The Law of Corporate Purpose

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ABSTRACT:

Delaware corporate law requires corporate directors to manage firms for the benefit of shareholders, and not for any other constituency. Delaware jurists have been clear about this in their case law, and they are not coy about it in extra-judicial settings, such as speeches directed at law students and practicing members of the corporate bar. Nevertheless, the reader of leading corporate law scholarship is continually exposed to the scholarly assertion that the law is ambiguous or ambivalent on this point, or even that case law affirmatively empowers directors to pursue non-shareholder interests. It is shocking, and troubling, for corporate law scholarship to evince such confusion about the most important black letter matter in the field. While I am a critic of the “shareholder primacy norm” in corporate governance, I am nevertheless convinced that shareholder primacy is the law. In fact, the critical vantage and reformative program that I have pursued in other writing presupposes that shareholder primacy is currently the law. This article is therefore dedicated both to providing doctrinal clarification on the law of corporate purpose, and to vindicating a key presumption in a broader normative agenda.
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“[T]he shareholder wealth maximization norm . . . indisputably is the law in the United States.”\(^2\)

- Stephen M. Bainbridge

“The notion that corporate law requires directors . . . to maximize shareholder wealth simply isn’t true.”\(^3\)

- Lynn A. Stout

I. INTRODUCTION

Corporate law scholars are divided on the fundamental question of what boards of directors are supposed to do with the corporations they command. It would be no shock to find disagreement on the normative question of what the law of corporate purpose should be. But corporate law scholars are at odds even on the positive question of what the law is on this most basic doctrinal issue. Many in the field take it as given that corporate boards are supposed to pursue profits for shareholders, and that directors have neither the obligation nor the right to pursue other interests. This view seems also to be widely accepted in broader social and political discourse about corporate operations. But readers of corporate law scholarship are continually confronted with the claim, made by some of the field’s most accomplished academics, that the law is that directors may steer the corporate ship in service of non-shareholding stakeholders, including employees, consumers, and the public generally, even where shareholder interests are in tension with such pursuits.

This is more than an important issue. It is the most important issue in corporate law, and one of the most important questions in contemporary social organization. The public, policymakers, and scholars are all rightly concerned with the question of what corporate law does or might do. Effective deliberation on this issue must be informed by a clear expression of what the law presently requires. The confusion in the literature on corporate purpose is therefore not just embarrassing, it is disempowering. In this article, I endeavor to clarify what the law of corporate purpose is, in order to help advance conversations about what the law of corporate purpose ought to be.


Scholars who are convinced that the law requires shareholder primacy in firm governance tend to also insist that such a governance norm is desirable. Scholars who insist that the law allows for a broader corporate agenda tend to argue that director attention to non-shareholder concerns is a good thing. My own view is that shareholder primacy is indeed the law, but I advocate reforms that would impose broader responsibilities on corporate boards. I have developed my normative view in a series of articles. However, I am concerned that the confusion reigning in the academy’s positive assessment of corporate law detracts from what might otherwise be a more direct and unified call for reform of the prevailing regime. This Article therefore both demonstrates that the black letter law of corporate governance is shareholder primacy and explains the missteps that I believe other scholars have made in interpreting that doctrine. I focus exclusively on Delaware corporate law, because Delaware dominates the corporate law landscape in the United States. Subsequent work might usefully extend this analysis to other significant bodies of corporate law, such as California, New York, or Nevada.

The Article is organized as followed. Part II dives into statutory and case law and climbs out with a positive assessment that Delaware demands shareholder primacy in corporate governance. Part III looks beyond formal law and examines extra-juridical statements that Delaware jurists have made about their state’s law. It shows that Delaware jurists have not been coy in expressing their view that Delaware law requires directors to advance shareholder interests, and permits no other purpose in the boardroom. Part IV examines the academic confusion on this question. Part V concludes the Article with an examination of the normative stakes involved in settling this (I hope no longer) ongoing doctrinal dispute.

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4 Clarification about the phrase “shareholder primacy” is in order at the start. Corporate law scholars sometimes use the phrase “shareholder primacy” as a description of the purpose of corporate governance (i.e., that the purpose is to advance shareholder interests); other times the phrase “shareholder primacy” is used as a description of the method of corporate governance (i.e., a method that allows significant shareholder influence in the mechanics of governance). This phraseological ambiguity can be confusing and should be cleaned up. In this Article, I used the phrase “shareholder primacy” to refer to corporate purpose. It is too familiar and elegant a phrase to exclude from an Article on this subject.
5 See infra, text accompanying notes ___.
6 See infra Section V, summarizing this scholarship.
7 Scholars who believe that shareholder primacy is the law typically treat the proposition as self-evident and do not rigorously make the case for it in their scholarship. See Stout, THE MYTH OF SHAREHOLDER PRIMACY, supra note ___ at 115 (collecting prominent examples of this). This Article therefore also serves to flesh out an important, but unproven, premise in such scholarship.
8 Sixty percent of publicly traded companies in the United States are incorporated in Delaware, and thus, by operation of the “internal affairs doctrine,” are subject to Delaware’s corporate governance law. See John Armour, et. al., Delaware’s Balancing Act, 87 IND. L. J. 1345, 1345 (2012). As of 2010, sixty-three percent of Fortune 500 companies were Delaware firms, and, in 2010, 76 percent of initial public offerings in the United States were Delaware firms. Id.
II. **EX CATHEDRA: DOCTRINE**

a. **The Statute: Delaware General Corporation Law**

Not formed by nature or common law, corporations are creatures of statute. To find the purpose of Delaware corporations, therefore, it would seem appropriate to start with the statute. Unfortunately, the statute provides no crisp declaration on this point. The code states that “a corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes.”⁹ The articles of incorporation of every firm must “set forth . . . the nature of the business or purposes to be conducted or promoted.”¹⁰ However, this requirement can be satisfied if the articles state “either alone or with other business purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized.”¹¹ So while the code feints towards clarity by requiring a statement of purpose, it counters with obscurity by allowing the purpose to be stated very generally as the intent to pursue “any lawful act.” In fact, most business corporations use this “any lawful act” language in the purpose section of their articles of incorporation.¹²

Once a corporation is formed, the code requires that it be managed. “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.”¹³ How will the directors of corporations formed to undertake “any lawful act” know what they are supposed to do with the firm they must manage? In the absence of a specified beneficiary in the articles of incorporation, is there a default constituency on whose behalf the firm should be managed? Or are directors to undertake lawful acts in a random fashion, without intent to serve any particular interest? Or may they manage the firm with the purpose of serving beneficiaries of their own choosing?

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¹² If there was real doubt outside of corporate law scholarship about what the law of corporate governance requires, the widespread failure of corporate lawyers to specify the constituency whose interests are to be served by a newly organized firm would be evidence of systematic professional blunder. But this routine omission is not blunder, because the law of corporate purpose in Delaware cannot reasonably be doubted. It appears that lawyers use the “any lawful act” language in corporate charters in order to give directors the widest possible latitude in deciding how to go about advancing shareholder interests. That is, incorporators do not specify that the purpose of their corporation is “to run a railroad” because they know that directors might someday consider it profitable to get the firm into the semiconductor business. Cf. Christopher M. Forrester and Celeste S. Ferber, FIDUCIARY DUTIES AND OTHER RESPONSIBILITIES OF CORPORATE DIRECTORS AND OFFICERS 37 (5th edition, 2012) (a handbook produced by Morrison & Foester, LLP, for use by its corporate clients: “One of the most difficult tasks for a board . . . is to balance the competing interests of multiple constituents of a business . . . The difficulty arises when decisions do not affect all parties equally. . . . there is a clear legal answer to the question: a corporation’s board and management owe a fiduciary duty as their primary obligation, above all others, to the stockholders, to maximize the value of the equity of the corporation.”).
¹³ Del. Gen. Corp. L. § 141(a) (emphasis added).
Indirectly, the code makes clear that by default directors owe fiduciary duties to the corporation and its stockholders. I say indirectly because the first and only mention of this obligation comes in a provision of the statute specifying that corporations may, if they so desire, choose to excuse their directors from liability for breaches of that obligation: “the certificate of incorporation may also contain . . . a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty.” This section also forbids limiting personal liability “for any breach of the director’s duty of loyalty to the corporation or its stockholders” or “for acts or omissions not in good faith.” This permissive exculpatory provision, and the limitation on it, indicates that by default directors owe fiduciary obligations of care, loyalty, and good faith to the corporation and its stockholders. This is the only language in the Delaware statute that addresses the fiduciary obligations of corporate directors.

Of course, to say that a person owes fiduciary obligations to another person can only start a meaningful conversation, it cannot conclude it. What goal is the fiduciary to pursue on behalf of the corporation and its stockholders, carefully, loyally, and in good faith? The statute does not specify. We are not told whether it is profits, profits with a conscience, profits balanced against the interests of other parties, short-term profits, long-term profits, or something else. All we know from the statute is that directors owe the corporation and its stockholders fiduciary obligations. Fortunately, a rich body of case law extends this conversation.

b. Case law: The Basics

This inquiry is concerned with Delaware law, but no review of corporate purpose can be properly undertaken without at least a ceremonial first-pitch from that venerable old Michigan case, Dodge v. Ford. In the first fifteen years of its existence, the Ford

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14 Del. Gen. Corp. L. § 102(b)(7). Section 145 authorizes corporations to indemnify directors, or other agents of the corporation, against liability and costs from any civil, criminal, or administrative action brought against them in connection with their service to the corporation, but only “if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.” Del. Gen. Corp. L. § 145(a). That section also allows the corporation to purchase insurance on behalf of a director or other agent to cover liability incurred by such a person, “whether or not the corporation would have the power to indemnify such person against such liability under this section.” Del. Gen. Corp. L. § 145(g). Thus while firms cannot exculpate or indemnify directors against liability for loyalty or good faith violations, they can insure them against liability for such wrongdoing.


17 Even if the articles of incorporation include an exculpatory provision, directors will still owe the fiduciary obligation of care, they simply will be protected from having to pay damages in connection with any finding that they violated that obligation.

18 But see Lynn A. Stout, Why We Should Stop Teaching Dodge v. Ford, 3 Virginia L. & Bus. Rev. 163 (2008). I address Stout’s arguments infra, text accompanying notes __-__. As will also be seen, infra, text accompanying notes __-__, it is clear that Delaware jurists are at least inspired by Dodge.
Motor Company was wildly successful and paid tens of millions of dollars in dividends to its shareholders. In 1916, however, Henry Ford, the majority stockholder, chairman, and dominant personage at the company, announced that the firm would no longer pay discretionary dividends. Instead, profits would be reinvested in the company for the avowed purpose of increasing wages for workers and decreasing prices for consumers. “My ambition,” Ford declared, “is 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.”\textsuperscript{19} The Dodge brothers, minority shareholders in the company, sued Ford for violating his fiduciary obligations to them. The Michigan Supreme Court famously admonished Ford:

There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority shareholders. A business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or the non-distribution of profits among stockholders in order to devote them to other purposes.\textsuperscript{20}

Remarkably, the Michigan court cited no statute or case law for this decisive statement of its corporate governance law. It is as if the Court considered it obvious.

The quote I have just reported is familiar to just about anyone who has sat through a survey course in corporate law. The lines have been cited in our secondary literature more than eight hundred times.\textsuperscript{21} However, \textit{Dodge} has been cited only 68 times by subsequent state and federal courts. It has been cited just three times, and never for the crucial issue of corporate purpose, in Delaware cases.\textsuperscript{22} It is a decision about Michigan corporate law, and Michigan corporate law is not even very important in Michigan. Ford Motor Company itself is today a Delaware corporation.\textsuperscript{23} (Having apparently learned from its ancestral missteps, the homepage of Ford’s Board of Directors contains an unambiguous caption: “The members of our Board of Directors are dedicated to serving

\textsuperscript{19} 170 N.W. at 683.
\textsuperscript{20} 170 N.W. at 683. The Court acknowledged that it is not forbidden for a corporation to engage in humanitarian undertakings that are incidental to its business. However, “the difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious.” \textit{Id.} I will return to an analysis of “incidental” non-shareholder benefits \textit{infra}, text accompanying notes \textbf{--}.\textsuperscript{21}
\textsuperscript{21} See Westlaw citing references for \textit{Dodge} (as of January 1, 2013).
\textsuperscript{23} See \url{http://corporate.ford.com/doc/2012_proxy.pdf} at 72.
the interests of our shareholders.” 24) Dodge remains a useful case for teaching and scholarship because of its interesting facts and elegant language. It does accurately express the rule that binds Delaware directors. But it is not a great doctrinal citation for Delaware law.

Ceremony aside, then, let us turn to the most important Delaware cases on this issue. Delaware’s jurisprudence on corporate purpose was most pointedly developed in a series of hostile takeover cases from the 1980s. 25 The first of these, and the most mischievous for what it (has been read to have) said about corporate purpose, was Unocal v. Mesa 26 in 1985. T. Boone Pickens, through his Mesa firm, had announced a “structurally coercive” tender offer for 51 percent of Unocal, Inc., an underperforming oil concern. 27 The Mesa tender offer would have provided Unocal shareholders with a premium over the prevailing market price for their stock. But Unocal’s board believed that Mesa’s offer was inadequate, in light of the board’s beliefs about the long-term prospects of the company. The Delaware Supreme Court was called on to decide whether it was permissible for Unocal’s board to deploy aggressive, costly measures to stymie Mesa’s takeover bid. The Court concluded that defensive measures adopted by a board in response to an unwelcome takeover effort would be analyzed under a standard that requires directors to show that their defensive actions were “reasonable in relation to the threat posed.” 28 The Court, per Justice Andrew Moore, wrote that developing a reasonable anti-takeover plan

entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may

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25 A hostile takeover involves an effort by one corporation (or other entity, or person) to gain control of another corporation against the wishes of its incumbent board of directors. Hostile takeovers present myriad legal questions, the most important in the cases discussed in the text here are whether and to what extent an incumbent board may use its corporate powers to resist a hostile threat that takes the form of a direct appeal to shareholders to tender (sell) their shares to the entity attempting the takeover.
27 In the hilarious argot of corporate takeovers, the Mesa offer was a “two-tiered front end loaded” tender offer. It was “structurally coercive” because Pickens offered a substantial cash premium for 51 percent of outstanding shares, while simultaneously announcing that after he gained control of Unocal he would merge Unocal with his Mesa firm under terms which would exchange the remaining 49 percent of outstanding Unocal shares for highly subordinated Mesa debt (“junk bonds”). This is an offer that Unocal shareholders could not refuse. Shareholders would stampede to tender their shares and get in on the front-end of the two-step program that promised the premium, out of fear that they would get stuck on the back-end and receive nothing but the junk bonds. If shareholders could coordinate their activity they might all refuse to tender on the front-end, thus denying Pickens control of the firm and protecting themselves from the second-step junk-bond freeze-out. But highly dispersed, diversified shareholders cannot coordinate their activity. Hence, the question that Unocal presented was to what extent the Unocal board could take action to protect shareholders from the Pickens offer.
28 Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). This standard is known as the “enhanced business judgment rule.” Id. I discuss the business judgment rule generally in Section IV(d), infra.
include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on “constituencies” other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.29

Remarkably, the Court cited no cases or statutory authority for this proposition.30

This passage has been cited many times by scholars claiming that Delaware allows directors to attend to non-shareholder interests and does not require shareholder primacy in firm governance.31 But that is wrong. The Delaware Supreme Court clarified its “‘constituencies’ other than shareholders” language in a second prominent takeover case, also decided in 1985, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.32 A basic understanding of the facts of Revlon is necessary before its crucial doctrinal point on corporate purpose can be clear. Revlon was the target of a hostile takeover bid by prominent raider (or knight, depending on your perspective) Ronald Perelman. The Revlon board responded with a series of defensive maneuvers. One of the things it did was offer its own shareholders the opportunity to exchange shares of Revlon stock for debt notes with a high interest rate. Like many debt instruments, the notes came with certain promises (covenants) restricting the firm’s subsequent business dealings. The covenants were meant to assure that the debt would be paid. The company offered to exchange these debt notes for up to 10 million shares, and the exchange was fully subscribed. The board hoped that the exchange would both mollify frustrated shareholders (who, like Perelman, believed their Revlon stock was underperforming) and ward of Pereleman, who they hoped would no longer want the company after it was burdened by the debt and the debt covenants.33

But Perelman was not dissuaded; he continued to increase his offer price for the company. Intent on not allowing Revlon to fall into Pereleman’s hands, the directors cut a deal to sell the firm to the board’s preferred suitor, Forstmann Little. Forstmann, the board concluded, had offered a fair price for the company and had also promised to

30 Perhaps even more remarkably, the Court did, immediately after the passage quoted, cite to an obscure piece of unpublished scholarship by two corporate law practitioners, Martin J. Lipton and Andrew Brownstein, titled Takeover Responses and Director Responsibilities – An Update, p. 7, ABA NATIONAL INSTITUTE ON THE DYNAMICS OF CORPORATE CONTROL (December 8, 1983). 493 A.2d at 955. The Lipton and Brownstein piece was subsequently published in substantially altered form at 40 Bus. Law. 1403 (1985). Still more remarkably, the published version of Lipton and Brownstein’s piece omitted the crucial “other constituencies” language that the Unocal court had borrowed from the unpublished version of the piece for its infamous passage. Id. Neither Lipton nor Brownstein recall any specific reason for dropping the “other constituencies” language between the draft and the published version. Email correspondence on file with author.
31 See infra, Section IV (reviewing scholarship).
33 506 A.2d 173 (Del. 1985).
support at full value the debt notes that the board had exchanged for outstanding stock. Pereleman’s bid contained no such promise. To secure Forstmann’s bid, the board also granted Forstmann a “lock-up” which promised to give Forstmann hundreds of millions of dollars if the firm ended up being sold to anyone else. Pereleman and other Revlon shareholders filed suit to enjoin the Forstmann deal, claiming that it violated the board’s obligations to the shareholders by unnecessarily and unreasonably ending an active bidding war for the company.

The board admitted that its deal with Forstmann was in part motivated by its desire to protect the noteholders. The board claimed that such a motive was proper under Unocal, which said that in charting the firm’s course in the takeover context, directors could consider an offer’s “impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).” The Delaware Supreme Court took this opportunity to clarify its Unocal language. This time Justice Moore laid down the law in no uncertain terms. The introduction to the Revlon opinion states that the Court would “address for the first time the extent to which a corporation may consider the impact of a takeover threat on constituencies other than shareholders.” This framing of the discussion repudiates the view that the Court had already addressed the other-constituencies issue in any substantive way in Unocal. The Revlon opinion then asserts that “while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the shareholders.” The Court reiterates this later in the opinion:

The Revlon board argues that it acted in good faith in protecting the noteholders because Unocal permits consideration of other corporate constituencies. Although such considerations may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.

Revlon thus clearly states the law in Delaware. Boards can attend to the interests of non-shareholders when the board believes that doing so will ultimately serve shareholders.

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34 Revlon, 506 A.2d at 176 (emphasis added).
35 Unocal, 493 A.2d at 955. The Revlon board was represented by, inter alia, Martin Lipton and Andrew Brownstein, who had written the unpublished article that the Unocal Court had cited in connection with its “constituencies other than shareholders” language. See Revlon, 506 A.2d 173 (Del. 1985).
36 Revlon, 506 A.2d at 176 (emphasis added).
37 Revlon, 506 A.2d at 176 (emphasis added).
38 Revlon, 506 A.2d at 182.
Boards may not attend to the interests of non-shareholders where those interests are not rationally related to shareholder interests. Remarkably, the Delaware Supreme Court cites no authority for its “rationally related benefits accruing to the shareholders” proposition, other than *Unocal*.39

In *Unocal* the board was allowed to aggressively repel a hostile takeover bid in order to protect its own vision for the future of the company. The board believed its long-term plans would prove more profitable to its shareholders than the short-term gains offered by Mesa’s tender offer. In making their decision to fight Mesa, it was appropriate for Unocal’s board to consider how its plans would impact workers, creditors, customers, even the community at large, since all these constituencies were relevant to the firm’s long term plans for making the company profitable. Consideration of these constituencies is therefore entirely appropriate for a going concern. But the only permissible *reason* for considering these constituencies is their relationship to the shareholder interest. In *Revlon*, the board had accepted that there would be no future, no tomorrow, for the company or its shareholders. The company was going to be bought by either Pereleman (the board feared) or Forstmann (the board hoped). Whoever bought the company was going to cash out the shareholders, bust up the company, and sell off its parts. Whether Pereleman or Forstmann took control of the firm, the shareholders were going to get cash for their stock, and would have no future stake in the company. In this scenario it was entirely irrelevant how the board’s actions would impact non-shareholding constituencies like creditors, workers, or customers, because the impact on those constituencies would not be relevant to any future shareholder interest. Any consideration of non-shareholders in that context would therefore be a violation of the directors’ abiding obligation to attend exclusively to shareholder interests.

*Revlon* left no doubt on this subject. But a recent case, *Ebay v. Newmark* (2010) again makes the point in language that is even clearer. *Ebay* is like *Dodge v. Ford* for the 21st century, in Delaware.40 One of the three founders of Craiglist, Inc., the online classifieds site, sold his Craiglist stock to Ebay, Inc., in a complicated transaction that the other two Craiglist founders had countenanced. Later it became clear that while Ebay expected to be actively involved in shaping Craiglist’s future, the two remaining founders wanted Ebay to be a passive investor. In their capacity as directors, the remaining founders undertook a series of maneuvers seeking to limit Ebay’s influence in Craiglist, and to assure that control of the company remained in their hands and would pass to their heirs. Ebay sued. Using a litigation playbook they may have ill-advisedly

39 *Revlon*, 506 A.2d at 182.
found on their own website, the Craigslist founders explicitly, proudly, defended their machinations as necessary to protect the public-service orientation of Craigslist and keep it from becoming too focused on profit-making.\textsuperscript{41}

Not on Chancellor Chandler’s watch. He wrote:

Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim’s and Craig’s desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a for-profit Delaware corporation and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan [Jim and Craig’s entrenchment plan] a corporate policy that specifically, clearly, and admittedly seeks \textit{not} to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce.\textsuperscript{42}

Remarkably, Chandler did not cite a single case, statute, or piece of scholarship to support his conclusion. Like the \textit{Dodge} court in Michigan, the proposition seemed so obvious and fundamental to Chandler that it needed no citation. But those who prefer to have one now have \textit{Ebay}.

The clarity of Delaware case law on the corporate purpose helps to explain, or at least give meaning to, the relative silence on the issue in the Delaware statute. With the help of its active Corporate Law Committee, the Delaware Legislature is very alert to developments in the interpretation of its corporate code and has not been shy about

\textsuperscript{41} \textit{Ebay Domestic Holdings, Inc. v. Newmark}, 16 A.3d 1 (Del. Ch. 2010).

responding to unsatisfactory judicial holdings with legislative amendments.\textsuperscript{43} The failure of the legislature to do so in the area of corporate purpose must be read to express legislative acquiescence in that judicial conclusion.

III. \textit{Ab Parietee: Judicial Epistles}

At a recent corporate law symposium, Professor William Bratton remarked that if you spend any significant time tilling the fields of corporate law scholarship you will inevitably develop a personal relationship with Delaware jurists.\textsuperscript{44} I was slightly chagrined by this comment, since I theretofore had thought I was something special for having gotten to know personally several Delaware jurists myself, mostly through visits they have made to my home institution, some 3000 miles from their docket. But I knew he was right. Delaware jurists are interested in the work of corporate law scholars and they are committed to being part of the scholarly conversation. But, as Bratton concluded: “they are never contained by us.”\textsuperscript{45} Considering it part of their calling to be ambassadors for Delaware corporate law, these jurists travel far and often, speaking before many audiences about their Court and their jurisprudence, defending, explaining, and rallying support for their prized institution. And when you hear Delaware jurists speak, they make no bones about the fact that Delaware law requires corporate directors to pursue the interests of shareholders, and allows them to do nothing else.

Leo E. Strine, Jr. became the newest Chancellor of the Delaware Court of Chancery in June of 2011, after serving as a Vice Chancellor since 1998.\textsuperscript{46} Strine has long been an active off-the-bench analyst and booster of Delaware Corporate Law.\textsuperscript{47} In

\textsuperscript{43} For example, the Delaware legislature adopted the exculpatory provisions of §102(b)(7) in direct response to the Delaware Supreme Court (seemingly) expanding duty of care liability in \textit{Smith v. Van Gorkum}, 488 A.2d 858 (Del. Sup. Ct. 1985).

\textsuperscript{44} William Bratton, Remarks at the Adolf A. Berle, Jr. Center of Corporations, Law & Society Symposium on the Theory of the Firms, Seattle University School of Law (January 13, 2012).


\textsuperscript{47} Recently the Delaware Supreme Court admonished Chancellor Strine for using his judicial opinions as a vehicle to express his personal views on business law. In \textit{Gatz Properties, LLC v. Auriga Capital Corp.}, 40 A.3d 839 (2011), Strine opined that Delaware’s LLC statute imposed fiduciary obligations on LLC managers by default. Whether that really is the default rule in Delaware is a controversial issue, but it was not an issue in the \textit{Gatz} case, where all parties admitted that their LLC agreement expressly provided for fiduciary obligations to be imposed on the firm’s managers. In upholding the Chancellor’s disposition of the case, the Supreme Court criticized Strine for unnecessarily expressing his views on the default rule issue and for, in the Supreme Court’s words, “hubristically” suggesting that it would be imprudent for the
March of 2011, just before being elevated from Vice Chancellor to Chancellor, Strine gave a lecture at the University of Western Ontario, which he titled, “Bailed Out Bankers, Oil Spills, Online Classifieds, Dairy Milk, and Potash: Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit.”\textsuperscript{48} He subsequently published the speech in the Wake Forrest Law Review, dropping the pre-colon portion of the title in the published version.\textsuperscript{49} As the title of his piece suggests, Strine argues that people should not be surprised when for-profit corporations externalize costs to non-shareholders while pursuing profits for shareholders. Such externalization, Strine candidly states, is entirely predictable, given the structure of corporations and the law orienting their conduct.\textsuperscript{50}

Strine is “weary of the naivete” with which even educated, worldly people continue to talk about corporations. In his view

\begin{quote}
\textbf{[t]he continued failure of our societ[y] to be clear-eyed about the role of the for-profit corporation endangers the public interest. Instead of recognizing that for-profit corporations will seek profit for their stockholders using all legal means available, we imbue these corporations with a personality and assume they are moral beings capable of being ‘better’ in the long run than the lowest common denominator. . . . In the end, policy makers should not delude themselves about the corporation’s ability to police itself; government still has a critical role in setting the rules of the game.}\textsuperscript{51}
\end{quote}

\begin{flushright}
\textsuperscript{49} Leo E. Strine, Jr., \textit{Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit}, 47 Wake Forest Law Rev. 135 (2012).
\textsuperscript{50} Strine, \textit{Our Continuing Struggle}, supra note __ at 135-36.
\textsuperscript{51} Strine, \textit{Our Continuing Struggle}, supra note __ at 135-36.
\end{flushright}
Of course “we” also tend to “imbue” governments with “personality” and expect them to operate in a manner better than the “lowest common denominator.” It is far from clear that such a view of government is wise. Normatively, Strine’s goal in *Our Continuing Struggle* is to encourage citizens and policymakers to stop wringing their hands, wishing and hoping that corporations would behave better, and instead turn their energies towards developing more fulsome external regulation that can constrain the socially deleterious projects that corporations will inevitably undertake. As I explain in Section V, *infra*, I find this prescription an implausible salve to the externalizing condition Strine accurately diagnoses. I instead advocate a reform of internal corporate governance standards that will require broader attention by corporate boards to non-shareholder interests. But the point for present purposes is to witness how certain Leo Strine, the Chancellor of the Delaware Court of Chancery, is that the corporate law over which he presides requires directors to run firms in the best interests of shareholders.52

Doctrinal analysts who have doubted the importance of *Dodge v. Ford* because it is not used in Delaware cases should at least be troubled to find that Strine commits a section of his paper to that famous case, and interprets it as standing for the proposition that while Ford “could help other constituencies such as workers and consumers, as an instrument to the end of benefitting stockholders, he could not subordinate the stockholders’ best interest.”53 The term *constituencies*, which Strine uses here, is the parlance of modern debates on corporate purpose, it makes no appearance in *Dodge*, and thus may be read to signal Strine’s view about the relevance of the case to contemporary corporate governance debates. But the most important doctrinal exegesis in Strine’s piece comes in a long footnote to his discussion of *Ford*.54 He writes

> It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term.55

He then interprets Delaware case law in a manner that fully accords with my interpretation in the previous section. Citing *Unocal*, Strine states that “when a

52 Strine does not address scholarship arguing the contrary position, which scholarship I address *infra*, Section IV.
53 Strine, *Our Continuing Struggle*, supra note ___ at 135-36.
54 Indeed, it is so obviously the most important doctrinal work in the piece that it seems perverse for him to put it in a footnote, unless he is exploiting the perverse instinct of the academic to search for the best material below the line (as it were).
55 Strine, *Our Continuing Struggle*, supra note ___ at 147 n. 34 (citing Wrigley, supra note ___, which is a case involving Delaware law).
corporation is ongoing, it may consider the interests of other constituencies in pursuing a long term course to maximize profits.”56 However, Strine continues, “when there is no long-term, as when a sale is inevitable, directors must maximize value for the stockholders immediately.”57 The footnote ends where this inquiry must ultimately end: “These cases, when read together, mean stockholders’ best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to that end.”58 It cannot be put more plainly than that.

Strine also dedicates a section of his paper to the eBay case, noting that it has “striking similarities to Dodge.”59 He approvingly quotes Chancellor Chandler’s statement in that case that directors cannot “defend a business strategy that openly eschews stockholder wealth maximization – at least not consistently with the directors’ fiduciary duty under Delaware law.”60 Strine calls this a “rather expected statement.”61

IV. THE SCHOLARLY CONFUSION

In this section I attempt to address the major arguments made by corporate law scholars who deny that the law of Delaware requires shareholder primacy in firm governance. To explain the interpretive problems that I see, I must showcase each step of my interlocutors’ arguments, following them down to their footnotes, and through their footnotes into the pieces they quote or cite. It is my hope that the stakes will make it worth the pain (in the brain or the bottom) of following this staking all the down. I do not attempt to review every piece of scholarship on this subject; both aspects of the time-space continuum preclude such an exhaustive review. I hope that my treatment of the major and recurring analytic moves addressed here can be deployed to analyze other scholarship, or future scholarship, on this question.

Before beginning this part, I want to sincerely acknowledge my intellectual debt to each of the scholars treated here. On many other issues, and especially on their normative conclusions, I agree with them entirely. Much of what I know about corporate law I have learned from these authorities. In other arts the sincerest form of flattery is imitation. In ours it is critique.

a. Misinterpreting Unocal, Revlon, and Their Progeny

56 Strine, Our Continuing Struggle, supra note __ at 147 n. 34.
57 Strine, Our Continuing Struggle, supra note __ at 147 n. 34.
58 Strine, Our Continuing Struggle, supra note __ at 147 n. 34.
59 Strine, Our Continuing Struggle, supra note __ at 149.
60 Strine, Our Continuing Struggle, supra note __ at 149.
61 Strine, Our Continuing Struggle, supra note __ at 149.
One of the most prominent corporate law scholars to reject shareholder primacy as a description of Delaware corporate law is Professor Lynn Stout of Cornell Law School. In 2008 Stout published an essay provocatively titled, Why We Should Stop Teaching Dodge v. Ford. She expanded the arguments in that essay into a book, The Shareholder Value Myth, published in 2012.

In her book, Stout invokes Unocal for her central conclusion that “the Delaware Supreme Court has stated that in weighing the merits of a business transaction, directors can consider ‘the impact of “constituencies” other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).’” But Stout never follows up on this Unocal presentment with Revlon’s clarification. In fact, she never quotes the Court’s crucial statement in Revlon that there must be “rationally related benefits accruing to the stockholders” before the considerations noted in Unocal would be permissible. She does discuss Revlon, but like many scholars she misconstrues its point. Stout argues that Revlon stands for the proposition that directors are only obligated to maximize shareholder value when a firm is about to be sold. Since in Revlon the shareholders were going to receive cash in exchange for their shares, she rightly acknowledges that “[t]hat meant there would be no public corporation whose long-term interests the board might consider.” She also rightly states that the “Delaware Supreme Court held that, under the circumstances, the business judgment rule did not apply and Revlon’s directors had a duty to get the public shareholders (soon to be ex-shareholders) the best possible price of their shares.” But from this she draws the non sequitor that, “[i]n other words, it is only when a public corporation is about to stop being a public corporation that directors lose the protection of the business judgment rule and must embrace shareholder wealth as their only goal.”

In terms of formal logic, Stout has committed the fallacy of “denying the antecedent.” For the logical statement “if A, then B” it is a fallacy to conclude “not A, therefore not B.” The Delaware Supreme Court held in Revlon that if [A] the firm is for sale, then [B] directors must maximize profits. Stout concludes from this that if the firm is not for sale, directors do not have to maximize profits. But this does not follow as a

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64 Stout, THE SHAREHOLDER VALUE MYTH, at 29.
matter of logic, and it is not Revlon’s teaching. It is worth revisiting Revlon’s crucial passage in full:

The Revlon board argued that it acted in good faith in protecting the noteholders because Unocal permits consideration of other corporate constituencies. Although such considerations may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.  

The statement that there must be “rationally related benefits to the shareholders” is directly connected to the Court’s discussion of its holding in Unocal. The phrase, “rationally related benefits to the shareholders” is given as an explanation of the “fundamental limitations” that attend Unocal’s invitation to consider the interests of non-shareholders. It is only after connecting the “rationally related benefits language” to Unocal that the Revlon Court moves on to explain how this teaching must operate in the auction setting. These words, in this order, cannot be interpreted to mean that the “rationally related benefits” language applies solely when a company is being sold to the highest bidder. Revlon therefore holds that so long as a business is a going concern Delaware will defer to the directors’ discretion in determining how to maximize shareholder value. This, the Unocal and Revlon courts recognize, may often include being good to non-shareholders. But in the last period, where the shareholders will have no continuing interest in the firm, directorial attention to the interests of non-shareholders cannot possibly bear on shareholder interests, and therefore, at the moment, attention to non-shareholder interests would necessarily violate the one duty that is always in place: the duty to the shareholders.

Most surprisingly, Stout does not even discuss eBay, wherein Chancellor Chandler explicitly repudiated corporate directors who publicly stated that their intention was something other than to “maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.”70 This omission is particularly troubling given that Stout’s book is aimed not just at scholars and corporate insiders, but also

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69 Revlon, 506 A.2d at 182.
70 See supra text accompanying notes __-__.
“informed laypersons,”71 who would have no reason to note or decide for themselves about the significance of omitting a case so obviously relevant to the discussion.

Professor Einer Elhauge of Harvard Law School makes a positive argument about Delaware law that would look to extend and deepen Stout’s basic claim.72 But it proves no more persuasive in the end. Elhauge argues that corporate law should (and he claims does) provide discretion for directors to sacrifice profits in the interests of non-shareholders, like workers, consumers, or the environment, in the same way that social norms and morality typically constrain the profit-seeking behavior of individuals engaged in business activity outside of the corporate form (e.g., in mom and pop fashion).73 Norms and morality often provide a socially useful form of behavioral constraint in business dealings. In the context of publicly traded corporations, however, shareholders are too dispersed from corporate operations to feel the shame or honor that pushes ordinary business practice in desirable ways, and so corporate law allows directors to stand in for that affective role, which they can plausibly do since they are publicly associated with the corporate activity. This is a nifty argument. But it flounders when Elhauge tries to make it cohere with Delaware case law.

In defending his claim, Elhauge first cites Unocal for the proposition that Delaware allows directors to “reject a takeover bid based on ‘the impact on “constituencies” other than shareholders.’”74 But he too fails to connect this language to the clarification in Revlon, which readers of this Article by now know requires that such considerations be “rationally related”75 to shareholder interests. In fact, Elhauge does not mention Revlon at all until 85 pages have separated it from his Unocal assertion, and even then he does not modify his claim about what Unocal allows.76

For his second piece of evidence in support of his positive claim, Elhauge quotes a different line from Unocal. He writes, “Delaware case law also explicitly states that ‘stockholder interests’ are ‘not a controlling factor.’”77 But the fuller passage from which these quotes are drawn reveals that they have nothing whatsoever to do with the Court’s view of the relative standing of shareholder and non-shareholder interests in the

71 Stout, THE SHAREHOLDER VALUE MYTH, at vi.
73 Elhauge, Sacrificing Corporate Profits, supra note __ at 764.
74 Elhauge, Sacrificing Corporate Profits, supra note __ at 764.
75 Revlon, 506 A.2d at 182.
76 Elhauge, Sacrificing Corporate Profits, supra note __ at 849.
77 Elhauge, Sacrificing Corporate Profits, supra note _ at 764-5 (emphasis added).
board’s responsibilities. The full *Unocal* sentence from which Elhauge plucked his phrases reads:

While not a controlling factor, it also seems to us that a board may reasonably consider the basic stockholder interests at stake, including those of short term speculators, whose actions may have fueled the coercive aspect of the offer at the expense of the long term investor.\(^{78}\)

The “basic” “stockholder interests” the Court is (somewhat inelegantly) referencing are whether the stockholder has been a long-term investor, which is one kind of interest, or is a short-term speculator, which is another. In a footnote to its sentence the Court cites studies finding that some target companies that resisted takeovers eventually traded at a higher price than the price offered in the hostile bid.\(^{79}\) This footnote buttresses my interpretation that in the phrases Elhauge quotes the Court is saying that consideration of the competing interests of long-term vs. short-term shareholders is appropriate. Deciding how to manage that tension is within the board’s discretion (i.e., there is nothing in the competing interests of these groups that is “controlling.”). The sentence in question comes in the *Unocal* opinion right after the sentence containing the infamous “other constituencies” language. Under Elhauge’s interpretation, the second sentence would be duplicative of the sentence that precedes it. It would add nothing to the sentence that precedes it. On my reading, the sentences are non-duplicative and coherent. To read *Unocal* as holding that directors may pursue non-shareholder interests that are unrelated to stockholder interests because “stockholder interests” are not a “controlling factor” is to misread *Unocal*.

For his third piece of evidence, Elhauge moves beyond *Unocal* and looks to *Mills Acquisition Co. v. Macmillan, Inc.*, a Delaware takeover case from 1989 in which the Macmillan directors were found to have violated their fiduciary duties in the course of selling the company by playing favorites with a bidding group comprised of incumbent managers, and dealing unfairly with a group of outside bidders who may have offered better terms.\(^{80}\) Here is an important line from the body of *Mills Acquisition*:

> Our decision in *Revlon* . . . requires the most scrupulous adherence to ordinary standards of fairness in the interest of promoting the highest

\(^{78}\) *Unocal*, 493 A.2d at 955-56.

\(^{79}\) *Unocal*, 493 A.2d at 956 n. 11 (“There has been much debate respecting such stockholder interests. One rather impressive study indicates that the stock of over 50 percent of target companies, who resisted hostile takeovers, later traded at higher market prices than the rejected offer price.”).

values reasonably attainable for the stockholders’ benefit. When conducting an auction for the sale of corporate control, this concept of fairness must be viewed solely from the standpoint of advancing general, rather than individual, shareholder interests.\textsuperscript{81} Solely. Did you catch that? Because you would not get it from Elhauge’s article. He does not cite it. Here is another important line from the body of \textit{Mills Acquisition} that Elhauge does not cite: “Thus, like any other business decision, the board has a duty in the design and conduct of an auction to act in ‘the best interests of the corporation and its shareholders.’”\textsuperscript{82} Taken together these statement make clear that a board’s obligation is the same whether they are in ordinary going concern times or at a pivotal sale-of-control moment. The duty is always to solely advance the interests of the shareholders.

Elhauge ignores these clear statements from the text of \textit{MacMillan} and instead quotes from a footnote in the case when he writes: “Delaware case law also holds that managers may rebuff tender offers based on ‘any special factors bearing on stockholder and public interests.’”\textsuperscript{83} He goes on to say that in \textit{MacMillan} “[t]he court also . . . stated that managers may base their rejection of a takeover bid on the ‘effect on the various constituencies, particularly the stockholders,’ which implicitly indicates the analysis is not limited to the effect on shareholders.”\textsuperscript{84} The reason the language Elhauge quotes here is from a footnote in \textit{Mills Acquisition} is because it is \textit{dicta}, with no direct bearing on the decision in the case, which, as stated, involved a flubbed auction, not a decision to reject a tender offer. In any event, especially in light of the \textit{Mills Acquisition} language I cited just above, the footnote language Elhauge cites cannot bear the interpretation or import he enlists it to carry. The portion of the footnote that Elhauge quotes is simply the \textit{Mills Acquisition} Court’s summary of the rule set out in \textit{Unocal}. Indeed, the Court pincites \textit{Unocal}’s “constituencies” language after the lines Elhauge quotes. As I reviewed above, the Court has made clear that a myriad of factors, including other constituencies and public interests, are of course relevant to a firm’s determination to reject a takeover bid and maintain the firm as a going concern, since such considerations may bear on the profitability of the firm. This is non-controversial. But \textit{Revlon} makes clear that the \textit{Unocal} language is to be understood as always requiring a “rational relation” to shareholder interests. There is nothing in the \textit{Mills Acquisition} footnote that suggests that

\textsuperscript{81} \textit{Mills Acquisition Co. v. Macmillan, Inc.}, 559 A.2d 1261, 1264 (1989) (emphasis added).
\textsuperscript{82} \textit{Mills Acquisition Co. v. Macmillan, Inc.}, 559 A.2d 1261, 1287 (1989) (emphasis added).
\textsuperscript{83} Elhauge, \textit{Sacrificing Corporate Profits}, supra note \_\_ at 765 (\textit{citing Mills Acquisition} at 1285 n. 35) (Elhauge emphasizes the “and” with an italics, I have dropped the emphasis in order to emphasize the Court’s usage).
\textsuperscript{84} Elhauge, \textit{Sacrificing Corporate Profits}, supra note \_\_ at 765 n. 68 (\textit{citing Mills Acquisition} at 1285 n. 35)
the interests of non-shareholders may be considered irrespective of, or when they conflict with, shareholder interests. This is especially so when the footnote is read in the shadow cast by the extreme shareholderist language in the text of the opinion itself, which I have relayed.

Finally coming to Revlon, Elhauge claims that “when corporate control is being sold, then that does trigger a duty to profit-maximize . . . . [b]ut the cases so holding emphasize that this profit-maximization duty applies only to such sales of corporate control and thus make clear that it does not apply otherwise.”85 I have already shown that this is not true,86 but this interpretation of Revlon is not even internally consistent with the rest of Elhauge’s positive vision of Delaware law. The “last period” of a firm’s life (e.g., the period in which it is sold) is one in which non-shareholder interests are particularly vulnerable, precisely because the firm no longer needs to be concerned with making credible commitments to such groups. Workers, entire communities, can be devastated by the dislocations accompanying the profitable bust-up of a going concern. Recall that Elhauge claims that Delaware law allows firms to sacrifice profits where norms and morality require it, to the same extent as non-corporate firms sacrifice profits for such reasons.87 But if norms and morality really do constrain non-corporate business behavior, we would certainly expect to see those factors constraining non-corporate businesses in last period contexts. I am thinking (in made up fashion, like Elhauge) of the mom and pop owners of a deli who “take care” of the guy who worked their counter for 30 years when mom and pop finally sell the place and retire to Florida. I am thinking of the mom and pop who “look out” for their customers when selling their operation as a going concern, refusing to sell unless the buyer makes commitments to maintain or service a product line after the sale. But in the final period Delaware explicitly forbids these kinds of norms and ethics considerations in directorial decision-making. If Delaware really blankets workers, consumers, and communities with the warmth of directorial attention in the days, weeks, and years before a sale of the firm is in the works, why would it yank it off and leave them cold in the very moment where they are most vulnerable to the (market) elements?

Elhauge argues that Delaware has to remove directorial discretion to sacrifice profits in the public interest in last periods because at that moment directors are no longer constrained in their profit-sacrificing conduct, as they are while the business is a going

85 Elhauge, Sacrificing Corporate Profits, supra note __ at 765
86 See supra text accompanying notes ___.___.
87 Elhauge, Sacrificing Profits, supra note __ at 739-756.
concern, by the disciplining power of the capital markets, product markets, labor markets, and the need to seek re-election to the board. Freed from these constraints in the final period, he argues, directors might suddenly become too generous in their profit sacrificing conduct. They might be far more generous than the non-corporate mom and pop in similar circumstances, because they are sacrificing other people’s money, not their own.

But this proves too little. By the time he reaches his “last period” analysis, Elhauge has already reviewed, and celebrated, case law in which Delaware courts assert substantive “reasonableness” restrictions on corporate decisions, including in the charitable-giving context. If Delaware really did consider it generally to be appropriate for directors to sacrifice profits in the public interest, then Delaware could easily also allow it in the takeover context, where it matters most, while imposing “reasonableness” parameters, since extra-judicial providers of reasonableness are non-functioning in that context. After all, the takeover context is already one in which customary judicial deference yields to enhanced judicial scrutiny and Delaware courts take it upon themselves to ensure the “reasonableness” of directors’ decisions to entrench and defend against takeovers, rather than give in and accept a takeover offer. If it were really true that Delaware generally considers it appropriate for directors to sacrifice profits for non-shareholders, then we would expect Delaware to extend a reasonableness framework to the analysis of profit-sacrificing conduct in the sale of control context as well, where directors might be tempted to do too much of it. Instead we see that such considerations are completely forbidden. My interpretation of Revlon is much more plausible: so long as a business is a going concern Delaware gives all deference to the directors to determine how to maximize shareholder value, which very often may include being good to non-shareholders; but in the last period, where the shareholders will have no continuing interest in the firm, directorial attention to the interests of non-shareholders cannot possibly bear on shareholder interests, and therefore at the moment attention to non-shareholders would violate the directors abiding duty to the shareholders.

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88 Elhauge, Sacrificing Profits, supra note __ at 739-756.
89 Elhauge, Sacrificing Profits, supra note __ at 848-852.
90 I review corporate charitable giving infra text accompanying notes __-__.
91 Of course they still function if the out-going directors hope to find themselves appointed or elected to the boards of other publicly traded companies, a contingency that may be especially on their mind knowing that they will soon be out of a job at their incumbent firm. Reputation community constraints also continue to operate on directors who may, in retirement, seek admission and comfortable membership in social clubs where faithful service to shareholders is valued.
92 See supra text accompanying notes __-__.
As if sensing that his Revlon analysis does not really make sense, Elhauge pursues a strained interpretation of another important case to argue that even in the last period, when the company is up for sale, Delaware authorizes directors to consider non-shareholder interests.\textsuperscript{93} He examines the 1989 auction sale of RJR Nabisco\textsuperscript{94} in which a disinterested board chose to sell the company to the investment firm KKR (Kohberg, Kravis, Roberts & Co.) rather than a group of competing bidders comprised of the firm’s incumbent managers. After a tense, complicated, high-stakes bidding process, the Board weighed KKR’s best offer, which the board’s investment bankers valued at “approximately $108 to $108.50 per share,”\textsuperscript{95} against the management team’s best offer, which the company’s bankers “were of the view . . . had a value of approximately $108.50-$109 per share.”\textsuperscript{96} The Court stated that “the Company’s bankers . . . were of the view . . . that the two bids, were, so far as financial analysis could determine, substantially equivalent.”\textsuperscript{97} Nevertheless, Elhauge looks to make hay of the fact that Delaware countenanced the Board’s decision to accept the KKR bid and reject the management team’s bid. He writes

the fact is that, even as valued by the corporation itself, the two bids were not equal: The accepted bid had a value of $108-108.50 and the rejected bid a value of $108.50-$109.00. The corporation’s own analysis thus indicated there was no chance the winning bid was worth more than the rejected bid. The best the corporation could say is that the difference in value was between $0 and $1. Accordingly, the rejected bid necessarily must have had higher expected value to shareholders. The decision effectively holds that, even in the auction context, management can go beyond considering only those nonshareholder interests that bear a rational relationship to shareholder value. Management can in addition conclude that consideration of nonshareholder interests overrides small differences in shareholder value, amounting to less than one percent of expected shareholder value, on the grounds that only “substantial” equivalence is required.\textsuperscript{98}

\textsuperscript{93} Elhauge, *Sacrificing Corporate Profits*, supra note ___ at 851-852.
\textsuperscript{98} Elhauge, *Sacrificing Corporate Profits*, supra note ___ at 851-852.
This analysis might hold up if it were true, as Elhauge writes, that “as valued by the corporation itself, the bids were not equal.” But that is not true. The firm’s investment bankers may have given the rejected bid a higher upper range than the accepted bid, by 50 cents. Of course the investment banks also said the bids were “substantially equivalent,” so their words conflicted with their numbers, unless 50 cents per share is insubstantial, which is really not their call. And that is the point. It is not their call. Under Delaware law, neither investment bankers nor law professors determine the value of a bid. The directors do that. Only by substituting “the corporation” for the “investment bankers” can Elhauge even plausibly claim the corporation believed there was no chance the winning bid was worth more than the rejected bid. The corporation, as manifest by the board, was under no obligation to accept the investment bankers’ word – or numbers – as final. Indeed, the board was obligated to make its own decision. Reading Chancellor Allen’s summary of the vast array of attributes and contingencies that went into valuing the extremely complicated securities that comprised each bidder’s offer – which included predictions about future market conditions – even the layperson can see that any dollar, or fraction of a dollar, figure put on the value of the securities was necessarily imprecise and speculative. Determining the value of investment instruments of that complexity requires more than a calculator. It requires judgment. That judgment was the Board’s to exercise.

Unlike Revlon’s Board, the Nabisco directors “disclaim[ed] any motivation other than one to pursue the special duty that fell to them with diligence for the best interests of the shareholders.” Chancellor Allen found nothing in the board’s process or its outcome that would countenance any other conclusion about their conduct: “the decision. . . can in no event be seen as justifying an inference that those who made such a choice must have had some motivation other than the honest pursuit of the corporation's welfare.” Allen concluded that the Board in good faith determined the KKR bid to be more valuable to the shareholders. Nothing in this jurisprudence implies that it was alright for the board to choose the KKR bid because there was a small difference in value

99 Elhauge, Sacrificing Corporate Profits, supra note __ at 851-852.
100 “Nor can the decision to prefer KKR's bid with . . . less nominal or face value per share be seen as so beyond the bounds of reasonable judgment as to raise an inference of bad faith in my opinion. The larger equity stub, the different future business plans of the two bidders, and the superior reset provision of KKR's proposed converting debentures, all provide a basis to support the notion that the choice was a rational one. That KKR as an acquiror presented antitrust questions or offered a somewhat lower proportion of cash simply presents an occasion for the exercise of judgment; the judgment reached does not, as indicated, appear so far afield as to raise a question of the motivation of the board.” In Re RJR Nabisco, Inc. Shareholders l Litigation, Unpublished Opinion, 14 DEL. J. CORP. L. 1132, 1138 (1989).
for the shareholders and the KKR bid was better for other stakeholders, as Elhauge would have us believe. In the first period, in ordinary times, and in the final period, Delaware requires and allows directors to serve only the shareholders.

b. “The Corporation and Its Shareholders” Names Only One Stakeholder

In several places both in Delaware’s statute and in its case law we read that directors owe fiduciary obligations to “the corporation and its shareholders.”103 Some scholars have pointed to this formulation as evidence that directors do not owe their duties to shareholders alone, but can serve other stakeholders as well.104

In an influential recent essay, David Millon offers the recurring “corporation and its shareholders” phrasing as one justification for his view that “Delaware law is not committed to shareholder primacy.”105 Millon argues that the formulation “must indicate that the corporation is something other than – and presumably more than – simply the shareholders alone. It could, for example be thought of as an entity existing separately from its shareholder and other stakeholders, or perhaps as an aggregation of its various constituencies.”106 In a similar vein, Christopher Bruner recently published an article comparing corporate law in the United Kingdom and the United States and argued that while the UK is clearly shareholderist

Delaware's courts have left the issue of corporate purpose considerably less clear, stating that directors owe duties of care and loyalty “to the corporation and its stockholders” simultaneously --a formulation reflecting deep-seated ambivalence regarding the degree to which shareholders’ interests ought to dominate corporate decision-making in the United States.107

Andrew Gold also puts great emphasis on the fact that Delaware cases sometimes refer to duties owed to shareholders and sometimes to duties owed to shareholders and the

103 See, e.g., supra, text accompanying notes ___-___ (reviewing statutory language) and supra, text accompanying notes ___-___, ___-___, and ___-___ (reviewing case law which this formulation).
104 See infra, text accompanying notes ___-___ (reviewing such arguments).
105 Millon, Two Models of Corporate Social Responsibility, supra note ___ at 526.
106 Millon, Two Models of Corporate Social Reponsibility, supra note ___ at 526.
107 Bruner, supra note ___ at 325. Bruner boldly states, as premise, that: “U.S. boards generally . . . have explicit latitude to consider the interests of other stakeholders, such as employees and creditors, in deciding how to respond to a hostile bid.” Id. For this proposition Bruner string-cites the familiar cases, Unocal, Revlon, etc. But neither his text nor his footnotes makes clear, as Delaware has, that the consideration of “interests other stakeholders” must be “rationally related” to advancing shareholder interests. Inexplicably, Bruner neither treats nor cites eBay.
corporation. “[B]ecause the interests of shareholders and the interests of the corporation will sometimes conflict,” he argues, “this amounts to an indeterminate standard.”\textsuperscript{108} But what kind of conflict between the corporation and its shareholders does Gold have in mind? He gives no examples, neither from case law nor even a hypothetical. He references cases that have used the double formulation, but none of them describe a conflict between the corporation and its shareholders.\textsuperscript{109} Gold says that “[t]he result is substantial ambiguity,”\textsuperscript{110} but he does not show it. If Delaware (or even one coherent strain of Delaware thinking) was of the view that “the corporation and its shareholders” comprised several stakeholders with cognizably divergent interests we would expect to see the formulation used in case law with reference to at least a speculative tension between such groups. We would expect to see the courts saying or alluding to the idea that directors have to “balance” the interests of the corporation and its shareholders, or shareholders and other corporate stakeholders, or some such thing. But there is no such language in any case.\textsuperscript{111}

As support for his proposition that there is ambiguity imbedded in the “corporation and its shareholders” formulation, Gold cites to an article written by former Delaware Supreme Court Chief Justice Norman Veasey (retired from the bench at the time of the article’s writing) and Christine Di Guglielmo, titled \textit{How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors}.\textsuperscript{112} In their piece, Veasey and Di Guglielmo quote from an article by Professor Eric J. Gouvin, \textit{Resolving the Subsidiary Director’s Dilemma}, in their assertion that

Well-established law in Delaware and other jurisdictions holds that the directors of corporations owe fiduciary duties to both the corporation and its shareholders. The Delaware Supreme Court has recently stated that these duties are ‘of equal and independent significance,’ but case law

\textsuperscript{108} Gold, \textit{Theories of the Firm}, supra note __ at 1097.

\textsuperscript{109} See Gold, \textit{Theories of the Firm}, supra note __ at 1098 n. 43 (citing Veasey and Di Guglielmo, \textit{How Many Masters}, supra note __ at 764 n. 8) (collecting cases).

\textsuperscript{110} Gold, \textit{Theories of the Firm}, supra note __ at 1098.

\textsuperscript{111} Gold argues that Delaware jurisprudence evinces uncertainty, or at least inconsistency, with respect to what theory of the firm its corporate law adopts or expresses. Andrew S. Gold, \textit{Theories of the Firm and Judicial Uncertainty}, 35 \textit{SEATTLE U. L. REV.} 1087 (2012). I concur with his central thesis. Different cases, sometimes the very same case, can be read to suggest that Delaware thinks of corporations as property, as an entity that is owned by the shareholders, on the one hand, or that the corporation is a nexus-of-contracts with shareholders enjoying a contract term making it the residual claimant, on the other. But this ambiguity as to Delaware’s theory of the firm should not be confused with ambiguity about corporate governance doctrine.

reveals that the directors’ duty to the corporation as an entity usually predominates over their duty to the shareholders.\textsuperscript{113}

But when you chase down the “of equal and independent significance” language that Gouvin quotes, from a case called \textit{Cede v. Technicolor},\textsuperscript{114} you find that it is actually part of a discussion not about distinctions between the corporation and its shareholders, but about the directors’ duty of care, on the one hand, and the directors’ duty of loyalty, on the other, as being two distinct things:

The duty of the directors of a company to act on an informed basis, as that term has been defined by this Court numerous times, forms the duty of care element of the business judgment rule. Duty of care and duty of loyalty are the traditional hallmarks of a fiduciary who endeavors to act in the service of a corporation and its stockholders. Each of these duties is of equal and independent significance. In decisional law of this Court applying the rule . . . this Court has consistently given equal weight to the rule's requirements of duty of care and duty of loyalty.”\textsuperscript{115}

The Court was repudiating the Chancery Court’s confusing conflation of the care and loyalty analysis. The discussion had nothing whatsoever to do with any disjunction between duties owed to the corporation and its shareholders.

There are indeed some passages in some Delaware cases where “the corporation” and the “shareholders” are treated as meaningfully separate things. However, even where the distinction is seen as significant, the cases \textit{never} suggest that directors have the right to do anything with or for the corporation other than manage it in the best interests of shareholders.

Any distinction made in the cases between the corporation and its shareholders is, I think, rightly described as follows. The corporation is a distinct legal entity, it owns its own assets, owes its own debts, etc. Shareholders are also distinct legal entities, distinct, that is, from the corporation (the shareholders may be natural people or some other legal entity). Shareholders \textit{qua} shareholders own and control something that is not owned or controlled by the corporation, and that is their shares, with attendant rights to residual returns, voting power, alienability, etc. This is the sense in which the distinction is dealt


\textsuperscript{114} \textit{Cede & Co. v. Technicolor, Inc.}, 634 A.2d 345, 367 (Del. 1993).

\textsuperscript{115} \textit{Cede & Co. v. Technicolor, Inc.}, 634 A.2d 345, 367 (Del. 1993). In \textit{Cede}, the quoted passage is introduced with a statement clearly linking the directors’ obligations to the shareholders, and no other constituency: “The elements, formulation and application of the Delaware business judgment rule follow from the premise that shareholders of a public corporation delegate to their board of directors responsibility for managing the business enterprise.” \textit{Id.}
with in *Grand Met Ltd. v. Pillsbury Co.*,\(^{116}\) the Delaware case that most explicitly distinguishes between shareholder and corporate interests. Grand Met had endeavored to wrest control of Pillsbury by means of a public tender offer for a controlling portion of Pillsbury shares. The Pillsbury Board adopted a poison pill in an effort to stymie the takeover bid. Grand Met and Pillsbury shareholders sued to enjoin the Board’s defensive maneuver. Because Grand Met had made a tender offer directly to the Pillsbury shareholders for *their* stock, and because the all-cash for all-shares offer was not structurally coercive, the Chancery Court concluded that there was no “danger to policy or effectiveness of the Pillsbury *corporation* (that is, the *company* as *company*) if the Rights were redeemed and/or if Grand Met succeeds in its Tender offer. Whatever danger there is relates solely to shareholders and that concerns price only.”\(^ {117}\) In a similar context the Chancery Court in *TW Services, Inc. v. SWT Acquisition Corp.* explained that, “tender offers essentially represent the sale of shareholders’ separate property and such sales-even when aggregated into a single change in control transaction-require no ‘corporate’ action and do not involve distinctly ‘corporate’ interests.”\(^ {118}\) The distinction is between something that directors (usually) run for shareholders – the corporation - and something the shareholders (usually) run for themselves – their shares. But there is nothing in this treatment that suggests that with respect to their duties to the corporation (the company as company) directors have any right to run it in a manner that benefits other stakeholders at the expense of shareholders.

After *Grand Met and TW Services*, Delaware doctrine developed to, under some circumstances, supply directors with the authority to defend against even non-coercive cash tender offers, thus threatening to collapse altogether the jurisprudential distinction between corporate and shareholder interests I have just outlined. In *Paramount Communications, Inc. v. Time, Inc.*,\(^ {119}\) the Delaware Supreme Court allowed the Time board to adopt defensive measures that would preclude Time shareholders from participating in a non-coercive, all-cash for all-shares tender offer by Paramount, Inc. The Court accepted the Time Board’s argument that allowing shareholders to tender to Paramount was disruptive of corporate policy, in that Time had developed a long-term business plan that would be prematurely terminated by the passing of control of the corporation to Paramount, even through a tender offer. “[W]e reject the argument that the only corporate threat posed by an all-shares, all-cash tender offer is the possibility of inadequate value.”\(^ {120}\) There is a real tension between *Grand Met* and *Paramount*, but the tension is between whether shareholders get to decide what is in their best interests or whether directors get to decide it. The interests of non-shareholders, accept as they relate

\(^{116}\) *Grand Metropolitan Public Ltd. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988).

\(^{117}\) *Grand Met*, 558 A.2d at 1056 (emphasis in original).

\(^{118}\) *TW Services, Inc. v. SWT Acquisition Corp.*, 1989 WL 20290 (1989).

\(^{119}\) 571 A.2d 1140 (1989).

\(^{120}\) *Paramount*, 571 A.2d at 1142
to shareholder interests, play no role in either decision or in the tension between them. Much of the confusion in the literature on corporate purpose stems from conflation of this question of “who” decides with the question of “what” is being decided. There remains ample ambiguity in Delaware doctrine about when corporate boards have plenary authority over corporate decisions and when the board must yield to a contradictory will of the shareholders. There is no question though that when the directors do act they must act in the best interests of the shareholders, even though their conception of the best interests of the shareholders may from time to time differ from the shareholders’ opinion of what is best for them.

The “corporation and its shareholders” double formulation is a little obscure, but as this sub-section makes clear, it cannot plausibly be read as black letter support for mandatory or permissive multi-stakeholder governance. The better reading of “the corporation and its shareholders” formulation is that it emphasizes rather than detracts from the norm of shareholder primacy. If Delaware just said that directors had obligations to “the corporation” then we might fruitfully argue about which stakeholders count in Delaware’s conception of the corporation. But the formulation we get is “the corporation and its shareholders.” Shareholders are the only stakeholder group that is singled out. We never see in Delaware jurisprudence, “the corporation and its workers,” “the corporation, its shareholders, and its workers,” or “the corporation and its stakeholders.” It is always, “the corporation and its shareholders.” The better interpretation of this phrase is to view it as expressing a unified, coherent set of obligations, rather than distinct, serial, or disjunctive ones. The directors’ attention is to be devoted to doing things aimed at increasing the value of the corporation for the shareholders. The cases cannot support any other construction.

c. Charitable Giving: Not an Exception to the Rule

There is a provision in the Delaware statute which gives corporations the “power to . . . [m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof.” When I began this project I was prepared to acknowledge the corporate charitable giving power as an exception to the rule of shareholder exclusivity in corporate governance. The fact

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121 For example, compare Air Products and Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011) (allowing directors to adopt a poison pill which had the effect of precluding voluntary shareholder participation in a non-coercive tender-offer) with Omnicare v. NCS Healthcare Inc., 818 A.2d 914 (2003) (enjoining director’s adoption of protective measures in connection with director’s preferred merger agreement where measures would preclude consideration of other offers for the firm).
122 DEL. GEN. CORP. L. § 122(9).
that this explicit exception is necessary, I was going to argue, helps to prove the rule. If the general powers that are granted to directors already include the power to advance the interest of multiple stakeholders and the public at large, then firms would already have the power to make charitable donations, there would be no specify it. The charitable giving exception brings the default rule into clearer focus. The charitable donation power is also capped through judicial interpretation by a reasonableness standard.123 I was going to point out that this substantive restriction differs markedly from the much broader latitude directors have in the main-sweep of their jobs, their primary obligation, their overarching obligation, the shareholder interest.

But after studying the matter I am convinced that the corporate charitable giving power, as interpreted under Delaware case law, represents no real exception or deviation from the fundamental rule of shareholder primacy. For starters, the provision granting firms the power to make charitable contributions comes ninth in a list of seventeen specifically enumerated powers that corporations created under the code “shall have.”124 Other powers include the power of “(1) perpetual succession . . . ,” the power to “(2) sue and be sued . . . ,” the power to “(3) appoint . . . officers and agents . . . and provide for them suitable compensation,” and the power to “(13) make contracts.”125 These are powers that corporations have, but the question still remains as to what principle should govern the exercise of these powers. Although the corporation has the power to make contracts, directors may not cause the corporation to make contracts that advance the interests of suppliers while neglecting or harming the interests of the corporation and its shareholders. Similarly, although the corporation has the power to make charitable contributions, it may not use that power in a fashion that neglects or deviates from the abiding purpose of corporate governance, the interests of the shareholders. Many times it will be in the interest of shareholders for firms to contract with suppliers, and it will also often be in the interests of shareholders for the firm to make donations for the public welfare.126 In the 19th and early 20th centuries there was contradictory case law on the question of whether business corporations had the power to make charitable contributions or whether such acts were ultra vires, beyond the powers of the firm to effectuate. The

123 See infra, text accompanying notes __-__.
124 DEL. GEN. CORP. L. § 122.
125 DEL. GEN. CORP. L. § 122(9). Similar to the corporate charitable contribution power, the twelfth enumerated power states that every corporation shall have the power to .” Id. This oddly worded provision has received no treatment in the case law and scant academic attention.
126 See William A Klein, J. Mark Ramseyer, and Stephen M. Bainbridge, BUSINESS ASSOCIATIONS 268 (7th edition, 2009)(“§122(9) can be read merely as an authorization to make charitable contributions that serve the basic purpose of corporations, which is to maximize profit.”).
statute clarifies that firms may make donations. When and how they make them is governed by background fiduciary principles.

Still, the statutory language on charitable giving is at best ambiguous on the point of purpose. But the key Delaware cases interpreting this statutory provision clearly adopt a shareholderist perspective on the power. The leading cases on the issue are usually cited for the proposition that the Delaware judiciary has engrafted a “reasonableness” limitation on charitable giving which is not explicitly contained in the statute. While it would be odd to think that the legislature meant to authorize “unreasonable” charitable donations, the presumed consequence of the imposed “reasonableness” limitation is to introduce an element of objective, substantive review, rather than the ordinary process-only review that directors enjoy when making regular business decisions. But the cases have more to offer in terms of helping us understand the purpose and rightful exercise of the charitable giving power.

Delaware’s first important case interpreting the charitable giving provision, Theodora v. Henderson (1969), responded to a complaint that the directors of Alexander Dawson, Inc., a holding company, had violated their fiduciary obligations to shareholders when they made a corporate gift of $528,000 to a charitable organization that ran a camp for under-privileged boys. After quoting the Delaware statutory language giving corporations the power to make charitable contributions, the Court framed its inquiry into the propriety of the gift thusly:

[C]ontemporary courts recognize that unless corporations carry an increasing share of the burden of supporting charitable and educational causes that the business advantages now reposed in corporations by law may well prove to be unacceptable to the representatives of an aroused public.

From the start, the Court’s emphasis is not on what charitable giving might do for the public interest, but rather, what corporate giving, or the absence of it, might mean for the public’s tolerance of the “advantages” that corporations enjoy. After this introductory framing, the Court moves to a favorable discussion of a famous New Jersey case, Smith v. Barlow, in which New Jersey corporate law was held to countenance a small gift that

127 Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (1969). The case actually involved myriad allegations of disloyal directorial shenanigans, but the charitable giving issue is the only one of relevance here.


the Smith firm had made to Princeton University. The *Theodora* court observed that the New Jersey court “noted that the gift tended to bolster the free enterprise system and the general social climate in which plaintiff was nurtured.”

In a bit of a *non sequitor*, the *Theodora* Court moves on from this discussion to state its conclusion, for which *Theodora* is usually cited, that: “the test to be applied in passing on the validity of a gift such as the one here in issue is that of reasonableness, a test in which the provisions of the Internal Revenue Code pertaining to charitable gifts by corporations furnish a helpful guide.”

(At the time the Internal Revenue Code allowed charitable contributions to be deducted as expenses up to 5% of taxable income; today the IRC allows for deductions of up to 10% of income, although the average corporation contributes just 1.5% of its income to charity.) Applying this newly announced standard to the Dawson firm’s support of the camp for underprivileged boys, the Court again returns to the issue of purpose, and situates that purpose in a shareholderist idiom. Taking into consideration the tax benefits associated with the contribution, the Court concludes that “the contribution under attack can be said to have ‘cost’ all of the stockholders of Alexander Dawson, Inc. including plaintiff, less than $80,000, or some fifteen cents per dollar of contribution.” But why does the Court put the term ‘cost’ in shock quotes? If it is a cost to the shareholders, even just a small cost, then why not just write the word? The reason is that the Court views the contribution to be no cost at all, but rather a gain, to the shareholders:

> It is accordingly obvious, in my opinion, that the relatively small loss of *immediate* income otherwise payable to plaintiff and the corporate defendant's other stockholders, had it not been for the gift in question, is far out-weighed by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, *thereby benefiting plaintiff in the long run*. Finally, the fact that the interests of the Alexander Dawson Foundation appear to be increasingly directed towards the rehabilitation and education of deprived but deserving young people is peculiarly appropriate in an age when a large

\[\text{References:}\]

130 257 A.2d at 404.
131 257 A.2d at 405.
132 257 A.2d at 405.
133 See Elhaug, *supra* note ___ at 836-37.
134 257 A.2d at 405.
segment of youth is alienated even from parents who are not entirely satisfied with our present social and economic system.\textsuperscript{135}

As with attention to non-shareholders in ordinary business decisions, the corporate charitable contribution is acceptable because of the long-term benefits it may bring to shareholders. A fair reading of the admittedly under-written \textit{Theodora} opinion must construe the “reasonableness” requirement in charitable contributions as having two components. The first component of reasonableness requires a reasonable relation to the shareholder interest, which explains the Court’s repeated reference to long-term shareholder interests in the maintenance of a free and capitalistic society (in which corporations enjoy advantages only so long as the public remains un-“aroused”). The second component of reasonableness is magnitude, which explains the Court’s reference to the tax code as guidance.

Consider a charitable contribution of less than 10 percent of taxable income that directors of a firm decide to make after deliberating and expressly concluding that the donation would not advance shareholder interests. In fact, the directors decide to make the donation after expressly determining that the donation would undermine shareholder interests. Suppose that the donation were made to a camp that was dedicated to teaching under-privileged children about the inadequacy of capitalism and democracy as means to overcoming the suffering of the American poor, and the unfairness of corporate advantages that benefit shareholders. Suppose further, if I don’t have you yet, that the camp explicitly targets the donating firm for criticism, building its entire curriculum around case studies of the firm’s alleged malfeasance. If shareholders challenged such a contribution, the directors’ action might very well be held to be unreasonable, not because of the size of the charitable gift, but because the nature of the gift was not reasonably related to the shareholder interest (and the directors did not think it was). The exercise of the power to make charitable contributions is circumscribed by the fiduciary obligations that directors owe to the corporation and its shareholders.

The more commonly cited case on corporate charitable giving is \textit{Kahn v. Sullivan},\textsuperscript{136} which is probably cited more often than \textit{Theodora} not only because of its relative recency, but because of its dramatic facts, which can raise the cackles of even the most rationally-ignorant, diversified, indexed-funds-only type equity investor when they

\textsuperscript{135} 257 A.2d at 405 (emphasis added). The opinion came down in 1969. In the final sentence quoted here the Court apparently is taking judicial notice that something was happening there, even if what it was was not exactly clear. \textit{Cf.} Buffalo Springfield, \textit{For What It’s Worth} (1967).

learn about the case. Kahn involved a challenge to a decision by the directors of an energy company, Occidental, Inc., to donate $50 million for the construction of a museum to house the art collection of Occidental’s retiring CEO. The Delaware Supreme Court accepted that the donation likely would pass the reasonableness test that it had established in Theodora. Usually unmentioned in references to Kahn, however, is the Court’s recognition of the Occidental board’s explicit finding that the charitable contribution would benefit the corporation by improving its reputation in the local community and around the world. The charitable contribution was not made for the purpose of pure public interest. It was a studied extension of a long-standing business plan:

For many years, the Board has determined that it is in the best interest of Occidental to support and promote the acquisition and exhibition of the Art Collection. Through Occidental's financial support and sponsorship, the Art Collection has been viewed by more than six million people in more than twenty-five American cities and at least eighteen foreign countries. The majority of those exhibitions have been in areas where Occidental has operations or was negotiating business contracts. Occidental’s Annual Reports to its shareholders have described the benefits and good will which it attributes to the financial support that Occidental has provided for the Art Collection.137

In considering the funding of the museum project, the board solicited and was informed by a law firm which produced a 96 page memorandum that, inter alia, “reviewed the authority of the Board to approve such a donation and the reasonableness of the proposed donation . . . [and] included an analysis of the donation's effect on Occidental's financial condition, [and] the potential for good will and other benefits to Occidental.”138 After deliberation, a Special Committee of the Board, comprised of independent directors (i.e., non-officer directors), “concluded that the establishment of the Museum, adjacent to Occidental's corporate offices in Los Angeles, would provide benefits to Occidental for at least the thirty-year term of the lease.”139

139 Kahn v. Sullivan, 594 A.2d 48 at 54. The procedural posture of Khan was complicated. The Supreme Court was reviewing the Chancery court’s acceptance of a negotiated settlement to a shareholder complaint about the charitable gift. While the Chancellor characterized the terms of the settlement as offering only small gains to the plaintiffs, he accepted the settlement as reasonable because he thought the plaintiffs had very little chance of succeeding on the merits. This is so because the Chancellor found that the charitable donation decision was disinterested, informed, and deliberate, and it was therefore “highly probable that . . . the decisions of the directors are entitled to the presumption of propriety afforded by the business judgment rule.” Id. Delaware cases have not examined the odd relationship between the business judgment rule and the reasonableness inquiry in the charitable giving context. Typically when a decision enjoys business judgment protection that very conclusion means that the court will not be doing a reasonableness
The point is that while *Kahn* is usually cited for the proposition that corporations may make charitable contributions so long as they are reasonable, the firm at issue in *Khan* made its charitable contribution only after concluding that the donation was beneficial to the corporation. And that determination was relevant to the Supreme Court’s upholding of the Chancery Court’s assessment of the reasonableness of the donation. Neither Chancery nor the Supreme Court considered “reasonableness” to be merely a matter of dollar figure. Purpose remains relevant in the inquiry, and the purpose must be to advance the overarching charge of the directors, to serve the corporation and its shareholders. There are no Delaware cases after *Kahn* involving a corporate charitable giving analysis, and none of importance before *Theodora*.

d. Maximization is the Standard

Another academic confusion involves the question of whether directors are required always to endeavor to “maximize” corporate profits, or whether they are permitted to do something less, even if one concedes that their decisions must always be intended in some way to promote shareholder interests. Most Delaware cases describe the directors’ duty as an obligation to “maximize” profits or pursue the “best” interest of the shareholders.  

\[140\] But in some cases the obligation is described as a duty to manage inquiry. The best reading is that business judgment rule protection in the charitable giving context means that plaintiff’s will bear the burden of showing that the gift was unreasonable. The plaintiffs could not meet that burden in *Kahn*.  

\[140\] See, e.g., *Paramount v. Time*, 1989 WL 79880, 58 USLW 2070 (Del. Ch. 1989) (“The legally critical question this case presents then involves when must a board shift from its ordinary long-term profit *maximizing* mode to the radically altered state recognized by the *Revlon* case in which its duty, broadly stated, is to exercise its power in the good faith pursuit of immediate maximization of share value.”) (emphasis added); *eBay*, 16 A.3d at 35 (“I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not to maximize* the economic value of a for-profit Delaware corporation for the benefit of its stockholders.”) (second emphasis added); *TW Services Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, (Del. Ch. 1989) (“Thus, broadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to *maximize* the long run interests of shareholders.”) (emphasis added); *Katz v. Oak Industries*, 508 A.2d 873, 879 (Del. Ch. 1986) (“It is the obligation of directors to attempt, within the law, to *maximize* the long-run interests of the corporation's stockholders; that they may sometimes do so “at the expense” of others . . . does not for that reason constitute a breach of duty”) (emphasis added); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (1989) (“Thus, *like any other business decision*, the board has a duty in the design and conduct of an auction to act in “the best interests of the corporation and its shareholders.””) (both emphases added). The phrase “long-term” in the context of this case law essentially refer to a time-horizon that is “other than immediate.” *Revlon* makes clear that, when the company is being sold and shareholders left with no continuing interest in the firm, directors have an obligation to maximize profits “immediately.” “Long-term” by contrast refers to the going-concern condition, in which profits are to be taken in a time-fame decided upon by directors acting in good faith. “Long-term” in this sense most certainly does not mean over a long period of time, just as surely as it does not mean that the directors must look to profits over a 100 year period instead of, say, a 20 year period. I do not think any corporate law scholar seriously argues that long-term means anything other than non-immediate and at the discretion of the directors, and so I do not pursue the point further here. However, anyone unconvinced on this point
the corporation “for the benefit of the shareholder owners,”141 with the maximization qualifier dropped. And then there is that Revlon language, which states that attention to non-shareholders is allowed only when there are “rationally related” benefits to shareholders.142 Sometimes shareholder primacy skeptics will claim that the inconsistent application of the “maximization” qualifier indicates that in the going-concern condition directors may steer the corporate ship in a manner that actively advances non-shareholder interests so long as some profits are involved for shareholders. On this view, Delaware allows directors to choose a less profitable course over a more profitable one, so long as the course is intended to give some benefit to shareholders.

This is not a plausible interpretation of Delaware law. To clarify this particular confusion it will serve first to reflect on the limited utility of the word “maximization” in discussions of human behavior. A highly stylized version of economics posits that humans are rational actors and will predictably act in such a manner as to “maximize” their utility or welfare, however they define it.143 More realistic versions of economics appreciate that human rationality is “bounded” by our limited cognitive capacity, our limited time, and other frailties of the fallen condition.144 “Boundedly” rational actors cannot hope to “maximize” their welfare in the sense of achieving what a perfectly rational version of themselves could do.145 Knowing that they cannot hope to achieve maximization, boundedly rational actors will routinely consider it prudent to set for themselves the goal of, as the neologism has it, “satisficing” welfare rather than “maximizing” it.146 That is, boundedly rational actors will aim at a “satisfactory” welfare achievement instead of the best possible outcome. This is a wise course of action for a boundedly rational actor. In this light, it makes little sense to charge a human agent with “maximizing” returns for her principal, unless one implicitly understands that a human so charged will rationally endeavor to “satisfice” rather than “maximize” returns. Indeed, the human agent who would pursue only “maximization” would end up foolishly wasting all of her principal’s resources in the failed effort to do it. Another way of putting it is that given our limited cognitive resources, “satisficing” is a “doing the best we can” strategy, and thus is a “maximization” strategy. So when talking about real humans there

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142 Revlon, 506 A.2d at 162 (“A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”)
146 The term “satisficing” was coined by Henry Simon, one of the founders of behavioral law and economics. See Henry Simon, MODELS OF MAN: SOCIAL AND RATIONAL (1957).
is no important difference between an agent who endeavors to maximize welfare and one who is merely trying to satisfice welfare. Thus the faithful Delaware board is perfectly prudent to pursue on behalf of its shareholders a satisfactory level of returns, a modest level of returns, or a consistent level of returns, rather than seeking in any strict sense to “maximize” returns. The level of returns that directors seek, like everything else, is left to their sound discretion.

What Delaware directors may not do is “satisfice” or “merely” satisfy the interests of shareholders in order to have cognitive capacity, time, or corporate wealth left over to serve the interests of non-shareholders. Consideration of non-shareholder interests is only permitted to the extent that such consideration is “rationally related” to shareholder interests. Suppose, in stylized fashion, that directors were confronted with a decision to set the price for a particular product. The directors believe in good faith that they can set the price at $100 and produce a yearly profit of $10 per share. They also believe that they could instead set the price somewhat lower and produce a yearly profit of $8 per share, with the extra $2 staying in the consumer’s pocket, to be put to other uses, like buying a donut or some life-saving medicine. Setting the price to produce the $8 profit might superficially be said to advance consumer interests in a way that is “rationally related” to advancing shareholder interests, since shareholders will make some profit out of the decision. But the directors here have to choose between setting the price to make $10 or $8 profit. They have both contingencies in mind, and must make a good faith choice between them. The decision to choose $8 profit instead of $10 profit is not “rationally related” to the shareholder interest. It advances the consumer interest at the expense of shareholders, and is thus forbidden. (Directors obviously may choose to make $8 now instead of $10 now if they believe it will establish better relationships with consumers and result in more profits in the long-run, but that is a different issue). Of course, directors do not ordinarily set prices for goods, they decide questions and set policy at a higher level of generality. The level of generality at which they choose to make decisions is entirely within their discretion, so long as that level is chosen with an eye towards serving shareholders, and not any other constituency.

147 See Alchian, supra note __ at 212 (“Under uncertainty, by definition, each action that may be chosen is identified with a distribution of potential outcomes, not with a unique outcome. . . . [L]et each of two possible choices be characterized by its subjective distribution of potential outcomes. Suppose one has the higher ‘mean’ but a larger spread, so that it might result in larger profits or losses, and the other has a smaller ‘mean’ and a smaller spread. Which one is the maximum? This is a nonsensical question.”).

148 Revlon, 506 A.2d at 162.

149 Cf. City Capital Associates Ltd. v. Interco, Inc., 551 A.2d 787, 802 (1988) ("Revlon dealt factually with an ongoing bidding contest for corporate control. In that context, its holding that the board could not prefer one bidder to another but was required to permit the auction to proceed to its highest price unimpeded, can be seen as an application of traditional Delaware law: a fiduciary cannot sell for less when more is available on similar terms.")
David G. Yosifon, *The Law of Corporate Purpose* (Draft, January 24, 2013)

Elhauge puts his own stylized version of this question thusly: “[c]an management of a timber corporation decline to clear-cut its timberland even though that sacrifices profits?” Of course they can if it means higher future profits, “[b]ut suppose, in an incautious moment, management admits that the present value of those future profits from not clear-cutting [that stem from non-shareholder goodwill] cannot hope to match the large current profits that clear-cutting would produce.” Delaware corporate law does not countenance the profit sacrifice under this scenario. And certainly, as I explore in the next sub-section, a director would violate Delaware law if ever she held secret in her heart or mind an idea about what was good for shareholders out of fear that its expression might be “incautious” for other corporate stakeholders.

e. The Fallacy of Normative Indifference in the Business Judgment Rule

A final interpretive move that has bred confusion on the law of corporate purpose is conflation of what the law requires with speculation about what directors can get away with. Some scholars claim that corporate boards can easily attend to non-shareholders at the expense of shareholders without getting caught or punished. While this may be true in some contexts, getting away with something to some extent sometimes is by no means the same thing as being always authorized to do it fully. This distinction is too often obscured, or ignored, in positive analysis of the law of corporate purpose.

The source of this *de facto* and *de jure* obfuscation is found in a slippery interpretation of one of corporate law’s most potent doctrines, the “business judgment rule.” This is a rule of judicial design which holds that courts will not impose personal liability against a director for a corporate decision so long at the director was personally disinterested in the decision (i.e., has no conflict of interest), the decision was informed, deliberate and made in good faith, and the decision was legal. If these simple conditions are met directors will be insulated from personal liability for bad, strange, negligent, or even disastrous business decisions. A shareholder whose only complaint is that directors are pursuing an unprofitable or insufficiently profitable business plan is bounced right out of Chancery.

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150 Elhauge, *supra* note ___ at 735-36.
151 Elhauge, *supra* note ___ at 735-36.
153 *Id.*
154 Several justifications are given for the business judgment rule. Most simply it is seen as giving force to the statutory injunction that “the business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.” DEL. GEN. CORP. L. § 141(a). Since somebody has to have the last word on what corporate decisions, the business judgment rule sees to it that, per the statute, it is the directors who decide, not complaining shareholders, not other stakeholders, and not indifferent courts. Directors are likely to know more about the particulars of problems their firms face than are relatively
Because of the business judgment rule, directors have near total discretion to run firms the way they see fit. It is true, therefore, that it is nearly impossible to enforce the shareholder primacy norm through litigation, absent, essentially, an explicit statement by directors that they are managing the firm towards some other goal. Absent, that is, a confession that negates the presumption of good faith that the business judgment rule supplies. But just because shareholder primacy cannot be easily enforced through lawsuits does not alter the fact that it is the prevailing law of corporate governance in Delaware. In *The Shareholder Value Myth*, Lynn Stout blithely collapses these distinctions when she writes: “The notion that corporate law requires directors . . . to maximize shareholder wealth simply isn’t true. There is no solid legal support for the claim that directors . . . in U.S. corporations have an enforceable legal duty to maximize shareholder wealth. The idea is a fable.”155 There is indeed little precedent showing courts enforcing the shareholder primacy norm, but the paucity of such actions stands beside a jurisprudence that very clearly specifies that Delaware’s law requires shareholder primacy in firm governance. Of course, it really is a fable to say that the enforceable duty is a fable, instead of more accurately saying that enforcement is rare, since *Revlon* and *Ebay* and are both cases where Delaware does enforce the shareholder primacy obligation.156

This is a recurring problem in the literature. After first promising that his article, *The Enduring Ambivalence of Corporate Law*,157 would “describe . . . explicit deviations from shareholder wealth maximization” as being “common both in takeover law and with respect to charitable donations,”158 Christopher Bruner finally acknowledges (in his footnotes) that he can draw only a “de facto”159 conclusion about the current state of these things in Delaware. I emphasize the word that Bruner slips into a parenthetical when he writes: “the board enjoys . . . considerable latitude to deviate (tacitly) from

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156 Stout later claims that *Revlon* is an “exception that proves the rule” and so is apparently for her not fable-busting. See supra text accompanying notes ___ (critiquing Stout’s view of *Revlon*).
159 Bruner, *The Enduring Ambivalence of Corporate Law*, supra note ___ at 1400 n. 84.
shareholder wealth maximization.”

The enduring ambivalence that Bruner purports to describe is not a statement about Delaware law, but about what lawless directors might get away with. With no good cases to substantiate his claim that Delaware disavows shareholder primacy, Einer Elhauge is in the end similarly left with nothing but what we might pedantically call the fallacy of normative indeterminacy in the business judgment rule. Where non-shareholder interests are threatened in a takeover, Elhauge writes, “[m]anagement need only, if it wants to do so, make sure that the winning bid is structured to include some securities whose future value can be claimed to bear some rational relationship to effects on other constituencies.”

Andrew Gold similarly misinterprets the business judgment rule as reflecting ambiguity about the law of corporate purpose:

The business judgment rule is often viewed as a response to judicial uncertainty regarding the appropriate means to corporate ends. . . . The business judgment rule, however, can also be viewed as a response to judicial uncertainty as to the appropriate ends of director decisions. But where is the evidence for this judicial uncertainty? It is not found in law, but in presumptions about practice: “The business judgment rule, combined with recognition that boards may consider long-term shareholder interest, makes it quiet easy for the board to ignore shareholder wealth maximization.”

In his essay describing ambivalence on the question of corporate purpose in Delaware, David Millon, argues that Delaware’s rule that non-shareholder interests have to be rationally related to shareholder value is “of no practical importance, because shareholders lack the ability to challenge management policies that favor nonshareholder interests even if the result is reduction of profits.”

The issue that I am trying to specify is not what directors might get away with in the courtroom but what the law calls on directors to think and do in the boardroom.


160 Bruner, The Enduring Ambivalence of Corporate Law, supra note __ at 1412.
161 Bruner, The Enduring Ambivalence of Corporate Law, supra note __ at 1400 n. 84.
162 Elhauge, Sacrificing Profits, supra note __ at 852. He further claims that “management may not even need to do that if the difference in price is less than one percent,” id, a claim I have repudiated in the text.
163 See Gold, Theories of the Firm, supra note __ at 1095.
164 Gold, Theories of the Firm, supra note __ at 1099. Gold inexplicably relegates Ebay to a terse footnote, and gives it no extended discussion. See Gold, Theories of the Firm, supra note __ at 1093 n. 20.
165 Millon, supra note __ at __.
Revlon and Ebay tell us that directors’ decisions must truly, actually, sincerely, be made in the best interests of the shareholders. Since directors are fiduciaries of the corporation and its shareholders, directors have an obligation to speak truthfully to shareholders about what they are doing with the firm. To behave in good faith, as the law requires them to do, directors must say what they believe and believe what they say. Directors, as fiduciaries, cannot lie about what they are doing and why they are doing it.

We must therefore in our positive analysis distinguish between plausible assertions, duties easily ignored, and tacit undertakings, which faithless servants may abide, and sincere, good faith deliberation and decision-making, which honest men and women will strive for when they are true to their duty. In this vein, Delaware’s pronouncements about directors’ obligations running solely to shareholders is most certainly of practical importance. God may forgive Jimmy Carter for committing adultery in his heart, but Delaware does not countenance directors secretly serving non-shareholders at the expense of shareholders. Progressive corporate law should not wed itself to or promote such duplicity. Within a corporate governance system that explicitly avows process, loyalty, credibility, and deliberation as its essential and most valued qualities, it would be, and is, wholly inapposite to conclude that anything “tacit” should play a crucial role in an accurate or desirable conception of proper corporate governance.

V. The Costs of Confusion

a. Critique of the Shareholder Primacy Norm

Shareholder primacy is undoubtedly the law of Delaware, the most important corporate law jurisdiction in the known universe. But I do not believe this rule is desirable. The shareholder primacy norm is responsible for substantial suffering and
political dysfunction in our society. The justifications offered in support of it are implausible.\textsuperscript{167}

The best contemporary normative defense of shareholder primacy is as follows. The law prescribes shareholder primacy as the default rule of corporate governance because it is the rule that all corporate stakeholders, including non-shareholders, would agree to if they actually sat down and negotiated the terms of their collective dealings. Since in the context of large publicly traded corporations it is impossible for all corporate stakeholders literally to gather and dicker over terms, the law prescribes default rules that it believes makes all parties better off than they otherwise would be, thus cloaking the default rule of shareholder primacy in both sacred vestments: efficiency and voluntarism.

In order to induce investment by shareholders who cannot get their money back once it is paid over (unless the firm profits and pays dividends), and who will have virtually no control over corporate operations, the law must provide shareholders with fiduciary attention at the level of firm governance. That is, the law must require directors to make governance decisions in a manner aimed at benefiting the shareholders. Since shareholders feed on profits only \textit{after} products have been delivered to consumers, wages paid to workers, and taxes rendered to the state, non-shareholder interests are \textit{necessarily} satisfied in the course of the directors’ struggles to benefit shareholders. Moreover, whereas shareholders are absent from firm operations, workers are present on the shop-floor and can manage or negotiate the terms of their association with the firm directly, or through unions. Consumers are similarly present and can manage their interests in firm associations at the cash register, by taking or leaving offers of sale.\textsuperscript{168}

This is an elegant formulation. But it starts to break down when it is seen that once directors are charged with managing firms in the shareholder interest, the directors will be motivated to overreach in their dealings with non-shareholders in order to better serve shareholders. Workers are watching, but it is difficult for them to see some kinds of cornering-cutting on safety in the workplace, such as asbestos in the walls or repetitive stress injuries in the keyboards. Consumers are on guard, but they cannot easily see or understand risk factors of many products, such as ammonia in cigarettes or trans-fats in french fries. The seriousness of this problem grows in light of social scientific research


\textsuperscript{168} \textit{See} Yosifon, \textit{The Consumer Interest in Corporate Law}, supra note ___ (elaborating this argument).
revealing that human perceptions of many things, and risk in particular, are far more vulnerable to influence and manipulation (through marketing efforts, for example) than our intuitions would otherwise lead us to believe. The standard defense of shareholder primacy is informed by common sense views about human decision-making and behavior, but this common sense has been brought into doubt by social science. Firms pursue shareholder interests not always by serving workers and consumers, but also by exploiting them. Even if this overreach problem is true, mainstream corporate theorists insist that it would be destructive to give up the clarity and efficiency of shareholder primacy in corporate governance. Instead, corporate directors should be required to pursue shareholder interests within a regulatory regime that forbids them from engaging in exploitative conduct. Instead of non-shareholders receiving attention at the level of firm governance, they should be protected from shareholder primacy’s overreach through employment law, consumer protection statutes, environmental regulations, and the like. But this is an unsatisfactory response, given that directors charged with pursuing profits for shareholders will recognize that such external regulations threaten to stand in the way of corporate profitability. Firms will ineluctably dedicate themselves to destroying or mitigating the impact of such regulations. They will pursue this through the normal sausage-making means: lobbying and supporting political candidates sympathetic to their interests, and through more elaborate efforts to influence public perception of what counts as sound public policy. Corporations with narrow interests and access to persuasive agents (like lawyers) will tend to enjoy an advantage in the competition for regulatory favor over widely dispersed, structurally impotent non-shareholders. Shareholder primacy in practice gives rise to a public choice problem that renders shareholder primacy unjustifiable in theory. When advocates of shareholder primacy address this public choice critique of their idea they have traditionally tried for one final retreat to the position that we should forbid corporations from participating in the political process, thus leaving the corporation to act unfettered in the shareholder interest, within government strictures well arrived at. But in Citizens United v. Federal Elections Commission (2010) the United

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169 See Jon Hanson & David Yosifon, The Situational Character: A Critical Realist Perspective on the Human Animal, 93 GEO. L. REV. 1 (2004) (surveying social scientific research which casts doubt on the plausibility and utility of rational actor and other intuitive models of human behavior in legal analysis); see also Daniel Kahneman, THINKING: FAST AND SLOW (2011) (summarizing his own Nobel prize winning work, and other researcher work, describing the complex and often counter-intuitive nature of human decision making).
States Supreme Court made clear that the First Amendment forbids Congress from restricting the political activity of corporations. As long as Citizens United is good constitutional law, shareholder primacy is bad corporate theory.

### b. Towards Honest Multi-Stakeholder Corporate Governance

Given the failure of shareholder primacy theory, and the myriad evidence of individual, social, and environmental harm caused by firms operating under the shareholder primacy norm, we must seek corporate law reforms which encourage good faith attention to the interests of multiple corporate stakeholders at the level of firm governance. Here I re-join my fellow “progressive” corporate law scholars who argue normatively for a departure from shareholder primacy.

Even if the business judgment rule as it functions in Delaware today provides directors with sufficient slack to get away with some amount of attention to non-shareholder interests, the current regime does not require, indeed, would not permit, the kind of open, fulsome discourse in the board room that we recognize as essential to any really good institutional decision-making. Any attention that is given to non-shareholders presently has to be done surreptitiously, in hushed tones, through lies. This is not sustainable, and it is not desirable. To govern effectively a corporate board must govern openly and honestly. Individual directors must be true to themselves, and they must be true with each other. So long as attention to non-shareholder concerns that are not really related to shareholder interests remains tacit, forbidden from actually being spoken, corporate decisions will be confused, incoherent, and likely destructive. “Don’t ask, don’t tell,” was a dishonorable, dysfunctional way of allowing homosexuals to serve in the armed forces while formal law forbade their presence in the service. “Don’t ask, don’t tell” is a similarly a dishonorable and dysfunctional way to bring non-shareholder interests into the boardroom, where formal law forbids their presence.

In other work, I have explored some ways in which such a multiple-stakeholder corporate governance regime could be implemented. I have examined what I call

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170 558 U.S. 50 (2010); see also Yosifon, The Public Choice Problem in Corporate Law, supra note __ (analyzing corporate law implications of Citizens United).

171 See Strine, Our Continuing Struggle, supra note __ (summarizing social and environmental harms caused by corporate operations).

“prescriptive discourse norms” as a mechanism through which expanded obligations of corporate directors could be actualized.173 “Discourse norms” comprise a key contract term in the firm’s relationships with its various stakeholders. The discourse norm in the shareholder’s contract presently calls for directors to speak to and about shareholders with the highest level of clarity and truth: “not honesty alone, but the punctilio of an honor the most sensitive.”174 Presently a looser, less demanding discourse norm is embedded by default into a corporation’s contracts with its workers and consumers. The reform that I imagine would require directors to serve multiple stakeholders as fiduciaries. They would accomplish this charge by undertaking the same process obligations that presently describes the directorial duty to shareholders. Directors would be required to become informed about and actively deliberate, in open, honest, good faith fashion, about how proposed corporate conduct would advance or undermine the interests of workers, consumers, and other stakeholders, not just shareholders. Where the interests of one stakeholder group are truly in tension with another, directors would be forced to exercise their sound discretion and balance competing claims, just as the law presently requires them to do when balancing the interests of short-term speculators and long-term investors, of diversified and undiversified investors, of old and young investors.

As Chancellor Strine recognized, for-profit corporate boards can usually be counted on to follow the structural motivations and legal requirements to serve shareholder interests. Sometimes they will do this by serving non-shareholder interests, but they will also do this, when they can, by exploiting non-shareholder interests. Chancellor Strine and other shareholder primacy advocates are mistaken, however, when they argue that this impulse can be restrained through external government regulation of corporations without altering the structure or law of corporate governance. Public choice dynamics, and constitutional limitations, make such exclusively external remedy implausible. Neither is it plausible to encourage directors to exercise present authority to pay greater attention to non-shareholder interests, for that authority is not there, not in Delaware anyway. Instead, we must have fundamental reform of corporate governance law that requires directors to actively attend to the interests of multiple stakeholders at the level of firm governance, openly, honestly, and in good faith.

173 See Yosifon, Discourse Norms as Default Rules, supra note __
174 Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (Cardozo, J) (defining the standard of conduct expected of a fiduciary).