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# MAKING SENSE OF THE BUSINESS ROUNDTABLE'S REVERSAL ON CORPORATE PURPOSE

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**Abstract**: In August 2019, the Business Roundtable (BRT) issued a statement on the purpose of the corporation in which it reversed a longstanding position. Since 1978, the BRT has periodically issued statements on Principles of Corporate Governance, which purport to summarize law and best practice in this area. Since 1997, all versions of those statements had embraced the view that corporations exist primarily to serve their shareholders. In contrast, the 2019 version contains a much broader conception of corporate purpose, which posits that corporations should "commit to deliver[ing] value to all of" the corporation's stakeholders.

Obviously, the BRT cannot unilaterally change the law. As this article explains, the law of corporate purpose remains that directors have an obligation to put shareholder interests ahead of those of other stakeholders and maximize profits for those shareholders.

What people do matters more than what they say. To date, the evidence is most BRT members remain committed to shareholder value maximization, despite their recent rhetoric to the contrary. This should not be surprising. The incentive structure faced by directors and managers still skews in favor of shareholders.

Why then did the BRT shift position? This article suggests two possibilities. First, the members may be engaged in puffery intended to attract certain stakeholders for the long-term benefit of the shareholders. Specifically, they may be looking to lower the company's cost of labor by responding to perceived shifts in labor, lower the cost of capital by attracting certain investors, and increase sales by responding to perceived shifts in consumer market sentiment. They may also be trying to fend off regulation by progressive politicians. Second, some BRT members may crave a return to the days of imperial CEOS.

This article is a response to Jeffrey M. Lipshaw, The False Dichotomy of Corporate Governance Platitudes, Journal of Corporation Law (forthcoming).

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# Making Sense of The Business Roundtable's Reversal on Corporate Purpose

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In August 2019, the Business Roundtable (BRT) issued a statement on the purpose of the corporation in which it reversed a longstanding position.[1] Since 1978, the BRT has periodically issued statements on Principles of Corporate Governance, which purport to summarize law and best practice in this area. Since 1997, all versions of those statements had embraced the view exist primarily to serve their shareholders.[2] In contrast, the 2019 version contains a much broader conception of corporate purpose, which posits that corporations should "commit to deliver[ing] value to all of" the corporation's stakeholders.[3]

As Professor Jeffrey Lipshaw notes in the article to which my essay responds, the 2019 revision "caused an immediate kerfuffle," evoking sharply worded criticism from proponents of wealth maximization who objected to "the mere suggestion [that shareholders] might not be the exclusive stakeholders to which the corporations owed commitments."[4] In contrast, "those appalled by excessive executive compensation, the gaps in wealth distribution, and the overall

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[1] Business Roundtable, *Our Commitment* (2019), https://opportunity.businessroundtable.org/ourcommitment/ [Accessed 13 Feb. 2020].

[2] Id.

[3] Id.

[4] Jeffrey M. Lipshaw, The False Dichotomy of Corporate Governance Platitudes, __J. Corp. L. ___ (2020). [NOTE: All page references herein are to Professor Lipshaw's version 2.14 dated 6/23/20).] Professor Lipshaw's article was motivated in large part by my short article, Stephen M. Bainbridge, BRT, Stakeholders and Corporate Purpose, 40 Corp. Board 6 (Nov.-Dec. 2019). Portions of this article therefore build on that earlier work.

concentration of corporate power thought the acknowledgment of inclusive corporate commitment was overdue."[5]

In debating the BRT's new statement, Professor Lipshaw and I stand mainly on well-trodden ground. There is a very considerable body of scholarship on the corporate purpose and a corporation's social responsibility.[6] It seems as though every generation of scholars feels obliged to contribute to the debate,[7] even though most are simply reiterating points that can be traced back to the Berle-Dodd debate in the 1930s.[8] My justification for nevertheless

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[5] Id. at 3. There is a normative stinger to Professor Lipshaw's argument, as it implies that those of us who believe shareholder wealth maximization is a corporation's proper purpose do not care about "excessive executive compensation, the gaps in wealth distribution, and the overall concentration of corporate power ." Id., This is a nifty rhetorical device if your intent is to cast your opponents as being akin to pre-Christmas Eve Ebenezer Scrooge, but lacks merit. After all, for example, many scholars have argued that excessive executive compensation is inconsistent with shareholder wealth maximization. See, e.g., Lucian Arye Bebchuk et. al., Managerial Power and Rent Extraction in the Design of Executive Compensation, 69 U. Chi. L. Rev. 751, 754 (2002) ("As a result of such deviations from optimal contracting, executives can receive pay in excess of the level that would be optimal for shareholders; this excess pay constitutes rents."); Lucian A. Bebchuk & Jesse M. Fried, Pay Without Performance: Overview of the Issues, 30 J. Corp. L. 647, 649 (2005) (arguing that "there is now widespread recognition that many boards have employed compensation arrangements that do not serve shareholders' interests"); Jill E. Fisch, Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 J. Corp. L. 637, 655 (2006) ("Yet a careful analysis of executive compensation demonstrates that, although stock options appear designed to increase the correlation between shareholder wealth and executive pay, in reality pay has largely been decoupled from firm performance."). Similarly, I have elsewhere argued one can reconcile a societal goal of restraining corporate power with the shareholder wealth maximization norm. Stephen M. Bainbridge, Corporate Purpose in A Populist Era, 98 Neb. L. Rev. 543 (2020).

[6] See Lyman Johnson, Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood, 35 Seattle U.L. Rev. 1135, 1136 n.2 (2012) ("There is a vast literature on law and corporate social responsibility."). Like Professor Johnson, I make no effort in this article "to cite to all of it." Id.

[7] See C.A. Harwell Wells, The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century, 51 U. Kan. L. Rev. 77, 78 (2002) (arguing that "each new round of debate on corporate social responsibility largely recapitulates the earlier debate in a slightly altered form").

[8] On the seminal Berle-Dodd debate, see A.A. Sommer, Jr., Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later, 16 Del. J. Corp. L. 33, 48-49 (1991).

revisiting this debate, despite having trodden much of this same ground previously,[9] is two-fold. First, is to ask whether the new BRT statement changes the terms or direction of the debate. Second, to reply to Professor Lipshaw's use of my prior arguments in other work on corporate purpose "as … a good-natured foil for [his own] reflections."[10] I trust my response will be equally good natured. My admiration for Professor Lipshaw's knowledge and deep base of practical experience remains intact, after all, even though I remain unpersuaded by his argument in this context.

Professor Lipshaw makes a number of arguments, all of which he asserts are grounded in the real world.[11] I do not propose to address each bullet point seriatim. Instead, I want to focus on just two questions.

First, what is the law of corporate purpose? As it turns out, Professor Lipshaw and I agree about how the vast majority of cases in this area will come out; namely, the court will invoke the business judgment rule and toss the case at the motion to dismiss stage. I will argue, however, that the reason courts do so differs from Professor Lipshaw's argument and that that reason matters. In addition, I will argue that the law in an admittedly small set of cases is clear and that that class of cases matters.

Second, it turns out that Professor Lipshaw and I agree about what (at least some) directors are doing in the corporate responsibility space, but I want to probe more deeply into

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[9] See, e.g., Stephen M. Bainbridge, The New Corporate Governance in Theory and Practice 57-72 (2008) (discussing the law and economics of corporate purpose).

[10] Lipshaw, supra note 10, at 2 n.4.

[11] Id. at 6 (stating that he offers "three arguments that will likely disappoint the ideologues but are more representative of what corporate managers really do").

why they are doing so. When one does so, I will argue, the real world turns out to be less benign that Professor Lipshaw paints it.

Part I of this article introduces the problem with a very brief review of the BRT's history of advocating what it regards as best corporate governance practices, which culminated in the new statement. Part II responds to certain of Professor Lipshaw's arguments about the law of corporate purpose. Professor Lipshaw argues that the BRT's new version more closely accords with the way the law works in the real world than did the prior statement.[12] In contrast, I will argue that the law of corporate purpose remains that directors have an obligation to put shareholder interests ahead of those of other stakeholders and pursue long-term sustainable profits for those shareholders. Part III replies to Professor Lipshaw's argument that the BRT's new statement also more accurately reflects the way businesses behave in the real world than did the older versions. As noted, I agree that some—but far from all—businesses are behaving in ways that purport to comport with the BRT statement. For most, however, socially responsible corporate purposes are just window dressing. For those where it is something more than that, moreover, it potentially introduces a whole new set of agency costs.[13]

[12] See, e.g., Lipshaw, supra note 4, at

[13] As economists Michael Jensen and William Meckling famously explained, agents may shirk or otherwise diverge from the interests of the principal. Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 (1976). The agent may seek offer a commitment that the agent will not shirk and incur bonding costs to make that promise more credible. Id. at 308. The principal may incur costs to monitor the agent. Id. Even if both principal and agent make optimal efforts, there likely will still be some lapses. Id. Agency costs are defined as the sum of these monitoring costs, bonding costs, and residual losses. Id. The proposition that "agency costs [are] corporate law's central problem ha[s] been taken for granted by most economically-oriented corporate law scholars" for the last several decades. David Millon, Radical Shareholder Primacy, 10 U. St. Thomas L.J. 1013, 1026 (2013).

## I. The Business Roundtable Statement

The BRT is a trade association comprised of approximately 200 CEOs large U.S. public corporations, which was formed in 1972 as a public policy advocacy group.[14] Its policy statements receive considerable attention and have significant influence with policymakers.[15] Since 1978 the BRT's policy statements have included periodic reports on Principles of Corporate Governance.[16] Starting in 1997, those principles have endorsed shareholder wealth maximization as the appropriate normative principle by which board of director decisions should be guided.[17] The 2012 version of the Principles, for example, opined that "it is the

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[14] Alma Cohen et. al., The Politics of CEOs, 11 J. Legal Analysis 1, 11 (2019).

[15] Id.

[16] James F. Reda, Board's Opportunities and Challenges for Corporate Governance and Sustainability: ESG-Based Incentive Plans Lead the Way, J. Compensation & Benefits, Jan./Feb. 2020, art. 5.

[17] Id. Some commentators use the term "shareholder primacy" to describe a decision-making norm, "under which the objective of the corporation's management should be to increase shareholder wealth, within the constraints of law and morality." Melvin A. Eisenberg, The Conception That the Corporation Is A Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L. 819, 832 (1999) In contrast, I have elsewhere suggested that:

> The term shareholder primacy typically connotes two distinct principles: (1) The shareholder wealth maximization norm, pursuant to which directors are obliged to make a decision based solely on the basis of long-term shareholder gain. This principle is well-established in U.S. corporate law, and for purposes of this essay, may be taken as given; (2) The principle of ultimate shareholder control. Although shareholders do not wield day-to-day authority, they purportedly exercise ultimate decision-making authority through proxy contests, institutional investor activism, shareholder litigation, and the market for corporate control.

Stephen M. Bainbridge, Director v. Shareholder Primacy in the Convergence Debate, 16 Transnatl. Law. 45, 45–46 (2002). I have argued that the second prong of that definition is erroneous. See id. at 46 ("Insofar as control is concerned, U.S. corporate law is far more accurately described as a system of director primacy than one of shareholder primacy."). Accordingly, although they are often used interchangeably, "the terms 'shareholder primacy' and 'shareholder wealth maximization' express distinct concepts." Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 Nw. U. L. Rev. 547, 574 (2003). I adopt that terminological convention herein.

responsibility of management, under the oversight of the board, to operate the corporation in an effective and ethical manner to produce long-term value for shareholders."[18]

In August 2019, the BRT issued a new statement on the purpose of the corporation:[19]

> While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:
>
> - Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
> - Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
> - Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
> - Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.
> - Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.
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> Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.[20]

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[18] Business Roundtable, 2012 Principles of Corporate Governance, https://www.businessroundtable.org/archive/resources/business-roundtable-principles-of-corporate-governance-2012.

[19] Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans," https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[20] Business Roundtable, Our Commitment, https://opportunity.businessroundtable.org/ourcommitment/

The statement was signed by 181 of the BRT's members.[21] It is regarded by many (but not all) as confirmation that "America's top business and financial leaders now officially support the rapidly evolving environmental, social and corporate governance ("ESG")/sustainability movement ...."[22]

## II. The Law of Corporate Purpose

I believe the law of corporate purpose is quite clear:

> As corporations developed and grew, a central principle of corporate law emerged: the sole duty of a corporation's officers is to maximize shareholder wealth. As time passed, calls rose for corporations to be more socially responsible, nonetheless, the principle that a corporate officer's overriding duty is to maximize shareholder wealth remains intact. Today, this appears to be the dominating goal of corporations in a free market society.[23]

The same is true of a corporation's board of directors, whose obligation it is "to attempt, within the law, to maximize the long-run interests of the corporation's stockholders ...."[24]

### A. Mere Dicta?

Professor Lipshaw claims that there are only two categories of cases in which courts have meaningfully addressed the shareholder wealth maximization norm and, moreover, that judicial statements about the norm in those cases are mere dicta.[25] One can quibble with both of those claims.[26] Even if one assumes, arguendo, that Professor Lipshaw is correct on both

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[21] Business Roundtable, supra note 19.

[22] John C. Wilcox, A Common-Sense Approach to Corporate Purpose, ESG & Sustainability, 23 No. 11 Wallstreetlawyer.com: Sec. Elec. Age NL 2 (Nov. 2019).

[23] Granada Investments, Inc. v. DWG Corp., 823 F. Supp. 448, 459 (N.D. Ohio 1993).

[24] Katz v. Oak Industries Inc., 508 A.2d 873, 879 (Del. Ch. 1986).

[25] See infra notes 28-39 and accompanying text (summarizing Professor Lipshaw's arguments).

[26] See infra notes 40-59 and accompanying text (critiquing Professor Lipshaw's arguments).

points, there is ample contemporaneous evidence that the alleged "dicta" was understood from the outset to be an accurate statement of the law.[27]

### 1. Lipshaw's Claims

Professor Lipshaw first argues that statements in cases articulating what he calls the shareholder wealth maximization principle[28] are mere dicta.[29] One only finds such dicta, he further argues, in just two categories of decisions.[30] The first category includes cases like

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[27] See infra notes 60-86 and accompanying text (discussing judicial and scholarly reaction to the seminal *Dodge* case).

[28] Professor Lipshaw uses the term "shareholder wealth maximization principle," which he abbreviates the SWMP. Lipshaw, supra note 4, at 3. In contrast, I prefer the term "shareholder wealth maximization norm." See, e.g., See Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green, 50 Wash. & Lee L. Rev. 1423 (1993). Norm is defined as "a model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something." NORM, Black's Law Dictionary (11th ed. 2019). In contrast, principle connotes a rule of law. See PRINCIPLE, Black's Law Dictionary (11th ed. 2019) (defining the term as a "basic rule, law, or doctrine"). The distinction is subtle, but suggests that a norm has application even when the law does not. That becomes important because a norm may still influence behavior even if the law does not mandate such behavior.

[29] See Lipshaw, supra note 4, at 25-29 (analyzing several leading cases and concluding all pertinent references to shareholder wealth maximization are dicta). Oddly, despite insisting at length that the pertinent statements are mere dicta, Professor Lipshaw at one point appears to concede that the shareholder wealth maximization is the rule of law in some cases:

> It might well be that, in the zero-sum game of the Bainbridge Hypothetical, the confession cases, or the death throes of the corporate enterprise, the rule of decision actually is something like "as between fulfilling a commitment to the community and fulfilling one to the shareholders when the choice is presented so starkly, the director's duty will be to favor the shareholder."

Id. at 29.

[30] See id. at 25 ("The only articulations of the SWMP in Delaware judicial opinions are dicta in cases arising from two idiosyncratic fact patterns.").

*Dodge v. Ford Motor Co.*[31] and *Ebay Domestic Holdings, Inc. v. Newmark*,[32] which "are what [former Delaware] Chief Justice [Leo] Strine calls 'confession' cases."[33] The dominant manager "admits that he is treating an interest other than stockholder wealth as an end in itself, rather than as an instrument to stockholder wealth." Indeed, in both cases, the defendants freely admitted—repeatedly and publicly—that they were putting stakeholder interests ahead of those of shareholders.[34]

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[31] 170 N.W. 668 (Mich. 1919). For an interesting analysis of *Dodge*, which contextualizes the decision in the history of the automotive industry as well as the law, see M. Todd Henderson, The Story of Dodge v. Ford Motor Co.: Everything Old is New Again, in Corporate Law Stories 37 (J. Mark Ramseyer ed. 2009). Like Professor Lipshaw, Professor Henderson views the key passage from *Dodge* as mere dicta—albeit "powerful and memorable dictum." Id. at 64.

[32] 16 A.3d 1 (Del. Ch. 2010).Concededly, other commentators have also treated the pertinent portions of *eBay* as mere dicta. See, e.g., Paul Weitzel & Zachariah J. Rodgers, Broad Shareholder Value and the Inevitable Role of Conscience, 12 N.Y.U. J.L. & Bus. 35, 79 (2015) (stating Chancellor Chandler's comments are "just strongly worded dicta"); David A. Wishnick, Corporate Purposes in A Free Enterprise System: A Comment on Ebay v. Newmark, 121 Yale L.J. 2405, 2417 (2012) ("Future interpreters should read [*eBay*'s] 'mandatory' language as dicta because the opinion offers two grounds for rescission of the poison pill that do not require inquiry into the definition of 'proper corporate purposes'").

[33] Lipshaw, supra note 4, at 26 (quoting Honorable 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, 777 (2015)).

[34] See, e.g., *Dodge*, 170 N.W. at 684 ("The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give."); *eBay*, 16 A.3d at 34 (explaining that controlling shareholders "Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future").

With respect to the confessional cases. Professor Lipshaw posits that "what makes any reference to shareholder wealth maximization on the facts of the confession cases dictum is the protagonists' binary 'yes-no' rejection of any interest in promoting the welfare of the shareholders." Lipshaw, supra note 4, at 28. I find that statement puzzling. Accepting *arguendo* Professor Lipshaw's analysis of the cases, it seems to me that the courts ruled against the defendants in those cases precisely because of their "binary 'yes-no' rejection of any interest in promoting the welfare of the shareholders." As such, should we not characterize those cases as holding that, in the face of such a confession, shareholder wealth maximization is the legal rule? Indeed, elsewhere in the article, Professor Lipshaw flirts with conceding that that is the case. See supra note 29.

According to Professor Lipshaw, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[35] typifies the other category of cases in which one finds the alleged dicta.[36] Once the board enters *Revlon*-land, as by deciding that the company is for sale in a way that will result in a change of control,[37] the directors become auctioneers charged with getting the best possible deal for the shareholders.[38] In such a case, any "concern for non-stockholder interests is inappropriate."[39]

**2. Quibbles**

One could quibble with Professor Lipshaw's claim that there are only two categories of cases in which one finds statements of the shareholder wealth maximization norm. Cases like *Katz v. Oak Industries Inc,* in which the late Delaware Chancellor William Allen stated that directors have obligation "to attempt, within the law, to maximize the long-run interests of the

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[35] 506 A.2d 173 (Del. 1986).

[36] See Lipshaw, supra note 4, at 28 ("*Revlon* ... involves the other pattern in which the SWMP appears.").

[37] See generally Stephen M. Bainbridge, The *Geography* of Revlon-Land, 81 Fordham L. Rev. 3277, 3314 (2013) (describing *Revlon*-land's borders).

[38] See id. at 3314-3320 (describing the duties of directors in *Revlon*-land).

[39] *Revlon*, 506 A.2d at 182. In Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), the Delaware Supreme Court had indicated that a target company board of directors faced with an unsolicited takeover proposal could consider the impact of that proposal on concerns such as "inadequacy of the price offered, nature and timing of the offer, questions of illegality, *the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally),* the risk of nonconsummation, and the quality of securities being offered in the exchange." Id. at 955 (emphasis supplied). *Revlon* limited the board's ability to consider the interests of non-shareholder constituencies in two respects. First, as we have just seen, it held that such concerns become irrelevant when the board is in *Revlon*-land. See Bainbridge, supra note 37, at 3315 ("In *Revlon*-land, … directors may not consider any interest other than shareholder wealth maximization."). Second, even when the board is not in *Revlon*-land, it can protect the interests of non-shareholder constituencies but only if "there are rationally related benefits accruing to the stockholders." *Revlon*, 506 A.2d at 182.

corporation's stockholders" and, moreover, "that they may sometimes do so "at the expense" of" other corporate constituencies,[40] fit awkwardly into Professor Lipshaw's schema.

Professor Stefan Padfield recently offered a different schema for dividing up corporate purpose cases, both of which he believes deserve greater scrutiny than required under current law.[41] One category involves cases in which "corporate decision-makers expressly disavow any duty to maximize shareholder wealth …."[42] In other words, Professor Padfield is concerned here with the class Professor Lipshaw refers to as confessional cases.[43] The second class of cases with which Professor Padfield is concerned are those in which "corporate decision-makers don't expressly disavow concern with shareholder wealth maximization but nonetheless provide a rationale that excludes any reference to shareholder wealth maximization while providing a rationale that is reasonably characterized as political …."[44] This latter category does not fit well into either of Professor Lipshaw's categories.

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[40] Katz v. Oak Industries Inc., 508 A.2d 873, 879 (Del. Ch. 1986).

[41] Stefan J. Padfield, The Omnipresent Specter of Political Bias, ___ Marquette L. Rev. ___ (forthcoming).

[42] Id. at 4.

[43] Professor Padfield compares the potential biases and motivations that may drive such decisions with the sort of conflicts of interest inherent when management responds to a corporate takeover bid. See id. at 32 ("Just as the omnipresent specter of managerial self-dealing warrants enhanced scrutiny of managerial decision-making in the context of resisting a takeover because common sense tells us the self-interest of those managers tilts strongly in favor of preserving their jobs, so too should the omnipresent specter of managerial self-dealing warrant enhanced scrutiny of managerial decision-making in the context of highly-politicized decision-making because common sense tells us the self-interest of those managers tilts strongly in favor of preserving their status (in their own eyes and/or the eyes of relevant others) as being 'on the right side of history.'"). Accordingly, he advocated applying so-called the intermediate—a.k.a., enhanced scrutiny—standard of review in such cases. See id. at 33-35 (describing his proposed standard).

[44] Id. at 4.

But let us assume *arguendo* that Professor Lipshaw is correct that there are just two categories. So what? The more important question is whether he is correct about the cases being dicta and, if so, whether that matter.

One can also quibble with his assertion that the cases are dicta. As we shall see in the next section, *Dodge* was a logical extension of legal trends of the time and was accepted almost immediately by both judges and scholars as a correct statement of the law of corporate purpose.[45] If that's dicta, it's certainly vibrant dicta, as to which the distinction between holding and law is obliterated.[46]

As for *Revlon*, the claim that its statements on point are dicta is even less persuasive. To see why, assume that there is a company division that is being sold and that there are various debts to be allocated. The company receives two bids, one of which would result in the seller receiving more cash, while exposing the creditors to higher risk. The other bid offers less money but greater protection for the creditors. If the selling company is a continuing business, the business judgment rule doubtless would protect the decision to take lower priced bid.[47]

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[45] See infra notes 60-86 and accompanying test (discussing *Dodge*'s antecedents and the reactions to the decision).

[46] On the concept of vibrant dicta, see Professor Marc McAllister, Dicta Redefined, 47 Willamette L. Rev. 161, 185 (2011) ("Dictum is 'vibrant' when it promptly and consistently flowers into law. When this occurs, the distinction between case holdings and dicta is effectively obliterated.").

[47] Chancellor Allen explained the general principle as follows:

> [T]he interests of the shareholders as a class are seen as congruent with those of the corporation in the long run; that directors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected, and thus directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other "corporate constituencies."

Why? Because in that case there would be a rational relationship to the long-run interests of the stockholders in doing so.[48] Fair treatment of the creditors in this hypothetical would be rational because it would give the company credibility to raise debt capital in the future at favorable rates, which should redound to the benefit of the shareholders.[49]

In contrast, it was precisely because there could be no such rational relationship that *Revlon* was decided as it was. Changing the context to a sale of the entire company did not produce either a new rule or an exception to the general rule. Instead, the decision illustrated the general rule—i.e., that fiduciary action must have a rational relationship to the best

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TW Services, Inc. v. SWT Acq. Corp., 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989). See, e.g., Simkins Industries, Inc. v. Fibreboard Corp., 5369, 1977 WL 2564 (Del. Ch. July 28, 1977) (holding that the business judgment rule protected a board decision to accept the lower of two offers for the sale of corporate assets, because the choice involved something more than simply deciding between two sums of money tendered by rival bidders); see also In re Novell, Inc. Shareholder Litig., 2013 WL 322560, at *15 (Del. Ch. Jan. 3, 2013) (noting that the business judgment rule provides directors "with a wide ambit of business judgment in fixing the terms and conditions of a sale of assets"); In re RJR Nabisco, Inc. Shareholders Litig., CIV.A. 10389, 1989 WL 7036, at *13 (Del. Ch. Jan. 31, 1989 (stating that, outside *Revlon*-land "an attack upon a decision made by an apparently disinterested board in the exercise of its statutory power to manage the business and affairs of the corporation [should be reviewed under] the business judgment rule"); see generally 1 R.F. Balotti & J.A. Finkelstein, The Delaware Law of Corporations and Business Organizations, § 10.6[A], (3d Ed. 2007) (stating that "it is ... firmly established under Delaware law that directors enjoy a presumption of honesty and good faith with respect to negotiating and approving a transaction involving a sale of assets"); Scott P. Towers, Ivanhoe Partners v. Newmont Mining Corp. - the Unocal Standard: More Bark Than Bite?, 15 Del. J. Corp. L. 483, 538 (1990) (arguing that "where a board's sale of corporate assets is challenged, the court might look at the range of values that financial advisors provided to the board, and determine if there was any rational basis for the board to accept a lower price").

[48] Morey W. McDaniel, Bondholders and Stockholders, 13 J. Corp. L. 205, 257 (1988) (arguing that, under *Revlon*, "directors may confer benefits on bondholders if (1) stockholders also receive benefits and (2) the stockholder benefits are 'rationally related' to the bondholder benefits").

[49] See John C. Coffee, Jr. & William A. Klein, Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations, 58 U. Chi. L. Rev. 1207, 1253 (1991) (noting that "bond covenants and other provisions that would reduce the firm's cost of capital" "would be in the interest of [a company's] shareholders").

interests of stockholders[50]—in a case in which the board could not show a rational relationship given that the stockholders were being cashed out.[51] It would make no sense to call this passage dictum, because it was the very basis for the holding and for rejecting a balancing of interests that could occur in another context where there was a rational relationship.

Let us assume, arguendo, that Professor Lipshaw is correct about the cases being dicta. Again, so what? The distinction between dicta and holding is both less evident and less important than Professor Lipshaw claims. To be sure, like any lawyer or legal academic, I have occasionally used the holding/dicta distinction to make an argument. In many cases, however, the distinction is both difficult to make and not very interesting.

Before he joined the legal academy, Josh Blackman undertook a survey of over 400 opinions examining the holding-dicta distinction.[52] He identifies five major tests courts have used to draw that distinction, each of which comes in multiple variations.[53] Courts are not consistent as to which test they use and typically fail to articulate why a particular test was

[50] See Justin Blount & Kwabena Offei-Danso, The Benefit Corporation: A Questionable Solution to A Non-Existent Problem, 44 St. Mary's L.J. 617, 646 (2013) (explaining that, "at least in a standard business corporation, the business judgment rule has as its guiding star the requirement that the decision must bear some rational relationship to a benefit for the shareholders"). On the meaning of rational and rationality in this context, see Stephen M. Bainbridge, Corporate Law 145-47 (4th ed. 2020).

[51] See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–83 (Del. 1986) (rejecting defendants' argument that they were entitled to take actions to protect noteholders because, under the circumstances, "nothing remained for Revlon to legitimately protect, and no rationally related benefit thereby accrued to the stockholders")

[52] Josh Blackman, Much Ado About Dictum; or, How to Evade Precedent Without Really Trying: The Distinction between Holding and Dictum (December 19, 2008), https://ssrn.com/abstract=1318389.

[53] See id. at 20 (setting out the five tests, which he sometimes refers to as factors, and noting that "judges have promulgated various formulations of these tests").

used in one case and not another.[54] He concludes that the distinction is a "standardless standard."[55]

Another empirical study by David Klein and Neal Devins identified "1649 cases from the U.S. courts of appeals, 8809 cases from U.S. district courts, and 3365 cases from state trial and intermediate appellate courts" referencing the holding-dicta distinction.[56] They then selected a random sample of each category for review.[57] From that sample of 1106 cases they identified "213 cases in which a lower court identified a statement from a higher court as dictum."[58] Further processing of the data leads them to the conclusion that "the distinction between dictum and holding plays an important role in lower court decision making in fewer than 1 in every 2000 federal district court cases (140 out of 327,524) and in fewer than 1 in every 4000 state court (60 out of 295,452) or federal circuit court (20 out of 80,421) cases."[59]

In sum, labelling a particular passage as dicta is essentially meaningless. The process by which that label comes to be applied is arbitrary and standardless. Applying that label does not result in courts refusing to follow it.

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[54] Id.

[55] Id. at 26.

[56] David Klein & Neal Devins, Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making, 54 Wm. & Mary L. Rev. 2021, 2035 (2013). They point out "that 13,823 hits in these three years strikes us as conclusive evidence that the concept of dictum is alive and present in judges' minds. What it does not tell us is whether the concept is consequential for their decision making."

[57] Id.

[58] Id. at 2036.

[59] Id. at 2041.

### 3. *Dodge*'s Precedents and the Contemporaneous Reaction to it

Although the case law from the 19th and early 20th Centuries is sparse, it is fair to say that *Dodge* did not spring fully formed and utterly original from the mind of the Michigan Supreme Court as Athena did from the mind of Zeus. Instead, it rested on principles that had been developing for some time. In particular, *Dodge* appears to be a logical evolution of the case law on corporate purpose.

Early enabling corporation codes typically required that the articles of incorporation set forth with specificity the purposes for which the corporation was organized and the powers it would utilize in pursuit of those purposes.[60] If the corporate entity entered into a transaction for an unauthorized purpose[61] or that required it to make use of an unauthorized power, the

[60] See Bainbridge, supra note 50, at 32 (discussing early corporation statutes). Former Delaware Chief Justice Norman Veasey and Christine Di Guglielmo explain that:

> In the broadest sense, the evolution of corporate law and governance might be seen in the following light: First, the King of England granted charters. Later, state legislatures began granting charters, based on each entity's proposed business purpose and the societal or communal need for the entity's specific contribution to the state's economy (e.g., building roads or bridges). Next, around the turn of the 20th Century, this micromanagement by the state legislatures gave way to the enactment of general corporation laws-- enabling statutes. Such enabling statutes provide fundamental parameters for corporate governance, yet allow for substantial flexibility to fit a corporation's governance structure with its particular needs.

E. Norman Veasey & Christine Di Guglielmo, History Informs American Corporate Law: The Necessity of Maintaining A Delicate Balance in the Federal "Ecosystem," 1 Va. L. & Bus. Rev. 201, 203 (2006)

[61] See, e.g., McDermott v. Bear Film Co., 33 Cal. Rptr. 486, 489 (Cal. App. 1963) (defining *ultra vires* as "an action which is beyond the purpose or power of the corporation").

transaction was *ultra vires* and would be declared void.[62] In a number of pre-*Dodge* cases, acts that today would be regarded as socially responsible were challenged as being *ultra vires*.[63]

In *Steinway v. Steinway & Sons*, for example, a late 19th Century New York court held "that the acts of the trustees of Steinway & Sons in providing… for the physical, intellectual, and spiritual wants of their employés, under the circumstances of the case, were not *ultra vires*."[64] Although the court thus framed its analysis in terms of corporate powers and purposes, rather than fiduciary duties, it anticipated *Dodge*'s view that while incidental

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[62] See, e.g., Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 59 (1891) ("A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect."). As I have detailed elsewhere, the *ultra vires* doctrine gradually eroded and today is almost wholly toothless. Bainbridge, supra supra note 50, at 32-35 (tracing history of the ultra vires doctrine). Today, the corporate purpose doctrine thus is litigated not under the *ultra vires* doctrine but under that of fiduciary obligation. See Dalia T. Mitchel, From *Dodge* to *eBay*: The Elusive Corporate Purpose, 13 Va. L. & Bus. Rev. 155, 175 (2019) (explaining that beginning with the famous Berle-Dodd debate over corporate social responsibility in the 1930s, "the doctrine of fiduciary obligations (rather than *ultra vires*) [became] the site where corporate purpose was to be found").

[63] In addition to the U.S. cases discussed in the text that follows, my research assistant Connor Jordan found two pre-*Dodge* foreign cases that are broadly consistent with the rule laid out in *Dodge*. The first case comes from the Court of Appeal in the United Kingdom, Hutton v. West Cork Ry. Co. (1883) 23 Ch D 654. In *Hutton*, the railway was preparing for dissolution and decided to pay—without legal obligation to do so—renumeration to its exiting directors. The court rejected this attempt at renumeration because the directors' decision did not pass its test of being "done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit." Id at 673. The court further iterated, regardless of whether the renumeration attempt was laudable, that the "law doesn't say there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company." Id.

The second case from The High Court of Australia, *Miles v Sydney-Meat Preserving Co Ltd* (1912) 16 CLR 50, echoed this sentiment. In *Miles*, a shareholder sued the company for failure to declare a dividend and not acting in the interest of the shareholders given the company's policy of retaining profits to create a purchase price subsidy for their cattle suppliers. The court dismissed the claim on the grounds that the directors' considerations of the economic interests of their suppliers was actually advantageous to the shareholder and company benefit and that "[t]his subsidy, then, has really enabled the company to do the things of which the plaintiff complains" Id. at 70.

[64] Steinway v. Steinway & Sons, 40 N.Y.S. 718, 720 (N.Y. Sup. Ct. 1896).

expenditures to benefit employees were not impermissible the purpose of the corporation remains the benefit of the shareholders:[65]

> The corporation is and has been doing all that the court could require it to do in transmuting [expenditures for the benefit of employees] into money. The expenditures to which I have referred were advantageous to the property, such as at some time at least would have to be made, and tended to render the property salable.[66]

At about the same time, a California court similarly ruled that a promissory note executed from a railway company to the conductor of a local baseball park was not *ultra vires*.[67] The court found that the note was executed in consideration for an agreement that the conductor's baseball park would be relocated next to the railway line. In addition to the benefit of an indirect increase in foot traffic to the railway, the conductor agreed to provide admissions royalties to the railway. Although the note appeared to be facially outside the railway's corporate purpose, the court found the substantive purpose of the note to was "to increase its legitimate business" and benefit the company. [68]

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[65] Compare Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employés, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. ") with Steinway v. Steinway & Sons, 40 N.Y.S. 718 (Sup. Ct. 1896) ( "I am not prepared to hold that the very moderate expenditures or contributions of the company toward church, school, library and baths were outside of its incidental powers.").

[66] *Steinway*, 40 N.Y.S. at 721. See also People ex rel. Metro. Life Ins. Co. v. Hotchkiss, 120 N.Y.S. 649, 651 (App. Div. 1909) (finding that an insurance corporation's decision to finance hospital grounds that would benefit their employees was permissible as "the enlightened spirit of the age… has thrown upon the employer other duties, which involve… [the] well-being of the employé" and although this decision "formerly might have been questioned as not fairly within the powers or duties of the corporation" it has become essential to acquire "competent and effective service" and is "merely transacting the business of the corporation.").

[67] Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634 (1894).

[68] Id. at 640.

An Illinois court of the same time period expressly held that corporate charitable contributions were *ultra vires*.[69] The Illinois court found that the financial contribution by the First National Bank of Charleston to a local manufacturer for the alleged retention of further services within their city was not within the bank's incidental powers and the presumption was that "mere donations are injurious to a bank and unwarrantable."[70] The court conceded that the retention of the manufacturer may generally benefit the city and therefore benefit the bank indirectly; however, the court reiterated that the funds could still only be used for the "strict furtherance of the business objects and financial prosperity" of the bank and that the bank's own "pecuniary interest will be advanced and directly forwarded can not be assumed" in such cases of charitable contributions.[71]

In a case involving facts quite similar to *Dodge*, a court declined to compel payment of a dividend where the directors (and majority shareholders) were retaining earnings to finance a program of expansion.[72] The minority shareholder alleged the directors' repeated decision to exclusively expand the business year after year without declaring a dividend left the shareholder without any claim to the increased value of the company. Although the court sympathized with the difficulty the minority shareholder faced with being unable to sell his shares to a publicly traded market given the nature of a closely held corporation, the court

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[69] McCrory v. Chambers, 48 Ill. App. 445 (Ill. App. Ct. 1892).

[70] Id. at 453.

[71] Id.; see also Brinson Ry. Co. v. Exch. Bank of Springfield, 85 S.E. 634, 635 (1915) (holding it was beyond the powers of a railway company to donate company funds to assist in the erection of a public school or promoting of the town the in which the school is located even though the railway's "transportation business might thereby be increased" as a result).

[72] Raynolds v. Diamond Mills Paper Co., 60 A. 941 (Ch. 1905).

none-the-less stated it was a matter of common knowledge that to "enable the business to be prosecuted advantageously and with profit" it must expand.[73] Despite this knowledge, the court still limited the directors' ability to expand indefinitely without consideration to the stockholders. The court reminded the directors it could only retain profits and expand so long as it did the not lead to the "practical starvation of the stockholders."[74]

Accordingly, as with *Dodge*, the *Raynolds* court essentially invoked—albeit without naming it—the business judgment rule.[75] Having done so, however, the court emphasized that directors need "to bear in mind that the only sure benefit to stockholders to be derived from the successful prosecution of the corporate business must come from the distribution of dividends in cash …."[76] The court's emphasis on shareholder primacy was further reflected in its observation that "[t]he success of a great business or manufacturing corporation is measured by what the stockholders get, and not by mere accumulation of assets."[77]

In addition to these antecedents, Professor Lipshaw's efforts to dismiss *Dodge* as a mere outlier spouting mere dicta are undermined by contemporaneous commentary on *Dodge*, which recognized it as an accepted rule of law. Although some commentators have argued that *Dodge* is really about resolving disputes among majority and minority shareholders in closely

[73] Id. at 945.

[74] Id. The court even alluded to the possibility that this "starvation" could be entirely plausible if the expansion strategy and retention of dividends continued for only one or two more years. See id. at 944 ("An entirely different conclusion might be proper… one or two years from the present time.").

[75] See id. at 945 ("I cannot, as a single equity judge sitting here, say that these gentlemen … were not doing an act that was absolutely necessary to the preservation of the successful business of the corporation.")

[76] Id.

[77] Id. at 948.

held corporations,[78] the earliest commentary saw it as describing the corporate purpose of for-profit corporations generally.[79] A 1919 American law Reports annotation, for example, described *Dodge* as bringing "into clear relief the principle, which earlier decisions had previously recognized, that the fundamental purpose of a business corporation is to earn as large a profit as trade conditions and the business sagacity of its management will permit …."[80] This passage stands as clear contemporaneous evidence that *Dodge* was seen as restating an established principle of law as to the purpose of a corporation, confirming my interpretation of the antecedent cases described above.[81]

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[78] E.g., D. Gordon Smith, The Shareholder Primacy Norm, 23 J. Corp. L. 277 (1998).

[79] See, e.g., Using Corporate Funds for Humanitarian Purposes, 52 Chi. Legal News 300 (1920) (providing a summary of the *Dodge* decision and concluding that "while the fundamental purpose of a business corporation is to earn as large a profit as possible," incidental expenditures for the benefit of employees are permissible so long as doing so redounds to the corporation's long-term benefit). But cf. Current Decisions, Corporations—Distribution of Dividends—Arbitrary Withholding on the Part of Directors, 28 Yale L. J. 710, 711 (1918-1919) (describing the dividend portion of *Dodge* as "a protection of minority holders against the arbitrary acts of a numerically small majority").

It must be acknowledged that most of the early scholarship focused on the portions of *Dodge* dealing with corporate dividends rather than corporate purpose. See, e.g., A.M.K. & E.N.D., Is Non-Cumulative Preferred Stock Cumulative?, 23 Mich. L. Rev. 779 (1925) (citing *Dodge* as authority for the proposition that "the rule of reasonableness" limits directorial discretion to declare dividends.); L.R.C. Jr., Noncumulative Stock, Priority Over Common Stock in the Withheld Earnings of Past Years, 11 Va. L. Rev. 553, 554 (1925) (same).

[80] Annot., Right of Business Corporation to Use Its Funds or Property for Humanitarian Purposes, 3 A. L. R. 443 (1919).

[81] An essay in the 1922-23 volume of the Yale Law Journal by Donald Richberg, who at that time was a prominent union lawyer and progressive politician, cites *Dodge* for the proposition that "the primary objective of industry is the enrichment of the owner of the property or tools utilized in the industry; and that the objectives of the public and of the workers are secondary" and that that principle had "been little affected by ideas of social responsibility or of the interdependence of man upon man in modern life." Donald R. Richberg, Developing Ethics and Resistant Law, 32 Yale L.J. 109, 117-118 (1922-1923). Other contemporaneous scholarship quoted the relevant passages from *Dodge* with either approval or, at least, without surprise. See, e.g., Note, H.L. Wilgus, Corporations, Shareholders' Right to Have a Dividend Declared and Paid Out of Surplus, 17 Mich. L. Rev. 502, 503 (1919) (quoting *Dodge*'s statement of corporate purpose); Editorial, Minority Stockholders—Compelling Directors to Declare

**B. Opinio Juris**

Having disposed of *Dodge*, *eBay*, *Revlon* and their ilk as mere dicta (at least to his own satisfaction), Professor Lipshaw then turns to statements about corporate purpose by one of Delaware's most prominent jurists:

> I not only disagree with Professor Bainbridge, but I am also going to say that Leo Strine is wrong about Delaware *law*. Even if I humbly defer to the corporate law expertise of Professor Bainbridge and Chief Justice Strine, I am willing to say that

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Dividends—Right of a Corporation Organized for Business Purposes to Devote Any of its Assets to Eleemosynary Purposes, 5 Va. L. Reg. 558, 565 (1919) (same).

As for *eBay*, scholarly opinion is divided. A number of commentators view it as a clear statement of the shareholder wealth maximization norm. See, e.g., Elisabeth de Fontenay, Individual Autonomy in Corporate Law, 8 Harv. Bus. L. Rev. 183, 211 (2018) (noting that "Delaware courts have recently suggested that managers of for-profit corporations are bound to maximize shareholder wealth"); Marc A. Greendorfer, Discrimination as a Business Policy: The Misuse and Abuse of Corporate Social Responsibility Programs, 8 Am. U. Bus. L. Rev. 307, 314-18 (2020) (stating that "there are no cases that say a Traditional Corporation can sacrifice shareholder wealth maximization to further the aims of third parties"); Janine S. Hiller & Scott J. Shackelford, The Firm and Common Pool Resource Theory: Understanding the Rise of Benefit Corporations, 55 Am. Bus. L.J. 5, 16 (2018) (stating that *eBay* "is in a line of cases that can give a director pause before taking nonshareholder interests into consideration in corporate decision making, and it highlights the application of shareholder wealth maximization not just to publicly held corporations but also under certain circumstances to closely held corporations"); Kristin A. Neubauer, Benefit Corporations: Providing A New Shield for Corporations with Ideals Beyond Profits, 11 J. Bus. & Tech. L. 109, 123–24 (2016) ("As Chandler's analysis clearly articulates, while a company's decision to embark on charitable endeavors is admirable under traditional corporate law, if that charitable endeavor threatens the traditional fiduciary obligations of directors, then the charitable endeavor will not be sustained as a viable defense in Delaware courts"). On the other hand, some commentators contend that the opinion leaves directors with wriggle room to pursue purposes other than shareholder wealth maximization, at least so long as there is some benefit to the shareholders. See, e.g., Lyman Johnson, Pluralism in Corporate Form: Corporate Law and Benefit Corps., 25 Regent U. L. Rev. 269, 274–75 (2013) (stating "the 2010 *eBay* decision is touted by some … as mandating shareholder primacy. Yet, the opinion … did nothing to alter craigslist's business focus strategy"); Robert A. Katz & Antony Page, Sustainable Business, 62 Emory L.J. 851, 868 (2013) ("The eBay case may even permit a company's directors to pursue a philanthropic purpose, as long as it is not the company's exclusive purpose"); Jena Martin, Business and Human Rights: What's the Board Got to Do with It?, 2013 U. Ill. L. Rev. 959, 970 n.53 (2013) (claiming "that a determined corporation could still maintain a strategy that values stakeholders (perhaps even above shareholders) in Delaware, so long as the corporation were to frame it within a shareholder-benefit framework").

> I am as qualified as they, jurisprudentially at least, on the subject of what *law* is. And on that point, they are simply wrong.[82]

I freely concede that Professor Lipshaw is as qualified to opine on the law as am I, if not more so, but I am not prepared to make that concession on behalf of Chief Justice Strine. His pronouncements in scholarly settings are, at the very least, strong evidence of what the law is and, arguably, themselves should be treated as law.

An analogy to international law may be helpful. Article 38 of the Statute of the International Court of Justice codifies the principle that "the teachings of the most highly qualified publicists of the various nations" may be looked to "as subsidiary means for the determination of rules of law."[83] The U.S. Supreme Court has likewise explained that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[84]

To be sure, both the ICJ statute and *Paquete Habana* deal with determining the content of international law rather than domestic corporate law. Yet, the principle of *opinio juris* seems equally apt to the latter context. As eminent constitutional scholar Edward S. Corwin reportedly

[82] Lipshaw, supra note 4, at 24.

[83] Statute of International Court of Justice, art. 38, para. 1(d).

[84] The Paquete Habana, 175 U.S. 677, 700 (1900).

observed, “[i]f judges make law,” “then so do commentators.”[85] As such, while it is true that “legislators and judges create new law,” one can argue that “law is also created by commentators writing in law reviews.“[86]

By expressly referring to the “most highly qualified publicists,” however, the ICJ statute clearly suggests “that not all writings are of comparable value."[87] Who could be more “highly qualified” (ICJ) and “peculiarly well acquainted” (*Paquete Habana*) with Delaware corporate law than Leo Strine, who has been a Vice Chancellor, the Chancellor, and the Chief Justice of that state?

To be sure, while I have acknowledged that even mighty Homer nods occasionally,[88] I have also observed that:

> When any Chief Justice of the Delaware Supreme Court speaks on a corporate law topic, lawyers and academics who toil in that doctrinal vineyard listen. When that Chief Justice is Leo Strine, they listen especially closely. The “well-respected” Chief Justice after all is the “[w]underkind of U.S. corporate law” and has been “recognized among academics, practitioners, and other judges” as an “intellectual leader” of the Delaware judiciary.[89]

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[85] Quoted in Buckner F. Melton, Jr., The Supreme Court and the Federalist: A Citation List and Analysis, 1789-1996, 85 Ky. L.J. 243 (1997).

[86] Stuart B. Walzer & Jan C. Gabrielson, Celebrity Goodwill, 2 J. Am. Acad. Matrimonial Laws. 35 (1986).

[87] Lori Fisler Damrosch & Sean D. Murphy, International Law: Cases and Materials 239 (7th ed 2019).

[88] Stephen M. Bainbridge, Corporate Social Responsibility in the Night-Watchman State, 115 Colum. L. Rev. Sidebar 39, 39 (2015).

[89] Id. I note with some amusement the existence of a parody Twitter account (with which I am not affiliated) entitled “Strine Says,” @StrineSays, Twitter, https://twitter.com/StrineSays, devoted to “[t]he eminently quotable retired Chief Justice Leo E. Strine, Jr.,” which perhaps confirms my view that when Strine speaks lawyers listen.

Surely the opinions of such a jurist are entitled to greater weight than those of virtually any other commentator.

With that background in mind, let us turn to the pronouncements in question. They leave no doubt as to where Chief Justice Strine stands. In 2012, for example, he quoted Chancellor Chandler's statement in *eBay* that directors "cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duty under Delaware law,"[90] and described it as a "rather expected statement."[91] He went on to explain that "corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders," while noting that the business judgment rule accords directors considerable discretion about how to do so.[92]

In 2015, Chief Justice Strine returned to the issue, focusing specifically on claims by many corporate law academics "that directors may subordinate what they believe is best for stockholder welfare to other interests, such as those of the company's workers or society generally."[93] In assessing that claim, the Chief Justice minced no words; to the contrary, he hurled multiple verbal grenades into the debate:

[90] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010).

[91] Leo E. Strine, Jr., Our Continuing Struggle with the Idea That for-Profit Corporations Seek Profit, 47 Wake Forest L. Rev. 135, 149 (2012).

[92] Id. at 155.

[93] Honorable 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, 764 (2015).

- "These well-meaning commentators, of course, ignore certain structural features of corporation law ...."[94]
- "Indeed, these commentators essentially argue that Delaware judges do not understand the very law they are applying, and the Delaware General Assembly does not understand the law it has created."[95]
- "It is not only hollow but also injurious to social welfare to declare that directors can and should do the right thing by promoting interests other than stockholder interests."[96]

Perhaps most damningly, however Chief Justice Strine essentially accuses the commentators—whom he called out by name in lengthy string cites[97]—of misrepresenting the law, arguing that they "*pretend* that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion, under the law of the most important American jurisdiction—Delaware."[98] To be sure, the commentators Strine is critiquing also contribute to the *opinio juris*, but, as we have seen, his opinion counts a lot more than theirs.

Importantly, Chief Justice Strine's understanding of Delaware law is shared by other prominent Delaware jurists. As we have seen, the late former Chancellor William T. Allen, who was called "one of the most respected jurists on corporate governance" and someone who,

[94] Id. at 765.

[95] Id. at 766-67.

[96] Id. at 767.

[97] Id. at 763-64 nn. 7 & 9.

[98] Id. at 763 (emphasis supplied).

"[w]hen he writes, lawyers listen"[99] believed that directors had a duty to maximize the long-run interests of shareholders.[100] As we have also seen, former Chancellor Chandler embraced the same rule in *eBay*.[101] In an extended and favorable treatment of *eBay*, Vice Chancellor Travis Laster observed that "directors owe duties to the corporation for the ultimate benefit of the residual claimants."[102] Those are some very heavyweight names to throw into the *opinio juris* balance.

**C. The Bainbridge Hypothetical, the Business Judgment Rule and the Trolley Problem**

In multiple works over the years, I have offered a thought experiment I find useful in thinking about the law of corporate purpose:

> [S]uppose that the board of directors is considering closing an obsolete plant. The closing would harm the plant's workers and the local community. However, the closing would benefit shareholders, creditors, and employees at a more modern plant to which the work previously performed at the old plant would be transferred. Moreover, the closing would benefit communities around the modern plant. Assume that the latter groups cannot gain except at the former groups' expense. By what standard should the board make the decision? Shareholder wealth maximization provides a clear answer to this otherwise difficult situation--close the plant. The alternative to following the shareholder wealth maximization norm would, on the other hand, force directors to struggle with indeterminate balancing standards. In turn, such standards would deprive directors of the critical ability to determine ex ante whether their behavior comports with the law's demands, thereby raising the transaction costs of corporate governance.[103]

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[99] James Lyons, Conflicting Interests, Forbes, Mar. 30, 1992, at 48.

[100] See supra text accompanying note 40 (quoting Chancellor Allen's opinion in *Oak Industries)*.

[101] See supra text accompanying note 90 (quoting Chancellor Chandler's *eBay* opinion).

[102] J. Travis Laster, Revlon Is A Standard of Review: Why It's True and What It Means, 19 Fordham J. Corp. & Fin. L. 5, 28 (2013).

[103] Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 Nw. U.L. Rev. 547, 581 (2003).

I believe Australian lawyer and blogger Peter Tunjic was the first person to refer to this as "the Bainbridge Hypothetical."[104] Taking note of his having done so, I posted a request to my blog asking for help in popularizing both the hypothetical and the name.[105] I thank Professor Lipshaw for taking up the cause, despite the criticism he proceeds to heap upon it:

> Professor Bainbridge has proposed and, indeed, has marketed [a zero-sum thought experiment]: the Bainbridge Hypothetical. … This is a nice academic problem to ponder in the rarified atmosphere of an ethics class or in Corporation Law 101, but the reality is that the zero-sum choice between the shareholders and some other constituency rarely so presents itself. The Bainbridge Hypothetical is the corporate equivalent of the famous ethical trolley problem and its variants, the basic one involving an uncontrolled trolley rolling down the tracks toward a junction and the protagonist having to decide whether to pull a switch that would cause only one and not six people to die. … I understand the basis for the rhetoric and the value of the problems as pedagogical tools. Nevertheless, there is a significant gap between academic thought experiments or political positioning, on one hand, and how the real world works, on the other.[106]

Professor Lipshaw's argument raises a couple of issues that need to be disentangled. First, is it true that cases in which the law of corporate purposes matters are rare? Second, if so, what does that tell us about the rule of law applicable to such cases, if anything? Finally, assuming that these cases are rare enough that they amount to a thought experiment, does that mean they are unimportant?

Professor Lipshaw undoubtedly is correct that cases in which courts have reached the merits of board decisions such as that posed in the Bainbridge Hypothetical are extremely

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[104] Peter Tunjic, Revisiting the Bainbridge Hypothetical: Corporate Purpose in Australia, onDirectorship.com, https://ondirectorship.com/ondirectorship/4ttslzs85gw4cwe78khn92kp295s2w.

[105] Stephen M. Bainbridge, Kindly help popularize the Bainbridge Hypothetical (Aug. 19, 2019), https://www.professorbainbridge.com/professorbainbridgecom/2019/08/kindly-help-popularize-the-bainbridge-hypothetical.html.

[106] Lipshaw, supra note 4, at 5.

rare.[107] Indeed, I would put the case even more strongly. The late Henry Manne defined a socially responsible corporate action as "one for which the marginal returns to the corporation are less than the returns available from some alternative expenditure," is purely voluntary, and is an actual corporate expenditure rather than a conduit for individual largess.[108] So defined, true corporate social responsibility decisions are rare. If one measures marginal returns over a long enough period, few corporate actions satisfy that criteria.[109]

Professor Lipshaw is also correct in identifying the business judgment rule as the reason for that scarcity.[110] As David Millon observes, when the business judgment rule applies, "courts will not second-guess decisions—including decisions that appear to benefit nonshareholders at the expense of shareholders--as long as management can assert some plausible connection with the corporation's long-run best interests."[111] Where Professor Lipshaw goes astray, in my view, is in thinking that the business judgment rule is a "rule of decision."[112]

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[107] See Lipshaw, supra note 4, at 24 (referring to "holdings in idiosyncratic zero-sum circumstances").

[108] Henry G. Manne & Henry Christopher Wallich, The Modern Corporation and Social Responsibility 1, 4-6 (1973).

[109] See id. at 8 (noting the difficulty of identifying true acts of corporate charity).

[110] See Lipshaw, supra note 4, at 32 ("In the ordinary balancing of constituency interests, … the business judgment rule applies.").

[111] David Millon, Two Models of Corporate Social Responsibility, 46 Wake Forest L. Rev. 523, 527 (2011).

[112] See Lipshaw, supra note 4, at 25 ("The business judgment rule, not the SWMP, is the prevailing rule of decision when the dispute arises from management's ordinary and routine mediation of various constituency interests."

Properly understood, the business judgment rule is neither a rule of decision, a standard of liability, nor a standard of review.[113] Instead, as I have argued at length elsewhere, the business judgment rule is an abstention doctrine.[114] No less an authority than former Delaware Chief Justice Norman Veasey has confirmed that that articulation of the rule is "consistent" with Delaware law.[115]

A decision to abstain is not a decision on the merits of a case.[116] To the contrary, when a court abstains, it is expressly refusing to decide the case on the merits.[117] In other words, in abstention cases, there is an underlying rule of law that the court for prudential or other reasons has decided not to apply to the facts of the case before it.

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[113] See William T. Allen et al., Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law, 56 Bus. Law. 1287, 1297 (2000) (describing the business judgment rule as "an expression of a policy of non-review of a board of directors' decision when a judge has already performed the crucial task of determining that certain conditions exist"); Bernard S. Sharfman, Being Informed Does Matter: Fine Tuning Gross Negligence Twenty Plus Years After Van Gorkom, 62 Bus. Law. 135, 145 (2006) (arguing that "the BJR is better described as a "standard of non-review").

[114] Stephen M. Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 Vanderbilt L. Rev. 83 (2004).

[115] See E. Norman Veasey & Christine T. Di Gugliemo, What Happened in Delaware Corporate Law and Governance From 1992–2004? A Retrospective on Some Key Developments, 153 U. PA. L. REV. 1399, 1421–28 (2005) ( ["Professor Bainbridge's] approach is consistent with the Delaware doctrine that the [business judgment] rule is a presumption that courts will not interfere with, or second-guess, decision making by directors."). See also Boland v. Boland, 5 A.3d 106, 122 (Md. Spec. App. 2010) (holding that "the business judgment rule serves as one of abstention"), rev'd on other grounds, 31 A.3d 529 (Md. 2011); Houle v. Low, 556 N.E.2d 51, 59 (Mass. 1990) ("Massachusetts has always recognized the need for courts to abstain from interfering in business judgments."); Gut v. MacDonough, 2007 WL 2410131, at *12 (Mass. Super. Aug. 14, 2007) ("The business judgment rule allows courts to presume that the board of directors acted in the best interests of the corporation and, therefore, to largely abstain from evaluating the validity of the board's decisions.").

[116] See, e.g., Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713 (1996) (explaining that abstention-based stay orders raise "an important issue separate from the merits" of the case).

[117] See, e.g., In re Jt. E. and S. Dist. Asbestos Litig., 78 F.3d 764, 775 (2d Cir. 1996) (discussing *Burford* abstention, under "which a federal district court may properly decline to decide difficult questions of state law").

When I teach the business judgment rule in class, I use a homely analogy to make the point. I show a PowerPoint slide with a picture of a Tootsie Pop. The reader will recall that the Pop is lollipop with a hard candy shell filled with a chocolate-flavored chewy candy. As long as the hard candy shell remains intact, it protects the center chewy candy from being eaten. Yet, even though the shell insulates the center, no one would deny that there really is a center.

Just so, even though an abstention doctrine (the hard candy shell) prevent the court (the eater) from invoking the underlying substantive doctrine, no one would dispute that there is still a substantive doctrine at the core of the case. This is precisely what the business judgment does. In the typical business judgment rule case, the underlying doctrine is the duty of care.[118] The fact that the business judgment rule applies to such cases does not mean that there is no underlying duty of care.[119] Likewise, the fact that the business judgment rule typically precludes a court from deciding whether directors breached the shareholder wealth maximization norm does not mean that the norm is not the underlying doctrine. The *Dodge/eBay* rule thus remains the chewy center even when the hard candy shell of the business judgment rule protects it from judicial review.

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[118] This is so because the business judgment rule does not preclude judicial review of violations of the duty of loyalty. See, e.g., Bayer v. Beran, 49 N.Y.S.2d 2, 6 (N.Y. Sup. Ct. 1944) ("The 'business judgment rule' … yields to the rule of undivided loyalty.").

[119] See In re Fleming Packaging Corp., 351 B.R. 626, 634 (Bankr. C.D. Ill. 2006) (stating that "the rule serves to preclude judicial review of the substantive merits of the decision"); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stock-holder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value."); Robert Louis Perkins, The Need for A New Political Playbook Which Mitigates the Public Harm Caused by Tax Incentives, 38 Miss. C. L. Rev. 1, 25 (2019) ("The business judgment rule limits the duty of care by preventing courts from reviewing a corporate board's substantive business choices.").

Professor Lipshaw doubtless will object to this line of argument, at least in part because he believes that "[u]ntil a rule comes to be applied to real facts on the ground, it is only an argument about what the law ought to be."[120] In doing so, however, he raises a deep philosophical question akin to the perennial question of whether there is a sound when a tree falls in the woods with no one around, which is beyond the scope of this article.

Professor Lipshaw will also object that I have confused "the business judgment rule with, for example, constitutional standards that a court may employ when undertaking due process or equal protection review of a statute."[121] But so what? If the law is a truly a seamless web, one ought to feel free to draw analogies from various areas of the law to shed light on corporate law problems.

Professor Lipshaw also objects that, in Delaware law, the law cycles between, "on one hand, *Shlensky*-like abstention, and, on the other, still an exceedingly limited scope of after-the-fact inquiry, primarily in duty of care cases arising out of corporate acquisitions."[122] I assume Professor Lipshaw is referring here to cases like *Van Gorkom*, in which the court found that directors breached their duty of care in approving a merger, rather than cases like *Unocal*, in which the court applied an intermediate standard of review rather than the business judgment rule.[123] In my view, *Van Gorkom* is perfectly consistent with the understanding of the business

[120] Lipshaw, supra note 4, at 31.

[121] Id. at 33 n.129.

[122] Id.

[123] Compare Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (holding that "that the Trial Court committed reversible error in applying the business judgment rule in favor of the director defendants in this case") with Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) ("When a board addresses a pending takeover bid ... there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.").

judgment rule advanced herein. Just as the Tootsie Pop's hard candy shell is not impervious, the business judgment rule has certain preconditions that must be satisfied in order to it to apply.[124] Among these, and arguably the most important, is that the business judgment rule will not protect an uninformed decision where the board's failure to inform itself constitutes gross negligence.[125] In such cases, the court will review the substantive merits of the board's decision to determine whether they complied with their duty of care.[126]

While I therefore differ with Professor Lipshaw with respect to how one disentangles the business judgment rule and the shareholder wealth maximization norm, recall my concession that there are few cases in which the business judgment rule fails to apply to a board decision in which it is claimed they violated the norm. Professor Lipshaw contends that those cases are therefore unimportant, except as fodder for the long running academic debate

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[124] See, e.g., Granada Investments, Inc. v. DWG Corp., 823 F. Supp. 448, 456 (N.D. Ohio 1993) (explaining that "while the presumption is that directors are entitled to the shield of the business judgment rule, there are preconditions to its use"); Bernard S. Sharfman, A Theory of Shareholder Activism and Its Place in Corporate Law, 82 Tenn. L. Rev. 791, 832 (2015) (explaining that, "if the preconditions of the business judgment rule are met, the defendants escape a substantive review of the decision").

[125] See, e.g., State of Wisconsin Inv. Bd. v. Bartlett, 2000 WL 238026, at *1 (Del. Ch. Feb. 24, 2000) (explaining that board "decisions are entitled to the benefit of the business judgment rule where plaintiff cannot show that the board of … failed to inform themselves adequately about the merger negotiation process); Lewis v. Honeywell, Inc., CIV.A. 8651, 1987 WL 14747, at *3 (Del. Ch. July 28, 1987).(holding that "where [directors] make an uninformed business judgment under circumstances constituting gross negligence, that decision would not be protected under the business judgment rule").

[126] See, e.g., Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1993). (explaining that "there are rare situations [in which the business judgment rule does not apply and] a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable"); B & L Cellular v. USCOC of Greater Iowa, LLC, CV 7628-VCL, 2014 WL 6882207, at *3 (Del. Ch. Dec. 8, 2014), judgment entered sub nom. Cellular, B&R v. USCOC of Greater Iowa, LLC (Del. Ch. 2015) ("Where the business judgment rule does not apply, D.C. courts apply a less deferential standard of reasonableness [under which] a court may have to undertake a potentially wide-ranging, fact-intensive inquiry into both substantive and procedural aspects of a decision.").

over corporate purpose, which he dismisses as a mere war of platitudes, waged by scholastic pedants, with no real-world significance.[127]

> The Bainbridge Hypothetical is the corporate equivalent of the famous ethical trolley problem and its variants, the basic one involving an uncontrolled trolley rolling down the tracks toward a junction and the protagonist having to decide whether to pull a switch that would cause only one and not six people to die. Just as people in real life are rarely asked to make that kind of horrific decision, corporate management rarely faces the binary choice of diverting value away from the shareholders to other stakeholders.[128]

Unlike Professor Lipshaw, I believe thought experiments like the trolley problem and the Bainbridge Hypothetical matter in both the academy and the real world of lawyers and business people.

The trolley problem serves to highlight the shortcomings of a consequentialist theory of moral permissibility and shine a light on the nuances of deontology, consequentialism's foil.[129]

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[127] See Lipshaw, supra note 4, at 4 ("Call my thesis here 'the Platitude Proposition.').

[128] Lipshaw, supra note 4, at 5. Philippa Foot used a "runaway tram" to show that the doctrine of double effect failed to explain why abortion was morally permissible in some, but not all, cases. Philippa Foot, The Problem of Abortion and the Doctrine of the Double Effect, 5 Oxford Rev. 5, 8, 13-15 (1967). Judith Jarvis Thomson then coined the phrase "trolley problem" by comparing similar thought experiments to study the moral intuitions behind such choices, giving rise to an interdisciplinary "trolleyology." See Judith Jarvis Thomson, Killing, Letting Die, and the Trolley Problem, 59 The Monist 204, 206 (1976); see also Judith Jarvis Thomson, The Trolley Problem, 94 Yale L. J. 1395 (1985); Judith Jarvis Thomson, Turning the Trolley, 36 Phil. & Pub. Aff. 359 (2008); Sarah Bakewell, Clang Went the Trolley, N.Y. Times (Nov. 22, 2013), https://www.nytimes.com/2013/11/24/books/review/would-you-kill-the-fat-man-and-the-trolley-problem.html [https://perma.cc/Y73C-FSZE] ("a whole enterprise of 'trolleyology' has unfolded, with trolleyologists generating ever more fiendish variants.").

[129] Larry Alexander & Michael Moore, Deontological Ethics, Stanford Encyclopedia of Philosophy (Oct. 17, 2016), https://plato.stanford.edu/entries/ethics-deontological/ [https://perma.cc/BN3Q-FKA7]; John Martin Fischer, The Trolley and the Sorites, 4 Yale J. L. & Human. 105, 106-07 (1992); W. Bradley Wendel, Economic Rationality and Ethical Values in Design-Defect Analysis: The Trolley Problem and Autonomous Vehicles, 55 Cal. W. L. Rev. 129 (2018); Stephen S. Wu, When Law and Ethics Collide with Autonomous Vehicles, 14 SciTech Law. 24, 25 (2017); Dietmar Hübner & Lucie White, Crash Algorithms for Autonomous Cars: How the Trolley Problem Can Move Us Beyond Harm Minimisation, 21 Ethical Theory and Moral Prac. 685, 687-88 (2018); Mathias Risse, Human Rights and Artificial Intelligence: An Urgently Needed Agenda, 41 Hum. Rts. Q. 1, 3 (2019); Lauren Cassani Davis, The Lifespan of a Thought Experiment: Would You Pull the Trolley Switch? Does it Matter?, The Atlantic (Oct.

Consequentialists espouse the ethical theory that choices – acts or omissions – are only morally assessable by their consequences: if choices directly or indirectly increase the Good, those choices are morally permissible.[130] In contrast, deontologists do not judge moral agency by an act's consequences; instead, deontologists hold that conformity to moral duties makes a choice morally permissible.[131] While consequentialism (Good = life, 5-lives > 1-life) and deontology (duty = do not take life, 5-lives > 1-life) would both morally permit the trolley driver to switch the trolley from the track with 5 trapped workmen to the track with 1 trapped workman, consequentialism generates the same outcome in the Footbridge variation (5 lives > 1 life) even though pushing a large, innocent pedestrian off the bridge onto the tracks to stop the trolley's momentum and save the 5 conflicts with one's moral intuitions.[132] Since consequentialism generates a Footbridge outcome inconsistent with one's moral intuitions, the trolley problem and its progeny serve to spotlight the factors involved in moral permissibility calculus.[133] Whether killing and letting die are equally morally impermissibile has received special attention, but the trolley problems have been used to illuminate out various other factors.[134]

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9, 2015), https://www.theatlantic.com/technology/archive/2015/10/trolley-problem-history-psychology-morality-driverless-cars/409732/ [https://perma.cc/L43T-6G4F].

[130] See Alexander & Moore, supra note 129; Fischer, supra note 129, at 106-07; Hübner & White, supra note 129, at 687-88.

[131] See Alexander & Moore, supra note 129; Fischer, supra note 129, at 107; Hübner & White, supra note 129, at 688.

[132] Alexander & Moore, supra note 129.

[133] Id. See also Bryant Walker Smith, The Trolley and the Pinto: Cost-Benefit Analysis in Automated Driving and Other Cyber-Physical Systems, 4 Tex. A&M L. Rev. 197, 198 (2017); Iria Giuffrida, Liability for AI Decision-Making: Some Legal and Ethical Considerations, 88 Fordham L. Rev. 439, 454 n89 (2019); Geoff Keeling, Why Trolley Problems Matter for the Ethics of Automated Vehicles, 26 Sci. & Engineering Ethics 293, 296 (2020).

[134] See Gabriel Andrade, Medical Ethics and the Trolley Problem, 12 J. Med. Ethics & Hist. Med. 1, 5 (2019); Douglas Laycock, Ultimate Unity of Rights and Utilities, 64 Tex. L. Rev. 407, 409 (1985); see

Properly construed as interrogating the morally permissible distribution of benefits and detriments, real-world trolley problems arise across disciplines. In World War Two, before Foot introduced the trolley problem, the English government and its scientists risked Germany destroying suburban London to protect more densely populated, central areas, while the U.S. government justified atomic bomb use by arguing more lives would be saved the sooner the war ended.[135] Military trolley problems continue to instantiate in collateral damage in military strikes, torture justifications, and even training.[136] Recently, autonomous vehicles birthed a vast trolleyology subset focused on the ethics and law of coding such vehicles, which will be

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also Wendel, supra note 129, at 129 ("Moral theorists have used the trolley problem to explore subtle issues including the nature of intention, the doctrine of double effect [], the act/omission distinction, agent-relative versus agent-neutral duties, moral agency and 'authorship' of wrongs, and the problem of moral luck.").

[135] Bakewell, supra note 128.

[136] Id. See also Adam J. Kolber, Will There Be a Neurolaw Revolution, 89 Ind. L. J. 807, 844 (2014) ("autonomous agents, especially unmanned military drones, will likely be confronted with real-life trolley problems").

programmed to "optimize" unavoidable crashes.[137] Technological advances similarly engender or utilize trolley problems in medicine, neuroscience, and moral psychology.[138]

Thought experiments like the trolley problem are equally important in legal scholarship.[139] Indeed, working on such thought experiments is a core function of legal

[137] See Spencer C. Pittman & Mbilike M. Mwafulirwa, Autonomous Vehicles and the Trolley Problem: An Ethical and Liability Conundrum, 88 Okla. B. J. 1719, 1720-23, 1720 n18 (2017); Mark A. Lemley & Bryan Casey, Remedies for Robots, 86 U. Chi. L. Rev. 1311, 1329-31 (2019); Mark A. Geistfeld, A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation, 105 Calif. L. Rev. 1611, 1647-48 (2017); Giuffrida, supra note 133, at 454; Amar Kumar Moolayil, The Modern Trolley Problem: Ethical and Economically-Sound Liability Schemes for Autonomous Vehicles, 9 Case W. Res. J. L. Tech. & Internet 1, 10-11 (2018); Wendel, supra note 129, at 133; Hin-Yan Liu, Three Types of Structural Discrimination Introduced by Autonomous Vehicles, 51 UC Davis L. Rev. Online 149, 151-53, 164 (2017-2018); Smith, supra note 133, at 199-200; Duncan MacIntosh, Autonomous Weapons and the Nature of Law and Morality: How Rule-of-Law-Values Require Automation of the Rule of Law, 30 Temp. Int'l & Comp. L. J. 99, 109-10 (2016); Samantha Godwin, Ethics and Public Health of Driverless Vehicle Collision Programming, 86 Tenn. L. Rev. 135, 142 (2018); Wu, supra note 129, at 25; Alfred R. Cowger Jr., Liability Considerations When Autonomous Vehicles Choose the Accident Victim, 19 J. High Tech. L. 1, 60 (2018); Keeling, supra note 133, at 293-97; Hübner & White, supra note 129, at 687, 693; Risse, supra note 129, at 3; Davis, supra note 129.

[138] For medicine, see Andrade, supra note 134, at 3, 5-8, 10-13 (discussing abortion and euthanasia); Robert Weinstock et al., Competence to Be Executed: An Ethical Analysis Post Panetti, 28 Behav. Sci. & L. (2010) (discussing the psychiatrist's role in prisoner competency determinations). For neuroscience and moral psychology, see Lewis Petrinovich & Patricia O'Neill, Influence of Wording and Framing Effects on Moral Intuitions, 17 Ethology and Sociobiology 145, 148 (1996) (discussing language's impact on one's trolley problem moral intuitions); Joshua D. Greene et al., An fMRI Investigation of Emotional Engagement in Moral Judgment, Science, Sept. 14, 2002, at 2105 (using trolley problems and functional-MRI scans to investigate brain region activity during moral cognition); Thomas Nadelhoffer & Adam Feltz, The Actor-Observer Bias and Moral Intuitions: Adding Fuel to Sinnott-Armstrong's Fire, 1 Neuroethics 133, 139 (2008) (discussing the impact of one's role in the trolley problem on one's moral intuitions); Joshua D. Greene, Beyond Point-and-Shot Morality: Why Cognitive (Neuro)Science Matters for Ethics, 9 L. & Ethics Hum. Rts. 141, 150 (2015) (describing the neuroscientific dual-process theory of moral judgment and supporting trolley problem evidence); Daniel Engber, Does the Trolley Problem Have a Problem?: What If Your Answer to an Absurd Hypothetical Question Had No Bearing on How You Behaved in Real Life?, Slate (June 18, 2018), https://slate.com/technology/2018/06/psychologys-trolley-problem-might-have-a-problem.html [**https://perma.cc/HPW2-5XFA**] (explaining trolley problems' value as a neuroscience tool).

[139] Indeed, the trolley problem and its variants often come up in legal philosophy with respect to distinctions and certain defenses, especially necessity or choice-of-evils. For distinctions, see Jules L. Coleman, Mistakes, Misunderstandings, and Misalignments, 121 Yale L. J. F. 541, 556-57 (2011-2012) (distinguishing, among other things, what is morally permissible for the trolley problem's driver and 1 workman); Tim Stelzig, Deontology, Governmental Action, and the Distributive Exemption: How the

scholarship. Conducting them allows law professors to probe the limits of a rule or problem at a depth for which clients would rarely be willing to pay, while thereby setting a foundation on which non-academic lawyers can do the sorts of work for which clients are willing to pay.[140]

> The purpose of [a thought experiment] is to strip away confounding information, so as to present us with a bare bones environment. Just as physical experiments are designed to allow scientists to test their theories under controlled conditions, thought experiments allow us to test our intuitions in an environment in which there is an unmistakable answer.[141]

Just so, the purpose of the Bainbridge Hypothetical is precisely to confront us with a bare-bones problem in which the necessity of choice is unavoidable. In part, just as the trolley problem does, this allows us to interrogate the relevance of our moral principles and normative priors to the problem, but it also has more practical utility.

Most business decisions, after all, do not directly oppose the interests of stakeholders and shareholders.[142] To the contrary, most business decisions are potentially win-win scenarios,

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Trolley Problem Shapes the Relationship Between Rights and Policy, 146 U. Pa. L. Rev. 901, 957, 957 n.267 (1998) (distinguishing state and individual inaction); George C. Christie, The Defense of Necessity Considered from the Legal and Moral Points of View, 48 Duke L. J. 975, 1013 (1999) (distinguishing misfeasance from non-feasance); Lawrence Crocker, Justification and Bad Motives, 6 Ohio St. J. Crim. L. 277, 293-94 (2008) (distinguishing what is socially preferable from what is morally permissible). For defenses, see Eric Rakowski, Taking and Saving Lives, 93 Colum. L. Rev. 1063, 1151, 1131 (1993) (discussing necessity and choice-of-evils defenses); F. E. Guerra-Pujol, Trolley Problems, Drake L. Rev. Discourse 101, 105-106 (2014) (discussing defense of necessity); Stuart P. Green, Looting, Law, and Lawlessness, 81 Tul. L. Rev. 1129, 1153-54, 1154 n92 (2007) (discussing defense of necessity); Robert Hallborg Jr., Comparing Harms: The Lesser-Evil Defense and the Trolley Problem, 3 Legal Theory 291, 302-03, 306 (1997) (discussing the lesser-evil defense).

[140] See Edward McGlynn Gaffney, Jr., Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality, 4 U. Pa. J. Const. L. 394, 437 (2002) ("Law professors frequently like to imagine a hypothetical world within which to conduct thought experiments that test the limits of a principle.").

[141] Christopher P. Chambers et. al, Flaws in the Efficiency Gap, 33 J.L. & Pol. 1, 5 (2017).

[142] See, e.g., Lisa M. Fairfax, Making the Corporation Safe for Shareholder Democracy, 69 Ohio St. L.J. 53, 96 (2008) (arguing that "the vast majority of stakeholders have interests that collide with shareholders").

such that the proverbial rising tide usually does lift all boats.[143] This is true even of decisions that in the short run seem to favor stakeholders at the expense of shareholders. Providing health benefits for employees may increase expenses and reduce profits in the short term, for example, but often leads to greater productivity in the long term.[144] Contrary to Professor Lipshaw, however, this is precisely what makes the zero-sum cases so fascinating. It is also what gives hard cases like the zero-sum ones such great utility, since—as the great Karl Llewellyn observed—"hard cases often make law better."[145]

In thinking about the Bainbridge Hypothetical, it becomes apparent that the core problem of corporate social responsibility is that directors who are responsible to everyone are responsible to no one. This suggests a research question; namely, can we reasonably expect directors to act as mediating hierarchs? Professor Bhagat and Hubbard recently addressed that question and concluded:

> Theoretically, it is quite difficult to maximize (optimize) more than a single objective. From a practical viewpoint, there are two challenges. First, the stakeholder paradigm suffers from internal inconsistencies. Consider the stakeholder perspective of "delivering value to our customers." A company like Apple can significantly improve value to current customers by selling its high-quality products at a fraction of current prices. In the short run, this pricing will lead to higher market share and many more happier customers. In the long run, if Apple continues to maintain or increase the quality of their products, it may face financial difficulty. In other words, focusing on just the short run value to customers is not a long-term sustainable practice.

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[143] Bainbridge, supra note 28, at 1447 n.57 (arguing that, in many cases, it is true that "a rising tide lifts all boats").

[144] Cf. Hayden W. Smith, If Not Corporate Philanthropy, Then What?, 41 N.Y.L. Sch. L. Rev. 757, 763 (1997) ("There is a widespread belief that, while contributions may reduce current, short-term profits, there are valuable long-term benefits that accrue to corporations from charitable giving.").

[145] K. N. Llewellyn, On Our Case-Law of Contract: Offer and Acceptance, I, 48 Yale L.J. 1, 17 (1938).

> The second practical challenge of the stakeholder governance paradigm is the operationalization and measurement of commitment to customers, employees, suppliers, communities, and to long-term shareholder value. This measurement challenge raises two separate, though related, problems. The first is the problem for shareholders through the board of directors of a company in providing a clear directive to corporate managers, and then holding them accountable to it. Under the stakeholder paradigm, almost any management expenditure of corporate resources, short of outright fraud, can be justified as consistent with addressing the priorities of some stakeholder group. Hence, the lack of managerial accountability becomes a problem. Second, this measurement challenge causes confusion in the public policy debate among investors, policymakers, and scholars regarding the performance of a corporation in the stakeholder governance paradigm.[146]

Thinking about how the law should deal with the Bainbridge Hypothetical further brings into stark focus the central point that authority and accountability are in constant tension. If we allow a judge to review the merits of the board's decision in the Bainbridge Hypothetical, we are effectively transferring decision-making authority from the board to the judge. The power to review, after all, is the power to decide.[147] Accordingly, we come away from the thought experiment recognizing that the key issue is whether the board's decision is sufficiently tainted with conflicts of interest to justify holding them to account in this particular case.

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[146] Sanjai Bhagat and Robert Glenn Hubbard, Should the Modern Corporation Maximize Shareholder Value? 6 (March 3, 2020), https://ssrn.com/abstract=3548293:

[147] As I have argued elsewhere, corporate law has two competing but equally legitimate goals:

> [O]n the one hand, because the power to review differs only in degree and not in kind from the power to decide, the discretionary authority of the board of directors must be insulated from shareholder and judicial oversight in order to promote efficient corporate decision making; on the other hand, because directors are obligated to maximize shareholder wealth, there must be mechanisms to ensure director accountability.

Stephen M. Bainbridge, Unocal at 20: Director Primacy in Corporate Takeovers, 31 Del. J. Corp. L. 769 (2006).

Contra Professor Lipshaw, moreover, we come away with insights that matter in real world cases. His trolley problem critique rests on the implicit claim that relevant cases are "rare" and "idiosyncratic." But "[b]usiness life is not somehow miraculously limited to win-win decisions."[148] It may well be that confessional cases are rare, moreover, but *Revlon* cases are not. To the contrary, *Revlon* governs "the majority of friendly deals affecting a Delaware public company."[149] Accordingly, *Revlon* is "the basis of the Delaware law governing negotiated transactions."[150] Knowing what the law is thus matters a great deal in this circumstance.

## III. What's Really Going On?

In the real world, Professor Lipshaw argues, CEOs "manage the interests of a number of constituencies, all necessary to the creation of value in the firm, and some of which, from time to time, conflict."[151] As a result, he believes that "the Statement represented hardly any change in corporations' orientation toward their constituencies …."[152] In contrast, I suggest that there are several other things that are going on out there in the real world.

### A. What People Do Matters More than They Say

It is certainly true that the BRT statement is consistent with much recent rhetoric coming from the C-suites of America. Professor Lipshaw draws our attention to two sets of

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[148] Thomas W. Dunfee, Corporate Governance in A Market with Morality, 62 L. & Contemp. Probs. 129, 138 (Summer 1999).

[149] Matteo Gatti, Upsetting Deals and Reform Loop: Can Companies and M&A Law in Europe Adapt to the Market for Corporate Control?, 25 Colum. J. Eur. L. 1, 74 n.381(2019).

[150] Robert T. Miller, Smith v. Van Gorkom and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law, 9 Wm. & Mary Bus. L. Rev. 65, 73 (2017).

[151] Lipshaw, supra note 4, at 7.

[152] Id.

corporate statements. First, he examines CEO letters accompanying annual reports for the 2017 fiscal year.[153] He finds that "the letters confirm, well before the issuance of the Statement, a healthy respect (at least in rhetoric if not in reality) for the processes and stakeholder constituencies through which the corporations achieved shareholder value.[154] Second, he examines the CEOs' response to COVID-19 in first quarter 2020 earnings announcements.[155] He finds that "the consistent message was that employees and customers were either explicitly or implicitly the company's highest priority, companies were diverting resources to employees, customers, and communities by way of enhanced benefits, relaxation of contractual limitations, and significant charitable contributions of cash and resources."[156]

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[153] See id. at 7-10 (describing sample of letters he reviewed).

[154] Id. at 8.

[155] See id. at 10-11 (describing sample of responses he reviewed).

[156156] Id. at 10. I should acknowledge a development pertinent to my own prior work in this area. In 2003, I observed that:

> A 1995 National Association of Corporate Directors (NACD) report stated: "The primary objective of the corporation is to conduct business activities with a view to enhancing corporate profit and shareholder gain." A 1996 NACD report on director professionalism set out the same objective, without any qualifying language on nonshareholder constituencies. A 1999 Conference Board survey found that directors of U.S. corporations generally define their role as running the company for the benefit of its shareholders. The 2000 edition of Korn/Ferry International's director survey found that when making corporate decisions, directors most frequently ranked shareholder interests as their primary concern, although it also found that a substantial number of directors feel a responsibility towards stakeholders.

Bainbridge, supra note 103, at 576. In contrast, a 2019 NACD report on board leadership took note of increasing "pressure for companies to articulate and justify their broader purpose, in terms of how they address society's unmet needs in an era of great social change, activism, and political uncertainty." National Association of Corporate Directors, The Report of the NACD Blue Ribbon Commission Fit for the Future: An Urgent Imperative for Board Leadership 9 (2019). A 2020 NACD survey of public company governance reported that almost "80 percent of public-company boards now engage with ESG issues in some meaningful way." National Association of Corporate Directors, Public Company Governance Survey 5 (2019). A 2019 survey found that over three quarters of directors "do not believe that shareholder

In some cases, they probably even mean it. After all, there are now social justice warriors even in the C-suite. Leaders like Salesforce.com CEO Marc Benioff, for example, promote "social activism among American chief executives."[157] Outside of Silicon Valley, however, most CEOs remain at least nominally Republican.

In any case, what people do matters at least as much as what they say. Research by Aneesh Raghunandan and Shiva Rajgopal found that companies whose CEOs signed the BRT statement had a higher incidence of federal regulatory compliance violations than companies whose CEOs had not signed the statement.[158] Signatory firms also had more stock buybacks, which many social responsibility advocates claim are antisocial, and a weaker association between CEO pay and performance.[159] They draw the reasonable conclusion that "Business Roundtable signatories aren't leaders in socially conscious environmental, social or governance practices or stakeholder orientation."[160] In subsequent work, moreover, they found that there was no stock market reaction to the announcement of the Statement," which suggests that

interests are significantly more important than stakeholder interests." Diligent Institute, Stakeholders Take Center Stage: Director Views on Priorities and Society 4 (2019).

[157] Monica Langley, Salesforce's Marc Benioff Has Kicked Off New Era of Corporate Social Activism, Wall St.J., May 2, 2016, https://www.wsj.com/articles/salesforces-marc-benioff-has-kicked-off-new-era-of-corporate-social-activism-1462201172.

[158] Aneesh Raghunandan & Shiva Rajgopal, Is There Real Virtue Behind the Business Roundtable's Signaling?, Wall St. J., Dec. 2, 2019, https://www.wsj.com/articles/is-there-real-virtue-behind-the-business-roundtables-signaling-11575330172.

[159] Id.

[160] Id. Professors Raghunandan and Rajgopal provide more detailed evidence in a May 2020 paper. See Aneesh Raghunandan & Shivara Rajgopal, Do the Socially Responsible Walk the Talk? 37 (May 24, 2020), https://ssrn.com/abstract=3609056 ("We find that Business Roundtable signatories exhibit worse records with respect to labor and the environment than their peers. … Finally, we find no evidence that firms' fundamental records with respect to "E" and "S" predict their inclusion in key mutual funds that purport to be ESG-oriented.").

investors did "not perceive the Statement as a true commitment to improve ESG practices in the future."[161]

Lucian Bebchuk and Roberto Tallarita argue that:

> [The BRT's] statement is largely a rhetorical public relations move rather than the harbinger of meaningful change. In particular, we [focus on] (i) the statement's ambiguity regarding the critical question of whether it advocates providing stakeholders with any benefits beyond what would be useful for shareholder value, (ii) the statement's disregard of the ubiquity of trade-offs between stakeholder and shareholder interests, (iii) the failure to reflect the commitment to stakeholders in corporate governance guidelines, and (iv) the lack of concern for legal constraints that preclude many companies from approaching stakeholder interests as an independent end.[162]

Bebchuk and Tallarita's third point makes a particularly striking contrast to the statements on which Professor Lipshaw relies. It is one thing to say a few positive words about one's ESG commitments in a shareholder letter. It is quite another to embed such commitments in the corporation's corporate governance guidelines. Bebchuk and Tallarita looked at a sample of corporate governance statements taken from 20 companies whose CEO had signed the BRT statement.[163] Not one had changed its corporate governance statement to bring it into line with the BRT statement.[164] Tellingly, "explicit endorsements of shareholder primacy can be found in the corporate governance guidelines of the two companies whose CEOs played a key leadership role in the BRT's adoption of its statement."[165]

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[161] Id.

[162] Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance 4 (Dec. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978

[163] See id. at 25-27 (discussing sample).

[164] Id. at 25.

[165] Id. at 26.

Professor Lipshaw dismisses their findings because, “given my view that the Statement itself reflected very little change in what companies had been doing all along,” the lack of changes to corporate statements of their governance principles is not surprising.[166] Yet, if Professor Lipshaw is correct that there has been a change that is more than just rhetorical, should not those principles refer to stakeholder interests? The New York Stock Exchange (NYSE) requires all listed companies to “adopt and disclose corporate governance guidelines.”[167] Best practice recommendations urge that such guidelines “be revisited on a regular basis.”[168] If ESG commitments are as mission critical as the BRT statement implies, it is thus not unreasonable to expect them to be incorporated into the corporation’s guidelines.

As another example, consider the behavior of the “Big Three.” The mutual funds and exchange traded funds (ETFs) managed by BlackRock, State Street, and Vanguard collectively control about 25 percent of shareholder votes at S&P 500 companies.[169] Importantly, although each of the Big Three’s holdings are divided up among many different funds and ETFs, each normally votes all shares controlled by all of its funds the same way.[170] All of which has turned the Big Three into the proverbial 800-pound gorillas of the investment world.[171]

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[166] Lipshaw, supra note 4, at 8 n.22.

[167] NYSE, Listed Company Manual § 303A.09, https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-77.

[168] Alan S. Gutterman, Business Transactions Solutions § 344:41 (July 2020).

[169] Erin O’Donnell, Passive Corporate Governance, Harvard Magazine (Mar.-Apr. 2020), https://harvardmagazine.com/2020/03/right-now-index-funds.

[170] See Assaf Hamdani & Sharon Hannes, The Future of Shareholder Activism, 99 B.U. L. Rev. 971, 980 (2019) (“Although they hold the stock of a single company through many investment vehicles, these large fund complexes tend to vote all their funds uniformly>”).

[171] See Bernard S. Sharfman, How the SEC Can Help Mitigate the "Proactive" Agency Costs of Agency Capitalism, 8 Am. U. Bus. L. Rev. 1, 2 (2019) (“BlackRock, Vanguard, and State Street Global

Although BlackRock CEO Laurence D. Fink arguably has been the most vocal proponent of ESG commitments,[172] all of the Big Three have publicly and repeatedly emphasized their commitments in this area.[173] Arguably, however, none of them have lived up to their commitments. They devote relatively few personnel and resources to monitoring ESG issues at their portfolio companies.[174] Despite the fact that the Big Three collectively own enough shares

Advisors control an extraordinary amount of shareholder voting power at many of our largest public companies ….")

[172] In 2017, 2018, and 2019 In 2017, BlackRock's CEO published open letters he had sent to the CEO's BlackRock portfolio companies, stating that "BlackRock considered ESG factors relevant to a company's business and management effectiveness and that it would not hesitate to … vote … against incumbent directors if the companies were insufficiently responsive or did not demonstrate progress despite ongoing engagement." Becky L. Jacobs & Brad Finney, Defining Sustainable Business-Beyond Greenwashing, 37 Va. Envtl. L.J. 89, 131 n.218 (2019).

[173] See Alexander T. Kraik, Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm, 44 Vt. L. Rev. 493, 526 (2020) ("BlackRock, Vanguard, State Street, and other asset managers have elevated ESG and use it as an important benchmark for their investment decisions and governance priorities.").

[174] Lucian Bebchuk & Scott Hirst, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy, 119 Colum. L. Rev. 2029, 2077 (2019) (arguing that "although the Big Three stress the importance of stewardship, their stewardship budgets are economically insignificant relative to the fees that they charge").

to determine the outcome of the vote on pro-ESG proposals made by other shareholders,[175] they rarely vote in favor of such proposals.[176]

Professors Raghunandan and Rajgopal provide further evidence that ESG commitments are mainly window dressing by examining "the largest ESG ETF and mutual fund, respectively: BlackRock's iShares MSCI KLD 400 Social ETF, which tracks MSCI's KLD 400 social index, and Vanguard's FTSE Russell's FTSE4Good US Select index."[177] They found little evidence that ESG factors determine whether companies are added to the indices.[178]

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[175] Caleb Griffin reports that:

> An analysis of the Big Three's ownership and voting control over Fortune 250 companies reveals that they have the power to determine the outcome of as many as 49.1 percent of environmental proposals, that Vanguard and BlackRock combined (the "Big Two") have sufficient voting control to determine the outcome of up to 35.1 percent of such proposals, and that Vanguard alone has sufficient voting control to determine the outcome of up to 15.8 percent of such proposals.] Numbers are similar for social proposals, with the Big Three together in a position to determine the outcome of as many as 49.0 percent of such proposals, the Big Two combined able to determine 34.2 percent of such proposals, and Vanguard alone determining the fate of up to 12.3 percent of such proposals.

Caleb N. Griffin, Environmental and Social Voting at the Big Three, The CLS Blue Sky Blog (June 16, 2020), https://clsbluesky.law.columbia.edu/2020/06/16/environmental-and-social-voting-at-the-big-three/.

[176] Griffin reports that:

> In the 2018-2019 proxy season, the largest of the Big Three — Vanguard and BlackRock — supported unique shareholder E&S proposals at rates of 7.5 percent and 7.1 percent, respectively. State Street explicitly markets itself as supporting progressive environmental and social issues and supported E&S proposals at the somewhat higher rate of 22.7 percent.

Id. Some might question how much support is evidenced by voting for barely 1 in 5 such proposals.

[177] Raghunandan & Rajgopal, supra note 160, at 37.

[178] See id. at 3 (stating that "while we find some cross-sectional evidence of a link between index membership and firms' 'fundamental' ESG records, which we measure as the underlying firms' federal enforcement records related to environmental and labor laws, there is hardly any correlation between index additions or deletions and 'fundamental' ESG data").

In sum, it seems probable that there is a marked difference between what the CEOs said in the BRT statement and what they are really doing. This is not surprising. As we shall see below, CEOs have incentives to puff[179] their ESG commitments, but when push comes to shove their core incentives to favor shareholder interests are likely to prevail.

CEOs are appointed by the board of directors.[180] Boards of directors are elected by the shareholders.[181] Until recent decades, of course, none of that mattered very much. Boards of directors passively rubberstamped the wishes of imperial CEOs.[182] As a result, the predecessors of the CEOs who signed the BRT statement had broad discretion to make decisions that put the interests of stakeholders ahead of those of shareholders.[183]

That world no longer exists. In response to new obligations imposed by state and federal laws, boards of directors have become more independent and less willing to acquiesce in a

[179] "Puffery is often described as 'involving outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers.'" Summit Technology, Inc. v. High–Line Medical Instruments, Co., 933 F.Supp. 918, 931 (C.D.Cal.1996).

[180] E. Norman Veasey, Corporate Governance and Ethics in A Post Enron/WorldCom Environment, 72 U. Cin. L. Rev. 731, 734 (2003) ("The board is boss. The CEO works for the board.").

[181] Del. Code Ann., tit. 8, § 211(a) ("Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws.").

[182] See In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 741 n.373 (Del. Ch. 2005), aff'd, 906 A.2d 27 (Del. 2006) (summarizing expert testimony by Professor DeMott about "how ornamental, passive directors contribute to sycophantic tendencies among directors and how imperial CEOs can exploit this condition for their own benefit"); Darian M. Ibrahim, Individual or Collective Liability for Corporate Directors?, 93 Iowa L. Rev. 929, 955–56 (2008) (explaining that, "according to conventional wisdom, at least, … inside directors are likely to enjoy board capture,' meaning that outside directors are likely to 'rubberstamp' any recommendations the insiders make").

[183] Cf. Faith Stevelman Kahn, Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy, 44 UCLA L. Rev. 579, 618 (1997) (noting senior executives' "power over corporate charitable contributions").

CEO's wishes.[184] At the same time, share ownership has shifted from individual retail investors to institutions.[185] Some of those institutions—especially activist hedge funds—have made corporate governance activism a central part of their business model.[186] Such investors are constantly on the lookout for managers who are failing to maximize shareholder value and are willing to pressure their boards for change.[187] Put bluntly, "hedge fund activists … want ordinary, solvent companies to maximize profits for their shareholder owners, as opposed to benefiting communities, workers, or other so-called stakeholders."[188] Boards that put stakeholder interests ahead of (or even on a par with) shareholder interests thus are likely to face proxy contests and other firms of activism from activist hedge funds and their allies.[189]

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[184] See Peter B. Heller, Involvement Overboard: An Evaluation of How and Why Corporate Boards Have Become Increasingly Active and the Problems the Activity Presents, 41 Colum. J.L. & Soc. Probs. 53, 66 (2007) ("Frequently, boards are taking a more active role in questioning management's proposals."); Patricia G. Butler, Board Committees and Avoiding Director Liability under Sarbanes-Oxley, 51 Prac. Law. 27 (December 2005) ("With the increased responsibility arising from the Sarbanes-Oxley Act, corporate directors have to take an active role in compliance and supervision.").

[185] Rachelle Sampson & Yuan Shi, Are Investor Time Horizons Shortening?, 41 Seattle U.L. Rev. 543, 544 (2018) ("Since 1950, a massive shift has taken place where many institutional owners have replaced direct, retail holdings of shares; in 1950, ninety-two percent of shares were held by individual investors, and by 2006, that number had declined to thirty-two percent. Institutional ownership climbed from eight percent to sixty-eight percent over the same time period.").

[186] See Hamdani & Hannes, supra note 170, at 973 (noting "the rise of activist hedge funds, which use proxy fights and other tools to pressure public companies into making business and governance changes").

[187] See Bebchuk & Tallarita, supra note 162, at 33 (noting that "low shareholder value increases the chances of intervention by a hedge fund activist"); James D. Cox & Randall S. Thomas, Corporate Darwinism: Disciplining Managers in A World with Weak Shareholder Litigation, 95 N.C. L. Rev. 19, 62 (2016) ("Hedge funds are constantly on the lookout for undervalued target firms.").

[188] Thomas W. Briggs, Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis, 32 J. Corp. L. 681, 713 (2007).

[189] See Bebchuk & Tallarita, supra note 162, at 40 ("Shareholder discontent with performance may put pressure on the board to replace the CEO or may lead to hedge fund intervention or even a proxy fight."); Fairfax, supra note 142, at 105 (observing that "hedge funds are not the kinds of shareholders who are likely to advance stakeholder issues"); see generally Mihaela Butu, Shareholder Activism by Hedge Funds: Motivations and Market's Perceptions of Hedge Fund Interventions (2013) 27

Managers and directors who too often shortchange shareholder value in the name of social responsibility may well find themselves on the losing end of such contests.[190] As long as that remains the case, the incentives of those who populate the C-suite and the boardroom will remain skewed in favor of the shareholders.[191]

**B. So Why Do Directors Say What They Say**

There are two possible explanations for why the BRT's members might have embraced ESG issues so publicly. First, as has been the case with corporate social responsibility in the past,[192] they may believe that doing so would redound to the long-term benefit of the shareholders. Second, they may be acting out of their own self-interest.

**1. Puffing for the Good of the Shareholders**

The BRT leaders may be seeking to reposition their companies to take advantage of perceived shifts in consumer and labor demand. In particular, millennials apparently prefer to work for and purchase from companies that are perceived as socially and environmentally responsible.[193] Accordingly, there is an increasingly widely held view in the business community

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(exploring techniques activist hedge funds use in attempts to increase shareholder value, including proxy contests).

[190] See Bebchuk & Tallarita, supra note 162, at 40 ("CEOs who care about their job and job market prospects have strong incentives not to protect stakeholders beyond what would be useful for shareholder value maximization.").

[191] See Deloitte LLP, CFO Signals: What North America's Top Finance Executives are Thinking – and Doing 21-24 (2015) (finding that of the companies surveyed "about half have made at least one major business decision specifically in response to shareholder activism" and that "share repurchases are most common").

[192] See supra notes 142-145 and accompanying text (discussing arguments that corporate social responsibility promotes long-term gains for shareholders).

[193] Jessica Love, Is Maximizing Shareholder Value a Thing of the Past?, KelloggInsight (Sep. 19, 2019), https://insight.kellogg.northwestern.edu/article/shareholder-value-purpose-corporation ("Young

that to attract Millennial and Generation Z workers and customers, companies must project an image as social justice activists.[194] Nike's embrace of Colin Kaepernick is but the most obvious example of this phenomenon,[195] but even such heartland companies as Walmart are embracing socially progressive stances, despite the risk of alienating their Red State customer base.[196]

The BRT's members also may be trying to head off regulation by progressive politicians. As Wall Street Journal columnist David Benoit observed, "Democratic presidential candidate Elizabeth Warren has argued that the primacy of shareholder returns has worsened economic inequality, enriching wealthy investors at the expense of workers."[197] With the mainstream of the Democratic Party seemingly moving in Warren's direction on business and finance issues, the BRT's members may have hoped that a voluntary—and perhaps intentionally ambiguous—embrace of corporate social responsibility platitudes would help them fend off more intrusive regulation in the event of a Democratic presidential victory in 2020.[198]

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people, who are becoming these firms' new employees and customers, are paying attention to the environment and how companies are sourcing certain materials.").

[194] See Richard Levick, The New "Rules" Of Corporate Social Activism, Forbes (Dec. 18, 2019), https://www.forbes.com/sites/richardlevick/2019/12/18/the-new-rules-of-corporate-social-activism/#4265316651a9 ("Eight in ten consumers say they want their brands to have a social purpose; most millennials expect it as a point-of-entry before they even consider a brand.").

[195] See Jonathan Berr, Nike Stock Price Reaches All-Time High After Colin Kaepernick Ad, CBS News (September 14, 2018), https://www.cbsnews.com/news/nike-stock-price-reaches-all-time-high-despite-colin-kaepernick-ad-boycott/ (concluding that the Kaepernick campaign "is resonating with the company's core customer base").

[196] See Levick, supra note 194(arguing that "Walmart 'productized' its good citizenship").

[197] David Benoit, Move Over, Shareholders: Top CEOs Say Companies Have Obligations to Society, Wall St. J. (Aug. 19, 2019), https://www.wsj.com/articles/business-roundtable-steps-back-from-milton-friedman-theory-11566205200.

[198] Love, supra note 193 ("Some of the CEOs' posturing here is to say, "You don't have to change many of the laws. We are responsible people. We will do it ourselves.").

**2. Feathering Their Own Nests**

As between stakeholders and shareholders, director and manager incentives skew towards the latter.[199] As between themselves and the shareholders, of course, agency cost economics tells us that directors and managers have strong incentives to favor themselves.[200] It is thus striking that the BRT is an organization of CEOs, not of directors.[201]

Until quite recently, aside from a brief period in the 1980s, when the hostile takeover was viable, post-World War II CEOs often were virtual emperors.[202] Over the last decade or two, however, the number of imperial CEOs has dwindled dramatically.[203] Boards of directors have become both more engaged and more powerful.[204] Shareholder activists have grown in number and power.[205] Unlike the gadflies of old, the new activists—mainly hedge funds—have been all about shareholder return.[206] In doing so they have substantially constrained the power of CEOs.

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[199] See supra notes 184-190 and accompanying text (examining director and manager incentives).

[200] See supra note 13 (explaining agency cost concept).

[201] To be sure, many board members are CEOS of other companies. In 2018, for example, 13.7% of S&P 500 directors were active CEOs of other corporations. Just under twenty-three percent were former CEOs of other corporations. The Conference Board, Corporate Board Practices in the Russell 3000 and S&P 500 (2019). Given those numbers, however, it would be wrong to suggest that the Business Roundtable speaks for directors generally.

[202] See Myles L. Mace, Directors: Myth and Reality 78-79 (1971) (describing the supine boards and powerful CEOs of the 1960s).

[203] See Marcel Kahan & Edward Rock, Embattled CEOs, 88 Tex. L. Rev. 987, 989 (2010) ("The CEOs of publicly held corporations in the United States are losing power.").

[204] See supra note 184 and accompanying text (noting increased board activism).

[205] See id. at 995-1007 (discussing rise of activist investors).

[206] See supra text accompanying notes 187-188 (describing hedge fund motivations).

> Hedge funds have created headaches for CEOs and corporate boards by pushing for changes in management and changes in business strategy, including opposing acquisitions favored by management both as shareholders of the acquirer and as shareholders of the target, and by making unsolicited bids.
>
> This new activism by hedge funds has become a prime irritant for CEOs. Martin Lipton, the renowned advisor to corporate boards, recently listed "attacks by activist hedge funds" as a key issue for directors. Alan Murray from the Wall Street Journal calls hedge funds the "new leader" on the "list of bogeymen haunting the corporate boardroom," and his colleague Jesse Eisinger notes that these days hedge funds are the "shareholder activists with the most clout."[207]

It seems reasonable to suspect that at least some BRT leaders look back fondly on the days of imperial CEOs and see embracing ESG issues as a way of restoring that sort of unfettered power.[208]

By embracing stakeholderism, the BRT leaders may hope to restore a measure of freedom. Consider how the Bainbridge Hypothetical is likely to play out in a world in which shareholder wealth maximization is not the norm. We can expect the decision to come out whichever way the board and management's self-interest cuts. If the board's and managers' self-interest is consistent with keeping the plant open, they will decide to keep it open and justify their decision by pointing to the impact of a closing on stakeholders such as the plant's workers and the local community.[209] In contrast, if directors' and managers' interests would be

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[207] Kahan & Rock, supra note 203, at 998-1000.

[208] See Bainbridge, supra note 4, at 9 ("Some BRT leaders probably would be quite content to see that kind of freedom restored to the C-suite."); Bebchuk & Tallarita, supra note 162, at 54 ("For them, support for stakeholderism may well be strategic: an attempt to advance a managerialist agenda dressed up in stakeholder clothing to make it more appealing to the general public.").

[209] See Bainbridge, supra note 28, at 1438 ("If management's compensation is tied to firm size, we can expect it to resist down-sizing the firm. The plant likely will stay open, with the decision being justified by reference to the impact of a closing on the plant's workers and the local community.").

best served by closing the plant, they likely will decide to close it and point to concern for the firm's shareholders, creditors, and other benefited constituencies.[210]

## IV. Conclusion

The Business Roundtable's restatement of corporate purpose likely will prove much ado about little. It allowed a handful of social justice warrior CEOs to signal their virtue, but likely will prove to be window dressing for most. Neither the law nor the incentive structure for CEOs has changed. When faced with (admittedly rare) zero-sum decisions, CEOS remain legally obliged—and can be expected to—prefer shareholder interests.

[210] See id. ("In contrast, if management's compensation is linked to firm profitability, the plant will likely close, with the decision being justified by management's concern for the firm's shareholders, creditors, and other benefitted constituencies."); see generally Bebchuk & Tallarita, supra note 162, at 54 (noting that "stakeholderism would make corporate leaders freer in their decision making").