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Looking Back, Looking Forward: Personal Reflections on a Scholarly Career

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Looking Back, Looking Forward: Personal Reflections on a Scholarly Career

David Millon*

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I. Introduction

I'm honored to have the opportunity to reflect on my over thirty years at Washington and Lee and to explain and evaluate the scholarly work that Professor Lyman Johnson and I have done here. In this Essay, I will focus on three topics. First, I will offer a few words about the beginnings of our collaborative work. We embarked on our scholarly careers in the later 1980s, a time of great turmoil in the corporate law arena brought about by the hostile takeover phenomenon and its social costs. Although we came to this problem from quite different political perspectives, we

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* J.B. Stombock Professor of Law, Washington and Lee University. I am grateful to the organizers of this Symposium for all the work that went into making it such a success. Thanks also to my friends and colleagues Christopher Bruner and Lyman Johnson for their thoughts on an earlier version of this Essay and to the Frances Lewis Law Center for its financial support.

shared a determination to challenge the then-orthodox view that the primary objective of corporate law was and should be shareholder wealth maximization. We termed this the "shareholder primacy" conception of corporate purpose.[1] In Part III of this Essay, I will address in detail what I take to be the status of shareholder primacy today.[2] I will close with some thoughts about the impact that we may have had both within and beyond the academy.

II. Shareholder Primacy and Hostile Takeovers

I arrived at Washington and Lee in 1986. This was my first teaching job after three years at a large Boston law firm, where I had been an associate in the litigation department. I spent most of my time there on large corporate and commercial cases, doing my part at the bottom of the staffing hierarchies. This mostly meant discovery, and most of that was utterly tedious document production. There were also research memorandums and some brief-writing, and occasional second-chairs at depositions, but I never did participate in an actual trial because the big cases almost never went to trial.

Because of my experience at the law firm, limited though it was, I thought I would be best suited to teaching civil procedure and evidence. My scholarly interests were elsewhere. I had a Ph.D. in medieval English legal history and expected to continue to work in that area, but I was also drawn to legal issues of more contemporary importance.

I was particularly interested in antitrust law because of the important political questions it addressed. In those days, debates still raged over the basic goals of the antitrust laws. There was a strong tradition that saw the law's principal goal as controlling the economic and political power of gigantic corporations.[3] Against this

1. *See* David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 223 n.2 (1991) [hereinafter Millon, *Redefining Corporate Law*] (coining the term "shareholder primacy").

2. *Infra* Part III.

3. *See, e.g.*, Jesse W. Markham, Jr., *Lessons from Competition Law From the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-To-Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 266 (2011)

older notion were new ideas promoted mainly at the University of Chicago.[4] According to this view, the antitrust laws should not be concerned with big business as such.[5] Monopoly could be efficient and therefore beneficial to consumers.[6] Loss of less-efficient smaller businesses therefore was not a bad thing, even though that meant loss of economic opportunity for their owners.[7] For me, this debate raised important political questions about economic power and social justice in the context of the structure of our nation's economy. As a result, my first major article, published in 1988,[8] was about the history of the Sherman Act,[9] the principal antitrust statute. I argued that the statute reflected nineteenth-century ideas that valued decentralized, balanced economic power and were hostile to concentrated power regardless of potential efficiency benefits.[10]

In addition to the course on antitrust law, I ended up being assigned to the business organizations course instead of civil procedure or evidence. It did not occur to me that I would end up writing about corporate law because I didn't think it would be of interest to me. The big questions then revolved around the balance of power between shareholders and management and how that balance might be adjusted to achieve better financial returns for investors. Larger issues of social or economic justice were generally ignored. Professor Victor Brudney, my law school corporate law

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("[A]ntitrust law in an earlier era was concerned about the threat of harm outsized enterprise posed to others by its sheer power . . . .").

4. *See* Millon, *infra* note 8, at 1221 (discussing antitrust law as emphasizing "the maximization of aggregate consumer welfare, defined as optimal satisfaction of consumer preferences" (citing Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979))).

5. *See id.* ("The second element [of the Chicago School] emphasizes that maximization can only occur if antitrust law is interpreted and applied without regard for other values that conflict with the efficiency norm.").

6. *Id.*

7. *Id.*

8. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988). This article had its origins in a paper I wrote as a third-year law student under the direction of Professor Morton Horwitz.

9. 15 U.S.C. §§ 1–7 (2012).

10. My article was in part a refutation of then-Professor Robert Bork's claim that the Sherman Act's legislative history reflected the Chicago School's efficiency agenda. Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

professor, acknowledged as much when I ran into him at a conference shortly after I entered law teaching. I expressed to him my misgivings about corporate law as an academic field. He responded, "Yes, the struggle between the common and the preferred shareholders is not the class struggle." For those interested in political economy and social justice, academic corporate law in the early 1980s evidently was not the place to be.[11]

But all that was changing when I arrived at Washington and Lee. The hostile takeover boom was in full swing.[12] For me, this ended up meaning that corporate law could be far more interesting than I had thought coming out of law school.

Hostile takeovers fractured long-standing assumptions about managerial autonomy and shareholder passivity in a two-party corporate governance universe.[13] Corporations and specialized buy-out groups were using borrowed capital to buy controlling blocks of stock in companies whose shares were undervalued.[14] The tender offer device allowed those seeking control to appeal directly to the target company's shareholders by offering them a large premium over the market price of their shares.[15] Raiders able to acquire a controlling block of shares could then put in a new management team dedicated to trimming waste and managerial slack, divesting the corporation of underperforming divisions and subsidiaries, and cutting expenses even where they might promise long-term gains.[16] If successful in these efforts, the new owner of the target corporation's stock would realize a potentially large increase in the value of its shareholding.

What was compelling about all this to Professor Johnson and me was the fact that hostile takeovers presented a stark tradeoff between the interests of shareholders on the one hand and those of

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11. To be sure, there were plenty critics of corporate power, but they generally were not corporate law academics. *See generally, e.g.*, RALPH NADER ET AL., TAMING THE GIANT CORPORATION: HOW THE LARGEST CORPORATIONS CONTROL OUR LIVES (1977).

12. Dale Arthur Oesterle, *Method to the Merger Madness: Revisiting the '80s Takeover Boom*, REGULATION, Spring 1997, at 27.

13. *See* Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 102 (1979) (discussing whether directors must accept any takeover bid "that represents a substantial premium over the current market [price]").

14. *Id.* at 104.

15. *Id.*

16. Oesterle, *supra* note 12, at 27.

nonshareholders—especially workers—on the other. For shareholders, a tender offer presenting a big premium over market price meant quick and easy profit.[17] And shareholders stood to gain even if their company was not the target of a hostile tender offer because all managers had an incentive to boost share prices in order to deter raiders looking to profit from acquisition of underperforming companies.[18]

But these gains for shareholders often came at the expense of nonshareholders.[19] Post-takeover corporate management cut costs wherever possible because it had to pay down the enormous debt assumed to finance the acquisition.[20] This could mean plant closings and lay-offs, and elimination of discretionary expenditures like research and development or marketing. It could also mean an end to investments in nonshareholder wellbeing such as job training or health and safety programs justified by the corporation's long-term sustainability.

Lawyers quickly developed legal tactics that allowed corporate management to resist unwelcome tender offers.[21] Most notable, of course, was the poison pill.[22] These and other antitakeover devices had the effect of blocking acquisition efforts not sanctioned in advance by target company management. Predictably, target company shareholders and hostile bidders challenged these antitakeover defenses in state courts, most importantly

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17. *See* Millon, *Redefining Corporate Law*, *supra* note 1, at 224 n.3 ("Premiums paid to shareholders in hostile tender offers have averaged 50% over market price.").

18. *See id.* at 234 ("The looming threat of a hostile takeover spurs corporate managers to eliminate slack and otherwise increase corporate profitability . . . .").

19. *See id.* at 225 (arguing that "relentless pursuit of profit maximization for [shareholders'] sake can impose substantial costs on nonshareholders").

20. *See id.* at 234 ("The use of enormous amounts of credit to finance these acquisitions creates strong pressures to cut costs, and, in some cases, prompts asset liquidations and plant closings." (citing John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 2–7 (1986))).

21. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165–82 (1981) [hereinafter Easterbrook & Fischel, *The Proper Role of a Target's Management*].

22. *See* Suzanne S. Dawson, Robert J. Pence & David S. Stone, *Poison Pill Defensive Measures*, 42 BUS. LAW. 423, 424 (1987) (describing the use and different methods of poison pill tactics . . . .").

Delaware's.[23] The stakes now being so high, judges found themselves compelled to revisit older rulings that had accorded broad (though not unlimited) business judgment rule deference to target company management seeking to resist a hostile takeover.[24] Now, they were required to side either with target company management and nonshareholders by allowing defensive measures or, instead, with target company shareholders and hostile bidders by striking down defensive measures and mandating that target company management remain neutral and allow shareholders to decide for themselves whether to accept a tender offer.

Advocates for shareholders saw the problem in terms of shareholder property rights and freedom of contract. Stock was the shareholders' property and they ought to be able to decide when to sell or not. The Delaware courts—wisely, in our view—chose a different perspective, characterizing the problem as a question of "where the power of corporate governance lies."[25] Allowing target company shareholders freedom to decide whether to accept a tender offer would in effect give them the power to decide the corporation's future, because a successful tender offer would result in new management and potentially big changes necessary to make the acquisition profitable to the raider.[26] Viewing the problem in terms of corporate governance, it was not surprising that the Delaware Supreme Court came down on the side of management's power to block hostile takeovers in order to preserve its authority to determine the corporation's future.[27] This conclusion was entirely consistent with the foundational principle of Delaware corporate law that management, not the shareholders,

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

24. *See, e.g.*, Cheff v. Mathes, 199 A.2d 548, 556–57 (Del. 1964) (applying the business judgment rule to determine whether directors should be liable for injury to shareholders for resisting a hostile takeover).

25. *Time Inc.*, 571 A.2d at 1154.

26. *See id.* at 1149–50 ("Did Time's board, having developed a strategic plan of global expansion to be launched through a business combination with Warner, come under a fiduciary duty to jettison its plan and put the corporation's future in the hands of its shareholders?").

27. *Id.* at 1154–55.

governs the corporation and decides its future.[28] The Delaware judges went further and also rejected the argument that management ought to be required to use its governance authority solely to promote shareholder financial interests.[29] Instead, the Delaware Supreme Court held that management's duty to "the corporate enterprise" included the power to take nonshareholder interests into account when faced with a hostile tender offer.[30] A duty to prioritize shareholder interests over those of nonshareholders was said to arise only in narrowly defined circumstances that could only occur if a target's management chose voluntarily to enter into a transaction that triggered that duty.[31]

Soon after Professor Johnson and I arrived at W&L, we realized that we shared the same perspective on the takeover phenomenon and on the larger question of the social costs of a legal regime of shareholder primacy. But we came to this perspective from very different directions. My politics are pretty far to the left and I have always voted as a Democrat. A legal regime that emphasized shareholder wealth maximization at the expense of other corporate stakeholders made no sense to me. Workers in

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28. *See id.* at 1154 ("Delaware law confers the management of the corporate enterprise to the stockholders' duly elected representatives . . . . That duty may not be delegated to the stockholders." (citing DEL. CODE ANN. tit. 8, § 141(a) (2016))).

29. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953–58 (Del. 1985) (ruling that management may consider factors other than a shareholder's financial interest in determining whether to accept a hostile takeover bid).

30. *See id.* at 955 (noting that directors may take into consideration the "impact on 'constituencies' other than shareholders" when entertaining a hostile takeover bid).

31. In *Revlon* (and in subsequent decisions clarifying the *Revlon* holding), the court held that management's duty was to obtain the best price available for its shareholders, regardless of nonshareholder considerations, when (i) break-up of the company becomes inevitable because management has initiated an auction of the company or has chosen to enter into a transaction that will have that result, or (ii) management enters into a transaction that will result in a change of control. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985); Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1994); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150–51 (Del. 1989). Absent these conditions, management's duty—at least in the takeover context—to prioritize shareholder interests over those of nonshareholders does not apply. And, even within *Revlon*'s narrow sphere, either triggering situation depends on a voluntary choice made by the company's management. In that important sense, *Revlon*'s pro-shareholder rule is optional.

particular lacked the bargaining power to protect their own interests by means of contract.

Professor Johnson, in contrast, is a conservative, though not of the stripe that is ascendant today. Values like community, stability, institutional self-reform, and regard for others animate his opposition to policies that valorize shareholder wealth maximization and leave affected nonshareholders to fend for themselves. Professor Johnson's religious commitment also led him to reject arguments based solely on so-called free-market economics. So, odd as it might seem to those who don't know us well, we were both drawn to the dramatic policy challenges presented by hostile takeovers, and it was an easy alliance from the start.

The genesis of our first co-authored article was an invitation from Professor Johnson and his wife to their home in Rockbridge County not long after I arrived at Washington and Lee. At the time, there was talk about whether the federal Williams Act[32] preempted state legislation restricting takeover activity. Professor Johnson asked whether, if that were the case, federal law would also preempt state common law doctrines that allowed corporate management to block hostile tender offers. When we looked into the question of preemption of state common law (as opposed to state statutes), we found that indeed the answer was yes.[33] So we offered a challenge to preemption advocates: Did they really intend their arguments to go this far?

Soon after that, we looked deeper into the preemption argument and found it was wrong both as to state statutes and to common law. In another co-authored article, we examined the Williams Act's legislative history and concluded that the United States Congress did not intend to take a position pro or contra on the desirability of hostile takeovers.[34] That policy question was assumed to be for the several states to decide for themselves.

32. 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2012).

33. *See generally* Lyman Johnson & David Millon, *Does the Williams Act Preempt State Common Law in Hostile Takeovers?*, 16 SEC. REG. L.J. 339 (1989).

34. *See generally* Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862 (1989) (reprinted in 33 CORPORATE PRACTICE COMMENTATOR 221 (1991)). Arguments about legislative intent often mistakenly conflate the legislature's *assumption* about the existence of a particular social phenomenon with an *intention* to shore up or encourage that phenomenon.

In addition to this Article, we wrote several more—some written together,[35] some individually[36]—about the problem of shareholder primacy in the hostile takeover context. Professor Johnson and I sought to illuminate the judicial and legislative rejection of an approach to takeover regulation that would have prioritized shareholder interests over those of nonshareholders. As we explained in one of our articles,[37] shareholder primacy in the

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35. For examples of our co-authored articles, see generally Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989) (reprinted in 31 CORP. PRAC. COMMENTATOR 581 (1990)); Lyman Johnson & David Millon, *The Case Beyond* Time, 45 BUS. LAW. 2105 (1990); Lyman Johnson & David Millon, *Corporate Takeovers and Corporate Law: Who's in Control?*, 61 GEO. WASH. L. REV. 1177 (1993).

36. For examples of articles that we wrote individually, see generally Millon, *Redefining Corporate Law*, *supra* note 1; David Millon, *State Takeover Laws: A Rebirth of Corporation Law?,* 45 WASH. & LEE L. REV. 903 (1988) [hereinafter Millon, *State Takeover Laws*]; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990). *See also* Lyman Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781 (1986); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992); Lyman Johnson, *Making (Corporate) Law in a Skeptical World*, 49 WASH. & LEE L. REV. 161 (1992) (reprinted in 34 CORP. PRAC. COMMENTATOR 367 (1992)); Lyman Johnson, *Sovereignty Over Corporate Stock*, 16 DEL. J. CORP. L. 485 (1991) [hereinafter Johnson, *Sovereignty Over Corporate Stock*]; Lyman Johnson, *State Takeover Statutes: Constitutionality, Community, and Heresy*, 45 WASH. & LEE L. REV. 1051 (1988); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865 (1990) [hereinafter Johnson, *Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*]; Lyman Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP. L. 35 (1988) [hereinafter Johnson, *The Eventual Clash*].

37. Johnson & Millon, *Misreading the Williams Act*, *supra* note 34, at 1882–86. The term "shareholder primacy" first appears in the law reviews in early 1989, in articles published by Professor Johnson and myself. Millon, *State Takeover Laws*, *supra* note 36, at 904; Johnson, *The Eventual Clash*, *supra* note 36, at 76–86 (outlining the differences in the approaches of legislatures and the courts). The term has gone on to achieve broad currency in the corporate law academy, both in this country and abroad. *See generally* Malcolm Anderson et al., *Shareholder Primacy and Directors' Duties: An Australian Perspective*, 8 J. CORP. L. STUD. 161 (2008) (Austl.); Paul Krüger Andersen & Evelyne J. B. Sørensen, *The Principle of Shareholder Primacy in Company Law from a Nordic and European Regulatory Perspective*, *in* THE EUROPEAN FINANCIAL MARKET IN TRANSITION (Hanne Birkmose, Mette Neville & Karsten Engsig Sørensen eds., 2011) (Neth.); John Armour, Simon Deakin & Suzanne Konzelmann, *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRIT. J. INDUS. REL. 531 (2003) (U.K.); Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45 (2002); Gregory Scott Crespi, *Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm*,

hostile takeover context had two aspects. It expressed the view that shareholder interests should take precedence over those of managers, workers, and other nonshareholders. Seen this way, there is no necessary implication of shareholder governance authority; management could be charged with the responsibility to protect shareholder interests.[38] This could mean the power to block a hostile bid deemed not to be in the shareholders' financial interest.[39] Shareholder primacy could also suggest, though, that shareholders ought to have the power to protect their own interests.[40] In the hostile takeover context, this would mean the power to decide for themselves whether to accept or reject takeover bids, even if that had the effect of determining the future of the corporation.[41]

Neither notion of shareholder primacy got much traction in the business community, whose leaders favored stability and the power of corporate managers to do their jobs without external interference. State legislators also rejected shareholder primacy for political reasons, being more responsive to local labor and business interests—both well organized—than to shareholders living elsewhere and lacking effective lobbying operations. Real economic hardship for local citizens also trumped abstract ideas like economic efficiency or freedom of contract. Over forty states (but not Delaware) therefore enacted statutes that expressly authorize management to take nonshareholder interests into account, even at the expense of shareholders.[42] And, as noted

55 SMU L. REV. 141 (2002); Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909 (2013); Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 MOD. L. REV. 49 (2005) (U.K.); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998) [hereinafter Smith, *The Shareholder Primacy Norm*]; Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002). For elaboration on the meaning of shareholder primacy without special reference to the takeover context, see David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013) [hereinafter Millon, *Radical Shareholder Primacy*].

38. Johnson & Millon, *Misreading the Williams Act*, *supra* note 34, at 1882.

39. *See id.* at 1883 (explaining that management "may go so far as to thwart a takeover bid—denying shareholders any opportunity to tender—where deemed necessary to 'protect' shareholder interest").

40. *Id.* at 1885.

41. *Id.*

42. *See* Millon, *Redefining Corporate Law*, *supra* note 1, at 225–27 (noting

above, Delaware's judicial response to takeover defenses denied shareholders the power to decide the corporation's future and rejected the idea (except in the very narrow *Revlon* context) that management's sole duty was to maximize shareholder wealth.[43]

In the takeover context, shareholder primacy's stronghold was in academia. A shareholder primacy approach to this problem would have required management to favor shareholders over nonshareholders by abstaining from interference with access to takeover premia. This was the view advocated by several corporate law scholars at leading law schools.[44] Seen this way, the central questions for corporate law were the balance of power between management and shareholders and the optimal mix of legal intervention versus market-based pressures in regulating that balance. The underlying assumption that shareholder interests should take precedence over those of other corporate stakeholders was taken for granted.

Shareholder primacy's rejection in the broader society was pretty uncontroversial and would have happened without Professor Johnson's and my scholarly efforts. We do like to think, though, that our work encouraged other law professors to question or even reject shareholder primacy at a time when doing so undoubtedly brought with it significant career advancement costs. Maybe it was easier to swim upstream in the company of others than it would have been to do so alone. This group was labeled "communitarians." I don't know where this came from. We didn't devise the name ourselves, and it may have been intended derisively, but we didn't mind, and the term offered a convenient counterpart to the so-called "contractarian," shareholder primacy mainstream.

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the enactment of these new statutes). *See generally* Katherine Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823 (2003) [hereinafter Hale, *Corporate Law and Stakeholders*] (collecting and commenting on the new legislation).

43. *See supra* notes 25–29 and accompanying text (explaining how the Delaware courts took a more management-oriented view of corporate governance).

44. In the context of takeover defenses, the leading articles were Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) and Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981).

III. Shareholder Primacy Today

Since those early years, when our focus was primarily on hostile takeovers, Professor Johnson and I have continued to argue against shareholder primacy, both as a description of the law as it is and also on normative grounds.[45]

From a normative perspective, shareholder primacy can have harmful effects on society.[46] Business policies designed to maximize profits can lead to illegal or reckless conduct, as in the cases of General Motors or BP, for example.[47] Even when corporations act within the law, obsession with profit maximization can result in harm to the environment, human rights violations in developing countries, or elaborate tax avoidance schemes.[48] Further, corporations need to have the discretion to invest in nonshareholder well-being, even where that involves short-term cost and the long-run financial benefits are uncertain and hard to quantify. For example, companies may want to spend money on employee "wellness" in order to enhance loyalty and productivity and thereby generate long-run value of an uncertain magnitude.

I agree with those who argue that legislation mandating socially responsible behavior would be a first-best solution, but there is essentially zero chance of that happening any time soon. For that reason, the law should at least give corporate management the freedom to voluntarily attend to social considerations even if that means less money for shareholders.

My own recent work has focused on corporate social responsibility (CSR). Because a CSR conception of management's

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45. Some of my work has been entirely unrelated to corporate law. *See, e.g.*, DAVID MILLON, SELECT ECCLESIASTICAL CASES FROM THE KING'S COURTS 1272–1307 (2009) (documenting medieval ecclesiastical cases bearing on conflicts of jurisdiction between church and royal courts); David Millon, *Juries, Judges, and Democracy*, 18 L. & SOC. INQUIRY 135 (1993) (discussing SHANNON STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (1990)); David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1 (1992) (considering how legal interpretation can be made more democratic).

46. Johnson, *Sovereignty Over Corporate Stock*, *supra* note 36, at 553.

47. David Millon, *New Directions in Corporate Law,* 50 WASH. & LEE L. REV. 1373, 1378 (1993).

48. *Id.*

function would authorize consideration of nonshareholder as well as shareholder well-being, I frame CSR as an alternative to shareholder primacy. The importance of CSR, in my view, is the potential for management of multinational enterprises to reject policies and practices—sometimes but not always legal—that enrich shareholders but harm the environment and violate human rights. I have considered the CSR alternative to shareholder primacy from three angles. First is the question of whether U.S. corporate law—especially Delaware—allows corporate management to deviate from shareholder wealth maximization in order to pursue environmental rights, human rights, and other values. Second, I have examined alternative conceptions of CSR, distinguishing between policies based purely on ethical considerations and those that have the potential to enhance corporate profits and long-run survival. Finally, I have written about the non-legal pressures that discourage voluntary adoption of CSR policies. I consider each of these issues in the remainder of this Part.

A. Shareholder Primacy and Contemporary Corporate Law

With respect to what the law is now, I and others (including Professors Johnson[49] and Bruner[50]) think corporate law—including Delaware's—already gives management the freedom to deviate from profit maximization where necessary to promote business policies responsive to social considerations.[51] The law is,

49. *See generally* Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405 (2013); Johnson, *Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, *supra* note 36.

50. *See generally* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008).

51. This was the main point of our recent article on the Supreme Court's controversial *Burwell v. Hobby Lobby* decision. Lyman Johnson & David Millon, *Corporate Law after* Hobby Lobby, 70 BUS. LAW. 1 (2015) [hereinafter Johnson & Millon, *Corporate Law after* Hobby Lobby]. We did not take a position on the broader question of the desirability of exempting corporations from Obamacare (or other federal mandates) on religious grounds. Rather, we looked at the decision from the perspective of state corporate law. *Id.* at 1. Our central point was that the majority's understanding of state corporate law (despite its somewhat opaque and incoherent exposition) as permitting incorporators to define business purpose in ways other than profit maximization is correct. *Id.* at

in our view, essentially agnostic on the question of corporate purpose. It accords broad discretion to the corporation's board and senior management to decide how zealously the company should pursue profit, when it should voluntarily undertake strategies or projects that do not have profit maximization as their primary objective, and when long-term gains should be preferred over short-term ones.[52]

With respect to existing law, it should first be noted that Delaware's corporation statute[53] nowhere mandates that corporations must be managed so as to maximize shareholder wealth. Nor, despite frequent statements to the contrary, does it refer to Delaware business corporations as "for-profit" entities. Instead, the statute states expressly that "[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes."[54]

Only a few Delaware cases address the question of corporate purpose. One recent trial court opinion speaks of shareholder wealth maximization as a statutory mandate, despite the absence of statutory language to that effect.[55] The case turned on the question of whether the founders of craigslist, a corporation formed pursuant to the Delaware business corporation statute, were free to define the purpose of the business as something other than profit maximization.[56] The three founders of the company chose deliberately, as a community service, to provide potentially lucrative publication of classified advertising free of charge to the advertisers.[57] One of the three founders later sold his minority

20–23.

52. Despite the absence of a shareholder primacy legal mandate, there is no real doubt that management will pursue profitable business strategies because there are plenty of market-based incentives to do so, including the need to raise capital in a competitive market, executive compensation arrangements that reward financial performance, and the need for the company's long-run survival in competitive product and service markets. The absence of a legal maximization requirement does not, in other words, present a serious threat that corporations will disregard profit-seeking in a substantial way. It does mean, though, that they are free to do so in response to competing considerations.

53. DEL. CODE ANN. tit. 8, §§ 101-15 (2011).

54. *Id.* § 101(b).

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

56. *Id.*

57. *Id.* at 7–8.

interest to eBay, which of course purchased those shares with knowledge that craigslist did not seek to maximize financial return.[58] eBay's objective was eventually to acquire control of craigslist and reorient its business model so as to maximize its substantial earnings potential.[59] When craigslist's remaining founders learned that eBay was engaged in competition with it, they implemented measures designed to prevent eBay from gaining control of their company and changing its mission.[60] Holding that this action amounted to a breach of fiduciary duty, the court stated that, "[h]aving chosen a for-profit form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."[61] As an observation of business reality, this is obvious and unremarkable—all corporations, including non-profits, must "promote the company's value" in order to survive. But even this fact of life finds no mandate in the corporation statute, which, again, does not refer to businesses organized under it as "for-profit" entities. But the court then proceeded to make a much bolder claim, asserting that corporate policies—like craigslist's—that seek not to maximize the economic value of a Delaware business corporation for the benefit of its stockholders are invalid.[62] In other words, according to this decision, not only does the statute—implicitly though not explicitly—mandate promotion of the company's economic value, it also requires maximization. So, according to this court, someone who buys shares in an existing corporation with notice that the business does not seek to maximize profits can demand a change in that company's mission.[63] That could only be because the

58. *Id.* at 11.

59. *Id.* at 9–17.

60. *Id.* at 21–24.

61. *Id.* at 34.

62. *See id.* at 35 ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.").

63. The key fact that eBay invested in craigslist knowing that the company did not seek to maximize profits and instead sought to provide a community service distinguishes that case from cases like *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). In that famous case, the court rejected Henry Ford's efforts to

Delaware corporation law does not allow private individuals to choose voluntarily to organize a business for any purpose other than profit maximization.[64] As noted, the statute itself says no such thing and in fact authorizes incorporation "to conduct or promote any lawful business or purposes."[65] As authority for a shareholder primacy conception of corporate purpose, this decision simply asserts its conclusion apodictically. No reasons are given why people like the craigslist founders should be disabled from tempering profit-seeking with social considerations, particularly when the complaining minority shareholder invested in the corporation with full knowledge of its community service mission.

The very few other cases cited in support of the shareholder primacy proposition offer even weaker support for it. There is, of course *Dodge v. Ford*,[66] in which the Michigan Supreme Court stated, without citation of authority, that

> A business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or the non-distribution of profits among stockholders in order to devote them to other purposes.[67]

That decision, beloved as it may be by many corporate law academics, has only been cited three times by Delaware courts and never for its celebrated declaration on corporate purpose.

As noted above, in the well-known *Revlon* decision,[68] the Delaware Supreme Court does define management's duty in terms

reorient the company's mission away from profit maximization for the sake of workers and consumers. The minority shareholders, however, had invested in the company with a reasonable expectation that the Ford Motor Co. would be run primarily in the financial interest of its shareholders. There was a legitimate gripe, therefore, that Ford had used his powers of control to "change the rules" in the middle of the game. In that sense, *Dodge v. Ford* can be described as a minority shareholder oppression case, see generally Smith, *The Shareholder Primacy Norm*, *supra* note 37, but the craigslist case cannot.

64. DEL. CODE ANN. tit. 8, §§ 101–15 (2011).

65. *Id.* § 101(b).

66. 170 N.W. 668 (Mich. 1919).

67. *Id.* at 683.

68. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).

of maximizing the short-term price of the corporation's shares.[69] Importantly, though, the decision addresses only the hostile takeover context and applies only when a corporation's board approves a transaction that will cause either a change of control or the break-up of the company.[70] By implication, then, beyond those two circumstances there is no such duty. The Delaware Supreme Court had already said as much with regard to takeover defenses, expressly authorizing consideration of nonshareholder interests in *Unocal Corp. v. Mesa Petroleum Co.*[71] and, in *Time/Warner*, endorsing the authority of corporate management to determine the corporation's future despite conflicting shareholder preferences.[72] And, in addition to the expressly narrow reach of *Revlon* is the important fact that either of the circumstances in which its mandate does apply can occur only when a corporation's board chooses voluntarily to enter into one or the other type of transaction.[73]

As far as the case law allegedly supporting shareholder primacy is concerned, that's about it.[74] One could go further and

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69. *See id.* at 182 ("The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

70. *See* Paramount Commc'ns v. QVC Network, 637 A.2d 34, 48 (Del. 1994) ("It is the significance of [a change of control or a break-up of a company] that justifies: (a) focusing on the directors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring close scrutiny of board action which could be contrary to the stockholders' interests.").

71. 493 A.2d 946, 955 (Del. 1985) (noting that a board can consider constituencies besides shareholders).

72. *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150–51 (Del. 1989) (explaining that a board can consider "long-term" values and "is not under any *per se* duty to maximize shareholder value in the short term").

73. Because it requires immediate share price maximization, it is hard to see how this decision could support the argument that Delaware law requires long-term maximization of firm value. *See generally* 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 (2015) [hereinafter Strine, *The Dangers of Denial*].

74. A Delaware trial court opinion states in passing that "[i]t is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders." Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986). However, that case dealt with the legal rights of corporate bondholders and therefore did not address the question of the claims of shareholders versus those of other corporate constituencies. Even taken at face value, the statement rejects the idea that shareholders are entitled to short-term share price maximization.

point to features of corporate law that seem to indicate lack of commitment to shareholder primacy. Fiduciary duty law's business judgment rule accords directors very broad discretion to run the company as they think best. As long as the claim is at least superficially plausible, directors can justify a range of policies—including policies that seem to favor nonshareholders at the expense of shareholders—by reference to long-run benefit to the corporation. Only serious cases of self-dealing or near total neglect of responsibility can lead to accountability, and statutorily-authorized[75] exculpation provisions included in most corporate charters eliminate monetary liability for breach of the duty of care. Further, while corporate law gives rights to shareholders—including voting rights, the right to bring derivative suits, and rights of access to corporate information—that are not available to other constituent groups, in practice these rights are very weak mechanisms for imposing discipline on corporate management. As Professor Bainbridge has written, "[s]hareholder control rights are so weak that they scarcely qualify as part of corporate governance."[76]

As noted above, over forty states have enacted so-called constituency statutes.[77] Using various linguistic formulations, these statutes expressly authorize corporate management to take nonshareholder interests into consideration even at the expense of shareholder wealth.[78] To that extent these statutes are an express repudiation of shareholder primacy. Delaware does not have one, but one might say that if the statute and case law are already agnostic on the question of corporate purpose and the law already accords very broad discretion to corporate management, no such

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75. DEL. CODE ANN. tit. 8, § 102(b)(7) (2015).

76. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 569 (2003) [hereinafter Bainbridge, *Director Primacy*].

77. Sources cited *supra* note 42 and accompanying text.

78. *See, e.g.*, KY. REV. STAT. ANN. § 271B.12-210(4) (2017) ("[T]he board of directors, in considering the best interests of the corporation, may consider in addition to the interests of the corporation's shareholders . . . corporation's employees, suppliers, creditors and customers . . . [c]ommunity and societal considerations . . . ."); N.Y. BUS. CORP. L. § 717(b) (McKinney Supp. 2017) (allowing a director to consider "the effects that the corporation's actions may have in the short-term or in the long-term upon" nonshareholder constituencies such as "employees" and "customers and creditors").

statute would be necessary. In the one area where the shareholder primacy idea was most urgent, the Delaware Supreme Court granted broad discretion to corporate management to defend against hostile takeovers in the interests both of nonshareholder constituencies and long-run strategic planning,[79] at least as long as there were some "rationally related benefits" for shareholders.[80] That restriction is too vague to provide a vehicle for judicial review of management decisions. Judicial decisions, in other words, may have obviated the need for legislative action in Delaware.

Having said all this, it remains a fact that a number of scholars deeply versed in Delaware corporate law are convinced that shareholder primacy is indeed a legal mandate.[81] This deep disagreement about a foundational question has always struck me as a very puzzling feature of the corporate law landscape. I suggested in a recent Article that part of the reason for this could be the ambiguous meaning of the shareholder primacy term.[82] In that Article, I used the term "radical shareholder primacy" to refer to the notion that corporate management is the agent of the shareholders, charged with maximizing their wealth.[83] Viewed from an agency perspective, the primary challenge for corporate law is to render management accountable to the shareholders. Some scholars therefore argue that law reform is needed in order to empower shareholders and thereby reduce agency costs.[84] Others are more inclined to view current arrangements as optimal because of the widespread adoption of the corporate form despite

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79. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1153 (Del. 1989) (discussing when *Unocal* duties attach); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (noting that whether a defensive measure is reasonable can include the impact on "'constituencies' other than shareholders").

80. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1985).

81. *See, e.g.*, Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231 (2008); Henry Hansman & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907 (2013); *supra* note 76; *infra* note 84

82. Millon, *Radical Shareholder Primacy*, *supra* note 37, at 1016–17.

83. *Id.* at 1018–19.

84. *See generally* Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

the "separation between ownership and control" characteristic of public corporations.[85] They are likely to point to market-based mechanisms that enhance accountability, perhaps limiting calls for law reform to new rules that would stimulate a more active hostile takeover market.[86] Scholars in the radical shareholder primacy camp, despite their disagreements over specific law reform proposals, nevertheless share the assumption that corporate management is the agent of the shareholders.

The agency conception of shareholder primacy originated in the late 1970s, when economically oriented legal scholars turned to cutting edge scholarship produced by financial economists. Economists wrote of a principal-agent relationship but did not seem to have had the legal idea of agency in mind and seemed instead to have been thinking generally about situations in which one person acts for another. The legal conception of an agency relation implies more than that, including the principal's power of control over the agent and fiduciary obligation running from the agent to the principal. Legal scholars took the economists' looser notion of agency and imported it into corporate law by characterizing the relationship between management and the shareholders in terms of agency law.[87] This implied a right of control and a fiduciary obligation running from management directly to the shareholders (rather than to the corporate entity). Seen from this perspective, agency cost reduction became the central problem of corporate law.[88]

Critics of shareholder primacy are correct in their view that this extreme version of shareholder primacy is not the law. There is no legal basis for the agency idea in this context because the relationship between the board of directors and senior officers on the one hand and the shareholders on the other does not conform to the definition of an agency relation.[89] While agency law insists

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85. Hansman & Kraakman, *supra* note 81, at 440.

86. *See generally* Rock, *supra* note 81, at 1923–25.

87. *See* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1428–30 (1985) (discussing the agency argument)

88. *See id.* at 1428–30 (outlining the limits of an agency approach).

89. *See id.* at 1428–30 (describing the various ways that these two relationships are different).

on the principal's right of control over the agent,[90] corporate law expressly provides that the board of directors, not the shareholders, manages the corporation.[91] Shareholders possess no legal mechanism for telling the board what to do. At best, they can exercise their voting rights to replace a board if they disapprove of its exercise of control but they cannot dictate how that power should actually be exercised. Further, in the modern publicly held corporation, shareholders typically lack the knowledge and expertise to exercise control over management, and most have no desire to do so. Efforts to control the board would in any event be subject to collective action costs, including the accommodation of heterogeneous preferences.

There is, however, a more limited sense in which shareholders do enjoy primacy, though only with respect to their place within the legal framework of corporate governance. Shareholders alone among the corporation's various constituencies enjoy voting rights with respect to election of directors and approval of fundamental changes, rights of access to corporate books and records and the list of shareholders, and the right to bring derivative suits. This model I refer to as "traditional shareholder primacy."

Disagreement over whether shareholder primacy is the law today is due at least in part to these two different meanings of the term. Those who insist that shareholder primacy is the law are correct, but in a limited sense. Traditional shareholder primacy is the law today, but it doesn't amount to much, and says nothing expressly about a shareholder wealth maximization mandate. Meanwhile, those who deny that shareholder primacy is the law are correct to the extent that corporate law does not embrace the agency model. They need, however, to acknowledge that long-standing features of current corporate law do lend themselves to a shareholder primacy characterization. But, there is no need to

90. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (defining agency); RESTATEMENT (SECOND) OF AGENCY § 1.1 (AM. LAW INST. 1958) (defining agency); ROBERT C. CLARK, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 56–59 (John W. Pratt & Richard J. Zeckhauser eds., 1985); *see also* Brudney, *supra* note 87, at 1428–30 (outlining the limits of an agency approach).

91. DEL. CODE ANN. tit. 8, § 141(a) (2016); *see also* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1149–51 (Del. 1989) ("Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives.").

resist seeing corporate law as reflecting the traditional shareholder primacy model because traditional shareholder primacy does not demand shareholder wealth maximization.

Delaware Supreme Court Chief Justice Leo Strine, in his paper for this Symposium,[92] argues that the Delaware statute's conferral of governance rights upon shareholders indicates an implicit requirement that corporations prioritize shareholder interests over those of other stakeholders, who lack such rights. History explains why this argument doesn't work. Toward the middle of the nineteenth century, when corporations began to replace partnerships for organization of businesses, these firms were closely held entities analogous to general partnerships.[93] It therefore was natural that shareholders but not nonshareholders (except by delegation from shareholders) should enjoy governance powers, just as partnership law conferred exclusive governance powers on general partners.[94] And, analogously to partnership law, for much of the nineteenth century corporate law presumed one vote per shareholder rather than one vote per share, unless provided otherwise by the corporate charter or by statute.[95]

Just as partnership law left it to the partners to decide what purposes the firm should pursue, corporate law accorded the same power to shareholders.[96] Before the advent of general incorporation statutes beginning around the middle of the nineteenth century, formation of a corporation required a special act of the legislature.[97] The incorporators defined the purposes that the firm was to pursue and were free to decide the extent to which profit maximization was to be the primary objective; no generally applicable statute or common law doctrine restricted this power. When incorporation pursuant to general statutes replaced special

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92. Leo E. Strine, Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV 1163 (2017).

93. Smith, *The Shareholder Primacy Norm*, *supra* note 37, at 291.

94. *Id.*

95. *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354–55 (2006) (explaining how this democratic system was extremely common in American and English law).

96. Smith, *The Shareholder Primacy Norm*, *supra* note 37, at 297.

97. *See id.* at 295 (describing early chartering requirements).

chartering, corporations were still small in scale and their stock closely held; large publicly held entities did not begin to achieve dominance until the last decades of the nineteenth century.[98] Early general incorporation statutes—like their modern successors—did not mandate profit maximization. Delaware's first general incorporation law, enacted in 1875, authorized incorporation for "charitable" as well as other specified purposes, including religious, literary, and manufacturing purposes.[99] Just as they were able to do under the special chartering regime, it seems to have been assumed that incorporators ought to have the freedom to define corporate purpose according to their own preferences. This made sense in a world of closely held firms because, as a practical matter, the shareholders—or at least a majority of them—had the ability to decide such questions for themselves. Rather than implying a particular conception of corporate purpose, the shareholders' governance monopoly seems instead to have obviated any need for statutory specification. If the shareholders wanted to maximize profits, they could commit the firm to that objective through the exercise of their powers of control. But this legal regime also gave them discretion to manage the firm so as to pursue other objectives.

The nineteenth-century statutory framework—shareholder governance monopoly without a shareholder primacy mandate—has survived essentially intact. Once large, publicly traded entities became commonplace after the turn of the twentieth century, shareholder governance powers lost much of their practical efficacy. This was the result of "the separation between ownership and control."[100] At this point, a statutory requirement of

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98. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 285–89 (1977).

99. Act of Jan. 28, 1875, ch. 119, § 1, 15 Del. Laws 3. This statute was replaced by a thoroughly revised statute in 1883. Act of March 14, 1883, ch. 147, 17 Del. Laws 212. The 1883 statute, like its modern successors, defined powers that corporations might exercise but included no provisions as to the purposes that corporations might lawfully pursue. In 1899 a new statute—modeled on New Jersey's—replaced the earlier one. Act of March 9, 1899, ch. 273, 21 Del. Laws 445. This statute authorized formation of corporations "for the transaction of any lawful business, or to promote or conduct any legitimate object or purpose" but, like its predecessors, said nothing about profit maximization." *Id.* § 1. For a history of the Delaware statutes, see generally S. Samuel Arsht, *A History of the Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976).

100. *See generally* ADOLF BERLE, JR. & GARDNER MEANS, THE MODERN

shareholder primacy might have seemed desirable if that were the policy objective, because the shareholders no longer had the practical ability to determine questions of corporate purpose. The Delaware legislature has chosen not to do this, instead retaining the long-standing statutory agnosticism. Perhaps the lawmakers prefer not to intrude upon managerial discretion, a value of foundational importance in Delaware law. Whatever the reason may be, the shareholders' governance monopoly does not now imply a shareholder wealth maximization requirement because it never did.

Despite the reading of Delaware law I've presented here, it remains a fact that a number of scholars deeply versed in Delaware corporate law—including Chief Justice Strine, a corporate law scholar of the highest rank—are convinced that shareholder primacy is indeed a legal mandate. Thus, when Chief Justice Strine writes that Delaware law requires that corporate directors "must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare,"[101] people who care about these questions must pay attention.

This is a debate that is not going to be resolved by reference to statutory and case law. The interpretive arguments are familiar and neither side seems inclined to change its mind. Perhaps though, debating the legal authority for shareholder primacy misses the point. If the Delaware judges are convinced that shareholder primacy is the law, challenging the authority for that position is not going to gain traction and may even be beside the point. Statements in law review articles by Chief Justice Strine—which otherwise might seem to be a problematic venue for resolving controversial legal questions[102]—then become useful

CORPORATION AND PRIVATE PROPERTY (1932) (explaining managerial autonomy due to wisely dispersed share ownership).

101. Strine, *The Dangers of Denial*, *supra* note 73, at 768. Chief Justice Strine's version of shareholder primacy would not require directors to maximize current share price. Rather it would require that they maximize the financial interests of shareholders in the long run. *Id.* at 766–67.

102. One might question whether it is appropriate for judges to attempt to clarify hotly debated questions of law by means of law review articles. Ordinarily, we look to legislatures to revise the law and to judges deciding actual cases to clarify its meaning. For judicial law-making, the adversarial process at work in a particular controversy with real stakes for the parties provides the occasion for

evidence of the judiciary's understanding of the law, more useful than the statute and cases.

The point here is akin to an older argument about the nature of law. For Sir William Blackstone, the great eighteenth-century English jurist, law consisted of customary principles resting upon "general reception and usage."[103] These principles were to be identified and explained by judges, "the depository of the laws; the living oracles."[104] Cases themselves were not law, only "evidence" of what the law is.[105] According to this view, Chief Justice Strine and his colleagues on the bench—whose knowledge is shaped by experience and study and whose work is guided by their oath of office[106]—enjoy privileged access to the meaning of the law's principles and it is their opinions about what the law is that count; arguments among mere academics about the implications of particular cases or statutes may actually be irrelevant.[107]

Even if this is so, Chief Justice Strine's definition of corporate purpose in terms of long-run profit maximization rather than of short-term share price[108] may go a long way toward satisfying critics of shareholder primacy. Coupled with the business judgment rule's broad deference to good faith managerial decisionmaking, the practical effect may be to allow management to sacrifice profits for the sake of competing considerations in many cases. Courts are unlikely to second-guess facially plausible claims of long-run financial benefit, for example, in the form of

reasoned argument and debate between contrasting positions. The judicial process at the appellate level requires collegial collaboration and the give and take that that can require, especially important in Delaware where there is a strong tradition of unanimity in the Supreme Court. And the requirement of publication ensures that opinions in controversial cases draw public scrutiny that judges generally are unable to ignore however hard they might try. In contrast, a law review article written by an author who identifies himself by reference to his judicial office inevitably carries significant authority despite the unofficial venue and despite the absence of institutional mechanisms that constrain and shape judicial opinions.

103. 1 WILLIAM BLACKSTONE, COMMENTARIES *68.

104. *Id.* at *69.

105. *Id.*

106. *Id.*

107. In this regard, note Chief Justice Strine's reference to "accomplished [Delaware] jurists" like Chancellor William Allen, Chancellor William Chandler, and Justice Andrew Moore. Strine, *The Dangers of Denial*, *supra* note 73, at 776.

108. *Id.*

reputational gains to be realized from being a "good corporate citizen."

B. Voluntary CSR

Given the law's flexibility as a practical matter (and perhaps doctrinally as well), it seems evident that corporate management possesses broad discretion to pursue socially valuable objectives, even if such pursuits come at the expense of the shareholders. Of course, corporations must make money to survive, but that fact of life still leaves management with substantial space within which to promote social welfare in appropriate cases, including, for example, employee well-being, the human rights of those affected by corporate activities, and environmental concerns.

I would prefer to see law reform both external and internal to corporate law that would address the relations between corporations and society more directly. Leaving it up to corporate management to make these choices in a world of conflicting pressures, extra-legal norms that encourage devotion to shareholders, and varying levels of commitment to social welfare values is a decidedly second-best solution. But, since meaningful law reform in this context seems to be something of a pipedream, and as long as corporations continue to generate social costs—or at least ignore them despite their ability to do much better—it seems to me appropriate to think about whether corporations might use their legal freedom to act in a socially responsible manner even in the absence of legal mandate.

In thinking about the prospects for voluntary CSR, I find it helpful to identify two different conceptions or models of CSR. I have referred to these as the "ethical" and "strategic" models of CSR.[109] The likelihood of voluntary adoption of CSR business policies may differ depending on which model one has in mind,

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109. David Millon, *Corporate Social Responsibility and Environmental Sustainability*, *in* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 35, 41–46, 65–71 (Beate Sjåfjell & Benjamin J. Richardson eds., 2015) [hereinafter Millon, *Corporate Social Responsibility and Environmental Sustainability*]. In an earlier article, I used the terms "constituency" and "sustainability" to refer to the "ethical" and "strategic" models. David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 523–525 (2011).

although it turns out that there are strong disincentives to acceptance of both versions.[110]

"Ethical" CSR posits that management owes a duty to respect the welfare of all the corporation's stakeholders.[111] In addition to shareholders, these include workers, creditors, suppliers, customers, and those affected by the corporation's impact on the environment.[112] Management's duty is to take the interests of one or more of these nonshareholder constituencies into account when it is appropriate to do so, even if that comes at the expense of the shareholders.[113] This can mean avoiding conduct that, while within legal bounds, is harmful to some stakeholder groups, such as profitable business activity that is harmful to the environment.[114] Corporations may also, for example, act affirmatively to alleviate suffering in a developing country in which they do business.

Ethical CSR does not specify when and how such trade-off decisions are to be made. Scholars primarily in the field of business ethics have developed normative theories to guide decisionmakers,[115] but the vast range of circumstances in which these questions can arise and the complexity of the relevant ethical considerations make generalizable, rule-like prescriptions impossible.

To this it is commonly objected that according management such broad power without meaningful guidance as to how that power should be exercised is a recipe for unaccountable discretion that may end up benefiting no one but the managers themselves. While there may be truth to this complaint, it does not seem to me that the antidote is to mandate shareholder wealth maximization

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110. *Infra* Part III.C.

111. Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 64.

112. *Id.* at 62.

113. *Id.* at 60–63.

114. *See id.* at 62 ("For example, management may decide to install expensive new equipment to decrease air pollution even though it is not legally required to do so. The public stands to benefit, but the added expense will reduce shareholders' profits, at least in the near term.").

115. *See* SUZANNE BENN & DIANE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 13–17 (2011) (describing various ethical constructs, including ethical egoism, virtue ethics, deontological ethics, consequentialist ethics, rights-based ethics, justice-based ethics, cultural relativism, and postmodern ethics, as relevant frameworks within which to discuss CSR).

without regard for the resulting social costs that may be inflicted on nonshareholders.

"Strategic" CSR is based on the idea that, under certain circumstances, business decisions that benefit nonshareholder constituencies can enhance shareholder wealth in the long run.[116] The justification therefore is instrumental, in the sense that policies benefiting nonshareholders are undertaken to further the financial interests of the corporation and its shareholders rather than out of a sense of ethical obligation. This has been referred to as the "business case" for CSR.[117]

There are plenty of real world examples of companies that have invested in the well-being of workers, suppliers, and others affected by their activities, resulting in enhanced productivity and output.[118] In a similar vein, numerous companies have used process and product design innovation to reduce costs while also contributing to environmental sustainability.[119] Importantly, a recent, well-designed empirical study provides impressive evidence of the potential financial benefits and competitive advantages to be realized from voluntary adoption of socially and environmentally responsible business policies.[120]

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116. Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 65.

117. *Id.*

118. *See generally* Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV. (Jan.–Feb. 2011), https://hbr.org/2011/01/the-big-idea-creating-shared-value (last visisted Mar. 11, 2017) (explaining how numerous companies, such as General Electric, Google, IBM, Intel, Johnson & Johnson, and others have been following the "principle of shared value, which involves creating economic value in a way that also creates value for society by addressing its needs and challenges") (on file with the Washington and Lee Law Review); Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV. (Dec. 2006), https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility (last visited May 2, 2017) (describing the CSR activities of General Electric, Toyota, and other companies) (on file with the Washington and Lee Law Review).

119. *See* Ram Nidumolu, C.K. Prahalad & M.R. Rangaswarmi, *Why Sustainability is Now the Key Driver of Innovation*, HARV. BUS. REV. (Sept. 2009), https://hbr.org/2009/09/why-sustainability-is-now-the-key-driver-of-innovation (last visited May 2, 2017) (describing how the pressure to develop sustainable business systems has driven innovation that results in cost-saving) (on file with the Washington and Lee Law Review).

120. *See generally* Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The*

C. Obstacles to Voluntary CSR

Despite evidence of the potential financial benefits of strategic CSR and although corporate management enjoys broad discretion within the law's loose limits to pursue CSR policies, a number of extra-legal factors operate to discourage voluntary adoption of strategic as well as ethical CSR policies. The culture of business—expressed in widely held assumptions as well as social norms—tends to discourage decisions that are not designed to maximize current shareholder value.[121] Business leaders typically assume that that is their primary responsibility.[122] Reinforcing this assumption is the prevalence of equity-based executive compensation in the form of stock grants and options. These incentives reward enhanced share prices achieved through strong short-term earnings, while failure to meet earnings targets can cost CEOs their jobs.[123] Beyond the board room and executive suite, prominent graduate schools of business promote a shareholder primacy vision of management's responsibility.[124] The business press likewise tends to take this idea for granted.[125]

Impact of Corporate Sustainability on Organizational Processes and Performance, 60 MGMT. SCI. 2835 (2014).

121. Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 53, 55–56.

122. *See generally* ASPEN INSTITUTE, UNPACKING CORPORATE PURPOSE: A REPORT ON THE BELIEFS OF EXECUTIVES, INVESTORS AND SCHOLARS 11–13 (2014), https://assets.aspeninstitute.org/content/uploads/files/content/upload/Unpacking_Corporate_Purpose_May_2014_0.pdf [hereinafter ASPEN INSTITUTE]; BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 2012, at 30 (2012), http://businessroundtable.org/sites/default/files/BRT_Principles_of_ Corporate_ Governance_-2012_Formatted_Final.pdf.

123. *See* Steven N. Kaplan & Bernadette A. Minton, *How has CEO Turnover Changed?*, 12 INT'L REV. FIN. 57, 82–83 (2012) (describing how likelihood of a CEO's termination has grown more tightly correlated to stock performance since 2000).

124. ASPEN INSTITUTE, *supra* note 122, at 37; *see also* RAKESH KHURANA, FROM HIGHER AIMS TO HIGHER HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 364 (2007) ("Inside business schools . . . faculties used principal–agent theory to recast the role of management. Instead of being responsible to multiple stakeholders . . . , managers were now said to be responsible only to shareholders . . . .").

125. *See, e.g.*, Aneel Karnani, *The Case Against Corporate Social Responsibility*, WALL STREET J. (Aug. 23, 2010), http://www.wsj.com/articles/SB10001424052748703338004575230112664504890 (last visited Feb. 20,

An especially strong disincentive to voluntary adoption of CSR policies is pressure from institutional shareholders.[126] This is particularly so in the case of large public and private pension funds. As a group, public funds own approximately eight percent of the U.S. stock market.[127] The largest of these are huge. The California Public Employees Retirement System (CalPERS), for example, has assets worth $290 billion and current obligations to over 600,000 retirees and contingent obligations to over 1.2 million members who are not yet retired.[128] Public pension funds, and private ones too, necessarily have very long time horizons because of their obligations to future retirees, so they are often referred to as the ultimate long-term investors. Nevertheless, these institutions are also subject to huge obligations to current beneficiaries, who are entitled to a check each month.[129] These institutions are therefore under strong pressure to maximize short-term returns on their portfolios, as are employer-sponsored defined benefit pension plans.

Mutual funds also face pressures that encourage insistence on short-term returns.[130] For most funds, fees are a function of total assets under management.[131] In the competition for investor dollars, growth and similar styles of mutual fund emphasize current performance because year-to-year results strongly influence investors' decisions to move money into or out of

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2017) ("The movement for better corporate governance . . . demands that managers fulfill their fiduciary duty to act in the shareholders' interest.").

126. *See generally* David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U. L. REV. 911 (2013) [hereinafter Millon, *Shareholder Social Responsibility*].

127. *Id.* at 913

128. OFFICE OF PUB. AFFAIRS CAL. PUB. EMPS.' RET. SYS., CALPERS FACTS AT A GLANCE 1–5 (June 30, 2015), https://www.calpers.ca.gov/docs/forms-publications/facts-at-a-glance.pdf. Nearly two-thirds of CalPERS' portfolio is invested in public and private equities.

129. *See id.* at 1 (showing that for CalPERS, the average monthly payment is $2,627).

130. *See* Millon, *Shareholder Social Responsibility*, *supra* note 126, at 934–36.

131. *Id.* at 934.

particular funds.[132] Publicly available year-end rankings seem to be especially important.[133]

Pension funds and mutual funds that follow short-term investment strategies tend to favor companies focused on strong quarter-to-quarter accounting results.[134] They exert pressure to meet earnings targets through exercise of voting rights, informal behind-the-scenes engagement, or the threat of large-scale sell-offs that will reduce share price. Managers of underperforming companies face pay cuts, lower bonuses, or even termination.[135]

The implications for voluntary CSR are clear. All shareholders focused on financial return tend to be hostile toward ethical CSR, which spends money or foregoes investment to promote social values, despite the negative impact on shareholder wealth.[136] Importantly, shareholders focused on short-term results also present an obstacle to strategically deployed CSR.[137] This is so even though strategic CSR justifies investment in nonshareholder well-being by reference to corporations' financial self-interest.[138] The problem here is one of time.[139] Investments in nonshareholder well-being will typically involve current expense that reduces current earnings and therefore, in today's investment environment, threatens share price.[140] Even if in the long-run the financial pay-offs can more than make up for the short-term cost, shareholders under pressure to generate short-term gains will be unwilling to wait.[141] Companies concerned about current earnings

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132. *Id.*

133. Keith C. Brown et al., *Of Tournaments and Temptations: An Analysis of Managerial Incentives in the Mutual Fund Industry*, 51 J. FIN. 85, 87–88 (1996).

134. *See* Brian Bushee, *Do Institutional Investors Prefer Near-Term Earnings over Long-Run Value?*, 18 CONTEMP. ACCT. RES. 207, 213–15 (2001) (discussing the relationship between the length of investment horizon and the reporting period by investors).

135. *See* Millon, *Shareholder Social Responsibility*, *supra* note 126, at 915–16 (outlining the various penalties corporate managers face for poor performance).

136. Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 43.

137. *Id.* at 71.

138. *Id.* at 65.

139. *Id.*

140. *See id.* at 65–66.

141. *See id.* at 57 ("[T]his leads to a strong preference for investments in companies that generate superior short-term earnings and against those whose value includes a significant long-term component. . . . The threat of replacement

and share price will therefore be reluctant to make investments that only generate returns years down the road.[142] This is why even strategically motivated CSR can meet with opposition.

In short, careful thinking about shareholder primacy and its implications for CSR leads to some disappointing conclusions. With respect to the law on the shareholder primacy question, even though the legal authority for a shareholder primacy mandate is questionable and controversial, it may not matter if those in positions of authority—the Delaware judiciary—are convinced that it is the law. Further, even distinguishing strategic from ethical CSR, in the hope that at least the former version might have some viability, is problematic because of pressures from powerful institutional shareholders who prefer strong current share prices to long-term gains.

IV. What Difference Have We Made?

After thirty years of writing about corporate law, one can't help but wonder what difference it might have made. Early in my academic career, a colleague at another law school said that a scholar's goal should be to change the way people think about his or her field. He didn't mean persuading everyone to see things the same way. What he meant was a reorientation of the scholarly conversation: new notions of what's important and what the relevant questions should be. Changing the terms of the debate.

In some respects, academic corporate law hasn't changed a great deal over the past thirty years. Many prominent scholars assume that shareholder wealth maximization is the relevant benchmark.[143] For them, the key questions continue to revolve around the balance of power between shareholders and management. Some argue that managerial discretion best serves

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motivates mutual fund managers to meet or beat performance benchmarks. . . . [a]nd [prioritize] short-term returns.").

142. *See id.* at 58 ("Even if long-term economic benefits are achievable, the immediate negative impact on earnings and potentially on share prices may discourage management from moving forward.").

143. *Id.* at 59.

that objective[144] while others insist that empowerment of shareholders will improve managerial performance.[145]

Even so, it strikes me as undeniable that the landscape has changed in important ways. There is today a serious debate over whether shareholder primacy is a legal mandate as well as a desirable policy goal. While the idea of CSR seems not to enjoy the traction in the United States that it does in the United Kingdom and Western Europe,[146] a number of scholars are exploring conceptions of corporate purpose and management responsibility that go beyond one-dimensional conceptions of shareholder primacy.[147] There is now a serious conversation about shareholder primacy that wasn't happening when Professor Johnson and I started to work together way back in the late 1980s. Shareholder primacy now appears—normatively and as a matter of positive law—to be a question for debate and argument rather than an assumed truth.

We don't claim credit (or blame!) for these developments. Nevertheless, we do think we might have played a role. As we embarked on our scholarly collaboration, we soon found ourselves part of a small number of corporate law pioneers—sometimes labeled "progressives" or "communitarians" though not all would accept either label—who were willing to take positions that were definitely out of the mainstream, even though we risked marginalization within the corporate law academy. The conference we organized at Washington and Lee in 1993—called "New Directions in Corporate Law"—was designed to energize scholars, especially junior ones, who were dissatisfied with the mainstream orthodoxy and were looking for a supportive group of like-minded academics willing to think seriously about alternatives. Perhaps our writing encouraged others inclined to challenge mainstream

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144. Professor Bainbridge is the most prominent proponent of this view. *See generally* Bainbridge, *Director Primacy*, *supra* note 76.

145. Professor Bebchuk is the best known partisan for a robust shareholder empowerment agenda. *See generally* Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 84.

146. Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 47–65.

147. *See id.* at 56 n.85 (identifying several scholars who he labels "highly regarded dissenters" from the mainstream view that shareholder primacy should be the law).

orthodoxy to do so as well. Maybe swimming against the tide is a little easier if one has companions.

Regardless of how influential we might have been in stimulating new questions and establishing new priorities, we are both proud of having been part of a movement that sought to move beyond shareholder primacy toward new conceptions of corporate purpose and management responsibility. And we're happy that our law school's name has been attached to that movement.[148] But the important thing for us is that the discourse has changed in ways that we think are extremely important. While many scholars continue to embrace a shareholder primacy orientation, there are now credible, broadly shared alternatives. That is not going to change any time soon. For us that has been an immensely gratifying development. And, in optimistic moments, we imagine that the momentum may even be trending in our direction, although that question—assuming it can even be answered—might best be left for another day.

Beyond the academy, it is harder to be confident that there is significant movement away from shareholder primacy as the normal conception of corporate purpose and management responsibility. There have been encouraging developments. There are plenty of anecdotes about companies realizing that treating employees well can generate financial pay-offs. And there is a growing body of empirical research showing that socially responsible companies can outperform rivals fixated on the bottom line.[149] Even so, there is a broadly held cultural assumption that the ultimate focus of corporate activity ought to be shareholder wealth maximization. As noted above, business leaders generally embrace this idea, which is taught in

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148. *See, e.g.*, Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 856 (1997) (stating that "the principal resistance" to the nexus-of-contracts theory of the corporation was "currently offered by a group of relatively young academics loosely centered around the corporate law faculties at Washington & Lee and George Washington law schools"); William H. Simon, *What Difference Does It Make Whether Corporate Managers Have Public Responsibilities?*, 50 WASH. & LEE L. REV. 1697, 1697 (1993) (referring to the "Washington and Lee School of corporate jurisprudence").

149. *See generally* Eccles et al., *The Impact of Corporate Sustainability, supra* note 120.

leading business schools, and the business press seems largely to take it for granted.[150]

Standard descriptions of the management-shareholder relationship reflect and reinforce shareholder primacy values. Shareholders are typically referred to as the "owners" of the corporation. This is a mistake; they own the corporation's stock and enjoy the rights that go with that property interest, but neither they nor anyone else "owns" the corporate entity. Nevertheless, the ownership idea obviously implies that the stewards of the shareholders' property—corporate management—ought to manage it in the owners' interest, just as, for example, the manager of a rental property ought to operate it primarily with the landlord's financial interests in mind. The mistaken agency description of the relationship between shareholders and management[151] seems also to have infiltrated public discourse about corporate law. This too implies a strong normative slant, namely that management should act on behalf of and in the interests of the shareholders according to normal legal conceptions of the principal–agent relationship.[152]

Not only is shareholder value widely assumed to be the appropriate benchmark for assessing corporate performance; shareholder value is today typically thought of in terms of maximizing current stock market prices through strong quarterly accounting results.[153] This is the widely noted "short-termism" phenomenon, which discourages even profitable long-term investment necessary for the corporation's sustainability because of its immediate impact on profits and share price.[154] Widely used equity-based executive compensation

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150. *Supra* notes 121–125 and accompanying text.

151. *Supra* notes 89–91 and accompanying text.

152. For discussions of various metaphors for the management-shareholder relationship and their normative slant, see generally David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA: ONLINE J. LEGAL PERSP., Winter 2001, at 39; David Millon, *Personifying the Corporate Body*, 2 GRAVEN IMAGES: J. CULTURE, L. & SACRED 116 (1995); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

153. *See* Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 53.

154. *See* Lynne L. Dallas, *Short-Termism, the Financial Crisis and Corporate Governance*, 37 J. CORP. L. 265, 268 (2012) ("[S]hort terminism . . . is defined as

arrangements give management a personal stake in maximizing current share prices, the point being to align managerial incentives with the shareholders' interest in share price.[155] And, as noted above,[156] management is also subject to external pressures from institutional shareholders who are themselves facing strong incentives to focus on current share prices.

One might have thought that first the accounting scandals of 2001, involving Enron and other companies,[157] and then the financial crisis of 2008[158] would have prompted a broad rethinking of shareholder primacy. Both situations involved efforts to boost profits and share prices, by fraud in the first case,[159] and by excessive, reckless risk-taking in the second.[160] The social costs were obvious in both cases.[161]

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the excessive focus of corporate managers, asset managers, investors, and analysts on short-term results, whether quarterly earnings or short-term portfolio returns, and a repudiation of concern for long-term value creation and the fundamental value of firms.").

155. *See* Millon, *Corporate Social Responsibility and Environmental Sustainability*, *supra* note 109, at 57 ("Equity-based compensation—stock grants and options—are typically the most important component of . . . [CEO] compensation packages, giving executives a direct stake in share price movements.").

156. *See supra* notes 126–135 and accompanying text (describing the pressures upon institutional investors to provide returns for their beneficiaries and how these investors in turn put pressure on corporate managers).

157. *See, e.g.*, William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1276–88 (2002) [hereinafter Bratton, *Enron and the Dark Side of Shareholder Value*] (describing the catastrophic bankruptcy and accounting fraud scandal of the Enron corporation in 2001).

158. *See generally The Origins of the Financial Crisis: Crash Course*, ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article (last visited Apr. 19, 2017) [hereinafter *Economist*] (on file with the Washington and Lee Law Review).

159. *See* Bratton, *Enron and the Dark Side of Shareholder Value*, *supra* note 157, at 1285 ("[T]he line between appropriate and inappropriate behavior has dissolved for many under real-world pressure to produce shareholder value. Exploitation and expansion of the gray area has become routine. The resulting loss of perspective facilitated Enron's step across the line to fraud.").

160. *See Economist*, *supra* note 158 ("Under pressure from shareholders to increase returns, banks operated with minimal equity, leaving them vulnerable if things went wrong.").

161. *See* Bratton, *Enron and the Dark Side of Shareholder Value*, *supra* note 157, at 1277 (describing the layoffs of 4,000 Enron employees, whose 401(k) retirement plans were also rendered virtually worthless, because they had been

Yet there has been no general reevaluation of a shareholder primacy conception of corporate purpose, such as occurred during the hostile takeover era. Then, business leaders were effective advocates for reform. The interests of corporate management aligned with those of workers and other nonshareholders because both stood to lose from a wide-open market for corporate control.[162] In contrast, the more recent crises saw management as the villain, either as crooks or as incompetents who did not fully understand the risks their companies were assuming. Had corporate leaders criticized shareholder primacy and called for reform, they would have lacked credibility.

There may be an institutional story as well. The Delaware judiciary took the lead in adjusting the law governing hostile takeovers to serve the conflicting interests of managers, shareholders, and nonshareholders.[163] The judges were required to decide the cases that came before them and therefore had no choice but to confront the significant public policy questions presented by the litigants.[164] And they could do so without being subject to the political, interest-driven pressures that legislators face.[165]

In contrast, in the wake of the 2001 and 2008 crises, judges generally were not called upon to decide foundational questions of corporate purpose. Instead it fell to the United States Congress to address demands for reform. First in Sarbanes–Oxley[166] and then

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sixty percent invested in the now-worthless Enron stock); *Economist*, *supra* note 158 (describing the massive worldwide economic downturn that resulted from the near crash of financial markets following the collapse of Lehman Brothers).

162. *See* Lyman Johnson & David Millon, *Corporate Takeovers and Corporate Law: Who's in Control?*, 61 GEO. WASH. L. REV. 1177, 1206 (1993) ("Management and nonshareholder interests may be naturally aligned in hostile takeovers. Both want to resist: managers so that they can keep their jobs and other nonshareholders so that they can avoid the various sorts of disruptions that predictably follow from sudden changes in control . . . .").

163. *Supra* notes 23 and 31.

164. *See* Johnson, *Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, *supra* note 36, at 887 ("Given the legislative public-law vacuum, the takeover dilemma falls squarely into the laps of the Delaware Judiciary. Unlike legislators, judges cannot evade the knotty questions associated with social transformation . . . [J]udges respond . . deciding specific cases for litigants while resolving bedrock issues for society at large.").

165. *See id.* ("[J]udges respond on an acute rather than a systematic basis, deciding specific cases for litigants . . . .").

166. Sarbanes–Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745.

in Dodd–Frank,[167] we ended up with a grab bag of provisions that aimed generally at empowering shareholders or that mandated new regulations purportedly for their benefit—even though it was obvious in both cases that shareholders' appetite for profits motivated the misconduct.[168] Here federal legislators seem to have been captive to a myopic, binary vision of corporate law, which is incapable of conceiving of corporate law reform other than in pro-shareholder terms.[169] More far-reaching reform is not even considered.

While the Supreme Court's *Hobby Lobby*[170] decision did reject the view that business corporations are legally required to pursue profit at the expense of competing values,[171] that decision seems unlikely to prompt broad acceptance of that interpretation of the law. The Court's interpretation of state corporate law on the question of corporate purpose is not binding on state courts deciding questions of state corporate law.[172] Further, the majority opinion, although correct in its conclusion, is not as clear as one might have preferred. And the political context—exemption from

167. Dodd–Frank Wall Street Reform and Consumer Protection Act, 111 P.L. 203, 124 Stat. 1376 (2010). As the name indicates, this statute included a number of consumer protection measures, including the creation of a new agency, but it did not use reform of corporate or securities law for that purpose.

168. *See* Bratton, *Enron and the Dark Side of Shareholder Value*, *supra* note 157, at 1283 ("That pursuit of immediate shareholder value caused them to become risk-prone, engaging in levered speculation, earnings manipulation, and concealment of critical information."); *Economist*, *supra* note 158 ("Low interest rates created an incentive for banks, hedge funds and other investors to hunt for riskier assets that offered higher returns.").

169. *See* David Millon, *Shareholder Primacy in the Classroom After the Financial Crisis*, 8 J. BUS. & TECH. L. 191, 191 (2013) ("In the wake of the financial crisis, most corporate law reform efforts have focused on the interests of the shareholders. . . . [S]uch proposals reflect the widely held assumption that the primary purpose of corporate activity . . . is to maximize the shareholders' returns on their investments.").

170. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

171. *See id.* at 2771 ("[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else . . . ."). For discussion, see generally Johnson & Millon, *Corporate Law after* Hobby Lobby, *supra* note 51.

172. *See* Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 51, at 24 ("But the Court's views on corporate purpose would not be binding in the context of a state law dispute on the issue of permitted (or mandated) corporate purpose, if the state's highest court had decided otherwise or the state legislature had amended the corporate statute.").

Obamacare's contraception mandate on religious grounds—has tainted the majority opinion in the eyes of progressive scholars who might otherwise be willing to embrace its views on corporate purpose.

So, for now at least, there does not seem to be strong, coordinated, and effective pressure for rejection of shareholder primacy outside of the legal academy. The Delaware judiciary and many business leaders take for granted that shareholder primacy is the law.[173] Social norms and extra-legal pressures also discourage socially responsible management.[174] While we and our colleagues at other law schools may have succeeded in encouraging debate and new ways of thinking about foundational questions, we are left with the disappointing truth that so far we seem to have had limited impact beyond our academic world.

V. Conclusion

Over the past thirty years, a constant theme runs through most of my co-authored and solo corporate law writing. That is concern about the social costs of a shareholder primacy conception of corporate purpose and managerial responsibility. Early on, Professor Johnson and I focused on the hostile takeover context because the conflict between shareholder and nonshareholder interests was so starkly presented. More recently, I have written about corporate social responsibility from several angles, focusing on legal as well as extra-legal impediments to widespread voluntary adoption of policies designed to address the social costs of corporate activity.[175] Meanwhile, Professor Johnson has continued to write about corporate purpose, corporate officers, and the relationship between religion and corporate law.[176]

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173. *See* Lyman Johnson, *Unsettled in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 434 (2013) [hereinafter Johnson, *Unsettled in Delaware Corporate Law*] (exploring the origins of erroneous beliefs in shareholder primacy as established law and attributing the sources of such beliefs to "perceptions . . . about legal mandates, business norms and conventions," business schools, and other sources).

174. *Id.*

175. *See, e.g.*, Millon, *Shareholder Social Responsibility*, *supra* note 126, at 911; Millon, *Radical Shareholder Primacy*, *supra* note 37, at 1019.

176. *See, e.g.*, Lyman Johnson, *Debarring Faithless Corporate and Religious*

It seems undeniable that the scholarly landscape has changed dramatically since we started our collaborative work. There is now serious and robust debate about whether shareholder primacy is the law and also whether it should be. We think this is a very positive development. Without claiming too much credit, we both think we played an important role in helping to bring about a major change in the focus of the scholarly conversation. I am less sanguine about developments beyond legal academy. Although the accounting scandals of 2001 and the financial crisis of 2008 should have prompted widespread debate about the social costs of chasing corporate profits, that does not seem to have occurred. Law reform efforts seem instead to have focused on protection for shareholders, as though corporate law exists in a binary world of management and investors, and law reform can only consist of efforts to tilt the balance of power in the direction of shareholders. The prospects for movement beyond that myopic worldview seem dim, even more so in the current political environment.

Fiduciaries in Bankruptcy, 19 AM. BANKR. INST. L. REV. 523, 524 (2011); Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 89 (2010); Johnson, *Unsettled in Delaware Corporate Law*, *supra* note 173, at 413–15, 432–33.