In Search of Lost Time: What If Delaware Had Not Adopted Shareholder Primacy?

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I. INTRODUCTION

Ideas go in cycles. So it is with corporate law. Since at least the mid-1980s we have lived in a world of shareholder primacy.[2] In this world the primary duty of directors is to maximize the value of the corporation for the benefit of the stockholders. Directors who reject this notion, who take actions that are for the primary benefit of other so-called "stakeholders" in the corporation—be they employees, customers, the communities served by the corporation or others—have their ideas rejected in the boardroom, may be the subject of scorn and derision in the business press and with their peers, can be voted out of their positions by shareholders and even be found to have breached their fiduciary duty to the company and its shareholders. The reason for this breach is simple: the primary—or fundamental, fiduciary—obligation of the director is to the corporation's stockholders, and while directors can take actions that benefit non-stockholder constituencies, the ultimate purpose of all of such actions must be to benefit the company's stockholders.

Yet it was not always so. As first described by the U.S. Supreme Court, the corporation was "an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as supposed best calculated to effect the object for which it was created."[3] Corporate charters typically do not state that the corporation must be run for the benefit of stockholders, and nothing in Chief Justice Marshall's opinion in

Dartmouth indicated that the corporation was to be run for the exclusive benefit of the shareholders. Rather, as discussed below, the stockholder primacy notion is a modern concept, that only gained widespread acceptance in the mid-1980s, and is based upon common law (*i.e.* judicial decisions rather than statutes) and academic theories that were substantially aided by regulatory developments, not statutory changes or changes to the company's charter.

Fast-forward from Chief Justice Marshall's opinion in *Dartmouth* to the 20th century. During this period the U.S. economy changed dramatically, from the development of the railroads and economic growth in in the late 19th century (associated with business leaders such as Rockefeller, Mellon and Carnegie, described variously as "captains of industry" or "robber barons" depending upon one's point of view), followed by the development and rise of antitrust law and other regulations designed to limit the economic (and political) power of large corporations; the decade of the 1920s, with the stock market bubble, followed by the market crash and the Great Depression; the response of President Franklin D. Roosevelt to this crisis, including the creation of the Securities and Exchange Commission (the "SEC") and the passage of the critical legislation that still forms the basis of our federal securities laws today; World War II and its aftermath in the 1950s, which led to an era of even greater government regulation in the market, the rise of unions and the concept that corporations had a duty to all of their stakeholders, including their employees and communities in which they operated, as well as being good "corporate citizens" by (among other things) paying taxes and sponsoring artistic and cultural events; to the advent of "stockholder capitalism" in the 1980s, perhaps best personified by Gorden Gekko's famous speech about "greed, for lack of a better word, is good," but whose lineage is perhaps best traced in popular culture to Milton Friedman's famous 1970 article in the New York Times Magazine stating that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits."[4]

The influence of Friedman's article, as well as Michael Jenson's 1976 "Theory of the Firm" article,[5] the deregulation environment championed by President Reagan and the takeover wars of the mid-1980s, led directly to the decline of the countervailing forces that had acted as a constraint on corporate power in the approximate half-century between the Great Depression and the mid-1980s, when the leading Delaware cases that form the rules of the game that continue to govern director conduct were decided. These cases, including *Revlon*[6] and *Unocal*[7], as well as more recent cases such as *eBay*[8] and *Trados*[9], emphasize that in today's world the board's ultimate duty is to the company's shareholders. As the court noted in the *eBay* case, having chosen "a for-profit corporate form…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…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."[10]

Yet as described above the concept that the core duty of directors is to "maximize the economic value of…the corporation for the benefit of the shareholders" is neither required by statute nor deeply (or permanently) engrained in judicial or economic precedent. Indeed, while the origins of shareholder primacy are now often traced to the

Michigan Supreme Court's decision in *Dodge v. Ford Motor Co.*,[11] no less an authority than former Delaware Chancellor Bill Allen noted that in the 1960s there was "scant attention" paid to this case and it "seemed that every interesting question in corporation law had been answered and that nothing remained" to be discovered in the study of corporate law.[12] Thus the notion of stockholder primacy is a rather recent development, arising out of the regulatory and academic arguments that became broadly influential beginning in the early 1980s, eventually moving over to become part of the Delaware common law in the mid-1980s, and can be seen as part of the broader response to the takeover wars and the academic and legal debate that was occurring during this time.[13]

In this essay I ask the question "what if"?[14] That is, how might directors and investors manage corporations if we did not live in a world of stockholder primacy? I think this is a critical question to ask for at least two reasons. First, as I will discuss below, while the concept of stockholder primacy currently dominates Delaware law, the courts in Delaware have held this view for a relatively short time. Indeed, no less an authority than Delaware Chief Justice Leo Strine wrote that the "Delaware Supreme Court first grappled with the question" of shareholder primacy in the late 1980s, in its decisions in *Unocal* and *Revlon*.[15] In the history of corporate law the stockholder primacy notion is just a youth, still capable of further development.[16]

However, despite the youth and geographic limitations on the concept of stockholder primacy, the doctrine's influence cannot be overstated. As one who has been advising corporate boards for more than 25 years, my own experience in the boardroom, the courtroom and in the business community demonstrates that corporate directors, business leaders, institutional investors, legal practitioners, politicians and pundits, including the business press, all take for granted that the sole duty of corporate directors today is to maximize stockholder value.[17] Any change from this consensus view would have enormous implications for director decision-making on all basic board issues.

Second, while stockholder primacy may currently be the cornerstone of Delaware law, the law can change. The reason for this is not particularly complicated; Delaware corporate law is based upon principles of common law and equity, while the Delaware General Corporate Law ("DGCL") is, as is well known, an enabling body of law, allowing directors to take most actions they choose unless specifically prohibited by the DGCL or—and here we are back to fiduciary principles—equity.[18]

In simpler terms, what this means is that the foundation underlying stockholder primacy in Delaware are the views of the distinguished jurists who presently sit on the Delaware Court of Chancery and the Delaware Supreme Court, and have come to hold those positions since the mid-1980s (*i.e.* during and after *Unocal* and *Revlon* and their progeny). While these judges correctly view themselves as constrained by certain precedents, the historical basis of the courts of equity must also be remembered: such courts were created as an alternative to the law courts, to allow judges to apply principles of equity based upon many sources to achieve a just outcome, rather than to simply apply the law as was then written. Further, many of these judges have not hesitated to make clear where they departed from precedent, and urged the Delaware Supreme Court (or the Delaware legislature, as appropriate) to change existing Delaware law and/or practice.[19]

This does not mean, of course, that the shareholder primacy rule that currently dominates in Delaware will disappear tomorrow. However, it does make it worth considering a world where stockholder primacy may not be the sole duty of directors in

Delaware, including a world where these other constituencies may even have standing to sue to enforce any obligations that may be owed to them or even in some far away world be granted voting rights to elect directors, as Delaware's common law often develops and changes in response to new facts and circumstances. [20]

The purpose of this essay is three-fold. First, and most simply, the essay demonstrates that stockholder primacy is a relatively recent development. While there was debate over the purpose of the corporation in the approximately half-century from the mid-1930s to the mid-1980s, by the mid-1950s no less a shareholder advocate than Adolf Berle recognized that corporate "powers [are] held in trust for the entire community" and that therefore the debate between him and Merrick Dodd "has been settled (at least for the time being) squarely in favor of Professor Dodd's contention."[21] As one who frequently advises directors and speaks with young corporate lawyers thinking about this topic, the mere awareness of a world before stockholder primacy is an important understanding for business leaders and many of their advisers.

Second, the essay attempts to recognize the broader historical and social constraints on corporate behavior, in an effort to show that the question of whether we live in a world of "stockholder primacy" or "director primacy" is ultimately to narrow a question. Instead, historically the greatest constraints on corporate behavior have traditionally not been shareholders (or even the courts) but rather various "countervailing forces" in the form of employees (particularly when bargaining collectively as unions), local, state and national communities (both through individual citizens groups and when acting through their respective government regulators), suppliers and creditors, the public, the press and other institutional authorities that have the ability to meaningfully affect to corporate behavior. At present these countervailing forces can only exist outside the corporation because, as Delaware Chief Justice Strine has recognized, to "expect that corporate directors elected by stockholders will foreswear the chance to reap materially higher post-tax profits for the benefit of their stockholders is naïve and even immature…the solution must come from other bodies of positive law that constrain corporate behavior such as the tax code itself, and cannot rationally rest on calls for corporate directors to 'be patriotic.'"[22]

Thus a second purpose of this essay is to note that there was a time (not so long ago) when corporate directors had to respond not just to a different tax code, but even more fundamentally to a different regulatory and structural regime. This regime sought to include a variety of constituents who could influence the corporation to consider different interests, whether it be unions forcing corporations to distribute more of the corporation's profits to workers rather than shareholders, or environmentalists arguing that trees and other inanimate objects should have the same standing to sue that corporations do.[23] With respect to corporate law, if standing to sue were extended to those affected by corporate decisions (not to mention voting rights under certain circumstances), including employees, communities and others one suspects that the "bodies of positive law that constrain corporate behavior" could be substantially expanded.

The third purpose of the essay is the most modest; to simply recognize that the law, including the most basic tenants of corporate law, are subject to change in the future. Former Chancellor Bill Allen recognized this reality long-ago, when he described corporate law as "schizophrenic" precisely because our view of the corporation changes along with our relative views of "efficiency concerns, ideology and interest group politics…".[24] Thus what seems permanent and solid today may someday change again, to something old or new.

The remainder of this essay is divided into four sections. Section II reviews the purposes of the corporation, including the rise of countervailing powers during for most of the 20th century, only to be replaced by the rise of stockholder primacy beginning in the mid-1980s. This Section includes a discussion of some of the political, economic and other factors that led to these developments, and attempts to the stockholder primacy argument within the broader context of the various regulatory and other developments that allowed stockholders to gain primacy.

Section III looks at Delaware law, but not to interpret what the state of the law is—again, I believe the duties of directors of a Delaware corporation are currently well established, as is the corporate purpose in Delaware—but rather to review how Delaware law might be different if it had gone down a different path. To accomplish this objective this Section considers separately the various constituencies identified by Justice Moore in *Unocal* and asks "what if" the law had developed to allow these constituencies to participate in corporate decision-making?[25]

The essay concludes by noting the potential for changes in corporate law, even in Delaware. In this Section I point out again some of the various elements that can lead to a change in the law, and how the law reacts to calls for change. Sometimes, of course, these changes occur outside the law, and again for much of the 20th century corporate behavior was constrained by powerful countervailing forces. The essay thus concludes by noting that many recent decisions have changed the way we view corporations as well as changed the ability to regulate corporate behavior, and that these recent decisions may ultimately lead to significant changes in corporate law, beyond those that seem possible to imagine today.[26]

II. A QUICK LOOK IN THE REAR-VIEW MIRROR: WHAT WAS THE CORPORATION FOR?

A. A World Before Shareholder Primacy

One need not go back centuries to find the "generally accepted" notion that directors owed duties to all corporate stakeholders. In fact, as I have previously discussed, the dominant view of corporate law for most of the 20th century eschewed the notion of "shareholder primacy," and still the modern corporation managed to exist quite nicely. [27] For example, as recently as 1946 the chairman of Standard Oil described the goal of the modern corporation as maintaining "an equitable and working balance among the claims of the various directly interested groups—stockholders, employees, customers and the public at large." [28] Just a few years later George Merck, then-President of Merck & Co., stated that the purpose of Merck was to develop medicine "for the patient. We try never to forget that medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear. The better we have remembered it, the larger they have been." [29]

The views of these business leaders were also echoed in the law and in the marketplace. For example, in the 1930s Professor Adolfe Berle engaged in a series of debates with E. Merrick Dodd about the purpose of the corporation in the Harvard Law Review.[30] As Chief Justice Strine has noted, Berle argued that managers should "operate within a binding accountability structure that demonstrated adequate regard for those affected by corporate conduct and that would therefore help managers act more in keeping with the better angels of their nature."[31] The question, of course, was where would this "binding accountability structure" urged by Berle come from? Berle and Dodd agreed that it was not going to come from shareholders, and by the mid-1950s, Berle made clear his belief that the accountability would also not come from courts holding directors accountable to shareholders. Rather, in a series of lectures in 1954 at Northwestern Law School, Berle argued that the world had developed to a place where shareholders had little power and the increasing power and wealth of the corporation made it less reliant on publicly invested capital.

Given the limited power and role of stockholders in the market, by the mid-1950s Berle concluded that management accountability had to come from regulators, employees, consumers, and others in the public sphere, as these were the only entities that had sufficient power to oversee and monitor corporate conduct. Thus Berle conceded that the debate between him and Dodd "has been settled (at least for the time being) squarely in favor of Professor Dodd's contention."[32]

Berle's views played out in the marketplace, where the "countervailing powers" to corporate (and board) action were not shareholders, but rather employees, regulators and others. For example, in the so-called "Treaty of Detroit," entered into in 1950 by the United Auto Workers ("UAW") and General Motors ("GM"), the primary power pushing GM for information about its business, profitability and costs was the union negotiating for better wages, not shareholders. The agreement GM reached with the UAW, following years of difficult negotiations (as well as strikes) between the UAW and the various automakers, provided for a five-year contract between GM and the UAW, whereby the UAW gave up certain bargaining rights in exchange for extensive health, unemployment, pension and other benefits.[33] Since 1950, the Treaty of Detroit has been the subject of considerable economic and political debate, and the merits of a labor agreement are obviously far beyond the scope of this essay.

However, there are at least two reasons why this agreement is significant in the context of an essay on corporate governance. First, when the UAW began negotiations it sought documents from GM, similar to the type of documents shareholders now seek under Delaware Section 220, to determine the value and profitability of the company. GM initially resisted production of many of these documents, arguing that the documents sought went beyond what was necessary for the negotiations and that there was no requirement for their production (these arguments will sound familiar to corporate litigators who have been involved in 220 disputes). Ultimately the federal government required production of most of these documents to the UAW, to help the UAW determine GM's financial condition as part of these negotiations. No one suggested that the UAW should make a demand *as a shareholder* for these documents pursuant to Michigan (or Delaware) law.

Second, at the time GM entered into the treaty, GM's shareholders do not appear to have had any role or taken any position on the impact of this agreement on GM's shareholders, while the government and the broader social good of this type of an agreement were topics of heated debate. Again, one can debate whether ultimately this labor agreement was a positive or negative benefit, and/or whether there should have been "more" concern for shareholder interests. The limited point of this essay, however, is that during the 1950s, and carrying through until the takeover boom in the 1980s and early 1990s (and the decisions by the Delaware courts arising out of these corporate control battles) was that the notion of "stockholder primacy" was far from decided.[34]

Even as late as the early 1980s stockholder primacy, while being widely discussed in academic circles, still was far from the prevailing view in business or law. For example, as late as 1981 the chairman of the Business Roundtable wrote the following in the New York Times, in support of the BRT's "Statement of Corporate Responsibility":

> [T]he character of shareholders has changed. At one time most of them were long-term, personally involved individual investors. Now large numbers of them are grouped in institutions as unidentified short-term buyers most interested in maximum near-term gain. Such interest must be balanced with a long-term perspective. *The simple theory that management can get along by considering only the shareholder has been left behind in old economic dissertations.*
>
> Chief executive officers who have been out there facing reality know that corporations are surrounded by a complicated pattern of economic, social, ethical, and political ideas and expectations. They know that they have to be concerned not only about shareholders but about such constituent groups as customers, employees, communities, suppliers and society at large. And they believe a corporation best serves its shareholders by carefully balancing the legitimate interests of all constituents.[35]

In short, for the period beginning at least with the New Deal in the 1930s until the early 1980s, corporations and corporate law generally recognized that a corporate board was responsible to the broader corporate stakeholders, including its customers, employees, communities, suppliers and others.[36]

Equally significant, enforcing the obligations on corporations also was not a single task or even within the exclusive province of corporate law; rather, it belonged to many of these same constituencies including, among others, employees (particularly when acting collectively through unions), communities (when acting through their various local, state and federal representatives as government regulators), individual citizens (when acting as activists and bringing attention to the roles of particular corporations), and even the media and the public, in a system that was described as one of "countervailing powers."[37] Contractual and other rights, both internal and external to the corporation, formed the basis for corporate regulation; this was further coupled with a general public sense that the corporation owed duties to constituencies in addition to stockholders.

It is important to note that the purpose of this essay is not normative, and I am not suggesting here that the governance system that existed during the period before the stockholder primacy regime we now live under was better (or worse) than what is often (erroneously) described as the "stakeholder primacy" system that existed from the 1930s until the mid-1980s.[38] Rather, the point of this essay is to confront the largely lost reality that there have been long periods of time in the U.S. when corporate leaders recognized that they had obligations to non-shareholder constituencies, that the rights of these non-shareholder constituencies were broadly recognized and enforced through a variety of different forums, that corporations (and the broader economy) managed to do just fine during these periods, and that it is entirely possible that the tides will turn again such that we may one day no longer be based upon a shareholder primacy system.

B. The Growth of Shareholder Primacy: De-Regulation and the Takeover Wars

As discussed above, the 1970s were a period of debate about the purpose of the corporation. Importantly, this discussion did not occur within a vacuum; to the contrary, the debate occurred in the context of multiple, fundamental changes to the U.S. economy in the late 1970s/early 1980s, including "stagflation," the election of President Reagan—whose view of economics and government regulation differed fundamentally from the

Keynesian consensus that had governed since at least the end of World War II, which led his administration to adopt policies that would substantially reduce the ability of the "countervailing powers" that had limited corporate power in the post-war period to perform this function—as well as the decline in the stock market during the 1970s, the rise of the so-called "corporate raiders" in the 1980s and the growing power of institutional investors in the market.

In addition, the legal/academic debate over the role of the corporate board of directors came into focus during this period as the takeover wars grew, with Marty Lipton's seminal piece "Takeover Bids in the Target's Boardroom" advocating for courts to give greater deference to decisions by the company's board of directors.[39] The response to Lipton came from Professor (now Judge) Frank Easterbrook and Dan Fischel, two of the leading proponents of the "law and economics" movement, who advocated that shareholder wealth should be the ultimate goal of the corporation.[40] Their article, in the Harvard Law Review, titled "The Proper Role of a Target's Management in Responding to a Tender Offer," advocated for a more "shareholder friendly" response to tender offers, and that the "proper" role of directors in responding to a tender offer was to be passive so that shareholders could make their own decisions.[41]

During the same period, Michael Jensen and Eugene Fama wrote a series of highly influential articles, which reframed the Berle and Means debate over corporate control. Jensen and Farma argued that shareholders contract for the residual right to the corporation's net cash flows, and in return allow management and the board to make the basic decisions about the company, subject to the right of shareholders to vote on matters reserved for their ratification.[42] Under this theory, day-to-day business decisions were the province of managers, while the role of the board (and, to the extent appropriate, other monitors) was to ensure that managers did not improperly expropriate for themselves cash flows that "belonged" to the residual claimants, *i.e.* the stockholders.

Changes in regulatory and enforcement rules and practices also helped foster this movement, as the role of the "countervailing powers" that had constrained the corporation had begun to erode by the 1980s. For example, the 1980s saw a significant decline in the role of unions in the United States, as President Reagan eased regulations allowing companies to avoid collective bargaining, while many companies, particularly manufacturing companies, moved from the Midwest to states that had so-called "right to work" laws, limiting the ability of unions to form.

The SEC also provided greater flexibility to companies by, for example, allowing companies to repurchase their own shares in the market. Thus in 1982 the SEC adopted Rule 10b-18 of the Securities Exchange Act.[43] This Rule gave a "safe harbor" against manipulation claims to companies making open market purchases of their own stock so long as, among other things, the company informed the public of the general repurchase plan and did not buy more than 25% of the previous four weeks average daily trading volume ("ADTV"). Rule 10b-18 led to a substantial expansion of shareholder buybacks by companies at a time when companies were also under increased pressure from governance advocates and others to more closely "link" executive compensation to the company's stock price, thereby increasing the significance of stock (and stock options) as part of executive compensation packages. These actions, and the regulatory developments supporting this trend, expanded the use of stock buybacks as a way of returning capital to shareholders rather than through dividends.[44] Another effect of this

Rule was to incentivize senior management and the board to increase share prices, even at the expense of re-investment in the company for such things as research or increased compensation for employees who did not own substantial amounts of stock, since a greater percentage of executive compensation was linked to increases in the company's share price.[45]

In addition to the decline in the power of unions and a more relaxed regulatory environment, the 1980s also saw a dramatic decline in the role of antitrust enforcement. New theories of antitrust regulation, based upon then-novel financial theories, were widely adopted by the Reagan administration. These theories, as well as the Reagan administration's broader philosophical opposition to much government regulation, led to a decline in the role of government as a countervailing force pushing corporations to consider broader constituencies, including consumers and others.

As a result of these changes, the period of the mid-1970s through the mid-1980s saw an erosion of influence by many of the parties that had traditionally been involved in the corporate governance debate, including labor, various regulators and other "countervailing powers."

At the same time the corporation was gaining greater influence over the traditional "countervailing powers" that had sought to limit corporate power, the courts and leading scholars were advocating for greater influence of stockholders in corporate governance. Thus, the growing influence of stockholders in corporate governance was occurring at the same time that power of other corporate stakeholders was on the decline.

III. *UNOCAL*, *REVLON* AND THE GROWTH OF STOCKHOLDER PRIMACY IN DELAWARE

As this debate was going on, the Delaware courts were relatively quiet about the issue of corporate purpose.[46] The Delaware courts did not confront the issue of corporate purpose until 1985, in the case of *Unocal v. Mesa Petroleum Co*.[47] In *Unocal*, the Delaware Supreme Court considered whether a board facing a takeover bid may consider non-stockholder constituencies when deciding how to respond to the offer. In answering this question, the court held that in "the board's exercise of corporate power to forestall a takeover bid our analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders."[48] However the court then noted that a board could consider corporate constituencies in addition to stockholders:

> If a defensive measure is to come within the ambit of the business judgment rule it must be reasonable in relation to the threat posed. This 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 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. 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.[49]

The court cited to an article by Marty Lipton to support the proposition that directors could consider constituencies in addition to stockholders.[50] The court also specifically rejected the Easterbrook and Fischel theory that the board should take no action to block shareholders from accepting a tender offer, finding that "[i]t has been suggested that a board's response to a takeover threat should be a passive one. However, that clearly is not the law of Delaware, and as the proponents of this rule of passivity readily concede, it has not been adopted either by courts or state legislatures."[51]

Not surprisingly, many supporters of stockholder primacy and the law and economics movement sternly criticized the *Unocal* decision. For example, Michael Jensen described the decision as a "stunning loss for Unocal shareholders and society" because the "evidence indicates that takeovers are beneficial."[52]

Shortly thereafter, in *Revlon*, the Delaware Supreme Court had the opportunity to, in its own words, "address for the first time the extent to which a corporation may consider the impact of a takeover threat on constituencies other than shareholders."[53] The court's answer to this question was clear: "while concern for various constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefits accruing to the stockholders."[54] As recently described by Delaware's current Chief Justice, Leo E. Strine, the "understanding in Delaware is that *Revlon* could not have been more clear that directors of a for-profit corporation must at all times pursue the best interests of the corporation's stockholders, and that it highlighted the instrumental nature of other constituencies and interests. Non-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefitting the stockholders."[55]

Revlon planted the Delaware flag firmly in the ground of stockholder primacy. In the years since *Revlon*, the foundation of stockholder primacy has been solidified in Delaware.[56] For example, in *eBay Domestic Holdings, Inc. v. Newmark*,[57] the founders and controlling shareholders of craigslist, Inc. ("craigslist") argued that the company should be allowed to favor its users and communities over shareholders by, among other things, choosing to not monetize its site.[58] Because the directors and majority shareholders of craigslist admitted that they were favoring the interests of a non-stockholder constituency over stockholder interests, the court found that these directors had breached their fiduciary duties:

> 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 [the founders'] 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. [The founders] 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…a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic status of a for-profit Delaware corporation for the benefit of its stockholders ….[59]

The Delaware Court of Chancery's decision in *eBay* came nearly 25 years the Delaware Supreme Court's ruling in *Revlon*, yet the philosophical consistency of the two decisions is beyond dispute. As these decisions (as well as the many more recent articles by Chief Justice Strine) all make clear, Delaware is now squarely in the camp of shareholder (or director) primacy. That said, based upon these same decisions it is equally clear that Delaware law prior to the *Unocal/Revlon* decisions on corporate purpose was less clear, since as the Delaware Supreme Court noted in *Revlon*, that case presented the court with the opportunity to "address *for the first time* the extent to which a corporation may consider the impact of a takeover threat on constituencies other than stockholders."[60]

IV. WHAT IF SHAREHOLDER PRIMACY WAS NOT THE RULE IN DELAWARE

Delaware today is firmly entrenched in the shareholder/director primacy camp. However, as described above, this has been the rule in Delaware just since the mid-1980s, and it was not always obvious that Delaware's jurisprudence would adopt this view. The remaining portion of this essay explores "what if" Delaware had gone down a different path, how corporate governance—and the broader economy—might be different. In particular, I look at some ways the various economic stakeholders in the corporation may have been affected had Delaware not concluded that the primary purpose of the corporation was to maximize wealth for stockholders.

To begin this path, let's assume that instead of adopting the stockholder primacy rules set forth in *Revlon* and its progeny, Delaware's courts chose to expand upon the court's words in *Unocal,* and ruled generally that directors had *the obligation* to consider "the effect" of *any corporate action* "on the corporate enterprise," which included "the impact on 'constituencies' other than stockholders (*i.e.*, creditors, customers, employees, and perhaps even the community generally generally)." This includes "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."[61] Further, assume that instead of *Revlon* and its progeny, we have a court that allows (or even mandates) directors to consider the other corporate stakeholders identified in *Unocal* to the same extent it is considering stockholder interests when making decisions, and (most importantly) allows these stakeholders to enforce these rights, whether at the ballot box on certain fundamental corporate decisions and/or grants standing as applicable to those stakeholders in a court of equity to enforce those rights.[62]

What if Delaware's law developed in this fashion since the mid-1980s through the present?[63]

A. What if the Corporation owed duties to Creditors?

Let's start with the first item on the list set forth in *Unocal*: what if the corporation owed duties to the company's creditors? This question seems particularly appropriate because, as recently explained by Vice Chancellor Laster, Delaware law with respect to the fiduciary duties owed to creditors has changed fairly dramatically over approximately the last decade. According to Vice Chancellor Laster, before 2007:

- The fiduciary duties owed by directors extended to creditors when the corporation entered the vicinity of insolvency;
- Creditors could enforce the fiduciary duties that directors owed them through a direct action for breach of fiduciary duty;
- Under the trust fund doctrine, the directors fiduciary duties to creditors included an obligation to manage the corporation conservatively as a trust fund for the creditors' benefit;
- Because directors owed fiduciary duties both to creditors and stockholders, directors faced an inherent conflict of interest and would bear the burden of demonstrating that their decision were entirely fair;
- Directors could be held liable for continuing to operate an insolvent entity and incurring greater losses for creditors under a theory known as "deepening insolvency."

However by at least the end of 2010, according to Vice Chancellor Laster, "none of these assertions remain true." In their place is a different regime in which the following principles are true:

- There is no legally recognized "zone of insolvency" with implications for fiduciary claims. The only transition point that affects fiduciary duty analysis is insolvency itself.
- Regardless of whether a corporation is solvent or insolvent, creditors cannot bring direct claims for breach of fiduciary duty. After a corporation becomes insolvent, creditors gain standing to assert claims derivatively for breach of fiduciary duty.
- The directors of an insolvent firm do not owe any particular duties to creditors. They continue to owe fiduciary duties to the corporation for the benefit of all of its residual claimants, a category which now includes

creditors. They do not have a duty to shut down the insolvent firm and marshal its assets for distribution to creditors, although they make a business judgment that this is indeed the best route to maximize the firm's value;…

- Delaware does not recognize the theory of "deepening insolvency." Directors cannot be held liable for continuing to operate an insolvent entity in the good faith belief that they may achieve profitability, even if their decisions ultimately lead to greater losses for creditors….[64]

So how could corporate law, and the economy more generally, look differently if Delaware law further changed the duties owed to creditors by extending fiduciary duties to creditors? While the literature on this issue is limited, there is at least some evidence that "firms are more likely to circumvent debt covenants when directors owe fiduciary duties only to shareholders than when they owe them to creditors as well…[and] that imposing fiduciary duties toward creditors reduces financial-reporting conflicts between equity and debt-holders, and consequently reduces the likelihood of manipulations that favor equity holders' over creditors' interests."[65]

More broadly, studies to-date indicate that financial reporting and board governance generally is positively associated when fiduciary duties are owed to creditors. As was recently reported, "board quality improves financial-reporting quality for the stakeholder to whom directors owe fiduciary duties."[66]

This should not be surprising; directors, as Chief Justice Strine has noted, respond to those who have power to compel their performance and the right to remove them if that performance does not favor their interests.[67] One such response is to tailor financial reporting (within legal bounds) to represent the interests of shareholders more favorably, even if such reporting results in less reliable information being available to creditors.

This should also not be surprising because, to the extent directors feel obligated to maximize stockholder interests and stockholder value, they (along with management) may be incentivized to present the company's financial statements in the manner that demonstrates the greatest financial value to the company's stockholders, even if this results in a portrayal of these financial statements in less "creditor-friendly" terms. Yet given how the Delaware courts have changed the scope and nature of duties to creditors over the last decade or so, one must wonder whether the potential benefits of greater financial transparency and disclosure should be a factor that could influence the courts as they continue to explore the duties owed to creditors.

Another potential implication of increased duties to creditors is empowering employees who are owed pensions by the corporation to protect their interests in those pensions. In 1983, the Reagan administration determined that corporations could terminate pension plans not just in narrow cases of "business necessity," but also generally so long as the company bought an annuity for the existing benefits from an insurance company.[68] The rule change allowed a board to terminate plans for the benefit of stockholders and at the expense of employees, who were creditors of the company by virtue of their interests in the company's pension plan.

As is by now well known, many boards took advantage of this change to terminate plans and distribute the "excess" from the pension plans to shareholders, without compensating the employee/creditor for the risks of the new plan or providing any of the "profits" from the plan to enhance the plans themselves.[69] Although the battle over which stockholder (or group of stockholders) should receive the "excess" from the pension plans was often litigated in Delaware, the courts did not address whether the board had a fiduciary duty to the original beneficiaries of these pension plans, to ensure that they received any "excess" before it was paid out to stockholders.[70] This had an enormous impact on the economy, as it effectively redistributed wealth from a group of long-term creditors/employees—pension plan beneficiaries—to the company's stockholders. This had important consequences for workers and corporate governance that remain to this day, and obviously would have been different had Delaware imposed duties on boards to consider the interests of employee/creditors as part of any termination of a pension plan.[71]

B. What if the Corporation Owed Duties to Customers?

Delaware has generally not allowed claims by customers to be brought against directors, or allowed customers to claim that they are owed duties by directors. At the same time, the notion that a company should be run for the benefit of its customers has a long tradition (arguably longer than the notion that the company should be run for the benefit of its shareholders). For example, Peter Drucker long ago wrote the following:

> Asked what a business is, the typical businessman is likely to answer an organization to make a profit. The typical economist is likely to give the same answer. The answer is not only false, it is irrelevant. To know what a business is, we have to start with its purpose. Its purpose must lie outside the business itself. In fact, it must lie in society since business enterprise is an organ of society. There is only one valid definition of business purpose: to create a customer.[72]

A similar view was expressed a few years later by Ken Mason, then-President of Quaker Oats, who wrote in *Business Week* that Milton Friedman's "profits are everything" philosophy represents "a dreary and demeaning view of the role of business and business leaders in our society.… Making a profit is no more the purpose of a corporation than getting enough to eat is the purpose of life. Getting enough to eat is a requirement of life; life's purpose, one would hope, is somewhat broader and more challenging. Likewise with business and profit."[73]

This view continues today with many of this country's leading companies. For example, Steve Jobs long ago stated that Apple "existed to delight customers first", and that the philosophy of putting its customers first benefited all the company's stakeholders.[74]

What would the economy look like if law allowed boards to prioritize customers over shareholders? According to Roger Martin, former Dean of the University of Toronto's School of Management, the effect of prioritizing shareholders over customers creates incentives for executives to meet the "expectations market" of the public stock exchanges rather than the "real world market" where "customers are the focus and the central task of companies is to find ever better ways to serve them."[75]

According to Martin, the focus on the "expectations market" has had significant negative consequences for companies, the economy and even for stockholders. Martin argues that rules requiring a company, its board and executives to emphasize shareholder value above all else leads to short-term profits at the expense of long-term investment, a focus on stock price rather than building better products, and even a business environment where there is incentive to take business and ethical risks to meet market expectations because share price expectations must be met at all costs.

In contrast, prioritizing customers over stockholders incentivizes executives to create the greatest products and services. This incentive system creates an opportunity to build for the long-term rather than short-term, and because this "real market" is focused on customers, employees and products it tends to create broader benefits for the employees and companies that create these products, which provides greater benefits for the broader economy and society.[76]

Martin compares how the rules governing corporations have focused on stockholders with the focus in the National Football League, which he says attempts to maximize "customer satisfaction". This comparison leads Martin to analogize CEOs and boards managing for the stock market to quarterbacks and coaches who seek to meet the point spread rather than to win games. Martin advocates for a system where stockholder interests are put secondary to the interests of customers (and other stakeholders), on the theory that if customers are the focus of corporations and boards then the type of long-term value corporations and shareholders is more likely to be created.[77]

Martin is far from alone in his view of the harm caused by focusing on shareholders rather than customers.[78] Again, however, the point here is not normative, to argue that one approach to management theory—or legal duties—is preferable. Rather, it is simply to point out an alternative—maximizing customer satisfaction rather than stockholder value—has a number of business, management and economic advocates, and may have several positive consequences for the economy and even stockholders.[79]

C. What if the Corporation Owed Duties to Employees?

The next constituency identified in Unocal was employees.[80] As an initial matter, there can be no dispute that employees are critical to the success of a company. Employees improve the company by, for example, the exercise of skill and effort beyond the minimum necessary to merely obtain their compensation. There is also no question that employees truly take risks and "invest" in the company through their work; workers obtain education, experience and skill for their employers, and make substantial sacrifices for their employers.

Yet even if one were to dispute the added value, efforts, risks and investment made by employees in their company, the law often imposes fiduciary obligations on employees—including duties of care and loyalty—that are more generally associated with directors, without imposing similar duties upon the employer. To the contrary, many employees are required as a condition of employment to sign employment agreements that expressly waive any obligations the company may have to the employee, while also limiting certain of their rights (*i.e.* requiring disputes to be resolved in arbitration rather than in court, perhaps limiting their rights to sue in other ways, expressly setting forth the employee's duties to the company, *etc*.).

Interestingly, while courts have held that employees can and generally do owe fiduciary duties to their employers, employers generally do not owe such duties to their employer.[81] Delaware is consistent with this view (which is also in the Restatement (Second) of Agency), and places a fiduciary duty on employees to act in good faith, loyalty and fairly with their employer, an obligation that is similar to the duties directors owe to shareholders.[82] However, such a duty is typically *not* imposed upon a company towards its employees.

What if the situation was changed, such that directors and companies had similar legal and equitable duties and obligations to each other, such that directors had the right to place employee interests above shareholder profits, and employees had the rights to elect a certain number of directors and/or standing to bring a lawsuit against directors for breach of fiduciary duty if the directors took actions that harmed employees?[83] What would the corporation look like, and is there a possibility that a board that was obligated to consider the welfare of its employees before considering shareholder profits may, in fact, be more successful than a corporation that focuses on maximizing shareholder value? Again, given the discussion is currently hypothetical it is not practical to expect a definitive answer, but there is at least some evidence that indicates that when employees do better the corporation as a whole (as well as society) does better.[84]

For example, many economists have long argued that corporations that pay higher wages have more productive employees.[85] This includes multiple studies showing, for example, that paying higher wages motivates employees to work harder and leads to less job turnover;[86] higher wages attract more talented, qualified and capable employees;[87] and better pay leads to increased customer satisfaction and service.[88] Many business leaders, including such prominent figures as Howard Schultz at Starbucks and Steve Easterbrook at McDonalds support the view that when companies focus on improving wages and benefits for employees the corporation is the ultimate beneficiary, not just because it achieves higher profits but because these employees provide better customer service, more loyalty to the corporation and generally are more productive.[89]

These steps have obviously been taken within the existing structure, where companies are obligated to give primacy to stockholder interests, and the benefits paid to employees under these circumstances have been supported by the notion that stockholders benefit from the investments in employees. However, a potential next step if directors owed duties to employees could include, for example, a duty to (1) share productivity gains with employees and not just stockholders, (2) focus on creating wealth for their employees as well as stockholders; and (3) require some relationship between pay at the top of the organizational structure and pay to all of the company's employees. In a world where a director's duties include creating value for the company's employees, and employees have the right to enforce that duty, there are many ways where more profits may be allocated to employees, which ironically may also benefit shareholders (but, at least under this definition, would not be done for that purpose).

D. *What If Directors Owed Duties to Their Communities?*

The growth of corporations since the takeover wars of the 1980s has also led communities to focus on how these corporations disclose and manage their social and environmental activities as well as their financial condition.[90] While multi-national corporations have been around for decades, the dramatic growth of the world's largest corporations over the last few decades is unprecedented. For example, by 2012 the largest 1000 public corporations (the "Global 1000") were responsible for half of the total market value of all of the world's more than 60,000 public companies; had $34 trillion in revenues; directly employed more than 73 million people, and millions more in their multiple supply chains; and had a total market capitalization of more than $28 trillion.[91]

The Global 1000 are larger than many nations. For example, Dow estimates that it is consuming as much energy on a daily basis as Australia, while the sales of Royal Dutch Shell and Wal-Mart are each higher than the GDP of all but about 30 countries.[92] The concentration of power in a few large corporations exists across industries. For example, when Google's search engine went down for five minutes in 2013 it caused global internet traffic to drop by 40%, Monsanto controls more than 90% of the global genetically modified (GM) seed market, and just six companies—Comcast, Disney, News Corp., Time Warner, Viacom and CBS—control an estimated 70% of cable broadcasting in the U.S.[93]

The concentration of power in large, global companies has created a demand for these companies to focus more on their communities and other stakeholders, which is challenging for these communities given the size and scope of these companies.[94] It should come as no surprise that a large, multinational company may be less inclined to focus on a local community than a smaller company who hires most of its employees locally and sells its products locally. As one commentator noted, for "an oil and gas company that extracts oil in Equatorial Guinea and sells downstream in the US the interests of customers, employees, suppliers and local communities are likely to diverge significantly."[95]

In response to this growing power, citizens and regulators are already challenging corporation to serve communities over stockholders. For example, surveys show that globally more than 80% of citizens want CEOs to shift their focus from short-term profits to broader business and social issues such as income inequality and society's interests.[96] Corporations and boards have also felt the pressure to focus on stakeholder issues in their public disclosures. For example, in 1992 just 26 companies issued sustainability reports (i.e. reports that discussed social, environmental or other governance information but did not include financial information); by 2012 that number had grown to more than 6000.[97]

All of this has occurred, of course, in a world where boards have not had a fiduciary obligation to consider the interests of communities as equal to (or above) the interests of stockholders. However, the growth of corporations (including the widely recognized growing political influence of corporations) has led to greater demand for more disclosure of non-financial issues by corporations. If boards and corporations had fiduciary obligations to communities then we would presumably see even greater development of the corporation functioning as an integral part of the broader economic and social part of society, which it appears that a vast majority of people expect, particularly in light of the growing power of corporations.

E. What if Boards Could Consider the Basic Stockholder Interests at Stake, including those of Short Term Speculators?

The last set of constituencies identified in *Unocal* are the "basic stockholder interests at stake, including those of short-term speculators" who may have created the situation that gives rise to the need of defensive actions being taken by the board.[98] If directors could consider the "basic stockholder interests at stake," and choose to prioritize one group of stockholders over another, how would directors choose between various classes of stockholders?

Again, it is worth starting off with a few basic points. First, while it is often stated that most Americans invest in the stock market, this is, in fact, not the case. Rather, recent evidence demonstrates that about half of all Americans have nothing invested in the stock market, and of those that do invest in the market the vast majority have very, very little invested.[99] Roughly speaking, about one-third of the stock market is owned by the richest one percent (or less) of the country; another one-third of the market is owned by the richest five percent; and the remaining one-third is spread out among the remaining 95% of the population that owns stocks.[100] Because share ownership is so concentrated among the wealthy (and very wealthy) in the U.S., maximizing share value at the expense of the company's other stakeholders means that that if shareholder wealth maximization is the ultimate goal of the corporation then the wealthy will benefit disproportionately as a result, since the wealthy own the vast amount of stock traded in this country.

Second, stock trading, as opposed to stock ownership, has come to dominate the market. As Chief Justice Strine has noted, even the mutual funds that serve as the primary investment vehicle for most Americans who do invest in the market trade on a "gerbil-like" basis, with turnover rates of more than 100% on an annual basis in their portfolio, and even pension funds engage in a similar turnover of their equity investments.[101] Further, the domination of trading by institutions means that the trading of stocks on all exchanges in the U.S. regularly exceeds 100%, rendering most institutions "more short-term speculators than committed, long-term investors."[102] The result is that the holding periods for stocks has declined substantially in recent years, at the same time as individuals have become less involved in the market.[103]

Consistent with the notion that stock markets today favor *traders* rather than *investors* is the simple reality that today's investors are not actually buying stock in a company, but simply buying shares from another trader, with the hope that those shares will increase in value without any financial interest or investment directly in the company. For example, Apple raised $97 million in its initial public offering in 1980,[104] since then, while Apple has had four stock splits, it has not sold any stock to the public. Thus buyers of Apple's stock today are hoping that they can eventually sell that stock for an even higher price, but Apple as a corporation does not receive anything from either the purchase or the sale of its stock.

This trend has substantially accelerated in recent years. For example, from 2000-2010 net issuance of corporate equity in the U.S. was a *negative $287 billion* according to the information provided by the Federal Reserve. In addition, there has been a dramatic decline of initial public offerings over the last several years. Together, this indicates that while the stock market involves a great deal of trading, the corporations whose stock is traded directly receive only a fraction of the proceeds from these trades.[105]

Yet at the end of the day does the time horizon of a company's stockholder base really matter? Company executives certainly believe it does, as studies show that more than 90% of executives believe that a company with long-term investors is more likely to grow market share and invest more in new products, while a company whose investor base is focused on short-term results is more likely to engage in share repurchases, cost reductions and other actions designed to impact stock price rather than longer-term growth initiatives and strategic planning.[106]

These results seem to lead back to the court's decision in *Unocal,* as many advocates today would argue that one reason companies are less inclined to engage in long-term investment is precisely because of the pressure created by short-term investors. If a firm that does not "heavily buy and sell its own shares" benefits when managers focus on the long-term, then its worth questioning whether structures should be established that allow those who have a greater long-term interest in the corporation to influence corporate behavior so that the debate about how the corporation should act is not dominated by those solely focused upon immediate actions that may result in a temporary increase in stock price.

V. CONCLUSION

Economic disruption over the last decade has raised fundamental questions about many of our leading institutions, including government, the financial sector and corporations. The disruption and anxiety has been fueled, at least in part, by growing wealth disparities in the country, and there is substantial evidence that the wealth disparities can be linked to the "stockholder primacy" philosophy of corporate governance, that requires that shareholder wealth be maximized over all other corporate constituencies.[107] This essay does not challenge the dominance of stockholder primacy in today's world. To the contrary, given the analysis by, among others, Delaware Chief Justice Leo E. Strine about the current state of Delaware law, as well as my own experience in advising directors and others on the duties of directors (including directors of companies incorporated in states other than Delaware), there can be little question about the dominance of shareholder primacy in the corporate community today.

Rather, the purpose of this essay is three-fold. First, to make clear that shareholder primacy is a relatively recent development. The origins of shareholder primacy are now often traced to the Michigan Supreme Court's decision in *Dodge v. Ford Motor Co.*,[108] but as former Chancellor Bill Allen noted, in the 1960s there was scant attention paid to this case and it "seemed that every interesting question in corporation law had been answered and that nothing remained" to be discovered in the study of corporate law.[109] It was not until the 1980s, with the rise of the takeover boom, the growth of institutional investors, the changing regulatory environment, the rising law and economics movement and developments in corporate finance as well as other macro-economic events, that shareholder primacy came into full force. Prior to that time, and in particular from the New Deal until the mid-1980s, directors managed companies for all corporate stakeholders, and the primary "enforcement mechanism" for stakeholder capitalism were the "countervailing powers" of other large institutions, including employees (largely through labor unions), customers and suppliers (often through consumer federations and other organizations) and communities (whether acting individually or through their representatives in local, state and national government regulators).[110] It was these countervailing powers that directors had to answer to, and responding to these powers precluded any notion of shareholder primacy. Further, by whatever measurement one chooses, the evidence shows that during this period American corporations were, on the whole, very successful.

Second, that while in hindsight it seems inevitable that Delaware would adopt a shareholder primacy model, at the time there was considerable debate about how this issue would be resolved in the Delaware courts. In particular, both *Unocal* and *Revlon* were vigorously litigated, and it was far from certain that the Delaware Supreme Court in *Revlon* would rule in favor of Perelman and against the board, particularly following Justice Moore's decision in *Unocal*.[111] Further, it is important to note that by the time of these decisions many of the countervailing powers that had served to limit corporate power since the 1930s—including most notably private unions and government regulatory agencies—had become significantly weaker by the mid-1980s. Thus while *Revlon* may be seen as enhancing shareholder rights at the expense of other stakeholders, *Unocal*, *Revlon* and their progeny would also come to be viewed as placing considerable process constraints on boards, particularly in the takeover context. In this way one can view the Delaware courts as becoming a (moderate) new countervailing power to corporate director conduct, particularly in the takeover context.

The final purpose of this essay is to note that while we now live in a world dominated by stockholder primacy, this too could change (again) in the future. Ideas and legal theories go in cycles, and while we lawyers, directors and business people are judged by current standards, that does not mean that these standards must or shall be frozen in time. To the contrary, the reality—indeed, the likelihood—is that today's standards will be discarded in the years to come, and it is more a question of "when," not "if." As then-Chancellor Allen wrote more than two decades ago (and less than a decade after both *Unocal* and *Revlon* had been decided):

> I suppose that there will be no final move in defining the nature or the purpose of the business corporation. It is perhaps asking too much to expect us, as a people—or our law—to have a single view of the purpose of an institution so large, pervasive, and important as our public corporations….Thus I conclude that we have been schizophrenic on the nature of the corporation, but as a society we will probably always be so to some extent. The questions "what is a corporation?" and "for whose benefit do directors hold power?" are legal questions only in the sense that legal institutions will be required at certain points to formulate or assume answers to them. But they are not simply technical questions of law capable of resolution through analytical rule manipulation. Even less are they technical questions of finance or economics. Rather in defining what we suppose a public corporation to be, we implicitly express our view of the nature and purpose of our social life. Since we do disagree on that, our law of corporate entities is bound itself to be contentious and controversial. It will be worked out, not deduced. In this process, efficiency concerns, ideology, and interest group politics will commingle with history (including our semi-autonomous corporation law) to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more. And so on, and so on, evermore.[112]

[1] Partner, Wilson Sonsini Goodrich & Rosati. The author would like to thank William Chandler, the Honorable Leo Strine, Jesse Fried, Rob Daines, Steven Davidoff Solomon, Larry Sonsini, Ignacio Salceda, Herb Fockler, and Aaron Benjamin for their insights and comments. Obviously all views are solely those of the author and not those of his firm or anyone else. *In Search of Lost Time* is also the English translation of the name of Marcel Proust's great novel "A La Recherche de Temps Perdu." As Proust also noted in one of the volumes of his oeurvre, "a powerful idea communicates some of its power to the man who contradicts it." *See* 2 MARCEL PROUST, IN SEARCH OF LOST TIME: WITHIN A BUDDING GROVE 186 (C.K. Scott Moncrieff & Terrence Kilmartin trans., Modern Library 1992) (1981).

[2] While the debate as to whether directors or stockholders control the corporation remains an active one in U.S. corporate law, *see, e.g.*, STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE THEORY AND PRACTICE (2008); Charles R.T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753 (2006), as will be discussed in more detail below, for purposes of this essay the differences between stockholder control or director control are less significant because the issue posed in this essay is whether non-stockholder constituencies should have the opportunity to enforce rights in addition to stockholders and directors. For this reason I refer to "stockholder primacy" to mean both stockholder or director primacy.

[3] *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

[4] Interestingly, the end of Friedman's sentence, which is critical to his thesis, is often forgotten: the full sentence states that "there is one and only one social responsibility of business–to use it resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud." Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970. As has been persuasively argued by, among others, Robert Reich, the key is to determine the "rules of the game" by which corporations (and markets) exist. *See generally* ROBERT B. REICH, SAVING CAPITALISM FOR THE MANY, NOT THE FEW 5 (2015) ("A market—any market—requires that government make and enforce the rules of the game. In most modern democracies, such rules emanate from legislatures, administrative agencies, and courts. Government doesn't "intrude" on the "free market." It creates the market."). These rules are frequently changed, often in little-noticed ways, that have the effect of favoring one industry over another or impacting legal regulations.

[5] *See* Michael Jensen & William Meckling, *A Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[6] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[7] *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946 (Del. 1985).

[8] *eBay Domestic Holdings, Inc., v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

[9] *In re Trados S'holder Litig*., C.A. No. 1512-VCL (Del. Ch. Aug. 16, 2013).

[10] *eBay*, 16 A.3d at 34.

[11] 170 N.W. 668 (Mich. 1919).

[12] William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 263 (1992).

[13] Stockholder primacy is also rather limited in its geographical scope; in particular, its principle locus is the state of Delaware, which for reasons beyond the scope of this paper is the "most important jurisdiction" for

corporate law in the United States. Further, a majority of states have laws expressly allowing directors to consider stakeholders in addition to stockholders. However, the statutes in these states have limited effectiveness, in part because the statutes generally do not allow these other constituencies to elect directors or even bring a lawsuit to protect their interests, while stockholders do have such rights. *See generally* Lyman Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, at 11, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew Gold eds., forthcoming 2016), https://ssrn.com/abstract=2814231. The federal government, as well as the listing rules on the stock exchanges, generally defer to the states on the duties of directors. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (corporations generally governed by state of incorporation). As a result, Delaware corporate law remains the most influential body of law in the country today, as it is the state of incorporation for well over half of U.S. public companies (as well as a substantial number of private companies). Given the influence of Delaware, the development of stockholder primacy in that state will be the focus of this paper.

[14] Many historians have noted that asking the question "what if" can also help eliminate what has been called "hindsight bias." *See* STEPHEN E. AMBROSE ET AL., THE COLLECTED WHAT IF? EMINENT HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN xiv (Robert Cowley ed., 2001). I find that helpful in this context because the prevailing wisdom of shareholder primacy is so strong. The potential for hindsight bias has also been recognized as a risk in director decision-making process. *See CDX Holdings, Inc., v. Fox*, C.A. No. 8031-VCL (Del. Ch. July 28, 2015), *aff'd*, No. 526 (Del. June 6, 2016); *see also* Travis J. Laster, *Cognitive Bias in Director Decision-Making*, 20 CORP. GOV. ADVISORS 1 (Nov.-Dec. 2012).

[15] Leo E. Strine Jr., *The Dangers of Denial: the Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015).

[16] That said, I wish to make clear that I am not challenging the view, so eloquently set forth by Chief Justice Strine in The Dangers of Denial, as well as by such learned jurists as former Chancellors Chandler and Allen, that Delaware law currently requires directors to "make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare." *See id.* at 771-72; *see also eBay*, 16 A.3d at 34; *TW Servs., Inc. v. SWT Acquisition Corp.*, 14 Del. J. Corp. L. 1169, 1183-84 (Del. Ch. 1989). Rather, as discussed in more detail below, the purpose of this essay is to review some of the broader, non-legal developments that coincided with the development of this case law, as well as to consider "what if" the law had not developed in this fashion.

[17] One recent study by the Brookings Institute found that the top twenty law schools and top twenty business schools in the United States routinely teach that maximizing shareholder value is "settled law" and that students are taught that their job as "corporate leaders" is to "enhance shareholder value and not to follow broader concepts of the corporation." *See* Darrell M. West, *The Purpose of the Corporation in Business and Law School Curricula*, BROOKINGS, July 19, 2011, at 17-19, https://www.brookings.edu/wp-content/uploads/2016/06/0719_corporation_west.pdf.

[18] *See, e.g.*, Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 191-92 (2007) (noting that the "Delaware Court of Chancery, as an equity court, has wide latitude to craft remedies and mold precedent to fit particular fact patterns in the tradition of the English High Court of Chancery. This fact has allowed the Court of Chancery to maximize efficiency in resolving disputes while undercutting the future applicability of precedent, which has led to a tension between efficiency and predictability.").

[19] For example, and as discussed in more detail below, in just the last decade the Delaware courts have fundamentally changed the duties owed to creditors. *See infra* Section III. Similarly, but perhaps more notably for those focused on M&A litigation, over the last few years the Court of Chancery has, for example, developed new laws allowing forum-selection bylaws and changed prior law relating to the settlement of merger litigation, and in particular disclosure settlements in the context of merger litigation. *See, e.g., Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (upholding the

validity of exclusive forum provision); *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016) (rejecting disclosure-only settlement and providing new standard for approval of such a settlement).

[20] Former Chancellor Allen expressed this notion long ago in his seminal article on the "schizophrenic" development of corporate law. *See* Allen, *supra* note 12, at 262 ("Corporation law and, indeed, the law generally, is not simply what it may seem at first, a comprehensive system of legal rules. While it is that, it is also a great deal more. People who think of law as a system of legal rules alone fail to understand that law is a social product, inevitably complex, at points inescapably ambiguous, and always dynamic—always becoming something new. Of course, it is essential…to understand the legal rules that at any moment constitute the most elemental part of that body of law. But…[i]n order to grasp the dynamic feature of legal rules, it is necessary to see them in their historical and social context. For while, in one sense, legal rules exist "out there," constituting shared interpretations of our common legal culture, they are, as well, continually re-created within that culture through interpretation.").

[21] ADOLF A. BERLE JR., THE 20TH-CENTURY CAPITALIST REVOLUTION 169 (1954). For a lengthier discussion of this issue, *see* David J. Berger, *One Practitioner's Random Thoughts on Shareholders' Rights in the Modern World*, *in* THE ACCOUNTABLE CORPORATION: ESSAYS IN CORPORATE GOVERNANCE 121 (Marc J. Epstein & Kirk O. Hanson eds., 2006).

[22] Strine, *supra* note 15, at 797.

[23] *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) (J. Douglas dissenting). As Justice Douglas recognized, many inanimate objects have standing to sue when their "rights" are impacted, including ships, corporations, various associations and other groupings.

[24] Allen, *supra* note 12, at 281.

[25] In taking this position I do not assume that Justice Moore in Unocal anticipated providing rights to non-stockholder constituencies, that Revlon was in any way a change from the court's decision in Unocal, or that the Delaware courts "should have" supported a non-stockholder constituency regime. Instead, I simply try to view what a legal structure that protected the different constituencies identified by Justice Moore might look like, including assuming that these different constituencies had the right to enforce the obligations owed to them by the board.

[26] For a longer discussion of some recent cases that have changed the way we currently view corporations and corporate law, as well as a discussion of the potential impact of these decisions, *see* Leo E. Strine Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 423 (2016) (discussing recent federal decisions that have changed the power of corporations and limited the ability to regulate corporate behavior).

[27] *See generally* Berger, *supra* note 21.

[28] *See id.* at 123.

[29] GEORGE W. MERCK, MED. COLL. OF VA. AT RICHMOND, MEDICINE IS FOR THE PEOPLE, NOT THE PROFITS (Dec. 1, 1950), https://www.merck.com/about/our-people/gw-merck-doc.pdf.

[30] Adolf A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolf A. Berle Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). As is by now well known, Berle and Dodd started from the same assumption: that the corporation would be run by its managers, largely free from stockholder interference. (Berle analogized corporate managers to "princes and ministers." *See* Berle, *For Whom Corporate Managers Are Trustees*: *A Note*, *supra*, at 1366).

[31] Strine, *supra* note 15, at 1 n.1. Berle and Dodd also differed substantially on the purpose of the corporation, with Berle arguing that the corporation should focus on maximizing shareholder wealth, while Dodd argued that corporations have a "social service as well as a profit-making function." Dodd, *supra* note 30, at 1148.

[32] BERLE, *supra* note 21, at 169.

[33] *See generally* Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (Nat'l Bureau of Econ. Res., Working Paper No. 13106, 2007), http://www.nber.org/papers/w13106.pdf (discussing background and impact of Treaty of Detroit).

[34] For example, Professor Berle, the leading proponent of running the corporation for the benefit of its stockholders, had articulated his vision in 1931 as follows: "[A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears." Berle, *Corporate Powers as Powers in Trust*, *supra* note 30, at 1049. However, as noted earlier, by the mid-1950s Professor Berle had changed his view, writing that "[t]wenty years ago the writer had a controversy with the late Professor E. Merrick Dodd, of Harvard Law School, the writer holding that corporate powers were powers in trust for shareholders while Professor Dowd argued that these powers were held in trust for the entire community. The argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention." BERLE, *supra* note 22, at 169.

[35] Andrew C. Sigler, *Business Forum; Reader Comment; Roundtable Reply*, N.Y. TIMES, Dec. 27, 1981, http://www.nytimes.com/1981/12/27/business/business-forum-reader-comment-roundtable-reply.html (emphasis added); *see generally* THE BUSINESS ROUNDTABLE, STATEMENT ON CORPORATE RESPONSIBILITY (Oct. 1981) (stating that "corporations have a responsibility, first of all, to make available to the public quality goods and services at fair prices, thereby earning a profit that attracts investment to continue and enhance the enterprise, provide jobs, and build the economy…. Business and society have a symbiotic relationship: The long-term viability of the corporation depends upon its responsibility to the society of which it is a part. And the well-being of society depends upon profitable and responsible business enterprises.").

[36] Another concept that did not exist at this time was "corporate governance." For example, neither Berle nor Dodd ever even used the term. Rather, the phrase "corporate governance" first came into widespread use in the mid-1970s, first as part of a Ralph Nader-led project to "democratize" and control large corporations, followed by SEC hearings in the late 1970s. *See generally* ROBERT TEITELMAN, BLOODSPORT: WHEN RUTHLESS DEALMAKERS, SHREWD IDEOLOGUES, AND BRAWLING LAWYERS TOPPLED THE CORPORATE ESTABLISHMENT 82 (2016).

[37] For the origins of this system *see* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (rev. ed. 1993). For a more detailed discussion of this system and its evolution to a shareholder primacy system, *see generally* Ralph Gomory & Richard Sylla, *The American Corporation*, 142 DAEDALUS, no. 2, 2013, at 102.

[38] I find the name "stakeholder primacy" not particularly helpful, as like "stockholder primacy" or "director primacy," these concepts have become politically loaded and not particularly meaningful. Rather, in my experience the real question is who gets to write the rules, elect directors and enforce rights? Simply giving directors the option to consider non-stockholder constituencies (as many states have done) has proven to be largely meaningless in the absence of giving these other constituencies the right to hold directors accountable if directors did not consider their interests. *See generally* Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209 (2012).

[39] *See* Martin Lipton, *Takeover Bids in the Target's Boardroom,* 35 BUS. LAW. 101 (1979).

[40] Messrs. Fischel and Easterbrook were leading members of the fast-growing "law and economics" movement, then led by academics associated with the University of Chicago. The law and economics movement also had significant support within the Reagan administration. *See generally* JANE MEYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016) (discussing the relationship between the law and economics movement and the Reagan Administration); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

[41] *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981)

[42] *See* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983); *see also* Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top Management Incentives*, 98 J. POL. ECON. 225 (1990) (arguing that top management should be paid primarily in stock, to better align their incentives with the company's shareholders).

[43] For a good discussion of the history leading to the adoption of Rule 10b-18, as well as some of the Rule's current effects, *see* William Lazonick, *Profits Without Prosperity*, HARV. BUS. REV., Sept. 2014, https://hbr.org/2014/09/profits-without-prosperity.

[44] There were, of course, many changes during the 1980s and 1990s that further supported shareholder primacy. For example, the growth of the institutional investor and the newly adopted requirements under the U.S. labor code that institutional investors vote their proxies solely for the economic benefit of the beneficiary, without regard to other interests, led to labor and other unions voting in support of transactions that resulted in many of their members losing their jobs and/or benefits. The Reagan administration also supported the benefits of shareholder primacy and an active m&a market. *See, e.g.*, COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT (Feb. 1985) (arguing that shareholders are the "true owners" of the corporation and that serving their interests is "socially beneficial); *see generally* TEITELMAN, *supra* note 36, at 180-86 (discussing impact of the CEA's Report).

[45] For a lengthier discussion of the benefits and costs of expanded stock buybacks, *see* Lazonick, *supra* note 43. More recently, scholars have argued that companies who do not engage in substantial share repurchases are more likely to benefit from long-term investors, but the benefits to (and from) long-term investors are less clear if (as is now typical) a company engages in substantial repurchases of its own stock. *See, e.g.*, Jesse Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554 (2015).

[46] Delaware had been the subject of some academic attacks during this period. *See, e.g.*, William Cary, *Federalism and Corporate Law*, 83 YALE L.J. 663 (1974) (arguing that Delaware had a vested interest in maintaining its dominance in corporate law and that the federal government should consider adopting minimum corporate standards). The criticism of Delaware was heightened following the Delaware Supreme Court's decision in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), a decision which some called "one of the worst decisions in the history of corporate law." *See* Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985)

[47] 493 A.2d 946 (Del. 1985).

[48] *Id*. at 955.

[49] *Id*. at 955-56 (citation omitted).

[50] *Id*. (citing Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities: an Update*, at 7, *in* ABA NATIONAL INSTITUTE ON THE DYNAMICS OF CORPORATE CONTROL (Dec. 8, 1983)).

[51] *Id*. at 955 n.10 (citation omitted).

[52] Michael C. Jensen, *When Unocal Won Over Pickens, Shareholders and Society Lost*, FINANCIER, Nov. 1985, at 50-52; *see generally* TEITELMAN, *supra* note 36.

[53] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173, 176 (Del. 1986).

[54] *Id*.

[55] Strine, *supra* note 15, at 773. As described by Chief Justice Strine, Revlon also led to substantial criticism, but this time from the proponents that the corporation should serve constituencies in addition to stockholders. *Id*.

[56] Much of the remaining portion of this section is based upon several recent articles written by Chief Justice Strine, who is both among the finest corporate law scholars of this era and, as the Chief Justice of the Delaware Supreme Court, presumably the most knowledgeable person on the current state of Delaware law. *See, e.g*, Strine, *supra* note 15; Leo E. Strine Jr., *Making it Easier for Directors to "Do the Right Thing*, 4 HARV. BUS. L. REV. 235 (2014); Leo E. Strine Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1 (2010) [hereinafter Strine, *Corporate Governance Question*]. That said, obviously all errors about the current state of Delaware law (or anything else in this essay) are solely the responsibility of the author.

[57] 16 A.3d 1 (Del. Ch. 2010).

[58] *Id*. at 8.

[59] *Id*. at 34.

[60] *Revlon*, 506 A.2d at 176 (emphasis added).

[61] *Unocal*, 493 A.2d at 955-56.

[62] While many states have adopted so-called stakeholder constituency statutes, these statutes are largely ineffective because they don't give these other stakeholders the opportunity to enforce their rights, either by the ballot or in court. As a result, these statutes have been criticized for simply giving directors greater discretion to act contrary to the interests of shareholders without any meaningful check on the scope of this expanded authority.

[63] Again, at the risk of being redundant, I am not disputing what Delaware law is, as currently articulated by (among others) Chief Justice Strine. I have been privileged to litigate many cases before Chief Justice Strine (including when he was both Chancellor and Vice Chancellor) as well as many of the other distinguished jurists on the Delaware courts, and completely defer to their views as to what Delaware law currently is. I am only asking "what if," and by this hypothesizing what Delaware law could be and how the world might look different if the law developed differently.

[64] *Quandrant Structured Prods. Co. v. Vertin*, 115 A.3d 535, 543-45 (Del. Ch. 2015).

[65] Shai Levi et al., *Does Fiduciary Duty to Creditors Reduce Debt-Covenant-Avoidance Behavior?* (Mar. 26, 2016), https://ssrn.com/abstract=2800724.

[66] *Id*.

[67] *See, e.g.*, Strine, *Corporate Governance Question*, *supra* note 56, at 7-9; *see also* Leo E. Strine Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759 (2006). This is again why the current regime of stakeholder constituency statutes outside of Delaware have proven to be largely ineffective; the constituencies these statutes were designed to benefit have no ability to remove or challenge the directors if their rights are not considered.

[68] *See* Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 933-36 (2013); Richard A. Ippolito, *Tenuous Property Rights: The Unraveling of Defined Benefit Contracts in the U.S.*, *in* PENSION POLICY IN AN INTEGRATING EUROPE 175-76 (Onotato Casellino & Elsa Fornero eds., 2003) (describing the specific regulatory changes and some of the policy implications).

[69] There were about 580 terminations between 1980 and 1985, and more than 1500 in 1986 alone, at the height of the takeover boom. Between 1980 and 1989, 1635 plans were terminated, yielding an aggregate of $18 billion (corresponding to 45% of these plans' assets), to shareholders. *See generally* Gelter, *supra* note 68, at 935-36.

[70] *See, e.g.*, *In re Anderson, Clayton S'holders Litig*., 519 A.2d 680 (Del. Ch. 1986) (noting that the board had decided to terminate "certain overfunded pension plans" for the benefit of shareholders, and assuming *sub silentio* that such termination did not create any obligation to share the excess in those pension plans with the beneficiaries of the plans).

[71] As the Wall Street Journal recently reported, many companies eliminated their pension plans in favor of 401(k) plans to cut expenses, while others simply eliminated all types of pension plans. The result is that nearly half of all households have no retirement savings at all, and retirement savings at virtually all levels of income are below recommended amounts. *See* Timothy Martin, *The Champions of the 401(k) Lament the Revolution They Started*," WALL ST. J., Jan. 2, 2017, http://www.wsj.com/articles/the-champions-of-the-401-k-lament-the-revolution-they-started-1483382348.

[72] PETER F. DRUCKER, THE PRACTICE OF MANAGEMENT (2006).

[73] Steve Denning, *The Origin of 'The World's Dumbest Idea': Milton Friedman*, FORBES, June 26, 2013.

[74] *See* Ben W. Heineman, Jr., *Steve Jobs and the Purpose of the Corporation*, HARV. BUS. REV., Oct. 12, 2011.

[75] ROGER L. MARTIN, FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL (2011).

[76] *Id*.

[77] *Id*.; *see also* Roger Martin, *Fixing the Game: The Problem with Expectations*, HUFFINGTON POST, May 4, 2011, http://www.huffingtonpost.com/roger-martin/the-problem-with-expectat_b_857458.html.

[78] *See, e.g.*, Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.-Feb. 2011; Steven Pearlstein, *Social Capital, Corporate Purpose and the Revival of American Capitalism*, CTR. OF EFFECTIVE PUB. MGMT., BROOKINGS, Jan. 2014,

https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsPearlsteinv5_Revised-Feb-2014.pdf.

[79] *See* MARTIN, *supra* note 75, (noting that total stockholder returns during the period of "stakeholder" capitalism (i.e., from approximately 1933-1976) was 7.5% compounded annually, while in the years of "shareholder capitalism" from 1976-2010 the S&P total return was 6.5% compounded annually).

[80] *Unocal*, 493 A.2d at 955.

[81] *Compare, e.g*., *Espinoza v. Aaron's Rents, Inc.*, No. 01-14-00843-CV, 2016 Tex. App. LEXIS 423 (Tex. Ct. App. Jan. 14, 2016), *and Beverick v. Koch Power, Inc.*, 186 SW.3d 145,153 (Tex. Ct. App. 2005) (holding that under Texas law an employer does not owe a fiduciary duty to an employee or manager), *with Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (quoting RESTATEMENT (SECOND) OF AGENCY § 13 cmt. a (1958)) (concluding that "when a fiduciary relationship of agency exists between employee and employer, the employee has a duty to act primarily for the benefit of the employer in matters connected with his agency").

[82] *See, e.g*., *Triton Constr. Co. v. E. Shore Elec. Servs.*, Inc., No. 3290-VSP, 2009 Del. Ch. LEXIS 88 (Del. Ch. May 18, 2009) (holding that an employee in Delaware law owes fiduciary duties to his employee, as under "fundamental principles of agency law, an agent owes his principal a duty of good faith, loyalty and fair dealing).

[83] As I have already noted, Delaware courts have held that corporations have standing to sue employees for breach of fiduciary duty, and many other countries, such as Germany, have companies that include employees. Query whether the lack of these type of structural safeguards allowed boards to conclude that they had no obligation to share any "excess" from the employee pension funds with their employees, and courts to generally not place such an obligation on the board.

[84] Some may point to the failures of some companies, such as various airlines like United, that failed in the late 1990s/early 2000s despite having significant ownership by employee stock ownership plans ("ESOPs"). However there is considerable analysis suggesting that these airlines failed for reasons other than the ESOPs, and that notwithstanding the ESOPs, employee interests were not sufficiently considered. *See, e.g*., Cory Rosen, *Observations on Employee Ownership: United Airlines, ESOPs and Employee Ownership*, NECO, 2002, https://www.nceo.org/observations-employee-ownership/c/united-airlines-esops-employee-ownership. In contrast, Southwest Airlines, one of the most successful airline companies over the last half century, publicly proclaims that it puts its "employees first, customers second and shareholders third", and that this policy is the reason for its success. *See* Emmie Martin, *Southwest Puts Employees First*, BUSINESS INSIDER, July 29, 2015 http://www.businessinsider.com/southwest-airlines-puts-employees-first-2015-7.

[85] *See, e.g*., Justin Wolfers & Jan Zilinsky, *Higher Wages for Low-Income Workers Lead to Higher Productivity*, PETERSON INST. FOR INT'L ECON., Jan. 13, 2015.

[86] MICHAEL REICH ET AL., U.C. BERKELEY INST. INDUS. REL., LIVING WAGES AND ECONOMIC PERFORMANCE: THE SAN FRANCISCO AIRPORT MODEL (Mar. 2003), http://laborcenter.berkeley.edu/pdf/2003/sfo_mar03.pdf; *see also* John Pepper, *Workers and Businesses Benefit From a Higher Minimum Wage*, U.S. DEP'T OF LAB. BLOG (Aug. 7, 2014), https://blog.dol.gov/2014/08/07/workers-and-businesses-benefit-from-a-higher-minimum-wage/.

[87] *See, e.g*., Ernesto Dal Bó et al., *Strengthening State Capabilities: The Role of Financial Incentives in the Call to Public Service*, 128 Q. J. ECON. 1169 (2013); *see also* Stephen V. Burks et al., *The Value of Hiring Through Employee Referrals*, 130 Q. J. ECON. 805 (2015) (discussing how higher wages can lead to more employee referrals, and such employees are more productive than non-referred workers).

[88] *See, e.g.*, Wolfers & Zilinsky, *supra* note 85.

[89] *See, e.g.*, Phil Wahba, *McDonald's CEO Says Better Worker Benefits Boosting U.S. Sales*, FORTUNE, Apr. 22, 2016; Myles Udland, *Starbucks Giving Every U.S. Employee a Raise is Part of the Biggest Economic Story in America*, BUSINESS INSIDER, July 11, 2016.

[90] *See generally* George Serafeim et al., *The Role of the Corporation in Society: Implications for Investors*, CALVERT-SERAFEIM SERIES, Sept. 2015 [hereinafter Serafeim et al., *Calvert Paper*]; George Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research*, HARVARD BUS. SCH. (May 2014) [hereinafter Serafeim, *Role of the Corporation*].

[91] *See* Serafeim, *Role of the Corporation*, *supra* note 90, at 6. There are less than 4,000 companies that are actively traded on the NYSE and NASDAQ, with another approximately 15,000 stocks traded "over the counter" in the U.S. The remaining companies are traded on various exchanges and in markets across the globe. However, this figure does not include the growth of companies controlled by private equity firms, which has also increased dramatically in recent years. For example, Blackstone alone has a portfolio of over 81 companies, with $70 billion in combined annual revenue and directly employs more than 560,000 people around the world. *See Private Equity*, BLACKSTONE, http://www.blackstone.com/the-firm/asset-management/private-equity (last visited Jan. 13, 2017). Many private equity firms have entered the market for services that were traditionally provided by governments, which has given rise to entirely new issues. *See, e.g.*, Danielle Ivory et al., *What Can Go Wrong When Private Equity Takes Over a Public Service*, N.Y. TIMES, June 25, 2016.

[92] *Id*.

[93] *Id*.; *see also* Serafeim et al., *Calvert Paper*, *supra* note 90, at 6-7.

[94] It is worth noting that as the Global 1000 have increased in size, institutional investors have also increased in size. For example, as of 2011 the ten largest institutional investors in the world collectively held 27.1% of the outstanding shares, on average, across Global 1000 companies. *See* Serafeim, *Role of the Corporation*, *supra* note 90, at 9.

[95] *Id*. at 7.

[96] *2016 Edelman Trust Barometer Global Report*, EDELMAN, Jan. 17, 2016, at 34, http://www.slideshare.net/EdelmanInsights/2016-edelman-trust-barometer-global-results.

[97] *See* Serafeim, *Role of the Corporation*, *supra* note 90, at 11.

[98] *Unocal*, 493 A.2d at 955-56.

[99] *See, e.g.*, Heather Long, *Over Half of Americans Have $0 in Stocks*, CNN, (Apr. 10, 2015), http://money.cnn.com/2015/04/10/investing/investing-52-percent-americans-have-no-money-in-stocks/; Justin McCarthy, *Little Change in Percentage of Americans Who Own Stocks*, GALLUP, Apr. 22, 2015, http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx (finding that 55% of Americans are invested in the stock market, which includes individual stocks, mutual funds and 401(k) and other retirement plans).

[100] *Id*.; *see also* Ralph Gomory, *Inversions are Revealing the Ugly Face of Shareholder Value*, HUFFINGTON POST (Sept. 9, 2014), http://www.huffingtonpost.com/ralph-gomory/inversions-are-revealing-_b_5785376.html.

[101] *See* Strine, *Corporate Governance Question*, *supra* note 56, at 10-11.

[102] *Id*. at 11. Historically the growth in trading over holding is even more extreme. For example, the average holding period for an equity traded on the New York Stock Exchange in the 1950s was about seven years; today its about six months. Similarly, households owned more than 90% of the U.S.-based public company, while today institutions (both domestic and foreign) own the vast majority of equity traded in the U.S., and it is these institutions that are engaged in the most active trading. *See generally* Justin Fox & Jay Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July-Aug. 2012.

[103] I have previously written about this phenomenon, and offered some modest suggestions for trying to encourage stockholders to have a longer-term focus. *See, e.g*., David J. Berger et al., *Tenure Voting and the U.S. Public Company* (Mar. 1, 2016), https://ssrn.com/abstract=2740538.

[104] WSGR represented Apple in its IPO.

[105] *See generally* Fox & Lorsch, 102.

[106] *See, e.g*, Anne Beyer et al., *Does the Composition of a Company's Shareholder Base Really Matter*, STANFORD CLOSER LOOK SERIES, July 2014.

[107] By far the most thorough explanation of the correlation between wealth and income inequality is THOMAS PIKETTY, CAPITAL IN THE 21ST CENTURY (Arthur Goldhammer trans., President & Fellows of Harv. Coll. 2014) (2013); *see also* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012).

[108] 170 N.W. 668 (Mich. 1919).

[109] Allen, *supra* note 12. In recent years many scholars have also challenged the validity and/or soundness of Dodge v. Ford. *See, e.g*., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008).

[110] *See generally* GALBRAITH, *supra* note 37.

[111] *See generally* TEITELMAN, *supra* note 36.

[112] *See* Allen, *supra* note 12, at 280-81.