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More Myths from Lucian Bebchuk

Two years ago, the Business Roundtable (BRT) issued a "Statement on the Purpose of a Corporation," signed by the CEOs of 184 major U.S. corporations, that rejected shareholder primacy, declared "a fundamental commitment to all [corporate] stakeholders" and linked corporate purpose to advancing and protecting the interests not just of shareholders, but of all corporate stakeholders. The BRT's statement reflected rapidly growing momentum towards a more inclusive corporate governance regime and promised to accelerate stakeholder governance by committing business leaders to the interests of employees, customers, suppliers, communities and the environment.

The BRT statement elevated the topic of stakeholder capitalism to the top of national and global policy debate. In 2020, the World Economic Forum launched the new "Davos Manifesto" in support of stakeholder capitalism. Nearly every significant asset manager—including the "big three," BlackRock, Vanguard and State Street—now insists that the companies in which they invest adopt sustainable stakeholder governance practices. At the urging of their investors, large companies are nearly uniformly undertaking efforts to make and measure progress in achieving sustainable, socially responsible operations. The signs of the step-up in the embrace of stakeholder governance by corporations and their major investors are everywhere.

This month, however, Lucian Bebchuk of the Harvard Law School published and then publicized an article claiming to demonstrate that the entire BRT exercise, and all the efforts that preceded and followed it to advance stakeholder governance, were "mostly for show." After reviewing a "hand-collected" set of corporate policy documents created by BRT signatories over the past two years, Bebchuk and a collaborator declared they saw little evidence that those documents had been recently revised to follow through on the BRT statement. From this self-proclaimed exercise in "empirical investigation," Bebchuk concluded that the BRT statement and allied initiatives to advance stakeholder governance are "ineffective and counterproductive."

Bebchuk's methodology is a farce. Bebchuk's "hand-collection" was of high-level corporate governance documents and policies where evidence of stakeholder commitment is unlikely to be found. As we have repeatedly observed, corporations are free to advance the interests of all stakeholders under previously-existing corporate governance mechanisms; the documents Bebchuk reviewed cannot establish his claim because there is no reason they would reflect evidence of stakeholder engagement. Absence of proof is not proof of absence—especially when one is looking for proof in the wrong place. The contrived data set Bebchuk serves up is thus just another of the many myths of Lucian Bebchuk.

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Had Bebchuk actually undertaken to search broadly for evidence of stakeholder governance over the past two years, moreover, he would have found much to report. JPMorgan Chase has committed billions to minority communities and has pledged to broaden its hiring base. That does not make it into Bebchuk's analysis. Nor does Sephora's effort to combat racial bias in customers' retail experience; or General Motors' election of a majority-female board of directors; or Nike's reimagination of its supply chain to create the "lowest-carbon shoe ever." Spend fifteen minutes on the internet and you will find any number of other stakeholder-facing initiatives that the Bebchuk analysis failed to capture. Also missing from Bebchuk's analysis is the commitment of scores of large companies—including Bank of America, Royal Dutch Shell, Dell Technologies and HP, Inc.—to benchmark their performance against standardized stakeholder capitalism metrics.

None of this is to say that the promise of the BRT Statement is fully realized. To the contrary, the debate on corporate purpose long predates both Bebchuk and the BRT; it is still evolving and will be resolved over time by commercial, environmental and political forces. The necessary partnership between companies and investors—*The New Paradigm* of corporate governance—is a work in progress. And when firms make stakeholder-facing commitments, they should expect to be held accountable. Indeed, ESG-related challenges create liability risk for firms across the economy, without regard to corporation-specific commitments, as we have emphasized.

But while much work is left to do, Bebchuk has supplied nothing to support his claim that the BRT call to stakeholder governance was "for show." Even less has he provided support for his reflexive rejection of stakeholder governance. Remarkably, in another recent article, Bebchuk and his co-author conceded that the "profit-seeking operations [of corporations operating under the shareholder primacy model] contribute to a wide array of society's problems and impose serious negative externalities on employees, communities, consumers, and the environment." His policy response to these incontrovertible developments—stay the course with shareholder primacy—is an analytical non-sequitur. Indeed, it is an invitation to abandon capitalism in favor of state corporatism.

Recognizing this, stakeholder governance—sustainable corporate governance for the long-term growth in value of the corporation—is gaining momentum, in boardrooms, among thought leaders, and within business associations and non-governmental organizations in the United States and abroad. Properly conceived and executed, stakeholder governance will drive value for shareholders, provide directors with guardrails for responsible decision-making, and make our corporations more productive and responsive. Bebchuk's pseudoscience notwithstanding, there is no evidence to the contrary.

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