with those outside of Delaware having a less-deep well of judicial precedent to guide their actions.

Of course, precisely because in the United States stockholders are the only constituency with genuine power to influence the board, there is no evidence that constituency statutes have done much, if anything, to impede takeovers or protect other constituencies from them. *See* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 703–04 (2004) (discussing the lack of any material effect constituency statutes have had on American corporate law); Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 463–64 (2006) (noting that, because constituency statutes "tend to be quite limited in scope," "generally provide only that directors *may* consider the interests of nonshareholders," and do not indicate "how much weight should be given to the various interests," "history has proven such statutes to be rather insignificant").

states.[22] Under the German "codetermination" model, employees must hold at least half of the seats on the second-tier supervisory board of large companies—with enforceable voting rights.[23] Employee participation systems that give one-third of the seats on company boards to employees or employee representatives are required in Austria, Denmark, Luxembourg, Sweden, the Czech Republic, Slovenia, Slovakia, and Hungary.[24] Other E.U. member states, including France and Ireland, also require employee participation in certain aspects of corporate governance.[25] In most European countries, companies also grant information and consultation rights to "works councils," or organizations that represent labor interests.[26] In addition to national works councils, large cross-border companies are also required to establish works councils under the European Works Council Directive.[27] These various mechanisms ensure employee

22. *See, e.g.*, Uwe Blaurock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L.J. 377, 390 (1998) ([German] [c]orporate law prescribes a one-third parity or half parity . . . relationship . . . primarily . . . at [the] corporation supervisory board level . . . ."); Enriques et al., *supra* note 1, at 100 ("The widespread introduction of employee-appointed directors to the boards of large European corporations is the most remarkable experiment in corporate governance of the 20th century. Many west European countries now mandate employee-appointed directors in at least some large companies . . . ."); Licht, *supra* note 21, at 735 ("In France, Ireland, Portugal, and other EU Member States, the law includes aspects of employee participation in corporate governance.").

23. *See* Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Business Enterprise*, 24 J. CORP. L. 975, 981 (1999); Enriques et al., *supra* note 1, at 100 ("German law establishes 'quasi-parity co-determination', in which employee directors comprise half the members of supervisory boards in German companies with over 2,000 (German-based) employees."); Carsten van de Sande & Sven H Schneider, *Germany*, *in* THE CORPORATE GOVERNANCE REVIEW, *supra* note 14, at 114, 116 ("In [German] companies with more than 2,000 employees, the Co-Determination Act requires that half of the supervisory board members be employee representatives.").

24. Enriques et al., *supra* note 1, at 100 n.47. *See also id.* at 100 n.46 (observing that employee representation on corporate boards of directors is especially widespread among state-owned enterprises in the European Union); Martin Gelter, *Tilting the Balance Between Capital and Labor? The Effects of Regulatory Arbitrage in European Corporate Law on Employees*, 33 FORDHAM INT'L L.J. 792, 803–04 (2010) (listing countries with similar employee participation systems).

25. Licht, *supra* note 21, at 735.

26. *See* Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 609 (2004) ("'Works councils are elected bodies of employees who meet regularly with management to discuss establishment level problems.' Most countries in Western Europe legislatively mandate the formation of works councils for enterprises or plants in excess of a certain minimum size." (footnote omitted)); Cunningham, *supra* note 12, at 1142 ("Many continental European countries have gone further than the EC mandates and require that virtually all corporations establish and maintain worker councils.").

27. "The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings." Parliament and Council Directive 2009/38, art. 1(1), 2009 O.J. (L 122) 28, 32 (EC), http://eur-lex.europa.eu/eli/dir/2009/38/oj.

The European Council requires the establishment of European Works Councils for any business with 1,000 or more employees within the member states and 150 or more employees in each of participation in the governance of E.U. companies.[28]

Under Delaware law and that of other U.S. states,[29] by contrast, no constituency other than stockholders is given any power.[30] Employees are not allocated board seats or voting rights and thus cannot block or interfere with stockholder or managerial action. In addition, creditors only have the right to enforce the fiduciary duties directors owe to the corporation when it is insolvent,[31] and there is no fiduciary duty owed to company

at least two member states. *Id.* art. 2(1)(a), at 33. *See also* Enriques et al., *supra* note 1, at 101–02 ("[T]he EC's Works Council Directive . . . requires all EU member states to provide employee information and consultation (but not decision) rights on matters of particular employee concern involving at least two different member states, such as the prospective trend of employment, any substantial change in firms' organization and production processes and collective redundancies or sales of undertakings.").

28. Scholarship about the effect of employee participation systems on stockholders is mixed, but given that the goal of such systems is to give workers greater influence over corporate policy, it is unsurprising that some studies show that stockholder welfare suffers when a works council is able to exert influence over the company. *See, e.g.*, Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 1061 (1998) (expressing skepticism about the utility of co-determination and explaining his view thusly: "Why does codetermination not lead to efficiency gains? In Kenneth Arrow's terminology, the board of directors serves as a consensus-based decision-making body at the top of an authority-based structure. Recall that for consensus to function, however, two conditions must be met: equivalent interests and information. Neither condition can be met when employee representatives are on the board."); Gelter, *supra* note 24, at 819 (noting some of the costs of employee participation systems and codetermination); Gary Gorton & Frank A. Schmid, *Capital, Labor, and the Firm: A Study of German Codetermination*, 2 J. EUR. ECON. ASS'N 863, 885–86 (2004). *See generally* Dieter Sadowski et al., *The German Model of Corporate and Labor Governance*, 22 COMP. LAB. L. & POL'Y J. 33 (2000) (citing studies that show that the existence of a works council exerts a negative influence on firm profitability, labor productivity, and innovation). Of course, this may be because the overall wealth created by the corporation is shared more with labor. Other scholars have a more positive take on the effect of codetermination on stockholder welfare. *See generally, e.g.*, John Addison et al., *Worker Participation and Firm Performance: Evidence from Germany and Britain*, 38 BRIT. J. INDUS. REL. 7 (2000).

29. Notably, the Model Business Corporation Act ("MBCA") does not include a provision that enables directors to consider the interests of other constituencies, and a supermajority of the states that have adopted the MBCA have also enacted a constituency statute. *See* MODEL BUS. CORP. ACT (AM. BAR ASS'N 2010); Stephen M. Bainbridge, *A Map of Model Business Corporation Act States*, PROFESSORBAINBRIDGE.COM (Nov. 4, 2013), http://www.professorbainbridge.com/professorbainbridgecom/2013/11/a-map-of-model-business-corporation-act-states.html (providing a map of states that have adopted the MBCA); Geczy et al., *supra* note 20, app. A (observing that thirty-three states have constituency statutes).

30. The Delaware General Corporation Law ("DGCL") is intensely stockholder-focused. The statute makes clear that only stockholders can bring derivative actions, vote for directors, approve certificate amendments, amend the bylaws, and vote on certain major transactions. *See* DEL. CODE ANN. tit. 8, §§ 109, 211(b), 242, 251, 367 (2016).

31. *See, e.g.*, N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) ("When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners. . . . When a corporation is *insolvent*, however, its

employees. Thus, in the ordinary course, managers of American corporations have the freedom to take action to maximize stockholder welfare. Most importantly, managerial directors know that only one corporate constituency has the power to unseat or sue them, and that is the stockholders.

C. THE NATURE OF THE STOCKHOLDER BASE

Another contextual difference that is often ignored by those who describe the European Union as stockholder paradise is the fact that the stockholder composition at a typical corporation in the European Union is different from that of the United States. In the European Union, it remains the case that relatively few companies are widely held, and a majority of firms have a single dominant stockholder or a wealthy family with practical voting control.[32] For continental Europe in particular, the concentration of

creditors take the place of the shareholders as the residual beneficiaries of any increase in value. Consequently, the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties."); Quadrant Structured Prods. Co., Ltd. v. Vertin, 102 A.3d 155, 176 (Del. Ch. 2014) ("[U]pon a corporation's insolvency, its creditors gain standing to bring derivative actions for breach of fiduciary duty, something they may not do if the corporation is solvent, even if it is in the zone of insolvency." (citing Robert J. Stearn, Jr. & Cory D. Kandestin, *Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests Under the Bankruptcy Code and Delaware Law*, 36 DEL. J. CORP. L. 165, 171 (2011))); Trenwick Am. Litig. Tr. v. Ernst & Young, LLP, 906 A.2d 168, 175 (Del. Ch. 2006) ("Even when the firm is insolvent, directors are free to pursue value maximizing strategies, while recognizing that the firm's creditors have become its residual claimants and the advancement of their best interests has become the firm's principal business objective.").

32. *See, e.g.*, Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. ECON. PERSP. 117, 117 (2007) ("[T]he fundamental problem of corporate governance in continental Europe and in most of the world is different. There, few listed companies are widely held. Instead, the typical firm in stock exchanges around the world has a dominant shareholder, usually an individual or a family, who controls the majority of votes. Often, the controlling shareholder exercises control without owning a large fraction of the cash flow rights by using pyramidal ownership, shareholder agreements, and dual classes of shares."); Patrick Speeckaert, *Corporate Governance in Europe*, 2 FORDHAM FIN. SEC. & TAX L.F. 31, 31 (1997) ("Corporate shareholder structures in Europe consist of holding companies, government holdings, wealthy families but a relatively small institutional shareholder base."). *See also* Marco Becht & Ailsa Röell, *Blockholdings in Europe: An International Comparison*, 43 EUR. ECON. REV. 1049, 1049 (1999) (observing from a "preview [of] empirical work by the European Corporate Governance Network on the size of block shareholdings in Europe" that "[t]he most salient finding is the extraordinarily high degree of concentration of shareholder voting power in Continental Europe relative to the U.S.A. and the U.K.").

The most notable exception is the United Kingdom, where just over half of the listed companies are widely held, and institutional investors are the largest owners. *See* Peter Cziraki et al., *Shareholder Activism Through Proxy Proposals: The European Perspective*, 16 EUR. FIN. MGMT. 738, 749 (2010). The Netherlands is another E.U. nation whose listed companies are more widely held, and it is the E.U. nation with the approach to corporate law most similar to Delaware's. Maarten J. Kroeze, *Comment – Comparing Company Law in Europe and the United States: Some Remarks Inspired by* stockholder voting power is very high when compared with the United States and the United Kingdom. For example, two researchers found that in 2007, half of German and Italian companies had a single stockholder who controlled over 55 percent of the vote.[33] By contrast, the large majority of U.S. corporations are widely held,[34] and the typical voting block is 5 percent.[35] The largest blockholders of U.S. corporations tend to be managers or directors, followed by institutional investors, who are often passive but are more likely to support stockholder-initiated proposals than the manager-investors themselves.[36]

Because most corporations in continental Europe are controlled by a single stockholder or family, the interests of the controller and the minority may not be aligned, and without tools to give some degree of power to the minority stockholders, the minority may have little ability to influence corporate governance or discipline management.[37] Put simply, paper rules that empower stockholders do little to protect minority interests if the corporation has one stockholder who can wield those powers free of minority influence.[38] It is therefore not surprising that corporate

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Carney et al.'s Presentation, *in* THE LAW AND ECONOMICS OF CORPORATE GOVERNANCE: CHANGING PERSPECTIVES 68, 79 (Alessio M. Pacces ed., 2010) ("Just like Delaware, the Netherlands is one of the few countries in the world to have a specialized business court: the Companies and Business Court of the Amsterdam Court of Appeal. The court plays an important role in shaping Dutch company law.").

33. *See* Enriques & Volpin, *supra* note 32, at 118.

34. *See* Cziraki et al., *supra* note 32, at 748 ("[L]arge US firms tend to have widely dispersed ownership structures . . . ."); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1665 (2006) ("The United States is characterized by widely held shareholder distributions.").

35. *See* Cziraki et al., *supra* note 32, at 748. *See also* Becht & Röell, *supra* note 32, at 1052 tbl.1; Gilson, *supra* note 34, at 1646 n.11 (noting that in the United States, 7.6% of NYSE-listed companies have a 25% control block and 1.7% have a 50% control block, and that for NASDAQ-listed companies, those figures are 5.2% and 2.0%, respectively).

36. Cziraki et al., *supra* note 32, at 748.

37. *See* Mario Becht, *Strong Blockholders, Weak Owners and the Need for European Mandatory Disclosure*, *in* 1 THE SEPARATION OF OWNERSHIP AND CONTROL: A SURVEY OF 7 EUROPEAN COUNTRIES 1, 4 (1997) ("The problem of corporate governance in the United States—'Strong Managers, Weak Owners'—is not the corporate governance problem for most companies in continental Europe. Europe's problem is a problem of 'Strong Blockholders, Weak Owners.' In Europe, small owners are potentially exploited by large voting blockholders—and the managers these blockholders appoint to run the companies; in turn, the managers are constrained to devising company strategies that are subject to the non-transparent obligations blockholders impose on them."); Enriques & Volpin, *supra* note 32, at 118.

38. In a provocative paper, Lucian Bebchuk and Assaf Hamdani noted that RiskMetrics (i.e., Institutional Shareholder Services ("ISS") in a fleeting guise) was giving credit in its corporate governance ratings to E.U. corporations that lacked takeover defenses, even if the corporations had a controlling stockholder. As they point out, when a company has a controlling stockholder, takeover defenses are largely meaningless to the minority, and the key question is the extent to which the minority is protected against self-dealing by the controller. *See* Lucian A. Bebchuk & Assaf Hamdani,

governance abuses by controlling stockholders in Europe have been relatively common[39] and that in the past two decades, Germany, France, and Italy have responded by enacting corporate governance reforms to empower minority stockholders to have some voice in governance.[40]

D. REGULATORY ENVIRONMENT

In addition to the differences in the stockholder base of the typical E.U. corporation, most managers in the European Union must contend with a more prescriptive regulatory environment than that of the United States. Since the 1980s, U.S. regulatory policy has had a deregulatory tilt.[41] In key

The Elusive Quest for Global Governance Standards, 157 U. PA. L. REV. 1263, 1288–89 (2009).

39. *See* Enriques & Volpin, *supra* note 32, at 123–25 (describing major financial scandals at companies with concentrated management in Europe and reporting evidence that suggests that minor forms of expropriation are systemic in continental Europe).

40. *Id.* at 127–37 (describing reforms, including laws that strengthen internal governance mechanisms, empower stockholders, enhance disclosure, and provide for tougher public enforcement). *See also* Yaron Nili, *Missing the Forest for the Trees: A New Approach to Shareholder Activism*, 4 HARV. BUS. L. REV. 157, 191–92 (2014) (describing corporate governance reforms in Italy).

41. Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1103–04 (1988) (discussing deregulation beginning in 1981, when President Reagan entered office); Fred E. Case, *Deregulation: Invitation to Disaster in the S&L Industry*, 59 FORDHAM L. REV. S93, S95 (1991) ("[D]eregulation began in earnest in the early 1980's."). *See also* Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45, 68–69 (1986) (discussing the National Labor Relations Board's ("NLRB") anti-union bias); Donald Tomaskovic-Devey & Ken-Hou Lin, *Financialization: Causes, Inequality Consequences, and Policy Implications*, 18 N.C. BANKING INST. 167, 170–71 (2013) ("The low-growth, high-inflation macro-economy of the 1970s led to the mobilization of the large firm corporate sector to push for economic deregulation, lower taxes, and a smaller state."); Alan L. Zmija, *Union Organizing After* Lechmere, Inc. v. NLRB*—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 HOFSTRA LAB. L.J. 65, 68–69 (1994) (observing a sharp decrease in union membership through the 1980s into the 1990s and noting that one possible cause may be "a composition of the NLRB that has not viewed labor's interests favorably").

The Reagan administration's efforts to reduce the regulatory effectiveness of the Environmental Protection Agency ("EPA") also led to a less intensive approach to enforcement by the EPA. *See* Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1126 (2015) ("[N]ew EPA cases under a key environmental statute fell from forty-three in fiscal year 1980 to three in 1982; and EPA's regional offices forwarded only thirty-six cases to the agency's central office for enforcement in 1981 after forwarding 313 in 1980. . . . In at least some instances, declining enforcement reflected deliberate policy. The administration formally abolished the EPA's Office of Enforcement and transferred its functions to the agency's legal office—a fairly dramatic signal of reduced commitment to adversarial environmental enforcement."). *See also* Richard N.L. Andrews, *The EPA at 40: An Historical Perspective*, 21 DUKE ENVTL. L. & POL'Y F. 223, 235–39 (2011) (discussing deregulation of the EPA through the 1980s into the 1990s); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 475 (1999) ("[W]hen Reagan's Environmental Protection Agency (EPA), led by Anne Gorsuch Burford, undermined enforcement of environmental laws by granting industrial polluters sweetheart settlements and assuring others that they need not worry about violations of water pollution regulations, the EPA acted contrary to strongly areas like labor law, the effectiveness of agencies like the National Labor Relations Board has been reduced, tilting power toward corporations and away from labor.[42] Corporations have also had a potent influence in tempering environmental, consumer-protection, and financial regulation, even insulating themselves from litigation challenges on those fronts.[43] As an overall matter, without denying that the United States regulates business in the name of protecting its citizens against corporate overreaching, there is good reason to see the European Union as more focused on doing so.[44]

expressed values of the electorate."). *But see* Chelsea J. Bacher, *Regulating the Swaps Market After the Dodd-Frank Act: In an Economic Crisis, Is Regulation Always the Answer?*, 5 CHARLESTON L. REV. 545, 564 (2011) ("President Barack Obama entered office with a pro-regulation administration.").

42. During the Reagan administration, the NLRB moved away from being an agency that enforced labor rights to one that was perceived as being reluctant to, or even resisting, the enforcement of such rights. *See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 239, 248–49 (2005) ("During the two year period from 1983–85, when the new set of [President Reagan's appointees to the NLRB] formed a majority, the Board's pattern of decisions changed remarkably from that of its recent predecessors. In the area of unfair labor practice adjudication . . . the Reagan Board upheld only 52% of the nearly 800 unfair labor practice complaints brought against employers—a decline of roughly two-fifths in the General Counsel's success rate. . . . The Reagan Board's anti-union predisposition was manifested in a substantial number of high-profile decisions, often overruling earlier Board doctrines, and in the many routine cases in which the Board overlooked employer misconduct and frustrated the rights of employees." (citations omitted)); Enriques et al., *supra* note 1, at 103 (discussing how U.S. corporations do not give strong consideration to employees' interests even where constituency statutes permit directors to consider the employees' interests in making business decisions); Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 101, 107–08 (1993) (discussing how many have observed that the "NLRB has become virtually irrelevant" and noting how it has been reluctant to regulate). *But see* Sam Ivo Burum, *Yes, NBA Players Should Make More Money: How the NLRB Can Change the Future of Collective Bargaining Agreements in Professional Sports*, 63 AM. U. L. REV. 845, 869 n.161 (2014) ("Since the beginning of the Obama Administration and the President's appointment of pro-union NLRB members, the NLRB has been consistently ruling in favor of unions on a broad range of issues.").

43. *See, e.g.*, David A. Dana, *The Perverse Incentives of Environmental Audit Immunity*, 81 IOWA L. REV. 969, 971–72 (1996) (discussing how corporations can avoid the negative consequences of violating environmental regulations by implementing an internal audit system); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 907 (2011) ("Banks, thrifts, and nonbank mortgage lenders strongly opposed even the weak and nonbinding regulatory guidance that federal regulators issued in 2006 and 2007 with regard to nontraditional mortgages and hybrid subprime ARMs."); Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1296–1327, 1421–22 (2013) (discussing Wall Street's influence in stalling Dodd-Frank Act financial regulations and consumer-protection regulations).

44. EUROPEAN COMM'N, ENVIRONMENTAL FACT SHEET: MOVING TOWARDS CLEAN AIR FOR EUROPE 2 (2005) (discussing regulatory steps the European Union has taken to protect its citizens from air pollution produced by industrial operations); David Vogel, Environmental Regulation and Economic Integration 3 (Oct. 1999) (unpublished manuscript), http://www.iatp.org/files/Environmental_Regulation_and_Economic_Integrat.pdf ("[T]he Single European Act also authorized and has contributed to a significant strengthening of EU environmental regulations. In recent years, the EU has emerged as the world's pace-setter for environmental innovation . . . ."). *See also* Donald C. Dowling,

By way of example, the European Union boasts perhaps the most ambitious, binding environmental legislation in the world. As of 2007, there were at least 300 environmental directives and regulations in the European Union.[45] These directives range from strict pollution limits to stringent labeling requirements for genetically modified foods.[46] In addition to E.U.–wide regulations, most countries enact national and regional or state regulations.[47] European policymakers have also assumed a leadership role in globalizing the European Union's ambitious environmental policy initiatives to ameliorate any competitive disadvantage from such rules, with moderate success.[48]

The European Commission has also recently proposed a draft regulation on a Common European Sales Law to make standard important consumer-protection techniques that are widely used across member states.[49] The draft regulation features mandatory proconsumer rules concerning consumer rights, remedies, disclosures, and warranties. It also prohibits practices deemed to be detrimental to consumers. As an example, the draft regulation bans choice-of-forum terms, such as mandatory

Jr., *How Does Europe Regulate Power Within Its Corporations? What Might the Answer Mean for the U.S.? An Essay and Review of* European Company Laws: A Comparative Approach, 12 NW. J. INT'L L. & BUS. 601, 603–04 (1992) (noting that "the U.S. may be the world capital of corporate overreaching" despite its attempts to "rein[] in all excesses of the exercise of corporate control" and further stating that the United States should look to Europe for ideas on how to limit corporate overreaching). *Compare* Annette M. Schüller et al., *Doing Business in the European Union: An Overview of Common Legal Issues*, COLO. LAW., June 2002, at 9, 17–19 (2002) (discussing how most European countries have laws that prohibit termination of a certain number of employees under any circumstance, including sale or purchase of a company), *with* Paul E. Starkman, *Mergers & Acquisitions: A Checklist of Employment Issues*, 13 DEPAUL BUS. L.J. 47, 99–102 (2000/2001) (discussing how only certain types of employers in the United States are required to give notice of termination in the purchase or sale of a company), *and* Wilson McLeod, *Rekindling Labor Law Successorship in an Era of Decline*, 11 HOFSTRA LAB. L.J. 271, 297–98 (1994) ("[A] consensus has emerged that [U.S. laws are] inadequate to protect workers' rights to self-organization in representation proceedings. That failure is perhaps even more striking in the successorship context, where discharged workers are required to make out an extraordinarily stringent case. A mass termination of predecessor employees will not be taken as sufficient in itself.").

45. Clifford Rechtschaffen, *Shining the Spotlight on European Union Environmental Compliance*, 24 PACE ENVT'L. L. REV. 161, 161 (2007).

46. *See* R. Daniel Kelemen, Globalizing European Union Environmental Policy 13–19 (Apr. 2009) (unpublished manuscript), http://aei.pitt.edu/33075/1/kelemen._r._daniel.pdf.

47. Norman J. Resnicow & Clifford A. Rathkopf, *Legal Due Diligence*, *in* DUE DILIGENCE FOR GLOBAL DEAL MAKING 149, 172 (Arthur H. Rosenbloom ed., 2002). Belgium, for example, has "three distinct local regulatory authorities [to regulate environmental matters]: the Flemish Region (strictest), the Brussels Metropolitan Region, and the developing Walloon Region." *Id.*

48. Kelemen, *supra* note 46, at 15.

49. Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law* 1 (Chi. Inst. for Law & Econ., Working Paper No. 598, 2012), http://chicagounbound.uchicago.edu/law_and_economics/420.

arbitration, which are often available to corporations in the United States.[50] This rule was modeled after similar statutes in Europe that prohibit choice-of-law or choice-of-forum clauses.[51] Other terms are presumed to be unfair, including limits to a buyer's remedies, one-sided termination rights, restrictions on seeking supplies or repairs from third parties, large advance payments, or setting a contract's duration to exceed one year.[52]

Additionally, the European Union has adopted a number of directives aimed at protecting employees and improving working conditions. These directives regulate work and rest hours,[53] information required to be disclosed in a written employment agreement,[54] protection of workers'

50. *Id.* at 7. *See also* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668–69, 673 (2012) (holding arbitration clause in consumer credit card agreement to be enforceable according to the Federal Arbitration Act ("FAA")); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 158 (2006) ("[A] major development [in the banking industry] is the inclusion of binding arbitration clauses by most major credit card companies in their agreements, a move designed to thwart any sort of ex post accountability for credit card companies."); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808, 2839 (2015) ("The United States Supreme Court opened the floodgates during the last three decades, as it reinterpreted [the FAA] to require courts to enforce a myriad of arbitration provisions, promulgated by issuers of consumer credit, manufacturers of products, and employers. . . . As a consequence [of the Court finding that the FAA was the product of Congress's powers under the Commerce Clause and declaring the FAA a substantive right], during the last three decades, the Court has ruled that the FAA can be used to bar access to courts when individuals claim breaches of federal securities laws; when employees allege discrimination on the basis of age; when employees file sex discrimination suits under state law; when consumers assert rights under state consumer protection laws; when merchants allege violations of the antitrust laws; and when family members claim that negligent management of nursing homes resulted in the wrongful deaths of their relatives." (citations omitted)); Carter Dougherty, *Bank Customers May Get Their Day in Court*, BLOOMBERG BUSINESSWEEK (Mar. 20, 2015, 9:10 AM), http://bloom.bg/1xmniUT ("Twenty-eight of the 50 largest banks by domestic deposits, including JPMorgan Chase and Wells Fargo, require checking account holders to submit disputes to arbitration, according to a 2012 study by Pew Charitable Trusts. Of the next group of 50 banks, 30 percent do so.").

51. *See, e.g.*, Giesela Rühl, *Consumer Protection in Choice of Law*, 44 CORNELL INT'L L.J. 569, 587 (2011) (noting that under Swiss law, "there is no choice of law in consumer contracts"). *See also, e.g.*, James J. Healy, *Consumer Protection Choice of Law: European Lessons for the United States*, 19 DUKE J. COMP. & INT'L L. 535, 535 (2009) ("Under Council Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I), consumers in Europe are permitted to select the applicable law of a contract, to the extent that the protections under the selected law do not derogate from the protections of the laws of their home jurisdiction.").

52. Bar-Gill & Ben-Shahar, *supra* note 49, at 7.

53. *See* Parliament and Council Directive 2003/88, 2003 O.J. (L 299) 9 (EC), http://eur-lex.europa.eu/eli/dir/2003/88/oj (establishing maximum work and minimum rest hours, including guidelines for part-time and night-time workers, and a right to four weeks of paid vacation per year).

54. *See* Council Directive 91/533, 1991 O.J. (L 288) 32 (EC), http://eur-lex.europa.eu/eli/dir/1991/533/oj (requiring employers to provide their workers with a written employment agreement or other written document that sets forth key terms of employment such as its duration, the requisite period of time for a termination notice, basic pay, working hours, and any relevant collective agreements).

personal data,[55] consultations with employee groups,[56] and employee dismissals as part of a change of ownership,[57] among other things. These directives come on top of preexisting nation-specific regulations that give workers generous amounts of vacation time, paid leave, and other benefits not legally required in the United States.[58]

Unlike their American counterparts, European workers and their representatives have rights to be informed of company information. The model rules require central management to hold an annual meeting to inform and consult the European Works Council of the company's progress and prospects.[59] Additionally, the European Works Council has the right to be informed of certain "exceptional circumstances," such as company relocations, business closures, or collective employee dismissals.[60] For instance, in the event of dismissals of a large group of workers within a given time period, the European Union's Collective Redundancies

55. *See* Parliament and Council Directive 95/46, 1995 O.J. (L 281) 35 (EC), http://eur-lex.europa.eu/eli/dir/1995/46/oj (limiting employers' ability to collect and store employee data).

56. *See, e.g.*, Parliament and Council Directive 2002/14, 2002 O.J. (L 80) 29 (EC), http://eur-lex.europa.eu/eli/dir/2002/14/oj (setting forth a general framework for informing and consulting employees in the European Union); Council Directive 98/59, 1998 O.J. (L 225) 16 (EC), http://eur-lex.europa.eu/eli/dir/1998/59/oj (establishing greater protection for employees in the event of collective dismissals); Council Directive 94/45, 1994 O.J. (L 254) 64 (EC), http://eur-lex.europa.eu/eli/dir/1994/45/oj (bolstering the right to information and consultation of E.U. employees in Community-scale undertakings and Community-scale groups of undertakings).

57. *See* Council Directive 2001/23, 2001 O.J. (L 82) 16 (EC), http://eur-lex.europa.eu/eli/dir/2001/23/oj (preventing employers from dismissing employees in the event of a change of ownership by requiring that the employer's obligations under the employment agreement pass to the new owner).

58. *See* REBECCA RAY ET AL., CTR. FOR ECON. & POLICY RESEARCH, NO-VACATION NATION REVISITED 2 (2013) ("The European Union's (EU) Working Time Directive (1993) sets a vacation floor for all EU member countries of four weeks or 20 days per year. Several EU member countries require substantially more than the lower limit established by the EU. France mandates 30 days of paid annual leave; United Kingdom, 28; and Denmark, Finland, Norway and Sweden, 25.") *See also id.* at 1 ("[T]he United States is the only country in the group that does not require employers to provide paid vacation time . . . .").

59. Parliament and Council Directive 2009/38, Annex I, § 2, 2009 O.J. (L 122) 28, 40 (EC), http://eur-lex.europa.eu/eli/dir/2009/38/oj.

60. *Id.* § 3. A distinguished scholar believes these requirements have had negative consequences for corporations and their investors:

> Because of the board's position at the apex of the corporate hierarchy, employee representatives are inevitably exposed to a far greater amount of information about the firm than is normally provided to employees. As the European experience with codetermination teaches, this can result in corporate information leaking to the work force as a whole or even to outsiders. In the Netherlands, for example, the obligation of works council representatives to respect the confidentiality of firm information "has not always been kept, causing serious concerns among management which is required . . . to provide extensive 'sensitive' information to the councils." The validity of this concern is confirmed by other commentators.

Bainbridge, *supra* note 28, at 1061 (citations omitted).

Directive obliges employers to inform and consult the respective employees' representatives.[61] Individual member states can decide how to sanction this obligation to consult.[62] These specific examples are illustrative of a large reality that affects whether the United States or the European Union is more stockholder focused. Precisely because the European Union is more aggressive about protecting other corporate constituencies, it diminishes the ability of corporate managers to govern corporations with as much focus on returns to investors as is the case in the United States.

II. THE PRACTICAL OPERATION OF DIRECT STOCKHOLDER INTERVENTION RIGHTS

Against this contextual backdrop, this Article evaluates how the supposedly more powerful rights of E.U. stockholders operate in the real world in comparison with the supposedly weaker rights of American stockholders. In so doing, this Article uses empirical evidence to test the practical operation of vaunted stockholder-protective rights available to stockholders in the European Union. First, it considers how often European stockholders use their rights to take direct action to call special meetings and otherwise influence corporate policy in comparison with U.S. stockholders. Second, it considers how often European stockholders use their supposedly greater power to take action to unseat directors.

A. How Often Do Stockholders in the European Union and United States Take Action to Influence Corporate Policy?

Scholars and commentators who describe the European Union as a stockholder paradise focus on laws that afford European stockholders the right to take action to influence corporate policy directly.[63] For example, in

61. *See* Council Directive 98/59, 1998 O.J. (L 225) 16 (EC), http://eur-lex.europa.eu/eli/dir/1998/59/oj.

62. *See, e.g.*, Manfred Löwisch, *Labor Law in Europe*, 20 RITSUMEIKAN L. REV. 101, 108 (2003) ("German law has included corresponding provisions in §§ 17 et seq. of its Dismissal Protection Act (Kündigungsschutzgesetz) for a long time. Accordingly, in Germany, it is assumed that information and dismissal are not effective until consultations have been held."); David Jonin & Francis Kessler, *Concentration and Merger Transactions: Information and Consultation to the Works Council in French Law*, IUSLABOR, no. 3, 2014, at 1, 3, http://www.upf.edu/iuslabor/_pdf/2014-3/JoninandKessler.pdf (noting that, in France, failure to consult employees regarding any change in the economic or legal organization of the company, including a merger or asset sale, as required under article L. 2323-19 of the French Labor Code, constitutes a criminal offense by the management that is punishable by a sentence of up to one year's imprisonment and a monetary fine, and an additional monetary fine to the company).

63. Enriques et al., *supra* note 1, at 73 ("[C]ontinental European jurisdictions . . . still allow qualified percentages of shareholders to initiate and approve resolutions on a wide range of matters . . . .

the United Kingdom, stockholders can amend the charter unilaterally by a special resolution of 75 percent of stockholders.[64] In addition, a statutory default rule allows a qualified majority of stockholders to overrule the board on *any* business decision and to fire the entire board with a simple majority resolution.[65] For this reason, one scholar claims that the United Kingdom is "the most shareholder-centric of our core [European] jurisdictions," even while admitting that shareholders "seldom overrule the board in this way."[66]

Under E.U. law, stockholders also have a comparatively easier ability to place items on the agenda for general meetings. The Voting Rights Directive gives European stockholders the right to place any number of items on the agenda as long as each item is accompanied by a justification or a draft resolution.[67] Although member states can specify a minimum ownership requirement to put items on the agenda, the threshold cannot exceed 5 percent of the company's share capital.[68] And in most member states, stockholders have the statutory right to call for meetings.[69] At these meetings, stockholders are often permitted to initiate and approve binding resolutions on a wide range of business decisions, including charter amendments.[70] For example, in the United Kingdom, stockholders with more than 5 percent of voting rights or groups consisting of at least one hundred shareholders together holding more than £10,000 of company stock may propose binding resolutions on any subject.[71] Most resolutions can be passed by a simple majority vote.[72] Germany and France have similar laws.[73]

By contrast, the U.S.—or at least Delaware—law is the least shareholder-centric jurisdiction."); Pinto, *supra* note 1, at 612 ("In Europe, shareholders are generally considered to have more power to act within the shareholder meeting compared to U.S. shareholders and this power relates to the shareholder ability to add to the agenda."); STOUT, *supra* note 1, at 56 ("Shareholders in U.K. companies have the power to call meetings, and to summarily remove uncooperative directors. They even get to vote to approve dividends.").

64. John Armour et al., *What Is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, *supra* note 1, at 1, 25 n.72.

65. Enriques et al., *supra* note 1, at 73.

66. *Id.*

67. Parliament and Council Directive 2007/36, art. 6, § 1(a), 2007 O.J. (L 184) 17, 21 (EC), http://eur-lex.europa.eu/eli/dir/2007/36/oj.

68. *Id.* § 2.

69. Pinto, *supra* note 1, at 612–13.

70. Enriques et al., *supra* note 1, at 73–74.

71. *See* CHRISTIANE HOLZ, GEORGESON, SHAREHOLDERS' MEETINGS IN EUROPE 90 (2008). The only requirement is that the stockholders give notice at least six weeks before the meeting. *Id.*

72. *Id.* at 93.

73. *See id.* at 30–40.

In the United States, by contrast, directors set the agenda for annual and special meetings. Stockholders, who typically do not have the right to call meetings, unlike their E.U. counterparts, may instead attempt to influence company policy through the passage of nonbinding resolutions under Securities and Exchange Commission ("SEC") Rule 14a-8[74] or by proposing bylaws using their state-law rights.[75] Rule 14a-8 allows any stockholder to submit a proposal and a short supporting statement to be included in the proxy statement distributed by the company before the annual meeting.[76] The stockholder proposal is limited to certain subjects and cannot be used to propose a slate of directors.[77] And although stockholders are given binding approval rights for certain transactions and amendments to the company's certificate of incorporation, they lack the power to initiate them.[78]

Although a comparison of these rights appears to give stockholders of E.U. corporations more leverage to influence company policy than stockholders in the United States, the reality is that E.U. stockholders rarely use the rights they are given.[79] Few, if any, stockholder proposals are actually made by stockholders of European corporations. Data collected by Georgeson, the leading proxy solicitation firm, reveals that management resolutions outnumbered stockholder resolutions by a factor of one hundred to one for all European countries in 2007.[80] In 2014, Georgeson reported

74. 17 C.F.R. § 240.14a-8 (2015). *See* Pinto, *supra* note 1, at 612–16 (comparing the shareholder proposal processes in the United States and European Union).

75. *E.g.*, DEL. CODE ANN. tit. 8, § 109(a) (2016).

76. 17 C.F.R. § 240.14a-8.

77. *Id*. *See also* Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 481 (2008) ("One 'red line' that the SEC has maintained throughout various formulations of the access conditions has been that the shareholder proposal cannot relate to a particular election of directors.").

78. *See, e.g.*, DEL. CODE ANN. tit. 8, § 242 (stockholder approval required for amendments to the corporation's certificate of incorporation); *id.* § 251 (stockholder approval required for a merger or consolidation).

79. *See, e.g.*, PAUL L. DAVIES, ORG. FOR ECON. COOPERATION & DEV., THE BOARD OF DIRECTORS: COMPOSITION, STRUCTURE, DUTIES AND POWERS 7 (2000), http://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf ("[F]or reasons related to competition among the institutions and conflicts of interest between the fund management and other arms of financial conglomerates and insurance companies [in the United Kingdom], co-operation among institutional shareholders to exercise their removal rights . . . has often proved difficult."); Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31, 65 (2005) ("Proxy fights are extremely rare in Germany."); Marco Becht et al., *Corporate Governance and Control*, *in* 1A HANDBOOK OF THE ECONOMICS OF FINANCE 1, 68 (George M. Constantinides et al. eds., 2003) (stating that "proxy fights are very rare" in the United Kingdom).

80. EUGENIA UNANYANTS-JACKSON, GEORGESON, PROXY VOTING SEASON REVIEW 2007: U.K. & EUROPE 31 tbl.3 (Sarah Wilson ed., 2007) (reporting that 1.18% of U.K. and European resolutions

eight stockholder resolutions in France and no other stockholder resolutions in Europe that year.[81] By contrast, there were 438 stockholder governance proposals in the United States in 2014.[82] Another study found that in the United Kingdom, supposedly the most stockholder-centric jurisdiction, only 0.0140 shareholder proposals were put forth annually at each U.K.–listed company between 1998 and 2008.[83] In the United States, the analogous rate was 0.0407, about three times as many as in the United Kingdom.[84]

One reason for the scarcity of European stockholder proposals is the fact that so many European companies feature a single stockholder with voting control.[85] In these companies, the managers are beholden to the controlling stockholder, who is able to overrule or replace them. Obviously, a controlling stockholder has no need to submit a proposal to agitate for change and discipline management,[86] and any minority stockholder who wishes to change existing governance practices would need to secure the controller's agreement. For that reason, scholars have found evidence that

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were shareholder resolutions in 2007).

81. GEORGESON, GEORGESON'S 2014 PROXY SEASON REVIEW 17, 20 (2014) (surveying companies in the United Kingdom, France, the Netherlands, Germany, and Switzerland).

82. RAJEEV KUMAR, GEORGESON, 2014 ANNUAL CORPORATE GOVERNANCE REVIEW 4, 12 (2014) (surveying companies that are U.S. members of the Standard & Poor's ("S&P") Composite 1500 Index as of January 2014 and that held annual meetings within the first six months of the year).

83. *See* Cziraki et al., *supra* note 32, at 750 tbl.2, 751 tbl.3.

I acknowledge that some argue that there is a long tradition of addressing stockholder interests through informal contacts in Europe, making outspoken shareholder activism unnecessary. *See, e.g.*, Andy Ryde & Murray Cox, *United Kingdom*, *in* THE CORPORATE GOVERNANCE REVIEW, *supra* note 14, at 411, 422 ("Where [U.K.] institutional investors do have criticisms, they are more likely to engage in private dialogue with the directors."); Iris H-Y Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 38 DEL. J. CORP. L. 983, 995 (2014) ("[U.K.] shareholder derivative or securities litigation for publicly-listed companies are not the norm, whether as an expression in corporate governance or as a form of market discipline. Shareholder monitoring in corporate governance, is predominantly expressed in informal forms of dialogue and engagement with management."); Samuel, *supra* note 2 ("'In Europe, you don't have to shout to get anywhere,' said [a chief executive of a European activist fund]. 'We approach companies and boards privately with a view to changing strategy.'").

Count me as skeptical, however, that the managers of E.U. stockholders are either naturally better listeners than American managers or that the potent (but rarely exercised) paper rights of E.U. stockholders make E.U. managers yield constantly to quietly muscular conversation.

84. *See* Cziraki et al., *supra* note 32, at 750 tbl.2.

85. *See supra* notes 32–33 and accompanying text.

86. Gelter, *supra* note 24, at 856 ("In continental Europe . . . blockholders dominate corporate governance. Controlling stockholders are not only in a position to use their influence to the detriment of other stakeholders, but they are also the likely beneficiaries."); Nili, *supra* note 40, at 182 ("Due to their cost, formal shareholder proposals are considered to be a last resort [in the United Kingdom], especially given the ability to influence management on a more informal day-to-day basis.").

minority stockholders, including "activist" hedge funds, will often choose to side with the controlling stockholder in order to gain access to management and curry favor with the controller rather than agitate for a change in management or existing policy.[87] In the words of one commentator, this model "is aimed at getting a seat at the table rather than turning it over."[88] In some instances, corporations in the European Union also have "golden shares," which vest substantial voting power in certain—often governmental—stockholders, another deterrent to activism by more minority stockholders.[89]

Other obstacles prevent minority stockholders from successfully intervening through stockholder resolutions. Culture is one stumbling block: "Europeans are not accustomed to exercising their influence as stockholders."[90] As well, high solicitation costs and large stock ownership requirements for participation restrict small stockholders from having an influence, especially given the reality that due to the presence of large blockholders, their voice is not likely to change the status quo.[91] In addition, European companies are not required to send proxy statements or a meeting agenda; stockholders must instead seek this information on their own.[92] As a result of these difficulties, minority stockholders in Europe rarely exercise their right to intervene and instead abide by the motto, "if we like them, we invest in them; if we do not, we walk."[93]

87. Nili, *supra* note 40, at 192 (discussing hedge-fund activism in Italy).

88. *Id.*

89. Christian Kirchner & Richard W. Painter, *Takeover Defenses Under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform*, 50 AM. J. COMP. L. 451, 461 (2002) ("France, Portugal and some other countries allow 'golden shares', usually owned by a government agency after a privatization, to have a decisive voice in the governance of many companies. These shares will almost never be tendered to a hostile bidder, making these companies unattractive tender-offer targets."). *See also* Andrei A. Baev, *The Transformation of the Role of the State in Monitoring Large Firms in Russia: From the State's Supervision to the State's Fiduciary Duties*, 8 TRANSNAT'L L. 247, 290 (1995) ("The concept of *special shareholder*, or *golden shareholder*, originated during the British privatization of the 1980s, when the then-state-held firms, such as Britoil and Jaguar, were sold off by Prime Minister Margaret Thatcher's Conservative government. The British Government retained so-called *golden shares* in both these enterprises, allowing the government to outvote all shareholders regardless of the number of shares held by the government. This technique has been employed during privatization by the governments of many countries. . . . In short, the provisions regarding the golden share enable the government to exercise a certain control over a privatized enterprise after the state has become a minority shareholder or even after total privatization. Thus, a golden share empowers the state with a control disproportionate to the state's equity in an enterprise. This 'authority-giving' quality of the share makes it 'golden' in the eyes of ordinary shareholders.").

90. Speeckaert, *supra* note 32, at 36.

91. *Id.*

92. *Id.*

93. Cziraki et al., *supra* note 32, at 743 (finding that "during [the] sample period, all proposals

By contrast, the operation of the supposedly less stockholder-focused corporate law in the United States allows stockholders great power. American stockholders have subsidized access to put proposals before the electorate using Rule 14a-8,[94] and directors know that if they do not adhere to the stockholders' view, they face the genuine risk of a proxy contest or a withhold-the-vote contest.[95]

These stockholder proposals can have meaningful effects on corporate governance, despite their nonbinding nature. One study found that boards of American companies adopted majority-supported stockholder proposals more than 40 percent of the time in 2002; this trend was expected to increase,[96] and there is strong evidence that it has. Boards face pressure to adopt majority-supported advisory proposals to avoid stockholder pressure tactics and bad publicity.[97] This pressure is even greater with the recently

put to shareholder vote were in fact sponsored by the board of directors" and concluding "[o]verall, the literature is clearly incomplete on the extent to which the proxy process is accessible to European shareholders as a disciplinary device, and if so, whether proposal submissions are useful and effective in mitigating corporate governance concerns").

94. *See* 17 C.F.R. § 240.14a-8 (2015) (requiring public companies to include shareholder proposals and supporting statements in their proxy statements unless the shareholder is ineligible under the rule, has failed to comply with procedural requirements, or if the proposal falls within one of thirteen bases for exclusion); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 879 (1994) ("Rule 14a-8 mandates that public companies subsidize access to the company's proxy mechanism for shareholders who offer 'proper' proposals."). *See also* Paul H. Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1359–60 (2014) ("Where once voting was limited to uncontested annual election of directors, it is now common to see short slate proxy contests, board declassification proposals, and 'Say on Pay' votes occurring at public companies.").

95. *Compare* Kaja Whitehouse, *Shareholders Threaten Boards Over 'Proxy Access'*, USA TODAY (Jan. 27, 2015, 12:43 PM), http://usat.ly/1JXzhIw ("More than a dozen companies have pushed back against shareholder-led changes, which has prompted investors to warn directors that they could lose votes in the upcoming election season."), *with* Nili, *supra* note 40, at 192 ("Contrary to hedge funds in the U.S., hedge funds in Italy cannot rely on the threat of a takeover or the launch of a proxy fight as a stick to wield against management.").

96. Yonca Ertimur et al., *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals* 2 (Harvard Bus. Sch., Working Paper No. 08-048, 2008), http://www.hbs.edu/research/pdf/08-048.pdf.

97. *See, e.g.*, Brooke A. Masters, *Shareholders Flex Muscles Proxy Measures Pushing Corporate Accountability Gain Support*, WASH. POST (June 17, 2006), http://wpo.st/cPHs1. *See also* Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 69–70 (2004) (noting that the mere threat of certain shareholder activists pressure tactics, including running "Vote No" campaigns, submitting binding bylaw amendments, and lobbying for regulatory change, has caused boards to become more responsive to majority-supported resolutions to avoid negative publicity and bad shareholder relations). As one empirical study stated:

> [W]e propose . . . an alternative mechanism for how shareholder support for a proposal affects firm value: majority support for a shareholder proposal essentially forces management to decide whether to follow shareholders' will by implementing the proposal. When

effected Institutional Shareholder Services ("ISS") policy of recommending against voting for directors of boards that refused to implement a nonbinding stockholder proposal that received majority approval in the previous year.[98] Moreover, even if boards determine not to adopt stockholder proposals in their entirety, they may nevertheless implement changes that reflect a compromise with the stockholders.[99] Additionally, certain institutional investors have an especially large influence on companies in the United States. Other research determined that, between 1989 and 1993, 72 percent of firms targeted by public pension fund CalPERS adopted its proposed governance changes.[100] And institutional investor activism may inspire other stockholders to agitate for corporate governance changes. Another study found that in the three years after being targeted by a public pension fund investor, target companies had a higher frequency of non–pension fund stockholder proposals, stockholder lawsuits, and public "no" votes for directors.[101]

The easiest way to illustrate the actual power of American stockholders is to consider the dramatic effect stockholder proposals to eliminate or reduce antitakeover defenses have had in the United States. As an example, the incidence of staggered boards at U.S. public companies has

> management refuses to implement a majority-supported proposal, the explicit disregard for shareholders' preferences is intensely publicized by shareholder organizations, undermining the confidence that passive investors had previously put into management. Yet such defiance is good for shareholder value because it reduces the entrenchment of insiders of the firm who are no longer viewed by default as stewards of shareholders.

Laurent Bach & Daniel Metzer, *Why Do Shareholder Votes Matter?* 1 (Swedish House of Fin., Research Paper No. 13-01, 2015), http://ssrn.com/abstract=2247084.

98. SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW 6 (2014), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2014_Proxy_Season_Review.pdf ("Under ISS's new policies, beginning with 2014 annual meetings, ISS will recommend a vote against or withhold from some or all directors if the board does not act on a shareholder proposal that received a majority of *votes cast* in the prior year."); Holly J. Gregory, *Lessons for the 2015 Proxy Season*, PRAC. L., Sept. 2014, at 28, 30 ("It appears that ISS negative vote recommendations based on the perceived lack of board responsiveness to shareholder concerns (as evidenced by the failure to implement a successful shareholder proposal) was the leading factor associated with directors who failed to receive a majority of votes cast in an uncontested election in 2014.").

99. *See, e.g.*, Brownstein & Kirman, *supra* note 97, at 70 ("In certain instances, companies that have received proposals to redeem poison pills have sought to compromise by implementing features that are perceived to be shareholder friendly, such as a Three-Year Independent Director Evaluation ('TIDE') plan designed to ensure that independent directors periodically review the poison pill, or 'chewable' pill features, which would permit a transaction that would otherwise trigger the rights to proceed if it meets certain fair price or similar requirements. A number of companies have also submitted their poison pills to a shareholder vote in response to majority vote resolutions.").

100. Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, 51 J. FIN. 227, 228 (1996).

101. Diane Del Guercio & Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism*, 52 J. FIN. ECON. 293, 295, 312 (1999).

decreased since the stockholder movement against them took off in the last decade. In 1998, the percentage of Standard and Poor's ("S&P") 1500 corporations with classified boards was about 58 percent, and the incidence of staggered boards among IPOs increased to over 70 percent in 2001.[102] But stockholder opposition began to mount; in 2006, support for nonbinding proposals calling for board declassification reached 65 percent at S&P 500 companies, 71 percent at mid-cap companies, and 82 percent at small-cap companies.[103] In 2011, 33 stockholder proposals to declassify boards were voted on at U.S. public companies; this number crept to 44 in 2012.[104] By 2014, most of the market had gotten the message, and fewer than 10 percent of S&P 500 companies featured staggered boards.[105] This trend in stockholder support for destaggering proposals continues: the Shareholder Rights Project at Harvard Law School reported that 31 declassification proposals were submitted to S&P 500 companies in 2014, "with seven of these companies agreeing preemptively to de-stagger their boards."[106]

102. Lucian A. Bebchuk, John C. Coates IV, & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 889 (2002).

103. Erik Larson, *In S&P 500, Firms Move Toward Board Declassification*, LAW360 (Jan. 3, 2007, 12:00 AM), http://www.law360.com/banking/articles/15773. *See also* George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 140 (2010) ("Support for shareholder proposals has grown, especially for those opposing antitakeover devices."); Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1007–09 (2010) (noting the decline of staggered boards as a result of stockholder activism); Guhan Subramanian, *Delaware's Choice*, 39 DEL. J. CORP. L. 1, 10–11 (2014) (noting decline in incidence of classified boards as a result of stockholder activism).

104. KUMAR, *supra* note 82, at 14 fig.3. *See also* SPENCER STUART, 2014 SPENCER STUART BOARD INDEX 7 (2014) (reporting that 93 percent of S&P 500 companies now have declassified boards, up from 55 percent in 2004).

105. SULLIVAN & CROMWELL LLP, *supra* note 98, at 4.

106. *See* Subramanian, *supra* note 103, at 11.

A recent article noted that there was new evidence that classified boards are associated with greater stockholder wealth creation, especially at firms whose profits are derived from research and development–intensive activities. But the authors were skeptical that the data would matter because stockholder antipathy to classified boards was strong:

> [I]t is probably already too late to save the staggered board, as momentum has gathered to purge it in all cases. Generally, resisting hedge fund activism will bring the company into conflict with its proxy advisors. Companies thus face a difficult choice between lying low or confronting the proxy advisor.

John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance* 100 (Columbia Law Sch. Ctr. for Law & Econ. Studies, Working Paper No. 521, 2015), http://ssrn.com/abstract=2656325. *See also id.* at 99–100 (discussing K.J. Martijn Cremers et al., Staggered Boards and Firm Value, Revisited (July 2014) (unpublished manuscript) (on file with author)); Diane Holt Frankle et al., *Proceedings of the 2014 Delaware Business Law Forum: Director-Centric Governance in the Golden Age of Shareholder Activism*, 70 BUS. LAW. 707, 709 (2015) (citing Cremers et al., *supra*, at 33) (observing that large companies are reluctant to adopt staggered boards

Likewise, the prevalence of the stockholder rights plan, or the so-called "poison pill," was greatly diminished by stockholder initiatives calling for its removal. As of 2002, about 60 percent of S&P 500 companies had a poison pill, and the number continued to grow until companies capitulated under pressure from stockholders to eliminate or modify their pills.[107] In 2003, there were over 100 proposals to remove or amend the company's poison pill submitted to stockholders, an increase of 194 percent from 2001.[108] Such proposals received support from more than 50 percent of stockholders casting votes in each of 2001, 2002, 2003, and 2004.[109] Largely because of these initiatives, the incidence of poison pills at S&P 500 companies fell to 7 percent in 2013.[110]

In other key areas, stockholder sentiment has led to real changes in corporate governance practices across U.S. companies. Investors wanted a say on pay. Congress gave it to them in 2011 by enacting the Dodd-Frank Act.[111] Although the rejection of a say-on-pay proposal does not obligate a company to make changes, such a rejection does mean that the company and its governance practices will receive increased scrutiny from the media, institutional stockholders, proxy advisory firms, and corporate governance activists.[112] As a result, these advisory votes have some influence on

because of stockholder opposition, despite recent evidence suggesting that such boards correlate with "positive abnormal returns"). *But see* Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 410 (2005) (finding that staggered boards are correlated with reduced firm value, as measured by Tobin's Q in the period between 1995 and 2002); Olubunmi Faleye, *Classified Boards, Firm Value, and Managerial Entrenchment*, 83 J. FIN. ECON. 501, 502, 528 (2007) (finding that classified boards "are associated with a significant reduction in firm value" and that they "significantly insulate top management from market discipline").

107. *See* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 10.03[A][6] (Amy L. Goodman et al. eds., 5th ed. 2011); STEPHEN DEANE, INSTITUTIONAL S'HOLDER SERVS., POISON PILLS IN FRANCE, JAPAN, THE U.S. AND CANADA 10 (2007).

108. Thomas W. Christopher & Stephen Fraidin, *Shareholders at the Door*, N.Y. L.J., Nov. 8, 2004, at 16, *reprinted in* KIRKLAND & ELLIS LLP: PUBLICATIONS, http://www.kirkland.com/sitecontent.cfm?contentID=223&itemId=2376 (last visited Aug. 18, 2016).

109. *Id*.

110. *See* Frank Aquila & Melissa Sawyer, *Poison Pills, An Antidote to "Raider-Like" Activism?*, DEAL PIPELINE, Aug. 7, 2014, *reprinted in* SULLIVAN & CROMWELL LLP: ARTICLES, https://www.sullcrom.com/siteFiles/Publications/AquilaSawyerDealPipeline2014.PDF (last visited Aug. 18, 2016). Admittedly, a poison pill can be put in place when a takeover bid emerges. But a board that tries to stand by a pill for too long after promising its stockholders it would not do so is in a weakened position to do so. Even more importantly, because the board will likely have gotten rid of its classified structure, a pill can really only be used to allow time for negotiation, the development of alternatives, and communication.

111. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See* Randall S. Thomas et al., *Dodd-Frank's Say on Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213, 1224 (2012).

112. *See* David F. Larcker et al., *The Influence of Proxy Advisory Firm Voting Recommendations on Say-on-Pay Votes and Executive Compensation Decisions*, DIRECTOR NOTES, Mar. 2012, at 1, 1–2,

company practices.[113] Likewise, when American stockholders made clear that they favored a so-called "majority voting" system that allowed them to deny a director a new term by simply getting a majority of the voting electorate to withhold consent, corporate managers quickly gave in. In just

https://www.conference-board.org/retrievefile.cfm?filename=TCB-DN-V4N5-12.pdf&type=subsite.

113. The effects of say on pay are complex. *See, e.g.*, Yonca Ertimur et al., *Shareholder Activism and CEO Pay*, 24 REV. FIN. STUD. 535, 536–38 (2011) (conducting a sample of withhold campaigns and stockholder proposals related to executive pay between 1997 and 2007 and finding that firms with high CEO pay targeted by withhold campaigns experience a $7.3 million reduction in total CEO pay, and in firms targeted by stockholder proposals calling for a greater link between pay and performance, the reduction in CEO pay is $2.3 million); Thomas et al., *supra* note 111, at 1256 (finding that the say-on-pay votes mandated by Dodd-Frank "appear to have catalyzed greater management attention to shareholder concerns, an increased shareholder interest in voting on corporate governance, and a broader dialogue on pay issues between management and shareholders (and proxy advisory firms)" during the 2011 proxy season); James D. Cox & Randall S. Thomas, Addressing Agency Costs Through Private Litigation in the U.S.: Tensions, Disappointments, and Substitutes 35 (Sept. 2, 2015) (unpublished manuscript), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6209&context=faculty_scholarship ("Say on Pay's introduction had a significant effect on American corporate governance. . . . Beginning with the U.S. experience, management at many companies made changes to the substance and disclosure of their pay programs in an attempt to more clearly align pay to performance. Many companies revised the content of the CD&A filed with the annual meeting proxy materials. At companies whose pay programs received negative say-on-pay recommendations by proxy advisory firms, management at some firms connected with shareholders following an 'against' recommendation."); Peter Iliev & Sveta Vitanova, The Effect of the Say-on-Pay Vote in the U.S. 27 (Feb. 1, 2015) (unpublished manuscript), http://ssrn.com/abstract=2235064 ("We find that compliance with the Say-on-Pay rule did not cause a decrease in levels of CEO pay. On the contrary, firms that had to comply with the new rule experienced both an increase in the total CEO pay and paid more cash bonuses. Firms with mandatory Say-on-Pay votes also showed an increase in the frequency of termination and change-of-control provisions, further supporting the notion that the overall pay increase is driven by higher risks for the CEO. Further, the market reacted negatively to the announcement of the unexpected two-year exemption for small firms, consistent with a positive net effect from the new rule. Finally, firms that had to comply with the Say-on-Pay rule experienced a significant increase in support for their directors during shareholder elections. Taken together, these results are consistent with the view that the new Say-on-Pay rule did not have the effect of curbing CEO compensation."). *See also* Randall S. Thomas & Kenneth J. Martin, *The Effect of Shareholder Proposals on Executive Compensation*, 67 U. CIN. L. REV. 1021, 1022 (1999) ("When we compare CEO compensation levels at firms receiving shareholder proposals with pay levels at similarly-sized firms in the same industry that did not receive shareholder proposals, . . . target companies do not increase average total CEO compensation levels as rapidly in the year after receiving a shareholder proposal (on average two percent increases) as firms not receiving such proposals (on average 22.3% increases)."); Ricardo Correa & Ugur Lel, *Say on Pay Laws, Executive Compensation, CEO Pay Slice, and Firm Value Around the World* 15–16, 38 tbl.1 (Bd. of Governors of the Fed. Reserve Sys., Discussion Paper No. 1084, 2014), http://federalreserve.gov/pubs/ifdp/2013/1084/ifdp1084r.pdf (finding that there may be a general trend in higher executive pay associated with higher firm value and that there is less of an increase in pay in countries that have adopted say-on-pay legislation, based on a sample of firms from thirty-eight nations—eleven of which adopted say-on-pay legislation and twenty-seven of which had not); *id.* at 16 ("[E]ven though CEO compensation has increased in several [say-on-pay] countries including the United States and the United Kingdom, the growth in CEO pay is higher in countries that have not passed [say-on-pay] laws.").

a few years, plurality voting went from the nearly universal rule to a minority rule.[114]

Aside from the active use of the corporate electoral machinery, directors are also held accountable in the United States by litigation focused on whether the directors are fulfilling their fiduciary duties.[115] In the United States, a principal worry is that the litigation tools given to stockholders are overused, making the benefit-to-cost ratio of representative litigation less favorable for stockholders than it could be.[116]

114. *See, e.g.*, CLAUDIA H. ALLEN, STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS 1 (2007) (observing that in 2006, only 16 percent of S&P 500 companies had adopted majority voting, but that in 2007, the percentage of companies who adopted majority voting rose to 66 percent of S&P 500 companies and over 57 percent of the companies in the Fortune 500, as average levels of support for majority stockholder proposals went from 12 percent in 2004 to over 50 percent in 2007); Joshua R. Mourning, Note, *The Majority-Voting Movement: Curtailing Shareholder Disenfranchisement in Corporate Director Elections*, 85 WASH. U. L. REV. 1143, 1149 (2007) ("The majority-voting movement . . . quickly became *the* issue of the 2005 and 2006 proxy seasons and saw its greatest gains in the 2007 proxy season."); Masters, *supra* note 97 (reporting on "a study by the Council of Institutional Investors . . . [which] found that 61 of the 97 companies—63 percent—whose shareholder proposals received a majority vote in 2005 had done something along the lines of what was requested, up from 28 percent the previous year"); *Majority Voting for Directors*, COUNCIL INSTITUTIONAL INV'RS., http://www.cii.org/majority_voting_directors (last visited Aug. 18, 2016) (observing that "the vast majority of companies in the S&P 500 use the majority vote standard for uncontested director elections").

115. *See, e.g.*, Bruner, *supra* note 15, at 609 ("To be sure, the shareholder suit is a far more developed means of enforcement in the United States than elsewhere."); Jennifer Hill, *Corporate Scandals Across the Globe: Regulating the Role of the Director*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 225, 253 (Guido Ferrarini et al. eds., 2004) ("Historically, the focus of corporate law in . . . the US . . . has been on liability of directors."); E. Norman Veasey, *Access to Justice: The Social Responsibility of Lawyers: Reflections on Key Issues of the Professional Responsibilities of Corporate Lawyers in the Twenty-First Century*, 12 WASH. U. J.L. & POL'Y 1, 9 (2003) (suggesting that Delaware courts can use fiduciary duties as a tool for combating corporate misdeeds); Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 TEX. INT'L L.J. 171, 186 (2006) ("Notwithstanding the foregoing federal incursions, the bulk of the regulation of defensive measures occurs at the state level. In the event of a takeover, an inherent conflict of interest arises between directors and managers, who seek to maintain their positions; and shareholders, who might benefit from the takeover. This conflict is primarily addressed through fiduciary duties imposed on corporate officers and directors by state law.").

116. *See* OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION 1 (2015) (observing that over 90 percent of "M&A deals valued over $100 million were litigated"); Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 557 (2015) ("Shareholder litigation challenging corporate mergers is ubiquitous, with the likelihood of a shareholder suit exceeding 90%. The value of this litigation, however, is questionable."); *id.* at 615 (arguing that settlements that solely result in supplemental disclosures in the proxy statement should be eliminated because they produce costs without any corporate benefits); Gideon Mark, *Multijurisdictional M&A Litigation*, 40 J. CORP. L. 291, 294–95 (2015) ("Merger litigation may yield tangible benefits, but many scholars, jurists, and other observers agree that most of this litigation is meritless and multijurisdictional M&A litigation is highly

But there is no doubt that stockholder litigation has had a profound effect in holding corporate fiduciaries accountable to stockholders and improving board practices.[117]

By contrast, stockholder litigation in the European Union, although increasing in volume, is still comparatively rare.[118] Moreover, E.U. investors face more onerous prerequisites to bringing a derivative suit

undesirable. M&A litigation burdens companies and their shareholders by increasing expenses . . . ."); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 471 (addressing the growing trend of multi-forum shareholder litigation and noting that "[m]ulti-forum litigation promises shareholders no benefits and threatens them with considerable costs: it can erode the usefulness of shareholder litigation and impair the development of corporate law in the U.S."); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* 7–8 (Yale Law Sch., Law & Econ. Research Paper No. 528, 2015), http://ssrn.com/abstract=2622595 (bemoaning the rise of litigation tactics in which the plaintiffs' bar sues on the same transaction in multiple jurisdictions, thus increasing the potential for rent-seeking settlements that do not benefit stockholders, and supporting the use of forum-selection clauses to address this problem).

117. For a sample of pertinent cases that have these effects, see Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 49–51 (Del. 1993) (holding that Paramount directors breached their fiduciary duties by failing to adequately negotiate and get the best value possible for the company's shareholders in a change-of-control transaction); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986) (holding that Revlon directors breached their fiduciary duties by "allow[ing] considerations other than the maximization of shareholder profit to affect their judgment, and follow[ing] a course that ended the auction for Revlon . . . to the ultimate detriment of its shareholders"); Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (holding that Trans Union directors breached their duty of care by hastily approving the sale of the company and failing to "inform themselves of all information reasonably available to them and relevant to their decision"); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (holding that, even though directors' decision to advance the time of a stockholder meeting complied with legal requirements, doing so to "obstruct[] the legitimate efforts of dissident stockholders" was "inequitable" and "contrary to established principles of corporate democracy," and upholding the rule that "inequitable action does not become permissible simply because it is legally possible"); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (articulating the corporate opportunity rule and noting that "[t]he rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest"); *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 813, 819 (Del. Ch. 2011) (finding that the directors of Southern Peru breached their fiduciary duties when they purchased an entity from the corporation's controlling stockholder because the transaction was not entirely fair to the Southern Peru stockholders and awarding damages of $1.3 billion); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 835–36 (Del. Ch. 2011) (holding board accountable for breach of fiduciary duties in the merger negotiation process); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967, 969–70 (Del. Ch. 1996) (establishing that directors can be held liable for failing "to exercise appropriate attention" to the corporation's operations and that directors have a "responsibility to assure that appropriate information and reporting systems are established by management").

118. *See, e.g.*, Enriques & Volpin, *supra* note 32, at 127 ("With no plaintiff bar and long-standing legal hurdles to shareholder litigation, private enforcement of directors' duties is almost unheard of. This pattern is in sharp contrast with the United States, where corporate directors face a high risk of being sued if they engage in self-dealing. When such a lawsuit occurs, the courts, especially in Delaware, are very strict in judging a director's loyalty to the corporation.").

against directors to protect stockholder rights.[119] Thus, minority stockholders are often deprived of an effective means of holding directors accountable for favoritism toward the controlling stockholder or for other fiduciary duty breaches.

Those who maintain that the European Union is more stockholder-centric must contend with reality: the vast body of empirical evidence shows that stockholders in the European Union rarely take action to influence corporate policy and suggests that stockholders of U.S. corporations are able to exert powerful influence both through the ballot box and the judicial system.

B. HOW OFTEN DO STOCKHOLDERS IN THE EUROPEAN UNION AND UNITED STATES ACT TO REMOVE DIRECTORS?

In addition to direct action rights, many commentators who contend that the European Union is more stockholder-centric than the United States focus on the fact that stockholders of E.U. corporations possess broad rights to appoint and remove directors.[120] It is true that in many E.U. member states, such as France, stockholders are given the right to remove directors and even executives at any time, often without cause.[121] And in Italy, stockholders can remove a director at any time, although the firm may be liable for damages if the stockholders did not have cause to do so.[122] Likewise, in the United Kingdom, stockholders with at least 5 percent of voting stock can demand a meeting at any time, at which directors can be removed without cause by a simple majority vote.[123]

Because the existence of at-will removal rights makes staggering director terms less effective to promote stability, staggered boards are rarely seen in the European Union. Therefore, a stockholder or group of stockholders at a typical E.U. company can convene a meeting and dismiss all the directors by a simple majority vote.[124]

The statutory default rule in Delaware does not provide stockholders with at-will removal rights. Under Delaware law, a majority of

119. *See, e.g.*, Nili, *supra* note 40, at 192; Lorenzo Segato, 26 NW. J. INT'L L. & BUS. 373, 398, 444 (2006).

120. *See, e.g.*, Cools, *supra* note 1, at 745.

121. Gelter, *supra* note 1, at 156–57.

122. *Id.* at 157.

123. BRUNER, *supra* note 1, at 29.

124. *See* Enriques et al., *supra* note 1, at 61 & n.30. Removal rights are less direct in Germany, where a three-fourths majority of stockholders may remove members of the supervisory board only, and not the management board. *See id.* at 61–62. *See also* Rivka Weill, *Declassifying the Classified*, 31 DEL. J. CORP. L. 891, 938–39 (2006).

stockholders must vote to remove a director at the end of the director's term, which is typically the end of the year. Outside of the term end, stockholders can only remove a director for cause.[125] Thus, if a corporation has a staggered board, stockholders will not be able to take action to remove the entire board of directors at once unless they have cause to do so.

In addition, stockholders in Europe have broad rights to add their own director nominees to the slate without waging a proxy contest.[126] In the United Kingdom and Germany, any stockholder can present her own candidates for the board before the annual meeting,[127] and in Italy, a stockholder can present her own slate so long as she meets a relatively small ownership threshold.[128] The stockholders in these jurisdictions can then vote their own directors into office with a simple majority vote. By contrast, as a default matter, stockholders in the United States cannot add their own director nominees to the slate, and instead must wage a proxy contest to contest the company's slate of nominees. That said, stockholders can use Rule 14a-8 to propose a bylaw under state corporate law, creating a process for stockholders to nominate directors. Both Section 112 of the DGCL and Section 2.06 of the Model Business Corporation Act give stockholders the power to create bylaws allowing them to nominate directors.[129]

But the argument that these broad appointment and removal rights give E.U. stockholders greater power than their counterparts in the United States often disregards a rather fundamental point. In the European Union, annual elections for directors are not common. Even in the United Kingdom, annual elections were uncommon until recently. In 2010, action was taken to make annual elections at Financial Times Stock Exchange ("FTSE") 350 companies a part of the U.K. Corporate Governance Code, which requires U.K.-listed companies to either comply with its guidelines or disclose why not.[130] Most U.K. companies have chosen to comply with

125. DEL. CODE ANN. tit. 8, § 141(k) (2016).

126. Cools, *supra* note 1, at 745; Enriques et al., *supra* note 1, at 58 ("All of our core jurisdictions apart from the U.S. allow shareholders to nominate directors.").

127. Enriques et al., *supra* note 1, at 58 n.14.

128. *Id*.

129. Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 123 n.21 (2014).

130. The Corporate Governance Code has had a profound influence on U.K. public company practices. Although U.K. companies have the option to "comply or explain," most companies choose to follow the Code's guidelines rather than make detailed disclosures to their shareholders. In fact, in 2014, 61.2 percent of FTSE 350 companies—the 350 largest companies in the United Kingdom by market capitalization—were in full compliance with the Code, and there was no single provision with

the provision.[131] But there are still no legal limits in the United Kingdom on the length of terms for which directors may serve.[132] In Germany, supervisory board directors' terms are limited to five years, and there is no term limit for management board directors, who are appointed by the supervisory board and not the stockholders.[133] Directors in other European

which more than 10 percent of FTSE 350 companies failed to comply. Even those corporate governance principles that were initially met with resistance, such as having separate chairman and chief executive positions, appointing a senior independent director, and holding annual director elections, have been adopted by U.K. companies. *See* FIN. REPORTING COUNCIL, COMPLY OR EXPLAIN: 20TH ANNIVERSARY OF THE UK CORPORATE GOVERNANCE CODE 30–31 (2012), https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Comply-or-Explain-20th-Anniversary-of-the-UK-Corpo.aspx (noting that guidelines that met initial resistance have become "established features of the system"); FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 4 (2014) [hereinafter U.K. CORPORATE GOVERNANCE CODE], https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf ("The 'comply or explain' approach is the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings and is the foundation of its flexibility. . . . It is recognised that an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means. A condition of doing so is that the reasons for it should be explained clearly and carefully to shareholders, who may wish to discuss the position with the company and whose voting intentions may be influenced as a result." (footnote omitted)); GRANT THORNTON, CORPORATE GOVERNANCE REVIEW 2014: PLOTTING A NEW COURSE TO IMPROVED GOVERNANCE 15, 42 fig.12 (2014), http://www.grant-thornton.co.uk/Global/Publication_pdf/Corporate-Governance-Review-2014.pdf (finding that in 2013, 96.7 percent of FTSE 350 companies had separate chairman and chief executive roles and 96.7 percent appointed a senior independent director).

131. U.K. CORPORATE GOVERNANCE CODE, *supra* note 130, § B.7.1, at 15 ("All directors of FTSE 350 companies should be subject to annual election by shareholders.").

When this provision was adopted in 2010, only 5.6 percent of FTSE 350 and 7.2 percent of FTSE 100 companies held annual director elections, but by 2014, those numbers had reached 97.7 percent and 94.0 percent, respectively. GRANT THORNTON, *supra* note 130, at 46. *See also* LEXISPSL CORP., MARKET TRACKER TREND REPORT: AGM SEASON 2014, at 16 (2014), http://bit.ly/1wW7siT ("[R]esearch revealed that 20 companies did not propose a resolution to re-elect all of their directors, but that was because some directors were resigning. All directors at those companies other than those that were resigning were put up for re-election.").

132. *See* U.K. CORPORATE GOVERNANCE CODE, *supra* note 130, § B.2.3, at 11–12 (providing no limit to a director's term but stating that "[a]ny term beyond six years for a nonexecutive director should be subject to particularly rigorous review, and should take into account the need for progressive refreshing of the board"); *id.* § B.1.1, at 10 (requiring that the board identify in its annual report the basis for considering any director who has served on the board for over nine years to be independent); *id.* § B.7.1, at 15 (requiring that "[n]on-executive directors who have served longer than nine years . . . be subject to annual re-election"); THE DIRECTOR'S HANDBOOK 78 (Martin Webster ed., 3d ed. 2010) ("[S]erving more than nine years raises the assumption of a lack of independence, which has to be rebutted each year by the board in the annual report. Despite this, nine-year terms are common, and there is a widely held view that the rule should be dropped. Many companies would argue that there is little point in sacrificing a director's experience and knowledge of a group after only six years because of an unjustified fear that they may have gone stale. Once nine years are reached, the Code suggests that the director should be subject to annual re-election.").

133. *See* DEUTSCHER CORPORATE GOVERNANCE KODEX § 5.1.2, at 9 (2002), http://www.dcgk.de//files/dcgk/usercontent/en/download/code/2015-05-05_Corporate_Governance_Code_EN.pdf; van de Sande & Schneider, *supra* note 23, at 127 ("[German stockholders'] influence is limited to electing the

countries also typically serve multiple-year terms, usually three years or greater.[134] Thus, although scholars in the United States bemoan that only one-third of the directors of a classified board face reelection every year,[135] in the European Union, European boards are far more entrenched in practice. The average European director faces election every three or four years,[136] and boards usually perpetuate themselves by their own action.[137] By contrast, annual director elections are required in every American state, and as discussed, classified boards are becoming less and less common.[138] Thus, as a factual matter, directors of E.U. companies are typically less accountable to stockholders than directors of U.S. companies, even those with classified boards.

members of the supervisory board members, who in turn appoint and remove the members of the management board.").

134. *See, e.g.*, ASS'N FRANÇAISE DES ENTREPRISES PRIVÉES & MOUVEMENT DES ENTREPRISES DE FRANCE, CORPORATE GOVERNANCE CODE OF LISTED CORPORATIONS § 14, at 11 (2015), http://www.afep.com/uploads/medias/documents/Corporate_Governance_Code_of_Listed_Corporations_November_2015.pdf (specifying a maximum term of four years for directors of listed corporations in France); CORP. GOVERNANCE CODE MONITORING COMM., DUTCH CORPORATE GOVERNANCE CODE § III.3.5, at 22 (2009), http://www.commissiecorporategovernance.nl/document/?id=606 (limiting a management board member's appointment to three four-year terms in the Netherlands).

135. *E.g.*, Bebchuk et al., *supra* note 102, at 897.

136. *See* GREGORY & SIMMELKJAER, *supra* note 11, at 192, 200, 211 (reviewing corporate governance codes of E.U. member states that show it is common for directors to serve for a term of multiple years, with terms of four years or more being common); Enriques et al., *supra* note 1, at 61 ("[C]orporations in Germany and France usually elect directors for five- or six-year terms respectively . . . ."); Marc Goergen et al., *Recent Developments in German Corporate Governance* 17 (European Corp. Governance Inst., Working Paper No. 41/2004, 2004) ("[In Germany, t]he management board is legally entrenched: only the supervisory board (balanced by the co-determination of shareholders and employee representatives) can remove the members of the management board who are usually appointed for a term covering the legal maximum of 5 years. . . . Furthermore, the supervisory board is also legally entrenched: the representatives of shareholders and employees have contracts for up to 5 years (with the option of renewing them)." (citation omitted)).

137. *See, e.g.*, Randall K. Morck & Lloyd Steier, *The Global History of Corporate Governance: An Introduction*, *in* A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD 1, 23 (Randall K. Morck ed., 2005) ("[I]n Dutch firms, . . . real decision-making power remains with self-perpetuating top corporate executives, entrenched behind formidable takeover defenses."). *Cf.* Enriques et al., *supra* note 1, at 61–62 (noting that, in Germany, stockholders "can only oust directors from lengthy terms by means of a supermajority vote," and that "German law favors stability on the management board as well, by insulating its members from abrupt removal by the supervisory board").

138. *E.g.*, DEL. CODE ANN. tit. 8, § 141(d) (2016). *See* CRAIG M. GARNER & JONATHAN B. KAPLAN, LATHAM & WATKINS LLP, ANNUAL MEETING HANDBOOK: 2009 EDITION 8 (2009), http://www.lw.com/upload/pubcontent/_pdf/pub2404_1.pdf ("Every state requires that a meeting of shareholders be held annually to elect directors and to transact other appropriate business, including, in many cases, obtaining the approval of the shareholders for fundamental corporate changes such as mergers, dissolutions, or amendments of the company's articles or certificate of incorporation."); *supra* notes 102–106 and accompanying text.

Of course, it could be the case that the legal right of stockholders to remove directors is a substitute for the annual election, such that we would see feisty E.U. stockholders taking action to remove stale, stodgy directors. In other words, perhaps the pro–E.U. argument rests on empirical data showing that European stockholders are able to and actually do use their power to remove directors. But the empirical evidence suggests that they do not. As one commentator from the Organisation for Economic Co-operation and Development observed, in Europe:

> co-operation among institutional shareholders to exercise their removal rights . . . has often proved difficult. As ever, the "law in the books" is one thing, its operation in practice may be quite another, and assessment of its impact needs to take account of the incentive-structure which applies to those who are apparently intended to make use of the rights which company law confers.[139]

Between 2005 and 2008, there were five stockholder proposals to remove directors in continental Europe.[140] In the United Kingdom, there were thirty.[141] In the United States, during a similar time period, stockholders initiated an average of 112 proxy contests opposing management *each year*.[142] These proxy contests resulted in the dissident gaining one or more board seats in more than 50 percent of the contests waged at listed companies.[143] ISS reported that in the twenty-three proxy contests waged at large public companies in the first half of 2013 in the United States, the dissident stockholders prevailed 70 percent of the time.[144] Because of the strong move to so-called majority voting, it is also inexpensive for dissidents to target particular directors they wish to unseat simply by urging that other stockholders withhold consent. Directors have been targeted for failing to go along with a prior non-binding stockholder proposal or even for other actions that influential institutional investors did not favor.[145] Even when stockholders do not succeed in getting a majority

139. DAVIES, *supra* note 79, at 7.

140. Cziraki et al., *supra* note 32, at 751 tbl.3.

141. *Id.*

142. Warren S. de Wied, *Proxy Contests*, PRAC. L., Nov. 2010, at 32, 33 (assessing the period 2006–2010).

143. *Id*.

144. U.S. RESEARCH TEAM, INSTITUTIONAL S'HOLDER SERVS., 2013 PROXY SEASON REVIEW: UNITED STATES 48–49 (2013).

145. *See* Richard Levick, *Activist Investors: The Ten Most Momentous Recent Events*, FORBES (Mar. 6, 2014, 9:18 AM), http://www.forbes.com/sites/richardlevick/2014/03/06/activist-investors-the-ten-most-momentous-recent-events. *See also* Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 751 (2013) (discussing Vanguard's use of withhold votes in director elections as an expression of dissatisfaction with executive compensation); Subramanian, *supra* note 103, at 14 (discussing how directors may adopt proposals from shareholders

of the holders of outstanding shares to withhold consent, negative publicity from the campaign can force a candidate to withdraw voluntarily from an election or even cause the company to replace the director during the director's term.[146]

In other words, in the United States, stockholders not only have an opportunity to vote to remove a director on an annual basis, they also wield their supposedly weaker power to get their desired representatives appointed to the board much more effectively than their European counterparts.[147] And although stockholders must bear the costs of waging a proxy contest, often the mere threat of a contest is enough.[148] For example, in 2013, ValueAct Capital, which owned less than 1 percent of Microsoft stock, successfully seated an activist investor on the Microsoft board. Instead of acquiring more shares, ValueAct sought the support of other larger stockholders and threatened to wage a proxy contest, and the Microsoft board capitulated to its demands.[149]

As this example shows, the mere threat of a proxy or withhold contest has frequently resulted in company capitulation to stockholder desires. For instance, The Macerich Company, a shopping mall operator, recently settled a proxy fight with two activist hedge funds. As part of the settlement terms, Macerich added two directors that were mutually agreed

in order to avoid being the subject of an embarrassing withhold-vote campaign).

146. *See* Ian D. Gow et al., *Consequences to Directors of Shareholder Activism* 31 (Harvard Bus. Sch., Working Paper No. 14-071, 2014) ("We also find that shareholder voting matters for director turnover. Directors that receive a greater negative vote percentage in the year of shareholder activism are less likely to remain on the board in the year after activism."); Mary Ann Cloyd, *Shareholder Activism: Who, What, When, and How?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 7, 2015), http://corpgov.law.harvard.edu/2015/04/07/shareholder-activism-who-what-when-and-how (discussing "vote no" campaigns); *Lessons from the Wet Seal Consent Solicitation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 17, 2012), http://corpgov.law.harvard.edu/2012/10/17/lessons-from-the-wet-seal-consent-solicitation (discussing how shareholders were able to get the majority of the board of directors of clothing company Wet Seal to voluntarily step down).

147. *See, e.g.*, Ewan McGaughey, Participation in Corporate Governance 86–88 (Nov. 4, 2014) (unpublished Ph.D. thesis, London Sch. of Econ.), http://etheses.lse.ac.uk/3079/1/McGaughey_Participation_in_corporate_governance.pdf ("Although the general meeting of a UK company did not usually play an active role in appointments, it had among the strongest rights in the world to do so.").

148. A successful stockholder may have costs reimbursed by the company, and stockholders may adopt a bylaw requiring corporations to provide for the reimbursement of stockholder expenses connected with a proxy fight. MODEL BUS. CORP. ACT § 2.06(c) (AM. BAR. ASS'N 2009); DEL. CODE ANN. tit. 8, § 113 (2016).

149. Joseph E. Gilligan et al., *Preparing for Proxy Contests: Practical Steps Every Company Should Consider*, BLOOMBERG BNA MERGERS & ACQUISITIONS L. REP., Feb. 24, 2014, *reprinted in* HOGAN LOVELLS, https://www.hoganlovells.com/en/publications/preparing-for-proxy-contests-practical-steps-every-company-should-consider (last visited Aug. 18, 2016); Shira Ovide, *Activist Storms Microsoft's Board*, WALL ST. J. (Aug. 30, 2013, 7:32 PM), http://on.wsj.com/2bHKcBt.

upon by the activist funds, removed the company's poison pill, and declassified the board.[150] This is not an isolated occurrence in the United States as companies are increasingly choosing to settle by granting activist stockholders board seats or other rights. In other words, focusing on actual proxy contests and withhold arguments understates stockholder influence in the United States because boards often settle by adding new objectives proposed by activists in advance of contests, because they know stockholder dissidents have the legal tools to make unseating directors a viable option.[151]

By contrast, for most European companies, it remains the case that a dissident stockholder who wants to unseat directors must convince the

150. *See* Liz Hoffman, *Macerich Settles Proxy Fight With Two Activist Hedge Funds*, WALL ST. J. (May 4, 2015, 5:18 PM), http://on.wsj.com/2bHKecx.

151. *See, e.g.*, GIBSON DUNN & CRUTCHER LLP, 2015 MID-YEAR ACTIVISM UPDATE 2–3 (2015), http://www.gibsondunn.com/publications/Documents/MAReport-2015-Mid-Year-Activism-Update.pdf (A survey of fifty-six activist campaigns at fifty U.S. companies with market capitalization of over $1 billion during the first six months of 2015 demonstrated that board composition was a goal of thirty-eight of the campaigns); *id.* at 17 (finding that, based on data from filed settlement agreements, the companies studied granted an average of 1.8 board seats or 17.2 percent of a 10.5 member board in the first six months of 2015 — less than in all of 2014); GIBSON DUNN & CRUTCHER LLP, ACTIVISM UPDATE: 2014 YEAR IN REVIEW 2 (2014), http://www.gibsondunn.com/publications/Documents/MA-Report-2014-Activism-Update.pdf (surveying sixty-four activist campaigns involving U.S.-listed companies with market capitalizations of over $1 billion and showing that in 2014, "[o]f those campaigns in which an activist sought board representation, at least some change in the board composition occurred nearly 77% of the time"); *id.* at 25 (concluding that companies granted an average 2.4 board seats or 21.3 percent of an 11.5 member board); John Laide, *Activist Influence at U.S. Corporations Continues to Rise in 2015*, FACTSET: INSIGHT (June 9, 2015), http://www.factset.com/insight/2015/06/activist-influence-us-corporations-continues-rise-2015 ("Settlements continue to rise. The 33 proxy fights that have been formally settled (or were withdrawn after the company made material concessions) as of June 5, 2015 is the most at this point in any year since FactSet began tracking proxy fights in 2001. More importantly, many companies are choosing to grant activist board seats, often as part of a standstill agreement, before letting an activist situation escalate into a proxy fight. Forty-six non-proxy fight activist campaigns have resulted in a board seat as of June 1, 2015, the most in any comparable period according to FactSet data. In comparison, 34 and 11 such campaigns resulted in board seats in the same period in 2014 and 2013 respectively.").

A recent study developed empirical evidence demonstrating the potency of shareholder activism in accomplishing board change. By matching available activist data (taken from FactSet's SharkWatch database and Securities and Exchange Commission filings) on all publicly disclosed activism events between 2004 and 2012 (2,645 events) with director data (taken from the Equilar database), the study examined 1,868 activism events, 832 of which were related to a demand for representation on the company board. Gow et al., *supra* note 146, at 10–11. The study specifically evaluated the effect of settlements before escalation to a proxy fight on board turnover. *Id.* at 13–14. The quantitative results confirmed that settlement was positively associated with director turnover. *Id.* at 19–20. The results also showed that there was no statistically significant difference when it came to the effect on director turnover between those activist events that settled and those that went on to election. *Id.* at 20. The authors concluded that "[o]verall, these coefficients are consistent with boards deciding to settle in cases where they are less likely to prevail in a proxy fight and with contested elections in proxy fights being just the tip of the iceberg in terms of director turnover." *Id.*

controlling stockholder to add minority representation. And seated directors know that to avoid the threat of removal, they must appease the controlling stockholder.[152] This reality makes the board of directors especially sensitive to the wishes of the controller, who is in a position to exploit this position of influence.[153] Thus, the presence of director-removal rights in the European Union that is touted as stockholder-protective actually results in less protection for minority stockholders at companies that feature a controlling stockholder. Because only the controller has the power to remove directors, the presence of such rights actually makes the board more sensitive to the desires of the controller and less sensitive to the interests of the minority stockholders.[154]

III. TAKEOVER DEFENSES AND THE M&A REGIME IN GENERAL

This Article next considers whether the putative existence of a non-frustration regime in fact gives E.U. stockholders more frequent access to takeover premiums and creates more favorable M&A results than those enjoyed by stockholders under the American system, as many scholars' arguments suggest.[155] It first considers the non-frustration rule and observes that it does not apply in many E.U. member states and is riddled with exceptions when it does apply. The Article then explores other

152. *See* Cools, *supra* note 1, at 750.

153. *See* Gelter, *supra* note 24, at 795.

154. In the United Kingdom, however, where the majority of companies are widely held, stockholders have the power to replace directors at any time by resolution at a special meeting. They can also amend the company charter by special resolution to grant themselves powers over the directors' future business decisions. *See* Companies Act, 2006, c.46, § 168 (UK). *See also* Bebchuk, *supra* note 1, at 849 ("Under a mandatory feature of U.K. law, shareholders may at any time replace all the directors with a majority of the votes cast in a special meeting called for this purpose.").

But despite these powers, it appears that actual activism in the United Kingdom is tepid, reflected by low turnout rates of 40 to 50 percent for non-management stockholders. Luc Renneboog & Peter Szilagyi, *Shareholder Engagement at European General Meetings*, *in* BOARDS AND SHAREHOLDERS IN EUROPEAN LISTED COMPANIES 315, 320 (Massimo Belcredi & Guido Ferrarini eds., 2013) ("In the market-oriented corporate governance regime of the UK, the turnout rate is 68 per cent on average, while the turnout of companies' free float – shares not held by managers, directors or controlling stockholders – is 40–52 per cent. In the stakeholder-oriented governance regimes of Continental Europe, shareholders are far less engaged. Turnout rates are less than 60 per cent on average and below 50 per cent in Belgium, Denmark, Norway and Switzerland. The gap is even more pronounced in the turnout of companies' free float, which stands at only 17 per cent in France, 10 in Germany and 4 in Italy." (citations omitted)).

155. *See, e.g.*, STOUT, *supra* note 1, at 56 ("Directors in U.K. companies cannot reject hostile takeover bids; they must sit back and let the shareholders decide if the firm will be sold to the highest bidder."); Skeel, *supra* note 1, at 147 ("The UK Takeover Code is far more shareholder-oriented than the US approach—target directors are forbidden from using defenses, for instance, and shareholders must be given equal treatment.").

takeover laws and jurisdictional differences that hamper the non-frustration rule's pro-stockholder effect. It then compares this takeover environment with that of Delaware, which has legal doctrines that require directors to address change-of-control situations by focusing on what is best for the stockholders and requiring, in any change of control, that the directors take steps to ensure that the stockholders get the best value.[156] It concludes by examining the empirical evidence that shows that the incidence of premium-generating M&A transactions is higher in the United States than in the European Union and that the takeover premiums are also more favorable.

A. THE NON-FRUSTRATION RULE

The non-frustration rule is one of the more important and controversial provisions in the E.U. Takeover Directive[157] and was inspired by the preexisting U.K. City Code on Takeovers and Mergers.[158] As codified in Article 9 of the Takeover Directive, the non-frustration rule states:

> During the period [from when the board of the offeree company learns of the offer until it lapses or is made public,] the board of the offeree company shall obtain prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company.[159]

The non-frustration rule thus prohibits the target board of directors from preventing a bidder from presenting an offer directly to the target's

156. *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 44 (Del. 1993) ("In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end."); Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when a change of control is inevitable, the board has a duty to maximize "the company's value at a sale for the stockholders' benefit").

157. Directive 2004/25, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 142) 12 (EC), http://eur-lex.europa.eu/eli/dir/2004/25/oj.

158. PANEL ON TAKEOVERS AND MERGERS, THE TAKEOVER CODE (2016), http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf. *See* Han-Wei Liu, *The Non-Frustration Rule of the UK City Code on Takeover and Mergers and Related Agency Problems: What Are the Implications for the EC Takeover Directive?*, 17 COLUM. J. EUR. L. ONLINE 5, 6 (2011) (noting that many aspects of the Takeover Directive, including the non-frustration rule, were modeled after the U.K. City Code on Takeovers and Mergers); Ventoruzzo, *supra* note 115, at 199–200.

159. Parliament and Council Directive 2004/25, art. 9, § 2, 2004 O.J. (L 142) 12, 19 (EC), http://eur-lex.europa.eu/eli/dir/2004/25/oj.

stockholders.[160] The non-frustration rule, that is, is not a rule designed to extract the highest-available value for target stock from the market; it is more like a codification of the passivity rule advocated by Frank Easterbrook and Daniel Fischel, a rule that those scholars admitted was not aimed at enabling target stockholders to get the best price.[161]

To be sure, on its face, the non-frustration rule appears stockholder friendly in the sense that when it applies, it prohibits a target board of directors from thwarting the ability of stockholders to receive an offer they may find attractive. But there are many reasons why the rule does not necessarily act to provide the highest M&A returns for stockholders of target companies.

For one, the non-frustration rule is not standard in Europe. Of the twenty-eight member countries in the European Union, at least fifteen have chosen not to adopt or to limit the application of the non-frustration rule in a material way.[162] Under Article 12 of the Takeover Directive, member states can opt out of the non-frustration rule altogether, and several, including Germany and the Netherlands, have done so.[163] In addition, under Article 12's "reciprocity rule," a member state can eliminate the application of the non-frustration rule if the target company receives an offer from a buyer who is not subject to the non-frustration rule.[164] As a result, bidders from many nations that allow corporate boards to take

160. *See, e.g.*, STOUT, *supra* note 1, at 56 (arguing that the United Kingdom is more stockholder-friendly, in part because "[d]irectors in U.K. companies cannot reject hostile takeover bids; they must sit back and let the shareholders decide if the firm will be sold to the highest bidder"); Skeel, *supra* note 1, at 147 ("The UK Takeover Code is far more shareholder-oriented than the US approach—target directors are forbidden from using defenses, for instance, and shareholders must be given equal treatment.").

161. Frank H. Easterbook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1164 (1981) (advocating the board-passivity rule even while admitting that managerial resistance to a takeover attempt can lead to a higher price for the firm's shares).

162. *See* COMM'N EUROPEAN CMTYS., COMMISSION STAFF WORKING DOCUMENT: REPORT ON THE IMPLEMENTATION OF THE DIRECTIVE ON TAKEOVER BIDS, Annex 1, at 12, (2007), http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf.

163. *See* JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCE CAPITALISM 167 (2010) ("[T]he directive gave the member states the ability to opt out of the 'nonfrustration' rule and duty of neutrality, leaving it largely neutered. Most member states, including Germany, duly opted out of the provision, thereby preserving wide variation in the treatment of hostile takeovers across Europe and in national models of capitalism."); JONATHAN MUKWIRI, TAKEOVERS AND THE EUROPEAN LEGAL FRAMEWORK: A BRITISH PERSPECTIVE 114 (2009) ("The Netherlands has opted out of both [Articles] 9 and 11 . . . .").

164. Parliament and Council Directive 2004/25, art. 12, 2004 O.J. (L 142) 12, 21 (EC), http://eur-lex.europa.eu/eli/dir/2004/25/oj.

frustrating action consistent with directors' fiduciary duties of loyalty and care to stockholders are not protected by the non-frustration rule. Such nations include not just the world's largest economy, the United States, but also Japan, Canada, and Australia.[165] Because of this limitation, large segments of the world's bidder community are in fact subject to frustrating action in the European Union. As a result, the stockholders of E.U. corporations who might be purchased by a bidder do not benefit from the existence of the non-frustration rule.

As scholars have pointed out, the European Commission has been disappointed by the limited extent to which the Takeover Directive has been implemented. As a distinguished scholar put it:

> The compromises in the Directive as regards options and reciprocity rules have tended to result in a move away from bidder-friendly rules. Yet the mandatory bid (Article 5) has mainly been a success, as have the other rules regarding general principles for supervision, disclosure and transparency, procedures, squeeze-out and sell-out. However, it cannot be ignored that the danger of protectionism has increased considerably.[166]

165. *See, e.g.*, Klaus J. Hopt, *Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis*, 20 COLUM. J. EUR. L. 249, 282 n.19 (2014) ("Australia, Japan, and Canada . . . allow significant defensive measures, particularly poison pills. All of these countries have rules that more or less correspond with the prohibition of frustrating action." (citation omitted)); Donald Gilchrist et al., *Public Mergers and Acquisitions in Canada: Overview*, PRAC. L., http://ca.practicallaw.com/7-501-9618 (last updated Dec. 1, 2015) (noting that although "[d]efensive tactics used by directors of targets governed by Canadian corporate legislation . . . can . . . be scrutinised by the courts on the basis that directors must act in the best interests of the target company under their fiduciary duties," "courts in Canada have been very deferential to the business judgement of directors"); Jon Skene & Lawson Jepps, *Public Mergers and Acquisitions in Australia: Overview*, PRAC. L, http://uk.practicallaw.com/0-501-4520 (last updated Nov. 1, 2015) (noting that management of Australian target companies may take defensive measures but remains subject to fiduciary duties and oversight by the Takeovers Panel).

166. Klaus J. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance* 45 (European Corp. Governance Inst., Working Paper No. 296/2015, 2015). *See also id.* at 5 (noting that there exists in the European Union "a universally perceived tendency toward protectionism, as most recently evidenced by the French Loi Florange of 2015 shielding French corporations from foreign public takeovers"). The Loi Florange, passed in spring 2014, altered France's takeover rules by, among other things, automatically granting double voting to shareholders who have owned company shares for over two years (unless a corporation opts out), introducing an over 50 percent minimum threshold for voluntary and mandatory offers, allowing French targets to take frustrating actions, and strengthening the role of works councils in the tender offer context. *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, INTERNATIONAL LABOUR LAW BULLETIN: SUMMER 2014 5 (2014), (noting that Loi Florange "introduce[d] an obligation to consult the works council of the target company on [a] takeover bid before the board of directors gives its opinion"); GLASS, LEWIS & CO., LLC, PROXY PAPER GUIDELINES: 2015 PROXY SEASON: FRANCE 13–14 (2015) (discussing double-voting rights); INSTITUTIONAL S'HOLDER SERVS., EUROPEAN PROXY VOTING GUIDELINE UPDATES: 2015 BENCHMARK POLICY RECOMMENDATIONS 3 (2014), https://www.issgovernance.com/file/policy/

B. OTHER CONTEXTUAL DIFFERENCES THAT AFFECT THE E.U. BIDDER ENVIRONMENT

In the member states that have chosen to apply the non-frustration rule, other features of the E.U. takeover regime limit its pro-stockholder effect. For example, the prohibition on non-frustrating action only applies to bids that meet certain qualifying conditions. These include the offer being available to all stockholders on equal terms once the bidder has reached a certain ownership threshold and being largely unconditional.[167] Consistent with the lack of conditionality, certainty of funding is often required for a bidder to make a legally qualifying bid.[168] Often, bidders in

2015EuropeanPolicyUpdates.pdf ("Under the Florange Act (Loi Florange), registered shares held for two years will automatically acquire double-voting rights, thereby breaching the widely subscribed-to one-share, one-vote principle. Prior to this act, French companies were allowed to grant double-voting rights to registered shareholders after a minimum of two years only when they had a bylaw provision specifically allowing for it."); *Changes to French Takeover Rules*, ALLEN & OVERY: PUBL'NS (Apr. 9, 2014), http://www.allenovery.com/publications/en-gb/Pages/Changes-to-French-takeover-rules.aspx (discussing the impact of Loi Florange on takeover rules).

167. *See* Koen Geens & Carl Clottens, *One Share One Vote: Fairness, Efficiency and EU Harmonisation Revisited*, *in* THE EUROPEAN COMPANY LAW ACTION PLAN REVISITED: REASSESSMENT OF THE 2003 PRIORITIES OF THE EUROPEAN COMMISSION 145, 153, 167 (Koen Geens & Klaus J. Hopt eds., 2010) (discussing Article 5 of the Takeover Directive, which requires a bidder who has acquired more than a certain percentage of stock (generally 30 percent) to make a bid for the remaining shares with voting rights at the highest price paid for the same shares in the last six to twelve months and explaining that the mandatory bid is unconditional and cannot be withdrawn once the bidder hits the threshold). *See also* Parliament and Council Directive 2004/25, art. 3, § 1, 2004 O.J. (L 142) 12, 15 (EC), http://eur-lex.europa.eu/eli/dir/2004/25/oj ("Member States shall ensure that the following principles are complied with: (a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected . . . ."); SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP, GENERAL GUIDE TO THE UK TAKEOVER REGIME 25 (2014), https://www.skadden.com/sites/default/files/publications/UK_Takeover_Regime.pdf ("It is a key principle of the [U.K. Takeover] Code that the ability of a bidder to invoke conditions and preconditions is severely constrained. The bidder may do so only if the circumstances which give rise to the right to invoke the condition or precondition are of material significance to the bidder in the context of the offer. [Takeover] Panel decisions applying this [r]ule have indicated that the materiality threshold applied by the [Takeover] Panel is extremely high.").

168. Andrew Brown & Mark P. Ramsey, *Acquisition Financings: European Certain Funds vs. US Limited Conditionality*, SKADDEN: INSIGHTS (Jan. 2015), http://www.skadden.com/insights/acquisition-financings-european-certain-funds-vs-us-limited-conditionality (observing that "European sellers in competitive M&A transactions expect bidders to demonstrate certainty of funding (including debt funding) before choosing a winning bidder" and quoting the U.K. City Code on Takeovers, which requires a bidder to announce a bid only after ensuring that it can fulfill any cash consideration and after taking all reasonable measures to secure the implementation of any other type of consideration).

In the United States, by contrast, the bidder is not required to show certainty of funding until the parties sign the transaction. "Funding must be in place at the time the merger is effective, or the time of acceptance of tenders pursuant to a tender offer. The US M&A market does not have a 'certain funds' or similar requirement relating to bids and offers." Andrew J. Nussbaum & Brett K. Shawn, the European Union are limited in their ability to increase,[169] lower,[170] or withdraw[171] an offer. In other words, the non-frustration rule is largely applicable only when a bidder is willing to bind itself unconditionally to go through with its initial bid.

This is no small thing for another related reason. In the United States, target boards enjoy the flexibility to determine, using their own business judgment, whether and on what terms to provide confidential information to parties interested in M&A activity.[172] In the European Union, by

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United States of America, *in* MERGERS & ACQUISITIONS: JURISDICTIONAL COMPARISONS 469, 478 (Andrew J. Nussbaum et al. eds., 2012).

169. In France, an increase cannot be made in the final five trading days before the closing date of the tender period. An increased offer cannot have new conditions and must do one of three things: raise the price by at least 2 percent in a cash offer, offer "substantially better terms" in a stock offer, or waive or reduce the minimum acceptance condition. BONELLI EREDE PAPPALARDO ET AL., GUIDE TO PUBLIC TAKEOVERS IN EUROPE 145 (2013). In Sweden, a higher offer must remain open for at least two weeks, and buyers are limited in their ability to increase an offer in the last two weeks before the end of the three-month offer period. *Id.* at 164. In the United Kingdom, a revised (higher) offer must similarly remain open for at least two weeks after the publication of the offer document. Moreover, if the buyer stated that the offer will not be increased, then it can only change the offer if the statement included specific exceptions, such as the emergence of a competitive offer, a recommendation from the seller, or the discovery of new, material information about the target. *Id.* at 169. By contrast, in Germany, a bidder may raise its offer as many times as it desires during the initial offer period. Additionally, the price will automatically increase if the bidder or any party in concert with it buys any shares of the target at a price higher than the offer price. *Id.* at 149. Also, in Italy, the offer may be raised, but the percentage of target share capital to which the offer applies can never be reduced. *Id.* at 153. In the Netherlands, a bidder is free to increase its offer so long as it can fund the increase in cash or another form of ready consideration and publicly announces the revised offer. *Id.* at 156. And in Spain, a bidder may raise the offer or modify its terms as long as the modification favors the seller's shareholders. *Id.* at 161.

170. In France, Germany, Italy, Spain, and the United Kingdom, it is not possible to lower an initial offer. *Id.* at 145, 149, 153, 161, 168.

171. In France, "as a matter of general principle, once an offer is filed [with the French agency that regulates takeovers], an offeror may not simply reserve a right to withdraw the offer. . . . [It] is generally . . . irrevocable from the time it is filed." *Id.* at 173. In Germany, Sweden, and the United Kingdom, a bidder generally cannot withdraw its takeover offer once it has been made, but a voluntary offer can be made subject to conditions, so long as those conditions are objective. *Id.* at 176, 186, 190. Further, in the United Kingdom, "[r]eflecting the principle that bids should be announced only when a bidder is highly confident it will be able to complete, the [Takeover] Code contains a number of provisions designed to limit the ability of a bidder to withdraw or lapse an offer." SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP, *supra* note 167, at 25. In Italy and Spain, both voluntary and compulsory takeover offers are irrevocable. BONELLI EREDE PAPPALARDO ET AL., *supra* note 169, at 179, 184. In the Netherlands, "[p]ublic offers are irrevocable, and an offeror therefore may not simply withdraw its offer after [it] has been formally launched by making an offer document available to the public. However, an offeror will be able to withdraw a voluntary bid at any time before it is formally launched, even if the bid has been announced before that time." *Id.* at 181.

172. Under Delaware law, even when a board is subject to *Revlon* duties, it is given leeway in determining whether to conduct an auction and how to conduct it, so long as it acts in the best interests of the corporation and its stockholders. *See* C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1067 (Del. 2014) (reaffirming the Delaware law principle

contrast, bidders are not allowed to proceed in as careful and contingent a manner. Many European nations have rules that provide that if any party gets access to due diligence, other parties—regardless of whether they have demonstrated a genuine interest in purchasing the company—must receive access to the same information.[173] As a result, in the European Union, it is more difficult for interested parties to conduct the sort of due diligence that is often necessary to induce them to make a binding bid.[174] To avoid having competitors learn key confidential information about the target company, the interested party may forego due diligence itself, which prevents it from assessing with more confidence the potential regulatory risks (for example, antitrust divestitures), liabilities, and other possible downsides to a combination. Not only that, in the European Union, most transactions do

that "'there is no single blueprint that a board must follow to fulfill its [*Revlon*] duties'" (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989))); 1 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 4.04[4], at 4-55 (2015). The board can even choose to favor a single bidder, such as by providing confidential information to one bidder and not to another, if doing so achieves the best possible transaction for stockholders in the board's informed judgment. *See In re* Novell, Inc. S'holder Litig., No. 6032-VCN 2013, 2013 WL 322560, at *9 (Del. Ch. Jan. 3, 2013) ("The Board could have dealt with bidders differently if the shareholders' interests justified such a course."); 2 ARTHUR FLEISCHER, JR. ET AL., TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 14.04[A], at 14-87 (2016) ("[N]ot sharing confidential information with a competitor may not raise an issue of bad faith, particularly in a context where the seriousness of the competitor's interest is in doubt."); KLING & NUGENT, *supra* ("Unequal treatment of bidders *is* permitted, so long as there is a rational basis for the discriminatory action such that the best interests of shareholders are advanced."). And outside of *Revlon*, a board may choose to explore a strategic merger that is not a change in control without any per se requirement to consider merging with other parties.

173. In Sweden, Spain, and the United Kingdom, sellers are required to make the same due-diligence information available to any bona fide potential bidder. BONELLI EREDE PAPPALARDO ET AL., *supra* note 169, at 131, 134, 139. German and Dutch laws are silent as to this requirement, but targets often do disclose equal information to other bidders. *Id.* at 123, 128. No obligation to share the same information exists in Italy. *Id.* at 126. *See also, e.g.*, Laurence Levy et al., *Public Mergers and Acquisitions in the UK (England and Wales): Overview*, PRAC. L., http://us.practicallaw.com/8-502-2187 (last updated Sept. 1, 2015) (noting that the City Code on Takeovers and Mergers requires a target company "to provide, on request, equal access to information to a competing bidder which may enable a hostile bidder to obtain non-public information that would otherwise be inaccessible to it in the absence of a competing (for example, recommended) bidder being granted access to non-public information"); HERBERT SMITH LLP ET AL., REGULATION OF PUBLIC M&A IN EUROPE 18 (Greg Mulley & Stephen Wikinson eds., 2011), http://www.herbertsmithfreehills.com/-/media/HS/L221211_Guide%20to%20public%20MandA%20in%20Europe%20-%207.pdf (noting the same rule exists in France).

174. *Cf.* Clas Bergström et al., *The Regulation of Corporate Acquisitions: A Law and Economics Analysis of European Proposals for Reform*, 1995 COLUM. BUS. L. REV. 495, 519–20 (noting that Council Directive 88/627, 1988 O.J. (L 348) 62 (EC), http://eur-lex.europa.eu/eli/dir/1988/627/oj, which requires the publication of certain information when a major holding in a listed company is acquired, increases the costs to a potential bidder purchasing a significant fraction of the stock in order to more closely evaluate the potential target).

not involve a merger, but instead private sales of assets or the purchase of shares sufficient for control.[175] These private asset sales and takeovers by a tender offer, which are increasingly common in the European Union, typically lack the kind of detailed contractual protections and information-surfacing process that occurs in a friendly merger, which is the most common transactional form in the United States.[176]

And when changes of control occur by a transaction other than a

175. For example, one study of comparative merger control policies between the United States and the European Union found over 30,000 publicly announced mergers in the United States between 1990 and 2007 but only over 3,000 publicly announced mergers in the European Union during the same time period. Mats A. Bergman et al., Merger Control in the European Union and the United States: Just the Facts 3 (Mar. 4, 2010) (unpublished manuscript), http://ssrn.com/abstract=1565026. *See also* Moschieri & Campa, *supra* note 10, at 72 ("The dissimilarity [between the United Kingdom and other European countries] arises not only from regulations, which establish the requirements for the launch of a public tender offer and/or the limits and size of such offers, but also from the structural characteristics of the business environment, such as the ownership and governance structure of corporations and the degree of bank dependence to finance corporate transactions.").

In the United States, by contrast, the most common way of obtaining control over a public company is through a reverse-triangular merger or through a negotiated tender or exchange offer followed by a back-end merger. Nussbaum & Shawn, *supra* note 168, at 473–74. Further, "[u]nlike in many European jurisdictions that permit schemes of arrangement or amalgamations, no court proceedings are required to implement a merger in the US and creditors do not have the right to object unless specifically provided in the relevant debt agreements." *Id.* at 474.

176. A European bidder's ability to conduct diligence is generally more limited than that of a U.S. bidder. In France, Germany, Italy, the Netherlands, and Spain, takeover buyers often have to rely on publicly available information, especially when it comes to hostile offers, because "[p]re-takeover diligence . . . is usually limited in scope, and certainly more limited than due diligence on a private acquisition." BONELLI EREDE PAPPALARDO ET AL., *supra* note 169, at 119. *Accord id.* at 122–23, 125, 128, 131. In Sweden, pre-takeover due diligence is also limited, but "[t]he Takeover Rules provide that if the offeror requests a due diligence exercise, the board of the target must decide whether [and to what extent] the target company can, and should, participate in such an exercise." *Id.* at 134. In addition to allowing all potential bidders equal access to conduct due diligence, if the target company discloses any nonpublic, price-sensitive information to a bidder, it must also provide the same information to its shareholders and promptly disseminate it to the public. Where the consideration consists of the buyer's shares, the target company may also insist on its own due diligence review of the buyer. *Id.* Although due diligence in the United Kingdom is likewise limited in the event of a takeover, the Takeover Code specifies that "an offeror must not launch an offer until it is absolutely certain that it is able to carry the offer through." *Id.* at 139. "Therefore, if an offeror chooses not to carry out due diligence at all, it may be unable to rely on the conditions to the bid if the financial circumstances of the target turn out to be worse than expected . . . ." *Id.* Like in Sweden, U.K. target companies are required to provide equal access to information to any potential bona fide offeror and may request their own due diligence review where consideration is offered in the form of the buyer's stock. *Id*. U.K. sellers also can make their company documents available in a data room and negotiate to limit their liability for breach of warranty to those matters that were "fairly disclosed" in the data room. SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, *Asian M&A: Understanding the Differences Between English and US Approaches to Negotiated Acquisition Agreements*, *in* 2014 INSIGHTS 140, 140–41 (2014). The definition of "fair disclosure" is heavily negotiated and often based on a notion of whether a reasonable person reviewing the documents with reasonable care would be able to understand the information and its potential impact. *Id.* at 140.

merger, it is common for the buyer to have to tolerate an ongoing minority because the E.U. rules typically allow an owner to freeze out the minority only after achieving a very high ownership threshold.[177] Under Article 5 of the Takeover Directive, once a bidder holds a very large majority of the company's securities as the result of a takeover bid, it can squeeze out the minority shareholders by compelling them to sell their securities at a "fair" price.[178] In return, minority shareholders have the right to compel any bidder who obtains stock above a high threshold to buy them out at a fair price.[179] The thresholds for squeezing out the minority or triggering a sell-out right vary by member state, but all are above 90 percent, and therefore a bidder in the European Union is likely to have to accept having a small group of minority stockholders or the potential of having to buy them out in an expensive way later.[180]

In the United States, various contractual protections give a buyer the potential to refuse to close a deal if the seller's condition is not materially the same as represented at signing, and these provisions also provide leverage for renegotiation. These provisions address risks that can occur as the parties in public company deals clear regulatory hurdles and seek to obtain stockholder approval. One protection included in almost all U.S. deals is the "material adverse change" clause, which empowers the buyer to refuse to complete the acquisition under certain specified circumstances.[181] This provision is usually expressed initially in the representations of the seller and then brought down to closing in the conditions to the buyer's

177. *See, e.g.*, Brian Baskin, *XPO Logistics Wins Round in Paris Court Over Norbert Dentressangle Shares*, WALL ST. J. (July 8, 2015, 6:49 PM), http://on.wsj.com/2bzdNcY (describing how the absence of an easy merger process and very high thresholds of 95 percent for securing the right to takeout the minority can allow an activist investor to put pressure on a bidder for control by buying a stake above 5 percent and holding out for a special price that exceeds even that which was paid for control to the controlling stockholder, using the leverage that the new majority owner will have to live with a minority).

178. Silja Maul & Athanasios Kouloridas, *The Takeover Bids Directive*, 5 GERMAN L.J. 355, 363–64 (2004).

179. *Id.* at 364. *See also* Marco Ventoruzzo, *Freeze-Outs: Transcontinental Analysis and Reform Proposals*, 50 VA. J. INT'L L. 841, 887 (2010) (noting that the mandatory bid mechanism under Article 5 of the Takeover Directive "provides that anyone who acquires control of a listed corporation must launch a tender offer on all the outstanding voting shares, including shares with limited voting rights. The price of the offer cannot be lower than the highest price paid by the bidder for the securities in a pre-determined period (between six to twelve months preceding the triggering event of the acquisition of control, according to the individual Member State)").

180. *See* Maul & Kouloridas, *supra* note 178, at 363–64.

181. In 2013, 99 percent of agreements for public deals included a right for the buyer to walk away from the transaction in the event of a material adverse change. MKT. TRENDS SUBCOMM., AM. BAR ASS'N, 2014 STRATEGIC BUYER/PUBLIC TARGET M&A DEAL POINTS STUDY 26 (2015).

obligation to close the deal. The definition of a "material adverse change" is intensely negotiated, and sellers are often able to carve out certain exceptions.[182] More specific representations and closing conditions are also common, which address company- and deal-specific issues and risks.[183] Such detailed contractual protections are still rare in the European Union.[184] When provisions like a material adverse change clause are

182. In fact, in 97 percent of the 2013 public deals where buyers secured a walk right, sellers were able to negotiate for exceptions to the material adverse change clause. *Id.* at 28. Examples of such exceptions include a material adverse change being caused by deal-specific changes, such as the seller's failure to meet analyst projections, or announcing the transaction, or the fact that the transaction is pending, as well as general changes, such as changes to the U.S. economy or the relevant industry, changes in legal or financial rules, or terrorist or war acts. Although nearly all sellers secure exceptions for such general changes, over 90 percent of buyers are able to include a requirement that the exception only applies if the general changes do not disproportionately affect the seller. *Id.* at 26–30. *See also* Robert Loewer, *Structuring European M&A Transaction Terms*, ACC DOCKET, Nov. 2014, at 40, 44 (2014) ("US M&A transactions in recent years have exhibited a trend towards more specifically defined [material adverse change] clauses featuring a number of carve-outs and exceptions. For European transactions completed in 2012, however, the CMS Studies show that the parties were less inclined to include specific exemptions, but instead chose to refer to general economic conditions . . . .").

183. Specific conditions vary:

> Typical conditions in an agreed merger or recommended tender offer [in the United States] include: receipt of the necessary stockholder vote, or in the case of a tender offer, minimum tender; competition approvals; no material adverse change in the business or financial condition of the target (and of the bidder where a material amount of equity is being issued); no legal impediment or prohibition on closing; material accuracy of representations and warranties contained in the acquisition agreement, and a 'bring-down' of those representations to closing; material compliance with interim undertakings; and, in the case of tax-free transactions, receipt of the appropriate tax opinion from counsel. Where material third-party consents are required for the bidder to realise the value it anticipates from the transaction, receipt of such consents, from a joint venture partner or key supplier or customer, may also be included.

Nussbaum & Shawn, *supra* note 168, at 479.

184. *See, e.g.*, BAKER & MCKENZIE, CUSTOMARY ISSUES IN NEGOTIATING ACQUISITION AGREEMENTS: GLOBAL COMPARISON 37 (2012) (observing that material adverse change conditions were uncommon in Germany, Italy, Spain, and the United Kingdom but were used in France and were often the focus of negotiation); Scott I. Sonnenblick & Andrew Cohn, *Contrast in MAC Clauses: Practice in the United States and Key European Jurisdictions*, N.Y. L.J., Oct. 25, 2010 (observing that material adverse change clauses are featured in the majority of U.S. M&As and are much less frequent in the United Kingdom, Germany, and France).

One report that analyzed 346 deals in 2014 found that material adverse change clauses were included in 14 percent of European deals, as compared with 94 percent of U.S. deals. CMS LEGAL SERVS. EEIG, CMS EUROPEAN M&A STUDY 2015, at 3, 6 (7th ed. 2015). Another study of ninety-seven European share-purchase agreements for deals over €25 million in 2008 found that 47 percent of European deals surveyed "included an express condition of closing that a material adverse change (MAC) shall not have occurred," which was markedly different from the United States, where 98 percent of the 106 surveyed acquisitions agreements included the provision. John F Clifford et al., *What's the Market for That Cross-Border Deal? The European, US and Canadian Private Target M&A Deal Points Studies*, 12 BUS. L. INT'L 139, 140–41, 144 (2011).

In the United Kingdom, although material adverse change clauses are commonly included in public deals, they are still relatively rare in private deals, where parties instead tend to use a "locked box" structure. In the "locked box" approach, the parties agree on a fixed price using financial statements of the target prepared at or even before the signing of the definitive agreement, and the included, they are often reviewed by E.U. regulatory agencies, and parties must draft the provision carefully so agencies do not consider it a subjective tool to be used in one party's (typically the buyer's) discretion.[185] So European bidders face the combined challenge of having limited ability to conduct pre-signing due diligence with the need to narrowly and objectively define a material adverse change provision. Notably, these clauses are difficult to use as an excuse not to close in the United States as well as in the European Union.[186] But the material adverse

target's ownership along with the associated risks are transferred to the buyer for the period between signing and closing. This approach typically excludes price adjustments at the time of closing, which is the approach more commonly taken in the United States. *See, e.g.*, CLIFFORD CHANCE US LLP, EUROPEAN M&A: ON THE ROAD TO RECOVERY? INSIGHTS FROM THE UNITED STATES 8 (2013), http://globalmandatoolkit.cliffordchance.com/downloads/United-States-2013.pdf (detailing the differences between the locked box approach and the "conventional completion accounts approach"); ERNST & YOUNG LLP, SHARE PURCHASE AGREEMENTS: PURCHASE PRICE MECHANISMS AND CURRENT TRENDS IN PRACTICE 4 (2d ed. 2012), http://www.ey.com/Publication/vwLUAssets/EY_TAS_-_Share_Purchase_Agreements_spring_2012/$FILE/EY-SPA%20brochure-spring-2012_eng.pdf ("Because there is no opportunity [with a locked box approach] to adjust the purchase price after closing (except through indemnities for breach of warranty, or other breaches of contract), typical concerns regarding the quality of the acquired net assets and the risk that the target suffers value erosion between signing and closing must be considered by the buyer when calculating the purchase price."); Katherine Ashton et al., *MAC Clauses in the U.K. and U.S.: Much Ado About Nothing?*, DEBEVOISE & PLIMPTON PRIVATE EQUITY REP., Fall 2013, http://privateequityreport.debevoise.com/the-private-equity-report-winter-2014-vol-14-number-1/the-private-equity-report-fall-2013-vol-13-number-4/mac-clauses-in-the-uk-and-us--------much-ado-abo__. *See also* CMS LEGAL SERVS. EEIG, *supra*, at 10 (finding an increase in the use of locked box mechanisms in Europe, especially in France, Southern Europe, German-speaking countries, and the United Kingdom).

185. In Germany, the offeror can show any contemplated conditions to the German financial regulatory authority, FFSA, before including them in an offer in hopes of avoiding future scrutiny, and an offer may not be subject to subjective conditions. BONELLI EREDE PAPPALARDO ET AL., *supra* note 169, at 123, 177. In Italy, if a material adverse change clause is drafted broadly and open to subjective interpretation, the Italian authority, CONSOB, may investigate the offeror's use of the provision. *Id.* at 180. In the Netherlands, a bidder invoking the material adverse change clause may escape agency scrutiny but could face litigation by the seller's stockholders. *Id.* at 182. In Spain, the offeror is required to obtain prior approval from the Spanish authority, CNMV, to terminate its bid, and the agency is generally unlikely to grant such consent. *Id.* at 185. In Sweden, where there is a growing trend to condition a bid on the non-occurrence of a material adverse change to the seller's financial position, results, and sales, the Securities Council requires that the provision adhere to objective standards. *Id.* at 187–88. In the United Kingdom, a bid may not be subject to conditions the fulfillment of which is within the sole discretion of one of the parties—unless it is not practicable to specify all of the factors on which the condition depends, such as a condition to receive "satisfactory" regulatory clearance. *Id.* at 192. This contrasts with the treatment of like conditions in the United States:

> Transactions in the US market may be conditioned on any terms agreed between the bidder and the target. In the case of a hostile tender offer, the bidder likewise can attach any conditions it deems appropriate. Conditions can be based on the discretion or judgment of the bidder, or can be 'objective' and factual in nature.

Nussbaum & Shawn, *supra* note 168, at 479.

186. In the United Kingdom, for example, it is difficult to terminate an offer for a breach of a material adverse change clause:

change clause in the United States is just a stopgap provision in an overall process of negotiation, where the buyer has access to substantial due diligence,[187] the parties can price key business risks, and the parties can continually deal with specific issues. Nor are litigation outcomes over the invocation of a material adverse change clause the full story of its utility to buyers. The leverage a material adverse change clause gives to a buyer can pressure the seller to go back to the bargaining table and negotiate adjustments to the deal price or other contractual provisions.[188]

American buyers are also commonly protected by the condition that the representations and warranties also remain true at the closing of the transaction, although there is intense bargaining over the extent to which that must be so.[189] This requirement can be used by a buyer to walk away from the deal or to allocate liability to the seller.[190] There are negotiations

> The [U.K. Takeover] Code provides that a bid can only be terminated if the relevant breach of condition is of material significance to the offeror in the context of the bid. This is a high hurdle: for example, in one instance the [Takeover] Panel determined that the events of 11 September 2001 in the USA were not sufficiently material in the context of a bid subject to a "material adverse change" condition.

BONELLI EREDE PAPPALARDO ET AL., *supra* note 169, at 194.

It has likewise not been easy for American buyers to invoke the material adverse change clause to terminate a deal. The Delaware Court of Chancery has emphasized that a material adverse effect must be a long-term effect as opposed to a short-term failure to meet a financial target, observing that a material adverse change provision is "best read as a backstop protecting the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant matter." *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 68 (Del. Ch. 2001). *See also* Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008) ("A buyer faces a heavy burden when it attempts to invoke a material adverse effect clause in order to avoid its obligation to close.").

187. *See* Nussbaum & Shawn, *supra* note 168, at 475 ("Other than compliance with third-party confidentiality obligations and the limitations of antitrust law, there are no limitations on the scope of due diligence that may be provided to a bidder. Prudence and federal securities laws dictate that such information should be shared only pursuant to a non-disclosure agreement. The antitrust laws prohibit the sharing of [product price–sensitive] or certain other competitive information between direct competitors. . . . But this, as well as other sensitive competitive information, may be separated and placed in a 'clean room' review, access to which is limited to certain employees and outside advisors.").

188. *See, e.g.*, David Cheng, *Interpretation of Material Adverse Change Clauses in an Adverse Economy*, 2009 COLUM. BUS. L. REV. 564, 604 ("The handful of MAC cases that actually result in a court decision each year may not be representative of the overall success rate of MAC claims. Although a Delaware court has never ruled for a buyer in a MAC case, the number of claims that are successfully settled out of court ensure that these clauses remain tremendously useful for buyers.").

189. *See* 2 KLING & NUGENT, *supra* note 172, § 14.02[1], at 14-7 to -8 (noting that "attorneys often seem to get surprisingly agitated" over "whether the bringdown [condition] should require that the representations and warranties be true when made at signing" and that "[f]rom the Buyer's point of view, the only way to keep the Seller 'honest' is to put the risk of the Buyer having a 'walk right' if a representation had been false when made, even if subsequently true, on the Seller").

190. In the United States, the buyer typically secures a bring-down provision. *See id.* § 14.02[1], at 14-7 n.1 ("It is a very rare transaction [in the United States] where the Buyer's obligations are *not* conditioned on the Company's or the Seller's representations and warranties being true at closing.");

and debates among practitioners over gradations in this context, such as whether the representations and warranties must be "accurate in all material respects."[191] To wit, it is now common (i.e., it is current "market") for representations and warranties at closing to distill down into a material adverse change clause whereby a breach of the representations and warranties can only excuse closing if it is so serious as to amount to a material adverse change.[192] But what is "market" in terms of contracting fluctuates over time and can be varied in any period in a deal-specific way depending on the respective leverage of the parties.[193] And although some studies indicate that there is convergence between the United States and the European Union in contracting to ensure that representations and warranties remain accurate at closing, it is still relatively uncommon for European sellers to agree to include all of the representations and warranties or to deliver a bring-down certificate.[194]

see also id. at 14-7 ("From a business point of view, the condition that the other party's representations and warranties be true and correct at closing is generally the most significant condition for Buyers and, if the purchase price is payable in securities of the Buyer or its parent company, for Sellers as well. This is what protects each party from the other's business changing or additional, unforeseen risks arising before closing.").

191. MKT. TRENDS SUBCOMM., AM. BAR ASS'N, *supra* note 181, at 18.

192. For example, the parties may agree to exclude any inaccuracies in the representations and warranties made by the seller that "[either] individually or in the aggregate, do not and could not reasonably be expected to result in a [material adverse change]." *Id.* But this creates a risk to the buyer that inaccuracies in the seller's individual representations and warranties that are excused as immaterial could, when taken together, result in a material adverse change. To guard against this risk, the buyer can negotiate for a "double materiality" carve-out, ensuring that the materiality qualifications contained in individual representations and warranties will be disregarded for purposes of the bring-down provision. *Id.* at 19. Thus, the materiality qualifiers to those representations and warranties would only be considered to determine whether there has been a material adverse change. *Id.*

193. According to a recent study of public deals, in 2013, 93 percent of deals surveyed included a materiality qualifier that is generally favorable to the seller, but many of those deals included exceptions for representations that are fundamental to the buyer. *Id.* at 20–22. For example, 90 percent of deals included a requirement that the seller's representation of its capitalization be true either in all material respects or in all respects with the exception of any de minimis inaccuracies. *Id.* at 22. The study also showed that 93 percent of deals included the buyer-friendly "double materiality" carve-out to disregard materiality qualifications in the individual representations and warranties for purposes of the bring-down provision. *Id.* at 20.

194. *See, e.g.*, BAKER & MCKENZIE, *supra* note 184, at 41–42 (observing that in France, Germany, Italy, Spain, and the United Kingdom, it is common to repeat the representations and warranties at closing, but that a bring-down certificate is not commonly provided); David Innes, *Olympic Update: The U.S. and the UK Battle for the Gold Choice on Law*, DEBEVOISE & PLIMPTON PRIVATE EQUITY REP., Fall 2013, http://privateequityreport.debevoise.com/the-pe-report-spring-2012-vol-12-no-3/olympic-update-the-us-and-the-uk ("In the UK, it is unusual for representations to be repeated (or 'brought down') at closing, although, as a compromise, sellers may agree that a small number of fundamental representations, such as with respect to title and legal capacity, are brought down to closing."); WINSTON & STRAWN LLP, M&A ACROSS THE ATLANTIC: WHAT A UNITED STATES

When it comes to the substance of the representations and warranties, American sellers are willing to agree to more than their European counterparts. For example, almost all U.S. agreements include a representation that the seller has no undisclosed liabilities, whereas such a representation is less common in Europe.[195] Also, unlike in the United States, European warranties are often further restricted to matters contained in public filings or formal due diligence reports.[196] In Europe, warranty and indemnity insurance is therefore an increasingly popular way to compensate the buyer for unknown risks that are not covered by the seller's limited contractual liability.[197]

BUYER SHOULD EXPECT IN THE UNITED KINGDOM 1 (2015), http://cdn2.winston.com/images/content/9/2/v2/92528/MA-US-buyer-UK-01-08-15.pdf (noting that U.K. sellers are reluctant to agree to a bring-down if there is a gap between signing and closing and that they may agree to reinforce only those representations and warranties over which they have direct control).

Although some may view the closing certificate as superfluous when there is a bring-down condition, the certificate offers important additional protection. *See, e.g.*, 2 KLING & NUGENT, *supra* note 172, § 14.02[5], at 14-12 ("[T]he certificate is needed in addition to the bringdown. How else will the Buyer know that the representations are true at closing and the bringdown condition is satisfied? Absent receiving the officers' certificate the Buyer could close, find out that there was a representation not true at closing and be told by the Seller when it complains (i.e., seeks indemnification): 'No one told you that the condition was satisfied. We knew it wasn't; we assumed you were waiving it.' Indeed the existence of such a condition may be the only reason either party learns of any such inaccuracy. Moreover, the mere act of an officer signing his name (and running some risk of potential liability if the certificate is false, particularly if the officer knows it) will make people more careful and more apt to find out about misrepresentations." (footnote omitted)).

Some recent data suggest more convergence in the use of closing conditions. One study shows that, in 2014, 58 percent of E.U. deals surveyed had a delay between signing and closing. In these transactions, closing conditions were included 91 percent of the time. CMS LEGAL SERVS. EEIG, *supra* note 184, at 27. *See also id.* (finding that the most common closing conditions were regulatory approval and compliance (32 percent) but that there were also a high number of "other" conditions, including confirmatory due diligence after signing, restructuring (e.g., carve-outs) after closing, and third-party consents (especially waiver of change of control rights)).

195. *See, e.g.*, Clifford et al., *supra* note 184, at 144 (finding that almost every U.S. acquisition agreement out of the 106 surveyed from 2008 included a representation that the seller was not aware of any company liabilities other than those disclosed or reserved against in its financial statements as compared with only 40 percent of the 97 European agreements surveyed, noting that European buyers more typically rely solely on the seller's financial statements to gauge liability).

196. *See, e.g.*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, *supra* note 176, at 141 ("It is also not uncommon in English and European M&A for the warranties of the seller to be limited by additional matters, which would be very unusual in a typical sale and purchase agreement in the United States. For example, it is common for the warranties to be given subject to matters contained in the financial statements and other public filings or public records of the target. Furthermore, in sell-side auctions, where it is reasonably common in Europe for the seller's accounting and other advisors to prepare 'vendor due diligence reports' which are shown to buyers, warranties are often qualified as to matters 'fairly disclosed' in the vendor due diligence reports.").

197. *See, e.g.*, CMS LEGAL SERVS. EEIG, *supra* note 184, at 6 (finding that the sellers' liability cap is less than 10 percent of the purchase price in 81 percent of deals with warranty and indemnity insurance, as compared with 9 percent of deals without such insurance); WINSTON & STRAWN LLP,

In the United States, parties also use deal protections to create incentives for the parties to facilitate consummation of the transaction. For example, American buyers often secure a termination fee that the seller has to pay if it does not go through with the deal.[198] U.S. sellers in turn can negotiate for the buyer to owe a reverse termination fee if it terminates the deal for another transaction, fails to get board or shareholder approval, incurably breaches its representations and warranties or covenants, or is unable to obtain regulatory approval or financing.[199] These deal protections provide some comfort to corporations; if they take the high-stakes risk of a public M&A deal, they will get some protection if, as can happen, another buyer ends up getting the deal, the regulators say no, or the seller's stockholders choose not to accept the offer. This comfort, many think, encourages more value-maximizing deals, to the benefit of stockholders.[200]

By contrast, the E.U. system is not set up to facilitate the voluntary exploration of M&A transactions. If a strategic competitor wishes to explore a friendly transaction in the European Union with an industry rival, it will not only know that its competitors are likely to get access to the same due diligence, but it will also know that it is unlikely to be able to receive any compensation if the deal is not consummated. Throughout much of the European Union, termination fees and other deal protections are severely limited.[201] This reality might be thought to deter bidders from

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WARRANTY AND INDEMNITY INSURANCE IN UK M&A DEALS 1 (2015), http://interact.winston.com/reaction/Corporate/ClientBriefingNewsletter/2015/Warranty_Indemnity_Insurance_JUL2015/Warranty_Indemnity_Insurance_JUL2015.pdf (observing that obtaining warranty and indemnity insurance has become increasingly common in the U.K. M&A market over the last two years).

198. *See* Albert O. "Chip" Saulsbury, IV, *The Availability of Takeover Defenses and Deal Protection Devices for Anglo-American Target Companies*, 37 DEL. J. CORP. L. 115, 148 (2012) ("The majority of merger agreements in the U.S. . . . include termination fee provisions."). The amount of the termination fee is reflected as a percentage of the deal price and averages between 3 and 4 percent. *See, e.g.*, Micah S. Officer, *Termination Fees in Mergers and Acquisitions*, 69 J. FIN. ECON. 431, 441, 443 tbl.2 (2003) (finding that the average amount of termination fees in U.S. deals between 1998 and 2000 was 3.80% of the deal price).

199. According to one study of 102 contracts inked between 2003 and 2004, these were the most common triggers for the reverse termination fee, in order of their frequency. Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 VAND. L. REV. 1161, 1194–95 (2010).

200. Saulsbury, *supra* note 198, at 115 ("[T]he availability of takeover defenses and deal protection devices under Delaware corporate law gives directors of U.S. target companies more negotiating power and allows them to generate higher premiums for shareholders in M&A transactions compared to their colleagues in the U.K.").

201. *See, e.g.*, CLIFFORD CHANCE US LLP, *supra* note 184, at 9 ("It is not market practice to find break fees on M&A transactions in France, Germany, Hungary, Ukraine, Belgium and Luxembourg. In France, a target may agree a break fee with a white knight on a hostile bid and, although while rare, if agreed, break fees do not generally exceed 2% of the deal value. In the Netherlands and Spain, break

making a bid because the bidder is not only limited from raising its bid, but the bidder also knows that it will not be reimbursed for the high costs of pursuing the transaction if its bid is not successful.[202]

Even if a bidder is willing to make a bid for a European corporation, that bidder may face the most insurmountable frustrating action of all: the intervention of a sovereign government intent on blocking the bid for reasons having nothing to do with stockholder welfare. Many takeover bids have been thwarted not by action of the target board, but instead by sovereign governments.[203] In the case of Sanofi-Aventis, for example, the target was the French company, Aventis.[204] Its board thought that the hostile bid from fellow French pharmaceutical company, Sanofi, was inadequate. The Aventis board then did what scholars like Lucian Bebchuk would urge it to do: it sought to secure the highest value for stockholders and put Sanofi under pressure to increase its bid by working with Novartis, a Swiss pharmaceutical company.[205] But French government officials, who had made it clear that they wanted the Sanofi bid to prevail so that a French "national champion" could be created, placed several threatening phone calls to Novartis.[206] The government also pressured the Sanofi chief executive officer ("CEO") to raise the bid and the Aventis CEO to accept

fees are used and are typically limited to 1% of deal value."); Saulsbury, *supra* note 198, at 154 (noting that takeover defenses, including no-shop provisions and termination fees greater than 1 percent of the purchase price, are strictly prohibited in the United Kingdom).

202. In response to the original form of this Article's hypothesis, that the comparative lack of deal protections available to buyers in the European Union might explain the lower rate of deal volume, distinguished scholars focused on studying the effect of the United Kingdom's decision in 2011 to make termination fees even less available than under its previously strict regime. Guhan Subramanian and Fernán Restrepo found that the incidence of deals in the United Kingdom decreased significantly after the 2011 reform relative to other European economies in the Group of Ten ("G-10"). Fernán Restrepo & Guhan Subramanian, The Effect of Prohibiting Deal Protection in M&A: Evidence from the United Kingdom 1 (Aug. 2016) (unpublished manuscript), http://ssrn.com/abstract=2820434. Using a database of public company M&A deals in the United Kingdom and a control group of other European G-10 countries from 2000 to 2015, the study found that before this reform approximately 50 percent of all deals in the sample involved targets from the United Kingdom. After the reform, this proportion fell to approximately 34 percent. *Id.* at 11. Similarly, the authors found that the post-reform incidence-rate ratio of U.K. deals to the average number of deals per quarter in the countries of the control group was approximately 50 percent of the pre-reform ratio. *Id.* These results indicate that potential bidders are deterred from initiating M&A deals when they do not have the security of a termination fee to compensate them if the deal is unsuccessful. *See id.* at 17.

203. *Cf.* Hopt, *supra* note 165, at 255 ("The new board neutrality regime may even result in the emergence of new obstacles in the market of corporate control. The number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large.").

204. *See* Anita Raghavan et al., *Sanofi to Swallow Aventis in a Deal Set at $65 Billion*, WALL ST. J. (Apr. 26, 2004, 12:01 AM), http://on.wsj.com/2bzxIsw.

205. *Id*.

206. *Id*.

it.[207]

As another example, the Spanish national government impeded the bid of a German utility, E.ON, to purchase a Spanish utility, Endesa, for reasons entirely unrelated to target stockholder welfare, conduct that was so inconsistent with Spain's own stated approach to company law that its stock market regulator resigned in protest.[208] Part of the problem for E.ON was that it not only faced opposition from the Spanish government, but it also was prevented from raising its bid more than once, and then only within five business days after the initial bid.[209] It was therefore trapped in a game it could not win and in which the business merits for target stockholders was not the focus of government action. Numerous other examples of this government intervention exist.[210] In the United States, a committed bidder need only fear state intervention in the form of antitrust review for large transactions, review by the Committee on Foreign Investment in the United States for certain transactions with foreign buyers,[211] and occasional review by state or federal agencies that regulate industries like the banking industry.[212] Whether the outcomes of this

207. *Id*.

208. *See* Leslie Crawford, *Spain's Market Regulator Resigns*, FIN. TIMES (Apr. 25, 2007), http://on.ft.com/2bzB5yS.

209. *See* John Close, *Spain's Labyrinth: The Endless Pursuit of Endesa*, 7 M&A J. 2 (2007), *reprinted in* M&A INTERNATIONAL MEDIA AWARDS 2007: WINNING ARTICLES BOOK 46, 47.

210. *See, e.g.*, Stephen C. Hicks et al., *International Business and Law in Cross-Border Transactions: A European Perspective*, 34 SUFFOLK TRANSNAT'L L. REV. 347, 356–57 (2011) ("Despite cross-border regulation, European member-states have frequently stepped in to favor their national champions. . . . [R]ecently, Portugal attempted to use a 'golden share' to block the sale of Portugal Telecomm's interest in Vivo, the Brazilian cellular phone company, to Spain's Telefonica."); Robert Profusek et al., *Foreign Investments into the EU: Demystifying National Protectionism*, M&A LAW, Sept. 2014, at 10, 10, 12 (discussing examples where E.U. member states threatened or implemented protectionist measures against foreign takeovers of national companies, including Italy's action to prevent a Spanish motorway operator from acquiring its Italian counterpart and the British government's intervention to prevent Pfizer from acquiring AstraZeneca); *'Protectionism' in M&A: A Mixed Picture*, ALLEN & OVERY: PUBL'NS (Mar. 16, 2015), http://www.allenovery.com/publications/en-gb/Pages/Protectionism-in-MA-A-mixed-picture.aspx (noting that after Kraft, a U.S. company, bid for Cadbury, the U.K. government introduced rules that would give more power to targets to defend hostile bids and observing that the French government, which was openly opposed to the proposed acquisition of French utility company Alstrom's electricity generation assets by U.S. conglomerate General Electric, expanded controls of foreign investments in energy supply and solicited Siemens, a German company, to make a competing offer).

211. In America, transactions that "could result in control of a U.S. business by a foreign person" may be subject to review by the Committee on Foreign Investment in the United States to evaluate their implications for national security. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY: RES. CTR., http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx (last updated Dec. 20, 2012).

212. *See* 2 TIMOTHY R. DONOVAN & JODI A. SIMALA, SUCCESSFUL PARTNERING BETWEEN

review are right or wrong, they are not focused on economic protectionism. As the Sanofi-Aventis and E.ON-Endesa examples demonstrate, that has not been the experience in the European Union, where laws designed for other purposes have been twisted to allow government to block deals on protectionist grounds to keep or create a national champion.[213] Contrast this with the United States, a great beer-drinking nation whose iconic companies, including Anheuser-Busch, have been sold to international buyers, leaving corporate lilliputians Sam Adams and Yuengling as the biggest American-owned beer companies.[214]

The risk of unpredictable government intervention that a bidder faces when attempting to acquire an E.U. company comes on top of the greater rights that member state governments gives to other corporate constituencies. In several E.U. member states, including Germany and several Scandinavian nations, board seats are allocated to representatives of labor.[215] And recall that most public companies are required to consult the works councils in the event of a takeover.[216] Target management must also consult the works council in connection with a change of control.[217] The Transfers of Undertakings Directive prevents companies from dismissing

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INSIDE AND OUTSIDE COUNSEL § 41:20 (2016) ("In the United States, the potential competitive impact of proposed M&A transactions that meet certain criteria is reviewed by the Federal Trade Commission (FTC) or the Antitrust Division of the U.S. Department of Justice (DOJ). Sometimes there is also review by state attorneys general or other state or federal regulatory boards for specific industries (e.g., state departments of insurance or the Federal Communications Commission).").

213. *See supra* note 210.

214. *See* John Kell, *Is Yuengling Now Bigger Than Samuel Adams?*, FORTUNE (Mar. 31, 2015, 3:40 PM), http://for.tn/19EUlI5 ("Yuengling in 2014 officially toppled Samuel Adams brewer Boston Beer has [sic] the largest producer of craft beer in the United States, according to the latest data compiled by the Brewers Association."); David Kesmodel et al., *Anheuser, InBev Reach a Deal for $52 Billion*, WALL ST. J. (July 14, 2008, 11:59 PM), http://on.wsj.com/2bJWcmd ("Anheuser-Busch Cos. agreed to be acquired by InBev NV for about $52 billion, creating the world's largest beer maker and placing an iconic American company in the hands of a Belgian-Brazilian giant.").

215. *See, e.g.*, Dinh, *supra* note 23, at 981 (noting that in Germany, which has a two-tiered board structure, a managing board and a supervisory board, labor representatives must hold at least half of the seats on the supervisory boards of large companies); Licht, *supra* note 21, at 735 ("In France, Ireland, Portugal, and other EU Member States, the law includes aspects of employee participation in corporate governance.").

216. *See* European Council Directive 2001/23, 2001 O.J. (L 82) 16 (EC), http://eur-lex.europa.eu/eli/dir/2001/23/oj; CIOFFI, *supra* note 163, at 166 (noting that under Germany's Securities Acquisition and Takeover Act, the bidder and the target's management are required to disclose information to the works council or the employees about the terms of the offer and its implications for the firm's employees).

217. *See* Cunningham, *supra* note 12, at 1142 ("Management must consult with [works] councils on major corporate policy affecting labor interests, including layoff proposals and, in many cases, potential changes of control. Galvanizing this labor element in the corporate governance model, the EC also requires that employment contracts follow business assets when sold as a going concern, so that a buyer of such assets remains subject to those agreements by operation of law.").

employees in connection with a transaction by requiring that any worker's employment contract will pass over to the new owner by operation of law[218] and requiring employers to provide an independent reason for a dismissal.[219] In addition, in the event of a planned change of ownership, the company must inform its employees, directly or through their representatives, of the time and reason for the transfer as well as of the implications of the transfer for the company and the employees.[220]

Thus, any bidder in the European Union knows that it must do more than please the stockholders; it must also reach more of an accommodation with labor than is the case in the United States.[221] Regardless of the merits of these policies, they may deter bidders from acquiring E.U. companies, and a bidder who fails to respect the enhanced worker protection regime may find itself in regulatory peril. For example, in 2009, Kraft Foods launched a campaign to acquire Cadbury PLC, a U.K. corporation.[222] During discussions, Kraft announced that it intended to keep a large factory open that Cadbury had intended to close, but shortly after the takeover was completed, Kraft reneged on its promise.[223] This decision led to public outrage, criticism from the U.K. Takeover Panel, the government body charged with regulating takeovers in the United Kingdom, and a parliamentary select committee hearing on the acquisition.[224]

218. European Council Directive 2001/23, art. 3, § 1, 2001 O.J. (L 82) 16, 17 (EC), http://eur-lex.europa.eu/eli/dir/2001/23/oj ("The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.").

219. *Id.* arts. 4–5, at 17–18. Article 4 provides that employees may not be dismissed solely because of the business transfer, but permits "dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce." *Id.* art. 4, § 1, at 17. Article 5 also excuses dismissals in the case of the company's insolvency. *Id.* art. 5, § 1, at 18.

220. *Id.* art. 7, at 18–19 (requiring employers to inform employee representatives of information about the transaction, including the proposed date of transfer, the reasons for the transfer, the legal, economic, and social implications of the decision, and any measures envisioned that would affect the workers).

221. *See* Nussbaum & Shawn, *supra* note 168, at 483 ("There are no required pre-notification or consultation provisions under US or state law relating to employees. Some collective bargaining agreements (CBA) may contain provisions that provide union employees with certain benefits, or the right to re-negotiate, their CBA in the event of a change in control. These matters are contract-specific, however, and not required as a matter of law.").

222. Scott Moeller, *Case Study: Kraft's Takeover of Cadbury*, FIN. TIMES (Jan. 9, 2012, 7:55 PM), http://on.ft.com/z8FTfv.

223. Slaughter and May et al., *Kraft Criticism and Takeover Code Consultation*, PRAC. L. (June 30, 2010), http://us.practicallaw.com/3-502-6376.

224. *Id.*; Zoe Wood, *Kraft Refuses to Extend Pledge to Protect Cadbury Jobs*, GUARDIAN (Mar. 15, 2011, 16:24), http://www.theguardian.com/business/2011/mar/15/cadburys-kraft-jobs-irene-rosenfeld.

For all of these reasons, the European Union is not an especially welcoming environment for bidders.[225] Scholars and commentators tend to ignore how important this issue is to the incidence of M&A transactions. The putative non-frustration regime is linguistically misleading because the overall dynamic that bidders confront in the European Union is, in many ways, more frustrating, unpredictable, and costly than in the United States.

C. THE AFFIRMATIVE DUTY TO MAXIMIZE STOCKHOLDER WEALTH IN A CHANGE-OF-CONTROL TRANSACTION IN THE UNITED STATES

As for the interests of target stockholders themselves, another factor is too often ignored. The fact that managers of an E.U. company cannot frustrate a bid does not mean that the board has any affirmative duty to advance the interests of stockholders by seeking out valuable M&A opportunities, attempting to maximize the sale value of the company when a takeover bid materializes, or putting the interests of stockholders above

225. On the point of being bidder friendly, it is worth noting that the United States's predominant corporate law has what is widely regarded as a weak antitakeover statute. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1766 (2006) ("To the contrary, the Delaware takeover statute is generally recognized as at worst mild, and perhaps even irrelevant, in its effect on hostile takeovers, and has had a far greater negative impact on friendly deals, as the limited case law demonstrates."); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 625 (2003); A. Gilchrist Sparks, III & Helen Bowers, *After Twenty-Two Years, Section 203 of the Delaware General Corporation Law Continues to Give Hostile Bidders a Meaningful Opportunity for Success*, 65 BUS. LAW. 761, 769 (2010) ("Section 203 is less restrictive than other state antitakeover statutes."). In fact, Delaware practitioners are not aware of any takeover that has ever been impeded by it. *See, e.g.*, Lawrence A. Hamermesh & Norman M. Monhait, *A Delaware Response to* Delaware's Choice, 39 DEL. J. CORP. L. 71, 74 (2014) ("[W]e are unable to find any reported decisions in this century referencing a challenge to Section 203's constitutionality. . . . [I]t seems to us that if the statute were [a] great . . . barrier to hostile tender offers . . . someone in the last fourteen years would have advanced such a claim. Second, in our experience when corporate practitioners perceive DGCL provisions as creating impediments to goals their clients desire to achieve, they convey those concerns to Delaware lawyers they know. We can recall no instance in the last dozen or so years of any member of Council having conveyed a suggestion from a professional colleague that Section 203 bears reexamination because it unduly hampers beneficial hostile takeover bids."). The antitakeover statute simply provides that if a bid proceeds without target-board approval and the bidder gets more than majority control, it may not do a back-end merger within three years unless it is able to acquire more than 85 percent of the shares. DEL. CODE ANN. tit. 8, § 203 (2016). But as I have noted, it is common in the European Union for any bidder seeking control to have to live with a minority because unless a bidder acquires at least 90 percent to as much as 95 percent of the shares in most E.U. jurisdictions, it cannot take out the remaining shares and must continue to allow the minority to remain as stockholders. *See* Maul & Kouloridas, *supra* note 178, at 363–64.

The view of the legal community that Delaware's antitakeover statute has never in fact been known to block a takeover was also recently embraced by distinguished scholars in a detailed review of studies of antitakeover statutes. In that review, Emiliano Catan and Marcel Kahan find that when all factors are considered, there is no reliable evidence that antitakeover statutes in the United States have had a potent antitakeover effect, discussing Delaware in particular. Emiliano M. Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 STAN. L. REV. 629, 665 (2016).

those of other corporate constituencies when a change-of-control transaction occurs, all of which hold true under U.S. corporate law.

Nor does the non-frustration rule come with any corresponding duty to create an auction to make sure that the prevailing bidder pays the highest price. To the contrary, the inability of the board to engage in frustrating action largely prevents a board from running an auction, as it lacks any real ability to say no to the first bidder, materially delay the procession of a qualifying offer, or offer a winning bidder deal protections to provide an incentive for the other bidders to pay their full reserve price.[226]

This is very different from the flexible approach embodied in Delaware law, which asks directors to address change-of-control situations by focusing on what is best for the stockholders and requiring, in any change of control, that the directors take steps to ensure that the stockholders get the best value.[227] To be sure, the ability of U.S. boards to use a poison pill or other defenses to say no to hostile acquirers may mean that stockholders will be denied access to a bid in some situations, but that cost must be compared with the corresponding benefit to target stockholders that results when a properly motivated board is able to act as a negotiating agent, generate market competition, and extract top dollar for the stockholders.[228] The leverage of the ability to say no to a hostile bid, if only for a short period of time, and to offer deal protections is largely absent in the European Union.[229]

226. *See* David Kershaw, *The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition*, 56 INT'L & COMP. L. Q. 267, 270 (2007) ("[O]nce the company is placed in play [takeover defenses] allow the board to determine a sale strategy and control the sale process: a controlled process is likely to result in a higher premium than an uncontrolled auction."). *See also, e.g.*, Close, *supra* note 209, at 47 (discussing Spanish rules that hampered Endesa from running an effective auction, including the non-frustration rule, the lack of withdrawal rights, a limit on raising its bid, and a rule that prevented its bid from having a timing advantage over a competitor bid).

227. *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 44 (Del. 1993) ("In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end."); Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when a change of control is inevitable, the board is duty bound to maximize "the company's value at a sale for the stockholders' benefit").

228. *See* Kershaw, *supra* note 226, at 270 (observing that takeover defenses "give the board greater bargaining power which may, depending on the particular circumstances, enable them to obtain a price that exceeds the board's reservation price and to extract a greater share of any deal synergies").

229. Carsten Gerner-Beuerle et al., *Is the Board Neutrality Rule Trivial? Amnesia About Corporate Law in European Takeover Regulation* 5–6 (London Sch. of Econ. & Political Sci., LSE Law, Working Paper No. 3/2011, 2011) https://www.lse.ac.uk/collections/law/wps/WPS2011-03.pdf (describing the role that the non-frustration rule plays in preventing the board from resisting hostile bids and observing that even in jurisdictions where the non-frustration rule does not exist, many companies

In addition, the U.S. system gives boards of directors the contractual and fiduciary flexibility to explore friendly M&A transactions at a comparatively lower cost. Due diligence can proceed on the basis of voluntary arrangements and does not trigger any broad right to share information with any industry player wanting to see the recipe for the secret sauce.[230] Parties can thus evaluate regulatory issues, material liabilities, and other important considerations when entertaining bids. Deal protections can be awarded to parties that make firm contractual commitments that have the potential to instill confidence in other bidders and to induce topping bids.[231] Parties that agree to be sold but are not acquired because of a lack of regulatory approval can receive compensation in the form of reverse termination fees.[232] These examples could go on, but they all highlight the reality that U.S. corporate law facilitates voluntary M&A transactions.

In addition to legal doctrines that are highly protective of stockholders in the United States, such as *Revlon*[233] and *Unocal*,[234] the strong voting rights given to target-company stockholders mean that there is an opportunity for friendly deals to be tested by competitors.[235] Because target-side stockholders are unlikely to approve a deal when a higher price is available elsewhere, even friendly buyers feel strong pressure to pay a

have a controlling shareholder with a large holding in the company, and as such, a hostile takeover is not possible as control is not available without agreement of the controller).

230. *See supra* note 172.

231. *See* 1 KLING & NUGENT, *supra* note 172, § 4.04[4], at 4-58 to -59 (noting that third parties may require that the target enter into an acquisition agreement with a lock-up option or other deal protections as a condition to entering the fray and that the board would be justified in acquiescing so long as it is convinced that the protections are necessary to induce the bid and that the bid is better for stockholders); Afsharipour, *supra* note 199, at 1175 ("Deal protection devices have long been blessed by the Delaware courts . . . ."). *See also* Stephen M. Bainbridge, *Exclusive Merger Agreements and Lock-Ups in Negotiated Corporate Acquisitions*, 75 MINN. L. REV. 239, 285 (1990) ("[B]ecause cancellation fees decrease the bidder's risk, management can demand appropriate consideration in return for granting such a provision, thus enhancing shareholder gains."); Heath Price Tarbert, *Merger Breakup Fees: A Critical Challenge to Anglo-American Corporate Law*, 34 L. & POL'Y INT'L BUS. 627, 708–10 (2003) (noting the five distinct ways "breakup fees benefit the overall economic environment").

232. *See* Afsharipour, *supra* note 199, at 1164 (noting that an increasing number of transactions provide for reverse termination fees in acquisition agreements, which are paid "by the buyer in the event the buyer cannot or does not complete the acquisition as specified in the agreement").

233. Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when the sale of a company is inevitable, the fiduciary duty of the directors of the target corporation is to secure the highest price for stockholders).

234. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985) (holding that a board of directors will receive business judgment rule protection when employing defensive measures that are reasonable in relation to the threat posed and are not employed to perpetuate themselves in office).

235. *See, e.g.*, 1 KLING & NUGENT, *supra* note 172, § 2.03, at 2-7 to -16 (discussing stockholder approval requirements for different acquisition types).

high price.

Because of those voting rights and related legal doctrines that protect stockholders, friendly deals typically contain fiduciary out provisions enabling the target to terminate the deal in favor of a higher bid.[236] As a result, in the United States, there has always been a healthy amount of deal jumping, where the original bidder loses because another bidder presented a more favorable bid.[237]

Today, deal jumping is less common than in the recent past. But there is a reason for that. Companies are now likely to sell only after conducting an extensive pre-signing market check involving both private equity and strategic bidders.[238] The blow to management from these successful efforts is tempered by incentive pay that rewards them for a favorable sale.[239] By

236. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 945 (Del. 2003) (Veasey, C.J., dissenting) ("What is the practical import of a 'fiduciary out?' It is a contractual provision, articulated in a manner to be negotiated, that would permit the board of the corporation being acquired to exit without breaching the merger agreement in the event of a superior offer."); Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 GEO. MASON L. REV. 157, 172 (2013) (noting the ubiquity of fiduciary out provisions in acquisition agreements).

237. *See In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1008 (Del. Ch. 2005) (recognizing that a marketplace exists "where strategic buyers have not felt shy about 'jumping' friendly deals crafted between their industry rivals"); ROBERT E. SPATT, SIMPSON THACHER & BARTLETT LLP, THE FOUR RING CIRCUS—ROUND ELEVEN; A FURTHER UPDATED VIEW OF THE MATING DANCE AMONG ANNOUNCED MERGER PARTNERS AND AN UNSOLICITED SECOND OR THIRD BIDDER 1 (2007), http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/publications23_0.pdf (noting that "[i]n the U.S., the incidence of unsolicited second and even third bidders surfacing after two companies have announced a definitive friendly merger agreement (or in the case of some foreign jurisdictions, a target-endorsed friendly offer) has become a standard execution risk of getting a deal done, and tends to reflect the ebb and flow of hostile acquisition activity" and listing examples).

238. *See, e.g.*, Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 734 (2008) ("In public-company deals, exclusivity is even more difficult to achieve because the target board has a fiduciary duty to maximize the price that it receives in a sale of the company. The traditional way in which boards fulfill this '*Revlon* duty' (named after the 1986 Delaware Supreme Court opinion in which the court most squarely articulated the duty) is by canvassing the market, then signing a merger agreement with the highest bidder.") JOHN M. POLLACK ET AL., SCHULTE ROTH & ZABEL LLP, PE BUYER/PUBLIC TARGET M&A DEAL STUDY: 2012 MID-YEAR UPDATE 1 (2012), https://www.srz.com/images/content/ 5/7/v2/57213/SRZ-PE-M-A-Deal-Study-2012-Mid-Year-Update.pdf (observing that the use of pre-signing market checks rose in the first half of 2012, as compared with 2011); JOHN M. POLLACK ET AL., SCHULTE ROTH & ZABEL LLP, PRIVATE EQUITY BUYER/PUBLIC TARGET M&A DEAL STUDY: 2011 YEAR-END REVIEW, at ii (2012), https://www.srz.com/images/content/5/7/v2/57170/SRZ-PE-Buyer-Public-Target-M-A-Deal-Study-2011-Yr-End-Review.pdf (observing that pre-signing market checks were employed in 65 percent of transactions in 2011, which was 20 percent higher than in 2010);.

239. *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1923–24 (2013) (arguing that corporate managers have financial incentives to accept an offer that would result in a generous change-in-control compensation package); Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251, 1254–56 (2002)

emphasizing stockholder wealth maximization, Delaware legal doctrines allow management the flexibility to pursue any transactional form that it believes best maximizes stockholder welfare. And this flexibility also creates powerful incentives for friendly M&A transactions.

It is thus not surprising that the available empirical evidence shows that the United States has a greater incidence of deal activity than E.U. member countries. For example, from 1990 to 2007, 7,853 friendly mergers were completed in the United States.[240] The United Kingdom came in second, with 1,748, about 22 percent of the United States' total.[241] France, number three, logged only 786.[242] The United States was also the leader in the number of hostile takeovers that were completed and attempted.[243] Of course, the United States has a larger economy than the most stockholder-friendly regime in the European Union, the United Kingdom, but normalized data show that the bid incidence rate in the United Kingdom from 1990 to 2008 was 77 percent of that in the United States, and the U.S. rate exceeded that of the United Kingdom for fourteen of those nineteen years, usually by a significant margin.[244]

The evidence thus suggests that if, as many scholars' obsession with takeover defenses suggest, sell-side takeover premiums are central to stockholder welfare, then the United States is much closer to paradise than the European Union. A study that looked at bid premiums in hostile deals around the world found dramatically higher premiums paid for companies in the United States and the United Kingdom than in France, Germany, and Spain.[245] Other studies have similarly found that takeover premiums for

(observing that managers have incentives to turn a hostile takeover bid into a "quasi-friendly" deal where management's compensation packages include stock options that will vest upon a change of control, noting that "[t]he substitute . . . for the pure hostile takeover is the quasi-friendly offer with vesting of heavy stock options that buy off managers from their opposition").

240. CULPEPPER, *supra* note 9, at 33 tbl.2.3. These statistics are based on "all deals valued at $200 million or more in constant (inflation adjusted) dollars." *Id.*

241. *Id.*

242. *Id.*

243. *Id. See also* Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe*, 11 U. PA. J. BUS. L. 135, 170 fig.7 (2008) (observing that the average number of hostile bids in the United States from 1995 to 2003 was 19.5, compared with 11.7 in the United Kingdom and 0.44 in Italy).

244. *See* Coates, *supra* note 9, at 264 tbl.9.6.

245. *See* Rossi & Volpin, *supra* note 9, at 282 tbl.2 (finding that takeover premiums for targets in the United States and the United Kingdom average 44.3 percent and 45.8 percent, respectively, whereas the mean bid premium for European countries surveyed is only 33.9 percent).

The extent to which the United Kingdom is distinct from the rest of Europe may diminish, if an ironic source—a speech by new Prime Minister Theresa May embracing the United Kingdom's exit from the European Union—becomes British public policy. In a bold address given two days before she officially took office, the Prime Minister advocated for the adoption of a national-champion strategy

U.S. targets vastly exceed those for European targets.[246]

Therefore, scholars who contend that the European system is better for stockholders must acknowledge the reality that in the American system of corporate law, managers have an affirmative duty to maximize stockholder welfare, and that the American bidder environment is comparatively friendlier than that of the European Union. They also have to reconcile the empirical evidence that shows that these realities lead not only to a higher incidence of premium-generating M&A transactions for U.S. stockholders, but also to higher premiums paid.

CONCLUSION

Some may view the argument made in this Article as a dull attempt at American boosterism, focused on the supposed market-moving effect of deal protection measures or other features of the U.S. corporate governance environment. But this Paper is not penned to promote American or Delaware law as the ideal; it is instead written to highlight the practical ways that our laws operate relative to those in the European Union and observe how that operation affects stockholder welfare because it is critical that policymakers deal with the world as it is and not as they wish it to be or are falsely told it is.

There is an increasingly global debate about corporate governance, and advocates of particular viewpoints on both sides of the pond often

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giving the United Kingdom authority to block takeovers that threaten important industries, requirements for boards to add representatives of workers and consumers so as to ensure that boards honor their duties to other stakeholders, and binding say-on-pay votes. This self-described "radical" agenda was to make real the idea that corporations do not just exist to benefit stockholders, but also "[w]orkers," "local communities," and "often the whole country." Theresa May, Member of Parliament, Speech to Launch National Campaign: We Can Make Britain a Country that Works for Everyone (July 11, 2016), http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for.

246. *See* G. Alexandridis et al., *Gains from Mergers and Acquisitions Around the World: New Evidence*, 39 FIN. MGMT. 1671, 1672 (2010) ("[W]e find that the United States, United Kingdom, and Canada . . . are the most competitive among all acquisition markets as they have, on average, the highest percentages of listed firms being acquired. Accordingly, the mean premiums paid in public acquisitions within these countries are 45.79%, 42.02%, and 37.01%, respectively, compared with only 31.91% in the rest of the world . . . ."); Moschieri & Campa, *supra* note 10, at 83 (observing that M&A transactions in Europe yield lower premiums than those in the United States); Marc Rustige & Michael H. Grote, Differences Between Takeover Premiums Across Countries: Investor Protection Matters Less than You Think, in Marc Rustige, Essays on Corporate Acquisition 50, 51 (2011) (unpublished Ph.D. thesis, Frankfurt Sch. of Fin. & Mgmt.), http://www.frankfurt-school.de/clicnetclm/fileDownload.do?goid=000000318792AB4 ("As in previous research, we find significantly higher takeover premiums in the US and UK compared with continental Europe. In our sample, the mean bid premium is 37.8% in the US . . . and 32.0% in the UK . . . . Premiums in continental Europe, on the contrary, average 25.9% . . . .").

make comparative-law arguments to support their respective positions. For example, advocates of so-called proxy access argued to the Securities and Exchange Commission that action was necessary because the U.S. market gave stockholders less influence than was the case in other countries.[247]

Policy matters should be evaluated in their full context. The fact that the United States uses a republican model as the means to pursue

247. *See, e.g.*, Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,025–26 (June 18, 2009) (announcing new proxy access rules and noting that "foreign investors have noted the lack of accountability of directors in the United States compared with other countries, stating among other things that '[t]he harsh reality is that U.S. corporate governance practices are on a relative decline compared to other leading markets'" (citation omitted)); Letter from Joseph A. Dear, Chief Inv. Officer, CalPERS, to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 14, 2009), https://www.sec.gov/comments/s7-10-09/s71009-622.pdf ("The financial crisis has revealed fundamental flaws in corporate governance in the US system. The point has been made by the Investors' Working Group in US Financial Regulatory Reform: 'Shareowners should have the right to place director nominees on the company's proxy. In the United States, unlike most of Europe, the only way that shareowners can run their own candidates is by waging a full-blown election contest, printing and mailing their own proxy cards to shareowners. For most investors, that is onerous and prohibitively expensive. A measured right of access would invigorate board elections and make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight of companies.'" (citation omitted)); Letter from Bess Joffe, Assoc. Dir., Hermes Equity Ownership Servs. Ltd., to Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 14, 2009), https://www.sec.gov/comments/s7-10-09/s71009-153.pdf ("[F]acilitating director nominations by shareholders will, in turn, enhance board accountability and thus go some distance in repairing the fractured relationship between companies and their owners which has been exacerbated by the recent economic downturn."); Comment from Peter C. Kelly, Dir., Determine Servs. Pty. Ltd., to Sec. & Exch. Comm'n (July 31, 2009), https://www.sec.gov/comments/s7-10-09/s71009-72.htm ("The US leads the developed world in the use of devices like 'poison pills' and other anti-shareholder mechanisms which have the effect of transferring wealth away from shareholders for the benefit of managers."); Letter from Peter Montagnon, Dir. of Inv. Affairs, Ass'n of British Insurers, to Elizabeth M. Murphy, Sec. & Exch. Comm'n (Aug. 3, 2009), https://www.sec.gov/comments/s7-10-09/s71009-73.pdf ("The ABI and its members strongly support the broad aims of the proposals. In our view, directors are fiduciaries and must be accountable to shareholders. . . . Indeed, a lack of access to the proxy and an inability to vote in a meaningful way (i.e. majority voting) on directors' elections, may have encouraged shareholder requisitioned resolutions on corporate affairs, which are significantly more prevalent in the US than other markets."); Letter from Peter Montagnon, Chairman, Int'l Corp. Governance Network, et al., to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (July 15, 2009), https://www.sec.gov/comments/s7-10-09/s71009-66.pdf ("A straw poll yesterday of 422 international delegates at our annual meeting in Sydney Australia indicated that 92.9% of respondents consider the ability to nominate, appoint and remove directors the most important shareholder right. Thus, it seems that the US is currently an outlier in relation to this important shareholder right and needs promptly to take remedial action."); Letter from Daniel Summerfield, Co-Head of Responsible Inv., Univs. Superannuation Scheme – UK, et al., to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 17, 2009), https://www.sec.gov/comments/s7-10-09/s71009-280.pdf ("We are quite familiar with practices in other markets that allow shareholders to remove ineffective directors or put candidates up for election without running expensive proxy contests. Our experience in markets like Britain, Australia and the Netherlands, is that those rights are rarely used. Instead, because of greater director accountability to the shareholders whom they represent, boards tend to put forth qualified candidates that are more responsive to shareholder interests.").

stockholder welfare does not mean that it is less stockholder friendly than the European system, which is not focused on stockholder welfare as its primary end but has elements of direct stockholder democracy that the United States does not.[248] Scholars who continue to applaud the E.U. member states for having stockholder-friendly rights on paper and contend that the United States should follow suit should remember that the Constitution of the Soviet Union afforded its citizens freedom of speech, freedom of press, and other generous protections. But the reality of these paper rights was a mockery. The gap between the stockholder nirvana the European Union is said to be and reality is, of course, far less stark. Yet the gap remains large.[249]

Even worse, the claim that the U.S. system is less stockholder friendly misunderstands means and ends. That the United States employs a republican system by empowering fiduciaries to advance stockholder welfare rather than a discrete democratic approach does not necessarily mean that the United States is less stockholder friendly. Instead, it may be that the United States has the system that best advances stockholder interests by maintaining, as do most republics, that there is a value to the electorate in giving their representatives the flexibility to govern free from moment-to-moment interventions.[250]

248. *See* Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499, 531 (2015) ("[I]n most jurisdictions outside the United States, . . . boards are not viewed solely as agents of the shareholders, but are required, as a matter of law, to serve as mediating hierarchs whose mission is maximize the joint value of the firm as a whole.").

249. Admittedly, with the European Union facing growing activism by institutional investors and with American investors (with their comparatively feistier approach) comprising a much larger percentage of the stockholder base, there is increasing pressure on widely-held European companies to be responsive to stockholder interests and the possibility of longer-term convergence with the U.S. market in terms of ethos. *See* PETER FITZROY ET AL., STRATEGIC MANAGEMENT: THE CHALLENGE OF CREATING VALUE 163 (2d ed. 2012) ("Europe is seeing a longer term trend towards an increasing number of hostile takeovers, driven by shareholder pressure for better returns."); Erik Berglöf & Mike Burkart, *European Takeover Regulation*, 18 ECON. POL'Y 171, 176–77 (2003) (discussing European M&A activity and noting that hostile takeovers have been on the rise in Europe since the late 1990s, that control blocks are often traded without formal takeovers taking place, and that the majority of transactions in Europe involve private firms selling assets or corporate control); Scott Mitnick, Note, *Cross-Border Mergers and Acquisitions in Europe: Reforming Barriers to Takeovers*, 2001 COLUM. BUS. L. REV. 683, 684 ("One of the most dramatic changes in European markets in recent years has been the increased frequency and ferocity of takeover battles. The Washington Post reported in March 1999 that '[t]he change in corporate culture and behavior here in the past few years has been nothing short of radical.'" (citation omitted)).

250. *See, e.g.*, Bainbridge, *Director Primacy*, *supra* note 8, at 557–59 (arguing that stockholders' interests are best served by empowering a central decisionmaker, such as a board of directors, to make decisions on their behalf).

It may be that the United States should adopt certain corporate governance policies that are prevalent in the European Union, or that the European Union would benefit from adopting certain U.S. governance practices. In either case, the policymakers should appreciate the very different contexts in which the law operates in each jurisdiction. And in so doing, they should come to terms with the reality that the American republican corporate-law model is uniquely and intensely focused on stockholder welfare, that the operation of the law gives stockholders in the United States more power and influence than stockholders in the European Union, and that these realities result in more and higher takeover premiums for stockholders of U.S. companies.[251]

251. *See* Moschieri & Campa, *supra* note 10; Rossi & Volpin, *supra* note 9, at 282.