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A New Urban Front for Shareholder Primacy

Anne Choike

Wayne State University Law School

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A NEW URBAN FRONT FOR SHAREHOLDER PRIMACY

Anne Choike*

ABSTRACT

The hundredth anniversary of Dodge v. Ford marks an occasion to reflect upon what, if anything, has changed about shareholder primacy in a century. Seizing this opportunity, in this Article I analyze new local laws and ordinances that promote stakeholder governance and engagement, which seek to protect the interests of non-shareholder constituencies such as workers, the environment, and the communities in which corporations operate, among others. In doing so, I argue that such local laws meaningfully differ from traditional stakeholder protections, most significantly in the way that they weaken managerial accountability to shareholders. The emergence of these city laws challenges – and thus creates a new urban front for – shareholder primacy, with both practical implications for the community benefits movement as well as theoretical implications for our understanding of corporate law.

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INTRODUCTION

In April 2019, Ford Motor Company held its first quarterly community meeting updating the public on its progress redeveloping historic Michigan Central Station in Detroit, Michigan.¹ The tallest rail station in the world at the time of its construction in 1913, Michigan Central Station was designed by the same architects who had previously worked on Grand Central Terminal in New

1. Aaron Mondry, *Ford update: Michigan Central Station to be powered by renewable energy*, CURBED DET. (Apr. 4, 2019 11:51 AM), <https://detroit.curbed.com/2019/4/4/18295346/michigan-central-station-ford-community-meeting-energy>.

York City.² Its Beaux-Arts architectural resplendence had become overshadowed in recent years, however, by its abandonment and ruin. In the years following the last train's departure from Michigan Central Station in 1988, vandals, scrappers, thieves, "urban explorers," the natural elements, and slumlords took their toll on the once-ornate station.³ The future of the train depot remained uncertain for a full thirty years until June 2018, when Ford Motor Company announced its intention to purchase and restore Michigan Central Station.⁴

As Ford now develops Michigan Central Station into a campus for its autonomous vehicle operations, it has made clear statements that "[t]his is not just a campus for Ford."⁵ Indeed, on top of its \$530 million in renovation costs and \$90 million building purchase price, Ford committed \$10 million in community benefits to fund education and workforce training, affordable housing, and neighborhood development.⁶ In addition to its financial commitments, Ford pledged to preserve cultural and historic assets, increase mobility in the area, and ensure retail and services within its campus would be open to the public and inclusive.⁷ It has also designated the station's ground floor for public "amenities and community space."

It is a fitting time for Ford Motor Company's commitments to stakeholder responsibility to make news: 2019 marks the hundredth anniversary of the famous *Dodge v. Ford* case that prevented the company's namesake, Henry Ford, from pursuing his own headline-making stakeholder responsibility agenda. On the one hand, Ford's twenty-first century community engagement pales in comparison to the twentieth century ambitions of Henry Ford "to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."⁸ To some, it also leaves much to be desired,⁹ especially in comparison to the over \$230 million in public investment Ford has already received in state and local incentives to re-

2. Dan Austin & JC Reindl, *Archive: Once crown jewel, Detroit train station now symbol of ruin*, DET. FREE PRESS (Dec. 26, 2013), <https://www.freep.com/story/news/local/michigan/detroit/2018/06/11/detroit-train-station-history-moroun-ford/690321002/>.

3. *Id.*

4. Chad Livengood, *Moroun Confirms Detroit Train Station Sold to Ford: 'Blue Oval Will Adorn the Building*, CRAIN'S DET. BUS. (June 11, 2018, 9:00 AM), <https://www.craindetroit.com/article/20180611/news/663281/moroun-confirms-detroit-train-station-sold-to-ford-blue-oval-will-adorn>.

5. Mondry, *supra* note 1.

6. Allie Gross, *Corktown Community Approves \$10 Million Aid Proposal from Ford*, DET. FREE PRESS (Sept. 25, 2018, 9:52 AM), <https://www.freep.com/story/news/local/michigan/detroit/2018/09/24/corktown-community-approves-10-million-aid-ford-proposal/1412705002/>.

7. *Id.*

8. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 679 (Mich. 1919).

9. Violet Ikonomova, *Detroit activists: Ford should Provide More Community Benefits in Exchange for \$104M*, DET. METRO TIMES (Oct. 15, 2018 9:13 PM), <https://www.metrotimes.com/news-hits/archives/2018/10/15/detroit-activists-ford-should-kick-in-more-community-benefits-for-104m-in-incentives>).

develop Michigan Central Station.¹⁰ On the other hand, Ford's community engagement is hardly insignificant in the absolute, especially as the company's sales slip,¹¹ and as it continues to pay off loans it discreetly borrowed as a part of the recent automobile industry bailout.¹² It also is a curious contrast to another redevelopment recently announced by Ford of its nearby Research and Engineering Center, estimated to cost nearly the same amount as Michigan Central Station (between \$550 million to \$660 million) and only ten miles down the street in Dearborn, Michigan¹³ – yet no such community investment has been similarly publicized, by Ford, the City of Dearborn or otherwise.¹⁴ The contrast between Ford's publicized investments in Detroit, and lack thereof in Dearborn, highlight the potential salience of the local law framework governing corporations' decision-making.

The divergence between Ford's actual and imagined stakeholder investments now and then, respectively, are an occasion to reflect upon what, if anything, has changed in a century, and whether such changes have had any impact upon the influential premise established by *Dodge v. Ford* – that “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”¹⁵ Seizing this opportunity, in this Article I analyze new local laws and or-

10. Breana Noble, *Ford Corktown Site Gets \$207M State Tax Break*, THE DET. NEWS (Nov. 27, 2018, 3:33 PM), <https://www.detroitnews.com/story/business/autos/ford/2018/11/27/ford-michigan-central-station-corktown-state-tax-break/2118796002>.

11. Nora Naughton, *Ford's U.S. Sales Fell 2.9% in First Half Amid Soft Market*, WALL ST. J., (July 5, 2019).

12. Joann Muller, *Trump Should Be Asking: Will Ford Pay Off Its Government Loan Before Moving Small Car Production To Mexico?* FORBES (Sept. 21, 2016, 2:09 PM), <https://www.forbes.com/sites/joannmuller/2016/09/21/trump-should-be-asking-will-ford-pay-off-its-government-loan-before-moving-small-cars-to-mexico/#5616cb9c5e37> (noting that “Ford likes to say it ‘didn’t take the money’ because unlike General Motors GM and Chrysler, it didn’t require a taxpayer bailout to survive the 2008-2009 credit crisis [even though] Ford tapped into a different pool of government money set aside for the auto industry during those desperate times”).

13. Kirk Pinho, *Ford outlines major overhaul of Dearborn campus by 2025*, CRAIN'S DET. BUS. (Sept. 17, 2019, 9:30 AM); see also Aaron Mondry, *Ford Releases Plans for Major Overhaul of Dearborn Campus*, CURBED DET. (Sept. 17, 2019, 3:21 PM), <https://detroit.curbed.com/2019/9/17/20870884/ford-dearborn-campus-redesign-research-engineering>.

14. See generally Michigan Economic Development Corporation, “News” <https://www.michiganbusiness.org/news/> (resulting in no search results when using search terms “Ford” and “Dearborn”); but see Michigan Economic Development Corporation, “Ford Land development transforms downtown Dearborn into 21st century hip locale” (Dec. 21, 2016), <https://www.michiganbusiness.org/news/2016/12/ford-land-development-transforms-downtown-dearborn-into-21st-century-hip-locale/> (publicizing limited economic development impacts of predecessor to 2019 Ford Dearborn Campus redevelopment). It is common for developments to be subject to development agreements that condition the receipt of financial incentives; while no such development agreement between Ford Motor Company and the City of Dearborn seems to be publicly available, it is possible that such agreement is in effect if Ford Motor Company is receiving financial incentives for the redevelopment of its Dearborn campus.

15. *Dodge*, 170 N.W. 668, 684 (Mich. 1919).

dinances that promote stakeholder governance¹⁶ and stakeholder engagement.¹⁷ These local laws and ordinances include, for example, the Detroit Community Benefit Ordinance¹⁸ that required Ford Motor Company to, at a minimum, consider the impact of its development of Michigan Central Station upon the neighborhood in the immediate vicinity, and also arguably led to the community benefits that Ford provided in addition to its private investment.¹⁹ In doing so, I argue that local laws like the Detroit Community Benefit Ordinance both meaningfully differ from conventional stakeholder protections and also weaken shareholder primacy – a term understood by many to mean a model of corporate governance or view of corporate purpose that prioritizes a corporation’s shareholders (and not its other stakeholders) as either or both the primary beneficiaries and ultimate controllers of the corporation’s activities.²⁰ I primarily use the term “shareholder primacy” in this Article to refer to shareholders as ultimate source of control within a corporation (as opposed to managers and directors, as in a director primacy model of corporate governance).

New stakeholder-centric local laws and ordinances are different from conventional forms of stakeholder protection (such as minimum wage laws or environmental regulations, whether at federal, state or local levels) for two reasons. First, the stakeholder protections that often result from new stakeholder-centric local laws and ordinances are unlikely to be subject to the same constitutional framework that limits local laws conventionally used for protecting stakeholders.²¹ Second, new stakeholder-centric local laws and ordinances empower managers with wide discretion to determine the specific substantive stakeholder protections resulting from the processes they promote. This contrasts with conventional stakeholder protections that typically specify the substantive actions that organizations must undertake in order to comply with them.

For communities interested in using stakeholder-centric local laws to advance stakeholder responsibility agendas, the widened managerial discretion

16. Stakeholder governance is a model of corporate governance in which corporate managers consider not only the interests of shareholders – as in shareholder primacy – but also those of stakeholders. I explain both stakeholder governance and shareholder primacy in more detail in Part I of this Article.

17. Stakeholder engagement is any process by which corporations involve the people affected by corporate managers’ decisions in such decision-making processes or the implementation of such decisions, and may be a part of stakeholder governance.

18. See generally DET., MICH., CODE OF ORDINANCES ch. 14, art. XII (2016).

19. Maurice Cox, City of Detroit Planning & Dev. Dpt., FORD CORKTOWN INVESTMENT AND MICHIGAN CENTRAL STATION RENOVATION: COMMUNITY BENEFITS REPORT (2018).

20. Steven Bainbridge, *Director Primacy: the Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 573 (2003) (describing shareholder primacy as comprising of “two distinct principles: 1) the shareholder wealth maximization norm . . . and 2) the principle of ultimate shareholder control”). Among other interpretations, shareholder primacy may also refer to the designation of shareholders as “the beneficiaries of judicially enforceable fiduciary duties by management.” Jill Fisch, *Measuring Efficiency in Corporate Law: the Role of Shareholder Primacy*, 31 J. Corp. L. 637, 638 at note 4 (2006); see also *infra* Part I.A.

21. *Infra* Part II.B.1.

that stakeholder-centric local laws create is an important consequence to keep in mind, so that advocates can effectively guard against the potential for unintentionally empowering corporations and other private organizations. Corporate shareholders are also affected by stakeholder-centric corporate laws. In widening the scope of considerations that managers may take into account in their decision-making, these new local laws also limit shareholder primacy in two ways. First, and most obviously, stakeholder-centric local laws promote a framework that incentivizes managers to consider interests other than shareholder interests in their decision-making processes. Second, due to the ambiguity inherent in promoting a process (i.e. a means of method for operating), but not an outcome (i.e. a specific truth), it is more difficult (if not impossible) for shareholders (or any constituency for that matter) to monitor and compel managers' fidelity to their interests.

My analysis in this Article illuminates the practical and theoretical value of describing new stakeholder-centric corporate laws and how they intersect with corporate law principles, even as the normative consequences of these new local laws remain uncertain.²² Practically, by focusing on the commonalities between seemingly different methods of protecting stakeholders at local levels, this Article identifies stakeholder-governed entities as new tools for the grassroots movement to secure community benefits.²³ This Article also identifies risks to stakeholder-centric local laws to achieve stakeholder protection, including threats of preemption at the state levels. Theoretically, by revealing the impact of local law – a jurisdiction previously ignored by corporate law scholars and practitioners alike²⁴ – upon a cornerstone concept in corporate law, this Article suggests the emergence of a new “local corporate law,” raising important questions about the creation and nature of corporate law itself.

22. Some commentators have evaluated certain stakeholder-centric local laws or proposed laws, or aspects thereof, discussed in this Article. *E.g.*, Colyn Eppes, *Legislatively Mandating A CBA Is Not The Way: A Case Study Of Detroit's Proposed Community Benefits Ordinance And Its Constitutionality Under The Takings Clause Of The Fifth Amendment*, 26 J. L. & POL'Y 225 (2018). The scope of this Article limits the extent to which normative consequences of stakeholder-centric laws that I describe can be fully explored; similarly, the reasons for the genesis of these stakeholder-centric local laws also extend beyond the ambit of this Article. I explore both topics in my working paper, *Local Corporate Law*. Anne Choike, *Local Corporate Law*, 2019 Winter Deals Conference hosted by Brigham Young University Law School (Mar. 7-8, 2019) (working paper); *see also* Anne Choike, *Municipal Corporate Law*, 2018 Wayne Law faculty workshop (June 2018) (working paper) and Anne Choike, *Municipal Corporate Law*, 2016 New York University Clinical Writers' Workshop (Sept. 2016) (working paper).

23. To be clear, my use of the phrase “stakeholder-governed entities” in this Article refers to entities employing a stakeholder governance approach to their corporate governance, which may but does not necessarily involve voting by stakeholders (as in the case of board directors selected by stakeholders through codetermination).

24. Priya Gupta, *Entwined Futures*, 43 CAMBRIDGE J. OF ECON. 1123 (July 2019), <https://academic.oup.com/cje/article/43/4/1123/5529826> (“While the efforts of national and transnational law to regulate the financial sector have been studied, there has been far less focus on local governments. Local governments, however, play a crucial role in how financial capitalism takes hold through their regulation of real estate and urban space”).

While both the practical and theoretical implications warrant further attention, this theoretical implication of the Article may be especially consequential in light of cities' recent rise to power, both economically and otherwise,²⁵ as well as their demonstrated, increased interest in regulating many other areas of law previously addressed at other levels of government.²⁶ To that end, this Article is the first undertaking of my broader project comprehensively developing the theoretical implications that I raise in this Article regarding local corporate law generally. Local laws addressing shareholder primacy are one of a number of recent city-level initiatives targeted at issues traditionally thought to be within the scope of state (and sometimes federal²⁷) corporate law: others include (1) board diversity mandates for organizations receiving funding from city budgets;²⁸ (2) city laws, resolutions and budget initiatives supporting the establishment of businesses formally organized as worker cooperatives;²⁹ and (3) even amendments to (or referendums to amend) city charters to strip corporations of

25. See generally Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. (forthcoming 2019).

26. See, e.g., Jesse Newmark, *Legal Aid Affairs: Collaborating with Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195–363, 212–219 (2012) (discussing local “innovative and progressive policies” in areas including immigration, international, human rights, employment, and environmental law); Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187 (2009) (local governments acting in labor and employment law); Sheila R. Foster, *Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare*, 75 OHIO ST. L. J. 57 (2014) (explores local expansion into consumer law); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L. J. 1409, 1409 (2001) (local governments acting in criminal law); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 576, 573 (2008) (local governments acting in federal immigration law); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J. L. POL. 147 (2005) (local governments acting in family law); Shanna Singh, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537 (2005) (local expansion into international law); Rick Su, *A Localist Reading of Local Immigration Regulations*, 29 IMMIGR. NAT'LITY REV. 741, 744 n.7 (2008) (local governments acting in federal immigration law); Sean Hannon Williams, *Sex in the City*, 43 FORDHAM URB. L. J. 1107 (2016) (explores local governments' expansion into family law).

27. State laws enabling the formation of and regulating the governance of corporations are increasingly complemented by corporate law at the federal level. See, e.g., Mark Roe, *Delaware's Competition*, 117 Harv. L. Rev. 588 (2003); Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REGULATION 26 (2003–2004); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Verity Winship, *Teaching Federal Corporate Law*, 8 J. BUS. & TECH. L. 217 (2013); James J. Park, *The Limits of the Right to Sell and the Rise of Federal Corporate Law*, 70 OKLA. L. REV. 159 (2017); William Nowak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in CORPORATIONS AND AMERICAN DEMOCRACY (Harvard Univ. Press, 2017); Marc I. Steinberg, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* (Oxford University Press 2018).

28. See, e.g., Chelsea Dennis & Steve Dubb, *Minneapolis Aims to Diversify Its 70 Neighborhood Associations*, NONPROFIT Q. (Feb. 7, 2019), <https://nonprofitquarterly.org/minneapolis-aims-to-diversify-its-70-neighborhood-associations/>.

29. See, e.g., Stacey A. Sutton, *Cooperative cities: Municipal Support for Worker Cooperatives in the United States*, 41 J. URB. AFF. 1081 (2019).

their legal personality under certain circumstances.³⁰ My ongoing and future research will explore not only the motivations leading to these new local laws, but also the prospect, political economy, taxonomy, theory, and applications of local corporate law.³¹ In the meantime, it is enough for present purposes to note that state and federal laws protecting stakeholders have achieved only mixed success,³² and it is conceivable that cities have begun taking up the charge on shareholder primacy as a result.

30. See, e.g., Timothy Williams, *Legal Rights for Lake Erie? Voters in Ohio City Will Decide*, N. Y. TIMES (Feb. 17, 2019) (updated Feb. 27, 2019 to reflect voter approval of the ordinance), <https://www.nytimes.com/2019/02/17/us/lake-erie-legal-rights.html>. The Ohio State Legislature subsequently nullified the LEBOR in July 2019 when it passed House Bill 166 that included text stating:

“(B) Nature or any ecosystem does not have standing to participate in or bring an action in any court of common pleas.

(C)(1) No person, on behalf of or representing nature or an ecosystem, shall bring an action in any court of common pleas.

(2) No person shall bring an action in any court of common pleas against a person who is acting on behalf of or representing nature or an ecosystem.

(3) No person, on behalf of or representing nature or an ecosystem, shall intervene in any manner, such as by filing a counterclaim, cross-claim, or third-party complaint, in any action brought in any court of common pleas.”

133rd General Assembly of the Ohio State Legislature, House Bill 166 (effective July 18, 2019); see also H. Clair Brown, “How Ohio’s Chamber of Commerce Killed an Anti-Pollution Bill of Rights,” THE INTERCEPT (Aug. 29, 2019), <https://theintercept.com/2019/08/29/lake-erie-bill-of-rights-ohio/>.

31. See generally Choike, *Local Corporate Law*, *supra* note 22.

32. At state level, these include statutes in state corporate law codes that specifically authorize directors to consider stakeholders’ interests during corporate takeovers. See generally, e.g., Eric Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992) (examining state corporate constituency statutes). State corporate law statutes also authorize corporations to make charitable donations. See, e.g., Revised Model Business Corp. Act § 3.02(13) (1984). All but twelve states have enacted enabling legislation establishing for the formation of entities with stakeholder governance. *Social Enterprise Law Tracker*, <https://socentlawtracker.org/#/map>. Specifically, states have introduced several kinds of socially responsible business organizations, ranging from the low-profit limited liability company (L3C) (adopted by 8 states and the Oglala Sioux Tribe), to the benefit corporation (adopted by 33 states and the District of Columbia), and the related benefit LLC (adopted by 5 states), and options in between such as the social purpose organization (adopted by 4 states). *Id.*

At the federal level, numerous attempts to federalize all or part of state corporate law have been motivated by a desire to protect stakeholders from corporations’ growing power. Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of Federal Charter-mongering*, 3 COLUM. BUS. L. REV. 1017, 1025 (2017) (“both sides of the debate believed corporate regulation should serve the public interest and were therefore only secondarily concerned with the economic interests of shareholders.”) These include initiatives “to (1) require or permit businesses to incorporate under federal charters, (2) require or permit businesses to obtain federal corporate licenses, or (3) impose comprehensive federal standards on the governance of state corporations.” *Id.* at 1026. As a result, federal corporate laws have increased in scope and number in many areas. *Id.* at 1019 (citing primary sources of federal corporate law governing for-profit corporations in the areas of securities regulation, proxy voting, gatekeeping, retirement fund investments, certain reorganizational transactions, executive compensation, board nominations, and disclosure by hedge fund and private investment fund managers.) Other federal proposals to protect stakeholders arguably

My immediate focus in this Article is to describe and analyze the impact upon shareholder primacy of local laws that promote stakeholder governance or the consideration of stakeholder interests through community benefits ordinances. This Article proceeds to do so in three parts. In Part I of this Article, I establish a foundation for understanding the local laws and new insights about shareholder primacy that I present in Part II of this Article. In Part III, I highlight the implications – both for the community benefits movement and for corporate law – of local laws that encourage stakeholder governance or the consideration of stakeholder interests.

I. SHAREHOLDER PRIMACY VS. STAKEHOLDER PROTECTIONS

Part I.A of this Article describes the landmark 1919 case of *Dodge v. Ford* and its legacy in corporate law. Part I.B then provides an introductory overview to shareholder primacy: its functional effect is that of a mandate, embodied in statutory and private law provisions that operate to promote the transparent accountability of managers to shareholders' interests, in order to facilitate shareholder control. Part I.C contrasts shareholder primacy to conventional and emerging stakeholder protection methods, including contractual relationships, government regulation, and stakeholder governance. Part I.D summarizes how leading scholars have resolved two purported contrasts between shareholder primacy and stakeholder protection, and reframe understanding of the distinctions between them.

A. *Dodge v. Ford's Legacy of Shareholder Primacy*

In January 1916, another successful year for Ford Motor Company had resulted in record profits of \$60 million for the automobile manufacturer. Rather than paying out the company's cash surplus of over \$52 million in special dividends as the company had done in prior years, however, Henry Ford – the controlling shareholder in Ford Motor Company, holding 58% of its stock – instead announced his ambitious expansion plans for the company. His grand vision included building a giant manufacturing plant and even the company's own iron smelting facility, in order to increase production, further decrease the sale price of the company's cars, employ more workers, and “spread the benefits of this

have also been successful in the areas of labor, employment, and environmental protection. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 111 (2004) (“These various bodies of law—what might be termed the ‘law of business’—reflect progressive principles of stakeholder protection and, though outside of corporate law, are powerful forces shaping the choices available to corporate management concerning basic operational and organizational decisions: whom to hire, fire, and promote; which products to produce and how best to produce them; how to set up the workplace; and how to allocate and invest firm assets. All of these decisions are made under the mandatory legal rules embodied in employment and labor law, workplace safety law, environmental law, consumer protection law, and pension law.”).

industrial system to the greatest possible number.”³³ Notably, Ford’s vision excluded the declaration of a special dividend for shareholders, and in August 1916, Henry Ford announced the suspension of special dividends.³⁴ A few months later in November 1916, two of Ford Motor Company’s minority shareholders sued, seeking to require the distribution of 75% of the company’s cash surplus, on the basis that their interests had been improperly subordinated to Ford’s grand plans. The two minority shareholders were the Dodge brothers. The brothers were major parts suppliers to the Ford Motor Company, and, more significantly, aspiring entrepreneurs seeking to establish their own, competing automobile manufacturing company and finance it with their Ford Motor Company dividends.³⁵ During the trial, Henry Ford defended the corporate policy decisions on explicitly stakeholder grounds, declaring that he eschewed firm profits in order to promote a variety of employee and social benefits.

The dispute between Henry Ford and the Dodge brothers ended with the famous 1919 *Dodge v. Ford Motor Co.*³⁶ opinion, in which the court sided with the Dodge brothers, explaining that “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”³⁷ Even though the concept of shareholder primacy precedes *Dodge v. Ford*,³⁸ these words have echoed loudly in the hundred years since the decision, and have become one of the most quoted sources in support of shareholder primacy.³⁹ The nuanced context surrounding the court’s decision in *Dodge v. Ford* and associated alternative interpretations notwithstanding,⁴⁰ most cite *Dodge v. Ford* for the premise that it supposedly sets forth: that directors are required to both pursue shareholder

33. Ford declared his ambition “to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.” *Dodge v. Ford Motor Co.*, 204 Mich. 459, 491, 170 N.W. 668, 679 (1919).

34. *Dodge*, 70 N.W. 668, 679 (stating Ford had declared that he would not pay any special dividends to the shareholders other than the 5% monthly regular dividend upon the authorized capital stock of the company).

35. See Alan M. Weinberger, *Henry Ford’s Wingman: A Perspective on The Centennial of Dodge v. Ford*, 14 N.Y.U. J.L. & BUS. 1013, 1019-1027 (2018).

36. *Dodge*, 204 Mich. 459, 491, 170 N.W. 668, 679 (1919).

37. *Id.* at 684.

38. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 37 J. CORP. L. 637, 646-50 (2006).

39. Others include economist Milton Friedman’s famous statement that that “There is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.” MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962); see also Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N. Y. TIMES MAG. (Sept. 13, 1970) at 33.

40. In fact, Alan Weinberger recently added another possible wrinkle to the interpretation of *Dodge v. Ford*: Ford suspended the dividend not to squeeze out the Dodge brothers, but for tax avoidance. Weinberger, *supra* note 35, at 1036 (“Tax avoidance was likely the critical motivation for Ford’s decision to suspend dividends.”).

profits above all, and to make every decision on behalf of the corporation driven by shareholder interests.⁴¹

The *Dodge v. Ford* decision has been described by one prominent corporate law scholar as “the high point of shareholder primacy as a legal mandate.”⁴² Subsequent decisions such as *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* and *eBay v. Newmark* have strengthened the legal force behind shareholder primacy in the contexts of contests for corporate control, and the standard of review for corporate defensive actions, respectively. Recent cases have further reinforced shareholder primacy. The Delaware Chancery Court—the principal judicial forum for corporate law — has shown an increased willingness to embrace shareholder primacy. In a prominent recent opinion in *In re Trados Inc. Shareholder Litigation*, the court wrote that “directors owe duties to the corporation for the ultimate benefit of the entity’s residual claimants,” and that “[o]ther constituencies may be considered only instrumentally to advance that end.”⁴³ Indeed, “the first empirical review of judicial discussion of shareholder profit maximization in the era of the modern corporation, 1900 to 2016” argued that “courts have pervasively embraced the concept that corporate managers should maximize shareholder wealth.”⁴⁴ Nonetheless, among corporate law’s most powerful jurists, it is still *Dodge v. Ford* (and not other authorities) that is applied as the dominant approach to the issue of corporate governance and purpose.⁴⁵

41. See, e.g., Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 165 (2008) (“*Dodge v. Ford* is cited almost invariably as evidence that corporate law requires corporations to have a ‘profit maximizing purpose’ and that ‘managers and directors have a legal duty to put shareholders’ interests above all others and no legal authority to serve an other interests.’ Indeed, *Dodge v. Ford* is routinely employed as the only legal authority for this proposition.”); but c.f., e.g., D. Gordon Smith, *The Shareholder Primacy Norm*, 23 IOWA J. CORP. L. 277 (1988) (“[T]he shareholder primacy norm was not created to mediate conflicts between shareholders and nonshareholder constituencies of a corporation. Indeed, the origin and development of the shareholder primacy norm suggest that it was introduced into corporate law to perform a much different and somewhat surprising function – the shareholder primacy norm was first used by courts to resolve disputes among majority and minority shareholders in closely held corporations.”).

42. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 IOWA J. CORP. L. 637, 650 (2006).

43. *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013); *id.* at 42 n. 16 (“[T]he standard of fiduciary conduct calls for the board to maximize the value of the corporation for the benefit of the common stock.”); see also *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. CV 12108-VCL, 2017 WL 1437308, at 18 (Del. Ch. 2017) (“[T]he fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital. . .”).

44. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 103 MINN. L. REV. 1951, 1954 (2018).

45. 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 Corporate Law*, 50 WAKE FOREST L. REV. 761, 772-777 (2015) (Chief Justice of the Delaware Supreme Court favorably discussing interpretations of *Dodge v. Ford* by Chancellors of the Delaware Court of Chancery).

At the same time, other highly respected corporate law scholars have challenged the significance of *Dodge v. Ford*. Professor D. Gordon Smith argues that shareholder primacy is “nearly irrelevant” to the ordinary business decisions of modern corporations.”⁴⁶ The late Professor Lynn Stout took her opposition even further, stating her view that *Dodge v. Ford* is bad law, and that corporate law professors should stop teaching *Dodge v. Ford* entirely.⁴⁷ Today, such debate continues about the impact of *Dodge v. Ford* upon corporate governance and corporate purpose. Nonetheless, *Dodge v. Ford* is generally accepted as the most famous legal pronouncement on the issue of shareholder primacy — even as questions remain about the legal status, effect, interpretation, application, and normative validity of *Dodge v. Ford*’s assertion of shareholder primacy.

B. Overview of Shareholder Primacy

Further complicating *Dodge v. Ford*’s contested legacy, it is difficult to find a single, authoritative, and clear explanation of shareholder primacy in primary legal authorities. In this section of the Article, I briefly summarize primary and secondary authorities on the topic of shareholder primacy, to explain what exactly shareholder primacy is, and how exactly it works in practice.

Shareholder primacy is a model of corporate governance, which is the system of rules, practices, and processes by which an organization is directed and controlled. Shareholder primacy is also one perspective regarding the overarching purpose of corporations and corporate law more broadly.⁴⁸ A shareholder primacy model of corporate governance or view of corporate purpose has evolved to mandate, by default, that it is a corporation’s shareholders — and not its other stakeholders such as workers, creditors, the communities in which the corporation operates, or the environment — that are the primary beneficiaries and ultimate controllers of the corporation’s activities. In particular, shareholder primacy operates to “assure that the corporation serves the best interests of its shareholders or, more specifically, to maximize financial returns to shareholders or, more specifically still, to maximize the current market price of corporate shares.”⁴⁹ While in theory shareholder primacy might be considered to be a default rule of fiduciary duties, in practice, corporations’ formation documents rarely, if ever, take advantage of charter flexibility to deviate from this now-established hierarchy among corporate constituents. As such, shareholder primacy has evolved to become a functional mandate by default and thus regulato-

46. Smith, *supra* note 41, at 279.

47. Stout, *supra* note 41, at 166.

48. John Armour, et al., *What Is Corporate Law?* in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 23 (3d ed, Oxford Univ. Press) (discussing various interpretations of the goals of corporate law).

49. *Id.* at 23.

ry in character⁵⁰ — unlike much of corporate law, which is comprised of default rules from which private parties can and do deviate, and which is therefore described as enabling in character.

Legal scholars are divided as to whether or not shareholder primacy's default mandate to serve the best interests of shareholders actually has formal, authoritative legal effect. Most commonly, shareholder primacy's default mandate is described only as a nonlegal "norm," for the reason that there is no general statement of shareholder primacy as mandatory law in state or federal statutes, or in the holding of any judicial decision that is not narrowly confined to specific corporate law contexts.⁵¹ The Delaware General Corporation Law is silent on the duty to maximize profits to shareholders, and the handful of cases that do identify such duty do not cite any prior authority therefor.⁵² In fact, statutes and case law sometimes authorize managers to consider factors other than shareholder interests in various contexts.⁵³ Furthermore, corporate law's business judgment rule fully vests a corporation's managers with the discretion to weigh not only shareholder interest, but also a multitude of other factors relevant to ordinary business decisions, provided that their decisions are fully informed, disinterested, made in good faith, and not grossly negligent. At the other end of the spectrum, some scholars argue that shareholder primacy's default mandate is endowed with legal enforceability and derive this legal enforceability from specific statutory provisions or judicial opinions. For example, state corporate codes grant shareholders the rights to vote⁵⁴ or to dividends,⁵⁵ and common law fiduciary duties impose duties of loyalty⁵⁶ and care⁵⁷ upon managers to shareholders.⁵⁸

50. See Rhee, *supra* note 44, at 2009.

51. See, e.g., Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 Va. L. & Bus. Rev. 163, 168 (2008). Stout also notes the absence of shareholder primacy in individual corporation's organizational documents, where theoretically organizations could elect to do so among the lawful purposes they pursue. *Id.* at 168-69.

52. David B. Guenther, *The Strange Case of the Missing Doctrine and the "Odd Exercise" of eBay: Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. BUS. REV. 427, 434 (2018).

53. See generally, e.g., Orts, *supra* note 32; *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

54. *E.g.*, DEL. CODE ANN. tit. viii, §§ 211(b), 242, 251, 271 (2009).

55. *E.g.*, *id.*, §171(c) (2009).

56. See *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests"); see generally Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675 (2009); Leo E. Strine Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010).

57. See *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985); Smith, *supra* note 41, at 285 (stating that the fiduciary duty of care's requirement that directors discharge such duty "... in a manner [the director] reasonably believes to be in the best interests of the corporation" is "the shareholder primacy norm and 'the best interests of the corporation' are generally understood to coincide with the best long-term interests of the shareholders").

In addition to the characterization of its status and effect as both “norm” and “law”, shareholder primacy also has been described as seemingly everything in between – including as “principle”,⁵⁹ “ideology,”⁶⁰ and even “dogma.”⁶¹ Most recently, Professor Robert Rhee persuasively reconciled these competing viewpoints, arguing that as a matter of positive law, shareholder primacy has the status of “law obligating managers to maximize value,” even though it is enforceable through disciplining market mechanisms rather than direct legal action.⁶² Specifically, Professor Rhee clarifies that shareholder primacy is not a specific duty that can be found in a single statute or judicial decision, enforceable through familiar legal mechanisms;⁶³ this is what he believes other scholars mean when they describe shareholder primacy as a “norm” rather than “law.” However, Professor Rhee diverges from these scholars in that he argues that shareholder primacy’s legal unenforceability does not render it non-law. He instead believes that the lack of legal sanction for noncompliance with shareholder primacy is simply a necessary consequence of harmonizing it with other, competing mandates in corporate law.

Whether as an enforceable or unenforceable law, a norm or something else, it is fair to say that conventional corporate law embraces shareholder primacy. Many statutory provisions, organizational documents and judicial opinions im-

58. It also takes the form of a preference to common stock over preferred stock and debt unless at the corporation is at an insolvency point.

59. E.g., Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 163 (2009) (“[u]nder the ‘shareholder primacy’ or ‘profit maximization’ principle, the interests of other constituencies must be incidental or subordinate to the corporation’s primary concern for maximizing shareholder wealth”) and David G. Yosifon., *The Public Choice Problem In Corporate Law: Corporate Social Responsibility After Citizens United*, 89 *N.C.L. REV.* 1197, 1241 (“[t]he term ‘shareholder primacy’ is sometimes used to refer to the principle purpose of corporate governance”).

60. E.g., Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 *TEX. L. REV.* 911, 911 (“shareholder primacy is an ideology”) and Lynn Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 *SEATTLE U. L. REV.* 1169 (repeatedly referring to the “shareholder primacy ideology”).

61. E.g., David Millon, *Shareholder Primacy in the Classroom After the Financial Crisis*, 8 *J. BUS. & TECH. L.* 191, 192 (2012) (“[s]hareholder primacy is also a foundational dogma”).

62. Rhee, *supra* note 44, at 1954, 1956. Rhee was not the first to state his interpretation of shareholder primacy as law; see also Jonathan Macey, *A Close Read of An Excellent Commentary on Dodge v. Ford*, 3 *VA. L. & BUS. REV.* 177, 178 (2008) (arguing that Dodge has “legal effect”) and Steven Bainbridge, *A Duty to Shareholder Value*, *N. Y. TIMES* (Apr. 16, 2015) (“Despite contrary claims by some academics and Occupy Wall Street-type partisans, [Dodge v. Ford] remains the law today.”). Rhee, however, uniquely locates the source of shareholder primacy’s legal authority as diffuse.

63. See Rhee, *supra* note 44 (arguing that the authoritative sources establishing shareholder primacy are found in: (1) the composite system of corporate law that generally encourages managers to seek shareholder profit maximization; and (2) the market setting the price for shares, which is in turn fused to an architecture of legal incentives promoting shareholder primacy, in the form of managers’ performance-based pay and threats to managers’ job security in contests for corporate control that turn on share price).

plement shareholder primacy. One shared feature of these authorities is that they methodically articulate shareholder economic rights. Certain statutory provisions or terms in organizational governance documents calculate shareholder dividends or voting rights according to mathematical formulas set forth therein.⁶⁴ The decision in *Revlon v. MacAndrews & Forbes Holdings, Inc.*, makes abundantly clear that in transactions involving a change in corporate control, “concern for non-stockholder interests is inappropriate . . . and the object no longer is to maintain the corporate enterprise but to sell it to the highest bidder.”⁶⁵ Corporate codes and case law also empower shareholders with rights to a preference over preferred stock and debt securityholders in specific circumstances.⁶⁶ Another feature shared by shareholder primacy-centric statutory provisions, organizational documents, and judicial opinions is that they empower shareholders with rights that facilitate their oversight of managers’ corporate strategy. For example, corporate codes provide shareholders rights to advocate that the company take a particular course of action in shareholder proposals;⁶⁷ authority to approve fundamental corporate transactions;⁶⁸ and the power to enforce the company’s rights when management fails to do so.⁶⁹

To be sure, shareholder primacy is also embodied in corporate laws that are more indeterminate in their operation. The most obvious example is the business judgment rule, which affords directors wide discretion in discharging their duty of care to the corporation subject to certain conditions. Setting aside this exception to the generally methodical implementation of shareholder primacy, the ultimate effect of the corporate laws discussed above is to promote accountability of managers to shareholders. They do so not only by providing shareholders with rights that directly check managers’ discretion, but also by clearly illuminating the calculus that managers undertake and the constraints that they face in making their decisions. This transparency reduces the scope of manag-

64. *E.g.*, DEL. CODE ANN. tit. viii, § 170(a) (2009) (setting forth a calculation of the source of capital from which dividends upon shares of capital stock may be paid); DEL. CODE ANN. tit. viii, § 212 (2009) (establishing the voting rights of shareholders to equal “1 vote for each share of capital stock held” unless otherwise provided in the certificate of incorporation); Ford Motor Co., Exhibit 3-A to Annual Report (Form 10-K) (Aug. 2, 2000) (setting forth the voting and dividend rights of Ford Motor Company shareholders). The boards of directors of corporations also declare dividends in corporate resolutions, though such documents generally are not filed publicly; *see, e.g.* Press Release, Ford Motor Co., Ford Motor Company Declares Dividend for Fourth Quarter 2019 (Oct. 10, 2019).

65. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

66. *See generally In re Trados Inc. S’holder Litig.*, 73 A.3d 17 (Del. Ch. 2013); *LC Capital Master Fund v. James*, 990 A.2d 435 (Del. Ch. 2010); *Equity-Linked Inv’rsv. Adams*, 705 A.2d 1040 (Del. Ch. 1997); *Katz v. Oak Indus.*, 508 A.2d 873 (Del. Ch. 1986).

67. 17 C.F.R. §240.14a-8 (2016); J. Robert Brown, Jr., *Corporate Governance, Shareholder Proposals, and Engagement between Managers and Owners*, 94 DENV. L. REV. Online 300, 301 (2017) (describing shareholder proposals “seeking the rescission of poison pills or elimination of staggered boards” and “addressing topics of social responsibility”).

68. *E.g.*, DEL. CODE ANN. Tit. viii, §§ 251 and 271 (2009).

69. *E.g.*, DEL. CODE ANN. Tit. viii, § 327 (2009).

ers' discretion by facilitating shareholders' objective evaluation of managerial performance.

C. Overview of Stakeholder Protection

Shareholder primacy stands in contrast to stakeholder protection measures, which facilitate the interests of non-shareholder constituencies such as workers, creditors, the environment, and the communities in which corporations operate. Even if not conventionally called stakeholder protection in name, both the contractual relationships between the organization and non-shareholders, if any, as well as the government regulation of organizations' treatment of, and relationships with, non-shareholders have traditionally protected organizations' stakeholders. More recently, two additional methods have emerged as new methods of stakeholder protection: stakeholder governance, another model of corporate governance and corporate purpose, and community benefits agreements.

Corporate law principally focuses on facilitating the relationships between shareholders and managers, among shareholders, and between shareholder and non-shareholders.⁷⁰ With respect to the relationships between shareholder and non-shareholders, corporate law has primarily relied upon contractual relationships and government regulation to moderate the balance between these constituencies since the turn of the nineteenth century.⁷¹ For example, creditors and employees are two key stakeholder constituencies for many organizations; loan or employment agreements are examples of contracts that detail the specific rights of creditors and workers, and the obligations to each of the borrowing or hiring entity, respectively. These contracts operate in the shadow of the regulatory landscape, which establishes the contours of relationships between shareholders and non-shareholders in the absence of contracts. For example, when contracts are silent or nonexistent, bankruptcy or employment law clarify the rights of creditors or employees, respectively. Some consider these contracts and regulations to be "external" to corporations and corporate law generally because their attention is not focused upon the organizational structure for allocating profits and control within the corporation, which is considered to be the focus of corporate law.

The newest development in contractual and governmental stakeholder protection are community benefits agreements (CBAs) and community benefits or-

70. Armour et al., *supra* note 48, at 2 ("Most of corporate law can be understood as responding to three principal sources of opportunism that are endemic to such organization: conflicts between managers and shareholders, conflicts between controlling and non-controlling shareholders, and conflicts between shareholders and the corporation's other contractual counterparties, including particularly creditors and employees").

71. See, e.g., Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 654 (2016) ("Around the turn of the nineteenth century, when state corporate law began to liberalize and become more enabling, the law increasingly turned to regulation outside the structure of the corporation to enforce responsibility on corporations and protect various stakeholders and the public.").

dinances (CBOs), respectively. A CBA is legally enforceable, privately negotiated arrangement between one or more community-based organizations, and an organization that is developing land in a community (whether as a commercial real estate developer, or as the operating company itself).⁷² Through CBAs, the latter commits to “providing specified community benefits through a proposed development project, and participating community groups agree to support the project in the governmental approval process.”⁷³ The nation’s first major comprehensive CBA is considered to be the L.A. Live CBA (also known as the Staples Center CBA, on account of the Staples Center sports arena built earlier on the site),⁷⁴ and was negotiated in 2001 between a coalition of community groups in Los Angeles and Anschutz Entertainment Group.⁷⁵ With its provisions for affordable housing, local hiring and living wage jobs,⁷⁶ the Staples Center CBA has served as a model CBA for others across the United States,⁷⁷ and has “catalyzed a national movement.”⁷⁸

A CBO is a law that requires an organization developing land in a community (whether as a commercial real estate developer, or as the operating company itself) to enter into a CBA as a condition for the development’s approval by a city, and also as a condition for contractually receiving some form of public subsidies (whether tax relief, below market price land, or otherwise).⁷⁹ The City of Detroit, Michigan, adopted the nation’s first CBO in 2016; several other cities have now adopted, or are in the process of considering adopting, CBOs since then.⁸⁰ Both CBAs and CBOs developed to fill the contractual and regulatory gaps, respectively, that communities perceive in the protection of community stakeholder interests.

72. JULIAN GROSS, COMMUNITY BENEFITS AGREEMENTS, CHAPTER 13 IN BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 216 (2005).

73. *Id.*

74. Leland Saito & Jonathan Truong, *The LA Live Community Benefits Agreement: Evaluating the Agreement Results and Shifting the Political Power in the City*, 51 URB. AFF. REV. 263, 264 (2015).

75. *Id.*

76. Community Benefits Program for the Los Angeles Sports and Entertainment District Project A-4-A-10 (May 29, 2001), http://juliangross.net/docs/CBA/Staples_CBA.pdf.

77. Saito & Truong, *supra* note 74, at 264, 282.

78. John Ahern, Priscilla Almodovar, Barry Gosin, & Joyce Moy, *Recommendation of the Task Force on Public Benefit Agreements*, presented to N.Y.C. Comptroller John C. Liu (Sept. 29, 2010).

79. PARTNERSHIP FOR WORKING FAMILIES, DELIVERING COMMUNITY BENEFITS THROUGH ECONOMIC DEVELOPMENT: A GUIDE FOR ELECTED AND APPOINTED OFFICIALS, 9 (2014), https://www.forworkingfamilies.org/sites/default/files/publications/1114%20PWF%20CBA%20Handout_web.pdf (describing “ordinances and policies establishing baseline community benefits”).

80. *See infra* Part II.A.

To be sure, the problem that CBAs and CBOs seek to remedy is widespread: inevitably contracts are incomplete or nonexistent,⁸¹ and regulations require interpretation, are absent entirely or are weakly enforced for a variety of possible reasons. When discretion is demanded at the edge of contractual or regulatory rules, managerial decision-making determines who has priority among shareholders and non-shareholders in the allocation of corporate profits and control. As previously described, shareholder primacy functionally mandates by default that such managerial decisions prioritize the interests of shareholders. The stakeholder governance model is emerging as an influential alternative approach, especially among commentators who fundamentally question the normative value and validity of shareholder primacy. Stakeholder governance is premised upon the recognition that corporations are a collection of contributions,⁸² including not only those of equity investors (who contribute financial capital), but also workers (who contribute labor and intellectual capital), communities (who contribute property and natural resources), and beyond. Stakeholder theorists also argue that non-equity investors make firm-specific investments that put them at risk just as much if not more than equity investors. Consequently, in contrast to shareholder primacy's elevation of shareholder interests, stakeholder governance is "the notion that the concerns of all the firm's investors should be brought into the governance of the firm."⁸³

Stakeholder governance is therefore considered by some to be an "internal" approach for protecting non-shareholder constituencies, by changing the fundamental structure of and within a corporation. Stakeholder governance simultaneously advances shareholder and non-shareholder interests through two primary features: (1) expanding the definition of "profit maximization" to mean the maximization of wealth for all stakeholders, not only shareholders;⁸⁴ and (2) ensuring that managers include representatives of both shareholders and stakeholders. These mechanisms have been implemented in a variety of forms: stakeholder-governed entity types such as benefit corporations,⁸⁵ social purpose

81. Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990); OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE (1995).

82. See generally Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

83. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1044 (2008).

84. *Id.* at 1050; see also Blair & Stout *supra* note 82, at 250-51 ("[C]orporate assets belong not to shareholders but the corporation itself. Within the corporation, control over those assets is exercised by an internal hierarchy whose job it is to . . . allocate the resulting production and mediate disputes among team members over that allocation.")

85. See, e.g., CAL. CORP. CODE § 14600 - § 14631 (2012); DEL. CODE ANN. tit. 8, ch. 1, §§361-68 (2019) ("Subchapter XV. Public Benefit Corporations") [hereinafter DEL. PUB. BENEFIT CORP. ACT]; MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to- 5-6C-08 (2013); N.Y. BUS. CORP. LAW §§ 1701-1709 (2013).

corporations,⁸⁶ flexible purpose corporations,⁸⁷ benefit limited liability companies,⁸⁸ low-profit limited liability companies;⁸⁹ certifications such as B Corp Certification⁹⁰ or local government certifications such as the Philadelphia Office of Sustainability Sustainable Business Certification;⁹¹ or even simply the adoption of stakeholder governance provisions in an conventional business corporation's organizational documents such as its articles of incorporation or by-laws.

Because stakeholder governance would require managers to be accountable to both shareholders and non-shareholders, stakeholder governance is thought by some to reduce managers' responsibility to any constituency at all.⁹² This is because an enlarged scope of duties accompanies an increase in agency costs, in particular the difficulty to monitor the compliance of managers with multiple duties.⁹³ Supporters of stakeholder governance point out that such criticism relies upon the interests of shareholders and non-shareholders diverging, which is not always the case.⁹⁴ Even to the extent that there is a zero-sum relationship

86. *E.g.*, CAL. CORP. CODE §§ 2500-3503 (2014); FLA. STAT. ANN. §§ 607.501 to- .513 (2014); TX. BUS. ORG. CODE §§ 23.001 to- .110 (2013); REV. CODE WASH. 23B.25.005 to- .150 (2013).

87. *See* Corporate Flexibility Act, 2011 Cal. Stat. ch. 740 (codified as CAL. CORP. CODE §§ 2500-3503 (2011)). On September 27, 2014, the Social Purpose Corporations Act, 2014 Cal. Stat. ch. 694(codified as CAL. CORP. CODE §§ 2500-3503 (2014)) amended the Corporate Flexibility Act to, among other things, rename the Corporate Flexibility Act as the Social Purpose Corporations Act, and rename flexible purpose corporations as social purpose corporations.

88. *E.g.*, DEL. CODE ANN. tit. 6, ch. 18, §§18-1201-08 (2019) ("Subchapter XII. Statutory Public Benefit Limited Liability Companies") [hereinafter DEL. PUB. BENEFIT LLC ACT]; MD.CODE ANN.,CORPS.&ASS'NS §§ 1-502, 4A-1201 to -1208, 5-6C-03 (LexisNexis 2019); ORE.REV.STAT. §§ 60.750-.770 (2014).

89. *E.g.*, ME.STAT.tit. 31, §§ 1502, 1508, 1559, 1611 (2013); Mich. Comp. Laws §§ 450.4102, .4204(2), .4803(1) (2016); VT.STAT.ANN.tit. 11, §§ 3001(27), 3005(a), 3023(a) (West 2013) (repealed 2014); *but see* Act of June 13, 2013, 2013N.C. Sess. Laws 157 (abolishing the low-profit limited liability company in North Carolina).

90. *Certification*, B LAB, <https://bcorporation.net/certification> (last visited Oct. 13, 2019) (describing the process and legal requirements for organizations to obtain B Corp certification); *see also* Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 784-785 (2014) (describing certified B Corps).

91. PHILA.,PA.,CODE § 19-2604(10)(a)(ii) (2009) [http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title4thphiladelphiabuildingconstructio/subcodeathphiladelphiaadministrativecod?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:philadelphia_pa\\$anc=JD_SubcodeA](http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title4thphiladelphiabuildingconstructio/subcodeathphiladelphiaadministrativecod?f=templates$fn=default.htm$3.0$vid=amlegal:philadelphia_pa$anc=JD_SubcodeA); *see also* Michelle Baker, *Socially Responsible Businesses Get a Boost From Local Governments*, NONPROFIT L. BLOG, (May 8, 2013), <http://www.nonprofitlawblog.com/socially-responsible-businesses-get-a-boost-from-local-governments/> (defining Philadelphia's sustainable business as a "business that gives substantial consideration to employee, community and environmental interests in its practices, products, and services").

92. Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 28-30 (2008) (summarizing and refuting the "Two Masters" argument).

93. *Id.*

94. *See e.g.*, Yockey, *supra* note 90, at 788 (describing the "hybrid ideal" as a "phenomenon that comes when everything a firm does generates social value and commercial revenue" where

between shareholder and non-shareholder constituencies, serving two masters may be challenging, but is neither impossible nor new. For example, managers already engage in balancing acts when considering their duties to shareholders with different classes of stock.⁹⁵ In fact, managerial duty-shirking may be even less likely under stakeholder governance, as more corporate constituencies have interests in monitoring managers.⁹⁶ Nonetheless, even supporters of stakeholder governance would concede that stakeholder governance increases shareholder agency costs and decreases managers' sole accountability to shareholders.⁹⁷ In making space for managers' consideration of non-shareholder interests, the multiple, and sometimes also mixed, motives mandated by stakeholder governance necessarily muddle managers' reasons for any given corporate action.⁹⁸

D. Reframing Distinctions between Shareholder Primacy and Stakeholder Protection

The distinction between shareholder primacy and stakeholder protections perceived by some to be binary is hardly clear, and increasingly less so in the wake of recent corporate law jurisprudence. As I summarize in this Part I.D, efforts to clarify two of the distinctions about the differences between these approaches to corporate governance have been oversimplified. The first is that the "principles-based" approach purportedly embodied by corporate law – and thus, shareholder primacy as well – is meaningfully distinct from the "rules-based" regulatory approach more often associated with conventional stakeholder protections like contractual relationships and government regulation. The second is that shareholder primacy is a method of regulating corporations from the "inside," while stakeholder protections (other than stakeholder governance) regulate corporations from the "outside." These debates about how to characterize the nature of shareholder primacy, stakeholder protection, and corporate law more broadly are not only inexact, but also incomplete. Specifically, by primarily focusing on the distinctions between principles and rules on the one hand, and internal or external regulation on the other hand, the implications upon managerial accountability of a law at any jurisdictional level has been overlooked as a distinguishing feature of corporate law.

"[i]n these situations there is no clear tension between profit maximization and social performance").

95. Greenfield, *supra* note 92, at 29.

96. *Id.* at 30.

97. *Id.*

98. Roberta Romano, *State Takeover Laws: Constitutional but Dumb*, WALL ST. J. (May 14, 1987), reprinted in LOS ANGELES DAILY J. (May 22, 1987) ("In promoting state regulation of takeovers, managers often claim to be furthering shareholders' interests. They also suggest that the interests of workers and local communities are served by these statutes. . . . it is most plausible that the principal beneficiaries of this regulation are its prime promoters – managers . . . fear[ing] the loss of their jobs.").

I do not attempt to conclusively settle any debate about the nature of corporate law in the following few pages. Rather, my purpose in this Part I.D is to provide support for a more nuanced understanding of the place of new stakeholder-centric local laws within corporate law. By briefly illuminating the inadequacy of the conventional categories, I seek to reframe the conventional debate about some of the distinguishing features of corporate law identified to date.⁹⁹ As I show later in this Article, shareholder primacy and stakeholder protections more accurately represent a spectrum, defined by the degree to which they weaken managerial accountability – and the local laws I later describe in Part II of this Article can be situated along such spectrum, depending on the amount of managerial discretion they grant.

1. “Principles”- vs. “Rules”-Based Regulation

In *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, Professor Lawrence Cunningham analyzes the relationship between rules-based and principles-based systems, arguing that complex regulatory systems are comprised of both rules and principles and do not solely operate according to only one type of classification. The conventional wisdom that Professor Cunningham challenges holds that rules- and principles-based legal provisions – and the legal systems of which they are a part – are fundamentally differentiated depending on whether the concepts or expectations that they communicate are demonstrated specifically (rules) or vaguely (principles), among other factors.¹⁰⁰

While rules and principles may seem simple to differentiate based on their definitions in the abstract, Professor Cunningham argues that meaningful distinction between them becomes increasingly difficult in practice. Furthermore, when a rule or principle interacts with other legal provisions within an area of law, this challenge is only compounded. For instance, legal systems do not solely operate according to only one type of classification. A legal system that is purportedly rules-based, for instance, demonstrates what is required based on clear statements or standards; principles, on the other hand, supposedly demonstrate what is permitted and are predominantly based on observances or general guidelines.¹⁰¹ However, if a system were strictly principles-based, all decisions

99. Other scholars have offered alternative approaches to delineate corporate law from other bodies for law, and the conventional categories provided in this section are not intended to be exhaustive. See, e.g., James J. Park, *Reassessing the Distinction between Corporate and Securities Law*, 64 UCLA L. REV. 116 (2017) (contending that corporate and securities law can be distinguished by the phase of the investment process in which investor protection is offered).

100. Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of Principles-Based Systems in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1420 (2007). Other factors include temporal classification: compliance with rules can be analyzed *ex ante*; principles, on the other hand, must be implemented before their compliance can be assessed *ex post*.

101. *Id.* at 1416.

would be left to the discretion of individuals or the corporation, so rules inevitably emerge to provide accountability and guidance in certain situations. On the other hand, principles necessarily provide contextual guidance that may further clarify the precise application of direct rule.¹⁰² This is true of shareholder primacy as well: shareholder primacy is a principle of general applicability, at the same time that it is embodied in numerous rules specifically delineating the form such shareholder primacy takes in particular situations.¹⁰³

When attempting to assess a system—such as shareholder primacy, or an entire legal system like corporate law more generally—as either rules- or principles-based, Professor Cunningham demonstrates that the exercise becomes so complex as to render it conceptually hollow. Yet, the characterization of legal systems as principles-based has nonetheless become increasingly more popular. Professor Cunningham hypothesizes that the reason for this development is that jurisdictions self-identify as principles-based “to forestall increased federal regulation” or otherwise ward off threats to their governing power. Doing so signals that their legal system is in a “sufficiently mature state to honor principles without the need for detailed rules.”¹⁰⁴

2. “Internal” vs. “External” Corporate Regulation

In the United States, the division of corporate law as “govern[ing] the internal structure of the corporation and laws outside of corporate law providing the primary check on corporate activity . . . is widely acknowledged.”¹⁰⁵ The internal structure – or internal affairs – of a corporation “are involved whenever the issue concerns the relations inter se of the corporation, its shareholders, directors, officers or agents.”¹⁰⁶ This division is a mere construction,¹⁰⁷ however – one that Professors Kent Greenfield and Daniel Greenwood contest, and that Professors Dalia Tsuk Mitchell and Elizabeth Pollman reveal is increasingly unsound.

Specifically, this boundary is “too simple” to accurately characterize a complex regulatory landscape, according to Professor Greenfield in *Reclaiming Corporate Law in a New Gilded Age*. Even external regulations “often have as a

102. In addition to the example presented in this paragraph, Professor Cunningham also explains that characterization of systems as rules- or principles-based is complicated because systems have a threshold in terms of whether they more closely identify as rules- or principles- based; accordingly, classifying a system as strictly rules-based or principles-based does not acknowledge all of the working parts of a complex system. Cunningham, *supra* note 100, at 1426.

103. See *supra* notes 64-69 and accompanying text.

104. Cunningham, *supra* note 100, at 1416.

105. Pollman, *supra* note 71, at 654-55.

106. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 313 cmt. a (1988).

107. See generally Dalia Tsuk, *Corporations without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861 (2003) (“In the course of the twentieth century, legal scholars and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory”).

goal the adjustment of behavior within the firm,” according to Professor Greenfield; therefore, he believes that it is more helpful to categorize corporate regulation as “(1) regulation requiring or encouraging certain results (e.g., pollution laws that prohibit the discharge of certain effluents); (2) regulation requiring or encouraging certain processes or actions (e.g., disclosure laws, nondiscrimination laws); and (3) regulation requiring or encouraging certain internal structures (e.g., a board that is elected by shareholders).”¹⁰⁸ As a result of this shift in perspective, Professor Greenfield illuminates the insight that stakeholders “typically have to depend on regulatory initiatives that focus on results and on procedures. The only stakeholders that have any significant structural protection within the corporate form are the shareholders.”¹⁰⁹

In his article *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, Professor Greenwood also challenges corporate law’s purported “internal” focus on shareholders and their relationship with managers, stating that the internal affairs distinction is “debatable, contestable, and ultimately quite fragile.”¹¹⁰ Professor Greenwood explains that:

“There is no principled line that explains what is or is not a part of corporations law nor what is or is not internal. . . . Nothing in the nature of the corporation determines when public shareholders will be seen as consumers, entitled to [federal securities law] protection without [regard to variations in state by state law], or when as voters and owners under a regime of voluntary law. . . . Conversely, some parts of the [Revised Model Business Corporation Act] are ‘internal’ only by the wispiest of legal fictions. . . . External regulatory laws – such as environmental, civil rights, consumer protection, labor, tort or criminal law, or even contract rules requiring contracting parties to fulfill their promises – impose more-effective or less-effective external constraints on decision-makers. Corporate law, in contrast, charges the decision-makers with a duty to use their freedom of action within those constraints to a particular end.”¹¹¹

Thus, to Professor Greenwood, “fiduciary duty is hardly an ‘internal affair.’ Everyone, not just shareholders, is affected by how national businesses are run.”¹¹²

Professor Tsuk Mitchell’s article *Corporations Without Labor* augments the awareness gained from Professors Greenfield and Greenwood by showing that corporate law’s focus on shareholders – to the exclusion of other stakeholders, such as workers – is by design.¹¹³ This provides further support for recognizing that the conventionally accepted “internal” nature of corporate law is actually arbitrary, rather than innate. Specifically, Professor Tsuk Mitchell argues that

108. Greenfield, *supra* note 92, at 21.

109. *Id.*

110. Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL’Y REV. 381, 421 (2005).

111. Greenwood, *supra* note 110 at 421-27.

112. *Id.* at 425.

113. *See generally* Tsuk, *supra* note 107.

“legal scholars and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory.”¹¹⁴ Professor Tsuk Mitchell explains that scholars and theorists did so because they were “[r]eluctant to admit the pervasiveness of class conflict, and viewing workers’ interests as protected by their unions,” and instead chose shareholders as a group with “less immutable social interests or classes . . . to tame corporate power.”¹¹⁵

While Professor Tsuk Mitchell ultimately differs from Professors Greenfield and Greenwood in acknowledging the existence of a boundary, whether or not it ever existed at all may matter less in light of recent developments in corporate law jurisprudence. As Professor Elizabeth Pollman argues in her article *Constitutionalizing Corporate Law*, the United States Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.* eroded the boundary between internal and external regulation of corporations by “allowing business corporations to opt out of generally applicable federal regulation.”¹¹⁶ In *Hobby Lobby*, the Court ruled that the Religious Freedom Restoration Act (RFRA) protected for-profit business corporations, and that RFRA is violated when administrative regulations do not provide corporations with a religious exemption from complying with law (in this case, minimum health insurance coverage standards requiring preventative care for women).¹¹⁷ As a result of this decision, she states that “corporate law’s foundational assumption that external regulations can address the interests of non-shareholder corporate participants” has been upended.¹¹⁸

Hobby Lobby thus creates ambiguity regarding the regulations with which a corporation must comply. Regulations that otherwise would have protected stakeholders may now be optional in some cases, and this flexibility increases managerial discretion. Greater managerial discretion means that *Dodge v. Ford*’s legacy of shareholder primacy has thus become especially potent in the wake of *Hobby Lobby*: managerial decisions previously limited by regulatory restrictions are now subject to the shareholder primacy norm, expanding the reach of *Dodge v. Ford*. At the same time, with the applicability of external regulation called into question, corporate law at all levels now has a heavy burden to take up the protection of stakeholders.¹¹⁹ While not conventionally con-

114. Tsuk, *supra* note 107, at 1864. Corporate law’s continued emphasis on shareholders within corporations’ “internal” structures is perceived as a political maneuver to Professor Greenwood as well. Specifically, according to the argument presented by Professor Greenwood in his article *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, such focus is “obscuring the peculiar political decisions” that endow corporate managers with regulatory discretion over our most important economic institutions. Greenwood, *supra* note 110, at 383.

115. Tsuk, *supra* note 107, at 1868.

116. Pollman, *supra* note 71, at 643.

117. *See generally* *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

118. Pollman, *supra* note 71, at 644, 670.

119. *See* 691 (“[i]f the interests of employees are not protected outside of corporate law, they may need to be addressed within.”).

sidered to be “corporate law,” the local laws summarized in Part II below function to fill such gap.

II. THE EMERGENCE OF CITY LIMITS ON SHAREHOLDER PRIMACY

Part II.A of this Article provides an in-depth survey of the laws and ordinances recently enacted by some cities¹²⁰ in order to encourage companies to formally adopt stakeholder governance, or at least encourage companies’ consideration of stakeholder interests. In doing so, these local initiatives consequently widen managerial discretion and limit shareholder primacy, as Part II.B explains. Overall, the goal of this Part II is to illuminate the functional impact of innovative city laws that create a new urban front for shareholder primacy.

A. *Local Laws Encouraging Stakeholder Governance or Consideration of Stakeholder Interests*

Stakeholder-centric local laws are one of a number of recent city-level initiatives targeted at issues traditionally thought to be within the scope of state (and sometimes federal¹²¹) corporate law. Others include (1) board diversity mandates for organizations receiving funding from city budgets;¹²² (2) city laws, resolutions and budget initiatives supporting the establishment of businesses formally organized as worker cooperatives;¹²³ and (3) even amendments to (or referendums to amend) city charters to strip corporations of their legal personality under certain circumstances.¹²⁴ All these board diversity mandates, worker cooperative incentives, and “disabling” corporate laws that strip corporations of their legal personality also address stakeholder interests in some way; however, in this Part I.A of the Article, I focus only on local laws and ordinances that encourage companies to formally adopt stakeholder governance, or at least encourage companies’ consideration of stakeholder interests.

There are several reasons for setting aside board diversity mandates, worker cooperative incentives, and “disabling” corporate laws in this Article. With respect to worker cooperative incentives, workers in worker cooperatives are both owners and stakeholders, and this dual role complicates an analysis of how such

120. *Infra* note 234.

121. State laws enabling the formation of and regulating the governance of corporations are increasingly complemented by corporate law at the federal level. *See, e.g.*, Mark Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003); Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REGULATION 26 (2003-2004); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); William Nowak, *The Public Utility Idea and the Origins of Modern Business Regulation* in CORPORATIONS AND AMERICAN DEMOCRACY (Harvard Univ. Press, 2017).

122. Dennis & Dubb, *supra* note 28.

123. Sutton, *supra* note 29.

124. Williams, *supra* note 30.

entities interact with shareholder primacy, which is the focus of this Article.¹²⁵ Similarly, “disabling” corporate laws – such as the City of Toledo’s Lake Erie Bill of Rights (LEBOR) that amended the City of Toledo charter to strip corporations of their legal personality for polluting the city’s adjacent Great Lake¹²⁶ – involve complex issues at the intersection of both shareholder primacy as well as corporate legal personality. With respect to board diversity mandates, to date such local initiatives have only operated upon nonprofit entities, which do not operate subject to shareholder primacy and thus also fall outside the scope of this Article’s focus.

The stakeholder-centric local laws and ordinances that I describe in this Part II.A focus on the interaction between stakeholder protection and shareholder primacy, and demonstrate variations of stakeholder-centric local laws in different settings. The first subset of such local laws and ordinances that I describe in Part I.A.1 encourages companies to formally adopt stakeholder governance, while the second subset that I describe in Part I.A.2 encourages companies’ consideration of stakeholder interests. To the extent that companies adopt stakeholder-governed entity types under the local initiatives described in Part I.A.1, or receive incentives or permits under the local initiatives described in Part I.A.2, the stakeholder protections require companies to consider, and in some cases deliver, stakeholder benefits – at risk of breaching their fiduciary duties or contractual obligations.

1. Local Initiatives to Encourage Entities’ Adoption of Stakeholder Governance

Several cities have undertaken measures to financially incentivize organizations that adopt stakeholder-governed entity forms, or that otherwise implement stakeholder governance within their organization. This section details several municipal programs encouraging stakeholder governance, including programs in Philadelphia, Pennsylvania (the nation’s first such program), and in Los Angeles County and the City of San Francisco, California.

In each case, the initiatives share a novel, local-level interest in organizations’ internal structure – specifically, internal structures that employ stakeholder governance. While individual states still retain their total monopoly on the establishment of available organizational forms, municipalities’ interest in influencing firms to choose stakeholder-governed organizational forms is a new

125. Even though workers are key stakeholders in every organization, this section excludes discussion of the numerous recent municipal initiatives that promote the organization of enterprise in worker cooperative forms. This is because in worker cooperatives, workers are shareholder-stakeholders; therefore, it is not entirely accurate to say that worker cooperative entities weaken shareholder primacy. While local initiatives promoting worker cooperatives is thus outside the scope of this Article, they are an example of a broader phenomenon of cities expressing interest and exerting power to shape legal issues traditionally addressed by state corporate law. I discuss local initiatives prompting worker cooperatives in *Local Corporate Law*, *supra* note 22.

126. Williams, *supra* note 30.

dynamic. It is also new for public incentives to express a preference for a particular approach to governance.¹²⁷

a. *Philadelphia Sustainable Business Tax Credit and
New Sustainable Businesses Tax Relief*

Under a local Philadelphia program enacted in 2009, launched in 2012 and reauthorized and expanded in 2015, Philadelphia offers Sustainable Business Tax Credits (“SBTC”) to certified B Corporations or organizations certified as sustainable by the City of Philadelphia’s Office of Sustainability.¹²⁸ In the preamble to Ordinance No. 160133 reauthorizing the SBTC, the ordinance explicitly states that it is designed “to assist existing B Corps certified businesses and incentivize more businesses to complete B Corps certification,” because B Corps benefit the city stakeholders.¹²⁹ Philadelphia offers a tax credit of up to \$4,000 to the first seventy-five businesses qualifying for the credit in any tax year.¹³⁰

Philadelphia’s support for stakeholder governed organizations like B Corps has increased since it introduced the SBTC, the first incentive program for stakeholder-governed organizations in any jurisdiction in the United States.¹³¹ When the program began, the SBTC was only available to the first twenty-five

127. While one of the best-known federal tax incentive programs, tax exemption under Section 501(c) of the Internal Revenue Code urges the adoption of specific governance mechanisms, such as conflict of interest policies, even it is agnostic among several options with differing governance structures. For example, a nonprofit corporation with either directorship or membership governance may be eligible to achieve tax-exempt status, depending on the circumstances; beyond nonprofit corporations, trusts, unincorporated associations, and, in some cases, even limited liability companies, each of which represent a variety of approaches to entity governance, may be eligible to attain tax-exempt status. See Internal Revenue Code Section 7701(a)(3) (defining “corporation”) and Internal Revenue Manual Section 7.25.3.2.3 (02-23-1999), 7.25.3.3(5)c (02-23-1999), and 7.25.3.12.1.4 (02-23-1999) (last visited Nov. 20, 2019); see also American Bar Association, *Non-profit LLCs*, BUS. L. TODAY (Mar. 23, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/03/02_brewer/ (last accessed Dec. 20, 2019).

128. PHILA., PA. ORDINANCE 160133 (2016) (revising the Sustainable Business Tax Credit to, among other revisions, increase the number of eligible businesses and the total tax credit amount, and to expand the credit so that it applies against total business income and receipts tax liability); see also Bradford Bucknum, *Don’t Leave Money on the Table: Have You Applied for the Sustainable Business Tax Credit?*, SUSTAINABLE BUS. NETWORK OF GREATER PHILA. (Feb. 5, 2019), http://www.sbnphiladelphia.org/member_stories/%20dont-leave-money-on-the-table-have-you-applied-for-the-sustainable-business-tax-credit/ (stating that “[g]rowing demand led to the credit’s expansion in 2015 . . .”).

129. PHILA., PA. ORDINANCE 160133 (2016) (stating that B Corps “are desirable for the City because they are overwhelmingly locally owned, twice as likely to offer health insurance and retirement plans, three times more likely to be owned by minorities or women, and thirty times more likely to donate at least ten percent of profits to charity than other businesses; and a significant portion offer some form of employee ownership . . .”).

130. PHILA., PA., CODE § 19-2604(10)(b)(ii),(c)(i) (2016).

131. Matt Devine, *Aligning Profits with Purpose: An Analysis of the Philadelphia Sustainable Business Tax Credit*, 25 TEMP. POL. & C.R. L. REV. 75, 75 (2016).

businesses that applied for it.¹³² In February 2017, Philadelphia expanded availability of the tax credit to fifty businesses.¹³³ The SBTC's reauthorization is expected in 2022, and further expansion may take place at that time. In addition, since 2018, the City of Philadelphia has also offered organizations that are eligible for the SBTC additional relief from local taxes if they meet certain additional requirements. If the organization is within its first three years since receiving certification as a Sustainable Business (which includes B corps) by the Philadelphia Office of Sustainability,¹³⁴ and employs at least two non-family members "who work in the City at least sixty percent of the time,"¹³⁵ the organization is taxed at a zero percent rate on both net profits as well as existing business income and receipts.¹³⁶

As of 2016, the only published analysis of Philadelphia's SBTC declared it a "noble effort," but found that it "consistently underperforms its expectations."¹³⁷ The analysis recognized that SBTC advocates point to it as a "national model"¹³⁸ and that business owners acknowledge the SBTC's "symbolic importance."¹³⁹ However, the analysis also criticized the program for its small size, failure to attract enough applicants to fully distribute the credits available under the program, an incentive amount that is insufficient to cover the costs of certification necessary to be eligible for the benefit in the first place, and other flaws.¹⁴⁰ In the three years since the publication of the analysis, it seems that many of its policy recommendations have been implemented, including the expansion of the eligibility of the program beyond organizations certified as B Corps, increasing the size of the program, and providing tax relief for eligible organizations on their total tax liability in the initial tax years immediately following certification.¹⁴¹

b. Los Angeles County Social Enterprise Preference Program

In 2016, Los Angeles County renamed and expanded its Transitional Job Opportunities Preference ("TJOP") Program to be the Social Enterprise Prefer-

132. Bucknum, *supra* note 128.

133. § 19-2604(10)(b)(ii)(a) (2016).

134. § 19-4201(2)(a) (2017); *see also* § 19-2604(10) (2017) (defining "Sustainable Business" to include B Lab certified B corporations and organizations with "certifications provided by other rating organizations that will be accepted in lieu of a 'B corporation' . . .").

135. § 19-4201(4)(a) (2017).

136. § 19-4201(2).

137. Devine, *supra* note 131, at 77.

138. *Id.* at 75.

139. *Id.* at 79.

140. *Id.* at 99-101.

141. *Id.* at 79. *See also supra* textual paragraph immediately preceding (about expansion of the program).

ence (“SEP”) Program.¹⁴² The mission of the SEP Program is “to increase contracting opportunities for enterprises whose primary purpose is to enhance Los Angeles County through economic, social, and environmental sustainability,”¹⁴³ one category of which is transitional job opportunities for underemployed or difficult to employ workers.¹⁴⁴ The program is the result of advocacy by the Roberts Enterprise Development Fund (REDF). From the fall of 2015 through its passage in July 2016,¹⁴⁵ REDF encouraged the Los Angeles County Board of Supervisors to include social enterprises in the Small Business and Locally Owned Business Certification Program.¹⁴⁶ New guidelines, issued in October 2016, expanded the scope of the County’s certification, procurement policies, and contract preferences for small business to include provisions for social enterprise businesses.¹⁴⁷

Currently, the SEP Program available in Los Angeles County offers social enterprises the ability “to receive a 15% bid price reduction or ‘preference’ when bidding on certain goods and services solicitations from Los Angeles County”.¹⁴⁸ The program is administered by the Los Angeles County Department of Consumer and Business Affairs (DBCA). Eligible businesses are: (1) those that are certified either as a B Corporation or incorporated as a benefit or social purpose corporation with the State of California; (2) those with a “Green Business Certification” by a city government located within Los Angeles County that its operation is environmentally sustainable; (3) those that provide employment and support services to individuals in transition; or (4) a “business whose primary purpose is the common good as demonstrated through a pub-

142. *Statement of Proceedings for the Regular Meeting of the Board of Supervisors of the County of Los Angeles Held in Room 381b of the Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, Tuesday, July 19, 2016, 9:30 AM, COUNTY OF L.A., CAL. BD. OF SUPERVISORS (Cal. 2016)*, http://lacounty.granicus.com/MediaPlayer.php?view_id=1&clip_id=2573; *see also* COUNTY OF L.A., CAL., LOCAL SMALL BUSINESS ENTERPRISE, DISABLED VETERAN BUSINESS ENTERPRISE, AND SOCIAL ENTERPRISE PREFERENCE PROGRAMS IMPLEMENTATION GUIDELINES 3 (2016).

143. *See* COUNTY OF L.A., CAL., OFFICE CONSUMER & BUSINESS AFFAIRS, L.A. COUNTY’S CONTRACTING CONNECTIONS: PROGRAM FACT SHEET, <http://bizfed.org/wp-content/uploads/2017/07/County-of-Los-Angeles-Contracting-Connections-Program-Fact-Sheet.pdf>; *see also* L.A. COUNTY, CAL., CODE OF ORDINANCES ch. 2.205.020 (2019), https://library.municode.com/ca/los_angeles_county/codes/code_of_ordinances?nodeID=TIT2AD_DIV4MIRE_CH2.205SOENPRPR_2.205.020PU.

144. LOCAL SMALL BUSINESS ENTERPRISE, DISABLED VETERAN BUSINESS ENTERPRISE, AND SOCIAL ENTERPRISE PREFERENCE PROGRAMS IMPLEMENTATION GUIDELINES, *supra* note 142, at 3.

145. *Policy: Legislative Successes*, ROBERTS ENTERPRISE DEVELOPMENT FUND (Oct. 13, 2019), <https://redf.org/what-we-do/policy/>.

146. *Id.*

147. *See generally* COUNTY OF L.A., LOCAL SMALL BUSINESS ENTERPRISE, DISABLED VETERAN BUSINESS ENTERPRISE, AND SOCIAL ENTERPRISE PREFERENCE PROGRAMS IMPLEMENTATION GUIDELINES, *supra* note 142.

148. COUNTY OF L.A., CAL., CONSUMER & BUSINESS AFFAIRS, SOCIAL ENTERPRISE (2019), http://dcba.lacounty.gov/wp-content/uploads/2019/02/2.11.19_Eng-Small-Business-Social-Enterprise_FINAL-NEW.pdf.

lished mission statement and whose principal business activity is directly related to accomplishing that stated social mission.”¹⁴⁹

Before the SEP Program took effect, ten non-profit firms applied for the TJOP – the SEP Program’s predecessor program – in twenty-nine solicitations for Los Angeles County contracts from 2011 to August 2015. Of these, seven of the applicants received one or more contracts, for a total of nine awards valued at more than 16.5 million dollars.¹⁵⁰ Since the SEP Program was established, however, reporting on its efficacy appears to have been delayed.¹⁵¹ In 2016, when the SEP Program was established, the Los Angeles County Board of Supervisors asked the Los Angeles County Department of Consumer and Business Affairs (DBCA) to develop a four-year action plan beginning on July 1, 2016 to pilot social enterprise certification and procurement goals to be achieved in target industries and occupations by June 30, 2020.¹⁵² The Los Angeles County Board of Supervisors also asked the DBCA to establish a work group to track and monitor social enterprise utilization, through commencement of a two-year pilot program to measure subcontract information, and development of policies and procedures about subcontractor certification status and eligibility. In 2018, the DBCA, together with the Los Angeles County Chief Executive, reported on the opportunities available for participation in Los Angeles County’s preference programs, including the SEP Program. Of the 6,658 County contracts identified and in effect at the time of the report, there were 1,741 active contracts with Los Angeles County reported to be potentially eligible for the SEP and other Los Angeles County preference programs.¹⁵³ In the report identifying these contract opportunities, a number of recommendations were made to increase participation in Los Angeles County’s preference programs, suggesting that participation is below target.¹⁵⁴

No other reports appear to be publicly available about the benchmark participation in the SEP Program, the specific number of organizations awarded the SEP or the number of contracts such organizations received since the SEP Pro-

149. COUNTY OF L.A., CAL. CHIEF EXEC. OFFICE, REPORT BACK ON THE EVALUATION OF EXISTING PREFERENCE PROGRAMS IN PURCHASING OR CONTRACTING ACTIVITIES (ITEM 3, AGENDA OF MAY 12, 2015) (2015).

150. *Id.* at 3.

151. Measurement of subcontract information appears to have been delayed. The Los Angeles Board of Supervisors originally instructed the DBCA to begin the subcontract measurement pilot program on January 1, 2017. On January 10, 2018, the DBCA, together with the County of Los Angeles Chief Executive Officer, reported contract opportunity data.

152. *Statement of Proceedings for the Regular Meeting of the Board of Supervisors of the County of Los Angeles Held in Room 381b of the Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, Tuesday, January 12, 2016, 9:30 AM*, COUNTY OF L.A. BD. OF SUPERVISORS (Cal. 2016), http://lacounty.granicus.com/MediaPlayer.php?view_id=1&clip_id=2410.

153. Publicly available records identify subcontract information data for all Los Angeles County preference programs, but do not specifically break out information for the SEP Program.

154. County of Los Angeles Chief Executive Office, *Assessing Economic Development Opportunities in Ongoing County Contracts*, (Jan. 10, 2018).

gram's inception. However, based upon a list of pre-qualified social enterprises that can be procured by Los Angeles County departments, the number of social enterprises participating in the SEP Program appears to be thirty-one as of May 14, 2019.¹⁵⁵ While this figure is small, it represents a 280% increase in the number of SEP certified organizations since the SEP Program's establishment. In May 2019, the Los Angeles County Board of Supervisors also approved a five-year extension of a Master Agreement with SEP certified organizations, through June 2024.¹⁵⁶

c. San Francisco Benefit Corporation Discount

In April 2012, the city of San Francisco passed an ordinance that created financial incentives for socially responsible businesses formed as California benefit corporations, known as the California Benefit Corporation Discount Ordinance.¹⁵⁷ A California benefit corporation is a subcategory of California business corporations that "allows entrepreneurs and investors to operate as publicly held stock corporations focused on social and environmental objectives rather than the economic return to investors."¹⁵⁸ Under the program, if a California benefit corporation bids on a city contract and met other requirements, it would generally receive a Benefit Corporation Discount of 4% for the purpose of determining the highest ranked or apparent lowest bid during the city's proposal selection process.¹⁵⁹ As of the date of this Article, the program's biannual evaluation report assessing its participation and providing recommendations to the San Francisco Board of Supervisors was not publicly available;¹⁶⁰ therefore, the success of the program before it expired in 2015 is unknown.¹⁶¹

155. County of Los Angeles Workforce Development, Aging and Community Services, Letter to the Los Angeles County Board of Supervisors (May 14, 2019).

156. *Statement of Proceedings for the Regular Meeting of the Board of Supervisors of the County of Los Angeles Held in Room 381b of the Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, Tuesday, May 14, 2019, 9:30 AM*, COUNTY OF L.A. BD. OF SUPERVISORS (Cal. 2019), https://docs.google.com/gview?url=http://file.lacounty.gov/SDSInter/bos/sop/1056086_051419.pdf&embedded=true.

157. S.F., CAL., ADMIN. CODE § 14C (2012).

158. S.F., CAL. ORDINANCE NO. 76-12 (2012).

159. S.F., CAL., ADMIN. CODE § 14C.3(d); *see also* Michelle Baker, *Socially Responsible Businesses Get a Boost from Local Governments*, NONPROFIT L. BLOG (May 8, 2019), <http://www.nonprofitlawblog.com/socially-responsible-businesses-get-a-boost-from-local-governments/> (last modified Oct. 19, 2019).

160. S.F., CAL. ORDINANCE NO. 250-13 (2013) (amending the original ordinance to transfer implementation and biannual evaluation responsibility for the discount to the Contract Monitoring Division of the San Francisco City Administrator). The author of this Article called the Contract Monitoring Division on August 12, 2019 and left a voicemail for one of its representatives; as of the date of this Article, the voicemail has not been returned.

161. The Municode website shows that the discount expired in 2015.

2. Local Initiatives to Encourage Entities' Consideration of Stakeholder Interests

In addition to the local initiatives described in Part II.A.1 aimed at encouraging companies to formally adopt stakeholder governance, a handful of cities are also undertaking measures that encourage organizations to consider stakeholders interests – even when such organizations have not adopted stakeholder-governance, either through choice of entity or otherwise. These measures have taken the form of “community benefits ordinances,”¹⁶² which require companies that accept financial incentives to develop within a city to engage with their stakeholders. At a minimum, community benefits ordinances require companies to dialogue with stakeholders about the local impact of their activities; in their strongest form, companies are required to provide community benefits desired by stakeholders to mitigate any negative impacts that their activities may have on stakeholders, in order to secure an incentive or permit to operate from a city. This section will summarize enacted community benefits ordinances in Detroit, Pontiac and Ypsilanti, Michigan, and Houston, Texas. Other community benefit ordinances have been considered to varying degrees in Berkeley, California;¹⁶³ Chicago, Illinois;¹⁶⁴ Kansas City, Missouri;¹⁶⁵ Salisbury,

162. *But see* DENVER, COLO., MUN. CODE § 27-184(b), ORDINANCE NO. 0019-18 (Feb. 12, 2018). Denver, Colorado has enacted an incentive for affordable housing that provides for “community serving use agreements.” In interpretive guidance about Denver’s affordable housing incentive, as well as prior drafts of the ordinance, the “community serving use agreements” are referred to as “community benefits agreements.” Denver City Council, Bill No. CB18-xxxx (Dec. 22, 2017 draft), https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/Zoning/text_amendments/38_Blake/Draft_incentive_ordinance_12-22-2017.pdf; Blair Lichtenfels, Bruce James & Kate Stevenson, *Denver City Council Implements Legislation Allowing Structures Up To 16 Stories In Rino*, WESTERN REAL EST. BUS. (Oct. 2018), https://www.bhfs.com/Templates/media/files/insights/WREB_Denver%20City%20Council_Oct2018.pdf.

163. Councilmember Ben Bartlett, Referral Letter to the City Manager and the Planning Commission: Adeline Corridor Community Benefits Ordinance (July 25, 2017), https://www.cityofberkeley.info/uploadedFiles/Council_3/Level_3_-_General/2017-07-25%20Item%2038%20Referral%20to%20the%20City%20Manager.pdf.

164. Matthew Lee & Elaine Chen, *After Years of Organizing, Obama Center CBA Ordinance Introduced in City Hall*, CHICAGO MAROON (July 28, 2019); Aaron Gettinger & Samantha Smylie, *Ald. Taylor Grows Frustrated with Progress on CBA as New Housing Legislation Goes to City Council*, HYDE PARK HERALD (Oct. 11, 2019), <https://hpherald.com/2019/10/11/ald-taylor-grows-frustrated-with-progress-on-cba-as-new-housing-legislation-goes-to-city-council/>; Laura Gersony, *After Protest, CBA Coalition Secures Housing Ordinance Meeting with City Officials*, CHICAGO MAROON (Nov. 23, 2019), <https://www.chicagomaroon.com/article/2019/11/23/protest-cba-coalition-secures-housing-ordinance-me/>.

165. COUNCIL OF KANSAS CITY, MO., COMMITTEE SUBSTITUTE FOR RESOLUTION NO. 160620 (2016), <http://cityclerk.kcmo.org/LiveWeb/Documents/ViewRevisionPDF.aspx?q=V5Z5if7AM5MQQNoQAXgkG1olpqwoyI%2Fev9fsjuoGpOhHGjIhEZO26zn1WDANDKUQsExECuVaH%2FFYxzhGo2Ci%2B9uZ2oL58NcsSivXNlcBqzCu5gNFzYXMQ%3D%3D>; *see also* Diane Stafford, *KC Eyes Local Hiring Pacts for Public-supported Developments*, KANSAS CITY STAR (Aug. 23, 2016, 6:12 PM), <https://www.kansascity.com/news/local/article97185332.html>.

North Carolina;¹⁶⁶ Philadelphia, Pennsylvania;¹⁶⁷ Pittsburgh, Pennsylvania;¹⁶⁸ and St. Louis, Missouri;¹⁶⁹ however, in the interest of brevity, they are not summarized in this section. While each of the implemented community benefits ordinances differ slightly, a feature shared by all is that they introduce a limitation upon the internal decision-making structure of the organization by encouraging or even requiring consideration (if not more) of stakeholder interests in the company desires to receive a public incentive or permit.¹⁷⁰

a. *Detroit's Community Benefits Ordinance*

In November 2016, Detroit adopted the nation's first community benefits ordinance – the “Detroit Community Benefits Ordinance” – which went into effect in 2017.¹⁷¹ The ordinance originated in Detroit's North End neighborhood,¹⁷² and its ultimate adoption was the result of a pioneering campaign that began in January 2014 by the Equitable Detroit Coalition (EDC), together with

166. Video commitment recorded by Mayor Al Heggins at at Kauffman Foundation's 2019 annual Mayors Conference on Entrepreneurship in Kansas City, Mo. (May 20-22, 2019).

167. City of Phil., Bill No. 190553 (as amended 12/4/19) (introduced June 13, 2019) (proposing to establish a new Chapter 17-2300 of The Philadelphia Code, entitled “Community Benefits Agreements,” and requiring Community Benefits Agreements for certain High Impact Projects or Development Projects that receive City Support or Financial Assistance), <https://phila.legistar.com/LegislationDetail.aspx?ID=3983719&GUID=BB3BC561-8D65-492F-B386-EFC14D93F3B0&Options=&Search=>; see also Jake Blumgart, *City to Weigh 'Social Impact' of Development Proposals on Public Land*, PLAN PHILLY (Sept. 22, 2016), <https://why.org/articles/city-to-weigh-social-impact-of-development-proposals-on-public-land/>.

168. See Juliette Rihl, *This Pittsburgh group wants all developers getting public subsidies agree to community benefits. Including you, Amazon.*, PublicSource, <http://www.publicsource.org/this-pittsburgh-group-wants-all-developers-getting-public-subsidies-to-agree-to-community-benefits-including-you-amazon>, (last visited Oct. 25, 2019).

169. St. Louis, Mo., Bd. Bill No. 11 (2019), <https://www.stlouis-mo.gov/government/city-laws/board-bills/>; ST. LOUIS, MO., ORDINANCE 71017 (2019); see also Jacob Barker, *St. Louis Moves Toward Community Benefit Ordinance for Major Developments*, ST. LOUIS POST-DISPATCH (Mar. 26, 2017), https://www.stltoday.com/business/local/st-louis-moves-toward-community-benefit-ordinance-for-major-developments/article_88611f0b-29a3-5217-93d3-96616ddce839.html; Maria Altman, *How to Get Real Community Benefits Agreements? Depends on Who You Ask*, ST. LOUIS PUBLIC RADIO (May 17, 2017), <https://news.stlpublicradio.org/post/how-get-real-community-benefits-agreements-depends-who-you-ask>.

170. Note here that there are other community benefits “fund” programs around the nation, for example the Cambridge Community Benefit fund – however, since these essentially establish a tax that organizations pay to generate a budget to be administered by cities/localities without any further action on the part of the organization, they are not discussed here as “community benefit ordinances.”

171. CITY OF DET., COMMUNITY BENEFITS ORDINANCE, <http://www.detroitmi.gov/Government/Departments-and-Agencies/Planning-and-Development-Department/Community-Benefits-Ordinance> (last visited Nov. 12, 2019).

172. DANIEL KRAVETZ, EQUITABLE DETROIT COAL., FIGHTING FOR EQUITY IN DEVELOPMENT: THE STORY OF DETROIT'S COMMUNITY BENEFITS ORDINANCE 2 (2017) at 7-8.

other community organizations.¹⁷³ The ordinance that the EDC initially proposed – commonly known as “Proposal A” – lost narrowly to the alternative introduced at the eleventh hour by Detroit’s City Council. According to statistics available from the City of Detroit as of September 2018, the Detroit Community Benefits Ordinance has applied to nine projects, resulting in over 500 participants at over 54 meetings and “dozens” of “key benefits for the community.”¹⁷⁴ However, the EDC and some Detroit City Council members, among others, have criticized the adopted ordinance as ineffective.¹⁷⁵ In January 2018, EDC published a report recommending twelve amendments to the ordinance, and in July 2018, the City of Detroit’s Legislative Policy Division (LPC) also suggested nine amendments, some of which overlap with those proposed by EDC.¹⁷⁶ Notably, the LPC recommended changing the current ordinance’s name to the “Detroit Community Engagement Ordinance,” in an apparent acknowledgement of the current ordinance’s inefficacy at providing community benefits.¹⁷⁷ As of the date of this Article, the City Council has not enacted any amendments to the Detroit Community Benefits Ordinance.

In its current adopted form, the Detroit Community Benefits Ordinance applies to organizations accepting a threshold level of “investment” by the City of Detroit of \$1 million, in the form of tax abatements or land transfers.¹⁷⁸ Depending on the project’s dollar value, the organization receiving such investment may be required take certain actions to deal with the impacts of its activi-

173. DANIEL KRAVETZ, *EQUITABLE DETROIT COAL., FIGHTING FOR EQUITY IN DEVELOPMENT: THE STORY OF DETROIT’S COMMUNITY BENEFITS ORDINANCE 2* (2017) at 7-8; see also Nina Ignaczak, *Two Community Benefits Ordinances in Detroit Set for Ballot Battle*, MODEL D (Oct. 31, 2016), <https://www.modeldmedia.com/features/cbo-ballot-103116.aspx> (last accessed Dec. 20, 2019) (“The first proposal was drafted by the Sugar Law Center and driven by a petition from the grassroots community coalition Rise Together Detroit, whose member organizations include Equitable Detroit Coalition, Detroit People’s Platform [the institutional anchor for the Equitable Detroit Coalition] and others.”).

174. CITY OF DET., *Community Benefits List*, https://www.dropbox.com/s/g6wyoh9lr3z5pu/Community_Benefits_List.pdf?dl=0.

175. Sarah Cwiek, *With Big Deals in the Works, Some Want Changes to Detroit’s Community Benefits Ordinance*, MICH. RADIO (June 20, 2018), <https://www.michiganradio.org/post/big-deals-works-some-want-changes-detroits-community-benefits-ordinance>; but see Aaron Mondry, *How Detroit Enforces Its Developer Agreements and Regulations, Explained*, CURBED DETROIT (February 4, 2020 11:21 AM), <https://detroit.curbed.com/2020/2/4/21122426/detroit-developers-community-benefits-agreement-51-percent> (reporting that the City of Detroit argues “that its enforcement methods exert real oversight over developments,” that “the CBO is working as it should,” and that “Detroit is doing development more equitably than any other city in the country.”).

176. Amendments proposed by both EDC and LPC include extending the duration of the process, changing the selection process for members of Neighborhood Advisory Councils (NACs), and giving NACs more useful and accessible information about the project. David Whitaker and City of Detroit Legislative Policy Division Staff, *Opinion Letter on Community Benefits Ordinance Amendments* (July 23, 2018), https://detroitmi.gov/sites/detroitmi.localhost/files/migrated_docs/legislative-policy-reports/2018/CBO%20Amendments.pdf; EDC, *Recommendation for Amendments, Detroit Community Benefits Ordinance* (Jan. 2018).

177. Whitaker and City of Detroit Legislative Policy Division Staff, *supra* note 176.

178. DET., MICH., *ORDINANCE NO.35-16 § 14-12-2* (2016).

ties and development upon affected community members.¹⁷⁹ For projects valued at \$75 million or more,¹⁸⁰ the process requires that at least two meetings to review the project and its impact. The Director of the City of Detroit’s Planning and Development Department (the “Planning Director”) conducts an initial public meeting in the community affected by the project,¹⁸¹ and another meeting with a nine-member “Neighborhood Advisory Council” (“NAC”) and the organization receiving the City investment.¹⁸²

In addition, within six weeks of the initial public meeting,¹⁸³ the Planning Director must provide to the Detroit’s City Council a “Community Benefits Report” regarding the project and the aforementioned meetings. This report must include, among other information, “[a]n itemized list of the concerns raised by the NAC” and “[a] method for addressing each of the concerns raised by the NAC, or why a particular concern will not be addressed.”¹⁸⁴ For projects valued at \$3 million or above but less than \$75 million, the process does not require any direct citizen engagement by either the Planning Director or the organization receiving City investment. Nonetheless, the organization must “partner” with the City of Detroit Planning Director, and, as appropriate, workforce development agencies, to promote local employment, and mitigate negative impacts upon the community and residents.¹⁸⁵

Under Proposal A – the Detroit Community Benefits Ordinance as originally proposed by the EDC – only \$300,000 in City investments would have triggered the proposed ordinance.¹⁸⁶ This figure is \$700,000 less than the minimum City investment amounts in the adopted ordinance. In addition to this difference, Proposal A’s project valuation thresholds were lower, and its substantive requirements were more stringent. For projects valued at \$15 million or more, the organization receiving City investment would be required to enter into a CBA¹⁸⁷ directly with the community affected by its development and activities.¹⁸⁸ The community benefits agreements would be legally binding contracts negotiated between the organization and the community-based organizations located within its project’s host community, without the facilitation of the Planning Director or any other governmental official.¹⁸⁹ For projects valued

179. See generally *id.*, at §§ 14-12-1–14-12-5.

180. § 14-12-2 (defining “Tier 1 Project”).

181. § 14-12-3(a).

182. § 14-12-3(b) and (c).

183. § 14-12-3(d)(4).

184. § 14-12-3(d).

185. § 14-12-4.

186. See Proposal A: Petition Initiative Ordinance for Community Benefits Agreement (full text available at <https://www.modeldmedia.com/features/cbo-comparison.aspx>).

187. *Supra* Part I.C.

188. See Proposal A: Petition Initiative Ordinance for Community Benefits Agreement (full text available at <https://www.modeldmedia.com/features/cbo-comparison.aspx>).

189. *Id.*

between \$3 million and \$15 million, the organization would only be required to adopt and implement a “Community Benefits Package” that would implement the policy recommended by Proposal A, which would “require, wherever feasible, proportional community benefits as a condition of significant public support for development” by organizations.¹⁹⁰

While Proposal A was not successful in its original form in Detroit, the weaker ordinance ultimately enacted in Detroit still requires affected organizations to consider stakeholder interests (at least superficially, if not more). Proposal A eventually found more success in the nearby city of Ypsilanti, Michigan, which enacted a community benefits ordinance strikingly similar to Proposal A in September 2018. I discuss the City of Ypsilanti’s community benefits ordinance at length in the penultimate section of this Part II.B.2 below.

b. *Houston’s Community Benefits Ordinance*

Approximately one and a half years after the City of Detroit’s landmark legislation to establish the first community benefits ordinance in the United States, the City of Houston, Texas was the next city to implement a community benefits ordinance. Houston’s City Council voted in May 2018 to enact amendments to its tax abatement guidelines, requiring organizations that apply to receive tax abatements to commit to provide community benefits as a condition of receiving such tax abatements.¹⁹¹

The purpose of Houston’s “Complete Communities” ordinance is “to attract development in complete communities . . . in order to focus civic, business, and philanthropic resources on community needs as identified by the residents and larger community, such as housing, parks and environmental, economic, health, educational, mobility and infrastructure, and other social services, projects, or programs.”¹⁹² Among other criteria, the ordinance requires that organizations provide community benefits in at least one of eight areas specified in the ordinance: local job recruitment; public improvements; crime prevention through environmental design; affordable or workforce housing; job training for entry or mid-skill level jobs; participation in job reentry programs; or paid internships for low income students.¹⁹³ Prior to entering into a tax abatement agreement with any organization, the ordinance requires that the City of Houston’s City Council hold at least one public meeting where interested parties can express their views about the project. The ordinance’s requirements have been applauded

190. Proposal A, Section 14-12-1 (full text available at <https://www.modeldmedia.com/features/cbo-comparison.aspx>).

191. Jared Brey, *Houston Attaches Community Benefit Strings to Public Subsidies*, NEXT CITY (May 24, 2018), <https://nextcity.org/daily/entry/houston-attaches-community-benefit-strings-to-public-subsidies>.

192. CITY OF HOUS., TEX. MAYOR’S OFFICE OF ECON. DEV., SUMMARY OF PROPOSED REVISIONS (2018 TAX ABATEMENT RENEWAL), (May 8, 2018), https://www.mayorsinnovation.org/images/uploads/pdf/18_-_Summary_of_Proposed_Revisions_and_FAQ.pdf.

193. *Id.* at 3 tbl. 44-1.

ed as a “historic shift,”¹⁹⁴ even though some of the advocates for the ordinance had hoped it would raise standards still higher. Just over one year since its opening, publicly available information about the program’s outcomes and efficacy is not yet accessible.

c. Ypsilanti’s Community Benefits Ordinance

The City of Ypsilanti, Michigan’s community benefits ordinance passed in 2018 in the wake of Detroit’s community benefits ordinance. According to one of the Ypsilanti council members voting in favor of the ordinance, the goal of the ordinance is to “affect more favorable outcomes for residents moving forward.”¹⁹⁵ The City of Ypsilanti Community Benefits Ordinance mandates that any organization receiving public support for development must: increase residents’ participation in development decisions;¹⁹⁶ enter into an agreement to provide “amenities, benefits, commitments, or promises to the City of Ypsilanti” that “reflect the scale of and [are] in proportion to the [p]ublic [s]upport provided;”¹⁹⁷ and meet other requirements.¹⁹⁸ The threshold level of public support required to trigger the ordinance is minimal: a project need only receive \$50,000 of “cash or near-cash assistance . . . principally encompass[ing] tax and economic incentives provided by federal, state, or local governmental bodies.”¹⁹⁹

The process and requirements for determining the community benefits required by the City of Ypsilanti Community Benefits Ordinance is complex, uncertain and potentially lengthy in terms of time. The Ordinance requires that all organizations seeking financial support hold a community meeting to inform residents and encourage discussion.²⁰⁰ After this meeting, the City Council creates an ad-hoc committee consisting of one council member and five to eight residents of the City of Ypsilanti. In appointing the resident committee members, the City Council must select at least three recommended at the initial community participation meeting, guided by “relevant community interests” such as geographic, demographic and socio-economic factors.²⁰¹ This committee will work together with the organization receiving financial support for de-

194. Mike Morris, *Houston Council Sets Higher Bar for Firms Seeking City Subsidies*, HOUSTON CHRON., (May 16, 2018, 6:25 PM) (quoting Michelle Tremillo, executive director of the Texas Organizing Project), <https://www.chron.com/news/houston-texas/houston/article/Houston-council-sets-higher-bar-for-firms-seeking-12919210.php>.

195. Brianna Kelly, *Ypsi Adopts Community Benefits Ordinance, Bolstering Residents’ Role in Development Process*, CONCENTRATE (Sept. 26, 2018), <https://www.secondwavemedia.com/concentrate/features/ypsicbo0473.aspx>.

196. YPSILANTI, MICH., ORDINANCE NO. 1325, §§30-527, 30-528, 30-530, 30-531 (2018).

197. *Id.* at §§ 30-501, 30-512.

198. For example, the ordinance requires a monitoring and compliance mechanism.

199. YPSILANTI, MICH., ORDINANCE NO. 1325, § 30-501.

200. *Id.*

201. *Id.*

velopment to recommend to the City Council the specific community benefits to be provided by the organization.²⁰² The committee has sixty days following its establishment to make recommendations, and must meet at least twice during that time; however, this period may be extended at the request of either the committee or the organization receiving financial support.²⁰³ Before voting to approve, reject, or amend the proposed community benefits,²⁰⁴ the City Council must also hold a public hearing regarding the community benefits at least fifteen days prior to the vote.²⁰⁵

In considering the committee's recommendation regarding the community benefits to be provided, the City of Ypsilanti Community Benefits Ordinance details that the city's consideration and ultimate approval of contracts between the city and the organization(s) providing community benefits "should" be guided by a "Quadruple Bottom Line Philosophy:" "the potential value a Project may bring to the community, the potential impact a project may have on the community, the profitability of a project, and identification of potential sites of cultural, historic, or archaeological significance, as well as the protection and preservation of such sites."²⁰⁶ The Ordinance includes "a non-exhaustive list" of examples of community benefits that organizations receiving varying levels of financial support could provide.²⁰⁷ Examples of these benefits include: (1) public infrastructure such as parks or public transportation; (2) project elements or city investments that are environmentally sustainable; and (3) unbundling of construction work into bid sizes that will better promote local small business competition.²⁰⁸ Projects receiving \$50,000 to \$250,000 in financial support must implement at least two of the listed benefits; projects receiving more than \$250,000 in financial support must comply with all three benefits and also provide two additional benefits,²⁰⁹ which may take the form of workforce training, educational or mentoring opportunities and affordable housing.²¹⁰

The Ordinance also empowers the City Council with the discretion to allow organizations to substitute benefits not described among the examples presented in the ordinance,²¹¹ and even exempt the organization from the requirement to enter into an agreement to provide community benefits entirely – provided the organization can meet certain criteria, including showing how it will "otherwise seek to implement the purpose of" the ordinance.²¹² As of the date of this Arti-

202. *Id.* at § 30-527(D).

203. *Id.*

204. *Id.* at § 30-529.

205. *Id.* at § 30-528.

206. *Id.* at § 30-513.

207. *Id.* at § 30-515.

208. *Id.* at § 30-515(A).

209. *Id.* at § 30-517.

210. *Id.* at § 30-515(B).

211. *Id.* at § 30-518.

212. *Id.* at § 30-546.

cle, information about the impact of the program was not accessible to the general public.

d. *Pontiac's Community Benefits Ordinance*

The most recent community benefits ordinance to be passed, the City of Pontiac, Michigan's community benefits ordinance passed in August 2019 and was effective as of September 2019.²¹³ Unlike CBOs in Detroit, Houston and Ypsilanti, Pontiac's community benefits ordinance, entitled "Provisioning Center Community Benefits Agreements" is unique in that it applies only to organizations conducting certain types of activities within its jurisdiction – specifically, the provision of medical marijuana.²¹⁴

Pontiac's Provisioning Center Community Benefits Agreements ordinance operates together with Pontiac's medical marijuana ordinance. Pontiac's medical marijuana ordinance, City of Pontiac Medical Marihuana Facilities Ordinance, requires that dispensaries obtain a permit from the city.²¹⁵ Applications for dispensaries will be assessed according to a scoring process that considers stakeholder impact, including among other factors: the effect of the dispensary on the surrounding neighborhood's traffic patterns and resident safety; the dispensary's plans to conduct local hiring and provide employee benefits; and "community improvement programs aimed at the City of Pontiac."²¹⁶ A dispensary need not offer any community benefits under the Provisioning Center Community Benefits Agreements ordinance, but if it does not do so, "such applicant will receive a zero (0) score in certain key segments of the provisioning

213. Pontiac City Council, "Official Proceedings, 113th Session of the Tenth Council" (Sept. 3, 2019) (approving Minutes of 112th Session of the Tenth Council on August 27, 2019 that describe successful motion for Adoption of an Ordinance to Amend Chapter 42 "Community Development" to add Article VII, Entitled "Provisioning Center Community Benefits Agreements"), <http://www.pontiac.mi.us/councilagendapack-090319amended.pdf>; see also *Changes made to application period for Pontiac Medical Marijuana Provisioning Centers*, CLICK ON DETROIT www.clickondetroit.com, (Sept. 5, 2019), <https://www.clickondetroit.com/michigan-marijuana/2019/09/09/changes-made-to-application-period-for-pontiac-medical-marijuana-provisioning-centers/> ("[C]ity council adopted the Provisioning Center Community Benefits Agreement Ordinance").

214. PONTIAC, MICH., ORDINANCE NO. [] [Note to MBELR editors: I could not find the ordinance number in the source – I defer to you as to how to proceed], §1(b) (2019) ("This Ordinance shall allow developers of provisioning centers, herein referred to as "Qualified Developments", to enter into agreements, herein referred to as "Community Benefits Agreements", that identify potential negative aspects of such developments and identify proportional community benefits to the City of Pontiac to rectify those negative aspects."). The total possible score for an application is 130 points. *Medical Marihuana Facility Permit Application Instructions for Provisioning Center Applications*, CITY OF PONTIAC, <http://www.pontiac.mi.us/Final%20Provisioning%20Center%20Application%20Instructions.pdf> (last visited Jan. 5, 2020).

215. PONTIAC, MICH., ORDINANCE NO. 2357(B) §8(a) (2019), <http://www.pontiac.mi.us/Ordinance%202357B%20Medical%20Marihuana%20Facilities%20Ord.pdf>.

216. PONTIAC, MICH., ORDINANCE NO. 2357(B) §9(f) (2019), <http://www.pontiac.mi.us/Ordinance%202357B%20Medical%20Marihuana%20Facilities%20Ord.pdf>.

center application scoring.”²¹⁷ The community benefits that dispensary permit applicants can offer include (but are not limited to) “amenities, benefits or commitments” that address: road infrastructure, parks, law enforcement, job training (including for previously incarcerated citizens), literacy, and business development.²¹⁸ Such benefits are “intended to ameliorate the potential negative aspects imposed upon the City of Pontiac by the Qualified Development.”²¹⁹

If an applicant has promised community benefits in its provisioning center application, the applicant must enter into a binding Community Benefits Agreement with the City including such community benefits, before receiving a provisioning center permit.²²⁰ Once a dispensary enters into a Community Benefits Agreement, it is required to provide an annual report detailing its compliance with its obligations under the agreement.²²¹ In addition, renewals or extensions of any dispensary permits are also conditioned on the dispensary’s reporting.²²² In the event that a dispensary breaches its Community Benefits Agreement, it risks losing its permit to operate.²²³

The 21-day period to apply for a provisioning center permit closed on December 10, 2019,²²⁴ and the negotiation and completion of any Community Benefits Agreements may occur after the application period ends.²²⁵ Community Benefits Agreements must be finalized within thirty (30) days after a dispensary receives notice that it is entitled to a provisioning center permit.²²⁶ As of the date of this Article, information about any CBAs under the Provisioning Center Community Benefits Agreements ordinance is not yet publicly available.

B. *How New Stakeholder-Centric Local Laws Weaken Shareholder Primacy*

The city laws, ordinances and programs that I describe in Part II.A might look like the same kinds of external contractual relationships or regulatory rules that traditionally apply to corporations for the protection of stakeholders. For example, the local initiatives are arguably “rules-based” in the sense that they

217. *Changes Made to Application Period for Pontiac Medical Marijuana Provisioning Centers*, CLICK ON DET. www.clickondetroit.com, (Sept. 5, 2019), <https://www.clickondetroit.com/michigan-marijuana/2019/09/09/changes-made-to-application-period-for-pontiac-medical-marijuana-provisioning-centers/>.

218. *Id.* (referencing <http://www.pontiac.mi.us/councilagenda-082019.pdf>)

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Medical Marijuana Facility Permit Application Instructions for Provisioning Center Applications*, CITY OF PONTIAC, <http://www.pontiac.mi.us/Final%20Provisioning%20Center%20Application%20Instructions.pdf> (last visited, Jan. 5, 2020).

225. PONTIAC, *supra* note 216.

226. *Id.*

set specific parameters triggering their application. In the case of the community benefits ordinances in Part II.A.2, this includes the amount of tax subsidy received. In the case of the programs encouraging stakeholder governance in Part II.A.1, this includes the entity or governance type adopted by an organization. In addition, the local initiatives seem “external” in that, on their face, they act *upon* organizations, rather than *within* organizations.

In Part I.D of this Article, however, I suggest reevaluating the weight and comprehensiveness of such distinctions.

Furthermore, on closer inspection, the local initiatives I present in Part II.A affect shareholder primacy, in additional ways that differ from typical regulations that limit the extent to which shareholders can profit at the expense of other stakeholders.

Parts II.B.1 and II.B.2 below elaborate upon these distinctions, describing at least two relevant reasons why these stakeholder-centric local laws described in Part II.A are or may be unlike traditional “external” regulatory stakeholder protections that limit shareholder primacy.²²⁷

1. Constitutional Regulatory Takings Limitations Localities from Encouraging Consideration of Stakeholder Interest

Assuming that a locality has the authority to adopt a local ordinance,²²⁸ such as one of the stakeholder-centric initiatives described in Part II.A (or any

227. Another difference is in the nature of the penalty for noncompliance with these new stakeholder-centric local laws, compared to the penalty for noncompliance with traditional regulations. The latter takes the form of fines, injunctive relief, and even criminal prosecution. The former takes the form of contract rescission and repayment of incentives received, among other penalties. This difference is not relevant to the issue at hand, which is the impact of stakeholder-centric local initiatives upon shareholder primacy, and thus is not detailed further in this Article.

228. According to blackletter law, local governments have no authority of their own, as they are creatures of state government; the only authority that they have is delegated to them through the state. MCQUILLIN MUN. CORP. § 9:1 (3d ed.). In fact, however, most local governments have significant authority. The scope of such delegation depends on whether a particular state follows Dillon’s Rule, a “canon of statutory construction from common law that calls for the strict and narrow construction of local governmental authority,” or provides for home rule, which reverses Dillon’s Rule and is much more common than Dillon’s Rule. MCQUILLIN MUN. CORP. § 4:11 (3d ed.). Such delegations may be specific and limited in a state that applies Dillon’s Rule to local jurisdictions, or broad and wide ranging in a state that provides for home rule in local jurisdictions through state constitution or state statute. MCQUILLIN MUN. CORP. §§ 10:10-20 (3d ed.). States may also employ a combination of Dillon’s Rule and home rule: “a state which is both a [h]ome [r]ule state and Dillon[’]s Rule state applies the Dillon[’]s Rule to matters or governmental units not accounted for in the constitutional amendment or statute which grants [h]ome [r]ule.” American City County Exchange, *Federalism, Dillon Rule and Home Rule* (Jan. 2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>. While specific grants of state power to local governments could be drafted broadly enough in a Dillon’s Rule state to give a local unit of government the authority to adopt stakeholder-centric local laws, MCQUILLIN MUN. CORP. §§ 4:11; 10:10 (3d ed.), this is not ordinarily done in practice. Accordingly, in a Dillon’s Rule state, stakeholder-centric local laws would be viewed as ultra vires without a specific grant of

other local stakeholder protection measure for that matter), a landowner nonetheless may have the right to be immune from such regulation. In particular, regulations that localities impose upon land use as an exercise of governmental police power (rather than as an exercise of one of the other powers that they may have been granted by the state, such as the taxing power²²⁹ or contracting power²³⁰) may invite judicial scrutiny under the takings clause of the Fifth Amendment to the U.S. Constitution.²³¹ The Fifth Amendment's takings clause, which is also applicable to states through incorporation into the Fourteenth Amendment of the U.S. Constitution,²³² permits the taking of private property for public use only upon payment of just compensation.²³³ CBOs arguably are an example of land use regulations that localities have adopted pursuant to their police power, and thus potentially subject to the limitations of the Fifth Amendment upon regulatory takings.²³⁴ (In contrast, the Philadelphia Sustainable Business Tax Credit and New Sustainable Businesses Tax Relief is an example of a locality's exercise of its taxing power, while Los Angeles's and San Francisco's government contracting preference programs are examples of a localities' exercise of their contracting power.)²³⁵

state authority to adopt such regulation. Conversely, home rule cities receive authority directly from the state constitution or by statute, MCQUILLIN MUN. CORP. § 10:16 (3d ed.). As such, home rule cities receive the full scope of state authority at the local level to engage in local lawmaking under the police power of the state, to implement whatever would have been done within the police power of the state, though there are still limitations on the locality's ability to act depending on what kind of home rule is in effect. MCQUILLIN MUN. CORP. § 10:30 (3d ed.). Consequently, a stakeholder-centric local law would likely fall within the scope of a local government granted general authority in a home rule state. Absent conflict with or limitations from other state law, MCQUILLIN MUN. CORP. § 4:30 (3d ed.), a city in a home rule state could adopt a stakeholder-centric local law without any further action necessary on the part of the state. At least for now, that is indeed what seems to have happened in Michigan, California, Pennsylvania, and Texas, the states in which the cities that have adopted the local laws described in Part II.A are located.

229. 16 MCQUILLIN MUN. CORP. § 44:5 (3d ed.) (2019).

230. See generally 10 MCQUILLIN MUN. CORP. § 29:7 POWER TO MAKE CONTRACTS (3d ed.); see also, e.g., Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U CHI LEG. F 187, 191-199 (discussing local government use of contract power to establish stakeholder protections) (2009).

231. 2 ZONING AND LAND USE CONTROLS § 9.01 (2019).

232. CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 601 (4th ed. 2013).

233. U. S. Const., amend. V (“... [N]or shall private property be taken for public use, without just compensation.”)

234. See, e.g., DET., MICH., ORDINANCE NO.35-16 § 14-12-5, § 3 (2016) (“This ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the People of the City of Detroit.”); see also generally *infra* Part II.B.2. It is also conceivable that localities may argue CBOs are an exercise of their contracting power, because they are transacting with the organizations subject to CBOs; if so, CBOs would not be subject to the Fifth Amendment's regulatory takings framework.

235. *Infra* Part II.B.1.

Indeed, some commentators have recently explored whether CBOs constitute regulatory takings under the Fifth Amendment.²³⁶ In one recent paper, Colyn Epps comprehensively summarizes and analyzes regulatory takings jurisprudence applicable to CBOs, and considers whether CBOs that mandate community benefit agreements as a condition for land use development projects seeking land-use approval are constitutional.²³⁷ Although Epps argues that CBOs that mandate a private CBA as a condition for development approval might face and even ultimately survive takings challenges,²³⁸ he concedes that CBOs “voluntarily” conditioning the receipt of public subsidies on the provision of community benefits are constitutional.²³⁹ Similarly, a report by the non-profit advocacy organization Partnership for Working Families evaluates various considerations – legal and otherwise – relevant to community benefits ordinances, among other strategies for the delivery of community benefits.²⁴⁰ Interpreting the constitutional jurisprudence applicable to CBOs, Partnership for Working Families states that constitutional limitations upon regulatory takings do “not apply to situations in which the government is in a contractual relationship with the developer, as when the local government leases land or provides subsidy for the project and wants to include community benefits measures in the lease or subsidy agreement.”²⁴¹ The report further clarifies that “regulations of general applicability, as distinct from conditions set for particular projects” may be subject to less stringent constitutional limitations.²⁴²

236. Commentators have also analyzed the constitutionality of CBAs. *See, e.g.*, Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010); Michael L. Nadler, *The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem*, 43 URB. LAW. 587 (2010-2011); Alejandro E. Camacho, *Community Benefit Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355 (2013).

237. Epps, *supra* note 22.

238. *Id.* at 230.

239. *Id.* at 229 (“Municipalities are free to condition the distribution of public subsidies in any way they see appropriate, and thus [a community benefits ordinance requiring a private CBA as a condition for receiving public subsidies] would have been constitutional.”) (citing ASS’N OF THE BAR OF THE CITY OF N.Y., LAND USE COMM., N.Y.C. BAR, *THE ROLE OF COMMUNITY BENEFITS AGREEMENTS IN NEW YORK CITY’S LAND USE PROCESS*, 28 (2010), <https://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf> (“Developers who object to the conditions imposed are free to decline to be involved in the project”).

240. PARTNERSHIP FOR WORKING FAMILIES, *supra* note 79.

241. PARTNERSHIP FOR WORKING FAMILIES, *DELIVERING COMMUNITY BENEFITS THROUGH ECONOMIC DEVELOPMENT: A GUIDE FOR ELECTED AND APPOINTED OFFICIALS*, *supra* note 79 at 5 (summarizing *Koontz v. St. Johns River Water Management District*, 568 U.S. 936 (2013)); *see also* PARTNERSHIP FOR WORKING FAMILIES, *DELIVERING COMMUNITY BENEFITS THROUGH ECONOMIC DEVELOPMENT: A GUIDE FOR ELECTED AND APPOINTED OFFICIALS*, *supra* note 79 at 9 (“[D]iscussions about CBAs for projects where the government is not using its contract power (such as through a lease, subsidy agreement or development agreement) may create a risk of legal challenge to any resulting CBA as a project condition. . . .”).

242. PARTNERSHIP FOR WORKING FAMILIES, *DELIVERING COMMUNITY BENEFITS THROUGH ECONOMIC DEVELOPMENT: A GUIDE FOR ELECTED AND APPOINTED OFFICIALS*, *supra* note 79 at

As both of these analyses of relevant constitutional guidance demonstrate, one of the threshold issues determining the likelihood of CBO's judicial scrutiny is whether the CBO employs a voluntary, contractual approach in seeking community benefits. This is because mandatory regulations of general applicability that do not fully diminish the economic value of a property interest may impose land use requirements subject only to what is known as the *Penn Central* test,²⁴³ which considers "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."²⁴⁴ Meanwhile, mandatory conditions set for particular projects, often by means of contractual development agreements – called "exactions" – must show an "essential nexus" and "rough proportionality" to the impacts of the project upon which the regulation is imposed, under what is known as the *Nollan/Dolan* test.²⁴⁵ Most recently, the United States Supreme Court extended *Nollan/Dolan* in *Koontz v. St. Johns River Water Mgmt. Dist.*, holding that the *Nollan/Dolan* test applied not only to physical exactions, but also to "so-called monetary exactions",²⁴⁶ such as "in lieu of" fees that "are utterly commonplace and . . . are functionally equivalent to other types of land use exactions."²⁴⁷

It is unclear whether the *Nollan/Dolan* test, as extended by *Koontz*, might prohibit some of the community benefits resulting from the voluntary, contractual local stakeholder-centric initiatives that I describe in Part II.A – such as workforce training or facilitating the provision of community services – if any such local initiatives conditioned land use approval on the provision of such community benefits.²⁴⁸ To the extent that these kinds of community benefits re-

11 ("In many states, regulations of general applicability, as distinct from conditions set for particular projects, do not have to satisfy the *Nollan/Dolan* test. If challenged as a regulatory taking, these regulations must satisfy a much more nebulous (and less rigorous) test set forth by the Supreme Court in the *Penn Central* case. Thus, in those states, local governments may adopt baseline community benefits laws without having to show a nexus and rough proportionality to the impacts of all projects on which they may be imposed. However, the Supreme Court's decision in *Koontz* has left some attorneys wondering whether all monetary fees imposed on development must satisfy *Nollan/Dolan*, even if imposed as a straightforward operation of a law of general applicability.").

243. 8 ZONING AND LAND USE CONTROLS § 52A.02 (2019) ("[W]hether a governmental action has gone beyond 'regulation' to a 'taking' depends upon . . . a test first formulated in [*Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)].")

244. *Id.*

245. See generally 2 ZONING AND LAND USE CONTROLS § 9.02 NEXUS, PROPORTIONALITY, AND TAKINGS: NOLLAN, DOLAN AND PROGENY (2019).

246. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013) ("We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

247. *Id.* at 612; but see *id.* at 615 ("It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'") (internal citations omitted).

248. Eppes, *supra* note 22, at 229-30; 5 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 90:47 (4th ed.) ("The *Nollan* substantial nexus test might well be applied to development exactions or conditions "voluntarily" assumed by a developer in the context of seeking additional development rights through some incentive zoning program. While this issue has not yet been addressed by

quired by generally applicable CBOs might be interpreted to impose monetary fees like impact or “in lieu of” fees, the Supreme Court’s recent decision in *Koontz* casts uncertainty about whether the higher standard of the *Nollan/Dolan* test applies, rather than the “much more nebulous (and less rigorous)” limitations of *Penn Central*.²⁴⁹ In *Koontz*, the Supreme Court recognized that if it accepted the argument that an obligation to spend money can near provide the basis for a takings claim, it would render it “very easy for land-use permitting officials to evade the limitation *Nollan* and *Dolan*.”²⁵⁰ However, in *Koontz*, the local government attempted to obtain the monetary exaction at issue as an alternative to an easement on the property owner’s land,²⁵¹ and thus the financial burden imposed was connected to physical property. Therefore, unless the community benefits obtained through a CBO are linked to a specific parcel of real property, it is unlikely that the reach of *Koontz* could extend to community benefits process under a CBO. If, however, the outcome of a community benefits process under a CBO required that an organization place a public park, workforce development program, or affordable housing upon its own physical property, or else pay a fee for the local government to do so in an alternative location, *Koontz* could possibly extend to such community benefits. As a result, CBOs are unlikely to be subject to the same constitutional regulatory takings limitations as, and thus differ from, traditional land use regulations enacted pursuant to local governments’ police power to protect stakeholder interests.

Another source of potential uncertainty in analyzing the constitutionality of CBOs that condition the receipt of incentives or permits upon providing community benefits is whether it is accurate to characterize such exchanges as truly “voluntary” in the first place.

An organization is subject to a CBO if it would like to receive certain incentives or permits whether below-market property, preferential bid rates, tax relief, or permits to operate at all. From a purely legal perspective, the relationship between an organization receiving such incentive, and the government providing it, is a voluntary contractual exchange. To developers and civic leaders, however, the legal characterization is incomplete if not inaccurate, as they claim that incentives are necessary to “overcome low rates of return and investor reluctance when attempting to build projects in the city.”²⁵² And in the case of local initiatives that all but condition permits to operate upon the organization’s provision of community benefits,²⁵³ the argument that such laws are actu-

the court, there is some logical and legal support for applying *Nollan*’s nexus test to incentive zoning programs.”).

249. PARTNERSHIP FOR WORKING FAMILIES, *supra* note 79 at 11.

250. *Koontz*, *supra* note 246, at 612.

251. *Id.*

252. John Gallagher, *Tax Breaks for Development Provoke Controversy and Conflicting Views of Impact*, DETROIT FREE PRESS (July 30, 2019, 6:00 AM), <https://www.freep.com/story/money/business/john-gallagher/2019/07/30/tax-incentives-development-detroit/1855844001/>.

253. *Supra* Part II.A.2.d.

ally legally mandatory may be even stronger. For this reason, organizations subject to CBOs that condition their access to incentives or permits may argue that CBOs practically function no differently than any other set of regulations with which an organization's managers must comply.²⁵⁴

Such reasoning is unlikely to prevail, however, in light of the Supreme Court's decision in *Penn Central*: *Penn Central* did not recognize diminished profitability as a taking. In light of the value of the property and continued availability of its primary use that nonetheless remained after imposition of the local regulation at issue.²⁵⁵ Organizations subject to CBOs as a condition of obtaining a financial incentive may still make use of their property, albeit at a lower profit margin without such incentive. Similarly, organizations that do not prevail in obtaining a permit to operate because they did not offer to provide community benefits in their permit application may also obtain other value from their property that is unlikely within its primary use and meets reasonable, investment-backed expectations. Therefore, even if organization perceive the incentives available only through a CBO to be practically indispensable to their bottom line, CBOs differ from traditional stakeholder protecting that are mandatory as a matter of law and are thus subject to Fifth Amendment's regulatory takings framework.

2. Wider Managerial Discretion in Comparison to Traditional Local Laws

Stakeholder-centric local laws empower corporate managers with wide discretion to determine the specific substantive stakeholder protections resulting from the processes that such laws mandate – unlike traditional stakeholder protections that typically specify the substantive actions that organizations must undertake in order to comply with them.²⁵⁶ While the emerging local initiatives clearly identify a distinct set of parameters prompting their application, they do not, however, similarly set forth many – or in some cases, any – specific requirements beyond the consideration of and provision for stakeholder interests generally. As a result of this indeterminacy, these new local initiatives permit a scope of substantive managerial discretion much wider than traditional stakeholder protection regulations. In this way, the new local initiatives function to

254. See *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759 (3d Cir. 1974) (business judgment rule cannot insulate directors from liability for a breach of fiduciary duty for committing illegal acts, on the ground that illegal acts were an exercise of sound business judgment).

255. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137-138 (1978). In addition, proposals to further decrease the thresholds triggering applicability of CBOs may suggest that existing thresholds do not pose an impracticable obstacle to development and that the organizations subject to CBOs could bear still greater costs. See Kimberly Hayes Taylor, *Why Detroit's Tool To Force Developers To Invest In Community Is Coming Up Short*, Curbed Detroit (Jan. 21, 2020, 11:02 AM), <https://detroit.curbed.com/2020/1/21/21066933/detroit-community-benefits-agreement-ordinance-process> (reporting that some members of Detroit City Council and local community groups advocate for lowering the threshold dollar amount triggering application of the Detroit Community Benefits Ordinance).

256. Greenfield, *supra* note 92, at 21.

impact an organization's internal decision-making framework (for example, by requiring a stakeholder governance model or a process for community engagement). Because they do not specify a particular outcome of managerial decision-making, they ultimately provide more latitude to managers to determine what substantive actions they must take to comply (for example, whether to undertake a program or project to benefiting particular stakeholders, and if so, what type, quality or scale of such program or project). This latitude stands in stark contrast to the methodical articulation of shareholder economic rights in some shareholder-centric corporate laws, such as those described in Part I.B of this Article. It also amplifies the ambiguity already enabled by corporate law's business judgment rule, regarding the proportion of profits shareholders and stakeholders can each expect to receive from an organization's activities. As a result, the boundary of regulation recedes, and the zone of managerial discretion widens.

For example, contrast the process of providing for public art accessible to community stakeholders under Detroit's Community Benefits Ordinance to a City of Santa Monica zoning ordinance that requires that organizations subject to the ordinance install public art meeting specific requirements.²⁵⁷ The latter, known as a "Percent for Art" ordinance,²⁵⁸ is a more traditional stakeholder protection regulation that sets forth the precise requirements that must be met to comply with it: it details the square footage of the project that must be dedicated to the public art, the definition of what counts as art, and many other particulars. In contrast, in the case of a community stakeholders' request for public art made through the process of Detroit's Community Benefits Ordinance, the compliance requirements are ambiguous. In one case, community stakeholders requested restoration of a prominently located historic theater; however, it is unclear whether the development could have proceeded even if managers of the organization developing the property agreed to salvage and relocate only the theater's façade, just the historic tile from the theater's interior, or even nothing at all.²⁵⁹ How the property developer's shareholders would ascertain whether managers gave away the farm (or in this case, the theater) is unknown, in a

257. SANTA MONICA, CAL., MUN. CODE 9.30 (2015).

258. *Percent-for-Art Programs*, AMERICANS FOR THE ARTS, https://www.americansforthearts.org/sites/default/files/PublicArtAdvocacy_talkpnts.pdf; see also Daniel Grant, *Developers Fight Efforts to Make Them Pay for Public Art*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/business/art-real-estate.html> (describing "Percent for Art" ordinances as "laws typically require[ing] around 1 percent of construction and renovation costs for public buildings to be set aside for the purchase of artworks for the site").

259. PLANNING AND DEVELOPMENT DEPARTMENT, CITY OF DETROIT, BOOK BUILDING & TOWER AND MONROE BLOCKS COMMUNITY BENEFITS AGREEMENT REPORT (2017) (reporting that the organization subject to the Community Benefits Ordinance agreed to restore the historic theater); c.f. PLANNING AND DEVELOPMENT DEPARTMENT, CITY OF DETROIT, FORD CORKTOWN INVESTMENT AND MICHIGAN CENTRAL STATION RENOVATION COMMUNITY BENEFITS REPORT (2019) (reporting that the organization subject to the Community Benefits Ordinance declined the community's request to commit to funding public art at 1% on their site of construction or renovation costs).

manner similar to the way that corporate law enables an organization's managers to wield business judgment subject to certain conditions. Yet, local laws protecting stakeholders typically do not grant organizations' decision-makers this kind of power; instead, typically they affirmatively specify what organizations must do to operate within their jurisdictions.²⁶⁰

Another way in which conventional local regulations that protect stakeholders differ from CBOs is that the former does not – and indeed, in some cases may potentially be unable to²⁶¹ – explicitly mandate some of the protections for stakeholders frequently resulting from the processes of stakeholder governance or community benefits ordinances. Thus, these stakeholder protections differ not only in the process by which community benefits are achieved, but also in substance. For example, the workforce development activities to be conducted by Ford under Detroit's Community Benefits Ordinance might be similar to the benefits Detroit might have sought in the absence of a community benefits ordinance;²⁶² the same may not necessarily be said, however, for other benefits that the community secured from Ford under the Detroit Community Benefits Ordinance, including the affordable housing to be funded by Ford, and a commitment to create a nearby wild pheasant reserve.²⁶³ With the affordable housing fund ringing in at \$2.5 million dollars, and a “gold rush” for land in the area where the pheasant reserve will be located,²⁶⁴ these community-instigated benefits pose potentially significant costs to Ford shareholders, and exemplify the way in which stakeholder-centric local laws increase managerial discretion and weaken shareholder primacy, in ways that differ from conventional stakeholder protections.

The most conspicuous way that stakeholder-centric local laws widen the zone of managerial discretion is by compelling managers to consider stakeholder interests that they may be only just permitted to take into account otherwise.

260. Greenfield, *supra* note 92, at 21.

261. *Supra* Part II.B.1.

262. See MGM Grand, Inc., Exhibit 10.41 to Annual Report (Form 10-K) (Mar. 22, 1999) (setting forth workforce development commitments of an MGM Grand, Inc. subsidiary, MGM Grand Detroit, LLC, prior to the enactment of the Detroit Community Benefit Ordinance in Section 2.6 of the Amended and Restated Development Agreement among City of Detroit and The Economic Development Corporation of the City of Detroit and MGM Grand Detroit, LLC for the City of Detroit Casino Development Project, as of April 9, 1998).

263. See Joel Kurth, *Down for So Long, Can Detroit Remember How to Include Neighbors in Growth?*, BRIDGE MAG. (June 3, 2019) (“the [Ford Motor Company Michigan Central Station community benefits] agreement contains neighborhood-specific benefits including money to preserve pheasants in adjacent North Corktown”); see also Maurice Cox, City of Detroit Planning & Dev. Dpt., “Ford/City Responses to Impacts as Identified by Ford Neighborhood Advisory Committee - September 26th, 2018” in FORD CORKTOWN INVESTMENT AND MICHIGAN CENTRAL STATION RENOVATION: COMMUNITY BENEFITS REPORT (2018) at 33 (“Ford will support in the creation of a bird habitat within the Impact Area, working with the City’s General Services Department, National Geographic and Audubon Society to push this initiative forward.”).

264. Kirk Pinho, *Corktown-to-Fordtown Gold Rush?*, CRAIN’S DET. BUS. (Mar. 25, 2018), <https://www.crainsdetroit.com/article/20180325/news/656206/corktown-to-fordtown-gold-rush>.

In addition, as illustrated by the above example, the requirements imposed by stakeholder-centric local laws are also uncertain: even when engagement between managers and stakeholders must be transparent, the specifics of what exactly managers must do in order to clear the hurdles posed by stakeholder governance or community benefits processes are indeterminate.²⁶⁵ Thus, without specific substantive consequences detailed, it is difficult (if not impossible) to ascertain whether or not a manager's action was required, preventing shareholders (and, for that matter, even stakeholders) from being able to effectively assess managerial performance.

As a result of such increased managerial discretion, managerial accountability to shareholders is necessarily diminished, at least in the absence of other mechanisms by which to monitor managers.²⁶⁶ In light of their requirements that managers consider or even balance stakeholder concerns alongside shareholder interests, both the stakeholder-governed entities incentivized by cities' local laws, as well as cities' community benefits ordinances, expand the discretion that managers would have otherwise been required to exercise solely in favor of shareholders. Therefore, the result of the uncertainty inherent in establishing process but not outcome is that shareholder primacy is curtailed by the new local initiatives that encourage stakeholder governance – not only because they ask managers to balance shareholder and stakeholder interests, but also because they impede the ability to precisely compel or monitor managers' total fidelity to shareholder interests.

This effect upon shareholder primacy holds true even when the process for considering stakeholder interests imposes some constraints on its substantive outcomes, as in the case of the community benefits ordinances of the cities of Houston and Ypsilanti. For example, while the City of Houston's community benefits ordinance requires organizations receiving tax abatements to provide community benefits in at least one of the eight areas specified in the ordinance, managers still have discretion to choose among the eight specified areas, each of which may have different implementation costs. The City of Ypsilanti's community benefits ordinance is even more exacting, requiring that organizations subject to it provide community benefits on "the scale of and in proportion to the [p]ublic [s]upport provided;" however, the ordinance also empowers the City of Ypsilanti's City Council to exempt organizations from its requirements.²⁶⁷ As this analysis of Houston's and Ypsilanti's community benefits ordinances shows, there is variation in the degree to which a particular law grants

265. See *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

266. *Infra* Part III.C.4.

267. The issue of discretionary exemption from regulation raises the issue of whether traditional regulations similarly weaken shareholder primacy. For example, city zoning ordinances may be waived by variances on a case-by-case basis. However, the process for obtaining variances is rigorous (at least in theory), and includes establishing eligibility for the variance, hearing(s) before a zoning board, appearance(s) before a municipality's governing body, and appeal(s) in administrative tribunals and courts of law.

managerial discretion and thus weakens managerial accountability; accordingly, shareholder primacy and stakeholder protection might be conceptualized to exist along a spectrum as well, rather than as a binary.

Not only do indeterminate, stakeholder-centric local city laws and ordinances function to weaken managerial accountability to owners in individual organizations, they may also fundamentally weaken the law or norm of shareholder primacy more broadly. To the extent that one is persuaded that a law of shareholder primacy is created by the interlocking system of legally and non-legally enforceable incentives and mandates upon organizations,²⁶⁸ individual laws that function to incentivize limits on shareholder primacy introduce cracks in this theoretical foundation. Even if shareholder primacy is a mere corporate law norm, it may still be weakened if it is functionally undermined – or at least not reinforced – by rules in other areas of law,²⁶⁹ such as the local incentives that I describe in Part II.A. Furthermore, local incentives that encourage the adoption of stakeholder governance or the consideration of stakeholder interests do not need to be mandatory as a matter of law in order to challenge and put pressure on the conventional dominance of shareholder primacy.

III. IMPLICATIONS OF SHAREHOLDER PRIMACY'S NEW URBAN FRONT

A new urban front for shareholder primacy has both practical and theoretical implications for corporate law. As I show in Part II.B, stakeholder-centric local laws and ordinances function to limit shareholder primacy – whether by encouraging the adoption of stakeholder-governed entities, or by requiring stakeholder engagement when a company's acceptance of incentives or desire for a permit triggers application of through a community benefits ordinance. Stakeholder-centric local laws also may create new possibilities and strategies for the community benefits movement. Conversely, such potential may also invite preemption at the state level. In addition, analysis of stakeholder-centric local laws from the perspective proposed by this Article identifies nuances and generates novel insights challenging our understanding of the nature of corporate law. Stakeholder-centric local laws may function as “local corporate law,” and they also may heighten the importance of corporate codes, value statements and other forms of corporate law “shadow governance.”²⁷⁰

268. See *supra* Part I.B.

269. In addition, non-legal pronouncements – like the Business Roundtable's recent headline-making statement embracing stakeholder responsibility – can also weaken legal norms. See *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>; *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

270. Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. __ (forthcoming 2020).

A. *Complementarity and/or Partial Interchangeability of Stakeholder-Governed Entities with CBAs and CBOs*

The community benefits movement advocates for more widespread use of CBAs, as well as the adoption of CBOs.²⁷¹ Both strategies are oriented toward ensuring that developers' and other organizations' activities provide positive benefits not only to the developer or organization, but also to the stakeholder community. Currently, it does not appear that the community benefits movement has considered the potential for achieving a positive impact upon stakeholders by requiring or incentivizing the use of stakeholder-governed entities (for example, benefit corporations or B Corp-certified entities). Incentivizing or requiring the use of stakeholder-governed entities to conduct development and other organizational activities, however, could conceivably result in positive benefits to stakeholders similar to those obtained through CBAs.

It is common practice for organizations to conduct their activities through numerous subsidiaries,²⁷² so communities or local governments might be able to achieve positive results for stakeholders similar to the impact that they seek through CBAs by requesting that organizations operate in communities through subsidiaries formed as stakeholder-governed entities. If development or other organizational activities were conducted through a stakeholder-governed subsidiary entity, such entity would be required by its governance documents to positively impact its stakeholders. Depending upon the specifics of the enabling law governing such stakeholder-governed subsidiary entity, the subsidiary might be required to pursue a general public benefit in addition to any "specific public benefit,"²⁷³ or may be limited to one or more "social purpose(s)" to

271. See, e.g., Erick Trickey, *The Test Just Began for the Community Benefits Movement*, NEXT CITY (Feb. 20, 2017) (describing community benefits agreements and community benefits ordinances as tools in the "community benefits movement, a two-decades-old effort to make developers more accountable to the neighborhoods in which they build.").

272. See Phillip I. Blumberg, *The Transformation of Modern Corporate Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 606 (2005) ("[i]n the modern economy, as noted, business of large or moderate size is typically conducted not by a single corporation but by a group of affiliated companies under the 'control' of a parent corporation"); John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1094 (2009) (empirically supporting that "[t]he standard organizational structure for [national or multinational corporate] businesses has a parent corporation as the sole shareholder of multiple, separately incorporated operating subsidiaries").

273. See, e.g., DEL. CODE ANN. tit. 8, ch. 1, §§362(1)(2019) ("[A] public benefit corporation shall . . . [i]dentify within its statement of business or purpose . . . one or more specific public benefits to be promoted by the corporation"); DEL. CODE ANN. tit. 6, ch. 18, §§18-1202(a)(2019) ("A statutory public benefit limited liability company shall state in the heading of its certificate of formation that it is a statutory public benefit limited liability company and shall set forth 1 or more specific public benefits to be promoted by the limited liability company in its certificate of formation"); see also, MODEL BENEFIT CORPORATION LEGISLATION §201 (BENEFIT CORP. 2017) ("A benefit corporation shall have a purpose of creating general public benefit. . . . The articles of incorporation of a benefit corporation may identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition . . .").

which it committed itself in its governing documents.²⁷⁴ Although nothing in existing model or enacted enabling statutes requires stakeholder-governed organizations to benefit the communities in the immediate geographic area where an organization's activities are located, communities or local governments could require such language be included in the organization's governing documents. The organization's managers would then be required to fulfill a fiduciary duty to the local stakeholders, which would be subject to monitoring through annual publicly available reports.²⁷⁵ Only shareholders, directors, the corporation, and, in certain states, specific persons granted standing (which could include, for example, municipalities or community group members) could enforce managers' fiduciary duties to the organization's stakeholders.²⁷⁶

Employing stakeholder-governed entities to provide community benefits has both advantages and disadvantages. On the positive side, using stakeholder-governed entities to provide community benefits may foster transparency and accountability – especially if the entity is formed in a state whose laws require third party assessment of annual reports and permit third parties, such as community organizations and community members, to sue to enforce the organization's fiduciary duties to stakeholders. Additionally, stakeholder-governed entities – and more broadly, the concept of addressing profit allocation through an organization's overarching legal framework – may be somewhat more familiar to business leadership than CBAs and CBOs, which may seem novel, uncertain and unwieldy. Also, using a stakeholder-governed entity rather than stakeholder-centric local laws might offer the potential for social equity approaches to address not only development impacts, but also corporate policy and operations more directly.

Even if third party assessment of annual reporting is voluntary, or standing to enforce is limited to the directors, shareholders, or corporation itself, stakeholder-governed entities are at least no worse off than CBAs or CBOs that typically do not offer these benefits either. Instead, the most significant disadvantage of using stakeholder-governed entities instead of CBAs or CBOs to deliver community benefits appears to be the lack of any specific process by which stakeholder engagement takes place in stakeholder-governed entities. CBAs bring to the negotiating table both community organizations and organizations developing land within a city, and CBOs provide one or more opportunities for members of the public to express their goals and concerns for particular developments within their communities. In their default forms under state

274. See, e.g., CAL. CORP. CODE tit. 1, div. 1.5 (“Social Purpose Corporations Act”) (Deering 2016) [hereinafter CAL. SOC. PURPOSE CORP. ACT]; WASH. REV. CODE §22B.25.020 (2012) (“Washington Business Corporation Act”); TEX. BUS. ORGS. CODE ANN. §3.007(d) (2006).

275. See, e.g., CAL. SOC. PURPOSE CORP. ACT, *supra* note 283; DEL. PUB. BENEFIT CORP. ACT, *supra* note 85; DEL. PUB. BENEFIT LLC ACT, *supra* note 88; see also MODEL BENEFIT CORPORATION LEGISLATION.

276. The current language of model and enacted enabling acts for stakeholder-governed entities limits standing to these parties. See, e.g., DEL. PUB. BENEFIT CORP. ACT, *supra* note 85; DEL. PUB. BENEFIT LLC ACT, *supra* note 88; see also MODEL BENEFIT CORPORATION LEGISLATION.

enabling statutes, however, stakeholder-governed entities only require that managers of such entities consider or balance all stakeholder interests, with no guidance as to how managers should determine such interests in the first place.

This this difference between CBAs, CBOs, and stakeholder-governed entities may be greater on paper than it is in reality. For example, critics of the Detroit CBO have pointed out that asking volunteer, time-limited community members to develop informed assessments about the stakeholder impacts of multi-million-dollar development projects in the Detroit CBO's six-week time frame is a Herculean task, especially considering the limited material information they are provided.²⁷⁷ The resources needed to provide a robust assessment and to enforce the stakeholder entities' commitments can exceed the capacity of some community organizations and individual community members, which can result in poor assessments, limited enforcement, and uncertain stakeholder engagement processes. Of course, if managers of stakeholder-governed entities take their duties to provide a public benefit seriously, it may alleviate the aforementioned concerns, even if robust community oversight is not a possibility. To that end, community activists interested in exploring stakeholder-governed entities to secure community benefits would be wise to emphasize the importance of managerial integrity (perhaps even requesting the appointment of certain organizational leadership if given the opportunity to weigh in). Ultimately, stakeholder-governed entities are not a complete substitute for CBAs or CBOs, which remain an important tool in communities' quiver of economic development strategies; however, they may present a complementary tool to these existing approaches for community activists to consider in pursuing community benefits.

B. *Danger of State Law Preemption of Stakeholder-Centric Local Laws*

The existence of the stakeholder-centric local laws presented in Part II.A depends upon whether or not the local government adopting such stakeholder-centric local law has been delegated the power to do so by the state.²⁷⁸ The states within which the localities discussed in Part II.A are located – California, Michigan, Pennsylvania, Texas – and other “home rule” states all grant wide lawmaking discretion to home rule cities within their jurisdiction.²⁷⁹ While the precise scope of such lawmaking powers varies in each state that provides for home rule by local governments,²⁸⁰ in general each such state provides a full grant of the state police power to localities to adopt regulations within the full

277. EDC, *supra* note 176 at 5; *see also* Whitaker and City of Detroit Legislative Policy Division Staff, *supra* note 176 at 1.

278. DET. MICH. ORDINANCE NO. 35-16, *supra* note 234.

279. *See, e.g.*, CAL. CONST. art. XI, § 7; MICH. CONST. art. VII, § 22; PA. CONST. art. IX, § 2; TEX. CONST. art. XI, § 5.

280. For example, a city in Texas may adopt Home Rule once the population exceeds 5,000. TEX. CONST. art. XI, §§ 4, 5. *See also generally* MCQUILLIN MUN. CORP. § 10:30 (3d ed.).

scope of such police power.²⁸¹ However, even in many home rule states, local ordinances also remain subject to any state laws that may limit or conflict with that power (such as state corporate law) or laws passed to preempt local government power on a particular issue.²⁸² Stakeholder-centric local laws may invite such preemption for various reasons, including their potential to empower cities to influence corporate governance – an issue conventionally reserved for state level lawmaking – and the increasing tension between state and local government power in general.²⁸³

Given this relationship between states and local governments, there is a threat that states may restrict cities from passing stakeholder-centric local laws, if they do not already do so. Stakeholder-centric local laws are already unavailable to cities in states that have not provided for home rule,²⁸⁴ and specific preemption of stakeholder-centric local laws by states that do provide for home rule would only further curtail such laws. This risk is real and significant: recently, many states in the United States have become much more aggressive in preempting cities from taking action on issues of local concern.²⁸⁵ So far, these preemption campaigns have not successfully prevented the passage of the stakeholder-centric laws that I discuss in Part II.A – though not for lack of trying. For example, members of the Michigan State Legislature twice tried to preempt Detroit’s Community Benefits Ordinance unsuccessfully.²⁸⁶ Had the proposed legislation succeeded, Detroit would not have been able to adopt its groundbreaking community benefits ordinance. As the idea for a community benefits ordinance originated in Detroit, it is unknown whether any of the other community benefits ordinances in other local jurisdictions would have developed in its absence.

281. MCQUILLIN MUN. CORP. § 10:30 (3d ed.).

282. *E.g.*, CAL. CONST. art. XI, §§ 7, 8.; MICH. COMP. LAWS. § 117 et seq.; 53 PA. C.S. 2961; TEX. CONST. art. XI, § 5; *see also* MCQUILLIN MUN. CORP. § 4:30 (3d ed.).

283. Schragger, *supra* note 25.

284. Home rule may be unavailable to a city if it is located in a state that follows Dillon’s Rule, or if it is located in a state that provides for home rule but applies Dillon’s Rule to matters or governmental units not accounted for in the state constitutional or statutory legal framework granting home rule. *Supra* note 234.

285. *See* NICOLE DUPAIS ET AL., CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (Courtney Bernard & Meri St. Jean eds., 2d ed. 2018), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>; *see also* Schragger, *supra* note 25.

286. *See* Ryan Felton, *Anti-Community Benefits Agreement Bill Heads to Michigan House*, DET. METRO TIMES (Dec. 9, 2014, 11:09 AM), <https://www.metrotimes.com/news-hits/archives/2014/12/09/michigan-house-panel-passes-anti-community-benefits-agreement-bill>; Ryan Felton, *Michigan Bill That Would Ban Community Benefits is Effectively Dead – For Now*, DET. METRO TIMES (Dec. 12, 2014, 2:34 PM), <https://www.metrotimes.com/news-hits/archives/2014/12/12/michigan-bill-that-would-ban-community-benefits-is-effectively-dead-for-now>; Ryan Felton, *State Legislator Reintroduces Bill to Ban Community Benefits Ordinance in Detroit*, DET. METRO TIMES (Jan. 30, 2015, 11:46 AM), <https://www.metrotimes.com/news-hits/archives/2015/01/30/state-legislator-reintroduces-bill-to-ban-community-benefits-ordinance-in-detroit>.

Stakeholder-centric local laws are still young and few in number in the states that have authorized cities to pass them, and their preemption would be premature. Even within the small sample of stakeholder-centric local laws that currently exist, there is already great variation as local governments start to innovate and experiment with this new stakeholder protection and economic development approach.²⁸⁷ In addition, state preemption at this early stage would prevent comprehensive evaluation of stakeholder-centric local laws – if not also the full realization of their potential, whatever that ultimately may be. For this reason, it is critical to protect against potential preemption challenges to stakeholder-centric local laws at the state level.

C. *Stakeholder-Centric Local Laws as “Local Corporate Law”*

Courts, legislators and corporate law scholars have conventionally considered corporate law to be a creation of state legislatures, implemented largely by statutes and interpreted by courts. Increasingly, the federal government has also entered the corporate law-making game, most recently via substantive corporate governance requirements enacted in Sarbanes Oxley and Dodd-Frank.²⁸⁸ The emergence of stakeholder-centric local laws that weaken shareholder primacy complicates this view. Not only is corporate law state and sometimes federal law,²⁸⁹ but also local laws may be considered to establish, structure and define the rights and duties of organizations’ shareholders and managers. In doing so, local laws that encourage stakeholder-governed entity forms or consideration of stakeholder interests may function as “local corporate law.”

Corporate law takes as its principle focus the relationship between an organization’s “internal” constituents, its shareholders and managers. Shareholder primacy in particular is concerned with the relationship between shareholders and the organization’s other constituencies. When local laws affect shareholders’ place in the overall hierarchy of an organization’s constituencies, they influence the relationship between managers and shareholders, in light of managers’ role in mediating among constituencies.²⁹⁰ In this way, local stakeholder protections thus may be understood to function as corporate law because they affect the relationships of an organization’s shareholders with the organization’s managers and other constituencies.

By revealing the impact of local law – a jurisdiction previously ignored by corporate law scholars and practitioners alike – upon shareholder primacy, a cornerstone concept in corporate law, this Article raises important questions about the fundamental construction and nature of corporate law. As a threshold matter, characterizing the local laws described in this Article as corporate law reframes the distinctions by which corporate law has been conventionally de-

287. *Supra* Part II.A.

288. Romano, *supra* note 27.

289. *Id.*

290. *See supra* Part I.D.2.

efined.²⁹¹ This is a decidedly functional, not formal, approach. However, the notion of local corporate law may seem like less of a stretch in light of the boundary-blurring already taking place in so many other fields of law.²⁹² Perhaps it is time to reconsider corporate law's unique choice of law rule, the internal affairs doctrine – especially considering the rising prominence of cities in our federal system.²⁹³

The prospect of local corporate law demands rigorous answers to questions of feasibility, payoffs, motivations and more. Can cities make corporate law? What are the boundaries of corporate law, and do local laws fall within the scope of those boundaries? Are the stakeholder-centric local laws discussed in this Article local corporate law, and what other examples of local corporate law might exist? Whether or not local laws are formally corporate law, what insights might be gained about corporate law by considering their functional impact? In particular, what is the practical impact upon corporate operations and the theoretical impact upon corporate law's internal affairs doctrine if localities can each make corporate law? Why might cities enter the field of corporate law in the first place? I explore hypotheses in response to these questions in my ongoing and future research.²⁹⁴

D. Stakeholder-Centric Local Laws and “Shadow Governance”

As detailed in Part II.B.2, stakeholder-centric local laws widen the zone of managerial discretion, and thus reduce managerial accountability and the ability of corporate constituents – shareholders and stakeholders alike – to monitor managers. While this development may cause understandable alarm to some, corporate “shadow governance” documents may offer a promising alternative mechanism by which constituents of some organizations may nonetheless be able to monitor managers. This potential application for shadow governance provides support for their importance within corporate law, and may also provide further opportunities to assess their efficacy as corporate governance documents capable of influencing – or at least assessing – corporate behavior.

In a recent article, Professors Cathy Hwang and Yaron Nili detail how these “non-charter, non-bylaw governance documents express a corporation's commitment in and process on issues as wide-ranging as campaign finance, environmental sustainability, and sexual harassment” influence corporate decision-making and corporate behavior,²⁹⁵ by “set[ting] the board's annual agenda, defin[ing] the metes and bounds of boards' and committees' responsibilities,

291. *Supra* Part I.D; *see also supra* Part II.B.2.

292. *Supra* note 26.

293. *See generally* Schragger, *supra* note 25 (arguing that as productive economic activity is increasingly concentrated in cities and the metropolitan areas, capabilities building should be focused more on the city level).

294. *See generally* Choike, *Local Corporate Law*, *supra* note 22.

295. Nili & Hwang, *supra* note 270.

and memorializ[ing] the corporation's values.²⁹⁶ Such documents include: committee charters;²⁹⁷ governance guidelines;²⁹⁸ codes of conduct;²⁹⁹ non-required committee charters;³⁰⁰ and non-required additional disclosures (such as human rights/environmental statements, political participation policies, anti-corruption policies, luxury expenditure policies, entertainment and gift policies, and market relationships policies)³⁰¹ According to the empirical research conducted by Professors Hwang and Nili, the average large (public) company discloses more than ten such shadow governance documents, primarily through the investor relations section of its website.³⁰² In addition to the documents that Professors Hwang and Nili analyze, corporate websites and self-reporting can also offer a wealth of information about corporate activities, plans, roles and values.

For example, Ford Motor Company publishes on its website twelve of the shadow governance documents described by Professors Hwang and Nili: Charters of its Audit Committee, Compensation Committee, Finance Committee, Nominating and Governance Committee, and Sustainability and Innovation Committee; its Corporate Governance Principles; its Codes of Conduct Handbook, Ethics for Senior Financial Personnel, Ethics for the Board of Directors, and "Human Rights, Basic Working Conditions, and Corporate Responsibility"; waivers for any director or executive officer from its codes of ethics; and its Conflict Minerals and Environmental Policies on its website.³⁰³ In addition, Ford Motor Company also publishes on its website additional documents that do not necessarily fall within the category of shadow governance, including: an annual Sustainability Report, indexed to various reporting frameworks;³⁰⁴ a corporate governance review;³⁰⁵ and an ESG (environmental, social and governance) review,³⁰⁶ among many other documents.³⁰⁷

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Corporate Governance*, FORD MOTOR COMPANY, <https://corporate.ford.com/company/governance.html> (last visited Jan. 5, 2020).

304. *Ford Sustainability Report 2018/2019*, FORD MOTOR COMPANY, <https://corporate.ford.com/microsites/sustainability-report-2018-19/assets/files/sr18.pdf> (last visited Jan. 5, 2020).

305. *Corporate Governance Review (Mar. 2019)*, FORD MOTOR COMPANY, https://s22.q4cdn.com/857684434/files/doc_downloads/governance/2019/08/Ford-Corporate-Governance-2019.pdf (last visited Jan. 5, 2020).

306. *Environmental, Social, and Governance Review (Nov. 2019)*, FORD MOTOR COMPANY, https://s22.q4cdn.com/857684434/files/doc_downloads/governance/2019/11/25/Ford-ESG-Review-Nov-2019.pdf (last visited Jan. 5, 2020).

Although Professors Hwang and Nili acknowledge that these corporate policy documents offer “shareholders and other corporate outsiders . . . little ability to influence change,”³⁰⁸ these documents nonetheless may offer a window into corporate decision-making that can reduce its opacity. For example, it is possible that Ford’s shadow governance and other similar documents described above may be able to provide at least some guidance regarding how Ford will exercise the widened managerial discretion resulting from stakeholder-centric local laws such as Detroit’s Community Benefits Ordinance. These non-traditional transparency mechanisms thus may mitigate some concerns regarding stakeholder-centric local laws’ widening of managerial discretion and reduction of managerial monitoring capabilities.

Corporate self-reporting carries with it the potential for bias (though use of common reporting indices, such as those used by Ford Motor Company in its sustainability reporting,³⁰⁹ may reduce this risk). In addition, the existence and disclosure of “shadow governance” documents varies.³¹⁰ Some public companies may err on the side of very limited to no disclosure of “shadow governance” documents, to the extent they exist at all.³¹¹ Meanwhile, private organizations may disclose much less, if anything at all.³¹² For example, one of the first developments to which the Detroit Community Benefits Ordinance applied was the Detroit Pistons basketball team practice facility.³¹³ The owners of the Detroit Pistons are Palace Sports & Entertainment, LLC, a Delaware limited liability company; in turn, Palace Sports & Entertainment is a portfolio company of Platinum Equity.³¹⁴ Links to the website of Palace Sports & Entertainment from Platinum Equity’s website redirect to a website that does not provide “shadow

307. *E.g.*, Reporting Downloads Center, FORD MOTOR COMPANY, <https://corporate.ford.com/microsites/sustainability-report-2018-19/performance-and-reports.html#reporting-downloads-center> (last visited Jan. 5, 2020).

308. Nili & Hwang, *supra* note 270.

309. Ford Sustainability Report, *supra* note 304 (providing links to downloads for “Reporting Framework Indices.”).

310. Nili & Hwang, *supra* note 270.

311. *Id.*

312. *See* ADAM PRITCHARD & STEPHEN CHOI, SECURITIES REGULATION: CASES AND ANALYSIS 169 (3d ed.) (“The mandatory disclosure requirements of the Exchange Act are triggered when a firm becomes a ‘public company.’”); *see also* MERRITT B. FOX, LAWRENCE R. GLOSTEN & GABRIEL V. RAUTERBERG, THE NEW STOCK MARKET: LAW, ECONOMICS, AND POLICY 191-92 (2019) (discussing mandatory disclosure requirements for publicly traded companies).

313. *Past CBO Engagement: Pistons*, CITY OF DET., <https://detroitmi.gov/departments/planning-and-development-department/citywide-initiatives/community-benefits-ordinance/past-cbo-engagement/pistons> (last visited Jan. 5, 2020). The owners of the Detroit Pistons, Palace Sports & Entertainment, LLC, a Delaware limited liability company, executed a Memorandum of Understanding with the City of Detroit Downtown Development Authority pursuant to the Detroit Community Benefits Ordinance. City of Detroit Downtown Development Authority and Palace Sports & Entertainment, LLC, “Memorandum of Understanding”, <https://detroitmi.gov/sites/detroitmi.localhost/files/2018-05/COMBINED%20REPORT.pdf> (last visited Jan. 5, 2020).

314. PALACE SPORTS & ENTERTAINMENT, PLATINUM EQUITY, https://www.platinumequity.com/palace_sports_and_entertainment (last visited Jan. 5, 2020).

governance” documents or any other similar documents with insight about Palace Sports & Entertainment;³¹⁵ Platinum Equity also does not disclose this information about either Palace Sports & Entertainment or its own corporate governance.³¹⁶ As this example illuminates, shadow governance may not entirely solve the managerial accountability problems that are enhanced by the local incentives analyzed in this Article.

CONCLUSION

In this Article, I identified several recent interventions by innovative cities, designed to promote more stakeholder-centric governance or to otherwise induce for-profit business corporations to engage with community stakeholders. I then analyzed the consequences of those local initiatives. I show that, in augmenting the conventional approach of protecting stakeholders by explicit command with incentives that instead ask organizations to consider or even benefit stakeholders’ interests through their governance processes, cities’ recent efforts increase the scope of managerial discretion.

One hundred years after the Michigan Supreme Court’s famous decision in *Dodge v. Ford*, the State of Michigan again leads societal debates between shareholder primacy and stakeholder visions. Normatively, the effects of the new local incentives that I present in this Article are ambiguous: they might weaken managerial accountability to the detriment of all stakeholders or empower the firm to provide greater benefits to local communities. As local efforts to affect corporate purpose show signs of gaining traction, this is a fertile area for further empirical and theoretical research. In the meantime, the City of Detroit, together with its bold community organizations and residents, continues to pioneer a new urban front for shareholder primacy, inviting our collective imagination to rethink what the future of the corporation can and should be.³¹⁷

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315. See, e.g., 313 PRESENTS, <https://www.313presents.com/> (last visited Jan. 5, 2020); *About 313 Presents*, 313 PRESENTS, <https://www.313presents.com/about-313-presents>. Palace Sports & Entertainment from Platinum Equity’s website can be found at: <http://www.palacenet.com/>.

316. See, e.g., *Palace Sports & Entertainment*, PLATINUM EQUITY, https://www.platinumequity.com/palace_sports_and_entertainment (last visited Jan. 5, 2020); *Guiding Principles*, PLATINUM EQUITY, <https://www.platinumequity.com/guiding-principles> (last visited Jan. 5, 2020); *Investor Portal*, PLATINUM EQUITY, <https://www.platinumequity.com/investor-portal> (last visited Jan. 5, 2020) (requiring log in credentials for access).

317. Candice Williams, *Detroit Panel Seeks Feedback on Changes to Community Benefits Law*, DET. NEWS (Jan. 30, 2020 9:26 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2020/01/30/detroit-community-benefits-ordinance-feedback/4613038002/> (“Detroit City Council’s Legislative Policy Division presented a list of 17 items to the community . . . for feedback as the council considers changes to a voter-approved law that requires developers to commit to hiring and other quality-of-life benefits for residents living in the area of proposed large-scale developments. An amended ordinance could be submitted to the City Council’s as early as this spring . . .”).

