Washington and Lee Law Review

Volume 74 | Issue 2 Article 14

4-1-2017

Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents

Joan MacLeod Heminway
University of Tennessee College of Law

Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents

Joan MacLeod Heminway*

Table of Contents

I. Introduction

In context, corporate law is often credited with creating, hewing to, or reinforcing a shareholder wealth maximization norm[1]: "A business corporation is organized and carried on

* Rick Rose Distinguished Professor of Law, The University of Tennessee College of Law. New York University School of Law, J.D. 1985; Brown University, A.B. 1982. Work on this paper was funded in part by a summer research stipend provided by The University of Tennessee College of Law. Like so many others, I am indebted to Lyman Johnson and David Millon for creating a rich body of scholarship on which we all can rely and with which we can engage. This Essay is designed to honor and celebrate that scholarly legacy.

1. A norm may be narrowly defined as "a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with." JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 32–33 (2008) (quoting Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON.

primarily for the profit of the stockholders."[2] Commentators from the academy (law and business) and practice (lawyers and judges) have taken various views on this asserted norm—ranging from characterizing the norm as nonexistent or oversimplified to maintaining it as simple fact.[3] This Essay contributes to the ongoing discussion by engaging key components of the shareholder wealth maximization norm principally as a matter of firm-level corporate governance—the point at which applicable corporate governance law theory, policy, and doctrine intersect with a firm's organic documents (e.g., for a corporation, its charter and bylaws) and, more generally, corporate governance

REV. (PAPERS & PROC.) 365, 365 (1997) (internal quotation marks omitted)). This essay uses the term "norm" to signify a dominant or accepted behavioral standard applicable in a particular context. *See*, *e.g.*, Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables, in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983) (defining norms as "standards of behavior defined in terms of rights and obligations,"); Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1174–75 (2006) ("[D]efin[ing] a norm as a standard of conduct or purported standard of conduct that (1) is of a type which has existence conditions that refer in some fairly direct way to facts about human behavior, attitudes, or beliefs, or to some combination of such facts, and that (2) does in fact exist because the appropriate existence conditions have been met . . . .").

2. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."). I note at the outset that the text of this essay uses the term "shareholder" rather than "stockholder" except when quoting from the work of others, even though Delaware statutory and decisional corporate law generally uses the term "stockholder."

3. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 29 (2012) (denying the existence of a pervasive shareholder wealth maximization norm); Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L L. 45, 45 (2002) (describing the shareholder wealth maximization norm as "well-established in U.S. corporate law" and treating it "as given"); Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 10–15 (2015) (surveying academic literature on the shareholder wealth maximization norm and concluding that there is none); Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 393–99 (2014) (describing shareholder wealth maximization as a norm of corporate governance and an objective of corporate law).

law practice. Relatively few commentators approach analyses of the shareholder wealth maximization norm from this perspective.

Much of the debate over a shareholder wealth maximization norm focuses on theory and policy, while acknowledging and analyzing legal doctrine. This is, perhaps, unsurprising, given the relationship between legal doctrine and norms in the corporate law context. Leaving aside governance rules embedded in federal and state securities law (primarily applicable to publicly traded companies) and generally applicable common law, state corporate law—statutory and decisional—directly or indirectly supplies the legal rules for U.S. corporate governance.[4] While corporate law statutory rules may, in fact, also represent or codify norms, decisional law often relies on theory and policy to fill gaps in meaning. Thus, theory and policy may "push" the law in individual settings one way or another when the issue is perceived to be one of first impression or otherwise creates legal uncertainty.

Moreover, much of the existing work on the shareholder wealth maximization norm focuses on the Delaware law governing publicly held corporations.[5] Again, this is somewhat

---

4. I write "directly or indirectly" to indicate that corporate law allows for private ordering through, e.g., corporate charters, bylaws, and shareholder agreements. *See, e.g.*, Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 845–46 (2008).

> [M]ore than fifty-five years ago, in *Sterling v. Mayflower Hotel Corp.*, the Delaware Supreme Court held that the stock-holders of a Delaware corporation had broad power to include provisions in the certificate of incorporation departing from the rules of the common law and many sections of the DGCL. Indeed, Professor Folk noted almost forty years ago that "the Delaware corporation enjoys the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise."

Id. (footnotes omitted).

5. Many authors expressly acknowledge the strength of the shareholder wealth maximization norm in Delaware judicial opinions or under Delaware corporate law generally and in the public company context. *See*, *e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1424–25 (1993) ("At least in Delaware, the shareholder wealth maximization norm . . . remains a more accurate description of the state of the law than any of its competitors."); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248–49 (1999) (noting, as one of "two recurring themes

unremarkable. Delaware enjoys the largest number of incorporations and most publicly traded companies are organized under Delaware law, making its law highly significant.[6]

Critiques of the shareholder wealth maximization norm also often view corporate governance rules on a generic macro level—from a broad-based, state-oriented doctrinal viewpoint.[7] Yet, corporate governance also can be viewed from the more narrow perspective of an individual state's legal doctrine (i.e., through a particular state's legislative and judicial rules only)[8] or at the firm level (taking into account the effects of permitted private ordering, as well as statutory and decisional law, in a specific identified firm).[9] For practitioners engaged in incorporating new

---

in the literature: . . . that the primary goal of the public corporation is—or ought to be—maximizing shareholders' wealth."); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1035–36 (2013) (describing the relationship between Delaware corporate law and the shareholder wealth maximization norm).

6. *See, e.g.*, Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 869 (2016) ("Today, 64% of the Fortune 500 companies are incorporated in Delaware, as are more than half of all companies listed on the New York Stock Exchange, NASDAQ, and other major stock exchanges."); Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 75 (2015) (observing that Delaware "can be thought of as the home of corporate America, with two-thirds of U.S. public companies being incorporated under Delaware corporate law, with Delaware courts deciding a large proportion of major corporate law cases, and with courts in other states often applying Delaware case law"); Johnson & Millon, *supra* note 3, at 10 (describing Delaware corporate law as "the most influential body of law for United States publicly held corporations").

7. Bernard S.F. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 391–92 (2015).

8. *See, e.g.*, Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 387–88 (2003) (referencing specific corporate governance rules under Pennsylvania, Ohio, and Massachusetts law); Chancellor William B. Chandler III, *Thoughts on the North Dakota Publicly Traded Corporations Act of 2007*, 84 N.D. L. REV. 1051, 1051–57 (2008) (offering commentary on North Dakota corporate governance and the federalist approach to corporate law, among other things); *see generally* Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499, 506 (2015) ("U.S. state law, whether of Delaware or another state of incorporation, will only govern the internal affairs of the specific entity incorporated within the state.").

9. *See, e.g.,* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws,* 81 BROOK. L. REV. 1637, 1639 (2016) ("The critical characteristic of the new governance is that it reflects a structural approach to the balance of power between boards and shareholders. Importantly, this

firms or modifying the internal governance of existing firms, and for litigators and judges involved in adjudicating controversies regarding the same, the private ordering implications of corporate law at the firm level assume paramount importance.[10]

Finally, shareholder wealth maximization theory focuses almost exclusively on financial wealth (i.e., pecuniary gain or profit), as opposed to other measures of satisfaction or benefit derived by shareholders from their equity ownership.[11] In addition, decisional law addressing the shareholder wealth maximization norm typically emphasizes the maximization of short-term or long-term profit or financial wealth in connection with an individual decision made by a corporation's board of directors.[12] Yet, shareholders (in particular, but not exclusively,

---

structural approach has been implemented through private ordering rather than regulatory reform."); Roberta Romano, *Less Is More: Making Institutional Activism A Valuable Mechanism of Corporate Governance,* 18 YALE J. ON REG. 174, 225 (2001) (noting that "the benefit of some corporate governance mechanisms vary with firm-specific characteristics"); *Paul Rose, Regulating Risk by "Strengthening Corporate Governance",* 17 CONN. INS. L.J. 1, 11 (2010) (observing that "'good' corporate governance is firm-specific and often based on qualities, such as corporate culture, that are not readily quantifiable and so are difficult or impossible to reduce to a set of metrics.").

10. *See generally*, *e.g.*, George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609 (2016) (providing an analysis of the validity of corporate governance private ordering as a matter of corporate law); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012); D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125 (2011) (extolling the virtues of firm-level corporate governance rule-making through bylaw provisions); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485 (2016) (arguing for private ordering with respect to corporate governance rules relating to shareholder litigation).

11. *See* Henry T.C. Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273, 1282–83 (1991) ("Most academics now believe that shareholder wealth maximization is the basic pecuniary objective of the modern publicly held corporation.").

12. *See*, *e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . ."); Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. . . . The discretion of directors . . . does not extend . . . to the nondistribution of profits among stockholders in order to devote them to other purposes.").

shareholders in privately held firms) may desire to enhance more than their financial wealth through their shareholdings, and they may value individual board decisions that eschew one element of desired shareholder value in favor of another as long as the board's overall management of the firm—through the exercise of both decision-making and oversight—prioritizes increasing aggregate shareholder value and benefit.[13]

In an effort to broaden the conversation about the shareholder wealth maximization norm in an applied context, this Essay describes shareholder wealth maximization under various state laws (in and outside Delaware) as a function of firm-level corporate governance—corporate law statutes, decisional law interpreting and filling gaps in that statutory law, and corporate charter and bylaw provisions—as applicable to both publicly held and privately held corporations in a variety of states.[14] In this overall context, the Essay considers the possibility that holders of shares in for-profit corporations may desire to maximize overall utility in their shareholdings of a particular firm, rather than merely the financial wealth arising from those holdings. To accomplish its purpose, the Essay first briefly and generally addresses shareholder wealth maximization as a function of applicable statutory and decisional law and as a matter of private ordering (collecting, synthesizing, and characterizing, in each case, points made in the extant literature) before suggesting the broad implications of that analysis for corporate governance and shareholder wealth maximization and concluding.

---

13. *See* Paul Weitzel & Zachariah J. Rodgers, *Broad Shareholder Value and the Inevitable Role of Conscience*, 12 N.Y.U. J.L. & BUS. 35, 41 (2015) (noting that "there is strong evidence that shareholders sacrifice their financial interests to promote their nonfinancial interests. If shareholders do not want pure profit maximization, the shareholder wealth maximization norm loses much of its theoretical support").

14. Delaware law and the ABA's Model Business Corporation Act are primary touchstones because of their overall importance to U.S. corporate law. Moreover, because I am licensed to practice in Tennessee and serve as a member of the Tennessee Bar Association Business Law Section Executive Committee, I will cite to and quote from Tennessee law with some significance throughout the Essay—with more frequency than, but not to the exclusion of, the law of other states.

II. Shareholder Wealth Maximization as a Matter of Statutory Corporate Law

Corporate law statutes relate to shareholder wealth maximization from several different perspectives. The contexts in which corporate wealth maximization questions arise include charter provisions on firm-level corporate purpose, director and officer standards of conduct in managing the business of the corporation, and stakeholder statutes. The succeeding paragraphs address each in turn.

State corporate law statutes articulate mandatory and permissive provisions for inclusion in a corporation's chartering document—e.g., a certificate of incorporation in Delaware, articles of incorporation in most Model Business Corporation Act ("MBCA") states, and a charter in Tennessee.[15] These provisions typically constrain corporations to exist for lawful purposes.[16] The most unusual provision I have come across to date in this area of the law is the California provision on chartered corporate purpose, which reads in pertinent part as follows:

---

15. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(a)(3) (2015) (mandating that the nature or purposes of the business be stated in the certificate of incorporation); TENN. CODE ANN. § 48-12-102(b)(2)(A) (2016) (providing that "[t]he charter may set forth: [p]rovisions not inconsistent with law: . . . [s]tating the purpose or purposes for which the corporation is organized"); MODEL BUS. CORP. ACT § 2.02(b)(2)(i) (AM. BAR ASS'N 2006) (stating that "[t]he articles of incorporation may set forth: . . . provisions not inconsistent with law regarding: the purpose or purposes for which the corporation is organized . . .").

16. Delaware law, for example, provides that

> The certificate of incorporation shall set forth the nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any . . . .

DEL. CODE ANN. tit. 8, § 102(a)(3) (2015). *See also* TENN. CODE ANN. § 48-13-101(a) (2016) ("Every corporation incorporated under chapters 11–27 of this title has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the charter."); MODEL BUS. CORP. ACT § 3.01(a) (AM. BAR ASS'N 2006) ("Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.").

> The articles of incorporation shall set forth:
>
> (b)(1) The applicable one of the following statements:
>
> (A) The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code; or
>
> (B) The purpose of the corporation is to engage in the profession of ___ (with the insertion of a profession permitted to be incorporated by the California Corporations Code) and any other lawful activities (other than the banking or trust company business) not prohibited to a corporation engaging in such profession by applicable laws and regulations.[17]

This California statute appears to mandate one of two express formulations of corporate purpose without allowing any variance from the form of the statement presented (other than filling in a blank). California's corporate law also allows for optional charter provisions, one of which allows for the charter to include "[a]ny other provision, not in conflict with law, for the management of the business and for the conduct of the affairs of the corporation, including any provision which is required or permitted by this division to be stated in the bylaws."[18] These state statutory provisions on corporate charters, even with their differences, do not mandate or expressly invoke an emphasis on shareholder wealth maximization or even shareholder value or primacy.

State corporate laws in the United States provide that the board of directors of the corporation manages or directs the management of the firm by default (absent charter provisions or other expressly permitted private ordering to the contrary)[19] and

---

17. CAL. CORP. CODE § 202(b)(1) (West 2015).

18. *Id.*§ 204(d).

19. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2016) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); TENN. CODE ANN. § 48-18-101(b) (2016) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the charter."). The Model Business Corporation Act similarly provides as follows:

> All corporate powers shall be exercised by or under the authority of

that officers, typically key agents of the firm appointed by the board of directors, have subsidiary management responsibilities typically delegated to them by the board or in the corporation's bylaws.[20] Although the General Corporation Law of the State of Delaware (DGCL) does not supply express behavioral guidance applicable to director and officer management activities, the MBCA and states adopting its framework for their corporate law do include standards of conduct for directors and officers.[21] These

---

> the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under section 7.32.

MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2006).

20. *See, e.g.*, DEL. CODE ANN. tit. 8, § 142(a) (2016) ("Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws. . . ."); TENN. CODE ANN. §§ 48-18-401(a) (2016) ("A corporation has the officers described in its bylaws or designated by its board of directors in accordance with the bylaws. Unless the charter or bylaws provide otherwise, officers shall be elected or appointed by the board of directors."); MODEL BUS. CORP. ACT § 8.40(a) (AM. BAR ASS'N 2006) ("A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws."). Tennessee law further provides that

> [e]ach officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

TENN. CODE ANN. § 48-18-402 (2016). Along the same lines, the Model Business Corporation Act provides that

> [e[ach officer has the authority and shall perform the functions set forth in the bylaws or, to the extent consistent with the bylaws, the functions prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the functions of other officers.

MODEL BUS. CORP. ACT § 8.41 (AM. BAR ASS'N 2006).

21. *See, e.g.*, TENN. CODE ANN. § 48-18-301(a) (2016) ("A director shall discharge all duties as director . . . (1) In good faith; (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) In a manner the director reasonably believes to be in the best interests of the corporation."); *id.* § 48-18-403(a) ("An officer . . . shall discharge all duties under that authority: (1) In good faith; (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) In a manner the officer reasonably believes to be in the best interest of the corporation."); MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2006) ("Each member of the board of directors, when discharging the

standards prescribe that actions be taken in good faith, with due care, and in the best interest of the corporation.[22] Yet, none of these statutory frameworks regarding officer and director management or conduct mention—no less require—management action in a manner that maximizes shareholder wealth or value or compels shareholder primacy.[23]

In fact, a significant number of states have adopted "other constituency" legislation—statutes that emphasize management's ability to consider the effects of corporate action on a variety of stakeholders. Almost twenty years ago, Professor Gordon Smith succinctly described the history and then current state of the law in this regard as follows:

> In the late 1970s and early 1980s, many corporations adopted charter amendments allowing managers greater discretion to consider the interests of nonshareholder constituencies in the context of a corporate takeover. In 1983, Pennsylvania adopted the first nonshareholder constituency statute, which allowed managers, "in considering the best interests of the corporation, to consider the effects of any action upon employees, suppliers, and customers of the corporation, communities in which offices or other establishments of the corporation are located, and all other pertinent factors." Nonshareholder constituency statutes have now been adopted in over half of the states . . . .[24]

---

duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation."); *id.* § 8.42(a) ("An officer . . . has the duty to act: (1) in good faith; (2) with the care that a person in a like position would reasonably exercise under similar circumstances; and (3) in a manner the officer reasonably believes to be in the best interests of the corporation.").

22. *Supra* note 21 and accompanying text.

23. *See* Stephen M. Bainbridge, *Interpreting Non-Shareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 990 (1992) [hereinafter Bainbridge, *Interpreting*] ("This is not to say that the statutes codify shareholder wealth maximization as the sole, or even the principal, guiding norm of corporate decision-making. To the contrary, the statutes do modify shareholder wealth's traditional position at the top of the corporation's list of priorities."); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 282 (2013) ("[N]o corporate statute states that a corporation must maximize profits or shareholder wealth."); Johnson & Millon, *supra* note 3, at 10 ("Delaware corporate law . . . does not mandate shareholder wealth maximization. The statute says no such thing."); Sharfman, *supra* note 3, at 398 ("Delaware General Corporation Law is silent on shareholder wealth maximization.").

24. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277,

This aspect of statutory corporate law has changed little since Professor Smith wrote these words.[25] Neither the DGCL nor the MBCA includes other constituency provisions.[26] Although other constituency statutes do not deny the existence of a shareholder wealth maximization norm in director and officer action that complies with applicable fiduciary duties, they do offer corporate managers some cover in considering the interests of other stakeholders when they engage in management activities.[27]

Of course, the lack of positive statutory law dictating shareholder wealth maximization does not signal the lack of a norm (as opposed to a doctrinal rule or legal requirement embedded in director and officer fiduciary duties).[28] One could

---

289 (1998).

25. *See* Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 93–98 (2015) (relating the history and components of constituency statutes throughout the United States).

26. *See id.* at 97 ("Neither Delaware nor the ABA Model Business Corporation Act, both leaders in corporate legislation, have adopted non-shareholder constituency language.").

27. *See* Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOY. L.A. L. REV. 765, 787 ("In other words, constituency statutes at least make clear that a board of directors may consider interests other than those of the shareholders when making corporate decisions.").

28. *See, e.g.*, Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, (forthcoming 2017) (manuscript at 2, 4) https://ssrn.com/abstract=2888052 ("The requirement of SWM enters into corporate law through a Board's fiduciary duties as applied under the Rule, not statutory law.") (on file with author); Smith, *supra* note 24, at 290 ("Even if the shareholder primacy norm is unenforceable as a rule of law, it still may influence corporate decision making. As noted above, the influence of the shareholder primacy norm on ordinary business decisions is an empirical question not susceptible to a ready answer."). One academic commentator articulates the strength of a social, rather than legal, shareholder wealth maximization norm in director conduct:

> [E]ven if the strong shareholder wealth-maximization language from *Dodge*, the ALI Principles, and *eBay* do not state enforceable legal requirements, the principle appears to be a widely shared norm among corporate directors. That is, even if the revisionists were correct on the law, it would still be the case that corporate directors are overwhelmingly primed to pursue shareholder wealth. That norm is prevalent in business schools, law schools, corporate social circles, and corporate boardrooms. Even the most ardent critics of the norm, moreover, acknowledge its prevalence in U.S. businesses. Corporate directors, in other words, are taught to believe in both the legal requirement and the normative desirability of shareholder wealth-

argue that benefit corporation statutes, which typically do not permit the corporation's board to prioritize shareholder wealth over other corporate interests, have become popular largely because of concern that a shareholder wealth maximization norm does exist (even in states with other constituency statutes) or may interfere with the board's ability to consider corporate interests other than the enhancement of shareholder financial wealth.[29] Decisional law offers some evidence of why this concern about a norm exists, even if the evidence may not permit a form conclusion that the norm has been codified as legal doctrine.[30]

III. Shareholder Wealth Maximization as a Matter of Decisional Law

The list of judicial decisions that support corporate shareholder wealth maximization is short and has been well trod in the literature. Typically, summaries of the court opinions in this area begin with the iconic early twentieth-century Michigan

---

> maximization. These social norms can be at least as powerful an influence on director behavior as legal doctrine, and they have had an enormous impact on the way that directors view their role within corporations.

James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1598–99 (2013) (footnotes omitted).

29. *See* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 838 (2012) ("[B]enefit corporation statutes . . . address not only the need for a new corporate form that changes the paradigm of shareholder primacy, but also respond to the demand . . . for a corporate form that meets the needs and expectations of increasingly socially and environmentally conscious consumers, investors, and entrepreneurs."); Joan MacLeod Heminway, *To Be or Not to Be (A Security): Funding for-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 302–04 (2013) (observing that benefit corporations and other social enterprise forms of entity are, in part, a reaction to the shareholder wealth maximization norm); J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 489 (2013) [hereinafter Murray, *Defending Patagonia*] ("According to their proponents, the benefit corporation statutes combat the shareholder wealth maximization norm that they claim is mandated by traditional corporate law."); Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 386 (2016) ("Benefit corporations are a contemporary effort to permit other participants to limit the reach of shareholder primacy in corporations.").

30. *See generally infra* Part III.

case *Dodge v. Ford Motor Company*[31] and extend through *eBay Domestic Holdings, Inc. v. Newmark*,[32] sometimes stopping along the way to note other cases, including *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[33] and its progeny, and perhaps another case or two, like *Katz v. Oak Industries Inc*.[34] Observers often cite to the judicial opinions in these cases to support the existence of a shareholder wealth maximization norm.[35] Rather than re-telling the entire story of these court opinions, this Essay notes a few salient observations about them as embodiments of a possible legal obligation to maximize shareholder wealth.

A number of prominent commentators acknowledge that none of this decisional law—not even the seminal, foundational *Dodge* opinion—substantiates an enforceable, judicially imposed legal obligation to maximize shareholder financial wealth in ordinary-course decision-making.[36] As Professor Lyman Johnson

---

31. 170 N.W. 668 (Mich. 1919). In a recent article, Professor George Mocsary notes that "*Dodge*'s view of shareholders as the corporation's residual claimants to whom the directors owe a duty of wealth maximization was a succinct restatement of the preceding several decades of Michigan common law. George A. Mocsary, *Freedom of Corporate Purpose*, 2016 B.Y.U. L. REV. 1319, 1344 (2016).

32. 16 A.3d 1 (Del. Ch. 2010). Despite the fact that the *eBay* opinion is a trial court opinion un-reviewed by an appellate court, it has assumed exceptional significance in contemporary conceptions of the shareholder wealth maximization norm under Delaware law because it is one of few recent cases to address director decision making in that context.

33. 506 A.2d 173 (Del. 1986).

34. 508 A.2d 873 (Del. 1986). Another recent Delaware court opinion reference the primacy of shareholder interests and the preservation of corporate value for shareholders without enunciating or applying a shareholder wealth maximization norm. *See*, *e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013) ("When exercising their statutory responsibility, the standard of conduct requires that directors seek 'to promote the value of the corporation for the benefit of its stockholders.'"); *id.* at 37 ("[D]irectors owe duties to the corporation for the ultimate benefit of the entity's residual claimants.").

35. *See*, *e.g.*, Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45, 47–48 (2002); Sharfman, *supra* note 28, at 31–33; David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 187–94 (2013).

36. *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 775 (2005) ("[E]ven *Dodge*, the high-water mark for the supposed duty to profit-maximize, indicates that no such enforceable duty exists."); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 11 (2012) [hereinafter Murray, *Choosing*] ("Even though they may disagree on why,

points out, this is unsurprising given the circumscribed role that the judiciary plays in adjudicating fiduciary duty cases in which the issue arises:

> Judges address only the particular claims and desired relief that are brought before them. They cannot and do not mandate that governing officials maximize shareholder wealth. They can only prohibit them from taking particularized actions. In *Dodge*, the plaintiffs sought more dividends. In *eBay*, the plaintiffs sought the nullification of certain anti-takeover measures. Neither plaintiff sought an injunction or other remedy that would have prohibited directors from pursuing the criticized business strategy, and neither the *Dodge* nor the *eBay* court altered corporate strategy. For judges who routinely recite the vaunted business judgment rule, moreover, one core rationale for which is that directors, not judges, govern corporations, the granting of such extraordinary and meddlesome relief would seem quite unlikely.[37]

When viewed through this judicial authority lens, one can understand the observations of scholars and others about the lack of a coherent legal rule, as well as the paucity of the decisional law referencing shareholder wealth maximization and the somewhat scattered, fact-based contexts in which a shareholder wealth maximization rationale is judicially employed.

Adding to the complexity is some doctrinal confusion—or perhaps just a lack of clear expression—in decisional law about the institution or constituencies to which or whom director and office fiduciary duties are owed. Some decisional law describes fiduciary duties owed to the corporation and other court opinions refer to duties owed to the corporation and its shareholders. Although anecdotal observation reveals that the latter cases may predominate more in change-of-control settings (where shareholder value primacy plays a more leading role),[38] the

---

commenters appear to agree that the *Dodge* court's ordering of directors to act in favor of shareholders (in the day-to-day context) is a rare outcome."); Murray, *Defending Patagonia*, *supra* note 29, at 489 ("In practice, except in a small handful of cases—*Dodge v. Ford*, *Revlon*, and *eBay v. Newmark*—courts very rarely enforce shareholder wealth maximization.").

37. Johnson, *supra* note 23, at 285–86 (footnotes omitted).

38. *See* Johnson, *supra* note 23, 286 ("[O]nly when the demise of the corporation is at hand or control over its direction shifts away from dispersed shareholders does stockholder wealth become the sole purpose."); Murray,

shareholder beneficiary language also occurs in other settings.[39] For example, in a leading case on director fiduciary duties relating to decisions made in the zone of insolvency, the Delaware Supreme Court articulated the beneficiary of the duties both ways in separate parts of its opinion.[40] In a recent case involving a challenge to a merger transaction, Vice Chancellor Travis Laster explained his understanding of the manner in which a corporation's directors may be seen to owe their duties to both the corporation and its shareholders:

> [B]y increasing the value of the corporation, the directors increase the share of value available for the residual claimants. Judicial opinions therefore often refer to directors owing fiduciary duties "to the corporation and its shareholders." This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants. Nevertheless, "stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."[41]

This formulation offers a bit more clarity than most judicial opinions on the subject, articulating a shareholder primacy

---

Defending Patagonia, *supra* note 29, at 489 (noting that "the takeover cases play a prominent role" in judicial enforcement of a shareholder wealth maximization norm).

39. *See, e.g.*, N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007) (adjudicating a creditor's right to a derivative action when a corporation is in the zone of insolvency); Guth v. Loft, Inc., 5 A.2d 503, 509 (resolving a corporate opportunity claim).

40. *Compare Gheewalla*, 930 A.2d at 99, 101 ("It is well established that . . . directors owe their fiduciary obligations to the corporation and its shareholders [and] . . . must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners."), *with id.* at 101 (asserting that "[i]t is well settled that directors owe fiduciary duties to the corporation."). See also *Guth*, 5 A.2d at 509–10, referring to "the principles governing officers and directors of a corporation with respect to their fiduciary relation to the corporation and its stockholders" and affirming that "[c]orporate officers and directors . . . stand in a fiduciary relation to the corporation and its stockholders," but proceeding with an analysis that references obligations to the corporation only—"undivided and unselfish loyalty to the corporation" and "the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents."

41. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36–37 (Del. Ch. 2013) (citations and footnotes omitted).

objective as a focus for the directors' management of the firm as fiduciaries.

Thus, the cases in most published accounts that directly address shareholder wealth maximization are a dispersed lot that address specific facts in markedly different decision-making contexts in two principal jurisdictions—Michigan[42] and Delaware.[43] To derive a single, broadly applicable norm or rule of law on shareholder wealth maximization from these decisions likely would be reckless. For instance, other state laws bear some scrutiny before such a task should be undertaken. I note for example that a Tennessee Court of Appeals case avers:

> As a fiduciary, the officer or director has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, such as minority shareholders or creditors, who also have legitimate interests in the corporation but lack the power of the fiduciary.[44]

Tennessee decisional law (federal and state) also variously states to what or to whom fiduciary duties are owed.[45] Other state law judicial opinions vary. A New York case provides that "directors and officers are bound by their duty of undivided and unqualified loyalty to their corporations, a duty which encompasses good faith efforts to insure that their personal profit is not at the expense of their corporations."[46] This seems to be a relatively consistent formulation in New York decisional law, with a Westlaw search conducted on December 4, 2016, revealing only

42. Dodge v. Ford Motor Co., 170 N.W. 668, 682 (Mich. 1919).

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

44. Intertherm, Inc. v. Olympic Homes Sys., Inc., 569 S.W.2d 467, 471 (Tenn. Ct. App. 1978).

45. *See, e.g.*, May v. Nat'l Bank of Commerce, 387 F. Supp. 2d 770, 779 (W.D. Tenn. 2004) ("[A] director . . . of the corporation must act in good faith and remain loyal to the corporation and its shareholders."); State *ex rel.* Oliver v. Soc'y for the Pres. of Book of Common Prayer, 693 S.W.2d 340, 343 (Tenn. 1985) ("A director of a corporation owes a fiduciary duty to the corporation and to its members or shareholders."); Franklin Capital Associates, L.P. v. Almost Family, Inc., 194 S.W.3d 392, 400 (Tenn. Ct. App. 2005) ("[T]he duty of care required of directors and officers is to act in good-faith and in the best interest of the corporation [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances . . . ." (internal quotations omitted)).

46. Limmer v. Medallion Grp., Inc., 75 A.D.2d 299, 303 (N.Y. 1980).

six cases of the sixty-two located (in a search for New York cases with the term "fiduciary duties" within five words of "to the corporation") in which a duty to security holders was mentioned in addition to a duty to the corporation. The same search conducted on the same day of California decisional law yielded more varied results. Of course, unexplored differences in the underlying statutory law in New York and California may contribute to these variances.

Finally, it bears noting that most formulations of the business judgment rule refer to director and officer actions being taken in the best interest of the corporation. Delaware's seminal case in this regard, *Aronson v. Lewis*,[47] is no exception, providing that the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[48] Tennessee law is in accord.[49] The omission of a reference to the best interest of shareholders has salience, especially in a jurisdiction without a decision (like *Dodge* under Michigan law or *Ebay* under Delaware law) that codifies or signals a shareholder wealth maximization requirement.

Overall, based on the evidence summarized in this part of the Essay, it would be over-claiming to assert that U.S. state decisional law—any more than U.S. state statutory law—articulates a clear, legally enforceable shareholder wealth maximization norm as a matter of substantive corporate doctrine. Yet, as Professor Haskell Murray notes:

> Despite all of the academic debate, the *persistent common perception* seems to be that directorial duties require placing shareholder wealth at the forefront. The perception may stem from the pronouncements of courts in *Dodge* and *eBay*, from various academic articles, from education in business and law schools, and from the popular media. The perception—as the

---

47. 473 A.2d 805 (Del. 1984) (overruled in other respects by Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

48. *Id.* at 812.

49. *See Franklin Capital*, 194 S.W.3d at 399–400 ("The business judgment rule, when it applies, provides 'a presumption that in making a business decision the directors [and officers] of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.'" (citations omitted)).

> phrase "shareholder wealth maximization *norm*" suggests—has arguably risen to the level of a widely recognized and influential norm.[50]

That norm, when layered onto statutory and decisional law that does not foreclose its existence or power, influences the practice of corporate law in very direct ways. Of course, it impacts the advice that a lawyer gives to a corporate client when the client's board is meeting to engage in decision making or oversight. But a shareholder wealth maximization norm also impacts choice of entity, corporate formation, and legal counsel on potential amendments to corporate organic documents—most especially corporate charters.[51] The next part of the Essay focuses on this aspect of the shareholder wealth maximization norm.

IV. Shareholder Wealth Management as a Matter of Corporate Organic Documents

A number of important questions emerge at the intersection of the shareholder wealth maximization norm and the terms and provisions of corporate organizational documents. Among them are the following:

- To the extent business promoters or managers desire to establish or clarify the nature of a corporation's purpose in its charter at or after formation in a manner that is inconsistent with the shareholder wealth maximization norm, will that charter provision be legally valid?
- If so, may directors rely on that chartered purpose in exercising their fiduciary duties to the corporation or will a court fail to give effect to the charter provision in that context?
- What role may corporate bylaws (as well as shareholder

---

50. Murray, *Choosing*, *supra* note 36, at 17–18 (footnote omitted).

51. *See, e.g.*, Robert P. Bartlett, III, *Shareholder Wealth Maximization as Means to an End*, 38 SEATTLE U. L. REV. 255, 295 (2015)

> [D]ecisions such as *eBay* and *Trados* . . . are in tension with long-standing doctrine . . . . As doctrinal innovations, these decisions risk undermining the utility of the corporate form as a vehicle for maximizing firm value, potentially inducing investors and entrepreneurs to turn to noncorporate entities to finance new business enterprises or deterring investment altogether.

> agreements and publicized board policies) play in addressing undesired effects of the shareholder wealth maximization norm in a particular corporation's governance?

This part of the Essay undertakes to briefly address these questions, which interact with each other.

As noted in Part II, state law provisions governing corporate charters typically allow for a corporation to include in its charter a statement of corporate purpose as long as that purpose is lawful.[52] Moreover, Part II notes that the authority of the board of directors to manage the corporation can be modified by provision in a corporate charter.[53] Accordingly, a charter provision that is inconsistent with the shareholder wealth maximization norm should be valid unless that provision establishes an unlawful purpose.[54] Is a statement of purpose that contradicts the shareholder wealth maximization norm lawful?

An easy answer to that question, given the evidence presented above in Parts II and III, would be that the provision is lawful because no positive law mandates the shareholder wealth maximization norm.[55] Indeed, there is support for that conclusion

52. *Supra* notes 15–18 and accompanying text

53. *See supra* note 19 and accompanying text.

54. It is worth noting at this juncture that many corporations operating under general purpose charter provisions explicitly operate in a manner that may be seen as contradictory to the shareholder wealth maximization norm. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1165 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Briscoe, C.J., dissenting) (observing, after noting the credit given by the majority opinion to the religious missions of Hobby Lobby Stores, Inc. and Mardel, Inc., that in "[t]he certificates of incorporation for both Hobby Lobby and Mardel . . . there is not a single reference to religion"). Instead, the certificates state simply that Hobby Lobby and Mardel were created for the purpose of "'engag[ing] in any lawful act or activity for which corporations may be organized under the OKLAHOMA GENERAL CORPORATION ACT.'" *Id. See also* Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 173 (2012) ("[A]n analysis of corporate behavior indicates that corporations with general-purpose statements, regardless of the state of incorporation, are not restricted to only activities that maximize shareholder wealth.").

55. *See, e.g.*, Justin Blount & Patricia Nunley, *Social Enterprise, Corporate Objectives, and the Corporate Governance Narrative*, 52 AM. BUS. L.J. 201, 242 n.192 (2015) ("While the shareholder wealth maximization language of *eBay Domestic Holdings* is quite strong, nothing in the case expressly rejects the contractarian argument that this objective is still only a default position that

in decisional law.[56] Professor David Yosifon takes on this issue in a recently published law review article, citing to that decisional law (among other things). After expressing his view that shareholder primacy constitutes a common law rule in Delaware, Professor Yosifon concludes as follows:

> The Delaware common law that has established shareholder primacy as the default governance rule for business corporations neither states nor implies any public policy indicating that the rule should be unalterable by charter provision. Neither does there seem to be a clearly implied policy of the General Corporation Law to prohibit alteration of the shareholder primacy rule in firm governance.[57]

While this Essay disagrees with Professor Yosifon's conclusion to the extent that shareholder primacy compels shareholder wealth maximization, Professor Yosifon's assessment on the validity of private ordering merits credit here.

Moreover, corporations have, in the past (during the takeover heyday of the mid-1980s), "adopted charter provisions specifying management's right to consider the interests of nonshareholder constituencies."[58] More recently, it was widely publicized that Google set up a for-profit social business corporation, Google.org, to conduct activities focused on attaining social objectives rather than shareholder wealth maximization.[59] Having said that,

---

can be expressly modified by the parties.").

56. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952) ("[T]he stockholders of a Delaware corporation may by contract embody in the charter a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.").

57. David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?,* 41 DEL. J. CORP. L. 461, 479 (2017) (footnote omitted).

58. Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 41 (1987); *see also* Morey W. McDaniel, *Bondholders and Corporate Governance*, 41 BUS. LAW. 413, 442 (1986) ("A few corporations have . . . amended their articles of incorporation to provide that directors not only may consider such nonshareholder interests, they shall consider such interests.").

59. *See, e.g.*, Leslie Dougherty, *Putting Poverty in Museums: Strategies to Encourage the Creation of the For-Profit Social Business*, 29 B.C. THIRD WORLD L.J. 357, 372–73 (2009); *see also* Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87, 89 (2008) (describing Google.org and the

statements made in legal opinions and by jurists and academics in secondary resources may cast some doubt on that simple conclusion, at least under the Delaware law governing public companies. I note in particular in this regard statements made in and about *eBay* by former Delaware Chancellor William B. Chandler III and in a law review article written by Delaware Supreme Court Chief Justice Leo Strine.

Chancellor Chandler's commentary in the *eBay* decision does not relate specifically to charter amendments, but his remarks may be read to indicate categorically that there is little room for private ordering around the shareholder wealth maximization norm in Delaware corporations that attract outside investment. Specifically, the Chancellor observes the following in commenting on the employment by the board of directors of craigslist, Inc. of a shareholder rights plan (i.e., poison pill) to protect its corporate culture:

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

---

potential accountability problems created by its structure).

> affected by their decisions, then there would be no one to object. eBay, however, holds a significant stake in craigslist, and Jim and Craig's actions affect others besides themselves.[60]

In a recent symposium, former Chancellor Chandler reaffirmed and explained his opinion in the *eBay* case, essentially confirming that, to avoid liability for a breach of fiduciary duty, "a Delaware corporate board must place shareholder financial wealth (whether in the short term or the long term) ahead of any other value in its decision making."[61]

Observers may wonder whether these words from the Chancellor in and about the *eBay* opinion can be taken or may be used to mean that a Delaware corporation must adopt any corporate policy or initiative that contravenes the shareholder wealth maximization norm *ab initio* or with unanimous shareholder approval. Proponents of the shareholder wealth maximization expressions in *eBay* certainly use the specific words chosen by the Chancellor in that opinion to argue that the shareholder wealth maximization norm is, if not legal doctrine in Delaware, entrenched public policy.[62] A hostile judicial reaction of this kind to corporate private ordering is reminiscent of the judicial reception to shareholder agreements before statutes

---

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

61. Joan Heminway, *Berle VIII and a Delaware Law Puzzle*, L. PROFESSORS BLOG NETWORK (July 4, 2016), http://lawprofessors.typepad.com/business_law/2016/07/berle-viii-and-a-delaware-law-puzzle.html (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review). *See also* Haskell Murray, *Thoughts on the Berle Symposium: Doing Well by Doing Good?*, L. PROFESSORS BLOG NETWORK (July 8, 2016), http://lawprofessors.typepad.com/business_law/2016/07/thoughts-on-the-berle-symposium-doing-well-by-doing-good.html (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review); Anne Tucker, *"Inc." Means Something*, L. PROFESSORS BLOG NETWORK (June 29, 2016), http://lawprofessors.typepad.com/business_law/2016/06/inc-means-something.html (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

62. *See, e.g.*, STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 53 (2008) ("[T]he shareholder wealth maximization norm . . . indisputably is the law in the United States."); Stephen M. Bainbridge, *The Geography of* Revlon-*Land*, 81 FORDHAM L. REV. 3277, 3283 (2013) ("To be sure, the directors are obliged to use their powers toward the end of shareholder wealth maximization . . . ."); Johnson, *supra* note 23, at 284 (discussing Chandler and Strine's position that directors are under a fiduciary obligation to promote shareholder wealth); .

expressly validated them as a means of agreeing around the directors' managerial authority over the corporation.[63]

Chief Justice Strine's 2015 article in the *Wake Forest Law Review* similarly reveals his view that Delaware law includes a common law shareholder wealth maximization norm.[64] After constructing his argument on the meaning of Delaware's common law, the Chief Justice sets out to debunk the views of commentators who disagree, and in the process addresses the possibility of a charter amendment that attempts to vary that common law:

> They . . . contend that stockholders are simply one constituency among many and that the directors are free to give other interests—such as the workers, consumers, the environment, and society as a whole—equal or even greater priority. In so doing, these commentators pretend that corporate directors do not, under corporate law of the most important American jurisdiction—Delaware—have to make stockholder welfare the sole end of corporate governance within the limits of their legal discretion. . . . But, the problem with that argument is that it does not happen to be true; it is inconsistent with judge-made common law of corporations in Delaware, as I have described. It may well be the case that a

---

63. *See, e.g.*, DOUGLAS M. BRANSON ET AL., BUSINESS ENTERPRISES: LEGAL STRUCTURE, GOVERNANCE, AND POLICY 486–98 (3d ed. 2016). Concerns present in that setting also exist in circumstances involving private ordering around the shareholder wealth maximization norm:

> Corporate statutes have traditionally reflected a desired symmetry, granting enormous power to the board while imposing corresponding fiduciary responsibilities of care, loyalty and good faith. However, to the extent boards of directors are stripped of this power by shareholders, the power and responsibility symmetry of the public policy is lost. The board's power, and hence, control would be usurped without a corresponding decrease in their fiduciary responsibilities. Corporate governance, now out of kilter, could inevitably lead to organizational chaos.

Id. at 486. Shareholder unanimity and special statutory and judicially imposed rules for close or closely held corporations, as well as general statutory provisions validating specific kinds of shareholder agreements (e.g., MBCA § 7.32), have evolved the law in this area to allow for greater private ordering than judicial opinions earlier allowed on a consistent basis. *See id.* at 486–87, 496–98.

64. *See* Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768–81 (2015).

> certificate of incorporation that said that a for-profit corporation would put other constituencies' interests on par with stockholders would, in view of § 101(b), be respected and supersede the corporate common law. But, in the case of silence, the idea that directors can subordinate stockholder interests to other interests of the directors' choosing is strained and at odds with the structure of our overall statute.[65]

While Chief Justice Strine gives credence to the possibility that a charter provision could successfully agree around the shareholder wealth maximization norm, his words are less than certain. Perhaps he is, in part, reacting to Chancellor Chandler's strong language in the *eBay* decision about the nature of a for-profit firm in Delaware.

Professor Stephen Bainbridge's academic work in analyzing anti-takeover devices and non-shareholder constituency statutes also casts doubt on the validity of private ordering that displaces the shareholder wealth maximization norm,[66] a norm that he argues is both the law and circumstantially compelled as an essential attribute of the for-profit corporation.[67] Specifically, Professor Bainbridge opines on the potential invalidity of "shark repellents"—in effect, charter-based rejections of the shareholder wealth maximization norm in response to unsolicited business combinations—as a form of private ordering involving a significant alteration of the directors' fiduciary duties.

> [S]tate law arguably does not permit corporate organic documents to redefine the directors' fiduciary duties. In general, a charter amendment may not derogate from common law rules if doing so conflicts with some settled public policy. In light of the well-settled shareholder wealth maximization policy, nonmonetary factors charter amendments therefore appear vulnerable.[68]

---

65. *Id.* at 782–83 (footnote omitted).

66. *See* Bainbridge, *Interpreting, supra* note 23, at 985 (questioning whether the law permits private ordering in derogation of director fiduciary duties and other common law rules).

67. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 575–77 (2003) ("[S]hareholder wealth maximization is not only the law, but also is a basic feature of corporate ideology.").

68. *See* Bainbridge, *Interpreting*, *supra* note 23, at 985; *see also* Sterling v.

Ultimately, in response to specific proposals in derogation of the shareholder wealth maximization norm, Professor Bainbridge argues that targeted regulation is the best way to counteract negative externalities impacting non-shareholder corporate constituents.[69]

Two additional factors provide a cause for pause in endorsing the validity of charter-based private ordering relating to the shareholder wealth maximization norm. The first is the State of California's repeated rejection of a corporate charter provision that included a social purpose clause, examined by Professor George Mocsary in a recently published account in the *Brigham Young University Law Review*.[70] This rejection may be attributed to California's distinct approach to corporate purpose clauses (noted in Part II),[71] although California's corporate statute does authorize a California corporation to engage in any lawful purpose.[72] Importantly, Professor Mocsary also reports that the same lawyer who sought to file the California charter provision unsuccessfully sought a Delaware law opinion "from several Delaware law firms . . . stating that a charter containing a distinctly nonwealth purpose would be enforceable,"[73] providing some affirmation of the uncertainty of that matter under

---

Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952) ("[T]he stockholders of a Delaware corporation may by contract embody in the charter a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.").

69. *See* Bainbridge, *supra* note 67, at 591. Specifically, he concludes that:

> [T]argeted legislative approaches better alleviate the externalities created by corporate conduct. General welfare laws designed to deter wrongful corporate conduct through criminal and civil sanctions imposed on the corporation, its directors, and its senior officers are more efficient than stakeholderist tweaking of director fiduciary duties, which by virtue of their inherent ambiguity are a blunt instrument. Fiduciary duties cannot assure that specific social ills will be addressed by the boards of the specific corporations that are creating the problematic externalities.

70. Mocsary, *supra* note 31, at 1369–70.

71. *See supra* notes 17–18 and accompanying text.

72. *See* CAL. CORP. CODE § 206 (West 2016) ("Subject to any limitation contained in the articles and to compliance with any other applicable laws, any corporation other than a corporation subject to the Banking Law or a professional corporation may engage in any business activity . . . .").

73. Mocsary, *supra* note 31 at 1370

Delaware corporate law. Professor Mocsary's additional analysis, examples, and suggestions for implementation bear significant attention in this area.[74]

The second additional factor that may affect the validity of charter-based private ordering that is determined to be inconsistent with the shareholder wealth maximization norm is the legislative adoption of benefit corporations and other statutory forms of social enterprise entity. The justification afforded to legislatures for these statutes is that they are needed to provide certainty to directors of for-profit corporations in their pursuit of social enterprise or other mission-driven objectives.[75] Accordingly, legislatures are "sold" on the existence of a shareholder wealth maximization norm that may not be legal doctrine but may, by the legislature's tacit endorsement, become public policy. A student note states the issue well:

> States, by creating benefit corporations, . . .are . . . unnecessarily reinforcing current beliefs by establishing a dichotomy in which there are only two entities: (1) regular corporations, which cannot take into consideration social factors and must maximize shareholder wealth; and (2) benefit corporations, which can take into consideration social factors and do not have to maximize shareholder wealth. By establishing this dichotomy, states inadvertently create a jointly exhaustive pair in which the very existence of benefit corporations requires that their counterpart, a shareholder wealth maximizing corporation, exist. In other words, benefit corporations further reinforce the assumption that corporations exist only to make money for their shareholders.[76]

The only saving grace, although perhaps it provides little comfort, is that benefit corporation statutes typically include a provision disclaiming any effect of benefit corporation statutes on the validity or interpretation of the for-profit corporate law outside the benefit corporation context.[77] This matter is important

74. *Id.* at 1369–89.

75. *See* J. Haskell Murray, *The Social Enterprise Law Market,* 75 MD. L. REV. 541, 546–48 (2016) (setting forth the arguments made in a white paper used to support legislative enactment of benefit corporation legislation).

76. Chu, *supra* note 54, at 185–86.

77. *See, e.g.*, DEL. CODE ANN. tit. 8, § 368 (2016) ("This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a

because many existing social enterprise firms are organized under the for-profit corporation laws in states adopting benefit corporation statutes—either because these entities were incorporated before adoption of the benefit corporation provisions or because the firms do not want to or cannot by their nature opt into other aspects of the benefit corporation form. For example, benefit corporation statutes only cover firms with a corporate purpose that incorporates the specific types of statutory benefits listed (most often requiring that the firm have a purpose to benefit both the environment and society).[78] Accordingly, even if

---

public benefit corporation, except as provided in § 363 of this title."); MINN. STAT. ANN. § 304A.011 (West 2016) ("The chapter does not affect a statute or rule of law that applies to a corporation formed under chapter 302A that is not a public benefit corporation."). Tennessee law similarly, but more pointedly, provides in this regard that:

> [N]o implication is made by, and no inference may be drawn from, the enactment of this chapter as to whether, in exercising their duties, the officers or directors of a domestic business corporation that is not a for-profit benefit corporation may consider the impact of the corporation's transactions or other conduct on: (1) The interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders; or (2) Any public benefit or public benefits identified in its charter.

TENN. CODE ANN. § 48-28-109 (2016).

78. *See, e.g.*, N.Y. BUS. CORP. LAW §§ 1702, 1706 (McKinney 2016) (requiring that "[e]very benefit corporation . . . have a purpose of creating general public benefit" and defining a general public benefit as "a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation"); OR. REV. STAT. ANN. §§ 60.750, 60.758 (West 2016) (providing that "a benefit company has the purpose of providing a general public benefit" and defining a general public benefit as "a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit company"). *But see* DEL. CODE ANN. tit. 8, §§ 362(a)–(b) (2016) (requiring a public benefit corporation to "[i]dentify within its statement of business or purpose . . . 1 or more specific public benefits to be promoted by the corporation" and setting forth a list of specific public benefits). Tennessee's corporate law provides that

> [t]he charter of a for-profit benefit corporation shall . . . include a statement regarding the purpose or purposes for which the corporation is organized including one (1) or more public benefits to be pursued by the corporation" and defining a public benefit as "a positive effect or reduction of negative effects on one (1) or more categories of persons, entities, communities, or interests, other than shareholders in their capacities as shareholders, including, but not limited to, an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological

it otherwise may desire to do so, not every firm that wants to look beyond shareholder wealth maximization for its corporate purpose is able to form a benefit corporation or other social enterprise entity because of statutory restrictions.

The accumulated evidence is at best unclear about whether a public or private firm incorporated in or outside Delaware can engage in private ordering in its charter to include a corporate purpose that may be interpreted in a manner inconsistent with the shareholder wealth maximization norm. Even assuming that a charter provision displacing the shareholder wealth maximization norm were to be determined legally valid as a matter of the statutory law governing charters and board management responsibilities, however, it may be found unenforceable as a matter of public policy in a specific context on the grounds that the shareholder wealth maximization norm—as Chancellor Chandler, Chief Justice Strine, and Professor Bainbridge, among others, assert or acknowledge—represents a strong public policy underlying corporate law in Delaware.[79] The potential unenforceability of an otherwise valid charter provision in specific circumstances puts corporate directors in the position of determining that they must act in an *ultra vires* manner (potentially opening themselves up to a legal claim in that regard, as permitted under applicable law)[80] or in bad faith—perhaps by violating a tacit duty of obedience[81]—to comply with corporate law or public policy giving legal effect to the shareholder wealth maximization norm.

---

effect.

TENN. CODE ANN. § 48-28-103(3), 104(e) (2016).

79. *See supra* notes 70–80 and accompanying text (summarizing the arguments of these three commentators on the strong role that the shareholder wealth maximization norm plays in Delaware law).

80. Modern state corporate law statutes significantly circumscribe legal actions in this area. *See, e.g.*, MODEL BUS. CORP. ACT § 3.04(b) (AM. BAR ASS'N 2006) (limiting legal challenges based on a corporation's power to act to: injunction proceedings by shareholders; actions by or on behalf of the corporation against incumbent or former director, officer, employee, or agent of the corporation; and enforcement proceedings brought by the state attorney general).

81. *See generally* Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457 (2010) (arguing for a revival of a duty of obedience in for-profit corporate law).

Given this uncertainty about charter-based private ordering, prospects for the validity and enforceability of corporate bylaws, shareholder agreements, and board policies also may be in doubt. Statutes addressing corporate bylaws generally permit corporations to make provision in them for internal governance of the firm as long as the contents are consistent with applicable law and the corporation's charter.[82] Yet, most statutes do not allow the management authority of a board of directors to be varied in the corporate bylaws.[83] Shareholder agreements for firms organized under the close corporation subchapter of the DGCL or in an MBCA state may do a bit better in agreeing around the shareholder wealth maximization norm. In each case, agreements meeting applicable statutory requirements should be facially valid and enforceable to the same extent as charter amendments. Statutes validating shareholder agreements typically allow them to limit or even eliminate the board's management authority,[84] and the statutory provisions dictating

---

82. *See* DEL. CODE ANN. tit. 8, § 109(b) (2016) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."); N.Y. BUS. CORP. LAW § 601 (McKinney 2016) ("The by-laws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its shareholders, directors or officers, not inconsistent with this chapter or any other statute of this state or the certificate of incorporation."); TENN. CODE ANN. § 48-12-106(b) (2016) ("The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the charter.").

83. *Supra* note 19 and accompanying text.

84. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 350, 351 (2016) (allowing statutory close corporations to restrict the discretion of directors or provide for management by the shareholders); TENN. CODE ANN. § 48-17-302(b) (2016)

> No written agreement that relates to any phase of the affairs of the corporation, whether to the management of its business or to the division of its profits or otherwise, . . . on the ground that it is an attempt by the parties thereto to restrict the discretion of the board of directors in its management of the business of the corporation or to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners.

MODEL BUS. CORP. ACT § 7.32(a) (AM. BAR ASS'N 2006)

> [A]n agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the

board management provide an exception for shareholder agreements by general reference or express mention.[85] Board policies (adopted by resolution of the directors) contrary to shareholder wealth maximization would seem to have the least likely chance of being valid and enforceable because they are not mandated or expressly recognized or validated under state corporate law statutes—in general or as potential sources of varying the board of directors' authority to manage or direct the management of the corporation. A board policy, like any other action taken by a corporate board of directors, may be challenged on the basis that it violates law or public policy or that it as constitutes a breach of fiduciary duty

Based on the foregoing, efforts to formalize legally valid and enforceable decision-making guidance for corporate directors—whether found in the corporation's charter, bylaws, a shareholder agreement, or board policy—that contravenes (de facto or de jure) the shareholder wealth maximization norm may or may not be successful. Faced with a challenge to firm-level board decision making that incorporates significant attention to non-shareholder constituencies or non-wealth maximizing corporate objectives benefiting or serving shareholders, directors run the risk of liability for violating a judicial interpretation of positive law (statutory or decisional) or salient public policy. Existing commentary suggests that the adjudication of a challenge of this kind may result in different outcomes based on the pertinent facts.[86] For example, corporations organized under the DGCL may be treated in a manner that is different from corporations organized in MBCA-adopting states. In addition, a public

---

> corporation even though it is inconsistent with one or more other provisions of this Act in that it: (1) eliminates the board of directors or restricts the discretion or powers of the board of directors; . . . or (8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

85. *See supra* note 19 and accompanying text (documenting the statutory basis for the management authority of the board of directors, including the exceptions to the grant of authority).

86. *See generally* Part IV (recognizing the fact-based nature of cases shareholder wealth maximization objectives).

company or large privately held corporation may be treated differently than a statutory close corporation or common law closely held corporation in which all shareholders have agreed to the adoption of the guidance. The area is fraught with uncertainty and unpredictability.

V. Resulting Implications

The description and analysis of corporate statutory and decisional law and private ordering included in the preceding parts of this Essay have many implications for corporate law and practice. At its core, this Essay asks fundamental questions about the breadth and flexibility of for-profit corporate law in and outside Delaware. If directors and officers of firms are obligated to act in good faith and in the best interest of the corporation or the corporation and its shareholders, what do those obligations mean in any individual corporation? How much of the content of that "good faith" and "best interest" requires adherence to a shareholder wealth maximization norm? How much of that content can be defined in corporate charters?

A determination of the answers to these questions necessarily engages debates about *ultra vires* corporate action and the potential role of a duty of obedience in guiding board decision-making.[87] One goal of projects focusing on these issues could be to sort out and optimize the operation of overlapping legal doctrine as applied to board decision making and oversight in for-profit firms that desire to organize as corporations but do not desire to strictly adhere to a shareholder wealth maximization norm. The oversight aspect of shareholder wealth maximization is often overlooked entirely in discussions about corporate management and governance oriented toward the interests of multiple constituencies[88] since legal actions

87. *See* Palmiter, *supra* note 81 (discussing the potential role for a duty of obedience in for-profit corporate law).

88. *Cf.* Olliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1215 (1984) (discussing firm governance without reference to oversight); William W. Bratton & Michael L. Watcher, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 129 (2008) (examining Berle's position on a multiple constituency system without reference to oversight).

challenging specific board decisions have constituted the principle body of judicial opinions on the shareholder wealth maximization norm. This understudied aspect of corporate governance deserves focused attention.

Ambiguities about the legal status and overall nature of the shareholder wealth maximization norm drive uncertainties in the law and its application to director decision making that engage the interests of multiple internal and external corporate constituencies at the firm level. Is the norm theory, legal doctrine, public policy, behavioral guidance, a social rule of conduct, or something else altogether? Resolution of this matter alone would push analyses further forward. Yet, that resolution is unlikely to occur in any definitive way without decisive formal legislative or judicial action.

Moreover, although commentators on the shareholder wealth maximization norm most often talk about "wealth" without definition, it is clear that many intend to refer to wealth in its simple, financial form. Yet some have come to more broadly refer, at least in some contexts, to more capacious notions of shareholder primacy as a focus for the directors' management of the firm consistent with their fiduciary duties—in other words, putting shareholder interests, whether they be financial or other, ahead of the interests of other constituencies in overall decision making and oversight.[89] This notion of shareholder wealth—really an articulation of shareholder primacy as the objective of corporate directors and officer fiduciary duties—would include both financial benefit and other value propositions (more a matter of shareholder value than shareholder wealth),[90]

---

89. A pair of authors note, along these lines, that:

> [T]here is strong evidence that shareholders sacrifice their financial interests to promote their nonfinancial interests. If shareholders do not want pure profit maximization, the shareholder wealth maximization norm loses much of its theoretical support. The theory supporting the norm is largely based on protecting shareholders' interests. If shareholders care about more than just profits, the theoretical support for pure profit maximization weakens.

Paul Weitzel & Zachariah J. Rodgers, *Broad Shareholder Value and the Inevitable Role of Conscience*, 12 N.Y.U. J.L. & BUS. 35, 41–42 (2015) (footnote omitted).

90. This distinction also has been noted by others:

> [S]hareholder *wealth* maximization is distinct from shareholder *value*

presumably as agreed between the shareholders and the firm. Broader conceptions of shareholder wealth would be more likely to be realizable in board decision making in privately held firms and, even more particularly, statutory close or closely held corporations.

The advent of for-profit social enterprise corporations—and in particular, the popularity of the benefit corporation—has altered the character of the conversation on all these matters—bringing issues to the fore while (at the same time) adding complexity to both descriptive and analytical accounts. While for many this complexity may be unwarranted or unwelcomed,[91] benefit corporations may be a proving ground for best practices regarding board processes in managing the interests of multiple constituencies. For example, litigation involving board decision making in benefit corporations may help us to develop a better understanding of optimal board processes that take into account a more inclusive consideration of constituents. Only time will tell.

VI. Conclusion

Is the existence of a shareholder wealth maximization norm, then, a simplistic, reductionist account or doctrinal truth? The evidence to date is inconclusive. No doubt, as Delaware Supreme Court Chief Justice Leo Strine repeated a number of times at the

---

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

Id. at 45 (emphasis added).

91. *See, e.g.*, Kennan Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 174 (2015) (observing that, "[i]nstead of wading through the murky waters, advocates of the benefit corporation have preyed on the fears of social entrepreneurs to help solidify the new corporate form").

symposium at which the ideas for this Essay were presented, directors cannot "do whatever they want."[92] But the extent to which directors must observe a shareholder wealth management norm in their management of the corporation for the short term and the long term in a fashion consistent with applicable fiduciary duties remains relatively untested. Moreover, the extent to which shareholders can limit or otherwise define the existence and nature of a shareholder wealth maximization norm at the firm level in a manner that is both valid and enforceable is also substantially unproven.

Given differences in doctrine and public policy among the states and variance in that doctrine and public policy among public, private, and statutory close or closely held corporations within individual states, answers to these many open questions are likely to (and should) depend on individualized facts assessed through the lens of specific statutory and decisional law and applicable public policy. As a court of equity sitting in the state that has a clear leadership position in U.S. corporate law, the Delaware Court of Chancery is likely to be a proving ground for many of these cases. In this author's mind, however, there is no doubt that the Chancery Court's opinion in the *eBay* litigation is not the end of the story in Delaware—or elsewhere.

92. Chief Justice Leo Strine, Address at the Washington and Lee Law Review Symposium: Corporate Law, Governance, and Purpose: A Tribute to the Scholarship of Lyman Johnson and David Millon (Oct. 21–22, 2016).