FIDUCIARY DUTY AND SOCIAL RESPONSIBILITY: IMPLICATIONS OF THE BUSINESS ROUNDTABLE'S STATEMENT ON THE FIDUCIARY DUTIES OF BOARDS OF DIRECTORS TO CORPORATE STAKEHOLDERS OTHER THAN SHAREHOLDERS.

MEGAN E. WEEREN*

CONTENTS

I. INTRODUCTION ... 157
A. *A Review of Delaware Fiduciary Law* ... 160
1. Duty of Care ... 162
2. Duty of Loyalty ... 162
B. *Discussion Roadmap* ... 164
II. THE METAMORPHOSIS OF THE CORPORATION ... 165
A. *Stakeholder Primacy: Misfortune for Shareholders, Upswing for Other Stakeholders* ... 167
B. *The Rise of Shareholder Primacy* ... 168
C. *The Reemergence of a Broader Corporate Purpose* ... 170
III. HOW MIGHT THE BUSINESS ROUNDTABLE STATEMENT BE WOVEN INTO LAW? ... 172
A. *Codifying the Business Roundtable Statement into Delaware Law* ... 172
B. *Adopting a Permissive Constituency Statute in Delaware* ... 174
C. *Maintaining Delaware Corporate Law, Allowing for Informal and Collateral Benefits to Stakeholders* ... 179
IV. *SHOULD* THE BUSINESS ROUNDTABLE STATEMENT BE WOVEN INTO LAW? ... 183
V. CONCLUSION ... 186

I. INTRODUCTION

For Nobel economist Milton Friedman, it was simple: "There is one and only one social responsibility of business . . . to engage in activities designed to increase its profits." [1] Companies must obey the law, Friedman noted, but beyond that, a company's job is to earn a profit for its shareholders.[2] In the American economy, Friedman's view prevailed.[3] For the last fifty years,

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[1] Milton Friedman, *A Friedman Doctrine-The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times Mag., Sept. 13, 1970, at 32, 126.

[2] *See id.*

[3] Steve Denning, *Making Sense of Shareholder Value: 'The World's Dumbest Idea'*, Forbes (July 17, 2017, 07:29 PM), https://www.forbes.com/sites/stevedenning/2017/07/17/making-sense-of-shareholder-value-the-worlds-dumbest-

Friedman's philosophy of "shareholder primacy" has been the core operating principle of public companies, both on Wall Street and in the corporate boardroom. The ideology of shareholder primacy defined American corporate culture. Indeed, it was this mindset that informed corporate raiders like the late T. Boone Pickens,[4] and contributed to an unwavering focus on quarterly earnings reports.[5] From economics, to law,[6] to pop culture,[7] shareholder primacy and the idea that "greed is good" is the lens through which American business is viewed.

Shareholder primacy is the principle that the board of directors of for-profit, business corporations have a fiduciary duty to shareholders that takes priority over whatever duties they might have to other corporate constituencies, such as consumers, employees, and the communities in which their business is located. Shareholder primacy gives shareholders significant authority in corporate affairs such as the power to elect directors, amend corporate charters and hold shareholder referenda on business decisions.

By the mid-1980s, the doctrine of shareholder primacy had become settled law and policy. The courts in the state of Delaware—home to more than 66% of all Fortune 500 companies[8]—began to issue key decisions, and the legislature enacted key statutes, firmly establishing the board's duty to its stockholders. Also during this period, a coalition of investors, business leaders, academics, economists, lawyers, and policy makers coalesced around the concept.[9] Finally in 1997, the Business Roundtable, an influential lobbying group composed of chief executives of the nation's largest corporations,[10] enshrined the philosophy of shareholder primacy in its Statement on Corporate Governance: "the paramount duty of management and of boards of directors is to the corporation's stockholders."[11] Each subsequent version of the Statement, published over the next twenty years, stated that corporations exist principally to serve their shareholders.

Times change.

In August 2019, 181 members of the Business Roundtable, including the leaders of Apple, JPMorgan Chase, and Walmart eschewed decades of long-held corporate orthodoxy in an attempt to redefine "the purpose of a corporation."[12] Breaking with the established idea that the primary responsibility of a corporate board and senior management should be to maximize shareholder value the Business Roundtable issued a statement (the "Statement") arguing that instead, corporate

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idea/?sh=1de49b6a2a7e. For a detailed report on corporate governance theory across European states see Int'l Fin. Corp., A Guide to Corporate Governance Practices in the European Union 13-108 (2015).

[4] *See* Editorial Board, *T. Boone Pickens Jr.*, Wall St. J., (Sept. 11, 2019, 7:15 PM), https://www.wsj.com/articles/t-boone-pickens-jr-11568243724.

[5] David Millon, *Radical Shareholder Primacy*, 10 U. St. Thomas L.J. 1013, 1018 (2013).

[6] *See generally* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 Minn. L. Rev. 1951, 1990 (2017); Dodge v. Ford Motor Co., 170 N.W. 668, 679 (Mich. 1919).

[7] Wall Street (American Entertainment Partners & Amercent Films 1987); Wolf of Wall Street (Red Granite Pictures et al. 2013).

[8] Brett Melson, *200,000 New Delaware Companies in 2017*, Delaware Inc. (Aug. 28, 2018), https://webcache.googleusercontent.com/search?q=cache:kQW4BydVFJAJ:https://www.delawareinc.com/blog/new-delaware-companies-2017/+&cd=11&hl=en&ct=clnk&gl=us.

[9] David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 Bus. Law. 659, 662 (2019).

[10] Signatory companies include Amazon, American Express, Goldman Sachs, Lockheed Martin, Pfizer Inc., Walmart, etc. *See* Press Release, Bus. Roundtable, Statement on the Purpose of a Corporation (Aug. 19, 2019) (on file with author), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf.

[11] Bus. Roundtable, Statement on Corporate Governance 3 (1997), http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf.

[12] Bus. Roundtable, *supra* note 10, at 1.

boards must make "a fundamental commitment to all . . . stakeholders."[13] This reimagined idea of a corporation dispenses with the notion that for-profit corporations function first and foremost to serve their shareholders and maximize profits. Rather, investing in employees, delivering value to customers, dealing ethically with suppliers, and supporting outside communities are goals to be taken into account when setting corporate policy, according to the Statement.

Though a shock to the system, this change was not unexpected. With corporate leaders facing widening social and political pressure in areas such as corporate governance, the environment, and what many see as a failure of capitalism to serve the broader needs of society, many believe the Statement to be a reflection of the current business environment. This shift in corporate priorities comes at a moment of increasing distress in corporate America as big companies face mounting global discontent over income inequality, harmful products, and poor working conditions.[14]

The Statement received intensive media coverage across the United States.[15] Skeptics aptly point out that the Business Roundtable did not accompany its Statement with a plan of action.[16] Indeed, the Business Roundtable's decision to change the definition of corporate purpose is not legally binding. Although the organization may have decided to not put shareholders first, in virtually all 50 states shareholder primacy is still the law.

Approximately 66% of all Fortune-500 companies are organized under Delaware corporate law.[17] For this reason, and because the Delaware courts have a body of well-developed case law concerning the duties of directors of Delaware business corporations, this Paper will focus on Delaware corporate law and governance in addressing the challenge posed by The Business Roundtable's 2019 Statement. In the exercise of their authority and discretion, should the Board of Directors of for-profit, business corporations be deemed to have a fiduciary duty to take into account and act to benefit the interests of all stakeholders in the corporation, including non-

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[13] *Id.*

[14] Some economic experts suggest business leaders are feeling pressure to rethink the role of business in society for a number of reasons. First, social norms are changing and expectations from employees, customers, and even investors are rising fast. Second, there's a growing realization that a focus on one key stakeholder or metric is flawed. Third, investors like Blackrock's CEO, Larry Fink, are increasingly pressing companies to focus on their purpose and how they contribute to society. But fourth, and perhaps most importantly, the world faces enormous, thorny challenges that business is feeling: climate change, growing inequality, awareness CEOs make hundreds of times more than their employees, water and resource scarcity, soil degradation and loss of biodiversity, and more. These issues require systemic efforts, cooperation, and pricing of those "externalities"—like pollution and carbon emissions—that business has been able to push off to society. The current shareholder-obsessed system is not fit for this purpose, critics suggest. Individual profit-maximizing businesses will not be incentivized to tackle shared global challenges. *See* Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, Harv. Bus. Rev., Aug. 30, 2019, https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric.

[15] *See, e.g.*, David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. Times (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html; Alan Murray, *America's CEOs Seek a New Purpose for the Corporation*, Fortune (Aug. 19, 2019), https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/; Jim Ludema & Amber Johnson, *The Purpose of the Corporation? Business Roundtable Advances the Conversation, Now We all Need to Contribute*, Forbes (Aug. 20, 2019), https://www.forbes.com/sites/amberjohnson-jimludema/2019/08/20/the-purpose-of-the-corporation/#a0cf05c3846c; *Should Business Put Social Impact Above Profit?*, Aljazeera (Aug. 19, 2019), https://www.aljazeera.com/ajimpact/businesses-put-social-impact-profit-190819184121676.html; *Corporate Leaders Scrap Shareholder-first Ideology*, BBC News (Aug. 19, 2019), https://www.bbc.com/news/business-49400885.

[16] *See* Winston, *supra* note 14.

[17] *About the Division of Corporations*, Delaware.gov, https://corp.delaware.gov/aboutagency/ (last visited Jan. 31, 2021).

shareholder stakeholders, and if so, does this affect or change their fiduciary duties of loyalty and care to shareholders?

A. A Review of Delaware Fiduciary Law

Under current law, a director of an United States corporation still owes her fiduciary duty to the corporation and its stockholders. In fact, just prior to the Roundtable's issuance of the 2019 Statement, Delaware's highest court reaffirmed the long-held doctrine that corporate management is beholden to shareholders alone.[18] Is such a fiduciary-duty mandate inconsistent with the Roundtable's new commitment to other constituencies?

How this tension will be resolved remains to be seen.[19] Such a change in corporate culture has the potential to prompt new developments in the law, potentially leading to new rules about the factors a board of directors must take into account when considering the best interests of company shareholders. Such change may lead to more litigation over board decisions. Many of these legal disputes would likely be heard in the Chancery Court of Delaware, the state under whose laws more major U.S. corporations are incorporated than any other.

Delaware has served as the premier state for the incorporation of business entities since the early 1900s. Why does the second smallest state in the United States occupy such a large place in the world of business entities? A number of factors have led to Delaware's dominance in business formation.

First, the statute—the Delaware General Corporation Law ("DGCL")- is the foundation on which Delaware corporate law rests.[20] Lauded for offering "predictability and stability,"[21] DGCL is shaped by the Delaware General Assembly based on advice provided by The Council of the Corporation Law Section of the Delaware State Bar Association, a group comprised of more than 500 Delaware attorneys, judges, and academics.[22] "The Delaware legislature every year reviews the DGCL to ensure its ability to address current issues."[23] The DGCL is not a detailed, prescriptive "company law." Instead, the DGCL includes a select number of mandatory requirements "to protect investors and otherwise provide[] flexibility for corporations to carry out their business."[24]

Second, the courts—as important as the DGCL itself are the courts that interpret it. Delaware is hailed for its judicial system and the expert and impartial judges of the Court of Chancery that decide its corporate cases.[25] Unlike in many other states, Delaware corporate law

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[18] Marchand v. Barnhill, 212 A.3d 805, 808 (Del. 2019).
[19]For a thought-provoking reflection on the Business Roundtable Statement one year later, *see Stephen M. Bainbridge*, The Business Roundtable's Statement on Corporate Purpose One Year Later, DIRECTORS & BOARDS, https://www.directorsandboards.com/articles/singlebusiness-roundtable%E2%80%99s-statement-corporate-purpose-one-year-later (last visited Jan. 31, 2021).
[20] *See* Del. Code Ann. tit. 8 (2020).
[21] *Why Businesses Choose Delaware,* Delaware.gov, https://corplaw.delaware.gov/why-businesses-choose-delaware/ (last visited Jan. 31, 2021).
[22] *About the Section of Corporation Law*, Del. State Bar Ass'n, https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/ (last visited Jan. 31, 2021).
[23] *Why Businesses Choose Delaware*, *supra* note 20.
[24] *Id.*
[25] Article IV, Section 3 of the Delaware Constitution requires that that state's judiciary be nearly equally balanced between Democrats and Republicans. The U.S. Supreme Court granted review of this recently. *See* Michael C. Dorf, *If There Are No "Obama Judges" or "Trump Judges," Does the Constitution Permit Delaware to Require Partisan Balance on its Courts? The Supreme Court Will Decide*, Verdict (Dec. 11, 2019),

cases are tried exclusively by professional judges, not by juries.[26] The Delaware Court of Chancery is a specialized court of equity with specific jurisdiction over corporate disputes.[27] Without juries and with only five jurists selected through a bipartisan, merit-based selection process,[28] "the Court of Chancery is known for its prompt, efficient and balanced adjudication of business disputes."[29] Cases from the Court of Chancery are appealed directly to the Delaware Supreme Court, which has final appellate jurisdiction on matters including corporate law.[30] The Delaware Supreme Court has five justices, some of whom served as Chancery Court judges before being elevated to the Delaware Supreme Court. Each justice has considerable experience with Delaware's business law.[31] Delaware's courts also offer a number of options for dispute resolution outside of litigation.[32]

Third, the case law—the Court of Chancery and the Delaware Supreme Court both have a history of issuing reasoned, well-written opinions supporting their decisions, thus allowing a significant body of precedent to accumulate over many decades. Judges, not juries, decide all corporate cases[33] and must give reasons for their rulings. The resulting body of case law provides detailed and substantive guidance to corporations and their advisors. One of the key concepts embodied in Delaware case law is the "business judgment rule," which is a judicial recognition that law-trained judges should not second-guess business decisions made in good faith and with due care by corporate directors—even if the decisions turn out badly.[34] Along with the business judgment rule, case law includes guidelines for directors in upholding their fiduciary duties of loyalty and care.[35]

Fourth, the legal tradition—along with a sophisticated judiciary, Delaware has an ample supply of lawyers who are experts in Delaware corporate law.[36] Delaware's statutes and case law provide a base of knowledge for attorneys who specialize in Delaware transactional matters and who practice in front of Delaware's courts. These professionals also assist the legislature by continually reviewing the business statutes and annually recommending changes to keep Delaware's law current.[37]

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https://verdict.justia.com/2019/12/11/if-there-are-no-obama-judges-or-trump-judges-does-the-constitution-permit-delaware-to-require-partisan-balance-on-its-courts.

[26] *See Litigation in the Delaware Court of Chancery and the Delaware Supreme Court*, Delaware.gov, https://corplaw.delaware.gov/delaware-court-chancery-supreme-court/ (last visited Jan. 31, 2021).

[27] *Court of Chancery*, Del. Cts., https://courts.delaware.gov/chancery/ (last visited Jan. 31, 2021).

[28] *Litigation in the Delaware Court*, *supra* note 25.

[29] *Delaware Court of Chancery Practice*, Polsinelli, https://www.polsinelli.com/services/delaware-court-of-chancery-practice (last visited Jan. 31, 2021).

[30] *Supreme Court*, Del. Cts., https://courts.delaware.gov/supreme/ (last visited Jan. 31, 2021).

[31] *Why Businesses Choose Delaware*, *supra* note 20.

[32] *See Delaware's Options for Alternative Dispute Resolution*, Delaware.gov https://corplaw.delaware.gov/delawares-alternatives-corporations/ (last visited Jan. 31, 2021).

[33] Jeremy Reed & Paul Sponaugle, *What Is the Delaware Court of Chancery?*, Delaware Inc. (June 22, 2020), https://www.delawareinc.com/blog/what-is-the-delaware-court-of-chancery/.

[34] For a detailed discussion of the Business Judgment Rule, see discussion *infra* Section I.A.1.

[35] *See The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, Delaware.gov, https://corplaw.delaware.gov/delaware-way-business-judgment/ (last visited Jan. 31, 2021).

[36] As a state, Delaware has a relatively small bar, approximately 967,171,000, while a state such as New York has approximately 19,542,209,000. However, of those 967,171,000, a significant percentage of Delaware lawyers practice corporate law or serve as local counsel to corporations.

[37] *See About the Section of Corporation Law*, *supra* note 21.

Fifth, the Delaware Secretary of State—the Division of Corporations of the Delaware Secretary of State's Office exists to provide corporations and their advisors with prompt and efficient service. Incorporations provide a major portion of the State's revenue. Accordingly, Delaware takes its role seriously. The personnel of the Division of Corporations view themselves as employees of a service business, and the Division meets worldwide quality standards as evidenced by its ISO 9001 certification.[38]

A cornerstone of Delaware corporate law is DGCL § 141(a): "the business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."[39] Pursuant to statute, directors serve as agents and fiduciaries to the owners of the corporation—shareholders. DGCL assigns both a duty of care and a duty of loyalty to corporate boards of directors.[40]

1. Duty of Care

The duty of care requires a fiduciary to be informed of all material information reasonably available before making a business decision on behalf of the corporation.[41] The fiduciary must act with a level of care that ordinarily careful and prudent persons would use in similar circumstances. In reviewing whether a director has satisfied the duty of care, Delaware courts have looked at the information available to a director and the process followed by the board in reaching its decisions.[42]

In evaluating a director's actions under the duty of care standard, courts apply the "business judgment rule."[43] The rule is a standard of review, not a separate standard of conduct. Under the business judgment rule, courts will presume that disinterested directors have made decisions on an informed basis with a good faith belief that the decisions are in the best interests of the corporation.[44] Parties challenging board decisions can rebut this presumption by demonstrating that the directors were grossly negligent in their decision- making in violation of their duty of care.[45] If this presumption is overcome, the directors will have the burden of proving the reasonableness of the challenged action.

Under the business judgment rule, courts focus on the board's process in making a decision, rather than the outcome of the decision. In determining whether the directors have satisfied their fiduciary duties, courts generally give deference to the board and will not substitute their own judgment for the board's judgment, even if a decision turned out to be unwise, so long as the directors acted on an informed basis, in good faith, and in the rational belief that the decision made was in the best interests of the company and its stockholders.[46]

2. Duty of Loyalty

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[38]Delaware Division of Corporations, *ISO 9001 Statement*, Delaware.gov, https://corpfiles.delaware.gov/CorpISO9001Statement.pdf (last updated Apr. 8, 2019).

[39] Del. Code Ann. tit. 8, § 141 (2020).

[40] William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 Penn. St. L. Rev. 837, 841 (2012).

[41] *Id.* at 842.

[42] *Id.* at 842-44.

[43] *Id.* at 841.

[44] *Id.*

[45] *Id.* at 842.

[46] *Id.* at 841.

The duty of loyalty prohibits self-dealing by directors and requires that directors adhere to their fiduciary duty as directors of the corporation.[47] It requires them to act in good faith and in a manner they reasonably believe to be in the best interests of the corporation and its stockholders. A guiding principle of this duty is that a director's own financial or other self-interest may not take precedence over the interests of the corporation and its stockholders when making decisions on behalf of the corporation.[48] Also, an integral component of the duty of loyalty is the obligation to act in good faith in the oversight of the corporation.[49] While some U.S. courts characterize good faith as a separate duty, the courts in Delaware generally treat it as subsumed within the duty of loyalty.[50]

A director's duty of loyalty is often implicated in connection with (i) conflicts of interest and (ii) corporate opportunities:[51]

A conflict of interest may exist when a director has a direct or indirect personal or financial interest in a transaction or other matter involving the corporation. As a general matter, directors should promptly disclose potential conflicts of interest to the board and describe all material facts concerning the transaction or other matters that are known to the director.[52] Following disclosure, an interested director should not vote on the matter that involves the conflict of interest. In some circumstances it may be appropriate for the director to refrain from participating in discussions of the matter, or to excuse himself from the board meeting during such discussions.

Transactions that present conflicts of interest should be approved by a majority of the disinterested directors after full disclosure of all material information regarding the transaction and the nature of the director's interest in the transaction.[53] Directors have a duty to disclose to the board material information in their possession bearing upon a board decision, particularly where the directors have a personal interest in the outcome of the board decision. When such approval is obtained, if a shareholder sues the board of directors for a breach of the duty of loyalty, the burden of proving that the transaction is not fair to the corporation generally shifts to the person challenging the transaction.[54] In the absence of such approval, if a particular transaction is challenged, the presence of a conflict will not automatically void a transaction, but the company and the interested director have the burden of establishing the fairness of the transaction to the corporation.[55]

In reviewing the fairness of a transaction where a conflict of interest exists, courts will look at the terms of the transaction as well as the process used by the board in approving the transaction.[56] With regard to terms, courts will examine the economic considerations relied upon when valuing the proposed transaction and whether the transaction is on arms-length terms. In

[47] *Id.* at 844.
[48] *Id.* at 845.
[49] *Id.* at 847.
[50] *Id.*
[51] *Id.* at 845.
[52] *Id.* at 844-46.
[53] *Id.*
[54] *Id.*
[55] *See* Shant H. Chalian & Kristen M. Bandura, *The Business Judgement Rule and the Entire Fairness Doctrine*, Robinson & Cole,
http://www.rc.com/documents/primer%20on%20business%20judgment%20rule.pdf (last visited Jan. 31, 2020).
[56] *Id.*

order to mitigate risks, disclosure of conflicts of interest and the results of deliberations by disinterested directors concerning such matters should be reflected in board minutes.[57]

Additionally, the duty of loyalty generally requires that if a director gains access to a corporate opportunity related to the business of the corporation, the director must make that opportunity available to the corporation before pursuing it on his own behalf. Directors should consider the following factors when deciding whether a potential business transaction is a corporate opportunity: the relevance of the opportunity to the corporation's existing or proposed business; the context in which the director became aware of the opportunity; the possible impact of the opportunity on the corporation and the level of interest of the corporation in the opportunity; and the reasonableness of any corporate expectation that the director should present the opportunity to the corporation.[58]

If a director presents the opportunity to the board and the disinterested directors disclaim interest in the opportunity, the director may pursue the opportunity on the director's own behalf. The director should be careful, however, to consider any negative publicity or impact on investor relations before pursuing the opportunity.

B. Discussion Roadmap

If CEOs truly wish to consider other corporate stakeholders on an equal footing with shareholders, Delaware law, as currently written and interpreted, bars their way. Thus, at present, the aspirations raised in the Business Roundtable statement are not enforceable. Indeed, a stakeholder perspective, as contemplated in the Business Roundtable's Statement is implausible. The Statement contains no legally binding obligation. What the CEOs "commit" to in the Business Roundtable's Statement is almost certainly not legally enforceable under a contract theory.[59] To be sure, stakeholders—employees especially—do possess legal remedies but such remedies are based on statutes and regulations, not agency law.[60]

Under current law, the board or a business corporation does not owe a fiduciary duty to any constituent other than its shareholders. The Delaware Courts have consistently confirmed this single obligation.[61] Most recently, the Delaware Supreme Court reaffirmed this duty in *Marchand v. Barnhill*, when, for the first time, it reversed dismissal of derivative claims based on a board's alleged failure to act in good faith toward company shareholders.[62] Like its predecessor cases,

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[57] *See id.*

[58] *See* Matthew R. Salzwedel, *A Contractual Theory of Corporate Opportunity and a Proposed Statute*, 23 Pace L. Rev. 83, 100-01 (2002).

[59] In order to enforce anything under a contract theory, the elements of a valid contract must be present. Those include, offer, acceptance, and consideration, or some type of justifiable reliance on behalf of a party. No such elements are present here.

[60] *See, e.g.*, The Fair Labor Standards Act of 1938, 29 U.S.C. § 201; Occupational Safety and Health Administration, 29 C.F.R § 1910; The Clean Air Act, 42 U.S.C. § 7401.

[61] *E.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 *Wake Forest L. Rev.* 761, 766 (2015).

[62] Marchand v. Barnhill, 212 A.3d 805, 808 (Del. 2019); *see also* Jason J. Mendro et al., *'Blue Bell' Reaffirms but Does Not Expand the Boundaries of Oversight Liability*, Law.com (July 17, 2019, 9:07 AM), https://www.law.com/delbizcourt/2019/07/17/blue-bell-reaffirms-but-does-not-expand-the-boundaries-of-oversight-liability/?slreturn=20190908165655.

Marchand illustrates just how paramount the board's duty to shareholders is.[63] But might this change?

This Paper examines the legal implications of enacting the objectives of the Business Roundtable statement into Delaware law and explores the question: *Should* a duty to non-shareholder corporate stakeholders be formally woven into law?

The Business Roundtable Statement and prevailing Delaware law are at odds. To harmonize the desire of the Business Roundtable and the jurisprudence of the courts, several avenues exist. First, there is the possibility that the Business Roundtable Statement will be codified into Delaware law. Second, is the possibility that Delaware adopts a permissive constituency statute, much like Pennsylvania or Illinois. Third, is the possibility that Delaware law remains unchanged, allowing for only informal and collateral benefits to stakeholders.

This Paper suggests that avenue number one is the least likely and least favorable, as corporations already have the option of amending their articles (certificates) of incorporation and electing to become a benefit corporation, providing for expanded stakeholder rights. Instead, this Paper advocates for possibility three. Option two, the addition of a permissive constituency statute, allows for board deference, which comports with current law and history but often proves inadequate. Option three, while actively implementing no change in the law still allows for the implementation of other measures to balance the stakeholder-rights space. Already, an option-three-like outcome has been endorsed by Delaware Supreme Court Justice Leo Strine.[64]

This Paper is organized as follows. Part two discusses the historic trajectory of the corporation and its long-debated purpose—from its inception to modern-day. Part three explores the trifold of possibilities that could emerge in Delaware corporate governance should the Delaware legislature act on the Business Roundtable Statement. Part four opines whether codifying the Statement is the best option for Delaware and presents arguments in favor and against each of the three presented legal possibilities. Part five concludes that, despite the fluid nature of the debate on corporate purpose, it is possible to maintain shareholder primacy while equitably accounting for the legitimate interests of other stakeholders.

II. THE METAMORPHOSIS OF THE CORPORATION

The public business corporation in the United States and England has served a variety of roles and interests for over two hundred years. The business corporation began as an institution chartered by the sovereign specifically to serve designated public functions, such as building bridges, dredging canals and constructing railroads. Corporations chartered to perform specific public functions had many of the characteristics of joint ventures, with charters that lasted between ten and forty years, often requiring the termination of the corporation on completion of a specific task, setting limits on the kinds of commercial enterprises the corporation could engage in and prohibiting corporate participation in the political process.[65] The corporate format eventually evolved into an independent institution governed by an influential board of directors enjoying a significant amount of discretion and often tasked with the singular goal of maximizing the wealth of its private citizen investor-owners, called shareholders.

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[63] For a greater discussion of the board's duties to shareholders, see *supra* text accompanying notes 17-57.

[64] Strine, *supra* note 60, at 786.

[65] *A Short History of Corporations*, New Internationalist (July 5, 2002), https://newint.org/features/2002/07/05/history.

In the landmark decision, *Trustees of Dartmouth College v. Woodward* (*The Dartmouth College Case*),[66] Chief Justice Marshall opined that a corporation, though an "immortal" and "artificial being," "may act as a single individual."[67] This decision and Chief Justice Marshall's opinion would mark the advent of corporations as we know them. The passing of the Joint Stock Companies Act of 1844[68] represents another milestone of the metamorphosis of the corporation, as it authorized the registration and incorporation of companies without specific legislation and allowed them to define their own purpose.[69] As states began to enact incorporation laws that permitted persons to incorporate at will, courts began to entrust them with more autonomy. In 1855, under the Limited Liability Act, shareholders were awarded limited liability: their personal assets were protected from the consequences of their corporate behavior.[70] In 1886, the United States Supreme Court recognized the corporation as a "natural person" under law.[71]

By the end of the nineteenth century, the idea of the public business corporation in America as a generator of wealth and prosperity had achieved widespread acceptance. The same was true for the American ideology of corporate capitalism. This generated a backlash among progressives and laborers, who bristled at the size, power, and behavior of giant industrial enterprises, which were dominated by power players including railroad magnates and robber barons.[72] As massive labor unrest brewed, the Sherman Act of 1890 and the Clayton Antitrust Act of 1914 were enacted. The Clayton Act proscribed monopolies that sought to enable the amassment of wealth and power in the hopes of empowering state regulation. Soon, American industry came to rely less on the "capitalist"[73] class, and corporate finance began to emanate from an array of equity investors, who

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[66] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).
[67] *Id.* at 636-37.
[68] Joint Stock Companies Act of 1844, 7 & 8 Vict. c.110 (Eng.).
[69] Prior to the 1844 Act, in general, incorporation was only possible by royal charter or private act. *See* John D. Turner, *The Development of English Company Law Before 1900* 4 (QUCEH Working Paper Series, No. 2017-01), https://www.econstor.eu/bitstream/10419/149911/1/877815712.pdf. The privilege of incorporation was closely guarded and rarely granted, because of the government's strict protection over the advantages thereby granted. Before the passage of general incorporation laws, corporations in America existed as specially chartered non-profit organizations, whose special status depended upon their promise to provide some sort of public function. The king of England, and later state governments in the U.S., would grant special charters to schools, churches, and municipalities, allowing such organizations to act as legal persons, i.e., to own property and to enter into binding contracts. Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 Am. U. L. Rev. 81, 84, 104 n.94 (1999). As artificial entities granted life by virtue of the state, they were subject to regulation by the state. Their special, nearly government-like, status in society meant that such organizations served a public purpose, and thus owed particular duties to the community. Their "shareholders" were not owners of business assets, but instead members of an already identifiable and socially meaningful group. *Id.* at 91. The state would also grant charters for corporations serving an economic purpose. Yet it granted corporate status only after negotiation, and only after argument regarding the important public service that the corporation would provide. Usually, the government would task the corporation to fulfill a specific need of the state's economy, e.g., to build bridges or roads. *Id.* at 105 n.95. The charters of these corporations were, therefore, specifically tailored to the corporation's specific business function. Here, too, the state would cede pieces of its sovereignty, endowing corporate managers with powers usually reserved for government.
[70] *See* Derek James Brocklehurst, *Limited Liability (Part 1): Heads I Win, Tails You Lose*, Managerism (Oct. 10, 2018) 1, https://www.managerism.org/images/pdf/Limited_Liability-oct2018.pdf.
[71] Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886).
[72] Will Kenton, *Robber Barons*, Investopedia (Mar. 13, 2020), https://www.investopedia.com/terms/r/robberbarons.asp.
[73] Angela Wigger, *Understanding the Competition-Crisis Nexus: Revisiting U.S. Capitalist Crises*, 29 Rethinking Marxism 556, 556-73 (2018).

placed their wealth into the hands of specialized corporate managers.[74] Weak were the voices of these neophyte shareholders. Capitalizing on the inexperience of these new equity investors, corporate directors retained company earnings rather than distributing dividends.[75] As the size and prevalence of the American business corporation grew, the American economy was transformed. Such transformation inspired competing theories of corporate purpose: stockholder primacy versus stakeholder primacy.

The modern debate over the purpose of a corporation can be traced back to 1931, at the height of the Great Depression, when the *Harvard Law Review* published opposing positions from two leading corporate scholars: Adolph Berle and Merrick Dodd.[76] Berle, along with colleague Gardiner Means, made the case for what came to be known as 'shareholder primacy,' the idea that a corporation exists to make a profit for its shareholders. The authors argued that "all powers granted to a corporation or the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders."[77] Berle sought to emphasize the negative implications of the concentration of exorbitant power and wealth in the hands of a corporation's board of directors. By surrendering control and responsibility over their investments, Berle argued, contemporary shareholders created a new form of property, one over which shareholders could claim ownership, but no control.[78] Shareholders of public corporations had lost their ability to control firm policies; their stocks were considered investments rather than an ownership stake that conferred control over the firm. Berle and Means used this development to justify the promulgation of a different kind of property theory that accounted for the unique characteristics of dispersed stock ownership.[79] Their solution was to name a corporation's board of directors as the trustee of this new form of property, controlled for the benefit of shareholder profit.[80]

Not so, Dodd countered. Dodd maintained that corporations are economic institutions that have "a social service as well as a profit-making function."[81] Under this theory, corporations are not simply economic vehicles to produce shareholder returns, but are vital societal entities that share interests with multiple groups including employees, consumers, and the general public. Dodd called for a dramatic revision in corporate legal theory that recognized not only investors as the focal point of the enterprise, but suggested that each of these other groups should share equally in the benefits of, and the responsibility for, the operation of the modern corporation.

A. Stakeholder Primacy: Misfortune for Shareholders, Upswing for Other Stakeholders

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[74] Alfred D. Chandler, Jr., The Visible Hand: The
Managerial Revolution In American Business 484 (1977) (examining the modem shift toward managers running large corporations and its effect on the concentration in American industries).

[75] Mark S. Mizruchi & Daniel Hirschman, *The Modern Corporation as Social Construction*, 33 Seattle U. L. Rev. 1065, 1070 (2010).

[76] A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049, 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1148 (1932).

[77] Berle, *supra* note 75, at 1049.

[78] Mizruchi & Hirschman, *supra* note 75, at 1068-69.

[79] Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. Pa. L. Rev. 1861, 1887 (2003).

[80] *Id.* at 1888.

[81] Dodd, *supra* note 75, at 1148.

Dodd's theory of stakeholder primacy gained significant support following the Great Depression.[82] From the end of World War II until the late 1970s, corporate leaders underscored the ideology that a company's primary purpose was to serve all of the various stakeholders who supported the enterprise.[83] Under this theory, stockholders constituted one category of stakeholder, but stockholders were not necessarily afforded priority.

> Corporate stakeholders included the workers who built the products sold by the corporation; suppliers who created the tools the corporation needed to build its products; the communities where the corporation operated (and its employees lived); and the creditors who invested in the corporation by loaning it funds.

Under the stakeholder primacy theory, the role of the board of directors was to manage the corporation for the benefit of all these groups, rather than concentrate solely on shareholder value.[84] Consistent with this theory, *The Business Roundtable* published a policy position that stated:

> Corporations have a responsibility, first of all, to make available to the public quality goods and services at fair prices, thereby earning a profit that attracts investment to continue and enhance the enterprise, provide jobs, and build the economy. . . . The long-term viability of the corporation depends upon its responsibility to the society of which it is a part.[85]

By the late 1970s, however, the tides began to turn.

B. The Rise of Shareholder Primacy

Nearly forty years after Berle and Dodd squared off in the *Harvard Business Review*, the clear ascendance of shareholder primacy theory began. In the 1970s, as inflation surged, the economy witnessed recession. In response, the government set out to jumpstart the stagnating economy by reducing the costs of doing business. Corporate tax rates plummeted while free trade increased.[86] The federal government began to deregulate. As American political discourse

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[82] *Id.* at 1145-63; Berger, *supra* note 9, at 660 (stating that following the 1929 stock market crash and the Great Depression, stakeholder concerns were being voiced once again, and the corporation is an entity separate from its shareholders and has citizenship responsibilities) Alexander Styhre, *The Making of the Shareholder Primacy Governance Model: Price Theory, the Law and Economics School, and Corporate Law Retrenchment Advocacy*, 8 Acct. Econ. L. 1, 4 (2017) ("In the turmoil that ensued after the . . . crash, an entirely new governance regime was widely regarded by policymakers as imperative to securing economic growth and prosperity, and, not least, social stability in the US. The New Deal programs initiated by the newly-elected Franklin D. Roosevelt largely set the framework for the corporate governance regime that would prevail well into the 1970s.").

[83] William Lazonick, *Profits Without Prosperity*, Harv. Bus. Rev., Sept. 2014, https://hbr.org/2014/09/profits-without-prosperity.

[84] *See* Robert Reich, *How Business Schools Can Help Reduce Inequality*, Harv. Bus. Rev., Sept. 12, 2014, https://hbr.org/2014/09/how-business-schools-can-help-reduce-inequality (stating that recognizing this duty, in 1951, Frank Abrams, then chairman of Standard Oil, described the goal of the modern corporation after World War II as maintaining "an equitable and working balance among the claims of the various directly interested groups . . . stockholders, employees, customers, and the public at large[,]" and this consensus view lasted for decades).

[85] Bus. Roundtable, Statement on Corporate Responsibility 12 (1981), http://www.ralphgomory.com/wp-content/uploads/2018/05/1981-Business-Roundtable-Statement-on-Corporate-Responsibility-11.pdf.

[86] Mizruchi & Hirschman, *supra* note 75, at 1097-98.

concentrated on the pruning of government power, the corporation as an expression of private economic power became a paradigm of the new economic order.

Accompanying the new economic order was new economic orthodoxy: the ‘social responsibility of business is to increase its profits.’[87] The ideology of shareholder primacy spread widely among academics and managers, fueled in part by what became known as “agency theory” — built on the idea that managers serve as agents for the shareholders, who are the principals of the corporation.[88] Friedman, a principal crusader of the theory, became President Ronald Reagan’s most trusted economic adviser. Soon shareholder primacy became a lynchpin of Reaganomics and American capitalism.

So rapidly did this ideology of shareholder primacy take hold, that by the mid-1980s, the doctrine was codified into law.[89] Courts in Delaware and elsewhere issued a series of key decisions firmly establishing the corporate board’s duties to stockholders as their primary fiduciary responsibility.[90] This judge-made common law serves as foundational precedent in the modern corporate governance space, and is now supplemented by statute.[91]

The legal theory of shareholder primacy appealed to the media— “the idea that shareholders were king simplified the confusing debate over the purpose of a corporation.”[92][9More

[87] Friedman, *supra* note 1, at 32.
[88] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 305-60 (1976).
[89] From 1900-1979, courts were virtually silent on the idea of profit maximization. However, starting in the mid-1980s, judicial discussion of the concept increased dramatically. In light of well-known business, economic, and intellectual histories, the increase in cases with the 1980s as the inflection point should not be surprising. The data confirms that shareholder primacy is judge-made law. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, Harv. L. Sch. F. on Corp Governance (Apr. 11, 2017), https://corpgov.law.harvard.edu/2017/04/11/a-legal-theory-of-shareholder-primacy/.
[90] *E.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).
[91] Del. Code Ann. tit. 8, § 141 (2020).
[92] Cydney Posner, *Washington Post Article on the Shift to Maximizing Shareholder Value*, Cooley (Aug. 30, 2013), https://www.cooley.com/news/insight/2013/washington-post-article-on-the-shift-to-maximizing-shareholder-value.

powerfully, it helped spawn the rise of stock-option pay,[93] corporate raiders,[94] and an unswerving focus on quarterly earnings reports.[95]

In 1997, The Business Roundtable adopted shareholder primacy, writing that "the paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders."[96] Notably, each version of its principles published over the past twenty years has stated that corporations exist principally to serve their shareholders.[97]

Yet today, in an atmosphere of widening economic inequality and deepening distrust of business that is similar to the ethos that many felt in late 19th and early 20th century America, this influential group has redefined its position.

C. The Reemergence of a Broader Corporate Purpose

Despite the late 20th century eclipse of Dodd's push to treat shareholders and stakeholders as equivalent within the corporation, in recent years the growing question of corporate purpose has led to renewed calls for a paradigm shift towards a stakeholder theory.

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[93] Stock options are a form of compensation. Companies can grant them to employees, contractors, consultants and investors. These options, which are contracts, give an employee the right to buy or exercise a set number of shares of the company stock at a pre-set price, also known as the grant price. *See* Elvis Picardo, *Employee Stock Option*, Investopedia (Sept. 17, 2020), https://www.investopedia.com/terms/e/eso.asp.

[94] The presence of corporate raiders illustrates the principle that the primary responsibility of corporate boards and senior management is to their shareholders, to maximize the return on their shareholders' investment in the company. While the twentieth century saw the nationalization of the public corporation in the United States, the twenty-first century bears witness to its internationalization throughout the world. The elimination of barriers to capital markets, along with privatization of national enterprises and pensions, yielded a new breed of investors with never-before-seen influence on capital markets and, therefore, corporate decision-making. *See* Leo E. Strine, *Towards Common Sense and Common Ground? Reflections on the Shared interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. Corp. L. 1, 4 (2007). Many of these investors clamored for profits, i.e., short-term increases in share price. *Id.* at 13. Flooding the world's burgeoning securities markets, these investors are often institutional and managed by intermediaries who do not necessarily share the same values as the companies in which they invest. Indeed, they often do not share the same values as the beneficiaries on whose behalf they invest-many of whom are themselves, ironically, corporate stakeholders. *Id.* at 4-5. An increasingly active hostile takeover market, prompted by stagnating securities markets in the 1970s, likewise turned directors' attention from long-term growth to their short-term job security, and, therefore, short-term stock prices. *See* Mizruchi & Hirschman, *supra* note 75, at 1100. Corporate managers, also aware that unhappy investors could move their money abroad and into to the budding global capital markets, would work hard to keep their stockholders happy. Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 Lewis & Clark L. Rev. 671, 679 (2008). Quarterly financial reporting requirements, in addition, focused management not on long-term sustainable growth, but short-swing profits.

[95] Lynn A. Stout, Response, *The Toxic Side Effects of Shareholder Primacy*, 16 U. Penn. L. Rev. 2003, 2019 (2013).

[96] Bus. Roundtable, *supra* note 11, at 3.

[97] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans'*, Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans ("Since 1978, Business Roundtable has periodically issued Principles of Corporate Governance. Each version of the document issued since 1997 has endorsed principles of shareholder primacy—that corporations exist principally to serve shareholders.").

This shift comes at a moment of increasing distress in corporate America, as big companies face mounting global discontent over income inequality,[98] harmful products,[99] the power of corporations,[100] environmental degradation,[101] poor working conditions,[102] and corporate reactions to the COVID-19 pandemic.[103] In the midst of this shift, The Business Roundtable's landmark 2019 "Statement on the Purpose of a Corporation," effectively repudiates its 1997 declaration that "the paramount duty of management and of boards of directors is to the corporation's stockholders." The new Statement calls on corporate directors and managers to commit to five groups of stakeholders—customers, employees, suppliers, communities, shareholders—without hierarchy. Shareholders are listed fifth, suggesting, perhaps, that they are in effect last among equals.

Some commentators have suggested that the corporate leaders behind the Roundtable's Statement are feeling pressure to rethink the role of business in society for a number of reasons:

> First, social norms are changing and expectations from employees, customers, and . . . investors are rising . . . . Second, [there is] a growing realization that a focus on one key stakeholder or metric is as flawed as using your cholesterol level as the only measure of your health. Third, investors . . . are increasingly pressing companies to focus on their purpose and how they contribute to society. [F]ourth, and perhaps most importantly, the world faces enormous, thorny challenges that business is feeling: climate change, growing inequality [], awareness that [] CEOs make hundreds of times more than their employees, water and resource scarcity, soil degradation and loss of biodiversity, and more. These issues require systemic efforts, cooperation, and pricing of those "externalities" [], like pollution and carbon emissions, that business has been able to push off to society.[104]

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[98] *See* Bob Lord, *Inequality in America: Far Beyond Extreme*, Inequality.org (Oct. 12, 2020), https://inequality.org/great-divide/inequality-in-america-far-beyond-extreme/.

[99] Examples include recent lawsuits against Purdue Pharma and Johnson & Johnson. *See* Natalie Sherman, *Purdue Pharma to Plead Guilty in $8bn Opioid Settlement*, BBC (Oct. 21, 2020), https://www.bbc.com/news/business-54636002; Tiffany Hsu & Roni Caryn Rabin, *Johnson & Johnson to End Talc-Based Baby Powder Sales in North America*, N.Y. Times (May 19, 2020), https://www.nytimes.com/2020/05/19/business/johnson-baby-powder-sales-stopped.html.

[100] Michael Balsamo & Marcy Gordon, *Justice Dept. Files Landmark Antitrust Case Against Google*, Associated Press (Oct. 20, 2020), https://apnews.com/article/google-justice-department-antitrust-0510e8f9047956254455ec5d4db06044; Spencer Soper, *Bezos Disputes Amazon's Market Power. But His Merchants Feel the Pinch*, Bloomberg (Apr. 17, 2019), https://www.bloomberg.com/news/articles/2019-04-17/is-amazon-too-powerful-its-merchants-are-starting-to-wonder.

[101] *Brazil's Amazon Rainforest Suffers Worst Fires in a Decade*, Guardian (Oct. 1, 2020), https://www.theguardian.com/environment/2020/oct/01/brazil-amazon-rainforest-worst-fires-in-decade; Zeke Hausfather, *2020 Is on Course to Be the Warmest Year on Record*, World Econ. F. (Oct. 26, 2020), https://www.weforum.org/agenda/2020/10/climate-change-environment-earth-temperature-global-warming-heat/.

[102] Andrew Mullin, *Analysis: Aramark Has Some Troubling Practices Outside of CMU*, Cent. Mich. Life (Feb. 13, 2020), https://www.cm-life.com/article/2020/02/aramark-outside-of-cmu; *Amazon Workers Stage Global 'Prime Day' Strikes over Poor Working Conditions*, Bus. & Hum. Rts. Resource Ctr. (July 2019), https://www.business-humanrights.org/en/latest-news/amazon-workers-stage-global-prime-day-strikes-over-poor-working-conditions/.

[103] Ezequiel Minaya, *New Ranking of Nation's Top Employers' Responses to Pandemic,* Forbes (May 26, 2020), https://www.forbes.com/sites/ezequielminaya/2020/05/26/the-forbes-corporate-responders-new-ranking-of-nations-top-employers-responses-to-pandemic/#4087e11a4a51.

[104] *See* Winston, *supra* note 14.

Proponents of a new corporate purpose suggest the current shareholder system is not fit for this purpose, and evidence suggests that many CEOs have been thinking about corporate objectives in stakeholder terms for some time now. Indeed, many corporate mission statements contain wording that is similar to portions of The Business Roundtable Statement. Most successful managers would probably agree that a company cannot neglect its employees, customers, or suppliers for long without negative implications. But should they have fiduciary obligations to these stakeholders in addition to meeting their statutory and regulatory requirements? Although stakeholder theory is gaining traction in the corporate world and is the rule of law in many states,[105] it remains unclear how an expanded definition of corporate purpose could *legally* be squared with the traditional definition of stockholder primacy. Little is known about the practical implications of adopting a stakeholder theory. If this theory is to be viable in actual corporate governance, the means by which it is to be implemented must be addressed.

III. How might The Business Roundtable Statement be Woven into Law?

The Business Roundtable is challenging companies incorporated in any of the states to enact change. Still, as the state in which the most public business corporations are incorporated, Delaware is challenged most. What would it really mean for Delaware companies to follow the principle of creating "value for all [] stakeholders?" United States Senator and former 2020 Presidential Candidate Elizabeth Warren hailed the initiative behind The Business Roundtable Statement as a "welcome change," but cautioned, "without real action, it [is] meaningless." This section explores what a Delaware-reaction might look like if the state legislature were to heed the call of The Business Roundtable.

A. *Codifying the Business Roundtable Statement into Delaware Law*

Currently, no state statute requires corporate directors to consider interests other than those of their shareholders when exercising their corporate decision-making authority. Until 2010,

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[105] The following states have some form of constituency statute: Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Wyoming. *See* Fla. Stat. Ann. § 607.0830 (LEXIS through all 2020 general legislation); Ga. Code Ann. § 14-2-202(b)(5) (LEXIS through the 2020 Regular Session of the General Assembly); Idaho Code § 30-1702 (LEXIS through 2020 Regular and First Extraordinary Sessions and November 2020 General Election); Ind. Code Ann. § 23-l-35-l(d) (Burns, LEXIS through the 2020 Second Regular Session of the 121st General Assembly); Iowa Code Ann. § 491.101B (LEXIS through legislation from the 2020 Regular Session of the 88th General Assembly); Ky. Rev. Stat. Ann. § 271B.12-210(4) (LEXIS through Ch.128 of the 2020 Regular Session); Mass. Ann. Laws ch. 156B, § 65 (LEXIS through Chapters 1-208 and the November ballot measures of the 2020 Legislative Session of the 191st General Court); Minn. Stat. Ann. § 302A.251(5) (LEXIS through the end of the 2020 Regular Session, and 5th Special Session, of the 91st Legislature); Miss. Code Ann. § 79-4-8.30(d) (LEXIS through the 2020 Regular Session); Mo. Rev. Stat. § 351.347.1(4) (LEXIS through 100th General Assembly, 2nd Regular Session and 2020 1st Extraordinary Session); N.J. Stat. Ann. § 14A:6-1(2) (LEXIS through New Jersey 219th First Annual Session, L. 2020, c. 109, and J.R. 2); N.M. Stat. Ann. § 53-11-35(D) (LEXIS through all 2020 legislation); N.Y. Bus. Corp. Law § 717(b) (Consol., LEXIS through 2020 released Chapters 1-285); Ohio Rev. Code Ann. § 1701.59(E) (Page, LEXIS through File 53 of the 133rd (2019-2020) General Assembly); Or. Rev. Stat. Ann. § 60.357(5) (LEXISN through the 2020 Second Special Session); R.I. Gen. Laws § 7-5.2-8(a) (LEXIS through Chapter 79 of the 2020 Session); S.D. Codified Laws § 47-33-4 (LEXIS through acts received as of October 1st of the 2020 General Session of the 95th South Dakota Legislative Assembly and Supreme Court Rule 20-06); Tenn. Code Ann. § 48-35-204 (LEXIS through the 2020 Regular and Second Extraordinary Sessions); Wyo. Stat. Ann. § 17-16-830 (LEXIS through 2020 Budget Session and First Special Session of the Wyoming Legislature).

however, Connecticut had a statute that mandated directors of a corporation to consider the interests of its employees, customers, creditors, suppliers, and the community in addition to shareholders.[106] These are the stakeholder groups that are identified in The Business Roundtable Statement as deserving equal consideration with shareholders.[107] Accordingly, in speculating what a Delaware codification of the Statement might look like, this Paper uses Connecticut's prior statute as a model.

Connecticut's statute had read in pertinent part:

> [A] director of a corporation . . . *shall* consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.[108]

If the Delaware legislature were to enact a statute codifying the aspirations of The Business Roundtable Statement, such statute might contain language similar to the above. Of course, this Paper would suggest that the statutory language be modified to include gender-neutral terms to prevent the reinforcement of historic gender stereotypes that the Connecticut legislature inadvertently reinforced by using the term "he."[109] This model statute is missing something else, too. While, on its face, the statute would seem to challenge the tenet that corporate directors owe their loyalty exclusively to shareholders, it does not provide non-shareholders with a right of enforcement. If the Business Roundtable Statement were to be codified into a statute with teeth, a cause-of-action for non-shareholders to enforce this provision must be provided for these other stakeholder groups.

Beyond this, Connecticut's constituency statute is silent on many key issues. Among the issues left open by this and almost all current constituency statutes are such critical questions as: How should directors decide whether particular claimants fall into one of the protected constituent categories, some of which, such as customers and communities, are very amorphous? What weight should directors assign to shareholder and non-shareholder interests? What should directors do when those interests cannot be reconciled? What should directors do when the interests of various non-shareholder constituencies conflict amongst themselves? Are all these decisions committed to the directors' discretion and business judgment? What standards should courts use in reviewing a director's decision not to consider non-shareholder interests? What standards of review apply to

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[106] Conn. Gen. Stat. § 33-756 (2009), *amended by* 2010 Conn. Legis. Serv. P.A. 10-35 (H.B. 5530) (West 2010). Arizona may have been mandatory also, but the legislative history is unclear.

[107] Creditors are not mentioned in the Business Roundtable Statement but could be considered customers or suppliers.

[108] Conn. Gen. Stat. § 33-756 (2009), *amended by* 2010 Conn. Legis. Serv. P.A. 10-35 (H.B. 5530) (West 2010) (emphasis added).

[109] *Pronouns*, Cuny Sch. L., https://www.law.cuny.edu/legal-writing/students/grammar/pronouns/ (last visited Nov. 22, 2020).

director action claimed to be motivated by concern for non-shareholder constituents? Nor is there, as yet, any significant guidance from the courts.

Additionally, Connecticut's former mandatory constituency statute only applied in particular circumstances. It applied to directors of a public corporation registered under the Securities Exchange Act of 1934 in control-shifting circumstances only. Similarly, Arizona's previously-mandatory constituency statute expressly limited a board's consideration of non-shareholder constituencies to takeover situations.[110] Idaho's mandatory constituency statutes were also limited to change-of-control or merger scenarios.[111] Though mandatory constituency statues across the country varied in scope, virtually all were limited to cases of mergers, takeovers, or changes-in-control. If Delaware were to enact a mandatory constituency statute that required a board to consider non-shareholder interests in all scenarios—as The Business Roundtable suggests—would the statute need to be drafted so as to apply to virtually any scenario that requires a board of directors to make a decision on behalf of the company, or are there some decisions as to which the interests of shareholders should prevail?

It also is worth noting that even if the model statute is interpreted literally, it requires a *consideration* of the interests of non-shareholders, not *action* to promote or effectuate the interests of non-shareholders. If the Delaware legislature were to seek to change the behavior of corporate leaders, as The Business Roundtable Statement implores, it should require directors to *act* in the best interests of all constituencies, rather than merely consider their interests.

That Delaware has declined to enact any sort of constituency statute over the last three decades suggests that the sudden enactment of a mandatory statute in the state today is highly unlikely. A permissive constituency statute, rather than a mandatory statute, though more problematic, could be more appealing to the legislature.

B. Adopting a Permissive Constituency Statute in Delaware

Although no state currently has a mandatory statute, forty-one states have enacted some form of a permissive constituency statute.[112] Unlike the mandatory constituency statute discussed above, permissive constituency statutes permit, rather than require, corporations to consider non-shareholders' interests. The unifying principle of these permissive statutes is that they "enable corporate directors to consider interests other than those of their shareholders when exercising their corporate decision-making authority."[113] A common permissive constituency statute contains the following provisions:

- The board of directors of a corporation may consider the interests and effects of any action upon non-shareholders.
- The relevant non-shareholder groups include employees, suppliers, customers, creditors and communities.

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[110] *See* Az. Rev. Stat. Ann. § 10-2702 (LEXIS through legislation from the 54th Legislature, 2nd Regular Session (2020), all legislation.).

[111] This is because they are included within the control share acquisition statute and a business combination statute. *See* Idaho Code §§ 30-1602, 1702 (LEXIS through 2020 Regular and First Extraordinary Sessions and November 2020 General Election).

[112] Joseph R. Shealy, *The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*, 94 N.C. L. Rev. 686, 698 (2016).

[113] Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 Loy. L.A. L. Rev. 765, 781-82 (2009).

- The directors may consider both long-term and short-term interests of the corporation.
- The directors may consider local and national economies.
- The directors may consider any other relevant social factors.[114]

In the states that have enacted constituency statutes, directors are allowed to explicitly consider the interests of the community even without a near-term benefit to shareholders.[115]

[These] statutes purport to change the duty of care of officers and directors while creating judicial standards for reviewing nonstatutory antitakeover devices such as poison pills. Whereas many of the early antitakeover devices imposed limitations on entities attempting an unsolicited purchase of another firm without addressing the duties of directors for the target firm, constituency statutes may be expanded to apply outside the context of hostile takeovers to influence everyday board decisions. These improvements suggest that constituency statutes enhance and codify widely accepted legal principles.[116]

The substance of permissive constituency statutes varies from state to state. Still, virtually all permissive statutes can be described as falling into one of four categories: (1) permissive statutes covering all corporate decisions; (2) permissive statutes declaring that the corporation itself is superior to shareholders; (3) permissive statutes covering only hostile takeover-related decisions; and (4) a formally mandatory statute such as Connecticut's, discussed above.

Pennsylvania's permissive constituency statute is an example of a statute that falls into the first category.[117] Pennsylvania's constituency statute provides that directors, in the discharge of their fiduciary duty to protect and promote the best interests of the corporation, may consider the effects of any action upon all groups affected by such action, including shareholders, employees, suppliers, customers, creditors of the corporation, and communities in which offices or other establishments of the corporation are located.[118] Furthermore, directors may consider the "short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation."[119] Importantly, this statute appears to cover all director decisions, not just those in the context of a hostile takeover, merger, or change in control.

Illinois' permissive constituency statute contains similar language, but also states that directors owe a primary duty to the corporation, not shareholders, thus placing it in the second group of statutes.[120] The Illinois statute also explicitly provides that directors must take into account "the effects of any action" and the "long-term and short-term interests of the corporation."

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[114] *Id.* at 782.
[115] Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 Wash. & Lee L. Rev. 409, 462 (2002).
[116] Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 Emory L.J. 1085, 1094 (2000).
[117] 15 Pa. Cons. Stat. § 1715 (2010).
[118] § 1715(a)(1).
[119] § 1715(a)(2).
[120] 805 Ill. Comp. Stat. § 5/8.85 (2005) ("In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.").

This is significant, as traditional jurisprudence describes the long-term interests of the corporation as the focus on shareholder return.[121] Finally, directors are given broad discretion when interpreting the degree of relevance a director must give to any specific factor when making a decision on behalf of the corporation. Thus, as long as directors believe that a factor is pertinent to a corporation, they may consider this factor even if it conflicts with the interests of the shareholders.

Oregon's permissive constituency statute provides an example of the third category of statutes, as it covers hostile takeover situations only. The statute reads:

When evaluating any offer of another party to make a tender or exchange offer for any equity security of the corporation, or any proposal to merge or consolidate the corporation with another corporation or to purchase or otherwise acquire all or substantially all the properties and assets of the corporation, the directors of the corporation may, in determining what they believe to be in the best interests of the corporation, give due consideration to the social, legal and economic effects on employees, customers and suppliers of the corporation and on the communities and geographical areas in which the corporation and its subsidiaries operate, the economy of the state and nation, the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation, and other relevant factors.[122]

Thus, the language of Oregon's permissive constituency statute only applies when directors are weighing whether to accept or reject a hostile takeover attempt.

As discussed *supra*, until 2010, the only state to deviate from the use of permissive language in its constituency statute was Connecticut. On its face, the Connecticut statute seemed to force directors to consider interests beyond the corporation and its shareholders. However, like the other enacting states, Connecticut did not provide non-shareholders with a right of enforcement. It is significant that Connecticut's constituency statute, in its previous mandatory form, was never reviewed and interpreted in a decision by the state's courts.

There are still nine states that have yet to enact a constituency statute. Delaware is one of these nine. If the Business Roundtable's Statement were to be codified into a permissive constituency statute by the Delaware legislature, it would need to be codified to fit into the first category of permissive statutes. As discussed *supra*, if the statute were to fall into one of the three other camps, it would either apply only in specific circumstances or fail to capture the intent behind the Statement that corporate boards must make "a fundamental commitment to all stakeholders."[123] Using Pennsylvania's statute as a model, a permissive constituency statue for Delaware might look like this:

> (a) General rule. In discharging the fiduciary duties of their respective positions, the board of directors may, in considering the best interests of the corporation, consider to the extent they deem appropriate:
>
> > (1) The effects of any action upon any or all groups affected by such action, including customers, employees, suppliers, communities in which offices or other establishments of the corporation are located, and shareholders.

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[121] *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); *see also* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994).
[122] Or. Rev. Stat. § 60.357(5) (2019).
[123] Bus. Roundtable, *supra* note 10, at 1.

(2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.

(b) Consideration of interests and factors. The board of directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described in this subsection and in subsection (a) shall not constitute a violation of standard of care and justifiable reliance.

(c) Specific applications. — In exercising the powers vested in the corporation, and in no way limiting the discretion of the board of directors, committees of the board and individual directors pursuant to subsections (a) and (b), the fiduciary duty of directors shall not be deemed to require them:

(1) to redeem any rights under, or to modify or render inapplicable, any shareholder rights plan, including, but not limited to, a plan adopted pursuant or made in relation to disparate treatment of certain persons;

(2) to render inapplicable, or make determinations relating to control transactions, relating to business combinations, relating to control-share acquisitions or relating to disgorgement by certain controlling shareholders following attempts to acquire control, or under any other provision of this title relating to or affecting acquisitions or potential or proposed acquisitions of control; or

(3) to act as the board of directors, a committee of the board or an individual director solely because of the effect such action might have on an acquisition or potential or proposed acquisition of control of the corporation or the consideration that might be offered or paid to shareholders in such an acquisition.

(d) Presumption. Absent breach of fiduciary duty, lack of good faith or self-dealing, any act of the board of directors shall be presumed to be in the best interests of the corporation. In assessing whether the best-interests standards has been satisfied, there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act as the board of directors, any committee of the board or any individual director relating to or affecting an acquisition or potential or proposed acquisition of control of the corporation than is applied to any other act as a board of directors, any committee of the board or any individual director. Notwithstanding the preceding provisions of this subsection, any act as the board of directors relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy the standard set forth in by the legislature,

> unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.[124]

Even if Delaware were to enact a permissive constituency statute covering all corporate decisions, this proposed statute allows, but does not require, directors to consider interests beyond shareholders' in certain contexts.[125] Thus, it will have little impact on directors who already enjoy protection from the business judgment rule, which Delaware directors do. In addition, this statute, like all other permissive constituency statutes across the country, does not indicate how much weight should be given to the various interests of constituents. The same concerns that inhibit the potential enactment of a mandatory constituency statute are present here. If this hypothetical statute were to operate in accordance with The Business Roundtable's aspirations, a legally enforceable right must be provided to non-shareholders, a standard against which various interests may be weighed against each other must be furnished, and the statute must require directors to *act* in the best interests of all constituencies, rather than merely *consider* their interests.

However, despite the appeal of a permissive constituency statute, enacting a statute that allows directors to consider the interests of other constituencies will not solve the problems The Business Roundtable seeks to rectify. In light of the discretion the statute gives to the board, the "failure by managers to consider the interests of other constituencies creates no managerial liability for such action."[126]

> Managers acting as rational maximizers and faced with a corporate decision have two interests. First, managers want to maximize their own wealth or utility; second, and this interest is clearly secondary to the first, managers want to maximize the wealth or utility of voting stockholders, since voting stockholders appoint managers. Managers, at least as rational maximizers, are essentially indifferent about the welfare of the other corporate constituencies. Because of their discretionary nature, constituency statutes change none of this. The incentives of managers after the passage of constituency statutes are exactly the same as the incentives before the statutes; as rational maximizers, managers still want first to promote their own interests and then to promote the interests of voting stockholders; they still are indifferent about the interests of other constituencies.[127]

Constituency statutes provide directors no additional incentives to maximize the value of the corporation or abstain from transferring wealth and resources away from unfavored constituencies. With the protection afforded by the Business Judgment Rule, management may also be able to use other constituencies to entrench itself. If a duty to all constituencies is interpreted so broadly, it will not be hard for management to find some group whose interests are adversely affected by a particular course of action, and therefore reject a corporate opportunity on that ground.[128] In this way, management would able to justify an action that leads to the preservation of its own position, even if that decision turns out not to be in the best interests of the corporation. Thus, constituency statutes, decidedly, are an incomplete remedy, and, allowing or mandating a broad interpretation of statutory duty may reduce a company's level of production rather than increase it.

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[124] This is a modified version of title 15, section 1715 of the Pennsylvania Consolidated Statutes.
[125] *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 462-63 (2006).
[126] Rutheford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 Fla. St. U. L. Rev. 561, 621 (1996).
[127] *Id.* at 621-22.
[128] *Id.* at 586.

A better approach may be to maintain a narrow interpretation of a board's fiduciary duty to shareholders, as Delaware does now, and allow firms that wish to adopt a different rule to opt out of the narrow interpretation, or allow for collateral benefits to stakeholders.

C. Maintaining Delaware Corporate Law, Allowing for Informal and Collateral Benefits to Stakeholders

Even if boards of directors were not held to have a fiduciary duty to stakeholders other than shareholders, and those other stakeholders were not afforded a legal right to challenge corporate management decisions which adversely affected them, this would not preclude boards and senior officers from behaving as if they actually had such a duty, and stakeholders other than shareholders had such rights. Moreover, a fiduciary duty owed exclusively to shareholders does little to threaten directors who set out to implement stakeholder-oriented policies.

Historically, courts did not encumber corporate managers with a fiduciary duty towards company shareholders in order to privilege shareholders vis-à-vis other stakeholder groups. Rather, the fiduciary responsibility was designed to prevent self-dealing on the part of directors.[129] There are at least three reasons to doubt that those fiduciary responsibilities to shareholders would prevent a board from acting to benefit non-shareholder stakeholders, as The Business Roundtable calls for:

First, it is not obvious that the right of shareholders to expect honesty, candor, and care on the part of management gives them a higher level of protection than the legal rights available to other stakeholders. Creditor interests, for example, are protected by bankruptcy law. Suppliers and customers can seek redress under the Uniform Commercial Code or more recent statutes such as "lemon laws" that cover used car sales. Tort victims are the beneficiaries of insurance requirements for various kinds of businesses and employees can enlist government assistance in collecting unpaid wages or compensation for income-diminishing injuries and can demand fiduciary protection for pension assets and other benefits. . . . Second, courts are starting to impose on corporate management fiduciary duties with regard to other groups under certain circumstances. In *Varity v. Howe* (1996) [the United States Supreme Court ruled] that a corporation that reorganized all of its money-losing ventures into a single subsidiary that eventually went bankrupt (leaving a healthy surviving parent) had breached its fiduciary duty to the employees of the subsidiary. . . . The Court [] extended this reasoning to the protection of non-retirement benefits when it found for employees [that were] dismissed after refusing to accept employment with another company, but a company with whom their original employer had arranged for them to do exactly the same work but with reduced benefits (*Intermodal v. Sante Fe Railroad*, 1997). And finally . . . when stockholders have attempted to challenge managerial behavior as being overly generous toward another constituency, they have almost always lost.[130]

Those who oppose any change to the doctrine of shareholder primacy often cite the famous dictum of the Michigan Supreme Court articulated in *Dodge v. Ford Motor Co.*[131] that the corporation exists for the benefit of the shareholders as evidence of a restraint on the free discretion

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[129] Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 Fordham L. Rev. 939, 939 (2019).
[130] Richard Marens & Andrew Wicks, *Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders*, 9 Bus. Ethics Q. 273, 277-78 (1999).
[131] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

of a board of directors.[132] However, an examination of the context of the court's decision makes clear that this statement was not meant to empower the shareholder at the expense of managerial discretion; it was meant to forbid "the company's decision to sit on a mountain of cash for allegedly philanthropic, not business, purposes, particularly when the court had reasons to doubt Ford's candor regarding his actual motive."[133]

Since *Dodge v. Ford Motor Co.*, courts have proven reluctant to examine the economic wisdom of business decisions. An examination of case law under circumstances less dramatic than the facts of *Dodge v. Ford Motor Co.* demonstrates that corporate directors have actually successfully defended generosity toward non-shareholder constituents.[134] Generosity toward employees has almost always won if, unlike in the *Dodge* case, the generous treatment is justified as a means of improving efficiency or productivity.[135] Corporations have routinely defeated challenges by stockholders to various bonus and profit-sharing plans for managers and employees when such plans were justified as creating incentives for better corporate performance.[136]

If board fiduciary duties toward shareholders is dispositive in any area of corporate governance, it is in a board's response to takeover bids. Still, on numerous occasions courts have applied the business judgment rule and refused to enjoin board decisions rejecting tender offers that were neither manipulative nor fiscally unsound and might have benefitted shareholders. The language of the courts' opinions in these cases is remarkably similar to that of a normative stakeholder approach. In particular, the Delaware Supreme Court, has consistently rejected the notion that directors have a duty to sell the company whenever a takeover proposal offers a premium over current market value of company stock.[137] The Court has even established a positive duty to adopt defensive measures to defeat a takeover attempt contrary to the best interests of the corporation and its shareholders.[138] The Court implicitly defined these non-shareholder, corporate stakeholder interests very broadly when it ruled in *Unocal Corp. v. Mesa Petroleum* that boards might consider impact on "customers, creditors, employees, and perhaps even the community generally."[139]

Numerous court decisions in other jurisdictions have reached similar results, supporting the right of boards to choose not to sell control of the corporation to raiders who will pay the highest premium stock price for shareholders.[140] The court in *Keyser v. National Finance*, for example, upheld a bank's decision to choose one takeover "suitor" over another, explicitly accepting, the bank's justification that the winning bidder was better on "social issues," including the prospect of creating more opportunity for the company's employees.[141]

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[132] *Id.*

[133] Marens &Wicks, *supra* note 129, at 279.

[134] *See, e.g.*, Kelly v. Bell, 254 A.2d 62 (Del. Ch. 1969); A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

[135] *See* Steinway v. Steinway, 37 N.Y.S. 742 (N.Y. App. Div. 1896).

[136] *See* Diamond v. Davis, 38 N.Y.S.2d 103 (N.Y. Sup. Ct. 1942); Gallin v. Nat'l City Bank of N.Y., 281 N.Y.S. 795 (N.Y. Sup. Ct. 1935).

[137] *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1144 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

[138] *Revlon, Inc.*, 506 A.2d at 184.

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

[140] *See* Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984 (E.D. Wis. 1989); Keyser v. Commonwealth Nat'l Fin. Corp., 675 F. Supp. 238, 254 (M.D. Pa. 1987); Baron v. Strawbridge & Clothier, 646 F. Supp. 690 (E.D. Pa. 1986).

[141] *Keyser*, 675 F. Supp. at 254.

Moreover, the fiduciary duties owed to shareholders are not as fixed or inflexible as they may appear. They can be, and frequently are, modified by contract.[142] For instance, workers should be able to contract for job security and wages with a corporation without necessarily requiring the board to prioritize workers over shareholders. The fiduciary duties owed to shareholders do not prevent workers from bargaining for and obtaining an agreement with respect to these and other employment issues. Workers can protect their wage expectations with pension guarantees, golden parachutes, successor clauses, stipulated cost of living adjustments, and other straightforward provisions. Similarly, workers can obtain credible assurances against being forced to work undesirable hours simply by stipulating the length of the workday. Working conditions can be guaranteed by making reference to a well-known status quo and requiring the employer to maintain working conditions at that level or above. In short, one can contract away fiduciary duties to shareholders without changing the law.

As with contracts with workers, contracts between shareholders and firms routinely subordinate the claims of shareholders to those of non-shareholder constituencies, such as employees. These very contracts clearly impede the freedom of directors and managers to maximize shareholder wealth, a concern that exists even in jurisdictions with constituency statutes. Often, shareholders are willing to bargain with workers to give them job security and better wages because doing so allows them to attract and retain better workers, thereby increasing profitability.

Similar logic applies to other fixed claimants such as bondholders and lenders. For example, corporations often provide fixed claimants with security interests in corporate assets or agree to restrictions on dividend payments or investments. These agreements benefit shareholders, while also aiding the other constituencies, by increasing the availability of credit and lowering the cost of borrowing.

Beyond contracts that carve out non-shareholder constituency rights, courts are able to protect non-shareholder constituents by imposing gap-filling responsibilities on boards of directors that are analogous to those provided by the fiduciary duties owed to shareholders. For example, should unforeseen contingencies arise that cast doubt on the efficacy of the contractual protection mentioned above, courts can protect workers by construing their employment contracts in light of the original purposes behind the agreements. Gap-filling by modern judges in interpreting contracts provides workers with the same sorts of protection that fiduciary duties provide for shareholders.[143]

This has arguably been the Delaware Supreme Court's approach in dealing with the non-shareholder constituencies identified by The Business Roundtable. It is noteworthy that the Delaware approach recognizes that, over a wide range of issues, there "really is no conflict between

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[142] Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 Cornell L. Rev. 1266, 1268 (1999).

[143] Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 Stetson L. Rev. 23, 37 (1991) ("It might be argued that rank-and-file employees lack bargaining power, and that at-will employment contracts are likely to reflect this lack of bargaining power. Consequently, it has been argued that the gap-filling that is done in the context of at-will employment contracts is likely to be unhelpful to employees. This argument is flawed. If workers lack bargaining power in their employment relationship, changing the law to add a fiduciary duty to this relationship will harm workers, not help them. This is because extending the reach of fiduciary duties to rank and-file employees will not change any fundamental imbalance in the allocation of bargaining power between workers and their employers that already exists. Any legal regime that 'protects' workers by making them the 'beneficiaries' of fiduciary duties will, by definition, make those same workers less valuable (in monetary terms) to their employers.").

the interests of other constituencies and the interests of shareholders."[144] For example, taking steps to improve relations with the local community benefits the corporation and its many constituents, generally. Similarly, drafting strong bond covenants or cultivating a reputation for fair dealing with bondholders and creditors benefits the shareholders by lowering the corporation's costs of doing business. Moreover, the current Delaware approach recognizes that generally it is not possible for a board to know beforehand with certainty, which decisions are specifically in the shareholders' interests, and which are not.[145]

In October 2019, shortly after the release of The Business Roundtable statement, then Chief Justice of the Delaware Supreme Court Leo Strine, self-published a paper, *Toward Fair and Sustainable Capitalism*, proposing "to reform the American corporate governance system by aligning the incentives of those who control large U.S. corporations with the interests of working Americans . . . ."[146] Chief Justice Strine suggested the interests of non-shareholder stakeholders can be equitably accounted for without modifying current statutory fiduciary duties by:

> Requiring not just operating companies, but institutional investors, to give appropriate consideration to and make fair disclosure of their policies regarding EESG issues, emphasizing "Employees" and not just "Environmental, Social, and Governance" factors;
>
> Giving workers more leverage by requiring all societally-important companies to have board level committees charged with ensuring fair treatment of employees, authorizing companies to use European-style works' councils to increase employee voice, and reforming labor laws to make it easier for workers to join a union and bargain for fair wages and working conditions;
>
> Reforming the corporate election system so that voting occurs on a more rational, periodic, and thoughtful basis supportive of sustainable business practices and long-term investment;
>
> Improving the tax system to encourage sustainable, long-term investment and discourage speculation, with the resulting proceeds being used to revitalize and green America's infrastructure, tackle climate change, invest in American workers' skills, transition workers from carbon-intensive industries to jobs in the clean energy sector; and
>
> Taking other measures, such as reform of corporate political spending and forced arbitration, to level the playing field for workers, consumers, and ordinary investors.[147]

The proposals suggested by Chief Justice Strine are powerful. Perhaps even more influential though, is that this call-for-action was authored by the same man who, in 2015, wrote: "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be

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[144] *Id.* at 34-35.
[145] *Id.* at 35.
[146] Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism*, Harv. L. Sch. F. on Corp. Governance (Oct. 1, 2019), https://corpgov.law.harvard.edu/2019/10/01/toward-fair-and-sustainable-capitalism/.
[147] *Id.*

taken into consideration only as a means of promoting stockholder welfare."[148] At first blush, it would appear that Chief Justice Strine's 2015 and 2019 positions are irreconcilable. This is not necessarily true. What the Chief Justice appears to mean is that there need be no conflict between the interests of these other constituencies and the interests of shareholders to which directors are beholden.

The shareholder primacy rule articulated by Delaware and present in modern socioeconomics can be considered a substantive judicial guardrail. The path it requires is clear. However, in addressing issues often framed as matters of corporate social responsibility, the shareholder primacy path does not preclude a for-profit company from taking social issues into account in the conduct of its business. What is required to stay on the path is that the company's consideration of those social issues have a sufficient nexus to shareholder welfare and value maximization. How can a board of directors determine that a sufficient nexus exists? For Delaware business corporations, the basic answer should be familiar. The board should do what it does in making other decisions regarding oversight of the company's business: define the issue; gather all reasonably available material information; identify and weigh the pros and cons; consider alternatives; and make an independent, disinterested and informed business judgment in good faith, looking solely to the economic best interests of shareholders as a whole. No time frame is mandated and building long-term value is the goal.

Of course, decisions by boards of Delaware for-profit corporations can be challenged by shareholders, as they frequently are. Such a challenge may be brought under state law for breach of fiduciary duty—the two duties being the duty of care and the duty of loyalty, discussed *supra*. Assuming the threshold application of the Business Judgment Rule is not rebutted, courts applying Delaware law will not second-guess a board's judgment unless the decision is found to be not rational. To make such a finding, a court would have to conclude that the board's decision cannot be attributed to any rational business purpose related to the company. As then-Chancellor William B. Chandler III of the Delaware Court of Chancery wrote in his *Craigslist* opinion:

> When director decisions are reviewed under the Business Judgment Rule, this Court will not question rational judgments about how promoting non-stockholder interests — be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture — ultimately promote stockholder value.[149]

Thus, it is possible that The Business Roundtable can achieve its goal of promoting non-shareholder stakeholder welfare by permitting Delaware to remain as-is and by pressuring companies to focus more on creating a nexus between EESG issues and shareholder profits. It is also possible that the Business Roundtable can achieve its goal by lobbying the Delaware legislature to follow the lead of the forty-one other United States who have enacted statutes promoting non-shareholder stakeholder welfare. Having discussed the legal avenues that exist, the lingering question that must be addressed is *should* a duty to non-shareholder corporate stakeholders be formally woven into law?

IV. *SHOULD* THE BUSINESS ROUNDTABLE STATEMENT BE WOVEN INTO LAW?

What would be the practical implications of adopting a true stakeholder theory approach for Delaware? The Business Roundtable Statement is not accompanied by a proposed plan of action.

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[148] Strine, *supra* note 60, at 768.
[149] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010).

Without such action, the Statement does nothing to forecast whether a true stakeholder approach might ever be implemented. Still, the Statement serves as a marker. The marker alone does create some accountability, as Chief Justice Strine has acknowledged and there are tangible steps that companies can take to show their commitment "is more than just of the moment."[150] The question is, which steps are best?

This Paper argues that by maintaining Delaware's current approach, companies are most suited to promote "[a]n economy that serves all Americans."[151]

First, expanding any fiduciary duty to non-shareholder constituencies is costly compared to contracting privately, and private contracting should be effective to curb manager opportunism. If the Business Roundtable Statement were codified into law, conflicting interests of various stakeholder groups would fall under the same fiduciary umbrella. Litigation costs over which group's interest is to receive priority would skyrocket. Fear of litigation would trigger increased managerial decision costs and costs in the form of foregone value-enhancing transactions. While private contracts may not perfectly constrain managerial opportunism, the cure is likely worse than the disease. The costs of such opportunism are likely dwarfed by the costs of bestowing a shared fiduciary duty among conflicting parties. Private bargains should be respected and parties should be permitted to constrain or modify shareholder primacy by contract. These parties have sufficient incentive on their own to design careful limits on managerial opportunism.

Second, constituency statutes, especially permissive constituency statutes, are ineffective. Despite their enactment in more than one-half of the states, currently all constituency statutes are discretionary. As discussed *supra,* this means that managers may, but are not required to, consider the interests of non-shareholder constituencies. The failure by managers to consider the interests of other constituencies therefore creates no managerial liability. Acting as rational maximizers, managers are essentially indifferent about the welfare of non-voting shareholders as no other constituency votes to appoint managers. Because of their discretionary nature, constituency statutes change none of this. The matter of obligations owed to various stakeholder groups should be addressed directly and inclusively and not through a statute that deals by indirection with only a part of a problem.

To be sure, this argument ignores the fact that corporations long have been able to issue multiple classes of shares with different economic and voting rights, with management owing fiduciary duties to each of these classes. Thus, it simply cannot be said that corporate law is incapable of reconciling the fiduciary claims of a variety of competing interests. The argument also ignores the effects of the Business Judgment Rule. Because most managers' actions are effectively protected against judicial scrutiny anyway, as a practical matter, the rights being taken away from shareholders by non-shareholder constituency statutes do not provide much in the way of concrete benefits for shareholders in the first place. Thus, the real problem with non-shareholder constituency statutes is not that they take away something of value from the only group that has any incentive to maximize the value of the firm, because other constituencies such as fixed claimants or workers often have the greatest stake in the decisions being made. Similarly, non-shareholder constituency statutes cannot be condemned on the grounds that they upset a system of legal rules that present a preexisting set of clearly defined behavioral guidelines for officers and directors. No such set of guidelines exists.

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[150] *Moral Money Special: Leo Strine's New Deal for Corporate America*, Financial Times (Oct. 1, 2019), https://www.ft.com/content/1d2f1348-e3de-11e9-9743-db5a370481bc.

[151] Bus. Roundtable, *supra* note 96.

The most compelling argument against constituency statutes is that such statutes fail to recognize that fiduciary duties are owed to residual claimants and residual claimants alone because this is group faces the most severe set of contracting problems with respect to defining the nature and extent of the obligations owed to them by officers and directors. Other constituencies besides shareholders face contracting problems, but these problems can be solved at far less cost than those confronting shareholders. Thus, fiduciary duties should properly be seen as a method of gap-filling in incomplete contracts. And shareholders place a far greater value on the protection provided by this gap-filling than do the non-shareholder constituencies of a corporation.

This dovetails into the third point, that non-shareholder constituencies already enjoy the protection provided by judicial gap-filling and do not need additional gap-filling protections afforded by expanding directors' fiduciary duties. Under modern principles of contract law, courts fill in gaps for these other constituencies against the background of the pre-existing contracts that these groups have with the firm. Thus, gap-filling for employees or bondholders is done in the context of interpreting the employment contracts, collective bargaining agreements, bond indentures, and covenants that these other groups have with the corporation. The obvious exception to this general rule arises with regard to the local communities in which large corporations operate. Unlike other constituencies, the local community has no pre-existing agreement with the firm, leaving no gap for a court to fill. But the local community is, or should be, well represented in the political process. Any grievance felt by the community should presented to elected representatives in the state and local government for redress.

Fourth, the most prominent structural alternative to shareholder primacy, Public Benefit Corporations ("B Corps"), already exists in Delaware.[152] A Delaware public benefit corporation is a for-profit corporation "that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[153] A B-Corp enables the business to be managed in a way that balances shareholder interests, the best interests of people "outside the corporate box" who are affected by the corporation's conduct, and the specific public benefits identified in its Certificate of Incorporation. The existence of B-Corps is based on a perceived incongruence between the legal framework governing for-profit corporations and the social purpose goals of sustainable business, impact investment, and social enterprise actors. While directors of for-profit companies traditionally have a fiduciary duty to maximize shareholder wealth, B-Corps are required to pursue a social mission and consider all stakeholders, internal and external, when making business decisions. Shareholder primacy is not an option for a benefit corporation; it is legally required to account for the effects of its decisions on all stakeholders. For a traditional corporation seeking to uphold the principles discussed in the Business Roundtable Statement, it may become a certified B-Corp.[154][154] To become a certified B-Corp, a company must first submit to an independent assessment of its social and environmental performance accountability and transparency. If the company scores high enough, it can become a certified B Corporation and then it must formally incorporate its social and environmental mission into its governance articles as

[152] Other states that have passed Benefit Corporation legislation include: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington DC, West Virginia, and Wisconsin. *See State by State Legislative Status*, Benefit Corp., https://benefitcorp.net/policymakers/state-by-state-status? (last visited Jan. 31, 2021).
[153] Del. Code Ann. tit. 8, § 362 (2020).
[154] *See "Converting" a Corporation to a Delaware Public Benefit Corporation*, INCNOW (June 7, 2018), https://www.incnow.com/blog/2018/06/07/how-to-convert-corporation-to-pbc/.

part of the terms of its certification as a B Corporation. Thereafter, the company needs to be reassessed every three years to ensure that it is maintaining the required standard.[155][155]

The number of B-Corps has grown dramatically in recent years. First formed in 2006, estimates indicate that there are over 2,500 B-Corps in more than fifty countries, including such prominent companies as Ben & Jerry's, Patagonia, and Athleta.[156][156] Consistent with its efforts to maintain its leadership in corporate law and governance, Delaware is a leader in benefit corporation legislation.[157][157] The guiding principle of a B-Corp is the very opposite of stockholder primacy; "investors and managers [of B-Corps] should not seek gains by simply extracting as much value as possible from the economy, but should instead seek gains by simply building and sharing value with all stakeholders in their investments."[158][158]

In short, supporting a stakeholder theory does not necessarily involve the kind of radical transformations of current legal relationships as some of its advocates might assume. Fulfilling fiduciary duties to shareholders does not entail that managers must side with shareholders and against other stakeholders. Companies have the legal autonomy to act proactively and advance the interests of a number of stakeholders simultaneously. Directors and organizations have considerable latitude in defining core values and philosophy, including exactly what kind of responsibilities it wishes to assume with respect to a variety of stakeholders. Directors are also free to exercise a wide latitude regarding the kinds of investments they wish to make and the way they evaluate alternative uses of corporate resources. So, while implementing stakeholder theory may seem to require radical changes in law, this is not so. It is well within the existing boundaries of corporate governance, and particularly with respect to the fiduciary duties owed to shareholders. To be sure, directors will still face difficult decisions about how to allocate resources and which priorities to establish among stakeholder claims. However, this Paper has suggested that these are, for the most part, moral choices which the law gives directors discretion to make without fear of violating their fiduciary duties to shareholders, and thus, not having to make wholesale choices between stakeholders and shareholders.

V. CONCLUSION

Ideology matters. Since the 1980s stockholder primacy has been the dominant ideology shaping corporate law. As a result, case law, director conduct, and our understanding of "best governance practices" have all been viewed under a single prism: how do these rules impact stockholder value?

The purpose of this Paper has been to underscore that fiduciary duty should be construed narrowly and afforded to shareholders alone. The Business Roundtable's Statement should not be interpreted as urging state legislators or companies to afford such fiduciary rights to other stakeholders. Such an interpretation is implausible as it creates a conflict between shareholders

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[155] Michele Giddens, *The Rise of B Corps Highlights the Emergence of a New Way of Doing Business*, FORBES (Aug. 3, 2018, 3:45 AM), https://www.forbes.com/sites/michelegiddens/2018/08/03/rise-of-b-corps-highlights-the-emergence-of-a-new-way-of-doing-business/?sh=7695b10c2ed2.

[156] *Ben & Jerry's Joins the B Corp Movement!*, Ben & Jerry's, https://www.benjerry.com/about-us/b-corp (last visited Jan. 31, 2021); Mara Leighton, *B Corps Are Businesses Committed to Using Their Profit for Good—These 14 Are Making Some Truly Great Products*, BUS. INSIDER (Mar. 23, 2020, 12:04 PM), https://www.businessinsider.com/b-corp-retail-companies.

[157] *See* Frederick H. Alexander, *Saving Investors from Themselves: How Stockholder Primacy Harms Everyone*, 40 SEATTLE U. L. REV. 303, 313-15 (2017).

[158] *Id.* at 319.

existing rights and new rights that would be carved out for others. Still, if American corporate law does little to inhibit a stakeholder orientation on the part of corporate managers, it also does little to compel one. It is certainly plausible that the definition of corporate ownership could be expanded to allow various stakeholders a greater say in the governance of the corporation. As this Paper suggests, this can be done without leaving shareholder primacy theory behind. Yet the Business Roundtable Statement has not offered any advice as to how such expansion might be implemented. In the interim, certainly, nothing prevents companies from "engag[ing] in activities designed to increase its profits," while simultaneously considering stakeholders as an important constituent when making corporate decisions.