Dynamic Corporate Purpose: Decentralizing the Choice over Director Orientation

The debate over corporate purpose has turned into a "gordian knot" where parties with entrenched beliefs about what the corporation should or should not be within society refuse to waver. There are inherent flaws with the governance models proposed by academics, politicians, and practitioners alike, so a novel method for setting and maintaining corporate purpose is required. This Note asks why there must be a one-size-fits-all approach to purpose and proposes a solution: dynamic corporate purpose.

This Note argues that states should not mandate all corporations hold the same corporate purpose but instead should use the logic of the public benefit corporation structure that allows for the firm to select its own purpose. By decentralizing corporate purpose, states like Delaware can leverage the economic advantages of shareholder primacy while also giving corporations flexibility to provide greater public benefits. States can harness the advantages of stakeholder capitalism without sacrificing the accountability and clarity of shareholder primacy. Exposing corporate purpose to market forces uses natural tension points to avoid traditional pitfalls of stakeholder-focused models—this is the power of dynamic corporate purpose.

To do so, this Note first discusses the historical evolution of the debate between shareholder primacy and stakeholder governance before analyzing the advantages and disadvantages of existing and proposed governance mechanisms. Dynamic corporate purpose fills this gap in an effort to minimize the disadvantages of existing mechanisms to provide the state with a model for economic and societal success.

INTRODUCTION

Some considered it a hollow public relations stunt,[1] but in 2019 the Business Roundtable lit a fire in the academic debate over a simple question: for whom is the corporation managed?[2] While most scholars generally agree that the role of corporations is to advance societal welfare—either economically or more broadly—vigorous debate surrounds the appropriate mechanism for corporations to maximize such welfare.[3] Should corporations be laser focused on shareholders to

1. *See* Elizabeth Warren, *Business Roundtable Declaration "Was Just an Empty Publicity Stunt,"* FAST CO. (Sept. 29, 2020), https://www.fastcompany.com/90557370/elizabeth-warren-business-roundtable-declaration-was-just-an-empty-publicity-stunt [https://perma.cc/3V8W-AUR7]; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 98 (2020) [hereinafter Bebchuk & Tallarita, *Illusory Promise*] (describing the change as "largely representing a rhetorical public relations move"); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899421 [https://perma.cc/2R2P-C26X] [hereinafter Bebchuk & Tallarita, *Will Corporations Deliver Value*] (showing empirically that the statement did not represent a meaningful commitment by signatory companies). Interestingly, Senator Warren and Professor Bebchuk are considered to be on opposite sides of the corporate-purpose spectrum, showing the complex and compelling web of perspectives in this debate.

2. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://opportunity.businessroundtable.org/ourcommitment [https://perma.cc/4UJ4-2HSL] [hereinafter *2019 Business Roundtable Statement*] (suggesting each corporation pursues its own corporate purpose and promising to support stakeholders beyond shareholders).

3. *See* Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose* 5–6 (Eur. Corp. Governance Inst., L. Working Paper No. 515, 2020) (arguing shareholder primacy advocates suggest that "the focus on shareholders is a tool for increasing social welfare and not an end in itself"). *But see* Margaret M. Blair, *Corporate Law and the Team Production Problem* 2 (Vand. L. & Econ., Working Paper No. 12-12, 2012) (arguing that advocates

minimize agency costs between owners and managers, or should corporations have a wider purview to support the interests of nonshareholders more directly? This Note takes stock of how the debate between shareholder primacy and stakeholder governance has developed since the 1930s, through the 1980s, and into the twenty-first century. Much has changed since legal scholar Adolf Berle and economists Gardiner Means and Milton Friedman analyzed the corporation's role within society, but the question remains at the heart of capitalism—should corporations prioritize shareholders to maximize economic benefit, or can directors effectively balance the interests of stakeholders to maximize societal benefit?

This Note argues that because of the increasing power of consumers and institutional investors, the market itself can resolve the debate between shareholder primacy and stakeholder capitalism if states apply the logic of public benefit corporations ("PBC" or "PBCs") and require corporations to set their own corporate purposes.[4] This idea of *dynamic corporate purpose* contends that the state does not need to provide a one-size-fits-all approach for directors to balance the interests of shareholders and stakeholders so long as investors have clarity as to the purpose of individual firms. Part I of this Note provides the backdrop against which the argument between shareholder primacy and stakeholder governance has developed over the last one hundred years. Part II breaks down the advantages and disadvantages of structures that policymakers have experimented with or advocated for, in an attempt to illustrate the decisions states can make in the years to come.[5] Finally, Part III lays out the framework for states to implement dynamic corporate purpose to leverage the advantages of shareholder primacy without neglecting the interests of wider stakeholder groups. Thereafter, Delaware, and other states, can better align the interests of corporations with those of society by prompting individual corporations to report against a clear, enumerated purpose.

of shareholder primacy have backed away from the idea that maximizing share value maximizes the firm's social value).

4. "If you want to fix something, expose it to market forces." Mike Speiser (@laserlikemike), TWITTER (Jan. 6, 2022, 1:06 PM), https://twitter.com/laserlikemike/status/1479152310739607554 [https://perma.cc/C4DQ-JPE6].

5. *See* John G. Ruggie, Caroline Rees & Rachel Davis, *Making 'Stakeholder Capitalism' Work: Contributions from Business & Human Rights* 3 (Harv. Kennedy Sch. Fac. Rsch. Working Paper Series, RWP 20-034, 2020) (saying the question has shifted "from *whether* corporate boards should take stakeholder interests into account, to *how* it should do so").

I. THE EVOLUTION OF CORPORATE LAW IN DELAWARE

A. History and Norms of Shareholder Primacy

When legal scholars discuss shareholder primacy, the first case that typically comes to mind is *Dodge v. Ford Motor Co.*[6] While the case did not establish shareholder primacy, it is the most poignant example of directors being admonished by a state court for not pursuing shareholder wealth maximization.[7] The case was heard by the Michigan Supreme Court, so its holding is not binding elsewhere, but its conceptual application of corporate purpose as the central driver of agency problems between corporations and their owners has reverberated through academia for the past century.[8]

Corporate law, and the requisite treatment of shareholders by directors, is governed by state law.[9] States charter businesses and often compete with other states in the laws and institutions governing these corporations in order to charter more for greater state revenue.[10] Delaware is winning—sixty percent of the Fortune 500 is chartered in the state, which has a population of a million people.[11] While it was Michigan that affirmed the construct of shareholder primacy by holding that Ford could not use cash to lower prices and raise salaries in an effort to avoid paying dividends to minority shareholders,[12] Delaware has its own line of cases that strengthen the idea that directors must

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6. 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

7. *Id.* (holding that Ford's decision to end special dividends for shareholders to lower prices for customers breached the duty to operate the business for shareholder interests).

8. *See, e.g.*, Michael J. Vargas, Dodge v. Ford Motor Co. *at 100: The Enduring Legacy of Corporate Law's Most Controversial Case*, 75 BUS. LAW. 2103, 2118 (2020) (describing how the case is rarely cited in case law but is oft cited in the legal academy).

9. Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking* 1 (Eur. Corp. Governance Inst., L. Working Paper No. 575, 2021) ("It is a bedrock (though still controversial) principle of American business law that corporate formation and governance are the province of state, not federal, law.").

10. *See, e.g.*, Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709–11 (1987) (assessing whether states competing for corporate-law supremacy is a "race for the bottom").

11. Peter A. Atkins, Marc S. Gerber & Edward B. Micheletti, *Social Responsibility and Enlighted Shareholder Primacy: Views from the Courtroom and Boardroom*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Feb. 4, 2019), https://www.skadden.com/insights/publications/2019/02/social-responsibility-and-enlightened-shareholder [https://perma.cc/3HEQ-AN5F]; *QuickFacts: Delaware*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/DE (last visited Jan. 5, 2022) [https://perma.cc/Z4CG-L7RG].

12. *Dodge v. Ford*, 170 N.W. 668, 684 (Mich. 1919).

look to maximize profits.[13] Like any federalist construct, different states have taken other approaches, and many have been less inclined to support such staunch shareholder primacy.[14]

Nevertheless, Delaware is the power center of corporate law because of the depth of its case law and the concentration of corporations in the state. There, three court opinions lay the foundation for shareholder primacy and its boundaries. First, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* held that when sale of the corporation is inevitable, directors must act to obtain the best price for shareholders.[15] By this logic, directors *cannot* consider factors that support interests of other stakeholders if those factors limit financial outcomes for shareholders.[16] After *Revlon*, *Paramount Communications, Inc. v. Time, Inc.* seemingly limited shareholder primacy in Delaware by saying "absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover."[17] But this limitation did not last. In 2010, the Delaware Chancery Court ruled in *eBay v. Newmark* that directors have an obligation to attempt to earn profits so long as some special character (e.g., status as a nonprofit) is not stated in the firm's charter.[18] Succinctly put, "[t]he [traditional] corporate form . . . 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."[19] Corporate form matters in the state of Delaware, and for-profit Delaware corporations

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13. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("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."); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed . . . [to] the maximization of the company's value at a sale for the stockholders' benefit.").

14. *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 585 (N.J. 1953) (permitting charitable gifts); Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (permitting stakeholder interest balancing).

15. 506 A.2d at 182 ("The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

16. When discussing "stakeholders" broadly, I include five groups commonly bundled together: employees, customers, communities, suppliers, and the environment. While shareholders are certainly stakeholders themselves, this Note refers to stakeholders as nonshareholders that are directly affected by corporate decisions.

17. 571 A.2d 1140, 1150 (Del. 1990).

18. 16 A.3d at 6, 34–35.

19. *Id.* at 34.

are expected to "promote the value of the corporation for the benefit of [their] stockholders."[20] While directors can make strategic decisions that also advance other stakeholder interests, "[p]romoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders."[21] These cases suggest there are contours to shareholder primacy, but nevertheless the prevailing conceptual rule for most directors in Delaware is to maximize shareholder wealth.[22]

Delaware case law is just the beginning—influential norms have been advanced by academics and taught in law and business school classrooms around the country.[23] Academic discussions on shareholder primacy most notably began with debate between Professors Merrick Dodd and Adolf Berle following the stock market crash of 1929. Professor Berle argued that directors were too unaccountable to shareholders, so pure director discretion should be limited by a clear orientation toward shareholder interests.[24] In response, Professor Dodd emphasized that pure profit focus by corporations was undesirable, and wider-scope decisionmaking improves corporate performance.[25] The next year, Professor Berle wrote in more detail how the separation of ownership and control between managers and rationally apathetic shareholders leads to considerable agency problems, and shareholder primacy reduces these concerns.[26] In general, these academics seem to be optimizing for different goals, such as limiting agency problems or curing societal ills through corporate purpose, so it is unsurprising that the methods for accomplishing such goals differ as well.

Milton Friedman took this concept a step further in his notorious 1970 New York Times essay.[27] Professor Friedman, in what later

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20. *Id.*

21. *Id.* at 33; *see also In re* Pattern Energy Grp. Inc. S'holders Litig., No. 2020-0357-MTZ, 2021 WL 1812674, at *1 (Del. Ch. May 6, 2021) (denying a motion to dismiss where directors prioritized insiders and a supplier over the interests of minority shareholders).

22. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 184 (2013) (arguing that "shareholder primacy is indeed the law"). *But see* Blair, *supra* note 3, at 10 (saying "corporate law does not require that directors or managers must maximize share value" except when in a *Revlon* situation).

23. *See* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1015 (2013) (suggesting shareholder primacy is a norm cultivated "in the leading business schools, in board rooms, and in the business press").

24. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1073–74 (1931).

25. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–55 (1932).

26. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 352–57 (1932).

27. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/RUZ3-SMN9].

became known as the Friedman Doctrine, asserted the only corporate social responsibility is to create shareholder value—managers are responsible for conducting business in accordance with the desires of shareholders.[28] Friedman argued not only that agency problems should be dealt with by orienting directors toward shareholder interests but also that shareholder primacy was the best proxy for wider societal interests.[29] Professor Bebchuk has reiterated this point in his modern writings that support strict shareholder primacy as a method for maximizing shareholder and stakeholder welfare.[30]

While some academics have been emphatic about the presence of strict shareholder primacy, others debate whether it is simply a norm in Delaware or whether case law has fully incorporated the concept. Leo Strine, a former Chancellor in Delaware, for example, is adamant that shareholder primacy is baked into the case law of the state.[31] Others, however, disagree about the intractability of shareholder primacy or suggest that critics overstate the tension created by orienting toward shareholders.[32] Professor Lynn Stout went so far as to argue the "dogma" of shareholder primacy "lacks any solid basis in actual corporate law."[33] In her view, the business judgment rule provides directors "virtually unfettered legal discretion to determine the corporation's goals" and the flexibility to make long-term decisions that may reduce profitability.[34] While Stout was correct in saying the business judgment rule provides directors wide latitude in decisionmaking, the norm that directors are expected to prioritize

28. *Id.*

29. *Id.*

30. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 98 (discussing the conceptual issues with "pluralistic stakeholderism and its implementation").

31. 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, 765–68 (2015) ("The contention that [the Delaware General Corporation Law] proves directors are free to promote interests other than those of stockholders ignores the many ways in which the DGCL focuses corporate managers on stockholder welfare by allocating power only to a single constituency, the stockholders."); *see also* Yosifon, *supra* note 22 (arguing shareholder primacy is the law of the land in Delaware).

32. Millon, *supra* note 23, at 1015 (asserting strict shareholder primacy is "not grounded in legal doctrine" and is instead grounded in the manifestation of social norms); Blair, *supra* note 3, at 10.

33. Lynn A. Stout, *Issues in Governance Studies: The Problem of Corporate Purpose*, 48 GOVERNANCE STUD. BROOKINGS 1, 4 (2012), https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf [https://perma.cc/NC4T-D7PN].

34. *Id.* at 5. Stout also cites *Air Products & Chemicals Inc. v. Airgas, Inc.* as evidence that directors are not actually required to maximize shareholder wealth. *Id.* (citing Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 98 (Del. Ch. 2011)) (suggesting that if *Revlon* duties have not kicked in, the board "is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover").

shareholders is still widely held and powerful.[35] At the very least, there is a decided norm that directors should act to maximize shareholder value. Otherwise we would not see directors justifying actions that clearly support stakeholders by their perceived positive impacts on shareholders. So, while there are norms of shareholder primacy based on specific fact patterns within Delaware case law, there is debate on the contours and boundaries of the concept, which only increases uncertainty in the marketplace and the classroom.[36]

B. The Emergence of Stakeholder Theory and the Modern Debate

In 1951, Frank Abrams, the chairman of Standard Oil in New Jersey, wrote, "the job of professional management . . . is . . . to maintain an equitable and workable balance among the claims of the various directly interested groups."[37] This statement encapsulates the stakeholder theory of capitalism: directors should be permitted, or even required, to advance the interests of a variety of interested groups—not just shareholders.[38] Many actually viewed stakeholder theory as the dominant concept of director orientation until Professor Friedman's

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35. *See, e.g.*, Peter A. Atkins, Marc S. Gerber, Edward B. Micheletti & Robert S. Saunders, *Directors' Fiduciary Duties: Back to Delaware Law Basics*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Feb. 19, 2020), https://www.skadden.com/insights/publications/2020/02/directors-fiduciary-duties [https://perma.cc/9YQU-3TNG] (explaining that directors' duty of loyalty "requires acting . . . in the best interests of the company and its stockholders"). *But see* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280–81 (1999):

> Thus, the primary job of the board of directors of a public corporation is not to act as agents who ruthlessly pursue shareholders' interests at the expense of employees, creditors, or other team members. Rather, the directors are trustees *for the corporation itself*—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.

(emphasis added).

36. *See* David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 463 (2017) ("Whether and how corporate purpose can be altered from the shareholder primacy rule is now a pressing matter of organizational law."). Pressure on directors to maximize shareholder wealth may be a norm created by the relative power of financial institutions as opposed to adherence to statutory or case law. As discussed *infra* Part III, reform to increase clarity will improve the corporate governance regime regardless of whether shareholder orientation is norm or law.

37. Frank W. Abrams, *Management's Responsibilities in a Complex World*, 29 HARV. BUS. REV. 29, 29 (1951) (shortly thereafter, Abrams included stockholders, employees, customers, and the public at large as the "interested groups"); *see also id.* at 30 (saying businesses "can be made to achieve their greatest social usefulness—and thus their future can be best assured—when management succeeds in finding a harmonious balance among the claims of the various interested groups").

38. *See* Blair & Stout, *supra* note 35, at 280–81 (arguing directors have a fundamentally different role within the organization and are not required to prioritize shareholders).

essay in 1970 and the spree of hostile takeovers in the 1980s.[39] Since, and in the aftermath of the 2009 financial crisis, many have blamed shareholder primacy for increasingly apparent societal externalities caused by corporate action and for increasing economic inequality in the country.[40]

Intensity behind the opposition to shareholder primacy has increased over the last decade. Preeminent corporate attorney Martin Lipton said, "acceptance of and reliance on the Friedman doctrine has been widely eroded, as a growing consensus of business leaders, economists, investors, lawyers, policymakers and important parts of the academic community have embraced stakeholder capitalism as the key to sustainable, broad-based, long-term American prosperity."[41] As Lipton suggests, he is not alone as business leaders have begun to publicly advocate for consideration of wider stakeholder interests.[42] Most notably, the Business Roundtable, an organization made up of leading chief executives, reversed its position on prioritizing shareholders in its 2019 Statement on the Purpose of the Corporation.[43] In the 2019 statement, the business leaders suggested each corporation serves its own "corporate purpose," but the signatories committed to advancing the interests of stakeholders: customers, employees,

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39. *See* Sanjai Bhagat & R. Glenn Hubbard, *For Whom Should Corporations Be Run?*, AM. ENTER. INST.: AEIDEAS (Sept. 4, 2020), https://www.aei.org/economics/for-whom-should-corporations-be-run [https://perma.cc/M66T-4JW2] (suggesting Friedman was responding to unfocused corporations of the 1960s and 1970s where managers could "pursue other objectives than the long-term value of the enterprise for its owners—shareholders"); Lynn A. Stout, *New Thinking on "Shareholder Primacy,"* 2 ACCT., ECON., & L. 1, 2 (2012).

40. *See, e.g.*, Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 74 (2015) (finding it unsurprising that the "corporate power structure [is] driving the growing inequality in the distribution of income"); Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 55–57 (Nat'l Bureau Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193 [https://perma.cc/WUC6-TZGN] (attributing a portion of inequality to power dynamics within corporate governance).

41. Martin Lipton, *The Friedman Essay and the True Purpose of the Business Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 17, 2020), https://corpgov.law.harvard.edu/2020/09/17/the-friedman-essay-and-the-true-purpose-of-the-business-corporation [https://perma.cc/9WJ7-CS83].

42. *See, e.g.*, Jenny Bloom, *It's All a Matter of Trust*, MEDIUM (Mar. 23, 2021), https://medium.com/third-prime/third-prime-its-all-a-matter-of-trust-3a5d2292a5fb [https://perma.cc/A5T2-A9UE] ("We hypothesize that this past year's need for swift action, mixed with businesses' ability to execute without the friction of systematized checks and balances, has amplified the call for businesses to accept the mantle of social leadership.").

43. *Compare 2019 Business Roundtable Statement*, *supra* note 2 (stating that it was "modernizing principles on the role of a corporation" by explicitly acknowledging that corporations need to "create value for all our stakeholders" and not shareholders alone), *with Statement on Corporate Governance*, BUS. ROUNDTABLE 3 (Sept. 1997) [hereinafter *1997 Business Roundtable Statement*] (stating "[t]he notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders fundamentally misconstrues the role of directors").

suppliers, communities, and shareholders.[44] Larry Fink, CEO of BlackRock—the largest institutional investor—has consistently argued that companies must do more than just maximize shareholder wealth, and he has ramped up his rhetoric since 2019 as more voices support stakeholder capitalism.[45] Countless other business leaders have discussed the importance of maximizing stakeholder interests to maximize firm value.[46] Thus, some view stakeholder orientation as the best method to maximize shareholder wealth, while others favor a construct where businesses optimize for wider societal welfare regardless of shareholder return on investment.[47]

Business leaders are not the only public figures calling for more board action focused on stakeholders—progressive politicians have taken up stakeholder capitalism as a main talking point in a quest to defeat growing income inequality. Senator Elizabeth Warren, for example, introduced the Accountable Capitalism Act in an attempt to rid the country of "fundamental" economic problems by shifting corporate law away from a shareholder primacy model and mandating that directors consider the interests of stakeholders.[48] In his campaign for the Democratic nomination for President in 2020, Bernie Sanders often called for greater labor control of corporations in an effort to shift

44. *2019 Business Roundtable Statement*, *supra* note 2. *But see* Bebchuk & Tallarita, *Will Corporations Deliver Value*, *supra* note 1 (showing the signatories did not commit to anything and, instead, simply sought positive publicity).

45. Larry Fink, *Larry Fink's 2019 Letter to CEOs*: *Profit & Purpose*, BLACKROCK, https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter (last visited Oct. 5, 2021) [https://perma.cc/34EC-LWYU] ("Purpose is not the sole pursuit of profits but the animating force for achieving them."); Larry Fink, *Larry Fink's 2018 Letter to CEOs*: *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (JAN. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose [https://perma.cc/9DQR-RPRK] ("As we enter 2018, BlackRock is eager to participate in discussions about long-term value creation and work to build a better framework for serving all your stakeholders."); Andrew Ross Sorkin, *World's Biggest Investor Tells C.E.O.s Purpose Is the 'Animating Force' for Profits*, N.Y. TIMES: DEALBOOK (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/business/dealbook/blackrock-larry-fink-letter.html [https://perma.cc/4PJE-U9TH].

46. This is most applicable to consumer-facing brands and seems to be less apparent in business-to-business ("B2B") industries. Andrew Ross Sorkin, *A Free Market Manifesto That Changed the World, Reconsidered*, N.Y. TIMES: DEALBOOK (Sept. 14, 2020), https://www.nytimes.com/2020/09/11/business/dealbook/milton-friedman-doctrine-social-responsibility-of-business.html [https://perma.cc/N4U6-Z4YB].

47. *Id.* According to Howard Schultz, former chairman of Starbucks:

> The ethos fueling such efforts—that companies have a responsibility to enhance the societies in which they flourish—was integral to Starbucks's ability to employ great people and attract customers, which in turn drove a 21,826 percent return to shareholders between 1992 and 2018, the year I stepped down as executive chairman.

Id.

48. Press Release, Elizabeth Warren, Sen., Warren Introduces Accountable Capitalism Act (Aug. 15. 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act [https://perma.cc/2CHY-VPEZ].

the focus from strictly shareholder wealth maximization toward the interests of other stakeholders like workers.[49] Joe Biden, in his eventually successful campaign for President, called for an end to shareholder capitalism.[50] Thus, the consensus around shareholder primacy seems to have eroded among some business and political leaders alike, strengthening calls for corporate action and reform to capitalism in Delaware and beyond.[51]

C. Purpose and Delaware Benefit Corporations

While academics and legislators have historically thought of director orientation from a top-down approach—what the law says directors must do—there have been some ways that directors have taken a bottom-up approach to supporting stakeholders through "purpose." That is, management sets a specific corporate purpose—either in the charter or more informally—to orient itself toward specific interests.[52] Delaware has gone so far as to codify this bottom-up approach in the form of a "public benefit corporation" in section 362 of the Delaware General Corporation Law ("DGCL").[53] In fact, Delaware has found such success with the PBC model that the state has decreased the threshold for shareholders to switch to a PBC from requiring ninety percent shareholder approval to requiring just a simple majority.[54]

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49. *Issues: Corporate Accountability and Democracy*, BERNIE SANDERS, https://berniesanders.com/issues/corporate-accountability-and-democracy (last visited Jan. 4, 2022) [https://perma.cc/MN7L-S44M].

50. Jesse Pound, *Biden Says Investors 'Don't Need Me,' Calls for End of 'Era of Shareholder Capitalism,'* CNBC, https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html (last updated July 10, 2020, 10:55 AM) [https://perma.cc/WQN7-ASZF]. Of course, these are national political figures, and ridding corporate America of greed is a popular refrain, but this does little to reverse the underlying state corporate law on the matter. Shareholder capitalism is virtually interchangeable with shareholder primacy.

51. *But see* Andy Kessler, Opinion, *Inequality by Way of Government*, WALL ST. J. (Mar. 28, 2021, 12:51 PM), https://www.wsj.com/articles/inequality-by-way-of-government-11616950304 [https://perma.cc/CK9G-9LZ8] (arguing inequality is not created by capitalist policies but instead is driven by "misguided government interventions").

52. Purpose statements are common. For example, Chobani's founding purpose was "[t]o make better food for more people," and Lego aims "[t]o inspire and develop the builders of tomorrow." Afdhel Aziz, *The Power of Purpose: The 7 Elements of a Great Purpose Statement (Part 2)*, FORBES (Feb. 18, 2020, 1:35 PM), https://www.forbes.com/sites/afdhelaziz/2020/02/18/the-power-of-purpose-the-7-elements-of-a-great-purpose-statement-paet-2/?sh=4f45318d41b7 [https://perma.cc/PM8C-35EZ].

53. DEL. CODE ANN. tit. 8, § 362 (2021).

54. Michael R. Littenberg, Emily J. Oldshue & Brittany N. Pifer, *Delaware Public Benefit Corporations—Recent Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 31, 2020), https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments [https://perma.cc/S2FS-EYZL]. Some shareholders, in response to the Business Roundtable Statement, even requested their boards to amend their charters to turn the

The status as a PBC is not unique to Delaware—there are similar forms available in thirty-six other states[55]—but Delaware's form is impactful due to the otherwise strict shareholder primacy in the state.[56] PBCs in Delaware are to be "managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."[57] Similar to the requirements of directors in traditional corporations, PBC directors fulfill their fiduciary duties to shareholders and the enumerated public benefit(s) so long as decisions are "informed and disinterested and not such that no person of ordinary, sound judgment would approve."[58] In other words, directors are permitted to apply their own business judgment in balancing the interests of shareholders and other stakeholders.[59] In addition to the normal reporting requirements, PBCs are required to biennially provide "a statement as to the corporation's promotion of the public benefit or public benefits identified," and some corporations report more than the legal requirement to become certified through third-party agents.[60] If leaders are invested enough in the enumerated public benefit and willing to report against progress, PBCs provide a legitimate route to pursue stakeholder interests.[61] Companies have sought benefit corporation status for numerous reasons ranging from altruistic to strategic, but

corporation into PBCs in order to effectively implement the tenants of the Statement. Bebchuk & Tallarita, *Will Corporations Deliver Value*, *supra* note 1, manuscript at 31.

55. *See State by State Status of Legislation*, BENEFIT CORP. (last visited Oct. 5, 2021), https://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/8B9F-ZPN5] (displaying information on the status of benefit-corporation legislation in all states containing such statutes).

56. *See generally* James Surowiecki, *Companies with Benefits*, NEW YORKER (July 28, 2014), https://www.newyorker.com/magazine/2014/08/04/companies-benefits [https://perma.cc/4UUE-PLXT] (explaining how PBCs diverge from the shareholder primacy model).

57. tit. 8, § 362(a).

58. Littenberg et al., *supra* note 54.

59. *See* Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 242 (2014) (saying "the benefit corporation is a modest evolution that builds on the American tradition of corporate law" in comparing the structure of governance in a PBC to that of traditional corporations).

60. tit. 8, § 366(b).

61. Markedly, in 2021, publicly traded Veeva Systems voted with ninety-nine percent shareholder approval to convert from a traditional Delaware corporation to a PBC. Press Release, Veeva, Veeva Becomes First Public Company to Convert to a Public Benefit Corporation (Jan. 13, 2021), https://www.veeva.com/resources/veeva-becomes-first-public-company-to-convert-to-a-public-benefit-corporation [https://perma.cc/9UXR-8U5P]. Further, Lemonade went public as a PBC in 2020, and their stock price more than doubled in its first day of trading. Wallace Witkowski, *Lemonade Logs Best U.S. IPO Debut of 2020 with More Than 140% Gain*, MARKETWATCH (July 2, 2020, 6:40 PM), https://www.marketwatch.com/story/lemonade-logs-best-ipo-debut-of-2020-with-more-than-140-gain-2020-07-02 [https://perma.cc/MW4G-RPXA].

some worry this status insulates management from investor pressure.[62] Nevertheless, providing a route for some corporations to consider and report progress toward stakeholder interests is a clear step away from strict shareholder primacy and could increase adoption of stakeholder capitalism within Delaware's current regime.[63]

From a bottom-up perspective, informal purpose statements have grown in popularity as business schools preach the concept that purpose leads to greater profit.[64] The Enacting Purpose Initiative, for example, has developed a framework to make purpose more than merely "a marketing slogan or vague set of values" to deliver actual value for shareholders and stakeholders alike.[65] In advancing a "New Paradigm," Martin Lipton called for "a voluntary collaboration among corporations, shareholders, and other stakeholders to achieve sustainable long-term value and resist short-termism."[66] Today, businesses are leveraging "purpose" strategically to advance shareholder value by orienting daily conduct toward stakeholders—and it is leading these "purpose-driven businesses" to outperform the overall market.[67] But, importantly, if these businesses are incorporated in the state of Delaware, they tend to engage in a roundabout analysis of how stakeholder-supporting action helps shareholders in order to fulfil their fiduciary duties. With the shareholder landscape changing drastically since shareholder primacy took hold of corporations in the 1980s,[68] more

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62. Surowiecki, *supra* note 56.

63. *See* Strine, *supra* note 59, at 242 ("In the liberal tradition of incremental, achievable reform rather than radical renovation, the benefit corporation is a modest evolution that builds on the American tradition of corporate law.").

64. *See* George Serafeim & Claudine Gartenberg, *The Type of Purpose That Makes Companies More Profitable*, HARV. BUS. REV. (Oct. 21, 2016), https://hbr.org/2016/10/the-type-of-purpose-that-makes-companies-more-profitable [https://perma.cc/PN4K-AFTK] (describing the increased dialogue about purpose since 1995 and examining research data comparing purpose statements with financial performance).

65. RUPERT YOUNGER, COLIN MAYER & ROBERT G. ECCLES, ENACTING PURPOSE WITHIN THE MODERN CORPORATION: A FRAMEWORK FOR BOARDS OF DIRECTORS 12–14 (2020), https://www.enactingpurpose.org/assets/enacting-purpose-initiative---eu-report-august-2020.pdf [https://perma.cc/4R2L-FZA3].

66. Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm [https://perma.cc/V9DB-B5ZN].

67. *See Statistics*, BUS. PURPOSE, https://www.businessofpurpose.com/statistics (last visited Oct. 31, 2021) [https://perma.cc/5L9G-3CLR] (providing statistics on how "[p]urpose-driven businesses outperform the market").

68. Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 733, 736 (2019) (explaining how three institutional investors—BlackRock, Vanguard, and State Street—collectively cast twenty-five percent of the votes on S&P 500 companies representing a four hundred percent increase in voting power since 1998); *see also* John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 2, 10 (Harv. Pub. L. Working Paper No. 19-07, 2018), https://corpgov.law.harvard.edu/wp-content/uploads/2019/11/John-Coates.pdf [https://perma.cc/9AKV-CNHR] (arguing that power is concentrated in the hands of twelve

voting power has supported this stakeholder-support-to-advance-shareholder-interests concept, leaving corporate conduct somewhere in between the two poles.[69] Thus, the changing landscape is creating friction in the current system where the legal regime may not reflect actual corporate behavior, which only increases the calls for reform.[70]

II. SHAREHOLDER PRIMACY VERSUS STAKEHOLDER THEORY

As the power dynamic has shifted between shareholders and stakeholders, states and politicians have provided a spectrum of possible policy outcomes for treating these classes of interested parties. This ranges from mandating that directors prioritize shareholders[71] to permitting consideration of various stakeholder interests[72] to mandating that directors consider stakeholders.[73] This spectrum of

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individuals); Lucian A. Bebchuk, *Don't Let the Short-Termism Bogeyman Scare You*, HARV. BUS. REV., Jan.–Feb. 2021, https://hbr.org/2021/01/dont-let-the-short-termism-bogeyman-scare-you [https://perma.cc/6HUG-32AS] (asserting that "concentration of ownership has introduced the possibility of meaningful investor oversight").

69. *See, e.g.*, Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES: DEALBOOK (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html [https://perma.cc/9NJX-3Q3F] ("To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society."); *State Street Introduces New Stakeholder Report*, BUSINESSWIRE (May 20, 2020, 9:00 AM), https://www.businesswire.com/news/home/20200520005483/en/State-Street-Introduces-New-Stakeholder-Report [https://perma.cc/DRE3-QQR3] (linking State Street's growth and strategy for the year with its emphasis on corporate responsibility and Environmental, Social, and Governance ("ESG") principles).

70. TEDx Talks, *TEDxPhilly - Jay Coen Gilbert - On Better Businesses*, YOUTUBE, at 10:06–10:18 (Dec. 1, 2010), http://www.youtube.com/watch?v=mGnz-w9p5FU ("[S]ystems should exist to serve society, and right now our capitalist system is not serving society; it's serving shareholders. And we can't run around expecting different outcomes until we change the rules of the game."); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 345 (2014).

71. *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1424 (1993); John F. Cogan, *Some Thoughts on the Business Roundtable's Statement of Corporate Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 7, 2020), https://corpgov.law.harvard.edu/2020/10/07/some-thoughts-on-the-business-roundtables-statement-of-corporate-purpose [https://perma.cc/2GPE-TL6D] ("Maximizing the resources society's members have available to meet these responsibilities is best achieved by maintaining the paramount duty of U.S. corporations to maximize shareholder value.").

72. *See, e.g.*, Lipton, *supra* note 66 (arguing for reforms "premised on the idea that stakeholder governance and ESG are in the best interests of shareholders"); Robert Goodyear Murray, *Money Talks, Constituents Walk: Pennsylvania's Corporate Constituency Statute Can Maximize Shareholders' Wealth*, 48 BUFF. L. REV. 629, 643 (2000) (explaining that Pennsylvania's Business Corporation Law establishes that stakeholder interests may be considered).

73. Accountable Capitalism Act, S. 3348, 115 Cong. § 5 (2018). Europe has a variety of other forms, most notably Germany's codetermination model where employees elect half of the board, but this oversimplified spectrum provided here is sufficient background to understand the contours

outcomes generally maps onto partisan fault lines, where the right believes in stricter shareholder primacy,[74] and the left argues for more significant stakeholder consideration.[75] Importantly, though, this debate is not just partisan or economic—corporate actors are highly invested given that trillions of dollars of capital are put at risk should the model of corporate purpose change.[76]

This Note is not simply a survey of this range of outcomes but rather is a normative description of how states can cut this "gordian knot" by pulling from both ends of this spectrum to create a more optimal corporate-governance model.[77] But first, it is important to break down the advantages and disadvantages as analysts move from shareholder primacy to stakeholder primacy to see why existing solutions are less than ideal.

A. The Case for Strict Shareholder Primacy

In 1997, the Business Roundtable articulated the doctrine advocated most cogently by Milton Friedman by explaining, "the paramount duty of management and of boards of directors is to the corporation's stockholders."[78] The Business Roundtable noted in the same statement that shareholders and stakeholders are not always in conflict, but requiring boards to balance their interests is "an unworkable notion because it would leave the board with no criterion for resolving conflicts between interests of stockholders and of other

of the American debate. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 445 (2001) (briefly describing German codetermination).

74. Cogan, *supra* note 71 (arguing strict shareholder primacy best allocates resources, saying "[a]ttempts to placate progressive politicians will only encourage further efforts to use U.S. corporations for their own social purposes").

75. BERNIE SANDERS, *supra* note 49.

76. *The Activist Investing Annual Review: The Seventh Annual Review of Trends in Shareholder Activism*, ACTIVIST INSIGHT 23–29 (2020), https://www.activistinsight.com/research/TheActivistInvesting_AnnualReview_2020.pdf [https://perma.cc/V7ZM-HSZ9]. The top ten institutional investors collectively have over thirty-four trillion dollars in assets under management, and operations of these underlying assets would change dramatically if the existing tenets of corporation governance were modified. Tim Lemke, *The 10 Largest Investment Management Companies Worldwide*, THE BALANCE (Nov. 5, 2021), https://www.thebalance.com/which-firms-have-the-most-assets-under-management-4173923 [https://perma.cc/4MQJ-66YT].

77. *See* Peter Atkins, Kenton King & Marc Gerber, *Stockholders Versus Stakeholders—Cutting the Gordian Knot*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 24, 2020), https://corpgov.law.harvard.edu/2020/08/24/stockholders-versus-stakeholders-cutting-the-gordian-knot [https://perma.cc/84RF-35P7] (referring to director orientation as the "gordian knot" due to the inability to solve the underlying issues); Wolf-George Ringe, *Investor-Led Sustainability in Corporate Governance* 8–18 (Eur. Corp. Governance Inst., L. Working Paper No. 615, 2021) (arguing that increasing investor power provides promise for promoting ESG values outside of any regulatory involvement).

78. *1997 Business Roundtable Statement*, *supra* note 43, at 3.

stakeholders or among different groups of stakeholders."[79] These statements, and other assertions in favor of shareholder primacy, generally follow three common arguments: (1) shareholder primacy provides boards some orientation for decisionmaking when interests between parties diverge, (2) shareholder value is the best proxy for wider welfare maximization, and (3) corporations committed to "social responsibility" misallocate resources.[80] These three pillars of shareholder capitalism deserve attention in turn.

First, prioritizing shareholders provides a compass for boards of directors that may otherwise confuse the corporate objective in making decisions where interested parties have competing priorities.[81] A strict shareholder primacy model asserts that directors must make decisions to maximize shareholder wealth—full stop.[82] Of course, as most advocates of shareholder primacy note, in order to succeed as a corporation and maximize shareholder wealth, the corporation must consider the stakeholders that are critical components to operating the business.[83] But when a corporation is locked in a hostile takeover, the interests of the shareholders and other constituencies often diverge, so shareholder primacy advocates argue that boards must negotiate for the best price as opposed to looking out for the future of employees, suppliers, creditors, and other stakeholders.[84] Where there is divergence, directors need to know what faction of stakeholders they are to be loyal and careful toward—shareholder primacy provides this clarity. They are to orient toward shareholders.

The second argument suggests that the competition for human capital, supply, community buy-in, and other fundamental corporate inputs ensures that corporations cannot leave nonshareholders

79. *Id.* at 3–4. Interestingly, while Friedman mentions potential trade-offs between different groups of stakeholders, he makes no mention of potential trade-offs between different groups of shareholders. Friedman, and others, think of shareholders as one indivisible concept. *See, e.g.*, Friedman, *supra* note 27; Bainbridge, *supra* note 71.

80. *See, e.g.*, Friedman, *supra* note 27 (criticizing the "social responsibilities of business" for encouraging executives to act in a manner not in the interest of the corporation's shareholders); Strine, *supra* note 31, at 767–68 (criticizing constituency statutes).

81. *See* Strine, *supra* note 31, at 767 (noting that allowing directors to promote the interests of other constituencies does not ensure protection for those constituencies or the stockholders).

82. *See id.* at 765–68 (discussing how commentators rejecting shareholder primacy under existing Delaware corporate law "ignore structural features of corporation law"); Millon, *supra* note 23, at 1013–15 (describing two different types of shareholder primacy—one "radical" and the other "traditional").

83. Cogan, *supra* note 71 ("Mistreat any of these stakeholders and shareholder value will decline. Competition from companies who take account of all of their stakeholders ensures this outcome.").

84. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986) (holding that the board's actions were motivated by interests other than the maximization of shareholder profits and thus could be enjoined during a hostile takeover situation).

completely behind.[85] As a result, in order to maximize shareholder wealth, the corporation must consider stakeholders, so boards do not need a legal requirement to consider these stakeholders.[86] Strict shareholder primacy advocates go on to argue that maximizing shareholder wealth is the best proxy for maximizing *stakeholder* welfare.[87] Because shareholder primacy, in this model, increases the size of the pie for all constituencies, nonshareholder interests are advanced whereas any other model simply divvies up the existing pie, or even shrinks the pie, without any added welfare.[88]

The last argument for shareholder primacy is founded in agency theory.[89] Because shareholders provide their own wealth to capitalize corporations and own the companies as a result but do not manage them, there is an agency cost ingrained in the corporate model.[90] Theoretically, these shareholders are investing in the corporation for management to use these funds to produce value and thereby increase the shareholders' wealth.[91] Based on this model, corporations are well suited to mix this capital with other inputs to create value through new outputs. Proponents of shareholder primacy assert that corporations are not well suited, however, to allocate resources to social or charitable causes.[92] At best, this is an inefficient use of resources, as corporations are no better at providing charity than their owners would be.[93] At worst, this a complete misappropriation of the owners' capital.[94]

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85. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 592 (2003) (arguing that contract law and regulation provide better protection for nonshareholder constituencies than a "stakeholder model of corporate law").

86. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 97.

87. *See* Bainbridge, *supra* note 85, at 592 (explaining how a shareholder-focused model "probably provides nonshareholder constituencies with more meaningful protections than would the stakeholder model of corporate law").

88. *See* Bebchuk & Tallarita, *Will Corporations Deliver Value*, *supra* note 1, manuscript at 13 (arguing that "increasing slack and underperformance . . . could reduce the pie available to shareholders and stakeholders"). As businesses innovate to create shareholder value, the argument goes, opportunities expand for communities, employees, and other stakeholders such that the "size of the pie" or the amount of gross value increases. *See* Rock, *supra* note 3, at 5.

89. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 288–89 (1980) (describing the efficiency of separating security ownership and control).

90. *See id.* at 291–92 (noting that diversified shareholders will be rationally apathetic to any one firm's performance and that management teams invest their "human capital" into the company and the best "rental rates" for their services in the market).

91. *Id.* at 292.

92. Friedman, *supra* note 27 (arguing that charitable contributions, or "social responsibilities," are those of individuals, not of businesses).

93. *Id.*

94. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 171–73 (arguing that expecting corporate leaders to address climate change would result in less resources for organizations meant to address those issues and deprioritize important legal and regulatory work).

While stakeholder capitalists, such as Lipton or former Starbucks CEO Howard Shultz, disagree with these pillars of shareholder primacy, much of the disagreement centers around the creation of externalities when boards have such singular focus.[95] The counterargument to shareholder primacy is that impacts to workers, communities, and ecosystems are negative externalities that corporations rationally will not internalize if their sole goal is profit generation and shareholder wealth maximization.[96] No board would protect the environment or pay workers a "living wage" if doing so increases their costs and decreases firm value. Of course, there are some moments where "shared value" can be created, and pulling these externalities into the business can enhance shareholder value.[97] For example, brands may promote green products in an effort to boost sales to environmentally conscious consumers or invest in the community of its headquarters to increase talent attraction and retention. When it is in the corporation's best pecuniary interest to maximize stakeholder welfare, the decisionmaking process for the board is not complex.[98] Boards do, and should, look for moments where they can create shared value, but these moments are not as common as the instances where interests diverge, like in a takeover scenario. It is in these moments of divergence where there must be a framework for directors to apply to ensure they are making a decision that is not only value-creating but also legal.

B. "May" and the Case for Permitting Stakeholder Consideration

The opportunity for corporations to consider stakeholders, or "other constituencies," varies by state, but some statutes generally permit boards to consider the interests of a defined set of stakeholders

95. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 410 (2021) (discussing how measuring value based only on shareholder wealth does not take into account the full costs of externalities and creates "a collective incentive for more responsible companies to be more callous to workers, consumers, creditors, the environment, and their communities so they can compete").

96. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 258 (2017) (describing how companies will "naturally drift toward social indifference" if they are restricted in their scope of purpose).

97. *See* ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 117–18 (2020) (proposing that companies award equity to workers in addition to (or in lieu of) executives).

98. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 129 (describing how there is no functional difference between stakeholderism and shareholder wealth maximization in win-win situations).

in addition to the short-term and long-term interests of shareholders.[99] Increasingly prevalent in the 1980s in response to the rise in hostile takeovers, these "other constituency" statutes clearly run contrary to strict shareholder primacy theory.[100]

The crux of permissive stakeholder consideration suggests that corporations have a larger role to play in society than simply returning capital to their investors.[101] Corporations employ millions, contribute positively to communities, support thousands of suppliers, and make material decisions that affect environmental ecosystems. As such, when considering these statutes as antitakeover mechanisms, it stands to reason that a corporation should not be forced to accept a takeover bid simply if the business is not performing as well as an activist investor feels it could be. The arguments for permissive consideration of stakeholders generally focus on the importance of stakeholders and the failure of regulation to protect against corporate externalities.

In the first category, proponents of permissive constituency statutes assert the importance of stakeholders such that any model that emphatically neglects them is irrational and misplaced.[102] These supporters contend that if boards can consider stakeholders,

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99. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 156B, § 65 (West 2021) ("[A] director may consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the state, region and nation, community and societal considerations, and the long-term and short-term interests of the corporation and its stockholders . . . ."); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2021) (permitting consideration of long-term and short-term interests of shareholders in addition to the effects of actions on "prospects for potential growth," current employees, retired employees, customers, creditors, and communities); 15 PA. CONS. STAT. § 1715 (2021) (saying "directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate" the effects of actions on any group affected, the "short-term and long-term interests of the corporation," and "all other pertinent factors" including the personal "resources, intent and conduct" of anyone seeking to acquire control of the corporation).

100. *See* Murray, *supra* note 72, at 629 (describing how Pennsylvania's constituency statute authorized the board to consider "employees, suppliers, and customers" when making decisions on behalf of the corporation); Richard B. Tyler, *Other Constituency Statutes*, 59 MO. L. REV. 373, 375–78 (1994) (explaining how "other constituency" statutes "reflect a public policy of encouraging managers to consider the effects on groups in addition to shareholders in determining whether or not a particular action is in the best interests of the corporation").

101. *See, e.g.*, Lipton, *supra* note 66 ("The prioritization of the wealth of shareholders at the expense of employee wages and retirement benefits, with a concomitant loss of the Horatio Alger dream, gave rise to the deepening inequality and populism that today threaten capitalism from both the left and the right.").

102. *See* Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARV. BUS. REV. (Aug. 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric [https://perma.cc/V95L-ZBLW] (suggesting the "current shareholder-obsessed system is not fit" to solve increasingly complex, global challenges that require systemic efforts and cooperation); Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 587 (1997) (arguing that as firms face increasingly competitive markets, employees and communities inevitably get left behind).

corporations will better serve their communities, employees, and the environment.[103] Some analysts go further to assert that providing boards more flexibility to consider more variables allows them to make decisions with long-term value creation in mind versus short-term stock price maximization.[104] Ultimately, this concept runs counter to the idea that welfare is enhanced by *shareholder* wealth maximization—here, supporters argue that such a proxy for greater welfare is not a sufficient fit, so boards must be able consider stakeholders more directly.[105]

There is also a regulatory component to permissive constituency statutes. Milton Friedman often admonished dissenters of shareholder primacy by saying corporations should do what they can within the rules of the game to maximize value.[106] Critics of shareholder primacy have often argued, however, that because the rules of the game do not support the welfare of certain stakeholders, corporate law must step in as a stopgap for regulatory failure.[107] In short, proponents of permissive constituency consideration are hoping boards will cure ills that legislative or regulatory bodies have failed to sufficiently address.[108] Maybe counterintuitively, some analysts support these permissive statutes in an effort to prevent more drastic regulatory measures.[109] Still, proponents of these statutes analyze their importance through a regulatory lens even if both sides see the issue conversely.[110]

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103. *See* Stout, *supra* note 33, at 10–12 ("Indeed, decently satisfying several sometimes-competing objectives, rather than trying to 'maximize' one, is the rule and not the exception in human affairs.").

104. *See* Lipton, *supra* note 66 (arguing that directors should commit to a "New Paradigm" where they flexibly support shareholders and stakeholders with an eye toward long-term strategy in order to make capitalism more sustainable).

105. *See* Blair, *supra* note 3, at 15–16 (explaining how a commitment to maximizing shareholder value partially led to the 2008 financial crisis).

106. Friedman, *supra* note 27 ("[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.").

107. *See, e.g.*, Ray Dalio, *Why and How Capitalism Needs to Be Reformed*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 13, 2020), https://corpgov.law.harvard.edu/2020/10/13/why-and-how-capitalism-needs-to-be-reformed [https://perma.cc/W4BA-5N3C].

108. *See* Rock, *supra* note 3 (suggesting legislative inaction has spurred ideas for private-sector solutions); David J. Berger, *In Search of Lost Time: What if Delaware Had Not Adopted Shareholder Primacy?*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES 31–33 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (discussing the growing power of corporations).

109. *See* Rock, *supra* note 3, at 4 (explaining how ideas such as Lipton's "New Paradigm" and other private sector initiatives stemmed from "frustration with legislative inaction and fear of radical future regulation").

110. *See* Winston, *supra* note 102 ("In fact, our inability to confront society's most pressing problems goes beyond over-reliance on shareholder value – a relatively new idea – which may be more a symptom of our real problem than its actual cause.").

Like strict shareholder primacy, counterarguments abound for permissive stakeholder theory. Opponents point to the uncertainty created when there is not a pecking order of interests.[111] By permitting boards to consider a wide range of interests that often diverge, directors have no direction on how to uphold their duties to the corporation.[112] Even worse, providing no criteria for decisionmaking may increase board entrenchment if boards can fashion defenses with a variety of ad-hoc stakeholder-support arguments.[113] Models that do not provide certainty decrease board accountability, which likely diminishes long-term shareholder wealth and may even limit long-term stakeholder welfare.[114]

On the other hand, proponents calling for required stakeholder consideration argue that merely permitting boards to consider stakeholder interests does not go far enough.[115] For example, some believe that boards will ignore stakeholders due to economic self-interest if they are not required to consider them.[116] Others suggest that the externalities created by the strict shareholder primacy of the last four decades would not be internalized by boards simply considering

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111. *See* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. (forthcoming 2021) (manuscript at 48–50), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155 [https://perma.cc/Z8WL-EE8P] (stating that permissive statutes may be interpreted as prioritizing stakeholder interests or taking them into account "only to the extent that doing so would serve shareholder value"); *see also* Patrick D. Daugherty, Paul D. Broude, Megan A. Odroniec, John K. Wilson & John J. Wolfel, *The Purpose of a Corporation*, FOLEY & LARDNER LLP (Nov. 2019), https://www.foley.com/en/insights/publications/2019/11/the-purpose-of-a-corporation [https://perma.cc/DC36-2W2X] ("We surmise that the current debate may well result in a more challenging role for boards of directors, which could be charged with balancing the oft-competing interests between stockholders and other constituencies (and, for that matter, the oft-competing interests among the other constituencies).").

112. *See* Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2442 (2020) ("The real problem with stakeholder theory is that it is not, at least at present, a real theory of corporate governance. Stakeholder theory lacks a model for allocating governance rights and responsibilities among the participants.").

113. Leung, *supra* note 102, at 618.

114. *See* Bainbridge, *supra* note 71, at 1433 (walking through possible uncertainties and the effects on the cost of equity capital and nonshareholder constituencies).

115. *See* Lenore Palladino & Kristina Karlsson, T*owards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance [https://perma.cc/TFG4-UNUP] (describing the rationale of mandatory stakeholder consideration).

116. *See, e.g.*, Gary von Stange, Note, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. & EMP. L.J. 461, 490 (1994) (suggesting that permissive constituency statutes will likely fail to accomplish corporate social responsibility if consideration for nonshareholder constituencies is not expressly mandated).

stakeholder interests—the law must go further.[117] Because permissive consideration of shareholders and stakeholders is seemingly the middle ground, there are arguments both that these constituency statutes overstep—moving too far from shareholder primacy—and that they do not go far enough.

C. "Must" and the Case for Requiring Stakeholder Consideration

For decades, Connecticut stood as the only state that required directors to consider the interests of "other constituencies" in determining the best interests of the corporation.[118] In 2010, Connecticut passed updated legislation and fell in line with the majority of other states that simply permit, but do not require, such consideration.[119] Even though there are now zero states that require consideration of other constituencies' interests, politicians and commentators alike still argue the necessity of such a requirement.[120] Support for such a position has two foundational ideas: (1) proponents simply believe stakeholder interests are more important than shareholder interests, and (2) proponents fundamentally disagree with activist investing that strips corporations of their assets to enrich shareholders and impoverish other constituencies.[121] As a result of these core beliefs, proponents believe a corporate-law structure that does not require boards to serve nonshareholder interests will never go far enough.[122]

Because the incentives of directors encourage boards to maximize wealth, proponents of requiring consideration of other constituencies believe stakeholders will always be left behind by wealth-maximizing managers unless corporate law steps in.[123] Many

117. *See* Ewan McGaughey, *Corporate Law Should Embrace Putting Workers on Boards: The Evidence Is Behind Them*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 17, 2018), https://corpgov.law.harvard.edu/2018/09/17/corporate-law-should-embrace-putting-workers-on-boards-the-evidence-is-behind-them [https://perma.cc/X47Z-D77M].

118. Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 215–16 (2012).

119. *Connecticut Updates Business Corporation Act; Clarifies Director Obligations, Shareholder Rights*, DAY PITNEY LLP (May 17, 2010), https://www.daypitney.com/~/media/files/insights/publications/2010/05/connecticut-updates-business-corporation-act-cla__/files/dp316pdf/fileattachment/dp_316.pdf [https://perma.cc/G8BM-SQ6L].

120. Accountable Capitalism Act, S. 3348, 115 Cong. § 5 (2018).

121. Donna Borak & David Benoit, *Democrats Take Aim at Activist Investors*, WALL ST. J. (Mar. 17, 2016, 5:51 PM), https://www.wsj.com/articles/democrats-take-aim-at-activist-investors-1458251491 [https://perma.cc/F8X9-W2DQ].

122. BERNIE SANDERS, *supra* note 49.

123. *Cf.* William T. Allen & Leo E. Strine, Jr., *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law*, 60 BUS. LAW.

point to other countries' corporate law structures in arguing that requiring stakeholder participation, and therefore consideration, is not extreme.[124] For example, some countries mandate labor representation on boards to be able to advocate for their interests at the highest level.[125]

Those that believe the current structure does not sufficiently support stakeholders can point to empirical research conducted by the Diligent Institute, which found ninety-two percent of directors were satisfied with their corporation's success in meeting stakeholder interests.[126] While the directors may be satisfied, only thirteen percent of stakeholders believe corporate communications are consistent with corporate action,[127] and this gap suggests the mechanism for promoting stakeholder interests is breaking down. Under this analysis, proponents believe corporate law must go a step further than simply permitting boards to consider nonshareholder interests.

Of course, a model that is so far afield from the norms of shareholder primacy will have plenty of detractors. The two main sources of contention are rooted in theory and practical application. Agency costs persist since the owners of the corporation—the shareholders—do not actively manage decisionmaking.[128] If boards are not only permitted to ignore the interests of the principal—in this case the shareholders—but required to do so, the model amplifies agency costs.[129] As a result, the gap between the owners and managers gets

1383, 1396 (2005) (discussing how executive compensation provides natural incentives for maximizing shareholder wealth).

124. *See* Palladino & Karlsson, *supra* note 115 (arguing that "Europe shows us that there are many ways a stakeholder model can be implemented").

125. *See* Susan R. Holmberg, *Workers on Corporate Boards? Germany's Had Them for Decades*, N.Y. TIMES (Jan. 6, 2019), https://www.nytimes.com/2019/01/06/opinion/warren-workers-boards.html [https://perma.cc/Z5GR-N9VB] (discussing Germany's longstanding system of "co-determination," which requires workers in large companies to elect up to half of the supervisory board members).

126. DILIGENT INSTITUTE, STAKEHOLDERS TAKE CENTER STAGE: DIRECTOR VIEWS ON PRIORITIES & SOCIETY (2019), http://view.ceros.com/diligent-corp/stakeholder-report/p/1 [https://perma.cc/BSB8-HJ7Q].

127. KKS ADVISORS, COVID-19 AND INEQUALITY: A TEST OF CORPORATE PURPOSE 27 (2020), https://c6a26163-5098-4e74-89da-9f6c9cc2e20c.filesusr.com/ugd/f64551_a55c15bb348f444982bfd28a030feb3c.pdf [https://perma.cc/D6HL-VH95].

128. *See* Fama, *supra* note 89, at 291–93 (outlining corporations' management tiers in relation to shareholders).

129. *See* Milton Ezrati, *Senator Warren's Accountable Capitalism Bill Has Big Problems*, FORBES (Feb. 5, 2019, 5:34 PM), https://www.forbes.com/sites/miltonezrati/2019/02/05/senator-warrens-accountable-capitalism-bill-has-big-problems [https://perma.cc/9JJU-SF6F] (arguing that even requiring consideration of parties other than shareholders poses problems to managers and directors); Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 115 ("[T]he task that stakeholdersim assigns to corporate leaders is Herculean.").

larger, and a host of unintended consequences are all but assured.[130] For example, cost of capital will inevitably increase if investors feel less confident that directors will protect their interests in value maximization.[131] Thus, if stakeholder interests are placed ahead of shareholder interests, corporations may not create the economic value they otherwise would, which not only harms shareholder wealth but may also harms stakeholder welfare.[132]

There are also practical concerns with placing multiple stakeholders ahead of shareholders. In addition to increasing agency costs, this would also inflame concerns that boards will have no direction, which could grind productivity to a halt.[133] With shareholders de-prioritized compared to other constituencies, the board still has a number of competing interests to consider in making any decision and no way of knowing what "serves the corporation best" if interests diverge. As a result, boards will be hesitant to make decisions fearful they are not fulfilling their duty to the corporation, which ultimately harms the firm, its shareholders, and its stakeholders.

In analyzing the spectrum of existing options, it becomes increasingly clear that inherent concerns plague each paradigm. Opponents of shareholder primacy are right to highlight corporate failings and externalities created by focusing solely on profit maximization but are wrong to wish away the importance of certainty, accountability, and economic viability. Fortunately, an existing model lurks beneath the obvious policy options that can be supercharged to make corporations more certain, accountable, and purposeful to maximize societal welfare without sacrificing shareholder wealth.

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130. Ezrati, *supra* note 129.

131. *See* Bainbridge, *supra* note 71, at 1433 (explaining that if rates of return do not meet investor expectations, investors will divest stock and change investments, ultimately increasing the cost of equity capital). Some firms, however, are now contracting for more favorable borrowing rates based on meeting certain ESG goals. *See* Dawn Lim, *BlackRock Must Hit ESG Targets or Pay More to Borrow Money*, WALL ST. J. (Apr. 7, 2021, 12:30 AM), https://www.wsj.com/articles/blackrock-must-hit-esg-targets-or-pay-more-to-borrow-money-11617769833 [https://perma.cc/BR34-CVLJ] (explaining how BlackRock created a financing deal that "links its lending costs for a $4.4 billion credit facility to its ability to achieve certain goals, like meeting targets for women in senior leadership and Black and Latino employees in its workforce").

132. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 120 (stakeholderism inevitably results in opportunities to provide benefits to stakeholders that will "come at the expense of shareholders").

133. Denise Kuprionis, *Will Warren's Accountable Capitalism Act Help? The Answer Is No.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2018), https://corpgov.law.harvard.edu/2018/09/10/will-warrens-accountable-capitalism-act-help-the-answer-is-no [https://perma.cc/5X6R-RH53].

III. DYNAMIC CORPORATE PURPOSE

A state's role in corporate law should be relatively simple: set the rules to maximize welfare and remove uncertainty such that players in the game react legally, appropriately, and expectedly.[134] Of course, this role is not that simple, but the purpose debate at the heart of corporate law has focused on stagnant poles that have clear priorities and clear disadvantages.[135] But why does "corporate purpose" have to be a one-size-fits-all proposition?[136] A holding company for oil and gas projects has significantly different objectives—and different potential benefits to society—than an environmentally conscious shirt retailer, so why must these corporations be held to the same centralized corporate purpose?[137] Actually, Delaware and thirty-six other states have already answered these questions by saying: they do not.[138] By providing a path to incorporate as PBCs, Delaware has asserted that corporations do not have to have the same corporate purpose—some corporations must orient only toward shareholders, while others advance the interests of stakeholders alongside shareholders.[139]

The State of Delaware, or any state for that matter, should look to use the logic of the PBC model to leverage the advantages of shareholder primacy while also advancing conscious capitalism through

134. *See* Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REGUL. 26, 27–28 (2003) (explaining state law's role in defining the rights of shareholders and the powers of directors).

135. *See* Edward Waitzer, *Dynamic Governance: Rethinking the Purpose of the Corporation*, NACD BOARDTALK (Mar. 6, 2018), https://blog.nacdonline.org/posts/rethinking-the-corporation [https://perma.cc/KU67-LDJG] ("What has become clear is that there is no 'right' corporate governance model. Governance is highly contextual, and is dependent on what a particular company does, its ownership structure, and the markets and political frameworks in which it operates.").

136. *See* Leon Yehuda Anidjar, The Pluralist Foundations of Corporate Governance 17 (Sept. 13, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3750857 [https://perma.cc/5XF6-65XC] ("[A]dherence to 'one-size-fits-all' approach prevents corporate law from meeting the challenge of complexity by crafting tailor-made law following a firm-specific perspective."); *see also* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 826 (2017) ("[T]he inescapable tradeoff between principal costs and agent costs cautions against . . . one-size-fits-all regulations.").

137. *See* Anidjar, *supra* note 136, at 38–39 ("[C]orporate law scholars have not considered the possibility that every company has its own unique purpose . . . . For example, . . . a company whose principal activity is limited to holding other several companies has a strikingly different objective from one whose main production activity is highly dependent on the capital contribution of its employees and managers.").

138. *See* Littenberg et al., *supra* note 54 (describing how directors of different PBCs have different duties based on their varied enumerated benefits).

139. *See* DEL. CODE ANN. tit. 8, §§ 361–68 (2021).

the essence of stakeholder governance.[140] States do not need to formally settle the debate by picking one concept or the other; states can instead leverage market power to optimize corporate performance through a concept known as *dynamic corporate purpose.*[141] Here, corporations themselves set their own purpose, which allows prioritized parties to be supported more specifically and allows the state to reform its legal structure to reflect actual corporate behavior.[142] In short, this will bring *purpose* back to corporate purpose.[143]

Dynamic corporate purpose permits corporations to advance wider societal goals without sacrificing board accountability or creating a disconnect between agents and principals.[144] While there is a risk this solution may fall short of its academic promise, concerns are cabined by market forces which should regulate the legal structure better than the current centralized framework.[145] By decentralizing corporate purpose,

140. Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387, 394 n.21, 509 (2001) ("Delaware is not the only state to be continually revising its corporation code: other states invariably follow suit, revising their codes to follow Delaware's innovations . . . .").

141. *See* Bebchuk & Hirst, *supra* note 68, at 725–26 (describing how "the institutional ownership of corporate equity increased tenfold, from 6.1% to 65%" from 1950 to 2017). As institutional investors have gained power through vote concentration, shareholders as a class have begun to exert more pressure on firms to reform internal corporate-governance mechanisms. *See* Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157, 175 (2013) (explaining how the Shareholder Rights Project is "contributing to moving a substantial number of S&P 500 companies toward arrangements that are more consistent with the preferences of institutional investors"); *see also* Anidjar, *supra* note 136, at 19 (citing Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 503–06 (2018)) ("[I]ncreased engagement of institutional investors—such as pension funds and insurance companies—does [have] the potential to improve corporate decision-making, and provides protection against excessive risk-taking.").

142. States required a specific corporate purpose when they began incorporating businesses. *See* Hayden & Bodie, *supra* note 112, at 2437 n.106 (citing Louis K. Liggett Co. v. Lee, 288 U.S. 517, 554–55 (1933) (Brandeis, J., dissenting in part) ("At first, corporations could be formed under the general laws only for a limited number of purposes . . . .")).

143. Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1312 (2021) (describing how effective purpose "enables corporate participants to formalize their goals and priorities, which can include not just the pursuit of profits, but the incorporation of operational constraints, stakeholder values, and social impact").

144. *See* Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, https://www.blackrock.com/hk/en/larry-fink-ceo-letter (last visited Oct. 31, 2021) [https://perma.cc/JPE5-542B] ("As I have written in past letters, a company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders.").

145. *See* Paul Crampton, *Striking the Right Balance Between Competition and Regulation: The Key Is Learning from Our Mistakes*, ORG. FOR ECON. COOP. & DEV. 2–3 (Oct. 17, 2002), https://www.oecd.org/regreform/2503205.pdf [https://perma.cc/2BWE-3SCK] (explaining the instances when competition is superior to regulation). Regulation is needed when there is a market failure or when the state is required to step in to advance the "public interest." *Id.* at 4. While some will argue there is a market failure in corporate law, the problem is better explained as regulatory-scheme failure. While proponents of stakeholder theory argue reform is needed to advance the

Delaware can promote societal interests without sacrificing the economic advantages of shareholder primacy.

A. Establishing Dynamic Corporate Purpose Through the DGCL

Because the tenets of strict shareholder primacy are baked into existing case law in Delaware, establishing dynamic purpose requires the legislature to amend the DGCL.[146] The simplest reform would be to amend subchapter XV on Public Benefit Corporations to eliminate PBCs and apply the concept to all corporations.[147] To avoid market uncertainty, dynamic corporate purpose would ask a corporation to list two items in its articles of incorporation: (1) the corporation's public benefit purpose statement[148] and (2) the parties materially affected by the corporation's enumerated purpose.[149]

Practically, this approach would require each corporation to set its own purpose statement and report progress against any materially affected parties to this purpose.[150] Here, directors would have a fiduciary duty to be careful and loyal to the corporate purpose, so directors of different organizations could be oriented toward different parties. To uphold their fiduciary duties, directors would need to use their business judgment to determine how certain decisions would advance the corporation's enumerated purpose, and investors would buy into the organization with a sense of which parties will be prioritized.

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public interest, the delicate balance in corporate law should be respected and instead calls for a decentralized approach that more dynamically advances varied interests.

146. Strine, *supra* note 31, at 765–68. Even if shareholder primacy is just a norm in the state of Delaware, a core tenet of dynamic corporate purpose is market and director certainty, so legislation provides the best avenue for reform. *See* Blair, *supra* note 3, at 10 (suggesting shareholder primacy is simply a norm).

147. *See* DEL. CODE ANN. tit. 8, §§ 361–68 (2021). For example, a corporation could state in its charter that "the purpose of the corporation is to engage in any lawful activity for which a corporation may be organized in Delaware for the benefit of shareholders." An alternative approach would be to state that "the purpose of the corporation is to support shareholders and the community of Eastern North Carolina through lawful activities for which a corporation may be organized in the state."

148. For example, existing PBC Lemonade, Inc. says its public benefit purpose is to "deliver insurance products where charitable giving is a core feature, for the benefit of communities and their common causes." Lemonade, Inc., Amended and Restated Certificate of Incorporation 2 (2019).

149. Firms could elect to not list parties that will be equivalent to shareholders in the pecking order, but that would leave the decision as to who is "materially affected" up to judges in litigation.

150. *See* Fisch & Solomon, *supra* note 143, at 1313 ("To be functional, a corporate purpose must both provide concrete guidance for the corporation's operations, priorities, or goals and meaningfully constrain corporate action.").

Delaware would need to amend sections 361 through 368 of the DGCL to apply the logic of PBCs to all corporations.[151] The state would require a corporation's certificate of incorporation to "identify within its statement of business or purpose pursuant to [section] 102(a)(3) of this title one or more specific public benefits to be promoted by the corporation."[152] Further, it would require corporations to "be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's purpose, and any benefits identified in its certificate of incorporation."[153] Any stock certificate would need to clearly state the enumerated purpose of the corporation with notice conspicuously given.[154] Unlike PBCs, though, corporations could elect their enumerated benefit be wholly for shareholders.[155] So, directors will owe a fiduciary duty to shareholders and any other parties materially affected by the stated corporate purpose, and the state will require biennial reporting as to progress in supporting the enumerated benefits identified in the certificate of incorporation.[156]

For PBCs, the DGCL presently requires reporting overall objectives, standards for measuring progress, and objective information to assess success in promoting the enumerated objectives.[157] These reporting requirements are based on the stated public benefit selected by the PBC, but in an environment of dynamic corporate purpose, these reporting requirements would apply to all corporations.[158] This reform takes the successful model of PBCs but flips the regime from an opt-in to an opt-out concept, which should exert more pressure on corporations

151. This would require amending section 361 to say "[t]his subchapter applies to *all* corporations" and striking language that refers to public benefit corporations. *See* tit. 8, § 361.

152. tit. 8, § 362(a).

153. *See* tit. 8, §§ 361–68 (This language mirrors the existing language in section 362.).

154. *See* tit. 8, § 364 (PBCs issuing stock certificates must "note conspicuously that the corporation is a" PBC.).

155. The logic here is that maintaining economic viability through incorporation is a sufficient "public benefit," and firms that are not equipped, or do not wish, to report against progress toward other benefits should not be expected to do so.

156. *See* Littenberg et al., *supra* note 54 (describing reporting requirements); tit. 8, §§ 365–66 (explaining the duties of PBC directors and the periodic statements PBCs must make to their shareholders).

157. Littenberg et al., *supra* note 54.

158. These reporting requirements are not too onerous for startups as startups can simply opt for shareholder primacy and report against financial performance to shareholders just like traditional corporations operate today. Existing corporations in the state should not be required to amend their charters and could be presumed to prioritize shareholders unless otherwise agreed to by shareholders.

to provide a reportable benefit to some prioritized stakeholder(s).[159] As such, the state should give corporations a grace period of two or more years to settle on a corporate purpose for shareholder approval.[160]

Some points of confirmation are necessary. The law would not require corporations to be managed for the interests of stakeholders if they do not wish to be—such corporations could simply state the benefit of the firm is to maximize economic viability.[161] Directors would not be permitted to wholly ignore shareholders' pecuniary interests either—just like fiduciaries of PBCs cannot do so today.[162] As a result, corporate purpose will be managed by the will of investors and the subsequent allocation of resources.[163] If a firm is too committed to shareholder wealth maximization and the business externalizes costs to the point of societal harm, investors can force a change in corporate purpose, while firms that fail to generate a reasonable return for shareholders could see investors force more shareholder focus.[164] Dynamic corporate purpose leverages the market's power to regulate corporate behavior and relies on shareholders exiting or voting as faithful mechanisms to maintain order.[165] As seen by Engine No. 1 winning a proxy battle over

159. Currently, consumers and investors do not expect firms to provide an explicit purpose. By reforming the mechanism for laying out a corporate purpose, investors, consumers, employees, and other stakeholders may exit a firm with a purpose that they see as illegitimate or insignificant.

160. With an extended timeline, managers can weigh their options and coordinate with the market to determine an optimal director orientation. If shareholders do not approve any additional corporate purpose—that is, they do not want to add any prioritized party to report progress toward—they will then tacitly approve a purpose solely dedicated to shareholder wealth maximization. Of course, this purpose can change as the corporation grows or evolves.

161. Professor Mark Roe has an interesting article that suggests firms with more market power have more profit margin to dedicate to the "costly" pursuit of purpose. Here, you could envision firms competing not only based on their culture for employees or on their product/service for customers but also on their corporate purpose. This could increase pressure on otherwise powerful, quasi-monopolistic firms. *See generally* Mark J. Roe, *Corporate Purpose and Corporate Competition* 2 (Eur. Corp. Governance Inst., L. Working Paper No. 601, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788 [https://perma.cc/VR27-3B64].

162. DEL. CODE ANN. tit. 8, § 365(a) (2021).

163. This admittedly puts some pressure on institutional investors to put their money where their mouth is. Under this model, BlackRock, State Street, and others should inevitably require some stakeholder orientation based on their previous public remarks. Similarly, every CEO who is a part of the Business Roundtable would face added pressure to reform their company's corporate purpose statement *in some way*.

164. *Compare* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–36 (1991) (arguing that the corporate purpose at the time of any given deal is binding between the corporation and the rights holders, so changing corporate purpose "mid-stream" raises a complaint for breach of contract), *with* Yosifon, *supra* note 36, at 498 (arguing that the power to amend the corporate charter is "expansive" and that Delaware's PBC statute permits an ordinary Delaware corporation to amend its charter to become a PBC).

165. *See* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1277 & n.63 (1982) (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970)) (discussing shareholders' choice to either leave a stock or expend extensive resources to form a voting bloc); Frank H. Easterbrook & Daniel R.

behemoth ExxonMobil, current market factors can exert pressure on corporations to enact change in strategy and stakeholder consideration.[166] Dynamic corporate purpose just makes this easier.

Like with PBCs, enumerated benefits under dynamic corporate purpose should also alter *Revlon* duties such that directors will be offered an antitakeover mechanism.[167] If a corporation's purpose prioritizes shareholders and employees, and directors reasonably believe a buyer will impinge on the firm's ability to support employees, directors will not be required to accept the bid even if it is economically superior (for shareholders) to another bid.[168] Instead, they will be expected to continue to advance the interests that they report progress against—to shareholders and employees. This should assuage some concerns over asset-stripping activist investors. While some may argue this antitakeover mechanism will increase entrenchment, there are incentives against orienting toward too many stakeholders, so directors must weigh their options proactively.[169] This tension should limit unnecessary entrenchment and could even lead to takeovers based on non-pecuniary grounds if the corporation is not executing toward its over-extended corporate purpose.[170]

Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395–99 (1983) (arguing that shareholders "express views by buying and selling shares"); *see also* Fisch & Solomon, *supra* note 143, at 1340–41 ("As *Citizens United* recognized, 'the procedures of corporate democracy' allow corporate participants to coordinate their expectations and impose those expectations on corporate decision makers.") (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010)).

166. *See* Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/4U3E-C2LF].

167. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); Strine, *supra* note 59, at 245 (stating that the Delaware statute establishing PBCs "makes clear that the *Revlon* doctrine does not apply to benefit corporations"); Frederick H. Alexander, Lawrence A. Hamermesh, Frank R. Martin & Norman M. Monhait, *M&A Under Delaware's Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV. 255, 270 (2014) (suggesting the *Revlon* analysis is different for PBCs than for traditional corporations).

168. Strine, *supra* note 95, at 428 ("The PBC model builds on the business judgment rule model by protecting the board from a challenge to a decision that it makes that requires it to balance the interests of various stakeholders, including in a sale of the corporation."). Proctor & Gamble, for example, directs the board in their corporate bylaws to orient towards employees but this is simply permissive. Bebchuk & Tallarita, *Will Corporations Deliver Value*, *supra* note 1, manuscript at 41.

169. Directors would want to avoid having to report progress towards too many stakeholders based on time and resource constraints and an increase in the risk of litigation. *See* Bebchuk & Tallarita, *Will Corporations Deliver Value*, *supra* note 1, manuscript at 30 (using Amazon as an example of how shareholders submit proposals to ask for clarity on how management will implement "stakeholderist principles"). Even more shareholder proposals requesting reports would be expected from firms that aim to support too many stakeholders.

170. *Cf.* Robert Eccles, Aeisha Mastagni & Kirsty Jenkinson, *An Introduction to Activist Stewardship*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 1, 2021), https://corpgov.law.harvard.edu/2021/03/01/an-introduction-to-activist-stewardship [https://perma.cc/RW9R-G3BN] (calling for "activist stewardship," where firms would promote

Lastly, the difference between the current opportunity for existing corporations to opt into becoming PBCs versus mandating that firms select prioritized parties is subtle but significant.[171] Currently, corporations can hide behind shareholder primacy in ways they could not under dynamic purpose—we see this when corporations support one class of stakeholders in the press but then ignore these stakeholders in the boardroom.[172] Institutional investors are not expected to exit investments in traditional, shareholder-focused corporations because the alternative market simply is not large enough to satisfy institutional investors' own fiduciary responsibilities.[173] With dynamic corporate purpose, firms will be expected—by consumers, employees, and investors—to memorialize their public-relations-driven objectives in the essence of their corporate purpose.[174] This mechanism will decrease the divide between what organizations state publicly and how they act privately, which should increase corporate efficiency and decrease bad behavior.[175]

ESG initiatives through traditional methods of activism as opposed to through simple private cajoling).

171. Fisch & Solomon, *supra* note 143, at 1341 ("Purpose provides a public-facing mechanism that expands the scope of those who can hold the corporation accountable.").

172. Johnson & Johnson presents one example of this dynamic. One week after the Business Roundtable released its refined corporate purpose statement a judge in Oklahoma ordered Johnson & Johnson to pay $572 million for its role in fueling the opioid epidemic. Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html [https://perma.cc/BUN4-8YN9]. Johnson & Johnson is known for its "credo" that it puts patients, doctors, and nurses first, and its CEO signed the Business Roundtable statement desiring a greater corporate purpose. Chevron presents another example as they have argued, after some shareholder pressure, that they have a long track record of supporting the interests of stakeholders and acting sustainably. Bebchuk & Tallarita, *Will Corporations Deliver Value*, *supra* note 1, manuscript at 39.

173. *See* Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 79–90 (2015) (explaining the fiduciary duties of institutional investors).

174. *See* Strine, *supra* note 95, at 429 (discussing the PBC model, Strine argues that "stockholder advocates ignore that undeniable potency of capital and product markets and the way they have tilted corporate governance."); *see also* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 549 (2016) (explaining that hedge funds have embraced activism because the costs and potential benefits of shareholder activism have decreased and increased, respectively).

175. One example of this behavior can be seen by the largest banks publicly claiming to support stakeholders by signing the Business Roundtable's Statement but failing to react to shareholder proposals that would turn these corporations into PBCs. *See Shareholder Advocacy for the 2021 Proxy Season*, HARRINGTON INVS., INC., http://www.harringtoninvestments.com/4379-2 (last visited Oct. 8, 2021) [https://perma.cc/2LZU-HH5J] (documenting this phenomenon for several large, publicly traded corporations); *see also* Patricia Kowsmann & Ken Brown, *Fired Executive Says Deutsche Bank's DWS Overstated Sustainable-Investing Efforts*, WALL ST. J. (Aug. 1, 2021, 5:33 AM) https://www.wsj.com/articles/fired-executive-says-deutsche-banks-dws-overstated-sustainable-investing-efforts-11627810380 [https://perma.cc/LKK9-JKPT] (describing how Deutsche Bank publicly stated that ESG was at the heart of operation, but, in reality, the

B. Advantages of Drawing from Shareholder Primacy

Dynamic corporate purpose keeps directors accountable to clear objectives based on defined measurements, maintains clarity of direction by limiting the purview of directors, increases certainty for investors, and limits agency concerns since the corporate purpose is well known throughout the relationship between principal and agent.

This construct permits corporations to support specific societal positions without removing methods of accountability. Here, directors have to report against enumerated objectives with clear measurements for success.[176] As a result, directors cannot assert post-hoc that they were attempting to support some previously unidentified objective in an attempt to entrench themselves or to pursue other motivations.[177] Directors will be free to support the stakeholders that investors direct them to definitively support, but such action will be constrained by the will of the shareholders.[178]

With a clear purpose statement, directors will have the clarity of direction desired by proponents of shareholder primacy.[179] While these advocates will certainly argue that directors cannot possibly be expected to serve a purpose that materially affects multiple parties,[180] Professor Stout was correct when she argued that the concept of a single "shareholder value" is, at best, an oversimplification and, at worst, a complete fiction.[181] That said, promoting a single concept ensures that directors are all acting with loyalty toward the same *thing*—here, directors are expected to be loyal to the corporation through the corporation's enumerated purpose. The business judgment rule already

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firm struggled to implement an actual strategy). This mechanism will inevitably put more pressure on institutional investors, too, who also tout stakeholderism in the press.

176. *See, e.g.*, PATAGONIA WORKS, ANNUAL BENEFIT CORPORATION REPORT FISCAL YEAR 2019, at 24–27 (2019), https://www.patagonia.com/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dwf14ad70c/PDF-US/PAT_2019_BCorp_Report.pdf [https://perma.cc/TRH6-EABV] (providing an example of the comprehensiveness of PBC reporting).

177. *See* Alexander et al., *supra* note 168, at 270–71 (discussing the difficulty courts would have in second-guessing director judgment about tradeoffs between shareholder wealth maximization at sale and pursuit of enumerated public benefits).

178. Opponents to shareholder primacy will undoubtedly argue this point, but this design feature ensures directors' accountability to their principals. Opponents cannot wish away the shareholders' role as owner.

179. *See* Cogan, *supra* note 71 ("The [Business Roundtable]'s proposed standard of multiple masters and numerous objectives is a recipe for a lack of corporate accountability.").

180. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 1, at 120 (arguing "potential trade-offs between shareholders and stakeholders are ubiquitous").

181. Stout, *supra* note 33, at 8–9; *see also* Roe, *supra* note 161, at 32 (describing how there is a growing divergence in goals between shareholder groups that are pro-profit versus those that are pro-purpose).

provides significant leeway to directors to fulfill fiduciary duties, so asking them to serve the best interests of the corporate purpose is not impossible.[182] Nevertheless, this construct provides a natural check on the number of stakeholders a corporation will select to orient toward, which limits the number of potential trade-offs. It would be too managerially complex to report progress toward a wide swath of stakeholders, so corporations would be wise to avoid overbroad purpose statements. This structure would lead to greater corporate focus on enumerated priorities and maintain directors' clarity of direction.

Clarity of true corporate purpose also increases investor certainty. The current regime, where executives support stakeholders in the press but shareholders in the boardroom,[183] limits certainty on corporate action and likely increases the cost of capital.[184] Because investors and lenders do not understand the objectives or priorities of management, there could be an uncertainty premium baked into current agreements in case directors begin unscrupulously giving away millions to various charities to the chagrin of lenders. More importantly, the system in Delaware requires directors to perform mental somersaults to determine how certain behavior ultimately supports shareholders, even if the connection is attenuated. A system that requires such circumnavigating is inefficient and increases director, investor, lender, and customer uncertainty.[185] Dynamic corporate purpose allows for a closer link between corporate action and actual investor interests so shareholders can strategically allocate resources to the corporate purposes they support and orient corporate governance in the optimal direction in the process.[186]

Lastly, dynamic corporate purpose limits agency concerns much like shareholder primacy does. Proponents of wealth maximization suggest that directors must orient toward shareholders because shareholders are the owners, and, otherwise, their interests will be

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182. Atkins et al., *supra* note 35.

183. *See* Warren, *supra* note 1 (illustrating companies' public promises to serve all stakeholders but subsequent refusals to provide action items on how they would do so).

184. *See* Wolfgang Drobetz, Sadok El Ghoul, Omrane Guedhami & Malte Janzen, *Policy Uncertainty, Investment, and the Cost of Capital*, 39 J. FIN. STABILITY 28 (Aug. 30, 2018) (noting that policy uncertainty increases the costs of capital). The reverse is also true, according to scholars, where a positive corporate reputation—which could be a byproduct of more purposeful corporations—decreases the costs of capital. *See* Damion Waymer & Sarah VanSlette, *Corporate Reputation Management and Issues of Diversity*, *in* THE HANDBOOK OF COMMUNICATIONS AND CORPORATE REPUTATION 471, 473 (Craig E. Carroll ed., 2013).

185. Some businesses have recognized this inefficiency and opted to convert to a PBC on their own. *See* Veeva, *supra* note 61.

186. *See* Fischel, *supra* note 165, at 1277 (describing how investor passivity is rational).

neglected.[187] A more dynamic model flips this concept on its head to get to the same result—where shareholders approve or amend the corporate purpose iteratively such that the gap between shareholder will and corporate behavior shrinks. Instead of a judge telling the shareholders what they should value, the shareholders select their corporation's purpose themselves. If shareholders feel like "their money"[188] is being misallocated, they can amend the corporate purpose to make it more shareholder-focused, just like they can vote to unseat underperforming directors. In this way, by decentralizing corporate purpose, the state can allow market forces to correct less-than-desired results; managers and investors will take note of competitors and determine whether to increase or decrease shareholder orientation based on results in the marketplace.[189] This allows the state's median corporate purpose to oscillate until optimized. In these ways, dynamic corporate purpose leverages market forces and the advantages of shareholder primacy to chart a new course for governance.

C. Advantages of Drawing from Stakeholder Governance

Importantly, dynamic corporate purpose also leverages the benefits of stakeholder governance. This construct gives corporations some flexibility to promote wider societal interests directly, provides a strong defense mechanism to asset-stripping activists, and promotes purpose in the boardroom, which may improve corporate performance.

First, dynamic corporate purpose allows the financially focused holding company to pursue a different corporate objective than the eco-conscious retailer.[190] This flexibility allows corporations to prioritize and protect certain stakeholders that may otherwise be neglected under a shareholder primacy model.[191] While the eco-friendly company very well could charter as a PBC today, the competitive pressure to prioritize some class of stakeholders will bring their competitors to face similar

187. *See* Friedman, *supra* note 27 ("Insofar as his actions in accord with his 'social responsibility' reduce returns to stock holders, he is spending their money.").

188. *Id.*

189. *See* Olga Hawn & Hyoung-Goo Kang, *The Effect of Market and Nonmarket Competition on Firm and Industry Corporate Social Responsibility*, *in* 38 SUSTAINABILITY, STAKEHOLDER GOVERNANCE, AND CORPORATE SOCIAL RESPONSIBILITY 313, 330 (Sinziana Dorobantu, Ruth V. Aguilera, Jiao Luo & Frances J. Milliken eds., 2018) (showing that higher corporate social responsibility in a firm's competitors leads to higher corporate social responsibility for that firm in response).

190. *See* Fisch & Solomon, *supra* note 143, at 1312 ("As with purely economic goals, the extent to which a particular corporate purpose is desirable or effective depends on the comparative advantage of the corporate form in pursing those goals.").

191. *See* Ruggie et al., *supra* note 5 (saying the question has shifted "from *whether* corporate boards should take stakeholder interests into account, to *how* it should do so").

strategic decisions. Market forces will encourage support for stakeholder groups instead of incentivizing corporations to externalize all costs to nonshareholders.[192] Scholars increasingly agree that shareholder wealth maximization is not a sufficient proxy for wider societal welfare,[193] so a more direct connection between shareholders and selected stakeholders seems necessary. Because corporations will report against progress made to their purposes, corporations will be accountable to prioritized stakeholder groups as opposed to simply supporting them in the press or having to justify actions on their behalf with shareholders in mind.

Take employees, for example. If a company must prioritize its employees to advance its corporate purpose, it will likely be able to attract better talent, but the corporation will be held accountable to this enumeration. If the directors are not promoting the interests of employees through corporate behavior, shareholders could bring suit that directors are not upholding their fiduciary duty of loyalty to the corporate purpose. This tension is powerful. Corporations incur litigation risk in the face of strategic advantages by adding a set of prioritized stakeholders to their corporate purpose. This limiting factor may lead to prioritizing less stakeholder groups per firm but will lead to stronger support per stakeholder in the process.

Dynamic corporate purpose will also provide strong antitakeover defenses. In a *Revlon* scenario today, if sale is inevitable, directors are required to accept the proposal that will maximize shareholder wealth—regardless of what may happen to the community, employees, creditors, or other stakeholders.[194] This requirement has rightly upset plenty of analysts who view short-termism as a pernicious byproduct of shareholder wealth maximization that ultimately reduces total value of corporations to society.[195] Here, directors will be required to remain loyal to the corporate purpose, which could protect a class of stakeholders outside of shareholders. If the corporate charter prioritizes supplier relationships, directors could refuse a takeover attempt that would harm the corporation's ability to support its suppliers. So, in essence, dynamic corporate purpose may erode some of the short-term focus of the current corporate-governance regime too.

192. *See* STOUT, *supra* note 33, at 1 ("Shareholder value ideology focuses on the interests of only a narrow subgroup of shareholders, those who are most short-sighted, opportunistic, willing to impose external costs, and indifferent to ethics and others' welfare.").

193. *See* Blair, *supra* note 3, at 1 (describing how leading shareholder-primacy advocates have shifted their opinions in the face of corporate scandals and financial crises).

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

195. *See* Lipton, *supra* note 66 (calling for a "New Paradigm" as a solution to short-termism).

Lastly, proponents of stakeholder governance suggest that a firm that is permitted to consider the interests of stakeholders will be more committed to long-term value by being more purposeful.[196] Business schools today often teach the idea that clarity of purpose and strategy leads to greater profitability.[197] Here, the state is calling on directors to follow through with this concept and memorialize an individualized corporate purpose in the firm's charter.[198] As a result, firms should act with more purpose, which not only has the potential to support stakeholder interests but should also improve corporate performance, benefitting shareholders.[199] As a result, dynamic corporate purpose provides corporations the requisite flexibility to better maximize total welfare and provides a mechanism to defend against value-destroying short-termism in the process. This creates a model of corporate purpose that neither shareholder primacy nor stakeholder theory could provide on its own.

D. Risks and Limitations of Dynamic Corporate Purpose

Permitting incorporation without mandating a centralized corporate purpose is not without disadvantages. Like any substantive change in approach to a fundamental legal or existential question, dynamic corporate purpose could impact the state less than anticipated or even create unintended consequences.[200] High-level, these risks include putting too much value on legally written statements, burdening firms during the incorporation process, and balancing the power dynamics of investors, managers, and stakeholders.

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196. *See id.*

197. *See, e.g.*, Serafeim & Gartenberg, *supra* note 64 (describing "high *Purpose-Clarity* organizations" as those "that score high on purpose but also on dimensions of management clarity" and noting that "high *Purpose-Clarity* organizations exhibit superior accounting and stock market performance"); Adi Ignatius, *Profit and Purpose*, HARV. BUS. REV., Mar.–Apr. 2019, at 10, https://hbr.org/2019/03/profit-and-purpose [https://perma.cc/Y4FE-67EK] (noting that there are companies "that have managed to create both financial and social value," and these companies accomplish this by "build[ing] a commitment to creating both kinds of value into their core activities").

198. *See* Fisch & Solomon, *supra* note 143, at 131 (arguing that corporate purpose serves as an internal tool to manage expectations of shareholders and stakeholders, signal priorities, and leverage competitive advantages of the individual firm).

199. Michael B. Dorff, James Hicks & Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 125 (2021) ("A substantial management literature argues that investing in employee well-being results in better long-term profitability outcomes.").

200. Yosifon, *supra* note 36, at 463 (discussing how the creation of the PBC form may actually narrow purpose flexibility in Delaware or may be all together trivial if shareholder primacy is just a default rule).

First, the biggest risk is that corporations would put forth purpose statements that are vague or noncommittal to any particular stakeholder group, which would increase shareholder uncertainty as opposed to decreasing it.[201] Because corporate purpose will not be centralized, investors, credit holders, future employees, and other stakeholders may need to do additional due diligence before transacting with corporations in the state. Ultimately, the state will need to ensure that the DGCL lays out the requirements of a sound purpose statement and will need to put forth a robust statement review process. While this will lead to greater bureaucratic involvement in incorporation, it is a small price to pay compared to potential regulations levied by other solutions. The state could go as far as requiring that firms specifically select which stakeholders the corporation will prioritize as opposed to determining the corporation's priorities based on its purpose statement.[202]

Similarly, there is a risk that all corporations, with the help of legal counsel, would create seemingly uniform corporate purpose statements that are watered down to decrease the probability of legal action against directors.[203] Vague purpose statements would decrease director accountability and erode the benefits of dynamic corporate purpose. While the likelihood that all corporations would have similar purposes under this system may be relatively high, the impact would be minimally invasive to the overall regime.[204] First, every corporation has the same corporate purpose today and under most reform concepts, demonstrating that it is not per se harmful to the state when all corporations are oriented toward a similar purpose. More importantly, applying market discipline for corporations to orient in the direction that makes the most sense for its owners will optimize corporate purpose regardless of the ultimate direction selected by a critical mass

201. Corporations already do this to some degree when they merely state that the purpose of the corporation is to "carry out any and all lawful activities."

202. You could envision a literal checkbox in the incorporation process asking founders to select prioritized parties among shareholders, employees, communities, suppliers, customers, ecosystems, or other parties.

203. *See* Hayden & Bodie, *supra* note 112, at 2438 (describing how corporations circumnavigated laws that limited corporate scope by using boilerplate language for their purpose statement: "the corporation is formed to conduct and transact all lawful business activities allowed under the laws of the state").

204. Importantly, this purpose statement would not constrain the activities of the corporation but rather would orient the board toward its stated purpose. As such, ultra vires actions for ignoring the stated purpose would not arise, but directors would be expected to act with care and loyalty toward the corporate purpose—whatever it may be. *See* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 628 (2017) (arguing that benefit corporations may open themselves up to ultra vires actions if directors ignore the corporation's stated public benefit).

of corporations.[205] In this sense, dynamic corporate purpose trusts that the ultimate outcome of corporate purpose will optimize over the long run even if individual corporations oscillate in the path toward such optimization. Corporations may at first provide watered-down purpose statements, but just as investors pressured corporations to de-classify boards,[206] there will likely be pressure to orient directors toward an optimal corporate purpose somewhere between shareholder primacy and broad-range stakeholder consideration.

The bureaucratic burden of reporting against enumerated objectives could be significant and could be a reason a state would not mandate individualized purpose. Because stating a purpose would be required for all corporations in the state as opposed to just large entities, a likely critique would suggest that small businesses do not have the necessary resources to select a purpose they will have a fiduciary duty to uphold. First, this critique underestimates the wherewithal of corporations' fiduciaries—asking individuals to determine who their corporation should be accountable to is not a significant burden and does not require significant resources.[207] Further, if individuals incorporating a business simply cannot decide an optimal orientation, shareholder primacy provides an easy default option. As the business grows and gains resources, the shareholders can vote to amend the corporate purpose based on any newfound epiphanies as to principles. Thus, purpose statements may lead to some increased legal work for large corporations, but there are numerous avenues for directors to opt out of a more robust corporate purpose.

Lastly, because dynamic corporate purpose is fluid, there could be concerns that the balance of power will shift. The debate over the optimal orientation of directors would turn from academics and legislators to directors and shareholders. Institutional investors, who have already seen their power increase during the twenty-first century, will set the course for corporate purpose, similar to how they have dominated the discussions around other corporate-governance issues.[208] Having shareholders set corporate orientation will represent

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205. Fisch & Solomon, *supra* note 143, at 1344 ("Purpose thus extends the potential for discipline beyond the capital markets to the product and labor markets.").

206. Steven Davidoff Solomon, *The Case Against Staggered Boards*, N.Y. TIMES: DEALBOOK (Mar. 20, 2012, 12:43 PM), https://dealbook.nytimes.com/2012/03/20/the-case-against-staggered-boards [https://perma.cc/25MR-H5W5].

207. *See* Yosifon, *supra* note 36, at 483 ("The PBC's notice and reporting requirements are not particularly onerous or restrictive, although they might be undesirable for some people, because they are costly or boring.").

208. *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2101–02 (2019) (describing how

a shift in who decides the longstanding debate over purpose, but external regulation can be enacted to control the behavior of these entities more directly than can a one-size-fits-all approach to purpose. While providing even more power to institutional investors is a considerable risk, incentives will likely keep these voting blocs relatively passive unless a corporation's proposed purpose is far afield of baseline expectations. Thus, legislators will have an opportunity to regulate the behavior of corporate actors and institutional investors more directly with heightened corporate accountability and investor certainty, even if some risks are present.

This last point provides a reasonable summation of the debate over corporate purpose. As has been discussed, some view regulatory failure as a basis for corporate law to step in as a stopgap measure. That idea confuses the role of corporate law and external regulation; governance law should only be used to set rules and incentives with clarity. Corporate governance does not exist to set some sort of policy agenda, but a sound governance regime should allow for regulation to be more effective. Dynamic corporate purpose will bring corporate communications in line with corporate action such that legislators can better understand where external regulation may be required. Dynamic corporate governance is no silver bullet—corporations will still be expected to pursue welfare maximization, but this regime will bring greater clarity, accountability, and purpose to corporations. And that should be the goal of corporate law.

CONCLUSION

Conveniently, the two poles of the corporate purpose debate are both attempting to optimize for the same thing—maximum societal welfare—by prioritizing different variables in the equation. Because proponents of shareholder primacy and stakeholder governance have the same end in mind, an approach that pulls from both concepts can bridge the gap to cut the academic debate and provide states with a better alternative. Shareholder primacy produces incentives for firms to shirk responsibilities to wider society that inevitably produces outsized externalities, requiring legislators to fill the gap with regulation. Stakeholder governance reduces director accountability and diminishes corporate performance such that the goals of greater societal welfare are not achieved. The existing mechanisms to command and control corporate purpose are inherently flawed, but an approach that

shareholder proposals have led to significant shifts in corporate-governance norms based on the increasing power of institutional investors).

shifts the balance of power through decentralization and market forces can provide an antidote to this longstanding struggle.

Individual corporations should be able to provide their own set of objectives and measurements of success to optimize corporate purpose. By decentralizing the decision as to which parties for whom corporations are managed, Delaware can provide directors greater flexibility to support societal interests while mitigating agency concerns and upholding economic fundamentals. Using the successful model of PBCs, dynamic corporate purpose can supercharge corporate performance, increase director accountability, provide clarity to directors and investors, and improve corporate standing within society. Delaware can do right by its citizens, its corporations, and stakeholders far and wide by decentralizing corporate purpose to solve longstanding governance flaws.

*Fields Pierce**

* J.D. Candidate, 2023, Vanderbilt University Law School; M.B.A. Candidate, 2023, Vanderbilt University Owen Graduate School of Management; B.S. Business Administration and Political Science, 2016, University of North Carolina at Chapel Hill. Thank you to Vanderbilt, Carolina, the Morehead-Cain, and Cape Fear Academy for giving me an incredible educational foundation. I am eternally grateful for the institutions and individuals that have invested in me—it certainly takes a village. Thank you to the editors and staff of the Vanderbilt Law Review, especially Erin Embrey, Caylyn Harvey, and Peter Byrne, for their hard work to make this piece fit for public consumption.