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BROAD SHAREHOLDER VALUE AND THE  
INEVITABLE ROLE OF CONSCIENCE

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*This article proposes an integrative solution to the modern debate on corporate purpose, the question of whether directors and officers must solely maximize profits or whether they may consider the effects on employees, the environment or the community. Many find pure profit maximization unseemly and suggest alternative theories, typically arguing that corporations owe a duty to a broader range of stakeholders. This position is inconsistent with the case law and unnecessary to allow conscience in the boardroom. We resolve the issue more simply by acknowledging that the purpose of a corporation is to promote the shareholders' interests, which includes the shareholders' financial and nonfinancial interests. These nonfinancial interests could potentially encompass product safety, the treatment of employees or environmental concerns, among others. We refer to this focus as broad shareholder value. In this article we show that a broader view of shareholder value is superior to competing models in theory, in case law, and in explaining the empirical evidence.*

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First, our theories of what a corporation is (corporate identity) imply that the proper corporate purpose is promotion of broad shareholder value, not mere profit maximization or duties to other stakeholders. In this we show that considerations of conscience are not only permissible, they are inevitable. For each investor, there is some body count that would be unacceptable for a set level of profits. We argue that if the value of life can ever outweigh the desire for profits, then the value of life must already be on the scale. The same holds equally for other social concerns. That is, if directors are ever required to say that some situation is too extreme to prioritize profits, then the directors must always ask, "Is this that situation?" Conscience is inevitable, and this article advances corporate law by recognizing and explicitly incorporating this insight.

Second, we show that the case law does not require pure profit maximization, as has been claimed, but instead allows consideration of other shareholder interests. For support, we provide a new understanding of the case law using principles of game theory and applying evidentiary burdens.

Third, we build on the work of prior scholars to show that a theory of broad shareholder value best explains the empirical evidence of what directors and officers actually do and what shareholders actually want. In short, real world evidence shows that pure wealth maximization theories lack both explanatory power and a normative mandate in the real world.

A broad shareholder value norm provides a stronger explanation and mandate than pure wealth maximization, without contradicting case law requirements that boards consider only the interests of shareholders, rather than other stakeholders.

INTRODUCTION .....	37
I. THE GREAT DEBATE .....	39
A. Shareholder Wealth Maximization .....	39
B. Alternatives to Shareholder Wealth Maximization .....	42
C. The Broad Shareholder Value Norm .....	43
II. THE BROAD SHAREHOLDER VALUE NORM BETTER CONFORMS TO OUR THEORIES OF CORPORATE IDENTITY .....	44
A. Defining Shareholder Wealth Maximization .....	44
B. The Nexus of Contracts Framework: The Hypothetical Bargain Methodology.....	46
1. Identifying the Bargainers .....	47
2. Shareholder Interests .....	49
3. Director Interests.....	56
4. Other Stakeholder Interests .....	58
5. Summary of the Hypothetical Bargain Analysis .....	60
C. The Principal-Agent Model .....	61

D.	<i>A Few Counterarguments</i> .....	62
1.	<i>The Role of Law</i> .....	62
2.	<i>Survival of the Firm</i> .....	64
3.	<i>The Two Masters Problem</i> .....	65
III.	THE BROAD SHAREHOLDER VALUE NORM BETTER CONFORMS WITH THE LAW .....	67
A.	<i>The Business Judgment Rule</i> .....	67
B.	Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. ....	68
1.	<i>Facts</i> .....	69
2.	<i>Analysis</i> .....	70
3.	<i>Revlon as an Evidentiary Rule: The Unjust Steward</i> .....	73
4.	<i>Revlon Summary</i> .....	74
C.	eBay Domestic Holdings, Inc. v. Newmark ..	74
IV.	THE BROAD SHAREHOLDER VALUE NORM CONFORMS WITH EMPIRICAL EVIDENCE .....	81
A.	<i>Shareholders Consider Conscience When Weighing Financial Decisions</i> .....	81
B.	<i>Directors and Officers Consider Conscience When Weighing Financial Decisions</i> .....	87
V.	THE BUSINESS JUDGMENT RULE REVISITED .....	95
	CONCLUSION .....	96

#### INTRODUCTION

To outsiders it may seem remarkable that corporate scholars and judges are so deeply divided about the most foundational question in corporate law: What is the purpose of a corporation? There is considerable debate as to whether directors can serve social or moral interests when making decisions or if they must only consider profits. In this article, we show that corporations are most efficient when directors are allowed to consider the social and moral norms of their shareholders. We refer to this as the broad shareholder value norm.

For support, we provide new thinking on the theoretical underpinnings of corporate entities, creating new ties to our theories of what a corporation is. We show that our theories of corporate identity offer stronger support for the broad shareholder value norm than they do for pure shareholder wealth maximization or other competing theories.

Next, we address the case law. While many have argued that the cases do not require maximizing shareholder wealth, doing so often relies on weak interpretations. These weak interpretations arise out of an attempt to prove too much. Scholars opposing shareholder wealth maximization typically argue that directors or managers have an affirmative duty to other stakeholders—such as employees, suppliers or local communities—or that managers and directors have unbounded discretion to follow their own conscience. This contradicts the case law, which typically requires that only *shareholders'* interests be considered. The broad shareholder value norm affirms the incorporation of moral and social norms, without requiring the proliferation of duties owed to others that claim a stake in the firm.

Finally, we build upon the prior empirical work in the field to show how disconnected the shareholder wealth maximization norm is from reality. The measure of any good theory is its ability to predict real world outcomes. On that measure, we continue the work of other scholars to show that the shareholder wealth maximization norm fails to account for the actions of directors and managers and the preferences of shareholders.

This article proceeds in five parts. Part I reviews the major theories of corporate purpose and outlines their various weaknesses. Part II analyzes the theoretical underpinning of our theory of corporate identity, showing that the broad shareholder value norm is more efficient and fits better into our understanding of corporate identity than the shareholder wealth maximization norm or stakeholder theories. Part III surveys the recent case law, focusing on two major cases that have troubled scholars who oppose shareholder wealth maximization theories. The broad shareholder value norm allows room for moral values in corporate actions, but fits naturally into Delaware law. Part IV builds upon prior empirical work to show that the broad shareholder value norm better predicts real world actions than the shareholder wealth maximization norm by examining evidence of shareholder and director preferences and actions. Part V offers concluding thoughts and suggestions for further research.

## I. THE GREAT DEBATE

One of the most fundamental questions in corporate law is whether directors or managers can consider the interests of non-shareholder constituencies. The chief justice of the Supreme Court of Delaware, Leo Strine, has called this the Great Debate.<sup>1</sup> Another Delaware chancellor, William Allen, characterized it less charitably, calling our dueling understanding of corporate purpose “schizophrenic.”<sup>2</sup> The debate has raged through the corporate literature for more than eighty years,<sup>3</sup> engulfing judges, scholars, practitioners, economists, politicians, directors and the electorate.<sup>4</sup> Equally remarkable is how convinced each side is that the debate is all but won.

### A. Shareholder Wealth Maximization

The dominant theory is shareholder wealth maximization, which is part of a larger theory known as shareholder primacy.<sup>5</sup> Shareholder primacy theory holds that corporations are to be controlled by and on behalf of the shareholders. Under early versions of this theory, shareholders were seen as the owners of the corporation, with the managers or directors serving as their trustees.<sup>6</sup> As trustees, the managers or direc-

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1. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1067 (2002).

2. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

3. Compare A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1074 (1931), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1152 (1932).

4. See, e.g., Stephen M. Bainbridge, *Al Franken, Shareholder Wealth Maximization, and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM, <http://www.professorbainbridge.com/professorbainbridge.com/2010/07/shareholder-wealth-maximization-and-the-business-judgment-rule.html>.

5. A distinct theory, director primacy, also finds shareholder wealth maximization to be the proper goal of the firm, but differs as to whether shareholders or directors ultimately control the corporation. See generally Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003). This article focuses on the purpose of the corporation rather than control, so these theories are functionally equivalent.

6. See Berle, *supra* note 3, at 1074.

tors were required to care for the interests of shareholders, interests, which over time have been reduced to profit maximization.

Later work rejected the idea that shareholders own the firm, describing the corporation not as a thing to be owned, but as a nexus of contracts.<sup>7</sup> Each interaction with the corporation was governed by contract, with corporate law providing default rules that the parties were free to customize. Under that understanding, shareholder wealth maximization was seen as the proper corporate purpose because it reduces agency costs.<sup>8</sup> The idea is that “directors that are responsible for everyone are accountable to no one” and without clear accountability, “directors will be tempted to pursue their own self-interest.”<sup>9</sup> With a clear corporate purpose—maximizing wealth to shareholders—directors will feel less leeway to line their own pockets in the name of social benefit. Going further, the efficient market hypothesis suggests that all information about a publicly traded firm is reflected in the stock price, which leads to stronger versions of shareholder primacy theory, which argue that the directors’ only purpose is to increase the stock price.<sup>10</sup>

The theoretical soundness of the shareholder wealth maximization norm helped it find its way into case law, which many argue mandates a singular focus on shareholder value.<sup>11</sup> For example, a recent opinion from the Delaware Court of Chancery issued an injunction on a plan implemented by a

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7. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (“The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.”).

8. *See id.*

9. Stephen M. Bainbridge, *Much Ado About Little? Directors’ Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 355 (2007).

10. Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 8 (2001) (“I argue that since it is logically impossible to maximize in more than one dimension, purposeful behavior requires a single valued objective function.”).

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

corporation's directors because it "openly eschews stockholder wealth maximization."<sup>12</sup>

A majority of scholars accept this theory. Chief Justice Strine wrote in his personal capacity 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."<sup>13</sup>

Many scholars even contend that there is no rational alternative. Henry Hansmann and Reinier Kraakman declared that we are converging on the "End of History of Corporate Law" because "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."<sup>14</sup> Professor Stephen Bainbridge echoes this sentiment, declaring "the shareholder wealth maximization norm . . . indisputably is the law in the United States."<sup>15</sup> David Yosifon, after a thorough review of the cases, also agreed that shareholder wealth maximization is "undoubtedly the law of Delaware."<sup>16</sup> A large body of scholars and jurists believe shareholder wealth maximization is required by law and that this is as it should be.

However, the theory has several problems. First, it lacks empirical support. There is strong evidence that directors and managers consider many things other than shareholder wealth maximization. This suggests that as a descriptive theory, the shareholder wealth maximization norm is aspirational at best and irrelevant at worst. Consequently, as a prescriptive theory, it is misguided and even destructive to comprehensive shareholder value.<sup>17</sup> In addition, there is strong evidence that shareholders sacrifice their financial interests to promote their non-financial interests.<sup>18</sup> If shareholders do not want pure profit maximization, the shareholder wealth maximization norm loses much of its theoretical support. The theory supporting

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12. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 25, 35 (2010).

13. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).

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

15. STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 53 (2008).

16. David Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 226 (2013).

17. Sumantra Ghoshal, *Bad Management Theories Are Destroying Good Management Practices*, 4 ACAD. MGMT. LEARNING & EDUC. 75 (2005).

18. See *infra* Part IV.

the norm is largely based on protecting shareholders' interests. If shareholders care about more than just profits, the theoretical support for pure profit maximization weakens.<sup>19</sup>

Moreover, many find the concept of pure shareholder wealth maximization unsavory. The norm explicitly ignores any social or moral consequences as long as the action is more profitable. As David Millon wrote, "corporate law has always understood—though usually only dimly—that truly relentless pursuit of shareholder wealth maximization is inconsistent with actual business practice and socially unacceptable in any event."<sup>20</sup>

Although the shareholder wealth maximization norm is still the dominant theory of corporate purpose, these weaknesses have led a small but growing number of scholars to suggest alternatives.

#### B. *Alternatives to Shareholder Wealth Maximization*

Scholars opposing shareholder wealth maximization offer several alternative theories, which vary widely. These theories are often lumped together as "stakeholder theories," because they consider the interests of stakeholders other than shareholders. On one end of the spectrum, Einer Elhauge modestly suggests that directors be given broader discretion to do what they think is right.<sup>21</sup> On the other end of the spectrum, Margaret Blair and Lynn Stout propose that directors are "mediating hierarchs" among the corporation's various constituents, with an affirmative duty to "balance . . . competing interests" among shareholders, employees, or other constituents.<sup>22</sup> These theories align better with the empirical data on director action and shareholder preference, and they overcome the socially distasteful idea of corporate actors ignoring moral and social norms.

Like their opponents, these scholars also argue the debate is nearly won. "Put simply, shareholder value ideology is based

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19. See *infra* Part II.

20. David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1374 (1993).

21. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 733 (2005).

22. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280–81 (1999).

on wishful thinking, not reality. As a theory of corporate purpose, it is poised for intellectual collapse.”<sup>23</sup>

However, these theories are difficult to reconcile with Delaware law. Delaware law requires a unitary focus on shareholder value,<sup>24</sup> and diverting resources for the benefit of other stakeholders violates this requirement.

### C. *The Broad Shareholder Value Norm*

This article argues that the broad shareholder value norm may bridge this intellectual divide and overcome the problems faced by both schools of thought.<sup>25</sup> We argue that shareholder wealth maximization is based upon a faulty premise: that shareholders value only profits. If we remove this faulty premise and accept that shareholders value some things in addition to, and sometimes above, profits, three things happen. First, the shareholder primacy theory fits more squarely into our theories of corporate identity. Second, the shareholder primacy theory begins to align with the empirical evidence of how managers behave. And third, we alleviate the social and

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23. LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 8 (2012).

24. *See infra* Part III.

25. This is not the first article to discuss the broad shareholder value norm, though the idea is typically thrown in as a caveat to the central argument and rarely provided with a full analysis under theory, case law and empirical evidence. *See, e.g.*, Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 33 (“That responsibility is to conduct the business in accordance with [shareholder] desires, which generally will be to make as much money as possible. . . .”); Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1433 (2006) (“Managers can promote shareholders’ interests without maximizing profits to the extent the shareholders have some objective other than profit maximization.”); STOUT, *supra* note 23, at 95 (presenting the idea but focusing largely on shareholders’ financial interests, rather than moral or social norms, and broadly promoting director discretion); Elhauge, *supra* note 21, at 806 (discussing the norm in light of a proposal to increase director discretion to do what directors think is right). We owe a great deal to each of these authors for their efforts and insights. This article’s unique contribution is showing that the broad shareholder value norm can fully bridge the intellectual divide between the two positions by resolving the weaknesses in the competing theories. It provides unique theoretical support, unique interpretations of recent case law, and builds on the empirical foundation showing that shareholders value more than just profits.

moral problems of considering only profits and the inefficiency created by limiting directors' actionable information.

The broad shareholder value norm also improves upon prior stakeholder theories. Because it allows consideration of only the shareholders' interests—whether financial, moral or social—it aligns more closely with the case law, especially in cases of a pending takeover.

In short, the problems raised by the prior theories are resolved.

TABLE 1

	Shareholder Wealth Maximization	Stakeholder Theories	Broad Shareholder Value
Theoretical Support:	Moderate	Varying	Strong
Empirical Support:	Moderate–Weak	Strong	Strong
Case Law Support:			
No pending takeovers	Strong	Moderate	Strong
Pending takeover	Strong	Weak	Strong

## II.

### THE BROAD SHAREHOLDER VALUE NORM BETTER CONFORMS TO OUR THEORIES OF CORPORATE IDENTITY

This part discusses the theoretical underpinnings of the broad shareholder value norm. We begin with a description of the currently dominant theory, shareholder wealth maximization. We then analyze this theory of corporate purpose (wealth maximization) under the dominant theories of corporate identity (nexus of contracts, agency).

#### A. *Defining Shareholder Wealth Maximization*

There are three concepts to keep in mind when analyzing shareholder wealth maximization. First, shareholder wealth *maximization* is not mere shareholder wealth *improvement*. It is common to hear that a social initiative is shareholder wealth maximizing because it is profitable. For example, suppose providing free childcare to employees costs \$100 in direct costs but allows the firm to save \$110 by reducing attrition. This action is wealth increasing, but it may not be wealth maximizing. To determine if a project is wealth maximizing, we must consider every other way we might have used that \$100. If any of

those possibilities would increase profits by \$111, then providing childcare is not wealth maximizing.<sup>26</sup> A course of action maximizes shareholder wealth if and only if no other course of action would have produced more shareholder wealth. If any other action would have brought in one additional penny, the action did not maximize shareholder wealth.

Second, shareholder *wealth* maximization is distinct from shareholder *value* maximization.<sup>27</sup> Shareholders may value things other than wealth, which necessarily implies a balance of interests. When making a decision, the costs and benefits are calculated for various effects, e.g., how will it affect profits, employee happiness or air quality. Under shareholder *value* maximization, these outputs are weighed and a course of action is selected that best improves the shareholders' total well-being. Under shareholder *wealth* maximization, all outputs except profits are ignored, and the course of action that maximizes profits is selected. In other words, maximizing for shareholder interests will reach the same result as shareholder wealth maximization if and only if the shareholders place zero value on every consequence but wealth.

Third, while the shareholder wealth maximization norm prohibits consideration of anything but profits, in practice it is too flexible to offer real guidance.<sup>28</sup> Ex ante, and with imperfect information, the shareholder wealth maximization norm is broad enough to cover any possible course of action. A director or officer with even the slightest amount of cleverness can invent some reason why their preferred action is profit maximizing. This is why academic articles supporting profit maximization theories typically begin their hypotheticals by *assuming* what is or is not profit maximizing.

Examples of this flexibility are plentiful. A donation to a university might increase goodwill, which will create a

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26. This hypothetical simplifies by assuming the profit created by the child care is less than the firm's cost of capital. Otherwise, the firm would raise capital and take both actions.

27. For a fuller description of these differences, see Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power* (Univ. Cal. L.A. Sch. of Law Law & Econ. Research Paper Series, Paper No. 05-16, 2005), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=783044](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=783044).

28. It might be argued that the broad shareholder value norm does not provide guidance either, so neither is to be preferred. This contention is addressed *infra* Part II.B.2.

favorable business environment, which will generate sales, which will increase profits.<sup>29</sup> Establishing an art museum next door may build goodwill, which will improve the company's financial condition, which will increase profits.<sup>30</sup> Granting scholarships could increase the education base, making skilled labor slightly cheaper, reducing total employment costs, which will increase profits.<sup>31</sup> Perhaps these claims are correct; perhaps they are not. But the Rube-Goldberg-like explanations frequently supporting them show that in practice shareholder wealth maximization is a very flexible norm. Because justifications are so easily devised, managers face almost no serious constraints from the shareholder wealth maximization norm.<sup>32</sup>

B. *The Nexus of Contracts Framework: The Hypothetical Bargain Methodology*

Most scholars understand the corporation not as a thing to be owned, but as a nexus of contracts.<sup>33</sup> To determine what the proper purpose of a corporation is under the nexus of contracts model, we will employ the hypothetical bargain methodology. This methodology was developed by Professor Bainbridge in his groundbreaking work on the director primacy model.<sup>34</sup> The justification for the method is as follows.

The nexus of contracts model of the corporation holds that a corporation is not a separate person or a thing to be

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29. See *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 147 (1953). The opinion even suggests that the donation would help preserve capitalism itself. *Id.* at 148 ("Capitalism and free enterprise owe their survival in no small degree to the existence of our private, independent universities and that if American business does not aid in their maintenance it is not properly protecting the long-range interest of its stockholders."); *id.* at 154 ("[S]uch expenditures may . . . be justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system.").

30. See *Kahn v. Sullivan*, 594 A.2d 48, 53 (Del. 1991).

31. See generally *Union Pac. R.R. & Co. v. Trustees, Inc.* 329 P.2d 398, 401-02 (Utah 1958).

32. The notable exception here is in takeover cases. See *infra* Part III.

33. Jensen & Meckling, *supra* note 7, at 311 ("The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.").

34. Bainbridge, *supra* note 5, at 577-79.

owned, but is instead a collection of contracts between shareholders, directors, suppliers, employees, customers and others.<sup>35</sup> Each of these constituents has a bundle of rights and obligations that form their contract with the other constituents.

Negotiating for each of these contracts would be costly, so corporate law serves as a body of default rules that can be adopted off-the-shelf. By adopting the corporate form these groups quickly establish rights and responsibilities to the other constituents.<sup>36</sup> Often, corporate law allows the parties to negotiate out of these default rules, but doing so creates bargaining costs. Therefore, the focus of corporate law is to provide rules that would be most commonly selected by corporations. This approach minimizes bargaining costs by allowing the maximum number of corporations to adopt the default rule.

One of the rules that must be selected is the purpose of the corporation.<sup>37</sup> The default should be the purpose that would be decided by a plurality of corporations. One methodology to determine what corporations would select as their purpose is to consider a hypothetical, costless bargain between the stakeholders to see how a negotiation may turn out. This is the hypothetical bargain methodology.

### 1. *Identifying the Bargainers*

The first step in the hypothetical bargain methodology is to identify who is invited to the bargain. Under the dominant theory, “the corporation [is] a vehicle by which the board of

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35. Jensen & Meckling, *supra* note 7, at 310.

36. See Bainbridge, *supra* note 5, at 578 (“If corporate law consists mainly of default rules, corporate statutes and decisions can be viewed as creating standard form contract provisions that are voluntarily adopted, perhaps with modifications, by a corporation’s various constituencies.”).

37. The phrase “corporate purpose” and its variants are a misnomer under the contractarian model. Because the model holds that the corporation is a nexus of contracts, it cannot have wishes, desires or purpose—it is merely a nexus of obligations, duties and rights. The purpose of each contract will be different for each party. See Jensen & Meckling, *supra* note 7, at 311 (“We seldom fall into the trap of characterizing the wheat or stock market as an individual, but we often make this error by thinking about organizations as if they were persons with motivations and intentions.”). However, the term ‘corporate purpose’ is typically used under the contractarian theory as shorthand to describe the primary duty of directors or officers, and this article conforms to that convention.

directors hire various factors of production . . . [so] the focus here is on bargaining between shareholders and the board of directors.”<sup>38</sup> However, this assumes that shareholders are a relevant source of capital and that hiring capital is more important than hiring other resources.

Since 1994, directors of public companies, on net, are not raising capital through equity issuances.<sup>39</sup> The aggregate issuance of equity during that time has been negative, meaning that corporations are repurchasing or retiring more equity than they are issuing.<sup>40</sup> Shareholders are on average a use, not a source, of cash for public corporations.

But even assuming that shareholders provide a relevant amount of cash to a corporation, it is not clear why this gives them a privileged seat at the bargaining table. Cash is also provided by credit facilities with local banks or in the market by issuing notes or bonds. Shareholders provide the same benefit—cash—as these other stakeholders, so this is not a sufficient reason to give them the privileged seat at the bargaining table.

It’s also unclear why cash is more important than contributions by other stakeholders. If we invite to the bargain only the party that provides the most value to the corporation, then the invitees would vary for each corporation. For some, it might be the patent owners that have licensed their technology to the firm. For others, it would likely be the employees, who bring firm specific human capital. Because we are setting up a default rule that should apply to as many corporations as possible, we do best by inviting everyone to the bargain.

This article addresses each bargaining party in turn, beginning with shareholders. The results would be the same even if only shareholders and directors were invited to the negotiation.

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38. Bainbridge, *supra* note 5, at 550.

39. Albert M. Teplin, *The U.S. Flow of Funds Accounts and Their Uses*, 87 FED. RES. BULL. 431, 439 (2001), <http://www.federalreserve.gov/pubs/bulletin/2001/0701lead.pdf> (“[T]he value of shares issued was far surpassed by the value of shares retired in cash-financed mergers and through firms’ own share repurchase programs.”); see LAURIE SIMON HODRICK, STAN. INST. ECON. POL’Y RES., ARE US FIRMS REALLY HOLDING TOO MUCH CASH? 5 (2013) (stating that Microsoft is paying high dividends and issuing debt while maintaining a strong cash position).

40. Teplin, *supra* note 39, at 439.

## 2. *Shareholder Interests*

Shareholders will prefer a model that allows directors to act upon all of their interests, rather than just their financial interests.

Efficient decision making requires understanding the full consequences and weighing all benefits and costs. This includes understanding the social and moral consequences, as well as the financial consequences, of decisions. Much of corporate law is a debate about whose benefits and costs are weighed and who does the weighing.

Under the shareholder wealth maximization norm, the shareholders are the relevant party for whom the benefits and costs are weighed. The directors are the party weighing the benefits and costs. However, the shareholder wealth maximization norm eliminates the directors' authority to consider the shareholders' nonfinancial interests. The authority to weigh nonfinancial interests is not granted to anyone else—it is simply assumed away. It effectively limits the information available to directors when making a decision. Assuming the shareholders place some non-zero value on any nonfinancial interest, this structure leads to inefficient resource allocations.

TABLE 2

	Shareholder Wealth Maximization	Broad Shareholder Value	Stakeholder Theories
Whose interests are weighed?	Shareholders	Shareholders	All stakeholders
Who weighs:			
financial interests?	Directors	Directors	Directors
nonfinancial interests?	No one	Directors	Directors

The case for shareholder wealth maximization provides two arguments to argue that shareholders will demand shareholder wealth maximization. First, shareholders have fewer legal and contractual protections.<sup>41</sup> For example, employees are protected by workplace safety regulations and minimum wage laws. Because shareholders have fewer legal protections than, say, employees, shareholders will place more value on being

41. Bainbridge, *supra* note 5, at 579 (“[N]onshareholders receive superior protection from contracts and both targeted and general welfare legislation.”).

protected by the directors. Therefore, shareholders will bargain for a rule that requires the directors to look out for the shareholders' interests. Because the parties value the directors' protection differently, there are gains from trade and a bargain will be struck that prioritizes the shareholders' interests.

This argument is sound, but it doesn't favor shareholder wealth maximization over broad shareholder value. Both norms put the interests of shareholders first. The difference is that shareholder wealth maximization limits which of the shareholders' interests they are allowed to promote. Considering the nonfinancial interests of shareholders doesn't change the protections of other stakeholders, such as employees, and it allows more flexibility to protect shareholders, so this argument offers equal support to the broad shareholder value norm.

Second, proponents of shareholder wealth maximization argue that considering nonfinancial interests will make shareholders' investment more risky and, all else being equal, higher risk commands higher returns.<sup>42</sup> Even assuming that this is true, shareholders may prefer lower returns in exchange for nonfinancial interests.

An example may clarify. Suppose we are shareholders of a pharmaceutical company developing a new drug. The question is whether to engage in clinical trials overseas to reduce regulatory costs to prove the drug's initial efficacy before continuing the investment.<sup>43</sup> Suppose conducting the trials domestically would increase regulatory costs such that our expected return would be limited to 8%. Conducting the trials in the reduced regulatory environment overseas would lead to more deaths, but would increase our expected return to 8.1%.<sup>44</sup> Assume also that we can avoid any publicity or other

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42. *Id.*

43. This hypothetical is loosely based on Pfizer's experimentation with Trovan in Nigeria in 1996. See David M. Carr's excellent article, *Pfizer's Epidemic: A Need for International Regulation of Human Experimentation in Developing Countries*, 35 CASE W. RES. J. INT'L L. 15 (2003). While international law places some limits on this hypothetical, moral and social norms fluctuate over time and geography, so international law cannot be relied on as a stable check for all moral and social norms.

44. One may suppose that this drug trial is moral because it provides potentially life-saving drugs to those that would otherwise not have access to them and because if the drug's use is hastened through these trials, many more lives will be saved. This is an excellent point if the question is whether

negative effects from these deaths, or, if the reader prefers, assume the total return provided here already deducts expected losses from these negative consequences. Could a group of shareholders find the loss of life so repugnant that they would reject the additional 0.1% return in favor of life? Suppose instead that the additional return is only 0.0001%. What if the additional return were only a few dollars?

Under the shareholder wealth maximization norm, it's irrelevant whether the additional savings are billions of dollars or a single penny—wealth is to be maximized. It's equally irrelevant whether reducing our safeguards kills one person or a thousand. Under the shareholder wealth maximization norm directors put only one item on the scales: profits.<sup>45</sup> If it is more profitable once all costs are considered, no other factor matters.

To be clear, we are not arguing that shareholders would never trade  $X$  lives for  $Y$  dollars. Civilization requires that each person consciously or unconsciously accept some  $X$  and  $Y$  for this equation. Instead, the argument is that the  $X$  and  $Y$  can be so disproportionate that shareholders would prefer not to maximize profits in a given instance. If at some point the value of life outweighs the profits, then the value of a life must already be somewhere on the scale. If there is a threshold for how many lives may be lost for the additional profits in a drug test, then directors must always ask if that threshold has been crossed.

This shows that conscience is inevitably part of corporate decision making. If we are weighing only profits, then no amount of lost life can matter. If lost life can ever tip the scale, it must already be on the scale. Put another way, if shareholders will reject profits at some valuation of human life, then human life is already part of their utility function. Even if conscience carries the day in only the most extreme situation, in every other situation directors must ask “is this that situation?” Conscience is inevitable. The broad shareholder value norm

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or not to do the drug trial; however, it is irrelevant if the question is how much cost to incur in doing the trial. If the trial were conducted in the United States, the same number of people would have access to a drug that would otherwise be unavailable.

45. For a discussion on why limiting these moral problems through general legislation is insufficient, see *infra* Part II.D.1.

advances corporate law by recognizing and explicitly incorporating this insight.

Returning to the original question, would shareholders negotiate away the right to have directors consider social and moral norms in order to avoid reduced profit margins? As explained in more detail in Part IV, there is strong empirical evidence that shareholders do sacrifice profits to promote their nonfinancial interests. If shareholders value social and moral norms, the most likely result is that they would allow the directors to consider them.

There are several counterarguments to this point. First, one might fight the hypothetical, arguing that such an extreme example would never happen in real life. The numbers used in the example were invented, but the underlying fact pattern was drawn from Pfizer's use of Trovan in Nigeria in 1996.<sup>46</sup> Pfizer's practices were alleged to have been responsible for the deaths of eleven children, with others suffering paralysis, deafness and blindness.<sup>47</sup> These tradeoffs happen in real life.

One might instead argue that any corporation that took such extreme actions to maximize profits would encounter negative publicity, legal sanctions and increased regulations that would make the action unprofitable in the long-term.

It would be wonderful if this were true. If doing the right thing were always the more profitable action, and that were observable, then there would be no need for ethics or for moral and social norms. But the evidence often suggests otherwise. Annual sales for the drug used in the hypothetical above were allegedly expected to exceed \$1 billion annually.<sup>48</sup> After a series of court cases, Pfizer settled for around \$75 million in total, less than 10% of their expected sales over a single year.<sup>49</sup> This real world example shows that expected profits can grossly outweigh the direct costs of morally questionable conduct.

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46. See *Abdullahi v. Pfizer, Inc.*, No. 01 Civ 8118, 2002 U.S. Dist. LEXIS 17436, at \*2-3 (S.D.N.Y. Sept. 16, 2002), *vacated*, 2003 U.S. App. LEXIS 20704 (2d Cir. 2003).

47. *Id.* at \*6.

48. *Id.* at \*2.

49. Joe Stephens, *Pfizer to Pay \$75 Million to Settle Nigerian Trovan-Testing Suit*, WASH. POST, July 31, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073001847.html>

This result is unlikely to change if we consider the indirect costs. We were unable to uncover any serious boycott efforts against Pfizer for its actions in Nigeria<sup>50</sup>, and such boycotts are extremely unlikely.<sup>51</sup> Tragically, however, many Nigerians are now boycotting lifesaving polio vaccinations out of a generalized fear of Western medicine.<sup>52</sup>

Another counterargument is that shareholders may prefer to limit director discretion for fear that directors will abuse that discretion and increase agency costs. That is, once directors are authorized not to kill children for loose change, they will use that authority to donate the corporate treasury to their alma mater. This argument is unpersuasive for three reasons.

First, this is actually an argument against discretion generally. Any action the director could take under the guise of social values, she could already take under the guise of business discretion.<sup>53</sup> Because directors already have near unfettered discretion, recognizing social and moral norms and broader shareholder interests will not grant them any power to pilfer from the corporate treasury that they do not already have. Second, it is also unlikely to change the effectiveness of the cur-

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50. There are currently various calls for boycotts of Pfizer for a variety of issues, but we could find no serious efforts to create a boycott based on this issue or any signs of changes in consumer spending habits.

51. Boycotts of pharmaceutical companies are extremely unlikely because the cost of substitution is so high. Often there are fewer substitutes for drugs than there are for, say, chicken sandwiches. A rational consumer boycotting a chicken sandwich company must value the moral objection and its expected return more than she values the cost of substituting the chicken sandwich for, say, a Big Mac. The Big Mac may be slightly more expensive or less appealing, but it is a minor cost that a consumer may be willing to bear to make a moral point. In contrast, a rational consumer boycotting a drug company must value her health less than her moral sensibilities. We may be willing to boycott sandwiches or even Botox injections, but we are unlikely to give up our cancer treatments. Because the individual boycotter suffers the full cost of boycotting the drugs but offers only nominal opposition to the drug company, such a boycott would likely be irrational to even the most morally outraged consumer.

52. See *NIGERIA: Government Blames Polio Vaccine Boycott on Pfizer Trials*, IRIN HUMANITARIAN NEWS & ANALYSIS, June 7, 2007, <http://www.irinnews.org/report/72601/nigeria-government-blames-polio-vaccine-boycott-on-pfizer-trials>.

53. Again, there may be some slight additional restrictions in the takeover context, but these typically happen only once per corporate life, if at all, so it is not a strong reason to eliminate all discretion over social and moral norms.

rent controls on agency costs. Various corporate governance and market pressures already pressure a director to reduce her agency costs. If the director is already limited by these pressures, she will not be able to expand her agency costs further. If she is not at the limits of these pressures, she can expand her agency costs regardless of whether discretion of social and moral norms is granted.<sup>54</sup>

Third, even assuming a self-serving director could increase agency costs somewhat, this may still be preferable. Returning to our example, suppose the international drug test would cost fifty additional lives and save only \$2. Suppose further that if we allow director discretion, the fifty lives will be spared, we will forfeit the \$2 savings, and the director will abuse her discretion by donating \$5 to her alma mater. Shareholders may still consider this \$7 cost acceptable to save fifty lives, even though it has increased agency costs.<sup>55</sup>

Another counterargument is that shareholders have such varied interests that allowing consideration of nonfinancial interests quickly becomes unworkable. Some shareholders will want to protect the environment, some will want to donate to cancer research, and others will want to buy only locally grown, sustainable, organic, non-GMO, fair trade, whole grain products for the employee cafeteria. If we allow directors to consider each of these nonfinancial interests, whose interests do we choose? Shareholders may not want directors to consider nonfinancial interests because directors may consider interests the shareholder doesn't care about.

It's true that directors may reach the wrong balance, but this is not sufficient reason to entirely neglect moral and social interests. The most likely result is Tiebout sorting.<sup>56</sup> That is, shareholders that value environmental interests will be willing to pay a premium for environmentally friendly directors. Those that place little value on environmental interests will sell, transferring their holdings to a corporation that better aligns with their financial and nonfinancial preferences. Over

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54. For a fuller treatment of these arguments, see Elhauge, *supra* note 21, at 806.

55. At most this increased agency cost will create dead weight loss that reduces the quantity of nonfinancial transactions taking place.

56. For a description of this self-sorting through mobility in municipalities, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

time, as directors show preferences for one social or moral issue, the shareholder base will come to reflect the values of the directors, that is, to the extent the directors' moral preferences have any noticeable effect.<sup>57</sup>

In addition, directors are capable of performing the appropriate balance. First, as discussed in Part IV.C.1., below, the empirical evidence suggests that directors are already balancing nonfinancial interests; recognizing that they make these balances merely brings the theory in line with practice. Second, directors already have broad experience balancing a range of financial interests—whether to seek long-term or short-term growth, whether to take high or low risk investments.<sup>58</sup> Most directors are already well equipped to balance competing interests. Third, as a final line of defense, shareholders have the ability to remove directors that are inept at balancing. Directors are elected at the will of shareholders. If a director consistently reaches the wrong outcomes, she will be replaced and the course will be corrected.<sup>59</sup>

Because shareholders value nonfinancial interests, and because granting discretion over these interests will likely not increase agency costs, in a hypothetical bargain with other stakeholders, shareholders would negotiate to allow directors to consider their financial and nonfinancial interests. Granted, in most situations this will require directors to maximize profits, but in each situation directors must consider the social and moral consequences.<sup>60</sup>

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57. Alison Mackey, Tyson B. Mackey & Jay B. Barney develop a similar model, finding that as the proportion of shareholders seeking social responsibility increases, market demand for socially responsible firms increases, which may cause more directors toward socially responsible actions to meet the demand. Alison Mackey, Tyson B. Mackey & Jay B. Barney, *Corporate Social Responsibility and Firm Performance: Investor Preferences and Corporate Strategies*, 32 ACAD. MGMT. REV. 817, 823 (2007).

58. For a description of the financial conflicts among shareholders, see Anabtawi, *supra* note 27, at 20–37.

59. For an extensive treatment on the limits on managers' ability to sacrifice profits see Elhauge, *supra* note 21, at 840–59.

60. Milton Friedman, no friend to using corporate funds for social issues, even implicitly acknowledged this result. In his article, he condemned social responsibility, but only after he defined social responsibility to *exclude* actions that were in the shareholders' interests. If the shareholders valued the action, it seems even Milton Friedman would support it:

What does it mean to say that the corporate executive has a 'social responsibility' in his capacity as businessman? If this statement is

### 3. *Director Interests*

The prior subsection has shown that shareholders would likely negotiate for a norm that prioritized shareholder profits but still allowed directors to consider the shareholders' moral and social norms. We now turn to what the directors would negotiate for.

More practically-minded directors are likely to accept any corporate governance rule the shareholders want in exchange for the business judgment rule, which directors would likely find both necessary and sufficient.<sup>61</sup>

In support of the shareholder wealth maximization norm, it has been argued that directors will prefer shareholder wealth maximization because any other alternative would lower share prices and increase the cost of equity capital, which would increase the likelihood of firm failure or takeover.<sup>62</sup> Takeovers harm directors personally by damaging their

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not pure rhetoric, it must mean that he is to act in some way that is not in the interest of his employers . . . The executive is exercising a distinct 'social responsibility' . . . only if he spends the money in a different way than they would have spent it.

Friedman, *supra* note 25, at 33.

61. See Paul D. Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 65–73 (detailing practical limits on shareholders' ability to control management).

62. See Bainbridge, *supra* note 5, at 580 ("At the margins, a higher cost of capital increases the probability of firm failure or takeover"). It is not clear why cost of capital through equity sales is the relevant cost in this argument, at least as far as it addresses firm failure. For example, if directors maximized the interests of employees, rather than shareholders, they could lower labor costs. And while dividends are typically discretionary, wages are not, which implies that in tough times wages are more likely to push a firm to fail. The bankruptcy code does not even allow shareholders to file for involuntary bankruptcy. See 11 U.S.C. § 303(b) (allowing claim holders, rather than interest holders, to file for involuntary bankruptcy).

This claim is also empirically suspect because over the last decade firms are much more likely to repurchase stock from shareholders than to sell it to them. See Justin Fox & Jay W. Lorsch, *What Good are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 50 ("Net issuance of corporate equity in the U.S. over the past decade has been negative \$287 billion, according to the Federal Reserve . . . Factor in dividend payments, and we find a multi-trillion-dollar transfer of cash from U.S. corporations to their shareholders over the past 10 years. Established corporations tend to finance investments out of retained earnings or borrowed money. They don't need shareholders' cash."). Where that is the case, the cost of equity is not very relevant. See also

reputation, reducing the value of their firm-specific human capital, and damaging their self-esteem in doing a job well.<sup>63</sup>

This argument is based on a questionable premise: that considering nonfinancial interests will lower share prices. This assumes that any additional risk created by considering nonfinancial interests will outweigh the benefit shareholders see in considering these nonfinancial interests. That is, if shareholders value some social issue more than profits, then taking account of that social issue will increase, not decrease, the share price. Therefore, consideration of moral and social norms, if done in accordance with shareholder preferences, decreases the cost of equity capital. As discussed in Part IV, there is considerable evidence that shareholders are willing to accept lower returns in exchange for promotion of their non-financial interests. The limits on what they are willing to accept will vary across firms, but a director that properly values all of the shareholders' interests will increase the demand for shares and the share price, which will reduce capital costs. This will reduce the risk of takeovers, which will increase the returns on the directors' firm specific human capital investment, improve the directors' reputations and improve the value of their stock-based compensation.

But even if accounting for social or moral norms lowered the stock price, there are additional reasons why directors may prefer such a norm. First, as discussed in Part IV.B., below, directors are human; most place some value on moral and social norms and would be willing to work for lower salaries to further causes they believe in. Because most directors are willing to make some level of financial concessions to promote social and moral causes, they would prefer a norm that allowed them to do what they think shareholders would deem as right. This willingness leaves room to negotiate for a norm that accounts for social and moral interests.

Second, directors are more involved than shareholders in any inhumane action the corporation carries out. Because di-

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Bainbridge, *supra* note 5, at 590 n.206 ("Some firms go for years without seeking equity investments. If these firms' boards disregard shareholder interests, shareholders have little recourse other than to sell out at prices that will reflect the board's lack of concern for shareholder wealth. In contrast, few firms can survive for long without regular infusions of new employees and new debt.").

63. See Bainbridge, *supra* note 5.

rectors are less removed from the bad act, they are less morally shielded from social or moral costs (i.e., guilt or shame). Directors are likely to negotiate for a system that allows them to consider alternatives to reduce these costs, which they often bear more acutely than shareholders.

One counterargument is that directors may prefer the shareholder wealth maximization norm because they do not want another factor to consider. They may believe that the information and decision costs associated with considering moral and social norms outweigh the benefits.

This seems unlikely. As explained in Part IV.B., directors already act on moral and social norms—our theories just pretend that they do not. Under the profit maximization norm directors are required to invent Rube-Goldberg-like explanations for how doing what's right will increase profits. Under a system that allows them to do what is right because it is right, they can save the costs of justifying why the action increases profits. They short-circuit the longer decision path, which may reduce decision costs. In addition, it may require more mental exertion to pretend they are not aware of certain social and moral consequences than it would to just consider those consequences in the balance. Where this is the case, information costs are reduced by considering moral and social norms.

Directors engaged in a hypothetical bargain would prefer a norm that allowed them to consider the moral and social interests of the shareholders. As long as the shareholders are happy, the directors are likely to improve their reputations and compensation. Because of this, in a hypothetical negotiation, directors are likely to prefer a rule that allows consideration of shareholders' moral and social interests.

#### 4. *Other Stakeholder Interests*

Next we turn to the corporation's other stakeholders. The category of other stakeholders includes those that are protected by contracts and those that are not. Stakeholders with contracts include consumers, suppliers, employees, independent contractors and debt holders. Stakeholders without contracts include tort victims, local municipalities and those that share environmental resources with the firm, for example, kids who play downriver from the factory.

For stakeholders with contracts, there is little need for a hypothetical negotiation. They have an actual negotiation

when they become stakeholders.<sup>64</sup> Because they will negotiate their own protections, they would likely prefer as wide a negotiation field as possible to search for mutual gains from trade. This suggests that contractual stakeholders would prefer a norm that allowed directors to consider moral and social norms because such a norm would broaden the field of the negotiation.

One might argue that many employees or customers do not negotiate before becoming stakeholders, so this is an unrealistic assumption. While market forces supply some of the negotiation on their behalf, relying on the market isn't necessary for our purposes. Both groups would prefer a norm that allowed directors to consider social and moral norms. Under the shareholder wealth maximization norm, employees should not be paid one cent above their market rate. Allowing consideration of social norms may allow them to earn higher wages. Likewise, the shareholder wealth maximization norm means products should only be as safe as necessary to maximize profits. Consumers will prefer a norm that allows directors to consider the moral consequences of reduced safety.<sup>65</sup>

Stakeholders without contracts would also likely prefer a norm that allowed directors to consider moral and social norms because it would give them additional chances for protection. A local community would prefer the directors to con-

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64. Bainbridge, *supra* note 5, at 589 ("Shareholders would want the protections provided by fiduciary duties, while bondholders would be satisfied with the ability to enforce their contractual rights, which is precisely what the law provides.") (citation omitted). Bainbridge also notes

Nonshareholder corporate constituencies can thus 'negotiate' with the board in precisely the same fashion as do shareholders: by withholding their inputs. If the firm disregards employee interests, it will have greater difficulty finding workers. Similarly, if the firm disregards creditor interests, it will have greater difficulty attracting debt financing. And so on.

*Id.* at 590 (footnote omitted).

65. An infamous example of financial calculations without consideration of moral issues is the Ford Pinto. Ford sold a car prone to explode rather than install an \$11 fix. The decision was based on crash testing (which revealed the problem) compliant with federal law, and a financial cost-benefit financial analysis developed by a federal agency, the National Highway Traffic Safety Association. The projected costs of human burns and fatalities was calculated to be about a third the cost of installing the \$11 part on all of the Pinto automobiles. Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379 (1992).

sider the social norms of dealing with a community. Children playing downstream would prefer for directors to consider whether dumping sludge in the river violates moral norms, even if dumping complies with law. And tort victims would likely prefer that directors consider the moral and social consequences of their safety programs, beyond the minimums required by law.

One counterargument is that profit maximization may benefit local communities by raising tax revenues, creating more employment, and even resulting in larger corporate reserves to satisfy tort judgments.

This is a reasonable argument, but it is internally inconsistent. While a corporation with strong profits has stronger *capacity* to stay in the community despite higher tax rates or to offer steady employment, this capacity will not be used unless doing so is profit maximizing. A director that only maximizes profits is limited in her ability to pass along the benefits of stable profits to employees, either through wages or job security.

Likewise, tort claimants are likely to find that maximizing shareholder wealth means maximizing the actual wealth of the shareholders, rather than leaving that wealth resting in the corporate treasury. This means distributing corporate reserves to shareholders through dividends and stock repurchases. Recall that the most famous case extolling shareholder wealth maximization successfully reduced the size of Ford's corporate reserves.<sup>66</sup>

There is no reason to think that either contractual or non-contractual, non-shareholder stakeholders would prefer a shareholder wealth maximization norm over a norm that allowed directors to consider shareholders' moral and social interests.

##### 5. *Summary of the Hypothetical Bargain Analysis*

In a hypothetical bargain between the various constituencies it is likely that shareholders would prefer a norm that allowed consideration of their nonfinancial interests because those interests affect their utility. Directors are likely to care primarily about the business judgment rule, but would also support consideration of the shareholders' nonfinancial inter-

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66. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

ests because it reduces their moral and social costs and because satisfying shareholders increases share prices, which provides job security, increased compensation and benefits to their reputations. Other stakeholders are also likely to support this outcome because it expands the range of any negotiation and may allow them to capture the benefits of any social and moral norms.

### C. *The Principal-Agent Model*

While the nexus of contracts model of the corporation has enamored most of the academy,<sup>67</sup> it is still common to see arguments premised on the idea of an agent-principal relationship between directors and shareholders.<sup>68</sup>

Under an agency model, shareholders are seen as owners of the corporation, with directors or managers acting as their agents to look after their interests. Nothing in law requires an agent to consider only the financial interests of their principals. In fact, proper consideration of a broad range of interests can actually increase the principal's total utility.

A brief example may illustrate the point. Suppose that your favorite kindergartener is selling homemade lemonade for a nickel and you ask us, as your agents, to go next door to get you a cup. Rather than pay the five cent asking price, we ridicule the girl, her poorly-made lemonade stand and her ugly pigtails until she cries, "Just take the lemonade! I don't care anymore!" and runs inside. We then help ourselves to free cups and proudly return to you with both lemonade and nickel.

We have maximized your wealth, but not your total welfare. The small financial gain is offset by the damage to your

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67. See STOUT *supra* note 23, at 36–44 (outlining arguments for rejecting an agency model); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1426 n.8 (1993) ("[N]either legal nor economic theory bases the primacy of shareholder wealth upon the existence of an agency relationship between shareholders or managers.").

68. See, e.g., Jensen & Meckling, *supra* note 7, at 308, 311 (founding the nexus of contract theory, but still adopting agent-principal arguments); Elhauge, *supra* note 21 at 783; Friedman, *supra* note 25. *But see* Donald Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1192 (2003) (urging caution when using agency law as an analogy to understand corporate law).

relationship and your other moral and social interests. By maximizing your financial interests to the exclusion of your social interests we lowered your total utility and served as an inefficient agent.

Some investors may not be concerned about whether the pigtailed kindergartener next door likes them, but the same principles apply for countless nonfinancial interests. There is some point at which shareholder interests are best served by rejecting profit maximization.

Take, for example, the scenario described in Part II.A., above, regarding drug trials conducted overseas to avoid regulation. Recall that these reduced regulatory protections will result in lower costs, but more deaths. A shareholder may be willing to tolerate a few deaths for large savings, but may be unwilling to tolerate many deaths for small savings. An effective agent must act in accordance with all of the shareholders' interests or the agent may decrease the shareholders' total welfare.

Because an agent is effective only to the degree she considers all of the principal's relevant interests, the agent-principal model of the corporation supports allowing directors to consider shareholders' nonfinancial interests.

#### D. *A Few Counterarguments*

There are a few remaining counterarguments that are commonly employed against proposals to consider interests other than pure wealth maximization. This section will address the role of law, the survival of the firm and the two masters problem.

##### 1. *The Role of Law*

One might argue that directors need not consider nonfinancial interests because any nonfinancial interest that is generally agreed upon is already protected by general and targeted public welfare laws. This argument fails because these laws may not match the preferences of shareholders, the laws are incomplete, the laws are subject to governmental inefficiencies and laws change over jurisdictions and time.

First, a perfectly functioning democratic government reflects the interests of all its citizens, which may differ systematically from the interests of the shareholders. For example,

Hobby Lobby Stores, Inc., was recently recognized by the Supreme Court as having interests that differed from the non-financial interests embodied by certain regulations.<sup>69</sup> At times the law will allow an exemption for such preferences, as the Supreme Court held, but often it will not. Laws may provide an outer bound to decision making, but idiosyncrasies of a particular group of shareholders may mean those boundaries are too permissive.

A second, related problem is due to bounded rationality and the costs of negotiating an infinitely complex set of laws. Even if the nonfinancial interests of shareholders perfectly align with those of society, laws will be incomplete.<sup>70</sup> Courts and regulatory agencies are inadequate mechanisms to fill these gaps because judges are not well equipped to make business decisions, not all business decisions will be subject to judicial or administrative review, judicial and administrative decisions typically come only after the business decision has been made, and the costs of litigating a reversal would be borne by shareholders. Without discretion to consider nonfinancial interests, directors' actions will not be able to fill the gaps relating to nonfinancial interests, which will lead to inefficient resource allocations.

Third, no democracy perfectly aligns with the majority's preferences. The law is subject to horse trading, regulatory capture, opportunism and special interest pressures. These make it unlikely that laws reflect the interests of society generally, let alone the interests of shareholders in a particular corporation.

Fourth, laws change and corporations are governed by multiple bodies of law across jurisdictions. The social and moral norms in the United States may be very different than the norms in Brazil or Zaire, and it is not clear why an investor in the United States should be required to yield her moral decision-making to citizens in other countries. As Einer Elhauge points out, "before 1924, slavery was legal in the Sudan and not yet prohibited by international law."<sup>71</sup> The law cannot be a

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69. See *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 18 (U.S. June 30, 2014).

70. For an excellent and in-depth description of the interplay between legal requirements and shareholders' norms, see Elhauge, *supra* note 21 at 740, 747-48.

71. Elhauge, *supra* note 21, at 802.

sufficient safeguard for moral and social norms because it would require shareholders in one country to yield decision power over their moral and social interests to voters in another country when engaging in global commerce.<sup>72</sup> Even if our morals align with international laws now, these laws are subject to change without our input.

For these reasons, law is not a sufficient mechanism to protect shareholders' moral and social interests.

## 2. *Survival of the Firm*

A common justification for the shareholder wealth maximization norm is that “[w]here competitors are numerous and entry is easy, persistent departures from profit maximizing behavior inexorably leads to extinction.”<sup>73</sup> That is, nice corporations finish last. There are three responses to this.

First, as a practical matter, self-interested directors are unlikely to knowingly take actions that will cause them to lose their jobs except in extreme circumstances. If following shareholders' nonfinancial interests is unprofitable, directors are more likely to err on the side of profit maximization so as to avoid being put out of work. In other words, as Einer Elhauge pointed out, this critique is a restraint on the pursuit of nonfinancial interests, rather than a reason to disallow it.<sup>74</sup>

Second, focusing on constituents other than shareholders sounds more like a formula for success than failure. As discussed further below, craigslist.org, a classified listings website, puts its customers and community before profits, a practice that made it the world leader in its industry.<sup>75</sup> Treating customers and employees as the top priority is now such common business advice that it has become a cliché.

Third, in the rare instance where directors are faithfully following the shareholders' interests and the shareholders' nonfinancial interests lead to insolvency, it's not clear why we should intervene. In insolvency, the shareholders are the lowest in priority, behind the claims of creditors, employees and

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72. There are examples of domestic laws that prohibit conduct by companies outside of the United States, such as the Foreign Corrupt Practices Act. These laws are typically the exception to the rule. *See, e.g.*, 15 U.S.C. §78dd-1 to -3 (2012).

73. Jensen & Meckling, *supra* note 7, at 329 n.30.

74. *See* Elhauge, *supra* note 21, at 809.

75. *eBay v. Newmark*, 16 A.3d 1, 8 (Del. Ch. 2010).

suppliers. If the shareholders are willing to sacrifice their entire stake to do what they feel is right (a very unlikely result), is it our business to stop them? To force them to take an action they find morally repugnant in order to prevent bankruptcy?

If so, we've proven too much. If we can prohibit corporations from going insolvent for moral reasons, why not for business reasons as well? Why allow corporations to engage in high risk activities or activities that pay off only in the extreme long-run? There would be little left of corporate law if we sought to protect corporations from insolvency. While self-imposed, morally-based insolvency seems extremely unlikely, it does not seem like something we should prohibit.

Another concern might be that deviating from profit maximization harms minority shareholders that would have preferred more profit maximizing actions, but this is merely a baseline problem. Minority shareholders that want pure profit maximization may have lower returns if pure profit maximization isn't required. But the remaining shareholders face moral and social costs if pure profit maximization is required. So this is a cost allocation problem that can be determined by the board of directors and need not be decided a priori by the courts.<sup>76</sup>

Shareholder wealth maximization cannot be defended on the grounds that other systems lead to insolvency because such deviations are unlikely in the face of market pressures, are likely to be profitable, and are rightfully within the shareholders' prerogatives.

### 3. *The Two Masters Problem*

Another justification for the shareholder wealth maximization norm is the "two masters" problem, a term coined by Professor Bainbridge in his insightful debate with Prof. Green.<sup>77</sup> The argument is that if directors are required to consider multiple goals, they will not have a determinate guide for decision making. Michael C. Jensen summarized the argument

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76. See Elhauge, *supra* note 21, at 739.

77. See Bainbridge, *supra* note 67, at 1427 (1993) (citing *Matthew* 6:24 (NIV) ("No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other. You cannot serve both God and money.")). It is wonderful irony that this scripture is used to argue that directors should consider only profits and not moral or social consequences.

saying, “since it is logically impossible to maximize in more than one dimension, purposeful behavior requires a single valued objective function.”<sup>78</sup>

While effective against some stakeholder theories, the two masters argument is a weak critique of the broad shareholder value norm. Under the broad shareholder value norm directors remain accountable to only one constituency: the shareholders. Deviations from shareholder wealth maximization occur only when doing so serves the *shareholders’* moral or social interests. There is still only one master.

Likewise the critique is weak against the broad shareholder value norm because even maximizing shareholder value requires balancing several competing interests, effectively maximizing in more than one dimension.<sup>79</sup> Public corporations have thousands of shareholders that define “long-term” in different ways. For you it may be when you retire; for me when my kids reach college.<sup>80</sup> The two masters problem appears as soon as the board is required to define “long-term.”<sup>81</sup> Directors are also required to consider our differing risk preferences and perhaps our diversification. It’s unpersuasive to argue that directors can manage several financial inter-

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78. Jensen, *supra* note 10; *see also id.* at 11 (“[T]elling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave that manager with no way to make a reasoned decision. In effect, it leaves the manager with *no* objective. The result will be confusion and a lack of purpose that will handicap the firm in its competition for survival.”); GREG MCKEOWN, *ESSENTIALISM* 49–57 (2014); Bainbridge, *supra* note 5 at 581 (“Because stakeholder decision making models necessarily create a two masters problem, such models inevitably lead to indeterminate results.”); *id.* at 582 (“[D]irectors who are responsible to everyone are accountable to no one.”).

79. *See* Anabtawi, *supra* note 27, at 20–37.

80. One interesting counter argument would be that the firm use a weighted average expected sales date. This would allow directors to maximize profits toward a single date. This would allow directors to maximize profits toward a single date. However, this number would change with every trade, making it at best a range. And if it is a range, what is to be done to decide between competing points in the range? Using a weighted average expected sales date, even if possible in theory, would not completely eliminate the two masters problem. It would also likely have the unfortunate result of skewing toward short-term objectives.

81. Another interesting suggestion would be for the firm to maximize shareholder wealth on an infinite time horizon. Apart from the difficulty of calculating such results, these computations would still require a discount rate, which can vary among shareholders. It would also be less profitable to most shareholders, assuming their mortality.

ests at once, but adding any nonfinancial interests would leave them without direction.

To the extent the two masters problem relates to serving multiple constituencies, it does not apply to the broad shareholder value norm, which serves only shareholders. To the extent it relates to serving multiple interests, it is a difference of degree, not of kind, from the shareholder wealth maximization norm, and there is no reason to suggest that this difference in degree will hamper the directors' performance.

### III.

#### THE BROAD SHAREHOLDER VALUE NORM BETTER CONFORMS WITH THE LAW

Part II showed how the broad shareholder value norm improves upon the theoretical underpinnings of the shareholder wealth maximization norm. This part shows that the broad shareholder value norm also resolves the weaknesses of stakeholder theories in the case law.

This article will focus on the most challenging cases for the various theories: *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* and *eBay Domestic Holdings, Inc. v. Newmark*.<sup>82</sup> At first glance, these cases seem to require shareholder wealth maximization, and the counter arguments scholars have proposed are incomplete at best. We argue that these cases stand for the proposition that Delaware courts will not recognize a moral interest in determining who has the proper character to own stock in a Delaware corporation.

This part begins with an introduction to the business judgment rule and how it creates ambiguity in corporate purpose cases. We then analyze the two major cases in turn.

##### A. *The Business Judgment Rule*

All discussions of corporate purpose are necessarily in the shadow of the business judgment rule, which often leaves rulings on corporate purpose ambiguous. "The rule itself 'is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best inter-

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82. There are several other old standards in any debate about corporate purpose. Many have been debated for fifty years, with very few new arguments in the last twenty.

ests of the company.’”<sup>83</sup> In practice, this means courts will not second guess a business decision under most circumstances. If the decision is the product of a business judgment, then courts will not analyze whether it was the right decision.

When analyzing most business decisions, courts apply the business judgment rule before considering whether directors maximized shareholder wealth. The business judgment rule is typically dispositive of the case, which cuts off any analysis discussing shareholder wealth maximization. Discussions that are provided are dicta.

However, when there are active bidders attempting to acquire the corporation and it becomes clear that the corporation will be sold, there are additional prerequisites before the business judgment rule applies.<sup>84</sup> Because of this, takeover cases provide the clearest statements of corporate purpose and have proved the most difficult for scholars to circumvent. We discuss the leading takeover cases here.

#### B. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*

Writing in his private capacity, the chief justice of the Delaware Supreme Court recently said that *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*<sup>85</sup> ended the debate about corporate purpose by precluding consideration of non-financial concerns in corporate action.<sup>86</sup> In contrast, some scholars, such as Lynn Stout, have argued that *Revlon* is merely the “exception that proves the rule,” and provides little practical limit on directors wishing to consider non-shareholder interests.<sup>87</sup> The following sections offer a new interpretation that does not preclude moral considerations and does not require consideration of non-shareholders’ interests. Rather, we show that the cases merely establish that courts will not recognize a pur-

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83. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (citation omitted).

84. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954–55 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

85. *Revlon*, 506 A.2d at 173.

86. Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 454 n.16 (2014).

87. STOUT, *supra* note 23, at 30–31.

ported moral interest in determining who has the proper character to own stock.

1. *Facts*

In *Revlon*, a firm was to be sold to either a hostile corporate raider or a party that was friendly to the board. The board supported the friendly bidder, in part because doing so would eliminate the directors' potential liability to noteholders.

It began when the board learned of an impending hostile tender offer by the corporate raider.<sup>88</sup> Advisers informed the board that the company as a whole was worth around \$55 per share, but if the company was broken up and sold, the pieces would be worth around \$60 to \$70 per share.<sup>89</sup>

Hoping to avoid a breakup, the board authorized two defensives. First, it repurchased some of its outstanding shares, thereby raising the share price.<sup>90</sup> Second, it adopted a poison pill, which would saddle the company with large amounts of debt unless the acquirer paid at least \$65 per share.

The hostile bidder offered \$47.50 per share.<sup>91</sup> The board urged its shareholders to reject the bid and issued debt in the form of notes as part of an exchange offer. The notes had a covenant that prevented certain asset sales, which would make it more difficult to break up the company.<sup>92</sup> The bidding continued, and the board began negotiating with a friendly bidder.<sup>93</sup>

The friendly bidder offered \$56 per share if the board waived the covenants in the notes, a move that severely decreased the notes' value and led some noteholders to threaten to sue the directors. The board accepted the friendly bidder's offer.<sup>94</sup>

The hostile raider topped the bid and promised to top any future bid the friendly bidder made.<sup>95</sup> The friendly bidder raised its bid to \$57.25, and the board again agreed. This time the agreement included a "no-shop provision," which would

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88. *Revlon*, 506 A.2d at 176.

89. *Id.* at 177.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 178.

95. *Id.*

prohibit the board from soliciting offers from other bidders, a \$25 million break-up fee if the deal wasn't completed with the friendly bidder, and a provision that would allow the friendly bidder to purchase some of the company's divisions at a deep discount if another bidder won. In exchange, the friendly bidder also agreed to support the notes at par value, which would likely keep the noteholders from suing the directors.

The hostile bidder sued. The Delaware Court of Chancery enjoined the asset transfer and the board's tactics, and the Delaware Supreme Court heard an expedited interlocutory appeal.<sup>96</sup>

## 2. *Analysis*

The Delaware Supreme Court held that the adoption of the poison pill and the share repurchase were reasonable responses to the perceived inadequacy of the bid.<sup>97</sup> However, once there was a live auction with topping bids,

it became apparent to all that the break-up of the company was inevitable. . . . The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities . . . . It no longer faced threats to corporate policy and effectiveness, or to the stockholders' interests, from a grossly inadequate bid. The whole question of defensive measures became moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.<sup>98</sup>

The court also condemned the directors for requiring the friendly bidder to support the notes at par value, a move the court saw as a naked attempt to avoid being sued.<sup>99</sup> In its defense, the board argued that it could consider the interests of other constituencies, including the noteholders, so supporting the notes was a proper use of their discretion.<sup>100</sup>

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96. *Id.* at 179.

97. *Id.* at 181.

98. *Id.* at 182.

99. *Id.*

100. *Id.*

The court disagreed.

A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.<sup>101</sup>

“The Notes were accepted by the holders on [the] basis [that the covenants might be waived] . . . . Thus, nothing remained for Revlon to legitimately protect and no rationally related benefit thereby accrued to the stockholders.”<sup>102</sup>

Proponents of shareholder wealth maximization frequently cite these statements to show that, at least in the takeover context, wealth maximization is required. Chief Justice Strine recently wrote, “*Revlon* settled the question as a practical matter in Delaware, by making clear that other corporate constituencies may only be considered instrumentally in terms of their relationship to creating profits for shareholders.”<sup>103</sup>

Others, such as Prof. Stout, have argued that the case does not broadly require companies to maximize shareholder wealth because it applies only when a takeover is imminent, that is, when a public company is about to stop being a public company.<sup>104</sup> However, even if she is correct, this doesn’t explain *why* the rules would change in that situation—nor does it neatly cover takeover situations where ownership is switching from one majority shareholder group to another, or from one parent corporation to another. If social and moral norms are worth considering in the daily operation of the company, why are they not worth considering when the company is making its most important decision, whether to continue its existence?

The broad shareholder value norm provides an answer. It is not that moral and social norms cannot be considered; it is that there are no actionable moral or social norms at issue.

The case establishes that the board’s actions must have “rationally related benefits accruing to the stockholders.”<sup>105</sup> In

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101. *Id.* (internal citation omitted).

102. *Id.* at 182–83.

103. Strine, *supra* note 86, at 454 n.16.

104. STOUT, *supra* note 23, at 30–31.

105. *Revlon*, 506 A.2d at 182 (internal citation omitted).

the context of a takeover, what are the shareholders' interests? The directors are not making a decision about whether to pollute the environment or how well to treat employees. They are deciding who gets to own shares of the company, or more specifically, to whom might other shareholders sell their shares. If the question is purely one of ownership, what moral interest could shareholders have? Future decisions about whether to break up the company will be made under the moral and social norms of the new owners, and if those morals violate some rule there can be a suit at that point, when the claim is ripe. But recognizing a shareholder's moral interest in who can or cannot own shares would effectively allow shareholders to claim a moral interest in deciding who has the proper character to own stock, which would be a troubling precedent.<sup>106</sup>

One counter argument is that this is more than just about ownership because the bidder was a hostile raider. The bidder planned to break up the company, which could harm local communities and employees, and shareholders may have moral interests in protecting these groups. It is not an objection to the raider's ownership; it is an objection to the raider's intentions. This argument fails for two reasons.

First, the duties outlined above only took effect once "it became apparent to all that the break-up of the company was inevitable."<sup>107</sup> Recall that the court approved the use of the poison pill and the share repurchase, which the board adopted before the friendly bidder entered the story. The board's actions crossed the line only when it was clear that breakup was inevitable. "The original threat posed by [the hostile bidder]—the break-up of the company—had become reality which even the directors embraced."<sup>108</sup> So it is difficult to argue that the decision here was to protect employees or com-

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106. One might ask if this is consistent with the court's statement in *Unocal*, stating that a board can act to prevent "a danger to corporate policy and effectiveness . . . because of another person's stock ownership." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). This statement could be understood to mean that mere stock ownership is something a person may morally object to. The next case, *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), routes that understanding, holding that courts will not allow a board to defend shareholders' alleged moral interest in who has the proper character to own stock.

107. *Revlon*, 506 A.2d at 182.

108. *Id.*

munities because a win by either bidder would result in breaking up the company. Again, the only decision was who would own the company, and the court is right to disregard any moral interests in who has the proper character to own stock.

Second, even if the hostile bidder planned to sell off the divisions, it is again, nothing more than a change in ownership of those divisions. Decisions about what to do with employees of those divisions will be made in accordance with the interests of the new owners, and a challenge about what the bidder might do once the company is acquired is not yet ripe for adjudication.

Another counterargument is that here the court rejected a deal that would have taken care of another constituency, the noteholders. By rejecting the benefit to the noteholders, the court could be said to have rejected any moral or social interest the shareholders felt in helping the noteholders.

However, no one claimed that the shareholders had any interest in helping the noteholders at their own expense. Because no one argued the existence of the shareholders' social or moral interest in helping the noteholders, the court had no basis to invent one.

### 3. *Revlon as an Evidentiary Rule: The Unjust Steward*

There is another common sense reason why the wealth maximization may be required in the takeover context but not in daily decision-making. The rule in *Revlon* may be seen as an evidentiary rule. Because of the extreme facts in a takeover context, courts may require a greater showing of the shareholders' nonfinancial interest. This "last stage" problem was examined nearly two thousand years ago, in the parable of the unjust steward. There a steward, knowing he was about to lose his job, forgave large portions of debts owed to his master with the hope of buying the favor of the forgiven parties.<sup>109</sup> Similarly, modern game theory predicts that players are more likely to defect in the last stage of a repeat game because they will not face repercussions in subsequent rounds.

In a takeover context, directors are soon to be out of work, so there is a heightened risk that they will unjustly transfer shareholder wealth to other constituencies to benefit themselves, and such an action would be more difficult to detect

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109. *Luke* 16:1–13 (NIV).

because the director's benefit is nebulously indirect. Because of these risks, once a takeover is inevitable courts may require stronger evidence that acts benefiting non-shareholders are actually in the true interests (moral or otherwise) of shareholders. Perhaps no amount of evidence could overcome the presumption that these acts are merely attempts by directors to gain favor with other constituencies. This would merely recognize that directors are better at creating false business justifications than courts are at unraveling the insincerity of these justifications. This would justify a reading of *Revlon* that allowed only financial considerations in the context of an imminent takeover—recognizing the heightened risks and their own limitations on determining business purposes—but still allowed shareholders' nonfinancial interest to be considered in less risky scenarios.

#### 4. *Revlon Summary*

*Revlon* supports two propositions. First, when a sale is inevitable, the central decision being made is who will own the company. Second, courts will not recognize shareholder interests about who has the proper character to own shares. Because there are no recognizable nonfinancial interests, directors are required to maximize financial interests. In addition, during a takeover there are greater incentives for directors to transfer wealth away from shareholders to buy favor with other constituencies in their own self-interest. Courts may simply require heightened evidentiary standards or prohibit consideration of nonfinancial interests altogether within the takeover context.<sup>110</sup>

#### C. *eBay Domestic Holdings, Inc. v. Newmark*

*eBay Domestic Holdings, Inc. v. Newmark* is the latest case in the debate over corporate purpose.<sup>111</sup> This case involved craigslist.org, a classifieds website that quickly rose to become the

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110. As a thought experiment, one might ask whether a court would enforce an agreement that required part of the purchase price to be donated to a disinterested charity. If such an agreement is acceptable, this would recognize an interest unrelated to the shareholders' economic interest, despite the strong language in this case, and would support our position. If such an agreement is unacceptable, it would be evidence of a pure shareholder wealth maximization requirement, which would oppose our position.

111. *eBay*, 16 A.3d 1.

most used classified listing site in the United States.<sup>112</sup> Despite its success, craigslist's directors had no intention of monetizing the site to maximize profits—the site did not charge for most listings, and it did not accept third-party advertising.<sup>113</sup>

There were three shareholders, who each held a board seat. Craig Newmark was the chairman and founder; he held 42.6% of the company.<sup>114</sup> James “Jim” Buckmaster, the CEO and president, held 29%. And eBay, an online auction platform, held 28.4%.<sup>115</sup>

In contrast to craigslist, eBay was keen on monetizing everything.<sup>116</sup> It acquired its shares from a disaffected director of craigslist, who had become disaffected precisely because he was unable to persuade Craig and Jim to monetize the site.<sup>117</sup> eBay believed it could succeed where this director had failed and bought the shares with the goal of eventually acquiring Craig's and Jim's shares and monetizing the site.<sup>118</sup>

In connection with eBay's acquisition of the shares, eBay, Jim and Craig entered into an agreement by which eBay would pay \$8 million each to Craig and Jim in exchange for various minority shareholder protections.<sup>119</sup> Among these protections was the continuation of cumulative voting, which would give eBay the power to elect one director. eBay also gained certain “consent rights” to block share issuances, certain dilutive transactions and charter amendments that would adversely affect eBay. The agreement imposed confidentiality restrictions on eBay and gave each of eBay, Craig and Jim preemptive rights to purchase shares in any new share issuance and a right of first refusal on each other's shares. Importantly, the agreement expressly gave eBay the right to compete, subject to certain consequences.<sup>120</sup>

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112. *Id.* at 7.

113. *Id.* at 8.

114. *Id.* at 25. These figures are before any of the attacks on eBay began. By the time of suit, Craig and Jim had diluted eBay's ownership down by about 3.5%, which went to Jim (1.4%) and Craig (2.1%). *Id.*

115. *Id.*

116. *Id.* at 9.

117. *See id.* at 9–10 (describing eBay's negotiations with the three craigslist stockholders, Knowlton, Jim, and Craig, to acquire Knowlton's shares).

118. *See id.* at 10–11 (describing eBay's purchase of Knowlton's share and its attempts to acquire Craig's and Jim's shares).

119. *Id.* at 11–12.

120. *Id.* at 12–13

If eBay chose to compete with craigslist in the United States, it would lose (1) its consent rights, which covered share issuances, dilutive transactions and charter amendments, (2) its preemptive rights to purchase shares in new issuances, and (3) its rights of first refusal of Jim and Craig's shares. Jim and Craig would also lose their rights of first refusal over eBay's shares, but not their rights of first refusal against each other.<sup>121</sup>

For the next three years, eBay continually tried to monetize or acquire craigslist, and Jim and Craig continually rebuffed eBay's advances.<sup>122</sup> During this time eBay routinely used craigslist's confidential information, in violation of its confidentiality restrictions.<sup>123</sup> eBay used this information to create a competitor to craigslist called Kijiji,<sup>124</sup> which operated outside the United States.

Nearly three years after taking its initial investment, eBay launched Kijiji in the United States, triggering the competition consequences.<sup>125</sup> eBay's director, who also ran Kijiji in Europe, resigned the following week, and although eBay selected a new director, Jim and Craig never seated him.<sup>126</sup>

Jim and Craig immediately began planning how to force eBay to sell its stock,<sup>127</sup> implementing three measures to push eBay out.<sup>128</sup>

First, they instituted a staggered board, meaning that only one director would be elected each year.<sup>129</sup> This made eBay's cumulative voting power useless because with only one availa-

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121. *Id.*

122. *See id.* at 14–16.

123. *Id.* at 17–18.

124. *Id.* Ironically, "Kijiji" is Swahili for village, invoking the same community spirit that eBay found so deplorable in craigslist and that Kijiji was designed to destroy. *What is Kijiji?*, KIJJI, <http://help.kijiji.ca/helpdesk/basics/what-is-kijiji> (last visited Aug. 29, 2015).

125. *eBay*, 16 A.3d at 18–19.

126. *Id.* at 19.

127. *Id.* Under the Stock Purchase Agreement, eBay had 90 days to cure once craigslist gave notice that eBay had triggered the competition consequences. *Id.* eBay lost its consent rights only after this 90-day period, but Jim and Craig did not wait for this period to run before planning how to push eBay out. *Id.* at 20.

128. *Id.* at 19.

129. *Id.* at 22–23. Cumulative voting allows a shareholder to cast one vote per share for each available director seat. When multiple seats are available, a minority shareholder can often guarantee itself one seat. If only one seat is

ble seat each year, there was nothing to cumulate. Jim and Craig now had full control over board elections.

Second, they instituted a poison pill, which would be triggered (1) if Jim, Craig or eBay acquired 0.01% of additional craigslist stock, or (2) if someone other than Jim, Craig or eBay acquired 15% of craigslist's outstanding shares.<sup>130</sup> eBay owned about 25% of the outstanding shares, which meant it could not sell its holdings to a single buyer without triggering the pill. The board retained power to waive any trigger event, and Jim and Craig controlled the board, so these measures primarily affected eBay.<sup>131</sup>

Third, the company offered additional shares to shareholders that granted the company a right of first refusal over their shares.<sup>132</sup> Jim and Craig's shares already had a right of first refusal on each other's shares, so they had little to lose by entering this agreement and boosting their percent ownership 1.4% and 2.1%, respectively.<sup>133</sup> In contrast, eBay's shares were freely tradable; entering this agreement would have encumbered them, so it suffered a 3.5% dilution to avoid the encumbrance.<sup>134</sup>

In response to these three measures, eBay sued Jim and Craig for breaching their fiduciary duties as directors and as majority shareholders.<sup>135</sup> Chancellor Chandler delivered his opinion after a nine-day trial.

Turning first to the poison pill, the court applied the *Unocal Corp. v. Mesa Petroleum Co.* standard, which requires (1) a reasonably perceived threat to corporate policy and effectiveness, and (2) that the poison pill be proportional to the threat.<sup>136</sup>

On the first prong, Jim and Craig argued that if they died, their heirs might sell their shares to eBay, who would "funda-

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available, the shareholders get only one vote per share, meaning the majority holder can always decide who is elected.

130. *Id.* at 23–24.

131. *See id.* at 24.

132. *Id.*

133. *Id.* at 24–25.

134. *Id.* at 25. This diluted eBay down to 24.9%, just below the 25% needed to elect a director under cumulative voting if the staggered board amendment was enjoined. *Id.*

135. *eBay*, 16 A.3d at 25–26. Jim and Craig were deemed to be a control group because of a voting agreement between them. *Id.* at 26.

136. *Id.* at 31–32.

mentally alter craigslist's values, culture and business model, including departing from [craigslist's] public-service mission in favor of increased monetization of craigslist."<sup>137</sup>

The court rejected this argument, finding instead that "Jim and Craig resented eBay's decision to compete with craigslist and adopted the Rights Plan as a punitive response. They then cloaked this decision in the language of culture and post mortem corporate benefit."<sup>138</sup>

With the court's holding that this is about punishment, not protection, it's hard to see this as anything other than a minority oppression claim. "Jim and Craig are not dispersed, disempowered, or vulnerable stockholders. They are the majority."<sup>139</sup> They can approve or reject any transaction they want; they can elect themselves directors without anyone else's vote; their response brief literally argued that the only way eBay could do anything was over Jim or Craig's dead body.<sup>140</sup> As the court held, this was not protection. This was punishment, which is a clear violation of the duty of loyalty.<sup>141</sup>

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137. *Id.* at 32 (alteration in original) (internal quotation marks omitted).

138. *Id.* at 34.

139. *Id.* at 31.

140. *Id.* at 31–32.

141. *Id.* at 34. The court hints at the minority oppression issue a few more times, saying, "a rights plan cannot be used preclusively or coercively." *See id.* at 30. Here the plan was "cram[med] down" on the shareholders, a hallmark of coerciveness. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387 (Del. 1995). And it was preclusive of nearly any change in the ownership structure.

Some scholars have even noted that the case bears a strong resemblance to another minority oppression case, *Dodge v. Ford*. *See* D. Gordon Smith, eBay v. Newmark: A Modern Version of Dodge v. Ford Motor Company, THE CONGLOMERATE (Sept. 9, 2010), <http://www.theconglomerate.org/2010/09/eBay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html>; *see also* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 148 (2012) (noting the "striking similarities to *Dodge v. Ford Motor*"). In each case, a minority shareholder decides to compete. *eBay*, 16 A.3d at 1; D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 315–16 (1998). The majority shareholder punishes it under the guise of doing good for mankind. *eBay*, 16 A.3d at 35; *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (Mich. 1919). And the court finds a breach of fiduciary duty with broad dicta stating that shareholder wealth maximization is mandatory. *eBay*, 16 A.3d at 34; *Dodge*, 170 N.W. at 684. Like *Dodge v. Ford*, this is a case of minority oppression.

Still, the dicta supporting shareholder wealth maximization is worth reproducing here, because it is particularly strongly worded.

The court eases in to profit maximization, saying that “[p]romoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders.”<sup>142</sup> Nothing in this statement prohibits promoting nonfinancial value for stockholders, so this is consistent with the broad shareholder value norm.

The court continues:

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

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142. *eBay*, 16 A.3d at 33.

cant stake in craigslist, and Jim and Craig's actions affect others besides themselves.<sup>143</sup>

Breaking this down a bit, the requirement that they "promote the value of the corporation for the benefit of its stockholders" is fully consistent with the broad shareholder value norm, which requires directors to run the corporation for the benefit of shareholders. Next, the court said it "cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders." The next two lines show that this is just strongly worded dicta and that the real issue is that majority shareholders are using their power to oppress a minority shareholder—a minority shareholder that happens to be primarily concerned with its economic value rather than its social or moral values. The court says, "If Jim and Craig were the only stockholders affected by their decisions, then there would be no one to object. eBay, however, holds a significant stake in craigslist, and Jim and Craig's actions affect others besides themselves."<sup>144</sup> In other words, Jim and Craig would have been free to do as they please had it not been to oppress eBay, a minority shareholder. It is, again, the minority oppression that troubles the court.

In addition, the same principles described under the analysis of *Revlon* above apply here. The court is not ruling on whether Jim and Craig had a proper corporate mission. The court did not require Jim and Craig to monetize the site; it ruled only on whether this poison pill was properly adopted. In that context, the only issue at stake is who can or cannot own shares without facing a penalty. Any changes to the corporate culture may or may not come in the future, but all that is being decided now is who can own shares of the company's stock. The concern here is even more distant than in *Revlon*. There, an actual corporate raider was climbing down the chimney; here, the directors were hogtying eBay under the guise of corporate culture, a culture which eBay had tried to change for three years without the slightest success. eBay posed no threat to the culture. It was ownership, not culture, that was at stake. As discussed in the analysis of *Revlon* above,

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143. *Id.* at 34.

144. *Id.*

the court is right to disregard any social or moral interest in who has the proper character to own stock. Owners do not need other owners to enforce their social or moral values with regards to assigning their ownership to others, because they are inherently in a position to do so themselves. Because there are no other interests supporting the poison pill, it was struck down.

Because this case is best understood as protecting a minority shareholder from oppression and because even in its strongest form it deals only with who has the proper character to own shares, this case is consistent with an understanding that directors can consider shareholders' nonfinancial interests.

#### IV.

##### THE BROAD SHAREHOLDER VALUE NORM CONFORMS WITH EMPIRICAL EVIDENCE

Part III showed that the broad shareholder value norm overcomes the weaknesses stakeholder theories find in Delaware case law. This part shows that the norm also overcomes the weakness the shareholder wealth maximization norm finds in the empirical evidence. Shareholders value more than just profits and are willing to sacrifice wealth to promote moral and social norms even when engaging in financial transactions. Likewise, the shareholder wealth maximization norm does not accurately predict the behavior of directors and managers, who do not maximize shareholder wealth.

##### A. *Shareholders Consider Conscience When Weighing Financial Decisions*

Do shareholders weigh nonfinancial interests when engaging in economic transactions? There is strong evidence that they do.

One measure is the amount of money invested in "socially responsible" funds, which invest only in companies that meet certain moral or social guidelines. Modest investments in socially responsible funds are irrational regardless of one's views on the moral or social issues presented. A single investor's portfolio is unlikely to make any difference in the overall social issue, but that investor faces the full costs incurred by in-

vesting in a more restricted fund.<sup>145</sup> And those costs can be substantial.

Compare a profit maximizing investor with an investor that conscientiously abstains from investing in certain firms.<sup>146</sup> The socially conscious investor has fewer investment options, so he immediately faces greater risk for lack of diversification, assuming that the social principle aligns with some industry or national boundary. In contrast, the profit maximizer can invest in any firm that the conscientious investor can, but the conscientious investor cannot invest in all of the firms that the profit maximizer can. The conscientious investors' best case scenario is that the most profitable investments are within his investment sphere, but even then both investors can select them and their returns will be equal.

One study estimated the costs of limiting investments to socially responsible companies.<sup>147</sup> If an investor is building a portfolio comprised of 100 companies from the S&P 500 Index and eliminates 20% of those companies from consideration, the investor would lose around 0.17% per year. For an investment manager with \$1.0 billion under management, these missed returns sum to \$153 million over 20 years.<sup>148</sup> An empirical study on actual results found even greater losses, finding that socially conscious funds underperformed alternative investments by 3.6%.<sup>149</sup>

So if social investing is on average less profitable (high cost), and if a single investor's decisions are unlikely to make any change in the social cause (low benefit), it is irrational for

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145. See Elhauge, *supra* note 21, at 792 (pointing out that there is little value and high cost to socially responsible investment, and suggesting that it demonstrates a concern by shareholders for their nonfinancial interests).

146. This assumes both investors have equal information and skill at selecting investments. If their skill or knowledge differs, then we are no longer measuring the effect of conscientious investing.

147. Timothy Adler & Mark Kritzman, *The Cost of Socially Responsible Investing*, CFA DIGEST, May 2009.

148. *Id.* This calculation assumes an average return of 8% on the S&P 500 Index and that the investor correctly ranks 52% of the securities in that index.

149. M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 614 (2009) (citing Christopher Geczy et al., *Investing in Socially Responsible Mutual Funds* (Oct. 2005) (unpublished manuscript) (on file with the Columbia Law Review)).

any investor to invest in socially responsible funds. But that is not what the data show.

In 2012, one out of nine dollars under professional management in the United States was invested in funds following socially responsible investment guidelines.<sup>150</sup> And this figure is growing. This was a 22% increase over the previous three years, and represents more than a 10% compound annual growth rate over 17 years.<sup>151</sup> In an anonymous survey of those managing the funds, 72% attributed the increase to client demand and to management's values.<sup>152</sup> Because it is irrational to invest any money in these funds, this figure undercounts the number of shareholders with social or moral interests.

Additional evidence of shareholder preferences comes from the marketing designed to sway investors. All but three of the Fortune 50 companies have published reports or websites demonstrating their social initiatives, which may include the environment, sustainability, treatment of employees or suppliers, community service, diversity or philanthropy.<sup>153</sup>

Even if these efforts are a ploy, mere "greenwashing,"<sup>154</sup> that forty-seven of the fifty largest companies in the United States do it is evidence that the ploy sways investors. It is possible that directors publish these reports merely to boast, but it seems an odd tactic to boast to the very people whose money they are presumably squandering.<sup>155</sup>

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150. THE FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTMENT, REPORT ON SUSTAINABLE AND RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 2012 11 (2012), [http://www.ussif.org/files/Publications/12\\_Trends\\_Exec\\_Summary.pdf](http://www.ussif.org/files/Publications/12_Trends_Exec_Summary.pdf).

151. *Id.* This amounts to a total increase of 486%, while all assets under professional management in the United States have grown by 376%.

152. *Id.* at 14.

153. Some have very short websites describing their initiatives, such as Amazon.com. Others, such as AmerisourceBergen Corporation included a section on social issues within their annual report to shareholders. This figure includes those, such as American International Group (AIG), that published reports in the recent past, but seem to have discontinued the practice. The three exceptions are Fannie Mae, Freddie Mac and Warren Buffett's holding company, Berkshire Hathaway.

154. Greenwashing refers to insincere attempts to appear socially minded. See Jane Hoffman & Michael Hoffman, *What Is Greenwashing*, SCI. AM., Apr. 1, 2009, <http://www.scientificamerican.com/article/greenwashing-green-energy-hoffman/>.

155. One counterargument is that shareholders do not pay attention to this anyway—they flip straight to the financials—so these reports are market-

The result does not change if we conclude these social initiative reports are designed to influence customers, employees or other non-shareholder constituencies, although the link is more attenuated. The marketing is useful only if customers, employees or other non-shareholder constituencies are making financial decisions based on the social actions of the firm. That is, they must be willing to accept higher prices, lower rents or inferior goods in order to support causes they believe in. Boycotts are a ready example of this behavior.<sup>156</sup> Because consumers and employees in one context are shareholders in another, evidence that these groups are willing to pay a premium or accept lower profits to satisfy their conscience in a financial transaction for wages or rents implies that they will be willing to make the same tradeoff when acting as a shareholder. That is, if they are willing to sacrifice dollars for morals in the consumer context, it is evidence that they are willing to sacrifice dollars for morals in the investment context.<sup>157</sup>

Survey data supports this finding. One survey asked shareholders what should be done with an employee that produced

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ing to bring praise to the CEO. See Tara Weiss, Matthew Kirdahy & Klaus Kneale, *CEOs on CSR*, FORBES (Oct. 16, 2008, 6:00 PM), [http://www.forbes.com/2008/10/16/ceos-csr-critics-lead-corpresp08-cx\\_tw\\_mk\\_kk\\_1016ceos.html](http://www.forbes.com/2008/10/16/ceos-csr-critics-lead-corpresp08-cx_tw_mk_kk_1016ceos.html) (quoting a money manager as saying, "If the CEO of XYZ company gives shareholders' money away then who gets the honor? The company? No. The CEO."). This may be true, but we would ask who is honoring the CEO and whether that person is a stockholder somewhere. See Anabtawi, *supra* note 27, at 26–29.

156. The idea that people stop caring about social issues when engaging in business transactions is unusual in light of the apparent counterexamples. See, e.g., Jim Van Dyke, 'Bank Transfer Day', *What Really Just Happened?*, JAVELIN STRATEGY & RESEARCH BLOG (Jan. 26, 2012), <https://www.javelinstrategy.com/blog/2012/01/26/%E2%80%98bank-transfer-day%E2%80%99-what-really-just-happened/> (finding that over a three-month period 610,000 consumers moved their money to smaller banks to protest corporate practices at larger banks); Ben Brumfield, *Eat Mor Chikin: Chick-fil-A's Stance on Same-Sex Marriage Faces Test*, CNN.COM (Aug. 1, 2012), <http://www.cnn.com/2012/08/01/us/us-chick-fil-a-controversy/> (describing a national protest in which one large group boycotted and an opposing large group increased purchases because of a social issue tied to the corporation).

157. Most boycotts are generally minor and do not represent every consumer that considers the social issue, rather they reflect only those instances in which the social issue outweighed the financial costs. Because of this, merely counting the number of people involved in a boycott will undercount those that support the cause because it will not count those that support the issue but find the cost of boycotting too steep.

a profit, but did so by acting in a way considered unethical.<sup>158</sup> Respondents were told that the behavior was legal and that the employee had acted in the best interests of the corporation. 52% of shareholders said the employee should be warned against the conduct and fired if it happened again. 6% would terminate the employee immediately. Nearly all the rest, 37%, would be glad for the profits but would caution the employee about the methods used. Only 5% would reward the employee. Overall, 58% of shareholders would sacrifice profits for ethical behavior. And 95% of surveyed shareholders would prefer the employee not take actions seen as unethical, even if those actions are profitable and legal.

Survey responses may be cheap talk, but there is strong evidence that individuals value moral and social interests in their actions as well. According to IRS data, individuals donate about 3.8% of their income to charities each year.<sup>159</sup> This is a direct trade of wealth for the advancement of social or moral norms. It is also remarkable because any single donation is unlikely to make a significant difference to the overall societal or moral issue addressed, so this giving is in spite of an economic incentive to free ride.<sup>160</sup>

Experimental evidence also shows that individuals care for the interests of others, even when it involves a personal

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158. Marc J. Epstein et al., *Shareholder Preferences Concerning Corporate Ethical Performance*, 13 J. BUS. ETHICS 447, 450 (1994).

159. *Table 2.1 Returns with Itemized Deductions: Sources of Income, Adjustments, Itemized Deductions by Type, Exemptions, and Tax Items, by Size of Adjusted Gross Income, Tax Year 2012*, IRS (May 27, 2015), <http://www.irs.gov/pub/irs-soi/12in21id.xls>. Even the lowest giving group, which includes taxpayers between \$500,000 and \$1,000,000, gave on average 2.46%.

160. One objection to this evidence is that this moral or social interest is selected by the shareholder, rather than the directors, so it is not evidence that directors should have the power to choose moral and social interests to advance. However, to the extent that the directors' interests are a form of self-dealing, the directors already have discretion to pursue self-dealing in various forms beyond contributions to pet social causes. To the extent that the director is honestly attempting to make a moral decision, the benefits of making these decisions without coordination would likely outweigh the information costs for shareholders to be involved in every minor decision. But in addition, this argument is in its weakest form when attacking charitable contributions because most states already expressly allow charitable contributions by corporations.

cost.<sup>161</sup> Behavioral economists often conduct experiments such as the “dictator game.” In this game one player is given a pot of money and asked to unilaterally decide how much to keep and how much to anonymously give to another, anonymous player. The second player must accept the result. The game is played with actual money, and the players get to keep their winnings. Because the game is fully anonymous, there are no social repercussions to the dictator’s decision. The wealth maximizing result is for the deciding party to keep the full amount. But on average deciding parties give between 20–30%.<sup>162</sup> Similar results have been found when the amount of money is increased and when participants are given more time to understand the payoff structure.<sup>163</sup>

These results have been repeated across a broad range of cultures.<sup>164</sup> And recent work in neuroeconomics provides further evidence that our preferences for altruism and social interests are hard-wired in our physiology.<sup>165</sup>

Professor Lynn Stout has, tongue in cheek, pointed to evidence from psychology to further make the point, arguing that a person that maximizes profits in their daily life at the expense of all other values would meet the American Psychiatric Association’s diagnosis for a sociopath.<sup>166</sup> She points out that “only 1% to 3% of the U.S. population suffers from Antisocial Personality Disorder, and many of these individuals are safely locked away in prison.”<sup>167</sup>

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161. Profs. Blair and Stout have done excellent work making this point. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1760 (2001).

162. Joseph Henrich et al., “Economic Man” In *Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAVIORAL & BRAIN SCI. 795, 798 (2005). In some cultures the most common result is to divide the money evenly.

163. *Id.*

164. *Id.* at 801. For example, one experiment in a small Polynesian culture found the same result using cigarettes instead of money.

165. Salomon Israel et al., *The Oxytocin Receptor (OXTR) Contributes to Prosocial Fund Allocations in the Dictator Game and the Social Value Orientations Task*, PLOS ONE (May 20, 2009), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0005535#pone-0005535-g005>.

166. Lynn A. Stout, *Taking Conscience Seriously*, in MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 1, 5 (Paul J. Zak, ed., Princeton Univ. Press, 2007), available at <http://ssrn.com/abstract=929048>.

167. *Id.* at 6.

Shareholders are willing to forego financial benefits to satisfy their conscience. This result is confirmed in actual investment decisions, behavioral economics, anthropology, neuroeconomics, psychology, marketing, and a long history of boycotts. It is also evident when we consider the actions of successful directors and officers when serving shareholders.

If shareholders at times prefer their nonfinancial interests over their financial interests, we should allow directors to consider the shareholders' nonfinancial interests.

B. *Directors and Officers Consider Conscience When Weighing Financial Decisions*

We have seen that the shareholder wealth maximization norm fails to account for shareholders willingness to forgo financial benefits to satisfy social and moral norms. This section will show that directors and officers already consider social and moral norms, in contrast to the requirements of the shareholder wealth maximization norm.

The question is not whether directors always try to maximize shareholder wealth. The vast literature on agency costs shows that directors frequently digress from shareholder wealth maximization to renovate their offices or pad their own compensation.<sup>168</sup> The narrow question here is whether direc-

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168. Warren Buffett told the following story at a panel discussion in 1985.

I have a friend who is the chief fundraiser for a philanthropy. Been that for about five years. And he calls on corporate officers and he has a very simple technique when he calls. All he wants to do is take some other big shot with him who will sort of nod affirmatively while he meets with the CEO. He has found that what many big shots love is what I call elephant bumping. I mean they like to go to the places where other elephants are, because it reaffirms the fact when they look around the room and they see all these other elephants that they must be an elephant too, or why would they be there? So when you see the Bohemian Club and the Business Round Table and things like that, it gives you some insight into what moves people. So my friend always takes an elephant with him when he goes to call on another elephant. And the soliciting elephant, as my friend goes through his little pitch, nods and the receiving elephant listens attentively, and as long as the visiting elephant is appropriately large, my friend gets his money. And it's rather interesting, in the last five years he's raised about 8 million dollars. He's raised it from 60 corporations. It almost never fails if he has the right elephant. And in the process of raising this 8 million dollars from 60 corporations from people who nod and say

tors and officers take social and moral norms into account. We will begin by looking at what they say, then at what they do.

Directors and officers often speak about the importance of doing the right thing without focusing on the bottom line. Larry Page, founder of Google, has said, "If we were motivated by money, we would have sold the company a long time ago and ended up on a beach."<sup>169</sup> This sentiment is common among directors. One survey found that directors are almost six times more likely to serve out of a sense of service or desire to give back to the community than they are for compensation.<sup>170</sup>

Mark Zuckerberg, chairman and CEO of Facebook, said, "Simply put: we don't build services to make money; we make money to build better services."<sup>171</sup>

John Mackey, CEO of Whole Foods, echoes this sentiment, "Making high profits is the means to the end of fulfilling Whole Foods' core business mission. We want to improve the health and well-being of everyone on the planet through

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that's a marvelous idea, its prosocial, etc., not one CEO has reached in his pocket and pulled out 10 bucks of his own to give to this marvelous charity. They've given 8 million dollars collectively of other people's money. And so far he's yet to get his first 10-dollar bill. So far, the Salvation Army has done better at Christmas than essentially he's done with all these well-reasoned arguments that lead people to spend other people's money.

*quoted in* John C. Coffee, Jr., Luis Lowenstein & Susan Rose-Ackerman, *KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER* 14 (1988) *cited by* William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, *BUSINESS ASSOCIATIONS* 286 (6th ed. 2006).

169. *Meet the Google Guys*, TIME (Feb. 12, 2006), <http://content.time.com/time/magazine/article/0,9171,1158956,00.html#ixzz2EO3YABft> (quoting Larry Page in an interview with Adi Ignatius). It's difficult to imagine Google changing its motto to "Don't be evil, unless it's profit maximizing."

170. Survey, *Boards Confront an Evolving Landscape* PwC's ANNUAL CORPORATE DIRECTORS SURVEY 1 (2013). Overall, 54% serve for intellectual stimulation, 22% to stay occupied, 17% to give back, 4% for the reputational benefits, and 3% for the money. If taken literally, this sense of service reflects on the purpose of the directors, rather than their purpose for the shareholders. But there are two indirect implications: first, that directors are looking for ways to improve the community; second, directors don't see financial gains as paramount in their own lives.

171. Facebook, Inc., Registration Statement (Form S-1) at 68 (Feb. 1, 2012). While one may argue such statements are backdoor marketing to consumers or potential employees, this statement was 68 pages into an SEC filing, which few shareholders will even read.

higher-quality foods and better nutrition, and we can't fulfill this mission unless we are highly profitable."<sup>172</sup> He also said, "I believe [social] programs would be completely justifiable even if they produced no profits and no P.R."<sup>173</sup>

This feeling isn't new or limited to young entrepreneurs. Johnson & Johnson's credo was literally carved in stone at their New Jersey headquarters in 1943; it "actually lists the constituents of the company in priority order. Customers are first; shareholders are last."<sup>174</sup>

Legal scholars will be familiar with Henry Ford's vision to cut dividends in order to benefit employees by "employ[ing] still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."<sup>175</sup>

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172. John Mackey, *Rethinking the Social Responsibility of Business*, WHOLE FOODS MARKET, <http://www.wholefoodsmarket.com/blog/john-mackeys-blog/rethinking-social-responsibility-of%C2%A0business>.

173. *Id.*

174. McKEOWN, *supra* note 78, at 53 (2014). Reference to this credo is what led company executives to sacrifice wealth maximization in favor of averting customer tragedy by recalling potentially poisoned Tylenol from distribution in 1982.

175. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (Mich. 1919). Ford's testimony at trial gave the judge "the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken." *Id.* at 683–84. Ford previously told the editor of the *Detroit News* that "I do not believe that we should make such awful profits on our cars. A reasonable profit is right, but not too much." CAROL GELDERMAN, *HENRY FORD: THE WAYWARD CAPITALIST* 81 (1981), quoted by Smith, *supra* note 141, at 317. This sentiment recalls Milton Friedman's description of corporate criticisms half a century later regarding "the already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled." Friedman, *supra* note 25, at 33.

While some have questioned Ford's sincerity, his life reflects a deep interest in philanthropy and social engineering. See *The American Experience: Henry Ford* (PBS television broadcast Jan. 29, 2013) (transcript available online at: <http://www.pbs.org/wgbh/americanexperience/features/transcript/henryford-transcript/>).

One of the more notable causes to his credit is doubling most of his workers' wages to \$5 per day; though in an unusual PR move, Ford Motor Company's corporate website rejects the PR benefits this might create, clarifying that his primary objective was to reduce worker attrition. *Henry Ford's \$5-a-Day Revolution*, FORD MOTOR CORPORATION, (March 12, 2011), <http://corporate.ford.com/news-center/press-releases-detail/677-5-dollar-a-day>

John Mack, CEO of Morgan Stanley, claimed a responsibility for the environment, saying, “We believe that we have a responsibility to manage and leverage our resources—and the work we do as one of the world’s leading financial services firms—in a way that promotes a healthy environment and community.”<sup>176</sup> And Mike Kowalski, CEO of Tiffany & Co., asserts that benefiting others is central to corporate purpose, saying, “A public company does not exist as a matter of right, it exists to serve—its customers, shareholders, employees and civil society at large.”<sup>177</sup>

A full accounting of these declarations (or puffery) could fill several articles, but it is undeniable that many directors and officers publicly declare they are not operating under the shareholder wealth maximization norm.<sup>178</sup>

These are not rogue statements made without company approval. As discussed above, all but three of America’s fifty largest companies have published reports or dedicated websites highlighting their social initiatives, which may include the environment, sustainability, treatment of employees or suppliers, community service or philanthropy.<sup>179</sup> The corporations themselves are publicly rejecting the shareholder wealth maximization norm.

But are these statements sincere? Enron won several awards for its social initiatives.<sup>180</sup> Perhaps these reports and

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[<http://ophelia.sdsu.edu:8080/ford/03-12-2011/news-center/news/press-releases/press-releases-detail/677-5-dollar-a-day.html>].

176. John Mack, CEO of Morgan Stanley, *quoted in* Weiss, *supra* note 155.

177. Mike Kowalski, CEO of Tiffany & Co., *quoted in* Weiss, *supra* note 155.

178. Jack Welch, the former CEO of GE who is considered by some to be a pillar of shareholder wealth maximization, is sometimes attributed to saying shareholder wealth maximization is the “dumbest idea in the world.” In fact, he said, “On the face of it, shareholder value is the dumbest idea in the world . . . Shareholder value is a result, not a strategy. . . . Your main constituencies are your employees, your customers and your products.” Jack Welch, *quoted by* Francesco Guerrera, *Welch Condemns Share Price Focus*, FIN. TIMES, Mar. 12, 2009 <http://www.ft.com/intl/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz3jrL9KMEY>. In context these statements reject shareholder wealth maximization as a strategy for accomplishing long-term success, but they do not clearly reject shareholder wealth maximization as the proper purpose of a corporation.

179. *See supra* note 153.

180. *See* Will Smale, *Do Firms Really Need a Social Policy?*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/6102108.stm> (last updated Dec. 1, 2006, 12:13 AM).

quotes are mere greenwashing. The evidence suggests otherwise. Directors and officers are rejecting the shareholder wealth maximization norm through their actions as well.

At the outset we should recognize that it's logically impossible to separate what the company did for profit and what it did out of conscience. If the action is known, it can be presumed that the firm knew the action would become known. If the firm knew the action would become known, we can always argue this publicity was the real intent.<sup>181</sup> In other words, any example we might use as evidence must be known, and knowledge of the event diminishes its usefulness as evidence.

In addition, some social initiatives may be profit improving but not profit maximizing, which further complicates any distinction between promoting shareholders' financial and their nonfinancial interests. Empirical research has found mixed results, sometimes finding that social initiatives increase firm value and sometimes finding these initiatives decrease firm value.<sup>182</sup> For our purposes, the results are less important than the intention.

One survey found that corporate philanthropy increased 59% from 2007 to 2012, with companies "often cit[ing] a link between business performance and giving budgets."<sup>183</sup> It is a rare businessman that disagrees; an anonymous survey by McKinsey & Company found that only 6% of CFOs and 7% of investment professionals believe social initiatives reduce a company's value.<sup>184</sup> So some skepticism is required when con-

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181. Peter M. Madsen & Zachariah J. Rodgers, *Looking Good by Doing Good: The Antecedents and Consequences of Stakeholder Attention to Corporate Disaster Relief*, 36 STRATEGIC MGMT. J. 776, 791 (2015).

182. Abigail McWilliams, Donald S. Siegel & Patrick M. Wright, *Corporate Social Responsibility: Strategic Implications*, 43 J. MGMT STUDIES 1, 11-12 (2006) ("These studies usually attempted to answer the question: do firms do well by doing good? The reported results have ranged from showing a negative relation between [corporate social responsibility] and firm performance, to showing no relation, to showing a positive relation . . . There is little consistency in these findings.").

183. MICHAEL STROIK, CECF, IN ASSOCIATION WITH THE CONFERENCE BOARD, GIVING NUMBERS 1, 10 (2013), [http://cecp.co/pdfs/giving\\_in\\_numbers/GIN2013\\_Web\\_Final.pdf](http://cecp.co/pdfs/giving_in_numbers/GIN2013_Web_Final.pdf). See also *id.* at 13 ("Some companies cited greater than expected . . . marketing sales results as reasons for higher giving levels in 2012.").

184. Sheila Bonini, Noémie Brun & Michelle Rosenthal, *Valuing Corporate Social Responsibility: McKinsey Global Survey Results*, MCKINSEY & CO., Exhibit 1,

sidering any evidence provided one way or the other on directors' true motives.

We can alleviate the publicity problem somewhat by looking at anonymous survey results. If the survey is anonymous, the respondents cannot engage in puffery to add specific value to her company by inflating the importance of social initiatives.

One anonymous survey found that 59% of investment professionals and 82% of CFOs already integrate environmental, social or governance considerations into evaluations of their corporate projects.<sup>185</sup>

Another asked corporate respondents what percent of their total philanthropic budget was used for various purposes. The responses were aggregated into an average, and the data showed that only three percent of philanthropy budgets were used primarily to benefit the corporation.<sup>186</sup> In contrast, 52% of these budgets were spent with "little or no business benefit" expected.<sup>187</sup> That is, each dollar corporations spend on philanthropy is 17 times more likely to go to causes that provide no expected benefit.

Another survey supported this conclusion, finding that 4.5% of executives expect no benefit at all from any of their social programs.<sup>188</sup> Combining these two surveys, 52% of spending is without any expectation of business benefit, and 4.5% of firms spend their entire philanthropic budget without an expectation of business benefit. This is significant given that surveys have found companies in the United States con-

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(Feb. 2009), [http://www.mckinsey.com/insights/corporate\\_finance/valu ing\\_corporate\\_social\\_responsibility\\_mckinsey\\_global\\_survey\\_results](http://www.mckinsey.com/insights/corporate_finance/valu ing_corporate_social_responsibility_mckinsey_global_survey_results).

185. *Id.* at Exhibit 6.

186. Stroik, *supra* note 183, at 21.

187. *Id.*

188. Economist Intelligence Unit, *Global Business Barometer*, THE ECONOMIST 6 (Jan. 16, 2008), [http://www.economist.com/media/pdf/20080116\\_CSRResults.pdf](http://www.economist.com/media/pdf/20080116_CSRResults.pdf). This survey asked about the primary benefits of the firms' corporate responsibility policy, to which the response was, "None of the above; Our corporate responsibility policy does not benefit our business." *Id.* at 6. This could also be interpreted as criticism of the policy, though that would still support the conclusion that the policy is implemented despite its costs.

tribute about 1% of pre-tax profits to charity, amounting to billions of dollars given without an expectation of return.<sup>189</sup>

These estimates are reflected in the attitudes of directors and officers. A survey of 1122 senior business executives found that only 31.4% of organizations agreed with Milton Friedman<sup>190</sup> that the corporate responsibility of their business is to maximize profits.<sup>191</sup> In contrast, an aggregate of 61.4%<sup>192</sup> provided some definition other something more than Friedman's view of maximizing shareholder wealth, including 16.4% who went so far as to say corporate responsibility requires "sacrificing some profits in order to do the right thing."<sup>193</sup> In addition, 22.6% said corporate responsibility "is meaningless if it includes things that companies would do anyway," which presumably includes profit maximizing.<sup>194</sup>

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189. Stroik, *supra* note 183, at 6. "America's Largest Companies" is defined to include the 60 survey respondents of the largest 100 companies in the Fortune 500 list. *Id.* at 4. The exact percentage of pre-tax profits contributed to charity, 0.96%, is overstated if responding to the survey is positively correlated with giving. *See also id.* at 10 (showing that among all respondents the rate stayed constant at around 1% of pre-tax profits from 2007 through 2012).

190. Friedman, *supra* note 25, at 33.

191. Economist Intelligence Unit, *supra* note 188, at 2.

192. This does not include the 7.2% who answered "Providing welfare through employment and corporate tax payments." Milton Friedman said corporations must follow the law, and a definition of corporate social responsibility that is limited to paying taxes would be fully in line with Friedman.

193. *Id.* The other responses for defining corporate responsibility were, "Taking proper account of the broader interests of society when making business decisions" (38.4%), "Maximising profits and serving the interests of shareholders" (31.4%), "Providing welfare through employment and corporate tax payments" (7.2%) and "Supporting initiatives that directly benefit society but do not directly benefit shareholders" (6.6%). *Id.* It is noteworthy that the option for maximizing profits includes "serving the interests of shareholders," which would include the norm proposed by this article.

There are two quick critiques of this survey. First, it was international, including only 19% in the United States and Canada. *Id.* at 1. This may overstate the same response if the survey were limited to United States executives. Second, it asks only for a definition of corporate responsibility, not whether the corporation acts on that definition. *Id.* at 2. The following page in the survey obviates this latter concern, finding that 87.5% of the respondents' corporations consider corporate responsibility to be a moderate to very high priority. *Id.* at 3.

194. *Id.* at 7.

These results are more pronounced outside the United States. A survey of directors of Australian companies found that only 6.6% believed that “acting in the best interests of the company required them to consider the long-term interests of shareholders only.”<sup>195</sup>

The American Law Institute in its summary of the law observed that “corporate decisions are not infrequently made on the basis of ethical considerations even when doing so would not enhance corporate profit or shareholder gain.”<sup>196</sup>

There is strong evidence that directors also rely on social and moral norms in their personal decision making. A Stanford study on MBA graduates across five business schools found that more than 90% would accept a smaller pay check to work for an organization with a better reputation for corporate social responsibility and ethics.<sup>197</sup> When prioritizing what they looked for in a job, MBAs were most interested in the intellectual challenge; the financial package was about 80% as important, and the firm’s reputation for ethics and caring about employees was only three percent behind, at 77%.<sup>198</sup>

Matriculation at business schools also supports this trend. Thomas Cooley, the dean of New York University’s Stern Business School, said in 2008, “Demand for CSR [corporate social responsibility] activities has just soared in the past three

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195. Meredith Jones et al., *Company Directors’ Views Regarding Stakeholders*, CTR FOR EMP’T AND LABOUR RELATIONS LAW, 1, 5 (2007), [http://www.law.unimelb.edu.au/files/dmfile/Company\\_Directors\\_Views\\_Regarding\\_Stakeholders\\_Research\\_Report\\_23\\_October20072.pdf](http://www.law.unimelb.edu.au/files/dmfile/Company_Directors_Views_Regarding_Stakeholders_Research_Report_23_October20072.pdf).

196. AM. LAW INSTIT. PRINCIPLES OF CORP. GOVERNANCE § 2.01(b) cmt. h (1994).

197. David Bruce Montgomery & Catherine A. Ramus, *Corporate Social Responsibility Reputation Effects on MBA Job Choice*, STANFORD GRADUATE SCH. OF BUS. (2003), <http://www.gsb.stanford.edu/faculty-research/working-papers/corporate-social-responsibility-reputation-effects-mba-job-choice>. On average, respondents were willing to give up \$13,700 per year, or 11.9% of their expected income, to work for a firm that cared about employees and other stakeholders and was committed to sustainability, *id.* at 14. The standard deviation was \$9,600, which suggests actual responses vary widely. *Id.*

198. *Id.* See also Alice LaPlante, *MBA Graduates Want to Work for Caring and Ethical Employers*, STANFORD GRADUATE SCH. OF BUS., <http://csi.gsb.stanford.edu/mba-graduates-want-to-work-for-caring-ethical-employers> (last visited Aug. 26, 2015).

years.”<sup>199</sup> Today’s MBAs are tomorrow’s directors, so this is strong evidence that directors care about social initiatives.<sup>200</sup>

Perhaps most surprising is that even those supporting shareholder wealth maximization occasionally recognize that it isn’t descriptively accurate. Prof. Bainbridge, who has fought with unrivalled valiance and wit to defend shareholder wealth maximization, once conceded that, “no one other than the occasional law or economics professor seriously expects managers to leave their ethical and moral concerns at home.”<sup>201</sup> Even Milton Friedman, the champion of wealth maximization, left room for directors to conform to “the basic rules of society, both those embodied in law and those embodied in ethical custom.”<sup>202</sup>

It is clear that shareholder wealth maximization does not accurately predict or constrain director behavior. A theory is only as good as its ability to predict accurate outcomes. A rule is only as good as its ability to constrain behavior. The shareholder wealth maximization norm fails on both counts. It is empirically less valid than the broad shareholder value norm.

## V.

### THE BUSINESS JUDGMENT RULE REVISITED

If we agree that under some circumstances directors must consider shareholders’ moral or social interests, then we find one additional, surprising result.

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199. *Just Good Business*, THE ECONOMIST, Jan. 17, 2008, <http://www.economist.com/node/10491077>.

200. If directors care about social issues, it is possible they would prefer to work for shareholders that share their values. This is an independent reason to allow consideration of other shareholder interests, because these shared values can create additional gains to both parties.

It is easy to underestimate the value that directors place on having the “right” shareholders. The first author once participated in a public offering in which the directors left on the table around \$25 million, or about 30% of the deal value, on their belief that they would gain a better type of common stock shareholder.

201. Bainbridge, *supra* note 77, at 1439.

202. Friedman, *supra* note 25, at 33. David Millon, a thoughtful, eloquent voice that typically opposes shareholder wealth maximization said, “corporate law has always understood—though usually only dimly—that truly relentless pursuit of shareholder wealth maximization is inconsistent with actual business practice and socially unacceptable in any event.” Millon, *supra* note 20, at 1374.

Suppose there is some scenario when directors are required to act upon moral or social interests, then in making any decision they must ask, "Is this that situation?" Which means that moral and social interests must be considered in each decision, even if only to ask whether we have reached an extreme situation. This means that if a director errs in balancing moral or social interests, this is an error of degree, not of kind.

The business judgment rule limits review of business decisions made in the ordinary course. For example, courts will not overturn a business decision that is an error in degree. If we thought we could make more money doing *X* than *Y*, but we erred, then the court will not review this error of degree.

Moving back to moral and social norms, because it is proper to consider moral or social interests, even if only to determine whether they are the extreme case, then an error when making these decisions is an error of degree that will not be reviewable by the courts. Doing so would require the court to exercise business judgment, which it is not well equipped to do. In other words, stakeholder theorists that would like corporations to have broad discretion to do social good do not need to prove as much as they attempt to. Instead, showing that moral and social interests are properly considered is sufficient to show that any errors here are proper business judgments. This prevents judicial review of these decisions. Stakeholders can reach the moral and social goals they seek by meeting the much lower bar set by the broad shareholder value norm.

#### CONCLUSION

The broad shareholder value norm resolves the conflict between the shareholder wealth maximization norm and theories that would consider the interests of employees, suppliers, local communities and the environment. It fits better into our theories about what a corporation is, it fits better into our case law, and it fits better over the empirical evidence of what shareholders actually want and how directors actually behave.

Still, more work needs to be done in this field. Surprisingly, there is a lack of survey data asking shareholders whether social and moral interests should be considered by directors. This survey data would be helpful, as would empiri-

cal studies of corporate behavior. Studies could focus on the observance of social or moral norms by sole proprietorships, in which the decision maker faces the full economic consequences of his actions. With better empirical evidence, we could establish the extent to which shareholders value social and moral norms and improve our theories of governance, sharpen our proposals for reform, and increase overall corporate efficiency.

While each board must determine how much weight is to be placed upon non-financial considerations in shareholder utility functions, this weight will typically be greater than zero—it is time to drop the restricting premises to the contrary. Likewise, we need not overcorrect, as stakeholder theories do, by expanding the set of stakeholders with valid claims on the firm in order to allow moral considerations in business decisions. When we recognize the broad values that shareholders hold, the role of conscience in corporate decision making is already inevitable. It's time we openly recognize this.