The Structure of Corporate Law Revolutions

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INTRODUCTION

Since, call it 1970, corporate law has operated under a dominant conception of governance that identifies profit-maximization for stockholder benefit as the purpose of the corporation. Milton Friedman's essay *The Social Responsibility of Business is to Increase Its Profits*, published in September of that year, provides a handy, if admittedly imprecise, marker for the coronation of the shareholder-primacy paradigm.[1] In the decades that followed, corporate law scholars pursued an ever-narrowing research agenda with the purpose and effect of confirming the shareholder-primacy paradigm. Corporate jurisprudence followed a similar path, slowly at first and later accelerating, to discover in the precedents and design of corporate law a far better defined profit-maximizing imperative than could have

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1. Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17.

been imagined before the Friedman pronunciamento. The analytical situation seemed sufficiently tidied up by 2001 that two academic giants announced "a widespread normative consensus that corporate managers should act exclusively in the economic interests of shareholders."[2] We had reached, we were told, "The End of History for Corporate Law."[3]

Except we hadn't. We were instead enjoying a settled analytical paradigm and a period of research and law-making in its service. This was no more the end of history than the analytical model that had preceded it, or that had preceded that. In the 20 years since history ended, scholars, commentators and lawmakers have been pulling at the threads of the shareholder-primacy model, raising objections, exposing contradictions, making trouble. Shareholder primacy, influential observers conclude, has "[f]ailed the [p]eople."[4]

And so, we are in the midst of a reordering, a reimagining, of corporate law that many lawyers and scholars would have called impossible not long ago. The conceit of this essay is to call this a corporate law revolution: a moment where social expectation and economic context create conflict between society's demands for corporate conduct and the dominant conception of corporate law. This "revolution," to borrow from the language of scientific revolutions, creates incommensurability between the law defining corporate purpose and the expectations of the society that gives corporations life. Reflecting the historically and socially contingent character of corporate law, this incommensurability requires that the law adopt in turn a new paradigm, one that more closely corresponds to social expectations—an analytical paradigm shift, working a doctrinal revolution. This has happened before, it's happening now, it will happen again.

You will have no doubt by now perceived that this essay is a somewhat overdetermined application of Thomas Kuhn's incomparable study on the evolution of scientific thought.[5] Kuhn showed that scientists generally operate subject to a settled conception or "paradigm"—think "Newtonian physics"—and spend most of their time working out puzzles within the prevailing model rather than testing it. This is called "normal science."[6] But in the course of the practice of the normal science, "anomalies"

2. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* 1 (Program for Stud. L. Econ. & Bus., Working Paper No. 280, 2000), http://www.law.harvard.edu/programs/olin_center/papers/pdf/280.pdf [https://perma.cc/FC48-4VZS].

3. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

4. Andrew R. Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES DEALBOOK (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html [https://perma.cc/7VP6-52BF].

5. *See generally* Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012).

6. *Id.* at 41.

can occur—results inconsistent with the paradigm. When anomalies accumulate to the point that the science and the theory cannot be reconciled, the result is doctrinal "incommensurability"—which results in a full-on challenge to the received wisdom, often ferocious debate between proponents of the incumbent theory and proponents of the heresy, the occasional house arrest or burning at the stake, all followed ultimately by the emergence of a new paradigm.[7] That is the structure of a scientific revolution. To be sure, corporate law revolutions are a little different. Because corporate law is a series of social rather than scientific principles, incommensurability does not arise from anomalous data but rather from irreconcilable social expectations. But the dialectic—and the point that today's doctrinal certainty may not survive tomorrow—is much the same.

I've drafted this essay with the voice and views of Marty Lipton, my senior partner, top of mind. This is for several reasons. The first is that Marty understood with preternatural clarity the operation of the dialectic described in this essay. When shareholder primacy was maturing to its early full bloom, Marty was very nearly a lone holdout, insisting that shareholder primacy could not endure. His 1979 article articulating that view, "Takeover Bids in the Target's Boardroom," was and remains a true classic.[8] Mr. Lipton's article anticipated the flaws in Friedman's shareholder-primacy narrative that would not become broadly apparent for 30 years. He saw incommensurability and anomaly in the shareholder-primacy paradigm, and the necessity of today's corporate law revolution, while the rest of the legal community was settling in for a long period of "normal science."

Even more, though, is this: Marty does not just talk about stakeholder governance; he lives it. It is the great privilege of my professional career to have practiced law at the law firm he built. Marty built it on the belief that everyone at the firm is family. And on the belief that commitment to craft, and client service, and tireless effort, and community engagement, and thought leadership, and constant innovation, and respect for every employee anywhere within the firm's walls, could all be harmonized into a coherent scheme of organizational governance designed to produce the world's best law firm. We should allow our corporate leaders the chance to strive for the same.

I. THE STRUCTURE OF CORPORATE LAW REVOLUTIONS

Let's start with *Dodge* v. *Ford.* After all, most everyone does, principally to demonstrate that directors have *always* labored under a duty to

7. *Id.* at 43.

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

maximize shareholder profit. The controversy turned on Henry Ford's decision to stop paying dividends to the handful of investors holding Ford Motor Co. shares—which handful included the Dodge brothers who would soon launch a namesake competitor to Ford—and to plow the funds into higher wages instead. The Dodges sued, claiming an entitlement to a bigger share of the profits.[9] Ruling for the Dodges on this issue, the Michigan Supreme Court held that "a business corporation is organized and carried on primarily for the profit of the stockholders."[10] Fairly read, and much wishful thinking and motivated reasoning to the side,[11] *Dodge* is a clear statement that directors are to manage in the service of shareholder profit.

That doesn't mean, however, that the corporate law always has or always will enforce that norm. Better to say that *Dodge* reflected the then-contemporary conception of the corporation "as essentially a sort of limited liability partnership,"[12] different in kind and degree from the contemporary corporate form. On this view, the Dodges were oppressed minority partners, entitled to their share of the enterprise's profits once its obligations to others had been satisfied.

But even accepting for now that the *Dodge* decision reflected a turn-of-the-century conception of corporate purpose and director duty, it was not, as Chancellor Allen observed, Dodge's shareholder-primacy holding, but rather Ford's losing position that "reflected an idea that was in the air":

> The secure wisdom of the nineteenth century, while convincing to the Michigan Supreme Court, was not strong enough to contain this [new] alternative view of corporations as independent social actors who do not simply owe contract or other legal duties to those affected by its operation but owe loyalty in some measure to all such persons as well.[13]

As Chancellor Allen suggests, Michigan's clear statement of corporate purpose supplied the rule of decision in the case, but it never became an operational rule of law.

In fact, the rule of *Dodge* scarcely survived its announcement. It was overtaken by a corporate law revolution reflecting an evolved public and political conception that the robber-baron era of corporate capitalism was no longer commensurate with society's expectations.[14] Throughout the

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9. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

10. *Id.* at 507.

11. *See, e.g.*, Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163 (2008).

12. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 268 (1992).

13. *Id.* at 270–71.

14. *Id.*

early 20th century, political leaders all along the spectrum—from progressive reformers like Woodrow Wilson to his free-market rival Theodore Roosevelt—agreed that as their power and heft accelerated, corporations needed to "act for the interests of the community as a whole."[15] *Dodge*'s holding, based as it was on a quaint conception of the corporation as a partnership on stilts, no longer fit. And so, *Dodge* notwithstanding, "the dominant view of corporate law for most of the twentieth century eschewed the notion of 'shareholder primacy.'"[16] In its place emerged a managerialist model that allowed—expected—boards to manage their corporations in the name of the entity and its various constituencies. Thus, as early as 1920, the chairman of the General Electric Company accepted the obligation to pay stockholders "a fair rate of return," but equally recognized a duty to manage the company "in the public interest . . . as a great and good citizen should."[17]

The theme endured for three generations. In 1946, the chairman of Standard Oil declared that management's duty "is to maintain an equitable and working balance among the claims of the various directly interested groups," including "stockholders, employees, customers and the public at large."[18] A few years later, to similar effect, the president of Merck & Co. stated that the company's purpose was to develop medicine "for the patient. We try never to forget that medicine is for the people. It is not for the profits."[19] No one thought the law was otherwise. Reflecting broadly on the managerialist conception of corporation—and on the limited and increasingly anachronistic rights still left to stockholders—Bayless Manning declared in 1962 that "corporation law, as a field of intellectual effort, is dead in the United States."[20]

Indeed, as late as 1981, the Business Roundtable[21] wrote in the *New York Times* that "The simple theory that management can get along by

15. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 173–82 (Random House, Inc., 2003) (quoting Theodore Roosevelt).

16. David J. Berger, *In Search of Lost Time: What If Delaware Had Not Adopted Shareholder Primacy?*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES 48, 54 (Solomon & Thomas eds. 2019).

17. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154 (1932).

18. Robert B. Reich, THE FUTURE OF SUCCESS 71 (Random House, Inc., 2000).

19. Berger, *supra* note 16, at 54.

20. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962).

21. The Business Roundtable is "an association of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. . . . Business Roundtable members develop and advocate directly for policies to promote a thriving U.S. economy and expanded opportunity for all Americans." *About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us [https://perma.cc/VWD3-C5D9].

considering only the shareholder has been left behind in old economic dissertations. . . . [CEOs] know that they have to be concerned not only about shareholders but about such constituent groups as customers, employees, communities, suppliers and society at large."[22] As David Berger aptly concluded, "for the period beginning at least with the New Deal in the 1930s until the 1980s, corporations and corporate law generally recognized that a corporate board was responsible to the broader corporate stakeholders, including its customers, employees, communities, suppliers and others."[23]

But, like the holding of *Dodge* v. *Ford*, the Business Roundtable's pronouncement was becoming obsolete just as it was uttered. The story of the economic disruptions of the 1970s and 1980s, and the concomitant upheaval in corporate law, has been well and often told and needs no rehearsal here.[24] Sufficient for my tendentious purpose to say that the flagging economic performance of the managerialist regime, the collapse of the conglomerate form, the rise of institutional investors, the emergence of the junk bond market, the globalization of the economy, the politics of deregulation, the intellectual chic of Friedman and the Chicago School, and the radically heightened level of takeover activity, all left the superstructure of corporate law implausibly perched upon a transformed base of social and economic reality that rejected its very premise. For sixty years, everyone trusted managers and the law reflected that. Now, rather suddenly, no one did. This was a classic sort of incommensurability. The law was going to have to change.

And it did. Here again, the change was more in the norms of practice and expectation than in the decided cases. *Revlon* held that in the context of a cash merger, director duties run to stockholders alone.[25] But companies and their advisors then applied the shareholder-primacy norm far beyond the context of the case. Hansmann and Kraakman could make a powerful case for the end of corporate law history because, by 2001, every model save shareholder primacy had seemed to be discredited. Scholars—and lawyers and judges too—were engaged in "normal science," working out the details of the shareholder-primacy model, rather than challenging it. Tall mountains of data were compiled and studied and restudied to

22. Andrew C. Sigler, *Roundtable Reply*, N.Y. TIMES (Dec. 27, 1981), https://www.nytimes.com/1981/12/27/business/business-forum-reader-comment-roundtable-reply.html.

23. Berger, *supra* note 16, at 61.

24. *See*, *e.g.*, Allen, *supra* note 12, at 263; Micklethwait & Wooldridge, *supra* note 15, at 121–54.

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

prove that shareholder-first governance generated higher returns for investors and better outcomes.[26] Legal rules were crafted, and an enormous industry launched to ensure this empirical research was given practical effect.[27] Until very recently, that paradigm was not only ascendant, but unchallenged.

The claim here, however, is that we are now in the early days of a Kuhn-style paradigm shift, evidenced by anomalies in practice and expectation that will create a mismatch between social demands and corporate law—incommensurability that will yield yet another corporate law revolution. More on that in a few pages. The takeaway for now is that corporate law changes, and changes again, and then again, not in response to court cases, and notwithstanding precedent, but rather to reflect far broader social, political and economic currents. *Dodge* may stand for the shareholder-profit theory of the corporation, but it doesn't control the question of corporate purpose.

II. A Concession, a Reservation, and a Hypothetical

So, we are shifting from what to what?

Not too long ago, Mr. Lipton and I published the following synopsis of director duty and corporate purpose:

> Nor does any rule of law mandate director obeisance to the ideology of share-price maximization. No statute anywhere enshrines or even endorses the objective of share-price maximization. Nor does case law require directors to manage the ongoing business and affairs of the corporation with the paramount goal of maximizing share price. Directors may be obligated to seek the highest price in the context of a corporate auction, and the market's perception of a corporation's future prospects, as reflected in the stock price, is no doubt a relevant factor in deciding how to manage the company to maximize its potential. But not even the most aggressive reading of precedent identifies share-price maximization as the polestar of director decision-making.

26. *See, e.g.*, Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107 (2003) (using empirical data to create the "G-Index" for good corporate governance, correlating effective governance with shareholder primacy); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (50-country survey claiming to demonstrate correlation between shareholder protection and corporate outcomes).

27. *See* GLASS LEWIS, 2023 POLICY GUIDELINES 23 (2023), https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf [https://perma.cc/E4M3-9LQF]; *see also* ISS GOVERNANCE, PROXY VOTING GUIDELINES 45–48 (2022), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/N7G8-5YZ2].

> Insightful commentators accurately emphasize that shareholders alone enjoy the corporate franchise, and with it the power to select directors. But that voting structure does not compel the conclusion that directors who are elected by shareholders must or should manage the corporation only in shareholder interests. Nor does it mean that directors, once impaneled as corporate stewards, cannot manage with the interests of society and people in view. To be sure, the vote makes directors accountable to shareholders, but it does not define or delimit the scope of directors' duties—which remain, first and foremost and in every U.S. jurisdiction, the preservation and promotion of long-term corporate health and value.[28]

Ed Rock characterized this as "a fairly clear statement of the traditional view" of corporate purpose, "with just a slight difference in emphasis" having to do with whether in some circumstances, "directors can pursue the interests of society and people when they believe that doing so does *not* benefit shareholders over any time frame."[29] Somewhat less generously, Stephen Bainbridge called our formulation (essentially) the dumbest thing he'd ever heard.[30]

Here is my narrow concession: I would withdraw our statement that "not even the most aggressive reading of precedent identifies share-price maximization as the polestar of director decision-making."[31] Learned commentators ***do*** read *Dodge* v. *Ford*, *Revlon*, and the cartoonishly idiosyncratic *eBay* v. *Newmark*[32] as compelling director decision-making to prioritize shareholder value above all else.[33] I cannot agree with their reading, partially because none of these cases were really about the limits of the duty to value-maximize, partially because none presented the issue in its crystallized form, and partially for the reasons advanced in this essay: the corporate common law is historically contingent and apart from a very few elemental principles—think theft and self-dealing—fiduciary principles are, properly, recrafted every day.

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28. Martin Lipton & William Savitt, *Stakeholder Governance—Issues and Answers*, HARV. L. SCH. F. ON CORP. GOV. (Oct. 25, 2019), https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/ [https://perma.cc/77YJ-DR9B].

29. Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose*, 76 BUS. LAW. 363 (2021).

30. Stephen Bainbridge, *Wachtell, Lipton's False Gospel of the Law of Corporate Social Responsibility and the Reasoning Behind It*, PROFESSORBRAINBRIDGE.COM (Oct. 26, 2019), https://www.professorbainbridge.com/professorbainbridgecom/2019/10/wachtell-liptons-false-gospel-of-the-law-of-corporate-social-responsibility-and-the-reasoning-behind.html [https://perma.cc/X3VN-X465].

31. Lipton & Savitt, *supra* note 28.

32. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

33. *See, e.g.*, STEPHEN BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 50–72 (Cambridge Univ. Press 2023).

But that note of disagreement notwithstanding, it can fairly be conceded that the strong form view of shareholder maximization does supply the prevailing paradigm. Ask the leading two dozen Delaware lawyers whether, under the law as it stands right now, directors have an obligation at all times to maximize stockholder profits and you'll receive a confident consensus of "yes."[34] Many if not most corporate practitioners doubt that a board can reject an unsolicited takeover bid without first comparing the premium offered against the expected long-term value of the company.[35] In a compelling address to the Weinberg Center for Corporate Governance, Vice Chancellor J. Travis Laster demonstrated the long antecedents of today's dominant stockholder-maximization model.[36] Leaving to the side whether the law so instructs, there is a consensus, not uniform but close to it, and stronger in Delaware than elsewhere, that directors must act always to further the objective of stockholder value.

That's the concession; here's the reservation: today's consensus is not likely to make it to tomorrow. Extracting the holdings of a selection of cases does not tell us what the corporate law is, let alone dictate director decision-making. The corporate law was not received on a mountaintop. It is forever in the process of being "worked out," as Chancellor Allen so well expressed it. Today's consensus "will not be a final answer to the question, what is a corporation."[37]

Without any intention of withdrawing the concession, now a brief hypothetical diversion. *eBay* and *Dodge* demonstrate that when a board adopts positions inimical to stockholders and stockholder interests, the courts may intercede. That does not dispose of the question of corporate purpose. Nor does it resolve how a board or a company must mediate serious conflicting interests implicating important constituencies or social interests. That case is not yet decided. Henry Manne long ago served up a hypothetical designed to sustain the shareholder-primacy model, in which several companies determine not to pollute a nearby river, thereby surrendering profit, only to have their good deed undermined by one uncooperative company.[38] Stephen Bainbridge picks up the thread in what he calls

34. I know this because I've done it.

35. Asked for a source to support this claim I can only report that I have heard transactional lawyers, over and over again, express the belief (or sometimes the surmise) that a board confronted with an unsolicited offer must compare standalone value to proposed deal value. I should add that I have heard learned commentators and judges express the opposite view, which I think is correct as a matter of both precedent and policy.

36. J. Travis Laster, *Purpose, Power, and Fiduciary Duty: Dimensions of Delaware's Corporate Law Regime*, UNIV. DEL. (May 18, 2021), https://tinyurl.com/yckcp5m8 [https://perma.cc/4DHD-T343].

37. Allen, *supra* note 12, at 279, 281.

38. HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY 31 (Am. Enter. Inst. for Pub. Pol'y Rsch., 1973).

the "Bainbridge Hypothetical," wherein a Rust Belt company is faced with a clear value-maximizing option to move offshore, at the expense of jobs and the local economy.[39] He concludes that the law does and should require the company to make the move.[40]

Very well. Let's put the two hypotheticals together. An industrial company sits on the edge of a river. It has the option to dump effluent into the river. Doing so will cause the extinction of a rare species of fish. Don't worry, it's completely legal; and the evidence before the board is conclusive that it will maximize stockholder value over the long term—taking fully into account any reputational or future regulatory concerns. May the board adopt a policy of species conservation that admittedly does not maximize corporate value for stockholders? Or would a court order the company to kill off the fish, just as Michigan told Mr. Ford to pay dividends? Raise your hand if you think directors who decline to exterminate the species would be personally liable to the stockholders for the lost profit.

No hands are up in the air of course. Ask superb practitioners in the field why and the first explanations usually fight the hypothetical: "The reputational hit of killing of species would be value-destroying." "The company would be subject to litigation from advocacy groups." "The long-term value of the company would probably be higher if it were a good corporate citizen." All that may be true in many cases, but not in this one—that's the hypothetical. The full and informed record before our board is conclusive that firm value over the long term will increase if the company takes advantage of the opportunity to lawfully pollute.

So, what then? The next explanation is often the business judgment rule. In Delaware, the principle of value-maximization has been endorsed as judicial holding only in cases involving corporate control.[41] Outside of that context, astute practitioners observe, boards have wide latitude to exercise their business judgment, taking into account a broad range of considerations, including but not limited to stockholder value. Moreover, boards are properly advised that outside of the change-in-control context, they are under no obligation to maximize immediate share value but are rather entitled to weigh reputational and long-term interests in any business decision. As a result, business decisions such as the question cued up in our hypothetical can usually be avoided by recourse to the principle of business judgment.

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39. Peter Tunjic, *Revisiting the Bainbridge Hypothetical: Corporate Purpose in Australia*, ON DIRECTORSHIP (May 12, 2017), https://ondirectorship.com/ondirectorship/4ttslzs85gw4cwe78khn92kp295s2w [https://perma.cc/7YCK-4EHZ] (coining term "Bainbridge Hypothetical"); *see also* BAINBRIDGE, *supra* note 33, at 132.

40. BAINBRIDGE, *supra* note 33, at 132, 167.

41. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

This is all true but, again, it all just avoids the question. And it can't always be avoided. In *Dodge* v. *Ford*, after all, the issue was whether the company had to pay a dividend—a question having nothing to do with corporate control and one as firmly confided to business judgment as the corporate law can imagine.[42] Nor does the flexibility of the business judgment rule tell directors *how* to exercise their judgment—whether they should ultimately direct corporate policy to maximize returns to shareholders or whether they have the discretion to subordinate that interest to broader or more inchoate concerns.

Put otherwise, there are lots of ways to *avoid* the question. But what is the right way to *answer* it? Must the directors cause the corporation to kill the fish if that result will increase value of the corporation for the stockholders? No one wants to admit it, but the prevailing paradigm says yes. The claim here is that paradigm cannot stand, and that, as the anomalies cataloged below confirm, it is already crumbling. First, though, let's address important claims that the coming paradigm shift is not legally or logically possible.

III. IS REVOLUTION POSSIBLE?

Several themes recur in opposition to a stakeholder-governance paradigm: arguments from accountability; arguments from economic contribution; and arguments from precedent. These considerations are invoked not only to show that stakeholder primacy is undesirable, but also that it is inconceivable. Yet it was also inconceivable in Galileo's time that the world circles the sun—and yet it moves[43]—or that the Proud Boys would be sitting in Ms. Pelosi's chair—and yet there they were. Only today's "normal science"—generations of commentary and scholarship designed to reinforce rather than challenge the orthodoxy—makes these obstacles appear insuperable.

A. On Accountability

If management is accountable to all stakeholders, goes the argument, it is accountable to none. The bad old days of imperial management and unchecked agency costs will return.[44] This critique refuses to take full measure of the accountability device contemplated by the legislature—elections. Every year, stockholders choose their directors. If the board is

42. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

43. *And Yet It Moves*, WIKIPEDIA, https://en.wikipedia.org/wiki/And_yet_it_moves [https://perma.cc/5F5N-B2HT] (accessed May 31, 2023).

44. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–91 (2007).

worrying too much about climate, or the environment, or employee welfare, and not enough about profit, the stockholder body can and will throw them out. Indeed, this is the accountability mechanism contemplated by statute. It does not radically overstate things to say it is nearly the *only* accountability mechanism contemplated by statute. And it is of course nearly the only accountability mechanism that governs the political republic on which the corporate republic is founded.

Suit for fiduciary breach is a supplemental judge-created accountability device, imported into the corporate law from the law of trusts. No doubt it is a critical component of a well-functioning accountability regime, necessary to police self-dealing, conflicts of interest, and analogous risks of disloyal fiduciary conduct. But no account of stakeholder governance would impair the right of stockholders to sue directors or managers for self-dealing or disloyalty.

Why aren't these accountability devices adequate? One answer is that corporate fiduciaries are agents of stockholders, standing in a position akin to a trustee, so that they must attend to the interests of their principals and none other. This contention confuses analogy with legal fact. The relationship between directors and stockholders is *like* an agency relationship in some ways; it is *like* a trustee relationship in other important ways. But it's also very different. Agents are obligated legally to carry out the wishes of their principals. Trustees are obligated legally to carry out the expressed directives of their settlors. No one claims that corporate directors are likewise constrained in their conduct by stockholders. Nor do trustees and agents work within a complex statutory scheme that designates another mechanism—elections—as the principal means of ensuring accountability, and which is required to elect a board of directors to operate as a hierarchical decisionmaker for widely dispersed, presumptively differentiated interests. These branches of the law supply useful analogies, or even metaphors for corporate law. As such they can illuminate the corporate law; they should not be permitted to devour it.[45]

Another accountability-based observation in support of an iron rule of shareholder primacy is that only stockholders elect directors. The idea is that the statute creates accountability only to stockholders and that directors should be expected to manage to please their electorate and to ignore non-voting constituencies.

45. So too with the claim, frequently made, that stockholders "own" the corporation, such that directors should act only in the stockholders' interest. Here again, this claim is at best a metaphor, and more likely more misleading than illuminating. Stockholders own shares of stock, not companies. By virtue of share ownership, stockholders enjoy specified statutory rights and contractual rights to the residual value of the assets and cash flows of the company whose shares they own. Commentators from Allen through Bainbridge have thus rejected the shareholder-primacy argument from "ownership." Allen, *supra* note 12, at 268–69; BAINBRIDGE, *supra* note 33, at 126–28.

Chief Justice Strine—as formidable a commentator on Delaware law as there can be—has frequently invoked Eddie Cochran's 1950's rockabilly classic "Summertime Blues" to make this point.[46] Although the song clocks in at under two minutes, the narrative tension is exquisite. Wikipedia nails it:

> The song is about the struggle between a teenager and his parents, his boss and his congressman during the summer. The narrator resents having to take a job in order to earn pocket money, and he cannot go on a date with his girlfriend because his boss keeps scheduling him to work late. After falsely telling the boss he is sick in order to get out of going to work, his parents will not let him use their car due to his laziness. Finally, he considers visiting the United Nations to complain about his situation; he settles for writing to his congressman, who brushes him off since he is too young to vote.[47]

It is the last bit that is of interest here. The protagonist does not actually write his congressman, but calls him, and apparently even manages to get him on the phone. The precise request is obscure but appears to involve access to the car and time off for a date. The congressman's response: "I'd like to help you son, but you're too young to vote."[48]

Chief Justice Strine invokes this vignette to conclude that "[w]hen only one constituency has the power to displace the board, it is likely that the interests of that constituency will be given primacy."[49] While I don't doubt that this is broadly true, I cannot agree that it is always or, more important for present purposes, that it bears on the scope of fiduciary duty. After all, politicians, sometimes, take unpopular positions for disenfranchised causes or constituencies.

And far from establishing that corporate directors may not consider non-stockholder interests in the exercise of their duties in office, Cochran's story rather more suggests the contrary. The congressman didn't tell the protagonist that he *couldn't* help him, only that he wouldn't.

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46. *E.g.*, Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1187 n.35 (2002); Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 455 n.17 (2014). I should note that I usually defer to the views of scholars, and nearly *always* defer to the views of judges—let alone my friend and colleague Chief Justice Strine. But all that goes out the window when a guitar or a radio is involved.

47. *Summertime Blues*, WIKIPEDIA, https://en.wikipedia.org/wiki/Summertime_Blues [https://perma.cc/R8V3-47VC] (accessed May 31, 2023).

48. *Summertime Blues Lyrics*, GENIUS, https://genius.com/Alan-jackson-summertime-blues-lyrics [https://perma.cc/G25C-76WN] (accessed May 31, 2023).

49. Strine, *supra* note 46, at 455 n.17; *see also* Strine, *supra* note 46, at 1187 n.35 (same); Leo E. Strine Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 153 n.52 (same).

More pertinently, members of Congress, and public officials generally, not only may, but routinely do, look after the interests of those who cannot vote: children of course, persons who are incarcerated, foreign nationals, future generations. Nor would it ever be said that a public servant was in dereliction of her duty by prioritizing environmental concerns. The electoral accountability mechanism properly tends to focus the official on interests of the electoral body—but there is nothing in the mechanism that limits or even ties the official's priorities or focus to the interest of the voters. Rather, it is left to the judgment of the official to allocate effort and investment, within the confines of the law and subject always to a reckoning at the polls. So too with directors.[50]

Finally, it warrants notice that the shareholder-value-maximization paradigm, rooted though it may be in Delaware law and popular consciousness, is not the general rule. Very few non-U.S. jurisdictions hew to it. None (or very nearly none) would bar a director from acting in the service of broader social or environmental interests, even if the net return to stockholders was negative. Some 30 U.S. states have statutes that expressly permit directors to weigh the interests of non-stockholder constituencies, even in weighing a takeover bid. Corporations chartered under these statutes and elsewhere in the industrialized world have not suffered from a collapse of accountability. No frenzy of virtue-signaling, rent-seeking entrenchment has ensued.

Now, it has been objected in response that firms operating under constituency statutes behave very much like Delaware-incorporated firms, proving that companies will not serve the interests of stakeholders even when empowered to do so.[51] This claim is a bit of a dodge, as I have argued elsewhere.[52] For one, it does not address but rather just avoids the fact that directors authorized to subordinate shareholder interests often choose not to, thereby undermining the accountability narrative (and much of the most overheated rhetoric of agency costs). This should be good news to shareholder-primacy proponents.

Moreover, the claim overlooks that in a sensibly narrow form of stakeholder governance, directors should, and should be expected to (and, as the preceding paragraph suggests, do), generally promote stockholder

50. *See, e.g.*, William Savitt & Aneil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORNELL L. REV. 1881, 1891–92 (2021).

51. *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

52. *See* Savitt & Kovvali, *supra* note 50, at 1890. Bebchuk's account shows that directors operating under the shareholder-primacy paradigm tend to sustain it, even when they may have flexibility not to. That's normal science. It does not remotely show that directors operating under a stakeholder paradigm would fail to sustain that paradigm.

welfare as a matter of priority.[53] Firms will mostly do well by doing good; managing for the broader goodwill most often generates high returns; irresolvable conflicts between stockholders and stakeholders will be the edge case. And that's what we're fighting about—edge cases that isolate the rule. Heaven knows *Dodge* and *eBay* were edge cases, yet they are the cases-in-chief for the stockholder-primacy crowd. Allowing tomorrow's edge case to be decided in favor of important environmental or social interests—even at incremental cost to stockholders—will do nothing to impair the imperative of director accountability.

B. The Matter of the Contract

Another leading claim against stakeholder governance is that stockholders alone, unprotected by contract rights, provide permanent capital to the firm. In the hypothetical bargain that the law should enforce, therefore, directors should advance shareholder interests alone. To do otherwise would shift wealth from stockholders to stakeholders (but not the other way around). That is improper, we are told, from the perspective of fairness and unwise from the perspective of efficiency.

Missing entirely from this account is the interest of the state, of the people. This account might be persuasive in the context of purely private ordering, such as an unincorporated partnership or a true trust arrangement. But a corporation is not simply promoters banding together, starting a business, and bearing the ensuing risks and rewards. Instead, the promoters band together, start a corporation, and, through the miracle of limited liability, lay off a substantial portion of their risk—on me and you, on society at large! There's a reason every business chooses limited liability. It is a subsidy, a hugely valuable cross-subsidy, from the people at large to corporate stockholders. When companies harm broader social interests, "[t]he corporate entity itself might face liability, perhaps even bankruptcy, but the shareholders can walk away from the wreckage, profits in hand."[54] Thus, relying on limited liability, "[s]hareholders have been let off the hook in case after case."[55]

One needn't take the view that limited liability is unjust or inefficient—which I do not for a moment believe—to observe that it constitutes a significant social contribution to every incorporated entity and allows stockholders to externalize much of their downside investment risk on the

53. *Id.* This framing would not readily support a broader scheme of stakeholder governance that—for example—anticipated legally enforceable duties running to stakeholders or stakeholder voting rights. But important incremental progress is achievable without such far-reaching structural upheaval. *See, e.g.*, Lipton & Savitt, *supra* note 28.

54. Katharina Pistor, *Limited Liability Is Causing Unlimited Harm*, WORTH (Feb. 13, 2020), https://www.worth.com/limited-liability-is-causing-unlimited-harm [https://perma.cc/44VW-YPH9].

55. *Id.*

public at large while retaining their unlimited claim on the upside. Through limited liability, society contributes to the corporate wealth-creation machine. By statute, that machine is guided not by stockholders but by directors. Having made that substantial contribution, society can fairly ask that directors take its interests into account in guiding corporate policy, and directors can fairly take society's interests into account in the exercise of their statutory mandate. There is nothing inequitable about it and nothing inefficient. To the contrary. The inequity would be to exclude society's interest notwithstanding its contribution. The inefficiency would be to bar directors from avoiding negative externalities while still broadly managing in the interest of value creation.

C. The Matter of Precedent

As we have discussed, there exist also a number of cases that have been invoked to argue that Delaware law must resolve conflicts between stockholders and other constituencies in favor of stockholders.[56]

Does this body of authority preclude a rule of law permitting directors to regard non-stockholder interests in an appropriate case? Doubtful, on multiple grounds. Other than a 100-year-old case on outrageously idiosyncratic facts, there is no appellate holding prohibiting directors from crediting non-stockholder interests outside the corporate sale context.[57] There is a broad field of latitude for a trial judge confronted with a difficult, novel question of interest-balancing to make room for director discretion.[58]

The *eBay* decision is often invoked as further powerful authority for the stockholder-maximization theory of corporate purpose. But the legal backing for the relevant part of the opinion is wafer-thin. Here's the key passage:

> Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the cor-

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56. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). We have already reviewed *Dodge* (albeit not a Delaware case), *eBay*, and *Revlon*. *See also* Laster, *supra* note 36, at 19 (citing *LC Capital*, *In re Trados*, *Blackmore Partners*; *Equity Linked*; and *Simons* v. *Cogan*). As Chief Justice Strine points out, moreover, Chancellor Allen recognized directors' duty to maximize long-term stockholder value in iconic cases including *TW Services* and *Time* v. *Paramount*. *See* Leo E. Strine, Jr., *The Dangers of Denial,* 50 WAKE FOREST L. REV. 761 (2015). As discussed in the text, however, I interpret Chancellor Allen's non-judicial writings differently than the Chief Justice, and as highly congruent with the premise of this essay.

57. I am aware of page 182 of the *Revlon* decision, but also of *Unocal*. *See* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946 (Del. 1985).

58. *See generally* Lynn M. LoPucki, *The End of Shareholder Wealth Maximization*, U.C. DAVIS L. REV. 2017, 2027–30 (2023).

> poration for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . .[59]

When a trial court makes such a consequential statement of legal policy, it might be expected to have a robust basis in the caselaw. But in support of this statement of law and corporate purpose, the *eBay* court cited—absolutely nothing. That is because there is no authority in Delaware law that would sustain the court's broad claim of corporate purpose. The only support the decision offers for the claim is from logic—that "[t]he 'Inc.' after the company name has to mean at least that."[60] But that's not right. What the "Inc." after the company name means is that the company has taken advantage of statutory limited liability, just like "Ltd." or "Corp." or LLC or LLP. The designation has nothing to do with stockholder value: many not-for-profit companies (which have no stockholders) also have "Inc." after their name.[61] The designation instead operates to alert counterparties that they are dealing with an entity that may not be answerable for all its debts—an entity, as argued above, that is receiving a significant subsidy from the state and all its citizens and can fairly be asked to repay that subsidy with due regard for societal interests.

Not only do these precedents not dictate the matter of corporate purpose, the overwhelming weight of authority, in Delaware and elsewhere, holds that directors owe duties "to the corporation and its stockholders."[62] Directors faced with operational decisions, and courts reviewing those decisions, could fairly view certain non-stockholder constituent interests as congruent with those of the corporation, giving rise to a conflict between corporate interests and stockholder interests.

United States courts have never addressed that conflict, but it could readily be resolved, as it has in other jurisdictions,[63] by recognizing that

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59. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

60. *Id.*

61. Skeptics are invited to review filings with state secretaries of state. By way of radically anecdotal evidence, I serve on two not-for-profit boards, both of which have "Inc." at the end of their names.

62. Laster, *supra* note 36.

63. Among illustrative examples, Canada, England, and Germany have been clear that companies can—and should—favor broader corporate and social interests, rather than the stockholder interest. *See, e.g.*, People's Department Stores v. Wise [2004] 3 S.C.R. 461, 481 (Can.) ("[T]he 'best interests of the corporation' should be read not simply as the 'best interests of the shareholders'"); Re BSB Holdings Ltd (No. 2) [1996] 1 BCLC 155, 251 (Eng.) (English law "does not require the interests of the company to be sacrificed in the particular interests of a group of shareholders"); GEOFFREY MORSE, PALMER'S COMPANY LAW 2605 (Sweet & Maxwell 2014) (when conflict arises, corporate interests should be given preference over shareholder interests) (England); Gerald Spindler, *Social*

director duty to the corporation is analytically prior and doctrinally paramount. That rule would conflict with no precedent and reinforce first principles. Governments charter corporations—and bestow upon them the remarkable gifts of perpetual life and limited liability—not primarily to make money for shareholders, but rather to promote the economy and opportunity for society at large. The essential obligation of corporate directors has thus historically been to the corporation itself: to nurture long-term economic growth that reaps benefits for, and avoids costly externalities on, the broader society.[64] A corporation that succeeds in that effort will advance the interests of all its stakeholders, not just its shareholders. Conceived in this way, shareholder profit is not the sole objective of the corporation, but rather the byproduct of a well-functioning corporate governance regime. These principles support director discretion in the event of a conflict between corporate and stockholder interest and fit seamlessly into the fabric of Delaware law.[65]

Recall, finally, that neither the corporate statutes nor any regulation even remotely compels the principle of stockholder primacy. The authority, whatever its force and in-point or not, is all judge-made, nearly all on idiosyncratic facts, nearly all at the trial level. The legislature can clarify

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Purposes in German Corporate Law & Benefit Corporations in Germany, *in* INT'L HANDBOOK OF SOCIAL ENTER. L. 585, 589–90 (2022) (German High Federal Court upheld that directors must pursue Unternehmensinteresse: the interest of the enterprise, which is not the same as the interest of its shareholders); Jacques Deguest, Cross-Country Comparison of the Evolution of Corporate Governance from a Shareholder to Stakeholder Perspective 26–62 (2014) (Master's Dissertation, Univ. of Liverpool) (http://dx.doi.org/10.2139/ssrn.2723706); Carol Liao, *A Canadian Model of Corporate Governance*, DIR. J. OF THE INST. OF CORP. DIRS., Jan.–Feb. 2014, at 36, https://ssrn.com/abstract=2379937 [https://perma.cc/L944-SDHL]; Youssef Djehane, *Corporate Governance and Directors' Duties in France: Overview*, THOMSON REUTERS PRACTICAL LAW (Mar. 1, 2023), https://uk.practicallaw.thomsonreuters.com/8-502-1296 [https://perma.cc/M52Q-9PRF]; Nichola Peters, Michelle de Kluyver & Jaya Gupta, *Directors' Duties: The UK Perspective*, GLOB. INVESTIGATIONS REV. (Jan. 4, 2023), https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2023/article/directors-duties-the-uk-perspective [https://perma.cc/53NN-Q7JQ].

64. One needn't view the corporation as pathological to recognize that it is "a state-created tool for advancing social and economic policy." Conceived in this way, the corporation "has only one institutional purpose: to serve the public interest "and not some circular conception of the public interests that equates it with the interests of business." JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 1598 (2003). Whatever one might think of this somewhat extreme contention, it seems hard to escape the conclusion that the legislature created the corporate form with the objective of improving the lot of society at large rather than enriching stockholders. Especially given that 95% of share price gains are concentrated in richest 5% of the population—such that "share price over everything" wouldn't make a very compelling electoral slogan. The underlying economic facts do not seem susceptible of important dispute. *See* Berger, *supra* note 16, at 71 (going on to observe "share ownership is so concentrated among the wealthy (and very wealthy) [that] maximizing share value at the expense of the company's other stakeholders means that if shareholder wealth maximization is the ultimate goal of the corporation, then the wealthy will benefit disproportionately as a result since they own the vast amount of stock traded in the country").

65. *See* Lipton & Savitt, *supra* note 28.

matters (as it has done in 32 states)[66] and judges can, and will, distinguish new facts. As Chancellor Allen observed, any answer to the question of corporate purpose "should itself be seen as provisional, not final."[67] He concluded:

> [I]n defining what we suppose a public corporation to be, we implicitly express our view of the nature and purpose of our social life. Since we do disagree on that, our law of corporate entities is bound itself to be contention and controversial. It will be worked out, not deduced. In this process, efficiency concerns, ideology and interest group politics will commingle with history (including our semi-autonomous corporation law) to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more.[68]

That is just what is happening now. The incumbent legal authorities do not and could not prevent it.[69]

IV. A CASCADE OF ANOMALIES

Numerous aspects of today's environment are in tension with the incumbent model of shareholder primacy. In the spirit of extending our Kuhnian riff, let's call them anomalies—phenomena not readily reconcilable with the expectations of the shareholder-primacy paradigm. Here are seven, in short-form description:

1. *ESG*. The broad-based support for ESG, not just from progressive activists, but from half of the political class as well as money managers who cater to actual investors (and who have received billions to invest on ESG platforms), constitutes an anomaly. Billions and billions of dollars have flowed into ESG investment vehicles, not because they promise maximum returns, but because they offer a more socially conscious, less profit-focused deployment of capital.[70] It bespeaks the erosion of consensus regarding the shareholder-primacy norm. Scholarly attention to its merits

66. Practical Law Corporate & Securities, *Defending Against Hostile Takeovers*, THOMSON REUTERS PRACTICAL L., https://1.next.westlaw.com/Document/I03f4d95feee311e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&isplcus=true&firstPage=true&bhcp=1 [https://perma.cc/4JVR-BAEY] (compiling data about state consistent facts) (Note 9-386-7206, at 33).

67. Allen, *supra* note 12, at 280.

68. *Id.* at 280–81.

69. Appeals courts can always overrule precedent—even well-settled precedent laying down a clear rule of law, as the current Supreme Court of the United States has recently demonstrated. But the authorities that exist on corporate purpose and the stockholders-only duty thesis are not of the kind that require that sort of heavy judicial artillery.

70. *See, e.g.*, *Investors' Willingness to Pay for ESG Funds*, NAT'L BUREAU ECON. RSCH. (Jan. 2023) ("investors are willing to pay 20 basis points more per year in fees . . . to invest in an ESG rather than a non-ESG fund"), https://www.nber.org/digest/20231/investors-willingness-pay-esg-funds

and demerits is novelty, not normal science. (My point, for now at least, isn't that ESG is right or wrong, sensible or not—it is more narrowly that existence and prominence is itself an anomaly, a departure from what should be expected by the stockholder-primacy paradigm.)

2. *Uncomfortable statistics*. The world really is getting hotter. A significant reason for that is profit-seeking corporate activity.[71] No one seems capable of doing anything about it. Wealth distribution is becoming more unbalanced to a point that is socially destabilizing.[72] The proposition that shareholder wealth is a tide that lifts all boats is increasingly questionable.[73] No one doubts that corporations are contributing to these systematic challenges, and no one believes that the incumbent rules animating corporate purpose are adequate to the task.[74] Sure, government could do something about problems like this—but it isn't. Only the actors creating the problem can, and that is becoming increasingly obvious.

3. *The inadequacy of regulation*. The reason that solutions to such problems fall to corporations is the incapacity of government. One standard and entirely reasonable answer to the observation that shareholder primacy encourages negative externalities is the availability of government regulation.[75] But government can't even make its bed in the morning, let alone stop the planet from burning up. Part of this is political dysfunction.

[https://perma.cc/BC5W-Q9LV]; *Sustainable Funds Beating Peers in 2023*, MORGAN STANLEY INST. FOR SUSTAINABLE INV. (Aug. 17, 2023), https://www.morganstanley.com/ideas/sustainable-funds-performance-2023 [https://perma.cc/5UXW-ER28].

71. *See, e.g.*, Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, GUARDIAN (July 10, 2017), https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change [https://perma.cc/YDT3-DAK9]; Thin Lei Win, *Multinational Companies Account for Nearly a Fifth of Global CO2 Emissions, Researchers Say*, REUTERS (Sept. 8, 2020), https://www.reuters.com/article/us-climatechange-companies-emissions-trf/multinational-companies-account-for-nearly-a-fifth-of-global-co2-emissions-researchers-say-idUSKBN25Z1W6 [https://perma.cc/4846-KPSR].

72. *See, e.g.*, Christopher Ingraham, *U.N. Warns That Runaway Inequality is Destabilizing the World's Democracies*, WASH. POST (Feb. 11, 2020), https://www.washingtonpost.com/business/2020/02/11/income-inequality-un-destabilizing/ [https://perma.cc/A7BL-3E8A]; Michael Massing, *Most Political Unrest Has One Big Root Cause: Soaring Inequality*, GUARDIAN (Jan. 24, 2020), https://www.theguardian.com/commentisfree/2020/jan/24/most-political-unrest-has-one-big-root-cause-soaring-inequality [https://perma.cc/QSB9-NTC7].

73. Even shareholder-maximizing acolyte Stephen Bainbridge concedes that price-maximization does not correlate with broader social welfare: "[T]he ability to externalize costs is baked into the corporation's DNA. As a result it is entirely plausible that in some cases the tide will lift the shareholders' boat while swamping those of society and the company's non-shareholder constituencies." BAINBRIDGE, *supra* note 33, at 129.

74. *See, e.g.*, Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217 (2022) (concluding that no presently available conceptions of corporate governance permit the corporate form to achieve its fundamental social purpose).

75. *See, e.g.*, Andrew Johnston, Kenneth Amaeshi, Emmanuel Adegbite & Onyeka Osuji, *Corporate Social Responsibility as Obligated Internalisation of Social Costs*, 170 J. BUS. ETHICS 39, 39–52 (2021) (discussing regulatory control of negative corporate externalities in arguing for form of corporate social responsibility).

Part of it is that governments act nationally while capital, and corporations, act globally. Part of it is that corporations may exercise undue influence over government policy.[76] But regardless of the reason, the failure of the regulatory-response solution is manifest, and it constitutes an irreconcilable difficulty at the heart of the shareholder-primacy paradigm.

4. *Caremark*. Something interesting and important is happening with the development of *Caremark* jurisprudence.[77] When the doctrine was announced in 1996, it was immediately understood to supply an important conduct rule, reshaping earlier precedent that seemed to hold that directors needn't take steps to ensure corporate legal compliance.[78] But it was never thought to be (and, arguably at least, never intended to be) an important liability rule. Reflecting this expectation, Delaware courts for decades recited that "a derivative claim against a company's directors, on the grounds that they have failed to comply with oversight duties under *Caremark*, is among the most difficult of claims in this Court to plead successfully."[79] As recently as 2009, the Delaware's Chancellor emphasized the need to maintain *Caremark* as a doctrine focused on compliance, and not as a tool to create "liab[ility] for a failure to monitor business risk."[80]

Since 2018, however, none of all this holds good. Chancery has instead indicated that it will permit *Caremark* claims to proceed when the pleadings suggest that the board "f[e]ll short of the rigorous oversight [Delaware law now] contemplates."[81] *Caremark* claims increasingly survive a preliminary motion—"at which point the pressure on defendants to settle becomes almost unbearable."[82]And as Bainbridge points out, "[i]f

76. *See, e.g.*, Dorothy Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, HARV. BUS. REV. (Jan.–Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business [https://perma.cc/49SX-TWVU].

77. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

78. *See id.* at 969–70 (abandoning the reactive approach to fiduciary compliance of *Allis-Chalmers* for an affirmative "duty to attempt in good faith to assure that a corporate information and reporting system . . . exists").

79. Teamsters Local 443 Health Servs. v. Chou, 2020 WL 5028065, at *1 (Del Ch. Aug. 24, 2020) (noting that the ultra-high pleading bar for *Caremark* claims as "among the hoariest of Chancery clichés"; dismissing the action). *See generally* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021–25 (2019) (cataloguing cases at that time and finding that few survive a motion to dismiss).

80. *In re* Citigroup S'holder Derivative Litig., 964 A.2d 106, 126 (Del. Ch. 2009).

81. *In re* Boeing Co. Derivative Litig., 2021 WL 4059934, at *28 (Del. Ch. Sept. 7, 2021).

82. Stephen Bainbridge, *After Boeing, Caremark Is No Longer "The Most Difficult Theory in Corporation Law Upon Which a Plaintiff Might Hope to Win a Judgment,"* PROFESSORBAINBRIDGE.COM (Sept. 8, 2021), https://www.professorbainbridge.com/professorbainbridgecom/2021/09/after-boeing-caremark-is-no-longer-the-most-difficult-theory-in-corporation-law-upon-which-a-plainti.html [https://perma.cc/REP8-7NTF].

courts are going to examine board decisions with a microscope and mandate that oversight 'be rigorous,' then it is no longer true that *Caremark* claims will be the most difficult corporate law claims to prove."[83]

So, consider this entirely plausible scenario. Over the course of many years, a company underinvests in product safety. The directors authorize this policy because they conclude it will enhance stockholder returns; because less is being spent on safety, profits are greater. Stockholders benefit because the share price is higher. If things go well, there is no safety incident, and the stockholders keep the entirety of the benefit generated by underinvestment in product safety. If things go less well, there is a safety incident. In that case, victims sue, and, if the tort system is functioning correctly, they are compensated. (If the victims are unlucky, the company becomes insolvent and—because limited liability prohibits suit against the stockholders who have been benefitting all these years—they are *not* compensated via the tort system.) Stockholders surrender some portion of the excess returns they've enjoyed, either through payments to the victims or higher insurance premiums. What happens next, in today's *Caremark* environment, is that after the *victims* sue, the *stockholders* sue. (Keep in mind, this is the same constituency that has been enjoying excess returns because of underinvestment in safety all these years.) The stockholders want to recover from the directors (or the carriers who ensure them) the costs to the company of paying for the legal consequences of the underinvestment.

That the corporate law increasingly invites these suits is anomalous. It reflects a legal system that, on the one hand, wishes to promote the principle of shareholder primacy, but on the other hand wishes to ensure that directors act in a socially-conscious manner—reflecting, among other considerations, the fact that society more broadly will now tolerate nothing less. (The odd result is that stockholders can benefit from, even encourage, risky conduct, and then demand to be made whole when the bill comes—a sort of fiduciary bailout.) This observation is not at all intended to criticize an appropriately tailored *Caremark* doctrine—which is essential to the contemporary law of corporate governance—still less to excuse the conduct that gives rise to corporate trauma. To the contrary: the point is that the expansion of *Caremark* reflects the legal system's tacit, likely unintentional recognition that shareholder-value-maximization doesn't really work in the current social environment and that "[b]oards cannot ignore the social expectations placed on [their] organizations."[84]

83. *Id.*

84. Robert C. Bird & Julie Manning Magid, *Operational Risk and the New Caremark Liability for Boards of Directors*, 42 B.U. L. REV. (forthcoming 2023) (manuscript at 42, 45), https://ssrn.com/abstract=4376029 [https://perma.cc/CQE2-93MB] (arguing for the expansion of

5. *The Business Roundtable.* Much ink has been spilled on the 2019 Business Roundtable Statement that emphasized broad commitment to stakeholders and the environment as necessary elements of corporate purpose. Is it greenwashing? Virtue-signaling? A power-grab? Regulation avoidance? To be debated but never decided.[85] The point for now is that the Business Roundtable is a finger in the wind. The CEOs who run it never have driven policy or shaped society. They follow it. And so, when the paradigm was secure in 1997, the BRT planted its flag in favor of shareholder primacy. They would not have put their stake down for stakeholders in an environment where the shareholder-primacy model remained secure. One more canary in the shareholder-primacy coal mine.[86]

6. *The unexpected response to Twitter.* In 2022, Elon Musk signed a merger agreement to acquire Twitter for a very large cash premium. In the run-up to the deal, and particularly in the drama surrounding Musk's attempt to avoid closing it, observers came to two sure conclusions. The first was that the merger price was the best economic outcome for Twitter stockholders, especially given the decline in social media shares and the erosion of the broader economic and financial markets. The second was that Twitter, in Musk's hands, would likely be far less committed to principles of diversity, equity and inclusion.

A surprising thing happened next: a chorus of voices in the academic community, including many generally committed to the stockholder-value principle, criticized the Twitter board for sticking to the deal—even though it appeared to promise the best possible outcome for the company's stockholders.[87] Todd Henderson (of the University of Chicago, no less!)

Caremark to operational risk, not on the basis of shareholder maximization but on the practical necessity of conforming corporate conduct to social expectation with the objective of "benefit[ting] all stakeholders, including board, business, and society").

85. *Compare, e.g.*, Bebchuk & Tallarita, *supra* note 51, at 124–137 (arguing that the Business Roundtable statement is pointless eyewash), *with* Savitt & Kovvali, *supra* note 50, at 1891–92; Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction*, 106 CORNELL L. REV. 1859, 1861–62 (2021); Einer Elhauge, *The Inevitability and Desirability of the Corporate Discretion to Advance Stakeholder Interests*, 106 CORNELL L. REV. 1819, 1844–46 (2021).

86. Francesco Guerrera, *Welch Condemns Share Price Focus*, FIN. TIMES (Mar. 12, 2009), https://www.ft.com/content/294ff1f2-0f27-11de-ba10-0000779fd2ac [https://perma.cc/C8U8-PV6M] ("The dumbest idea in the world."); Steve Denning, *Why Maximizing Shareholder Value Is Finally Dying*, FORBES (Aug. 19, 2019), https://www.forbes.com/sites/stevedenning/2019/08/19/why-maximizing-shareholder-value-is-finally-dying/?sh=419991c56746 [https://perma.cc/8WXW-HZK2] ("By 2019, maximizing shareholder value has come to be seen as leading to a toxic mix of soaring short-term corporate profits, astronomic executive pay, along with stagnant median incomes, growing inequality, periodic massive financial crashes, declining corporate life expectancy, slowing productivity, declining rates of return on assets and overall, and widening distrust of business.").

87. *See, e.g.*, Jeffrey N. Gordon, *The Twitter Board Bears Personal Responsibility for a Bad Outcome in the Twitter Sale*, COLUM. L. SCH. BLOG ON CORPS. & CAP. MKTS. (May 5, 2022), https://clsbluesky.law.columbia.edu/2022/05/05/the-twitter-board-bears-personal-responsibility-for-a-bad-outcome-in-the-twitter-sale/ [https://perma.cc/HG3E-PD8Q] (attacking the Twitter directors on

summed up the analysis in the *Wall Street Journal*: “Twitter might be worse off under [Musk’s] ownership at this point, a fate Twitter’s board is legally obligated to try to avoid.”[88]

None of all this criticism can be reconciled with the stockholder-value principle of corporate purpose. If that principle is the law, and Twitter’s directors believed the deal price was the best value that would ever be available to the company’s stockholders, what conceivable basis could there be for the board to refuse to pursue the deal? Citing *Paramount* v. *Time,* one might say: Twitter’s board had the right and obligation to preserve Twitter’s culture.[89] Except the *eBay* court, in its zeal to enshrine in law stockholder-value as the purpose of the corporation, foreclosed that escape route, holding that “promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders.”[90] Or one might say: Twitter’s board could have concluded that there was greater long-term value for stockholders in maintaining the independence of the company. But that would be fighting the hypothetical, or rather more accurately, fighting the facts as they appeared.

The criticism of the Twitter board for determining to complete the transaction is another anomaly, inconsistent with the stockholder-value paradigm. Confronted with a proposed merger, a board still has the legal right to say no, but no account of that right remains coherent if it is assumed or shown that directors believe stockholders will never realize better value, short-term or long. The necessary doctrinal conclusion of *eBay* and the principle it seeks to embody is that, whatever the context, boards should protect non-stockholder interests only if that protection creates a bigger long-term pot of gold for stockholders at the end of the rainbow. That doctrine no longer comports (if it ever did) with society’s view of

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this ground: “[t]he single motivating factor in its decision, apparently, was that the deal was a good one for Twitter shareholders, without apparent regard for how Musk might run the company and the consequence for the social media infrastructure that Twitter had created, much less the public welfare”); Guhan Subramanian & Caley Petrucci, *ESG Amnesia in M&A Deals: The Case of Musk and Twitter* (Working Paper, 2023), https://ssrn.com/abstract=4594776 [https://perma.cc/S2TP-LSPB] (asserting that Twitter’s board could have and should have traded deal value for assurances about the sound operation of the post-deal organization); Tom Hals & Jessica DiNapoli, *Analysis—Twitter Exploring a Sale Would Make Free Speech an Afterthought*, REUTERS (Apr. 19, 2022), https://www.reuters.com/article/us-twitter-m-a-musk-speech-idCAKCN2MB1B6 [https://perma.cc/6MA6-NXXJ] (“If they [Twitter’s board] think Musk will turn Twitter into a free-speech hellscape, that is sufficient justification to [reject his offer.”) (quoting Brian Quinn).

88. J.B. Heaton & M. Todd Henderson, *Twitter’s Lawsuit Against Elon Musk Looks Like a Loser*, WALL ST. J. (July 13, 2022), https://www.wsj.com/articles/twitters-lawsuit-against-elon-musk-looks-like-a-loser-11657716142 [https://perma.cc/UMM2-LC9F].

89. Paramount Commc’ns, Inc. v. Time Inc., 571 A2d 1140 (Del. 1989). *See also* Time Inc. v. Paramount Commc’ns Inc., 1989 WL 74969 (S.D.N.Y. June 28, 1989); Paramount Commc’ns Inc. v. Time Inc., 1989 WL 79880 (Del. Ch. July 14, 1989).

90. 16 A.3d 1, 33 (Del. Ch. 2010).

how a company should react to a takeover bid—hence the irreconcilable tension between the shareholder value model (which requires a sale) and the pleas for directors to overlook it to preserve important corporate culture.

7. *And, finally, the proof goes poof.* In the early part of this century, a star team of scholars—Paul Gompers, Joy Ishii and Andrew Metrick—introduced a dataset created by the Investor Responsibility Resource Center.[91] The dataset claimed to quantify shareholder rights at the company level, covering a cross-section of U.S. traded issuers.[92] The Gompers team crafted an index to rate companies (called the G-Index) that synthesized the data into a proxy for corporate governance; the more shareholder-friendly the company, the higher the G-Index. The paper's findings were many, but perhaps the major headline conclusion was that shareholder-friendly governance correlated with long-term firm value.[93]

What ensued was a long period of what Kuhn would have recognized as picture-perfect "normal science." "The decades since [the Gompers] contribution . . . spawned an alphabet soup of governance indices, all derived directly from the same foundational data used to construct the G-Index."[94] Other studies used the G-Index "as a jumping-off point for new empirical corporate governance research"; another "used the G-Index to test whether weak governance causes diminished stock returns."[95] Scholars all around the world placed their faith in the same or related data to confirm and reconfirm the dogma that corporations animated by the stockholder-value purpose perform better, are better.

But it turns out the data was wrong—that it was inadequately narrow, insufficiently sensitive to the nuance of legal context, and compiled in a way that inaccurately sustained the correlation between shareholder governance and investment returns.[96] A recent pathbreaking analysis, based on a hand-labelled collection of over 25 years' worth of corporate charters for S&P 1500-listed issuers, indicates that the error rate for data underlying the G-Index is greater than 80 percent, conservatively estimated.[97] Even more important: "[N]ot only do the errors in the G-Index affect results, but they do so in a disconcerting way. In each of the reported replications that use our corrected [data], the estimated abnormal return"—that

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91. Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107 (2003).

92. Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric L. Talley, *Cleaning Corporate Governance*, 170 U. PENN. L. REV. 1, 12 (2021).

93. Gompers, Ishii & Metrick, *supra* note 91, at 121–25.

94. Frankenreiter, Hwang, Nili & Talley, *supra* note 92, at 12–13.

95. *Id.*

96. *Id.* at 39–40.

97. *Id.* at 39–40 (finding "the G-Index [is] inaccurate over four-fifths of the time").

is the alleged correlation between shareholder governance and firm performance—"grows weaker."[98] The inaccuracies in the G-Index data "are not simply garden-variety statistical anomalies."[99] To the contrary, "they unsettle even one of the most famous results in the field: that systematically investing in firms with 'good governance' delivers returns that significantly eclipse the market."[100] The research goes on to express skepticism that further analysis of the newly-available data will validate any part of the received G-Index governance wisdom: "[t]o the extent any part of it survives, it does so in a materially attenuated form."[101]

It is difficult to overestimate the importance of this revelation for the corporate-purpose debate. For a generation or more, scholars and practitioners have been working to explain the "fact" that firms with shareholder-facing governance outperformed those that confided greater discretion to directors (including, of course, the discretion to manage in the broader interests of stakeholders and society). That fact is now revealed as a myth. Legal theory no longer needs to explain the superiority of stockholder governance any more than astronomers need to explain why the sun revolves around the earth. Newly open to free debate is the proposition that more expansive conceptions of corporate purpose generate better and more profitable firms as well as a better and more equitable world.[102]

Like all these anomalies, this dataset shouldn't exist if the prevailing shareholder-value paradigm adequately explained corporate purpose. They are all marks of incommensurability, of the inadequacy of the standard account of corporate purpose measured against the accumulating facts and social expectations. That incommensurability signals the coming corporate law revolution.

V. CONCLUSION—MR. LIPTON & KING CANUTE

In 1050 or thereabouts, King Canute of England and all Scandinavia, marched to the sea's edge with a coterie of fawning courtiers and commanded the rising tide to recede. The courtiers, certain of Canute's endless

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98. *Id.* at 5, 45. The authors of the study refer to their dataset as the "Cleaning Corporate Governance" or CCG database. They have made it publicly available as open source "in the hope it will catalyze and improve future research." *Id.* at 5.

99. *Id.*

100. *Id.*

101. *Id.*

102. That the December 2021 publication of the CCG database has not received greater attention or caused a more swift reconsideration of the revealed "good governance" truths is notable but unsurprising. Conventional wisdom resists quick revision, even in the face of uncomfortable data, especially when deeply institutionally entrenched.

authority or perhaps just reluctant to object to conventional wisdom, assured the King that his directive would be followed. The sea paid no mind, of course, and the King was soon drenched.[103]

Still unresolved is whether Canute actually believed he could reverse the direction of the ocean or whether he contrived the episode as a lesson to his subjects on the feebleness of human intentionality faced with the grand tides of history and nature. And so, the story is sometimes told to demonstrate the folly and hubris in resisting the inevitable and sometimes told to demonstrate the wisdom of humility and its power in the hands of exceptional leaders.

The corporate law revolution described in this essay brings both lessons to mind. Scholars may continue to insist on stockholder-value as the polestar of corporate purpose; reporters may finesse that theory into an American Law Institute "restatement" of law that's never been stated[104]; judges may continue to divine from precedent a mandatory requirement that director decisions must ultimately be made in the stockholder interest. All this will prove as effective as Canute shaking his scepter at the incoming sea. The question of corporate purpose is bigger than the rhetorical forces that seek to define it. Corporations are created in the public interest; they will evolve to serve the public interest, and that evolution, in today's world facing today's challenges, will not permit the persistence of a stockholder-above-all conception of corporate purpose.

Mr. Lipton has understood this since the debate began decades ago. From *Takeover Bids in the Boardroom*, through the invention and prudent deployment of the poison pill, through the resistance to the strong form of *Revlon*, through the defense of corporate culture, through the principled opposition to opportunistic activists—through it all, Marty realized, and reminded everyone, that boards of directors, answerable to stockholders, constrained by duty, but empowered and obligated to act in the broad social and corporate interest are the proper custodians of corporate purpose.

And it is Marty's essential wisdom that is today being vindicated. Directors must and will act to advance long-term corporate value, for the benefit of stockholders. The structure of the corporate law ensures that accountability. But directors are also authorized to protect employees; to create jobs; to innovate; to promote social equity and avoid social harms; to safeguard the environment; to behave, in short, like good people running good organizations with the objective of doing good things in the world. And to do all that not only when (to quote the stray line from *Revlon* so

103. DAVID HUME, THE HISTORY OF ENGLAND, Vol. I, 1028–31 (1778).

104. *Restatement of the Law, Corporate Governance* (Am. L. Inst., Preliminary Draft No. 4, 2023) (forthcoming 2023), https://www.ali.org/publications/show/corporate-governance-rs/#drafts [https://perma.cc/3RXV-KUWS].

often trundled out to justify shareholder-value as the guiding principle of corporate purpose) "there [is] some rationally related benefit accruing to stockholders," but instead to do all that because that is why society created the corporate form.[105]

105. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).