The False Dichotomy of Corporate Governance Platitudes

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In 2019, the Business Roundtable amended its principles of corporate governance, deleting references to the primary purpose of the corporation being to serve its shareholders. In doing so, it renewed the "shareholder vs. stakeholder" debate among academic theorists and politicians. The thesis here is that the zero-sum positions of the contending positions are a false dichotomy, failing to capture the complexity of the corporate management game as it is actually played. Sweeping and absolutist statements of the primary purpose of the corporation are based on arid thought experiments and idiosyncratic cases in which corporate leaders have managed to be either bullheaded or ill-advised. In the real world, management regularly commits itself to multiple competing constituencies, including the shareholders.

There are three arguments. The first is from reality, borne out by a survey of pre-amendment CEO annual report letters to shareholders (2017) and post-amendment responses (2020) to the COVID-19 pandemic. The second is from economics. Neo-classical economic theory supporting the doctrine is misplaced; transaction cost analysis under the New Institution Economics does a far better job of explaining the primacy of wide corporate discretion in allocating surplus among the corporate constituencies. The third is from jurisprudence. Doctrinal dicta like "corporations exist primarily to maximize shareholder wealth" are not so much right or wrong as meaningless. Rather, the business judgment rule, which justifies almost any allocation of corporate surplus having an articulable connection to the best interest of the enterprise, subsumes all other platitudes posing as rules of law.

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The acknowledgment that gives me the most pleasure, however, is to Steve Bainbridge. That I have taken his arguments as (I hope) a good-natured foil for my reflections does not diminish my admiration for his corporate law chops. I assign his hornbook as one of the texts in my introductory business associations class. STEPHEN M. BAINBRIDGE, CORPORATE LAW (3d ed., 2015). True to form, he provided helpful comments on an early draft. Then he honored me by accepting the JOURNAL OF CORPORATION LAW's invitation to respond. Stephen M. Bainbridge, *Making Sense of The Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. ___ (2021). I hope readers enjoy the full, frank, friendly, and fun exchange of views and draw their own conclusions.

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I. INTRODUCTION

The Business Roundtable ("BRT") describes itself as "an association of chief executive officers of America's leading companies working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy."[1] On August 19, 2019, it announced an amendment to its Principles of Corporate Governance in a document signed by 181 chief executive officers (the "2019 Statement").[2] The effect was to eliminate previous references to the "primary purpose" of a corporation as serving its shareholders. Rather, the CEOs observed, while every company might have its own corporate purpose, they shared a "fundamental commitment" to different groups of corporate stakeholders, all of which were "essential" to the future success of their companies, communities, and the country.[3] One of those commitments would have been uncontroversial in the eyes of most corporate law scholars and commentators: "Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders."[4]

The 2019 Statement caused an immediate kerfuffle because the CEOs affirmed other commitments in the four preceding paragraphs: to customers (delivering value; meeting or exceeding their expectations), employees (fair compensation and benefits, training, diversity, inclusion, dignity, and respect), suppliers (fair and ethical treatment), and communities (respecting people; protecting the environment).[5] The ideological extreme of "shareholder-focus" absolutists, represented in the academy by corporate law icon Stephen

1. *About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us (last visited Oct. 2, 2020).
2. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/468Z-L8XD].
3. *Id.*
4. *Id.*
5. *Id.*

Bainbridge[6] and in the real world by the Council of Institutional Investors,[7] immediately took as an affront to shareholders the mere suggestion they might not be the *exclusive* stakeholders to which the corporations owed commitments under the Delaware General Corporation Law and that of states with similar doctrine. At the other end of the spectrum, those appalled by excessive executive compensation, the gaps in wealth distribution, and the overall concentration of corporate power thought the acknowledgment of inclusive corporate commitment was overdue.[8] Senator Warren described herself "encouraged" by the statement but only "if . . . accompanied by tangible action that provides real benefits to workers and other stakeholders."[9] The left-hand column of the Wall Street Journal editorial page had the most cynical reaction, characterizing it as less substance than media spin in light of a potential Warren presidency.[10]

The shareholder-stakeholder debate was taking place in legal academic circles long before the BRT issued the 2019 Statement, with Professor Bainbridge ably a consistent protagonist for the shareholder wealth maximization principle ("SWMP") on one side.[11] The other side, reflected in both academic writing and political rhetoric, has been the "social responsibility view," under which corporate directors should be held to have no particular duty to favor shareholder interests over those of other corporate constituencies, or more affirmatively, be required to consider stakeholder interests.[12] Indeed, academics,

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6. *See generally* Stephen M. Bainbridge, *BRT, Stakeholders and Corporate Purpose*, CORP. BOARD, Nov.–Dec. 2019, at 6; Stephen Bainbridge, *A Tweet to the Business Roundtable re the Law of Corporate Purpose*, PROFESSORBAINBRIDGE.COM (Aug. 19, 2019, 1:59 PM), https://www.professorbainbridge.com/professor bainbridgecom/2019/08/a-tweet-to-the-business-roundtable-re-the-law-of-corporate-purpose.html [https://perma.cc/6MZV-WPW8]; Stephen Bainbridge, *William Galston Could Not Be More Wrong; He Could Try But He Would Not Be Successful*, PROFESSORBAINBRIDGE.COM (Oct. 5, 2016, 11:18 AM), https://www.professorbainbridge.com/professorbainbridgecom/2016/10/william-galston-could-not-be-more-wrong-he-could-try-but-he-would-not-be-successful.html [https://perma.cc/R83L-AJHC].

7. *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL OF INST. INV. (Aug. 19, 2019), https://www.cii.org/ aug19_brt_response [https://perma.cc/8DUU-8VD2].

8. *See, e.g.*, Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES (Aug. 21, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility. html [https://perma.cc/ZF6U-HYN5].

9. *Senator Warren Asks CEOs to Honor Their Commitments to 'Promote an Economy that Serves all Americans'*, ELIZABETH WARREN (Oct. 4, 2019), https://www.warren.senate.gov/oversight/letters/senator-warren-asks-ceos-to-honor-their-commitments-to-promote-an-economy-that-serves-all-americans [https://perma.cc/7DTY-PX64].

10. The Editorial Board, *The 'Stakeholder' CEOs*, WALL ST. J. (Aug. 19, 2019, 5:09 PM), https://www.wsj.com/articles/the-stakeholder-ceos-11566248641 [https://perma.cc/X2U4-V2LX] ("There is also more than a whiff of pre-emptive politics here. The executives—the Business Roundtable is led by JPMorgan CEO Jamie Dimon—know they are political targets . . . . The CEOs no doubt want to get out in front of this by showing what splendid corporate citizens they are.").

11. *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, 1423–25 (1993).

12. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 764 (2015); LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 4, 6–7 (2012); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 300 (1999); Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 324–25 (2011); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 745–46 (2005); Lyman Johnson, *Unsettledness in Delaware*

practitioners, and judges had previously weighed in on the narrower question whether Delaware law actually incorporated the SWMP.[13] One of the most subtle articulations of the SWMP came from Leo Strine, now the former chief justice of the Delaware Supreme Court, and widely recognized as perhaps the nation's leading corporate jurist. His view of the SWMP has been wholly descriptive but not normative. While he supports the idea that corporations *should* have legal obligations to stakeholders other than shareholders, Delaware law presently does not allow for them. That is, current doctrine incorporates the SWMP.[14]

The 2019 Statement merely brought the policy and doctrinal debates forward once again, most notably by Professor Bainbridge. Call my thesis here "the Platitude Proposition." The debates are a war of platitudes based on a false dichotomy having almost no traction worth discussing as a practical matter. In the real world, directors obviously promote the shareholders' interest in returns on their investments, but they do so by mediating the various and often opposed interests of shareholders, employees, customers, suppliers, and communities.[15] That was true before the BRT issued the 2019 Statement and it is true now. To the extent the 2019 Statement suggested otherwise, it probably should have been amended. To suggest that one or another corporate constituency is the exclusive beneficiary of the directors' concern, the protagonists in "shareholders vs. constituencies" debate must put aside real-world social and economic checks and balances. Instead, they must propose zero-sum thought experiments in which affording a benefit to another constituency by definition is "in irreconcilable conflict" with maximizing shareholder

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Corporate Law: Business Judgment Rule, Corporate Purpose, 38 DEL. J. CORP. L. 405, 444–48 (2013); Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 168–69 (2008).

13. *See, e.g.*, Strine, *supra* note 12; Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 10–11 (2014); Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 940 n.3, 950–56 (2017); Elhauge, *supra* note 12, at 775; J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 10–11 (2012).

14. *See* Strine, *supra* note 12, at 765–68.

15. Because of my capacious view of legally permitted corporate ends or purpose, I find much to agree with in what otherwise purport to be contending points of view about corporate purpose. *See* Martin Lipton et al., *On the Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 27, 2020), https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation [https://perma.cc/V9DQ-NNXN]; Peter A. Atkins et al., *An Alternative Paradigm to "On the Purpose of the Corporation"*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 4, 2020), https://corpgov.law.harvard.edu/2020/06/04/an-alternative-paradigm-to-on-the-purpose-of-the-corporation/ [https://perma.cc/H5GN-7HV5]; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 105 CORNELL L. REV. (forthcoming Dec. 2020), https://ssrn.com/abstract=3544978 [https://perma.cc/34F2-DF5J]; Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction. A Comment on '*The Illusory Promise of Stakeholder Governance*' by Lucian Bebchuk and Roberto Tallarita* 3–4 (Eur. Corp. Governance Inst., Law Working Paper No. 522, 2020), https://ssrn.com/abstract=3617847 [https://perma.cc/DP3H-U9B].

The irony is that I am probably more sympathetic to Professor Bainbridge's concern for the shareholders' interest than I am to the stakeholder position that the status quo is bad and needs to be overturned. At least for enterprises that require significant capital investment, no enterprise will exist to benefit employees, customers, suppliers, and communities unless investors receive competitive returns on their investments. The very nature of the system is that all of the constituencies are competing for as much of the surplus created by the enterprise as they can get, and the system, by and large, works pretty well. The point here is that the 2019 Statement is nothing more than a reiteration of how that pretty good system works. Both the Atkins blog and Professor Mayer's essay seem to agree with that, consistent with my view that the shareholder versus stakeholder debate is a false dichotomy.

wealth.[16]

Professor Bainbridge has proposed and, indeed, has marketed one: the Bainbridge Hypothetical.[17] An obsolete plant needs to be closed. It will cost jobs and devastate the local community around the old plant but will benefit shareholders as well as the employees and communities associated with the new plant. Professor Bainbridge's question incorporates the zero-sum assumption: "Assume that the latter groups cannot gain except at the former groups' expense. By what standard should the board make the decision?"[18] He answers his own question, "Shareholder wealth maximization provides a clear answer—close the plant."[19]

This is a nice academic problem to ponder in the rarified atmosphere of an ethics class or Corporation Law 101, but the reality is the zero-sum choice between the shareholders and some other constituency rarely so presents itself. The Bainbridge Hypothetical is the corporate equivalent of the famous ethical trolley problem and its variants, the basic one involving an uncontrolled trolley rolling down the tracks toward a junction and the protagonist having to decide whether to pull a switch that would cause only one and not six people to die.[20] Just as people in real life are rarely asked to make that kind of horrific decision, corporate management rarely faces the binary choice of diverting value away from the shareholders to other stakeholders. I understand the basis for the rhetoric and the value of the problems as pedagogical tools. Nevertheless, there is a significant gap between academic thought experiments or political positioning, on one hand, and how the real-world works, on the other. The debate (like many in today's polarized political environment) speaks far more to each pole's fear of the slippery slope of the other's position than to a real-world concern.

I thus offer three arguments that will likely disappoint the ideologues but are more representative of what corporate managers really do. The first, in Part II, is the argument from reality (or at least from the rhetoric of what the corporations themselves say about their commitments, assuming that reflects the reality). The second, in Part III, is the argument from economics. The third, in Part IV, is the argument from jurisprudence. Each makes the same point: any absolutist maxim designating a single constituency to which directors owe their complete duty is not so much wrong as it is meaningless platitude, unhelpful in either describing what boards do or prescribing what they should do. Rather, the business judgment rule, which *is* an actual rule of decision, justifies almost any allocation of corporate surplus having an articulable connection to the best interest of the

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16. *See, e.g.*, Bainbridge, *supra* note 11, at 1435.

17. *Id.* at 1435–36; Stephen Bainbridge, *Kindly Help Popularize the Bainbridge Hypothetical*, PROFESSORBAINBRIDGE.COM (Aug. 19, 2019, 12:43 PM), https://www.professorbainbridge.com/professor bainbridgecom/2019/08/kindly-help-popularize-the-bainbridge-hypothetical.html [https://perma.cc/Y4PJ-RVAF].

18. Stephen Bainbridge, *The Importance of the Shareholder Wealth Maximization Standard*, PROFESSORBAINBRIDGE.COM (Feb. 7, 2006, 5:22 PM), https://www.professorbainbridge.com/ professorbainbridgecom/2006/02/the-importance-of-the-shareholder-wealth-maximization-standard.html [https://perma.cc/C3CN-RMUP].

19. *Id.*

20. Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5, 8–9 (1967) (presenting the original version); John Mikhail, *Moral Grammar and Intuitive Jurisprudence: A Formal Model of Unconscious Moral and Legal Knowledge*, 50 PSYCH. LEARNING & MOTIVATION 27, 31–37 (2009) (proposing many variants).

enterprise and subsumes platitudes like the SWMP posing as rules of law.[21]

After fifteen years as a law professor that followed more than a quarter-century as a real-world corporate lawyer and senior officer of a public corporation, I still find myself more amused than educated by the debates between the ideologues on real-world subjects that I know, as a practical matter, rarely present themselves in such a binary fashion when those in the corporate management trenches address them. Academics (especially tenured), politicians (especially those tending to the extremes of the liberal-conservative continuum), and pundits have the luxury of professing ideologically pure positions. But they are false dichotomies. Corporate executives and their lawyers know that leading and managing organizations—i.e. execution rather than mere rhetoric—is a lifelong process of coming to terms with the tension between principles, on one hand, and pragmatism, on the other. The shareholder absolutists and the stakeholder or social responsibility purists are engaging in a rhetorical battle largely removed from the reality that shareholder success is and always has been inseparable from corporate commitment to some or all of those constituencies.[22]

II. THE ARGUMENT FROM REALITY (OR RHETORIC)

In one of his early absolutist defenses of shareholder wealth maximization, Professor Bainbridge asserted that principle "long has been the fundamental norm which guides U.S. corporate decisionmakers."[23] That is an assertion that hovers delightfully and enigmatically between the empirical and the normative. Really? Is it a statement about what directors actually discuss in the boardroom, or what executives actually do in the management suite? In the real world, when there is no litigation involved, do corporations really view shareholders as the sole constituency for whose welfare they are responsible? Or is it a description of how law professors view an abstract legal principle?

To me, as a former corporate officer, the 2019 Statement was hardly surprising. It merely emphasized what CEOs regularly say to their constituencies of shareholders, customers, employees, and communities when not shackled by the constraints of academic thought experiments. They manage the interests of a number of constituencies, all necessary to the creation of value in the firm, and some of which, from time to time, conflict. While it is a fair question whether mere statements are a reflection of rhetoric or reality, it is also fair to say that the test under Delaware law when second-guessing a corporate decision depends heavily on the rhetoric that management has used to justify its action. Given the overwhelming reach of the business judgment rule in any conceivable case which corporate managers do not wholly dismiss the interests of the shareholders, the rhetoric may well be the reality.[24]

I undertook two non-scientific tests of my proposition that the 2019 Statement represented hardly any change in corporations' orientation toward their constituencies. The first, developed in late 2019, before the onset of the COVID-19 pandemic, was to see what

21. My use of the word "articulable" rather than "rational" is deliberate. *See infra* note 144.

22. The trigger for this essay was the reaction to the 2019 Statement, so I focus primarily on the shareholder wealth maximization position. My position on the meaninglessness of governance platitudes could extend equally to stakeholder or social responsibility purists, except that nobody is seriously arguing that those platitudes are currently rules within corporate law doctrine. Hence, the discussion will be somewhat one-sided.

23. Bainbridge, *supra* note 11, at 1423.

24. I am indebted to my colleague Joe Franco for emphasizing this point. *See infra* Part IV.

CEOs were saying about their constituencies at a time not too long before the issuance of the 2019 Statement, namely, a non-scientific sampling of 100 "CEO letters to shareholders" in fiscal 2017 annual reports. The second, which arose by happenstance, was to survey those same 100 companies to assess their reactions to the economic hardships of the pandemic in terms of the same constituencies. In both instances, the conclusion is that shareholder value matters, but so do commitments to stakeholders, at least in rhetoric.

A. 2017 CEO Letters to Shareholders

The database is a sampling of the usual letters introducing the annual reports issued in early 2018 referring back to fiscal year 2017 (the thought being they would be recent enough to reflect current sensibilities but would also have preceded the 2019 Statement). The samples came from four categories: (1) BRT member companies whose CEOs signed the 2019 Statement; (2) BRT member companies whose CEOs did not sign; (3) non-BRT member companies traded on the New York Stock Exchange; and (4) non-BRT member companies traded on NASDAQ.[25]

The conclusion is nuanced. Nobody has ever suggested that shareholders are not an important, perhaps even the most important, constituency for management. The shareholder wealth absolutists objected to the 2019 Statement's position that shareholders were not the only constituency to which management felt committed.

A sampling of the text of the letters adds some color to the numbers.[26] Aflac said it "is committed to making business decisions that balance the needs of our many constituencies, including our policyholders, employees, distribution network and shareholders, while recognizing the obligation we have to the global community;" while Ball Corporation congratulates itself on delivering higher comparable operating earnings, diluted earnings per share, and free cash flow, it also lauds its efforts in sustainability, talent management, and community ambassadorship, noting in particular its inclusive corporate policies and practices related to lesbian, gay, bisexual, transgender and queer workplace equality; 3M is in partnership with its customers to "improve lives and help solve society's toughest challenges," citing as its most valuable resource the curiosity, passion, and skill

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25. The entire database is available for public review. *See infra* Appendix A and note 148. The sampling was not systematic. There were only four BRT members who did not sign the 2019 Statement. I did no testing of the statistical significance of differences among the four categories, but my casual observation was that there were none worth noting.

This data compares to another recent study. Bebchuk & Tallarita, *supra* note 15. Bebchuk and Tallarita purport to demonstrate that the 2019 Statement was primarily a public relations gimmick. They counted the number of signatory companies that modified their corporate governance principles explicitly to refer to commitments to stakeholders other than shareholders. *Id.* at 21–28. Hence the authors assert that their finding of very few changes is consistent with the conclusion that the BRT statement was neither expected nor intended to produce major changes in the treatment of stakeholders. *Id.* In my view, it is hardly surprising that very few did, given my view that the 2019 Statement itself reflected very little change in what companies had been doing all along. My primary concern about the piece was its misplaced characterization of the SWMP in Delaware corporate law doctrine. It simply gloms onto Leo Strine's *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law* and cites a vague "consensus" at a recent conference as a statement of the law. For a discussion of the Strine article and other non-legal pronouncements posing as law, see Part IV.

26. The following text and Table 3 in Appendix A draw examples from the database for purposes of illustration. As noted, the entire database is publicly available.

of its 91,000 people around the world. Companies with products as diverse as power tools (Stanley Black & Decker), toys and games (Hasbro), cosmetics (Estée Lauder), and auto parts (Advance Auto Parts) extol both their financial results and their commitments to LGBTQ+ diversity and inclusion.

The narrative of one major corporation (not included in this sample) helps to understand what this data shows.[27] On March 7, 2000, Procter & Gamble announced it would not meet its earnings estimate for its third quarter. In one day, its stock price dropped from $86 to $60. Because the company was a component of the Dow Jones Industrial Average, its stock led that index to a 374-point decline. The stock continued to decline. In June 2000, A.G. Lafley was named the company's new CEO. As he later wrote about the experience,

> our biggest problem in the summer of 2000 was not the loss of $85 billion in market capitalization. It was a crisis of confidence. Many of P&G's leaders had retreated to their bunkers. Business units were blaming headquarters for poor results, and headquarters was blaming the units. Investors and financial analysts were surprised and angry. Employees were calling for heads to roll. Retirees, whose profit-sharing nest eggs had been cut in half, were even angrier.[28]

Several years later, Lafley met with the late management scholar and guru, Peter Drucker, to assess the CEO's role in linking the "inside" of a corporation, its organization, to the outside "of society, economy, technology, markets, and customers." What I find most interesting, in light of Professor Bainbridge's assertion about the fundamental norm of shareholder wealth maximization, is Lafley's characterization of the corporation's stakeholders. He adopted Drucker's maxim that the "purpose of a business is to create a customer." Hence, to Lafley, "[o]f all our stakeholders, both inside and outside, the primary one is the customer." Ironically, Lafley needed to make clear that the customer was not the only stakeholder about which he needed to be concerned:

> Although the consumer is clearly P&G's most critical external stakeholder, others are important as well: retail customers, suppliers, and, of course, investors and shareholders. Over the past decade we have dramatically changed how we work with retail customers and suppliers, both of which help P&G deliver on its purpose. For too long these relationships were transactional—a series of win-lose negotiations. Beginning in 2000 we tried to make them win-win partnerships. We focused on common business purposes and goals, on joint business plans, and, most important, on joint value creation.[29]

What Lafley's story reflects is the complexity of the management task in mediating among constituencies in a dynamic organization. P&G's employee stakeholders were its most valuable assets, but it was important not to put their interests ahead of the customers because it would result in an internal and short-term focus. Rather, employees ought to be motivated by how they can "personally touch and improve consumers' lives." He

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27. A.G. Lafley, *What Only the CEO Can Do*, HARV. BUS. REV. (May 2009), https://hbr.org/2009/05/what-only-the-ceo-can-do#:~:text=The%20CEO%20has%20both%20a,brands%20and%20products%20every%20day [https://perma.cc/3AAQ-U764].

28. *Id.*

29. *Id.*

concluded, "[t]he process of clarifying and communicating the priority of external stakeholders is ongoing, because many internal and external stakeholders have important demands. I wouldn't ignore any of them. But if there's a conflict, I make sure we resolve it in favor of the consumer."[30]

B. Responses to the COVID-19 Pandemic

If any circumstance in the last seventy years or so has offered public corporations the chance to make a binary choice between their shareholders and other constituencies, it has been the COVID-19 pandemic of 2020. The Standard & Poor's 500 Stock Index fell thirty-four percent from its peak closing of 3,386.15 on February 19 to its low of 2,237.40 on March 23.[31] In February, unemployment in the United States was 3.5%, its lowest level in fifty years. By April, it had reached 14.7%, the highest since the Great Depression.[32] If the Bainbridge Hypothetical had utility as a guide to reality (as opposed to a thought experiment designed to justify the SWMP), I would have expected to see corporations' actions and rhetoric reflecting an overriding concern for the wealth of the shareholders.

The reality (or, again, perhaps the rhetoric) turns out to be far more nuanced. For the enterprise to provide wealth it needs to survive, and survival depends on a complex web not only of investors, but of employees, customers, suppliers, and communities. The 2020 data includes the COVID-related communications and first-quarter earnings announcements of the 100 companies already selected for their 2017 annual report letters.[33] Of the 100 companies, 98 mentioned the COVID-19 pandemic either in the earnings release for the first quarter of 2020 or in another communication. Eighty-three of the 100 companies stated explicitly that the health or safety of employees and/or customers was the highest/first/primary priority of the company. Nineteen of the 100 companies referred explicitly in their earnings releases to a commitment to shareholder value or returns to shareholders. Of those 19, 16 were among the 83 companies stating that the health or safety of employees and/or customers was the highest/first/primary priority of the company. Hence, only three companies committed to shareholder value and not to the health or safety of customers or employees as the highest/first/primary priority. But the sample did not include a single communication suggesting directly or indirectly that the highest priority of the corporation was the continued short-term maximization of shareholder wealth.

To the contrary, the consistent message, even in the earnings releases for the first quarter of 2020, was that employees and customers were either explicitly or implicitly the company's highest priority, companies were diverting resources to employees, customers, and communities by way of enhanced benefits, relaxation of contractual limitations, and significant charitable contributions of cash and resources.[34] Companies advised that, while

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30. *Id.*

31. S*&P 500®*, S&P DOW JONES INDICES (July 15, 2020, 4:44 PM), https://perma.cc/23LR-GUL8.

32. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Oct. 6, 2020, 4:41 PM), https://data.bls.gov/timeseries/LNS14000000 [https://perma.cc/8TBH-KS9A].

33. *See infra* Appendix B, Tables 4, 5. Table 4 shows the results of coding references in earnings releases. Table 5 shows the results for COVID-specific communications. In each table, as for the 2017 CEO letter data, I have separated out 2019 Statement signatories and non-signatories. Again, without making any claim to statistical significance, I do not see much difference.

34. *See infra* Appendix B, Table 5 (detailing the specific COVID responses messages of the companies by percentage).

they could not predict the impact on financial results (and indeed withdrew previous earnings guidance), the companies had strong balance sheets, liquidity, and access to capital, and that their focus was on the long term.[35] In other words, "shareholders, please be patient; we have other things to attend to right now." In short, during the first half of 2020, public corporations have been attending to their metaphorical dashboards, balancing the long-term interest of their shareholders against the current needs of all other corporate constituencies.

C. Conclusions

The point of all of this is the nuance of real-world corporate management and its resistance to easy platitudes like the SWMP, whether enshrined in the 2019 Statement or espoused by academic theorists. The data bears out my original intuition: The pre-2019 Statement BRT governance principles were probably an overstatement. It turns out that looking out for the long-term interest of the enterprise is a complex task. It was true in 2017, before the issuance of the 2019 Statement. It was borne out after the 2019 Statement by the priorities that companies set in response to the pandemic and in their outpouring of concern and largesse to constituencies other than the shareholders (at least in the short term).[36]

III. THE ARGUMENT FROM ECONOMICS

The second thesis is about the law and economics of corporate management. Professor Bainbridge has consistently maintained for almost thirty years that, within the prevailing "nexus of contracts" theory of the firm, the SWMP is both the status quo and "wholly consistent with the prevailing neoclassical model of the firm."[37] I simply cannot find a path from the axioms of economic models to justification of the SWMP either as a rule of law or a helpful model of how corporations actually deal with their competing constituencies. My experience in senior corporate management between 1992 and 2005 was rather more consistent with an economic model proffered by Margaret Blair and Lynn Stout at about the same time.[38] Yes, we were vitally concerned with increasing shareholder wealth, our own compensation being significantly tied to it. But, at the same time, our directors and my fellow officers were mediating hierarchies among various constituencies. And the governing law, as Blair and Stout suggested, was "designed to protect *the corporate coalition* by allowing directors to allocate rents among various stakeholders, while

35. *See infra* Appendix B, Table 4 (detailing the specific considerations mentioned in the earnings releases by percentage).

36. On July 22, 2020, I received an unsolicited e-mail from the National Association of Corporate Directors, soliciting my participation in its directorship certification program. E-mail from Stephanie Mullette, Sr. V.P., Membership, Nat'l Assoc. of Corp. Dirs., to author (July 22, 2020, 08:32 EDT) (on file with author). I noted even that pitch did not highlight a particular duty to the shareholders: "NACD enables directors to earn distinguished credentials that demonstrate they are prepared to understand complex issues, ask the right questions, apply leading practices, exert thorough oversight, and protect stakeholders' long-term value." *NACD Credentials*, NACD, https://nacdonline.org/credentials/content.cfm?ItemNumber=66235 [https://perma.cc/6Y66-3H6K].

37. Bainbridge, *supra* note 11, at 1426. This was in the context of responding to Professor Ronald Green's claim that the status quo ought to change away from the SWMP. *See generally* Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409 (1993).

38. Blair & Stout, *supra* note 12; *see generally* Stout, *supra* note 12.

guarding the coalition as a whole only from gross self-dealing by directors."[39]

Nevertheless, here we are in 2020 with sophisticated scholars and practitioners of corporate law still claiming there is such a direct path. I will try to reconstruct it. I accept, for purposes of this discussion, that the goal of "law and economics" is to explain legal doctrine by way of the predictions that microeconomics makes about human behavior.[40] Thus, we should ask two questions. First, why does the prevailing doctrine—the business judgment rule—reflect an implicit contract between the shareholders and the board in which the former vest the latter with almost unbounded discretion to maximize the value of the corporate enterprise? Second, why does the prevailing doctrine impose significant barriers (i.e. transaction costs) to any challenge to the directors' allocation of the value so created?

The punchline is that the very theoretical elegance that makes neoclassical microeconomic theory powerful for some explanations is not up to the task when applied to the complexity and nuance of managing a public company. Thought experiments like the Bainbridge Hypothetical, which forsake complexity in the interest of making a theoretical point, are similarly elegant and similarly flawed. On the other hand, there is substantial explanatory power when we focus on transactions among the various corporate constituencies in the manner of the New Institutional Economics. In the actual play of the game, the absolutist shareholder maximization rule turns out to be relatively toothless as an institutional safeguard against the governance hazards affecting the shareholders. Except in limited circumstances, the business judgment rule turns out to reflect the most persuasive economic model of the corporation.

A. Neoclassical Economics

While scholars can quibble over the details, neo-classical microeconomic analysis can fairly be characterized as a discipline seeking to explain the allocation of scarce resources by way of highly generalized mathematical models.[41] The discipline "(1) assumes rational maximizing behaviour by agents with given and stable preference functions, (2) focuses on attained, or movements towards, equilibrium states, and (3) is marked by an absence of chronic information functions."[42] In his seminal treatise on the application of economics to legal doctrine, Richard Posner highlighted at least two of the salutary purposes of microeconomic models. First, they predict the equilibria of prices and outputs by way of fundamental principles.[43] Those include (1) an inverse relation between the price charged and the quantity demanded; (2) the positive relationship between a supplier's opportunity cost, on one hand, and its price and output, on the other; (3) the tendency to stable equilibria in which, unless the conditions of supply or demand change, there is no incentive to alter prices or outputs; and (4) the gravitation of resources toward their most valuable uses.[44] In

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39. Blair & Stout, *supra* note 12, at 321.

40. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW XIX (6th ed. 2003).

41. Tony Lawson, *What is this 'School' Called Neoclassical Economics?*, 37 CAMBRIDGE J. ECON. 947, 950 (2013).

42. GEOFFREY M. HODGSON, EVOLUTION AND INSTITUTIONS: ON EVOLUTIONARY ECONOMICS AND THE EVOLUTION OF ECONOMICS 23, 29 (1999) (quoting GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 5 (1976)).

43. POSNER, *supra* note 40, at 3–10.

44. *Id.*

aspiring to scientific *explanation*, economic theory of law deliberately puts aside the "full complexity, richness, and confusion" of the real-world phenomena precisely because descriptive completeness would not constitute a theory but merely a description.[45]

Second, the models permit the observer to assess whether the transaction has been "efficient," that is, whether, from a societal standpoint, the transaction indeed represents a net gain in utility or happiness.[46] Hence, economic analysis of law goes beyond merely explaining legal rules and institutions as they are. It also provides one means for assessing whether legal rules promote or impede (because they promote or impede economic efficiency) maximizing the wealth of a society.[47]

Traditional economic theory has informed corporate governance doctrine via an amalgam of two related theoretical conceptions of the firm. The first is the "principal-agent" conception that addresses agency cost issues, i.e. the divergence of interests as between shareholder "principals" of the firm and its centralized manager-agents.[48] The second is the "nexus of contracts," under which the firm is an imaginary construct in which every relationship can be characterized by way of an explicit or implicit contract.[49] The primary contract affecting the shareholders is implicit and enshrined as a corporate law default rule: all other creditors of the firm agree the shareholders will have limited liability for the firm's obligations, and that management will serve as proxy or agent for the shareholders' interests.[50] That is the source of the shareholder absolutist position: economic theory supports the view that the only appropriate role of management is to maximize price and output outcomes for the shareholders as between the shareholders and every other constituency in the corporation. Indeed, that is the conclusion Professor Bainbridge derives from the factual premises in his Hypothetical.

So how would that work if brought down from high theory to the play of the governance game? Logically, management would be engaged in basic microeconomics of price and output equilibria as to every other input (e.g., labor, materials, overhead) and output (e.g., sales) relationship that contributes to the wealth of the shareholders. In that conception, each separate price and quantity decision for each element of firm production ought to be mapped on an Economics 101 graph of marginal costs and marginal revenues in which the shareholders' interests are, as in the Bainbridge Hypothetical, in direct and irreconcilable conflict with those of the other contracting party. Management's sole goal, as agent for the shareholders, would be to administer each of the contracts in the theoretical nexus to maximize the firm's profits, i.e., to create and take for the shareholder-principals as much surplus as possible from each separable contracting activity that constitutes the "nexus." As Professor Bainbridge observed, the heart of corporate law (in this conception) resides in the gain allocation rules under which each constituency bargains for a share of the surplus and the shareholders are entitled to whatever is left over. Because those constituencies can protect themselves via contracts and the political process, they have no

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45. *Id.* at 17.

46. *Id.* at 10–16.

47. *Id.* at 24–26.

48. The seminal work is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavioral, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

49. OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 173 (1996) [hereinafter WILLIAMSON, MECHANISMS]; Blair & Stout, *supra* note 12, at 248 n.1, 258–59; Jensen & Meckling, *supra* note 48, at 310–11.

50. Bainbridge, *supra* note 11, at 1426–31.

economic or legal entitlement to the surplus. Hence, the *corporate* (as opposed, for example, to labor, contract, or environmental) law's role in surplus allocation is solely to protect the interests of the shareholders.[51]

Jamming the empirical reality into the neo-classical model, however, puts the real-world cart before an unsteady theoretical horse. In the past, I have been skeptical about trying to force real-world transacting and contracting motives into neo-classical microeconomic theory.[52] The problem from my standpoint, having operated in the real rather than the theoretical world of contracts and transactions, is the academic tendency to elevate rarified coherent theory over the complexities of real-world experience. As an example, in their seminal exposition of corporate agency costs within the nexus of contracts, Jensen and Meckling acknowledged they were only addressing the agency cost issues inherent when the inside manager's ownership did not align with that of widely-dispersed outside investors.[53] Their models only accounted for the tension arising between the entrepreneur-manager, on one hand, and outside stockholders, and bondholders, on the other, in the "initial set of contracts."[54] The models predicted equilibria for the incurrence of managers' agency costs and the optimal scale of the firm, taking into account the disparity of ownership between insiders and outsiders.[55] They addressed whether those equilibria would, in theory, be economically efficient.[56] For the purposes of reducing real-world complexity to the point they could derive generalized theorems about those equilibria and efficiencies, they explicitly put aside the fact that those same conflicted inside managers would also be the agents of the outside owners when dealing with agency and monitoring costs for all the other supplier, employee, creditor, and customer contracts constituting the nexus that is the firm.[57] So an inferential leap from the theory based on the Jensen and Meckling article to a justification of the SWMP in practice is in itself problematic.[58]

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51. Bainbridge, *supra* note 11, at 1433–34.

52. *See infra* notes 70–72 and accompanying text.

53. Jensen & Meckling, *supra* note 48, at 343–44.

54. *Id.* at 351.

55. *Id.* at 312–23, 343–51.

56. *Id.* at 327–28, 349–50.

57. *Id.* at 310–11. For example, almost thirty years ago, two scholars attempted an empirical study to determine whether shareholder returns would be improved when corporations did not permit the CEO also to function as the chair of the board of directors, as agency theory would predict. At the time, they concluded that shareholder returns were actually better in companies with one person holding both positions, suggesting that "stewardship theory" rather than "agency theory" might be a better explanation: "The safeguarding of returns to shareholders may be along the track, not of placing management under greater control by owners, but of empowering managers to take autonomous executive action." Lex Donaldson & James H. Davis, *Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns*, 16 AUSTRALIAN J. MGMT. 49, 62 (1991).

58. In fairness, Professor Bainbridge himself acknowledged that the nexus of contracts is incomplete as a theory of how people actually relate to one another within a firm. He proffers it instead as a putatively helpful explanatory metaphor in the same way Judge Posner views theoretical economic models. Stephen M. Bainbridge, *Contractarianism in the Business Associations Classroom:* Kovacik v. Reed *and the Allocation of Capital Losses in Service Partnerships*, 34 GA. L. REV. 631, 644 (2000). That all seems reasonable to me, but I still do not think it comes close to closing the gap between the economic analysis and a justification of the SWMP.

Even so, Professor Bainbridge's recent co-authored treatment of board functions strikes me as pushing the nexus of contracts beyond mere metaphor. STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, OUTSOURCING THE BOARD: HOW BOARD SERVICE PROVIDERS CAN IMPROVE CORPORATE GOVERNANCE (2018). The proposal there is that traditional boards could be replaced by outsourced "board service providers." That is wholly

Beyond that, it is important to understand how neo-classical economics comes to justify the welfare-enhancing efficiency of transactions, and why the theory fails to capture what corporate managers really do. How do we get to the idea of wealth maximization, whether of the shareholders or anybody else? The underpinning of the neo-classical model is utilitarian moral philosophy developed in the nineteenth century. Utilitarianism assumed rational people wished to maximize their utility, their happiness. More utility, more happiness, all other things being equal, are better for society. Utility increases when the scarce resources of the world get allocated to those they would make the happiest. The ideal is called Pareto-optimality or Pareto-efficiency: the state of the world is such that any further exchange between anybody would result in a net decrease in utility for somebody.[59] In his seminal treatise on the economic analysis of law, Richard Posner noted, however, that abstract and philosophical conceptions of utility, and thus Pareto-efficiency, were unhelpful in the economic analysis of law. If economic theory is to be useful in assessing the real world (including legal doctrine), it can really only generalize about the allocation of *value*—how much money A is willing to pay for something in a transaction or how much B will require to part with the something. Hence, the more pragmatic goal is wealth maximization, something that can be measured with money.[60]

The goal of any economic analysis of law, then, is to determine whether the law permits or encourages a "Kaldor-Hicks" efficient outcome in terms of the maximization of wealth. A transaction is Kaldor-Hicks efficient if each party obtains additional value as a result, provided that any harm to a third party does not exceed the total surplus created in the transaction. Where parties voluntarily engage in a transaction, it is almost surely the case that the transaction is efficient between those parties.[61] Here is a simple example of how surplus gets created and allocated. Assume that Joshua, a cartoon buff, sees Russian style nesting dolls having a series of Looney Tunes characters on each doll, ultimately revealing one at the center with an image of Mel Blanc. What Joshua really wants is a similar doll but with characters from the series *Clutch Cargo*, famous in its day for its limited animation (only the characters' mouths moved), but long since forgotten by just about everyone. One day he happens to find exactly what he is looking for on eBay. The seller, somebody named Igor in Russia, is offering Clutch Cargo nesting dolls. Assume it costs him $5 to make and sell a set. We can therefore assume that he would be willing to take the best price he could above $5. Joshua is willing to bid up to $90. In economic terms, regardless of the price on which they ultimately settle, the transaction between Igor and Joshua will be efficient as long as the price settles somewhere between (and including) $5.01 and $90. There is surplus or wealth available in the amount of $84.99. The price on which we settle merely allocates that surplus or wealth. If Joshua buys something for $50

consistent with Professor Bainbridge's *legal* conception of the board's obligation: in short, the board's unique duty in the nexus of contracts is to transact with the other constituencies in the interest of maximizing the shareholders' wealth, and a modular board could perform that duty just as well. My personal experience tells me that *legal* conception misses something about the leadership role of the board; indeed, that the corporation as a firm is something more than the sum of its parts.

59. POSNER, *supra* note 40, at 11–12; Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512–13 (1980).

60. POSNER, *supra* note 40, at 13–15; Coleman, *supra* note 59, at 523. Coleman notes that wealth maximization in itself is not an alternative to "efficiency," but a normative basis other than utility for justifying the pursuit of efficiency either under Pareto or Kaldor-Hicks criteria. *Id.*

61. POSNER, *supra* note 40, at 15.

for which he was willing to spend $90, he is $40 wealthier. If Igor sells something for $50 he was willing to sell for $5.01, he is $44.99 wealthier.[62] The normative point of economic analysis of law is that legal rules should not impede the creation of $84.99 of societal wealth, regardless how Igor and Joshua split that wealth through our bargaining over the price of a resource or an asset.

There is, however, an additional consideration with respect to the Kaldor-Hicks efficiency of the transaction. Unlike the Looney Tunes nesting dolls, which were made under a license from the copyright holder, Warner Bros., Igor never obtained a license from the holder of the Clutch Cargo copyright, Cambria Studios. Let us assume that Cambria is worse off as a result of the transaction between Igor and Joshua because it loses licensing revenue it would have otherwise earned. If either of them could fully compensate Cambria and still have a positive surplus, the transaction would be Kaldor-Hicks efficient.[63] But it does not matter. The assumption in Kaldor-Hicks efficiency is that the losers do not get paid. Even if we could figure out the net impact on others, the point is to assess the efficiency of the transaction between Igor and Joshua whether or not either ever compensates losers like Cambria.[64]

Assuming management acts as the notional agent for the shareholders in each transaction, neo-classical economics works to assess equilibrium prices and outputs for discrete transactions in the nexus, as well as an assessment whether those equilibria are efficient, regardless of the allocation of the joint surplus. Those are "the traditional questions of economics—resource allocation and the degree of utilization."[65] That is where Oliver Williamson, the dean of transaction cost economics, would place economic analysis of the production functions of the firm.[66] The problem is that the very ex-ante predictive elegance to which the theory aspires for discrete inputs and outputs, say, the markets for labor or materials, is less insightful in assessing the more complex management. As Williamson noted, managing interdependent corporate constituencies is not amenable to that kind of "[o]ptimality apparatus, often marginal analysis."[67] Rather, he proposed the new institutional economics to look at governance structures, like firm management, whose goals are maintenance of order, mitigation of conflict, and the creation of mutual gains.[68] Thus, the focus turns away from ex-ante predictions of price and quantities and toward ex-post "play of the game," or in other words, "aligning governance structures with transactions."[69]

The trap into which the Bainbridge Hypothetical falls is very much a part of Professor Bainbridge's acceptance of the traditional approach. Just as Jensen and Meckling strip away most of the real-world complexity to achieve expository elegance, so does Professor

62. *Id.* at 13 (using wood carvings as the example).

63. Coleman, *supra* note 59, at 513–14.

64. *Id.* Indeed, if we actually compensated all the losers, the distinction between Kaldor-Hicks and Pareto efficiency would disappear. This connection between the two standards is why Kaldor-Hicks is sometimes referred to as "potential Pareto superiority." POSNER, *supra* note 40, at 13.

65. Kenneth J. Arrow, *Reflections on the Essays*, *in* ARROW AND THE FOUNDATIONS OF THE THEORY OF ECONOMIC POLICY 727, 734 (George Feiwel, ed., 1987).

66. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 600 (2000).

67. *Id.*

68. *Id.* at 599.

69. *Id.*

Bainbridge with his Hypothetical. The simplicity of the transaction—in which there is no tension other than the one posited between the interest of the employees to maintain the plant and the interest of the shareholders in having it closed—allows managers to be Kaldor-Hicks optimizers. By its premises, it removes all considerations from the problem other than the ex-ante equilibria and efficiency of the transaction as between the shareholders, on one hand, and the single competing constituency, on the other. There may be other losers, but the model and the Hypothetical require we ignore them.

Moreover, the result Professor Bainbridge argues from the Hypothetical is no less brutally normative for all of its coating in economic justification. As Richard Posner observed in his discussion of economic efficiency, "[e]conomists can usually appeal to a generally accepted goal, such as maximizing the value of output, rather than having to defend the goal. By showing how a change in economic policy or arrangement would advance us toward that goal, they can make a normative statement without having to defend their fundamental premises."[70] The alignment of the SWMP with neo-classical economics is a "no-brainer" not because the economic theory dictates the goal, but more likely because the goal happens to fit within the limited reach of the theory. It is circular. If you believe that, as between the employees and the shareholders, the shareholders are entitled to be better off under the circumstances of the Bainbridge Hypothetical, you are likely going to be able to argue that the transaction is Kaldor-Hicks efficient. Whether or not there are other winners and losers does not matter, as long as the transaction between the company and the affected constituency results in a net welfare enhancement for the shareholders.

To be somewhat more charitable to neo-classical economics, there is a helpful conception here having to do with "joint surplus." I first need to distinguish two instances in which leading scholars have used the concept of joint surplus inappropriately to conflate the generalized rationality of theoretical neo-classical economics with real-world human motivations. Both have to do with the joint surplus created in an otherwise Kaldor-Hicks efficient transaction, regardless of its allocation between the contracting parties. First, in their argument why business firms would prefer formalistic rather than contextual contract interpretation, Alan Schwartz and Robert Scott notably assumed that sophisticated contracting parties would seek to maximize the joint surplus of both parties combined (between Igor and me, $84.99) rather than being concerned over the allocation of that surplus between the parties.[71] Second, in his attempt to theorize why lawyers appear at all in business transactions, Ronald Gilson felt it necessary to put aside the notion that it had anything to do with competition over distribution of the economic surplus of the transaction, contending instead that lawyers could only rationally be justified if they contributed to a theoretical increase in the joint surplus, wholly apart from its allocation between the parties.[72] I have yet to find anything else in the economics literature that supports imputing *individual* desire to maximize joint surplus in bargaining from an overall societal perspective that maximizing joint surplus is the point of welfare economics generally.[73]

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70. POSNER, *supra* note 40, at 15.

71. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003).

72. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 245–46 (1984).

73. Indeed, the theses in those two articles seem to me to violate Posner's articulation of the meaning of

Nevertheless, the idea of maximizing joint surplus makes perfect sense when assessing the role of corporate management in the *nexus* of contracts. But, as soon as you begin to focus on joint surplus among multiple parties, the limitations of the neo-classical theory in the face of organization complexity become apparent. Lafley's thesis at Procter & Gamble was nothing less than the need first, before any allocation, to maximize the surplus created jointly by all the firm's constituencies. To propose a homely metaphor here, a business that creates value is a goose. Chances are it needed capital, and investors do not invest without the prospect of a competitive return—i.e., a piece of the goose. And everybody wants a piece of the goose. Customers want lower prices, and if the business has a unique value proposition, they will not get them. Employees want higher wages. Communities want taxes and support of local institutions. Suppliers want higher prices. Managing the business is usually the process of making the goose as big as you can so that there is something worth fighting over.[74] Indeed, corporate managers act like "potential Pareto-optimizers," trying to get the corporation to the ideal state in which every constituency is actually compensated for the adverse effect of every other constituency's gain. To Posner's point, we are then no longer talking about an elegant and reductive economic model but a description of the reality of corporate management.[75]

In short, neither neo-classical economics nor the Bainbridge Hypothetical captures what is going on among the managers of a public corporation. Unlike the zero-sum hypotheticals, in each transaction with a constituency, managers must consider whether the gain from the transaction harms another constituency. That moves us from the simplified equilibria and efficiencies of neo-classical economics to the far more complex assessment of institutions like corporate governance. Fortunately, there are other economic tools allowing that move.

B. New Institutional Economics

Twenty years ago, Blair and Stout managed to summarize in a single sentence my observation then (from the playing field) and now (from the color commentary booth) how corporate management really works. Corporate management clearly has an interest in returns to the shareholders. That interest is hardly monomaniacal. As Blair and Stout observed, "Rather, the directors are trustees for the corporation itself—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together."[76] That observation aligns with an assessment of transactions among shareholders, the directors, and other corporate constituencies using the tools of the New Institutional Economics.

As Oliver Williamson observed, governance deals with limits of ex ante planning and promising, as well as the complexity of multiple interests in the transaction being

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rationality in economic analysis. Rationality, for the purpose of neo-classical economics is simply "the ability and inclination to use instrumental reasoning to get on in life." POSNER, *supra* note 40, at 17. That basic modicum of rationality does *not* translate into some kind of meta-capability of perceiving increases in societal utility while one is negotiating a deal.

74. Blair & Stout, *supra* note 12, at 288 ("The interests of the corporation, in turn, can be understood as a joint welfare function of all the individuals who make firm-specific investments and agree to participate in the extracontractual, internal mediation process within the firm.").

75. POSNER, *supra* note 40, at 17.

76. Blair & Stout, *supra* note 12, at 280–81.

considered. Hence, he stated:

> The organizational imperative that emerges in such circumstances is this: Organize transactions so as to economize on bounded rationality while simultaneously safeguarding them against the hazards of opportunism. Such a statement supports a different and larger conception of the economic problem than does the imperative "Maximize profits!"[77]

My contribution here, updating Blair and Stout, is to demonstrate the continued doctrinal meaningless of the SWMP by focusing on the shareholders' investment in the corporation as a transaction in the manner of Williamson's simple model of contracting.

The heart of Williamson's entire model is a vector diagram linking three variables: price, the hazards associated with the exchange, and the safeguards within which the exchange is embedded. A boundedly rational and opportunistic actor will determine price at any given moment in light of the hazards and safeguards at that moment. Hence, a contemporaneous exchange of price for goods or services is at price *p* because there is neither risk of future hazard nor need for safeguard against it. An exchange that is not immediate has a hazard greater than zero, and if there is no safeguard, the price *p'* ought to be higher than *p* to account for the risk. But if there is a safeguard, then the price ought to be *p"*, and *p"* ought to be lower than *p'* but higher than *p*. The relevant algorithm reflects that price is in part a function of the extent to which the safeguards of future performance mitigate the hazards.[78]

The point here is that the corporation as a complex institution needs institutional tools of analysis. If the firm is a nexus of contracts, then it may well be useful to think of the firm itself as "a neutral nexus within which equilibrium relations are worked out."[79] This black box, as it were, is the hub and thus working out with each constituency exchanges that could be modeled on the foregoing vector diagram.[80] But we cannot simply view management as a black box. Its centrality is unique among the interdependent corporate constituencies, and thus other analytic models are necessary.[81] On one hand, management acts for the shareholders in mediating among all the constituencies. "Given its centrality in the contracting process (the neutral nexus needs someone to contract on its behalf), the management will sometimes be in a position to realize advantages by striking mutually 'inconsistent' contracts with other constituencies. Undisclosed contractual hazards can arise in this way."[82] On the other hand, management will have its own contracting tensions with the shareholders of the sort that Jensen and Meckling explored.[83] And the role of the board of directors is ambiguous. The board can be viewed purely as the shareholders' means of monitoring the managers. Or the board can be viewed as participating in the active management of the firm.[84]

If the cost of capital constitutes the price the corporation must pay in the shareholder

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77. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 32 (1985) [hereinafter WILLIAMSON, INSTITUTIONS].

78. *Id.* at 30–35.

79. WILLIAMSON, MECHANISMS, *supra* note 49, at 179.

80. *Id.*

81. WILLIAMSON, INSTITUTIONS, *supra* note 77, at 318.

82. WILLIAMSON, MECHANISMS, *supra* note 49, at 179 (citation omitted).

83. WILLIAMSON, INSTITUTIONS, *supra* note 77, at 319–22.

84. *Id.* at 322–23.

investment transaction, it seems equally clear that shareholders are buying into, as Blair and Stout observed, "not so much a 'nexus of contracts' (explicit or implicit) as a 'nexus of firm-specific investments,' in which several different groups contribute unique and essential resources to the corporate enterprise, and who each find it difficult to protect their contribution through explicit contracts."[85] Hence the *implicit* contract with shareholders, governed ex post by the institutions of the market and the corporate law, is colloquially something like this:

> We, the shareholders, in the interest of minimizing transaction costs, agree that you, the management, have the widest possible discretion in looking after our interests, both long-term and short-term, and considering all the other necessary factors (customers, suppliers, employees, communities, reputation, etc.) for the firm's success. That is the business judgment rule. If we don't like what you are doing within that broad range of judgment, we have relatively low-cost institutional remedies—we can sell our equity. Our main concern is that you don't completely ignore our interests when you exercise that widest possible discretion. Hence, there is a contractual, institutional check in that case, namely a rule that says you can't completely ignore our interests. We understand, however, that the cost of succeeding on that claim is going to be very high.

In other words, the cost of equity capital to the firm in a hazard-free environment would be *p*.[86] The actual cost of such capital would be higher, *p'*, reflecting the hazard of opportunism, namely that the board does not comport with the implicit deal I described above, if there were no mitigating or safeguarding institutions. The actual cost of capital is *p"*, somewhere between *p* and *p'*, reflecting that there are safeguards.[87]

The question is what those institutional safeguards might be. Certainly, the market is one. Whether or not the SWMP is actually a rule of law (the subject of Part III), I have real doubt whether it does much to safeguard the shareholders against management opportunism. Even in the academic business management literature, the bulk of the discussion is still a normative "shareholder vs. stakeholder" debate among business ethicists, rather than a practical question being addressed by the managers who actually have to deal with the competing constituencies.[88] One indicia of the SWMP's

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85. Blair & Stout, *supra* note 12, at 275.

86. In Williamson's model, this is usually the price of an instantaneous exchange in which there is no possibility of future opportunism. It seems to be that *p* in this case would be an otherwise opportunism-free investment, like a U.S. government bond.

87. Most of the economic and finance literature applying transaction cost economics to the cost of capital appears (in my relatively quick survey) to concern decisions about whether to employ debt or equity. *See, e.g.*, Rahul Kochhar, *Explaining Firm Capital Structure: The Role of Agency Theory vs. Transaction Cost Economics*, 17 STRATEGIC MGMT. J. 713 (1996), and the extensive references therein. I have not found anything that discusses explicitly the effect on the cost of capital of the kinds of hazards about which the shareholder absolutists have been concerned, namely, a focus by corporate management on something other than the exclusive pursuit of return to the shareholders.

88. *See generally* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17; John Hendry, *Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate*, 11 BUS. ETHICS Q. 159 (2001); John Hendry, *Economic Contracts Versus Social Relationships as a Foundation for Normative Stakeholder Theory*, 10 BUS. ETHICS: EUR. REV. 223 (2001); Lenahan L. O'Connell et al., *An Organizational Field Approach to Corporate Rationality: The Role of Stakeholder Activism*, 15 BUS. ETHICS Q. 93 (2005); H. Jeff Smith, *The Shareholders vs.*

meaninglessness as an institutional safeguard is Professor Bainbridge's own concession that, in all but the most extreme or foolish cases, the business judgment rule—the one that presumes the legality of the corporation's intermediation among constituencies—supplies the rule of decision. As he observes, "[t]he court may hold forth on the primacy of shareholder interests, or may hold forth on the importance of socially responsible conduct, but ultimately it does not matter. Under either approach, directors who consider nonshareholder interests, like directors who do not, will be insulated from liability by the business judgment rule."[89] Indeed, the exception tends to prove the rule. If management does a consistently poor job of advocating the shareholders' interest vis-à-vis other constituencies, there *is* a market for corporate control. Some other group or other firm will offer itself as an alternative to incumbent management. Even there, incumbent management is entitled to drive a hard bargain, including the deployment of proportional takeover defenses, if it reasonably perceives a threat to its view of corporate policy and effectiveness. Even then, however, the SWMP does not come into play in the logic of the governing law until the sale of the company, rather than its continuing as an independent firm, becomes inevitable.[90]

There are several lessons to take away from economic analysis, but a legal rule enshrining the SWMP does not happen to be one of them. First, as any economist will tell you, utility is not the same as money. If your particular happiness gets compensated with social justice at the firm's expense, you ought not to say that explicitly in a deposition or at trial.[91] Second, if you do say it that way, it is legitimate to view your pursuit of that utility as precisely the opportunism with guile against which contracts in the New Institutional Economics are safeguards. Third, that of all the norms and institutions that might provide a safeguard against your opportunism (credible commitments, reputation, etc.), the weakest is courts as a crude and expensive last resort. Finally, you can expect the court to announce some rule of decision in the derivative lawsuit, the court may indeed hold that you breached the implicit contract with your shareholders and, at least in that circumstance, that the contract was that you were to maximize the shareholders' and not your own utility. Nevertheless, of all the institutions that safeguard the shareholders' investment against opportunistic hazard, the least significant (a) are any resort to litigation, and (b) more specifically, depend in such litigation on the SWMP.

IV. THE ARGUMENT FROM JURISPRUDENCE

As others have repeatedly observed, there are no cases in which a Delaware court has been required to hold that corporate management has a generalized and single duty in every circumstance to maximize shareholder wealth.[92] My contribution to the discussion is

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Stakeholders Debate, 44 M.I.T. SLOAN MGMT. REV. 85 (2003); James A. Stieb, *Assessing Freeman's Stakeholder Theory*, 87 J. BUS. ETHICS 401 (2009); Yves Fassin, *Stakeholder Management, Reciprocity and Stakeholder Responsibility*, 109 J. BUS. ETHICS 83 (2012); Yves Fassin, *The Stakeholder Model Refined*, 84 J. BUS. ETHICS 113 (2009).

89. STEPHEN M. BAINBRIDGE, CORPORATE LAW 248 (3d ed. 2015).

90. *See infra* Part IV for discussion of Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

91. That was the problem in the so-called "confession cases." *See infra* notes 103–118 and accompanying text.

92. *See supra* note 13.

jurisprudential, and goes to the fundamental meaninglessness of the SWMP as a statement of what the law *is*. I not only disagree with Professor Bainbridge, but I am also going to say that Leo Strine is wrong about Delaware *law*. Even if I humbly defer to the corporate law expertise of Professor Bainbridge and Chief Justice Strine, I am willing to say that I am as qualified as they, jurisprudentially at least, on the subject of what *law* is. And on that point, they are simply wrong. There may be Delaware *dicta*, Delaware *platitudes*, Delaware *arguments*, or articles written by present and former Delaware *judges* to that effect. But there is no Delaware *law* that generalizes holdings in idiosyncratic zero-sum circumstances into an overarching duty in every circumstance to favor the shareholders over other constituencies. Accordingly, the 2019 Statement hardly merited the kerfuffle it raised between detractors and supporters.

Professor Bainbridge has asserted unequivocally that "the law remains clearly contrary to the [Business Roundtable's] new commitments" in the 2019 Statement.[93] In doing so, he relied in part on Chief Justice Strine's own scholarly assertions to that effect.[94] The upshot of both arguments is that the articulation of the SWMP as a rule of law transcends the facts of the cases from which they claim it has putatively derived, and that the mere repeated assertion by authoritative figures of the SWMP outside of its application as a rule of decision makes it law rather than mere platitude.[95] And, in reconciling the SWMP with the business judgment rule, it seems to me that both Professor Bainbridge and Chief Justice Strine have reversed the general rule and the exception to it. Why they are wrong to have reversed them is ultimately jurisprudential. The business judgment rule, not the SWMP, is the prevailing rule of decision when the dispute arises from management's ordinary and routine mediation of various constituency interests. The 2019 Statement addresses the manner in which corporations routinely balance the interests of their constituencies as contemplated by the business judgment rule. It is therefore entirely consistent with the actual law of Delaware.

There are three different arguments from jurisprudence. The first is easy for any lawyer to understand. The only articulations of the SWMP in Delaware judicial opinions are dicta in cases arising from two idiosyncratic fact patterns. "A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner."[96] Put simply, if the court could reason its way to the judgment without ever having uttered the particular proposition, the proposition is superfluous and therefore not binding as a rule of decision in future cases. Moreover, just because a court makes a "forceful utterance" that sounds like a holding does not mean it is a holding. "The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment."[97] Delaware courts and judges (including Chief Justice Strine in his Supreme and Chancery Court opinions) recognize the distinction between holding and dictum even in cases concerning corporate law and policy generally or the Delaware

93. Bainbridge, *BRT, Stakeholders and Corporate Purpose*, *supra* note 6, at 6.

94. *See generally* Strine, *supra* note 12.

95. Murray, *supra* note 13, at 17–18.

96. Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006).

97. *Id.* at 1257.

General Corporation law specifically.[98] Dicta issued by smart and thoughtful judges well-respected in their field can be persuasive and worthy of discussion[99] or even "powerful,"[100] but they are still dicta and not law.[101]

Dodge v. Ford Motor Co.[102] and *eBay Domestic Holdings, Inc. v. Newmark*[103] are what Chief Justice Strine calls "confession" cases.[104] The dominant manager "admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth."[105] I would venture to say that most professors teaching corporations view the dictum about corporate obligations in *Dodge* as the exception that proves the rule: the business judgment rule would have prevailed were it not for (a) the Michigan Supreme Court perceiving that Henry Ford was "the dominant force in the business of the Ford Motor Company," (b) Ford stating his "ambition . . . is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes," and (c) Ford testifying that he had made up his mind not to pay dividends for the foreseeable future.[106] Even with this testimony as the basis for the holding, we need to parse the critical paragraph to understand what is dictum and what is holding. The dictum on which the shareholder absolutists rely is this:

> A business corporation is organized and carried on primarily for the profit of the stockholders. 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 . . . .[107]

But in the next paragraph, the Michigan Supreme Court acknowledged that Ford could have carried on with humanitarian activities and motives if they had been incidental to the

98. *In re* MFW S'holder Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (Strine, C.) ("In Delaware, such dictum is 'without precedential effect.' Thus, broad judicial statements, when taken out of context, do not constitute binding holdings."), *aff'd sub nom*, Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); Hazout v. Tsang Mun Ting, 134 A.3d 274, 285 (Del. 2016) (Strine, C.J.) (interpreting a previous statement in a Delaware Supreme Court opinion as to the statute by which a nonresident officer of a Delaware corporation was deemed to have consented to the exercise of personal jurisdiction over him constituted dictum); Flood v. Synutra Int'l, Inc., 195 A.3d 754, 766 n.81 (Del. 2018) (Strine, C.J.) ("musing" in a footnote conflicted with the court's actual holding; "[o]ur system of justice depends on the court hearing out both sides, and a footnote speculating about the outcome of a motion that was never brought is a clear example of dicta"); Beneville v. York, 769 A.2d 80, 86 n.14 (Del. Ch. 2000) (Strine, V.C.) (presenting language in another Delaware Chancery that could be read to suggest a contrary result "is pure dictum"); *In re* Cox Communications, Inc. S'holders Litig., 879 A.2d 604, 637–38 (Del. Ch. 2005) (Strine, V.C.) (noting that language from a Delaware Supreme Court case was both dictum and inapposite to the present dispute); King v. Verifone Holdings, Inc., 994 A.2d 354, 364 (Del. Ch. 2010) ("[T]he Federal Court's suggestion in dictum does not bind this court, nor does its approach persuade"), *rev'd*, 12 A.3d 1140 (Del. 2011).

99. Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 784–86 (Del. Ch. 2004) (countering an argument based on dictum from prior Chancery cases).

100. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 58 (Del. Ch. 2011).

101. *See In re MFW S'holders Litig*., 67 A.3d at 521.

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

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

104. Strine, *supra* note 12, at 776–77.

105. *Id.*

106. *Dodge*, 170 N.W. at 683–84.

107. *Id.* at 684.

main business of the corporation.[108] Indeed, that is the court's key distinction: Ford could have expended corporate funds "for the benefit of the employés, like the building of a hospital for their use and the employment of agencies for the betterment of their condition."[109] But it was not a legitimate corporate activity merely to have "a general purpose and plan to benefit mankind at the expense of others."[110] In short, the holding of the case has nothing to do with acting primarily for the profit of the shareholders. It is that a generalized desire to better mankind has no connection whatsoever to the profit of the shareholders. As a former litigator, I cringe every time I think about this case. A better prepared and more disciplined witness never would have uttered the magic words that provoked the dictum.

In *eBay*, the company in dispute was craigslist, Inc., the majority owners of which were Craig Newmark and James Buckmaster. They also served as directors. eBay held a minority share interest in craigslist. There was a tense relationship between Newmark and Buckmaster, on one hand, and eBay, on the other, one that Chancellor Chandler described as "oil and water" based on contrasts in strategies, cultures, and perspectives on the meaning of success.[111] Newmark and Buckmaster caused craigslist to adopt a shareholder rights plan, a defensive tactic often referred to as a "poison pill," designed to force hostile bidders to negotiate with a target board.[112] Under Delaware law, shareholder rights plans are considered to be legitimate if the directors use them in a good faith effort to enhance shareholder value.[113] But they are also the subject of enhanced judicial scrutiny because of the possibility that incumbent managers and directors might use them to benefit themselves at the shareholders' expense.[114] The judicial standard for review of a takeover defense tactic under *Unocal* was whether (a) the directors properly and reasonably perceived a threat to the corporation's policies and effectiveness, and (b) the plan was a proportional response to the threat.[115] Chancellor Chandler never said that share wealth maximization was the only, or even the primary obligation of management. Even if he had, it would have been dictum. His actual holding was that Newmark and Buckmaster failed to meet their burden of showing that the rights plan satisfied the first prong of the *Unocal* test. The directors of a Delaware for-profit corporation cannot *wholly* disregard the shareholders via "a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value . . . for the benefit of its stockholders."[116] Chancellor Chandler found, as a matter of fact, that the reasons for the plan were not to enhance shareholder value, but to punish eBay through the adoption and defense of "a business strategy that openly eschews stockholder wealth maximization."[117]

In sum, what makes any reference to shareholder wealth maximization on the facts of the confession cases dictum is the protagonists' binary "yes-no" rejection of any interest in

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108. *Id.*
109. *Id.*
110. *Id.*
111. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 7 (Del. Ch. 2010).
112. *Id.* at 28.
113. *Id.*
114. *Id.* at 29–30.
115. *Id.* at 28, 31–32; *see generally* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
116. *eBay Domestic Holdings, Inc.*, 16 A.3d at 34.
117. *Id.* at 35.

promoting the welfare of the shareholders. As Chief Justice Strine himself observed about the problem of dictum, "[o]ur system of justice depends on the court hearing out both sides."[118] Nobody in either of the confession cases was making an argument, in ordinary circumstances, (a) about *balancing* the interests of constituencies, say, as between shareholders, on one hand, and customers, suppliers, employees, or communities on the other, or (b) that a "fundamental commitment" to another constituency constituted dereliction of other duties to the shareholders.

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. involves the other pattern in which the SWMP appears.[119] A hostile corporate takeover reaches the point at which the target's management concedes that there is no longer a long-term enterprise to be preserved and the only issue is how much money the shareholders will reap from its disposition. The dictum in *Revlon* is, despite Chief Justice Strine's assertions to the contrary, another exception that proves the ordinary rule.[120] *Revlon* and *Unocal* are the two cornerstones of Delaware case law on the directors' fiduciary obligations in the face of a hostile takeover threat. *Unocal*'s two-prong test applies when there is a corporate future, replete with policies and plans, to be defended. *Revlon* applies, on the other hand, as Chief Justice Strine correctly noted, when the end of the corporation's independent life by way of a sale becomes inevitable. Only at that moment, when the corporation no longer faces threats to its policy and effectiveness, do the duties of the directors' change "from the preservation of [the enterprise] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."[121] Only then do the directors cease being "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[122] I simply cannot understand how either Professor Bainbridge or Chief Justice Strine could proffer *Revlon* as anything other than a holding that applies only in a circumstance like the Bainbridge Hypothetical in which every factor other than a binary conflict between the shareholders and other constituencies has disappeared.

The second argument from jurisprudence, applied to the SWMP as a purported rule of law, has to do with what is meaningful about the very nature of law itself, and how legal academics can subtly transform narrow case holdings into broad policy statements reflecting their normative druthers. This requires a short explication of the distinction between what law *is* and what one might think it *ought to be*, and how the two get conflated all the time. If you can say what the law *is*, say a speed limit or a voting age or the deductibility of a particular kind of expense, it is a descriptive exercise, but not particularly interesting. What makes law normative and interesting, both in practice and in academia, is not what it *is*, but what in each unique case it *ought to be*. Legal argumentation, at its core, is the translation of a real-world narrative into a legal consequence. If the case is an easy one, then it is so by convention: nobody can credibly suggest there are alternative logical models favoring one side or the other. The interesting issues involve the application of rules to specific narratives, how wide a range of narratives support the application of a particular generalized rule, and how rules get restated to accommodate new and different

118. Flood v. Synutra Int'l, Inc., 195 A.3d 754, 766 n.81 (Del. 2018) (Strine, C.J.).

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

120. Strine, *supra* note 12, at 773.

121. *Revlon, Inc.*, 506 A.2d at 182.

122. *Id.*

narratives.[123]

A rule of law in the abstract is neither right nor wrong; it is meaningless. A doctrinal rule is only really meaningful as an "is" of the law when it supplies the rule of decision in the unique narrative that constitutes a particular case. It might well be that, in the zero-sum game of the Bainbridge Hypothetical, the confession cases, or the death throes of the corporate enterprise, the rule of decision actually *is* something like "as between fulfilling a commitment to the community and fulfilling one to the shareholders when the choice is presented so starkly, the director's duty will be to favor the shareholder." Characterizing the rule instead as "a director's duty is to maximize shareholder wealth" and then granting it universal and privileged status in the corporate doctrinal canon truly is the leap from "is" to "ought" David Hume warned us about.[124] The Bainbridge Hypothetical is the corporate version of the "trolley problem" in philosophy. It may sharpen thought by taking a narrative to the extreme, but it rarely reflects the nuanced decisions we make in the real world. It may well reflect the author's preference for a universal "ought" in the corporate law canon, but there is no reason to believe it is a desirable outcome in cases yet to arise.

Moreover, attempts to articulate the *intent* of doctrine rather than assess its application on particular facts tends to reveal more about the normative druthers of the articulator than the doctrine. For example, Professor Bainbridge "concede[d] that the business judgment rule sometimes has the *effect* of insulating a board of directors from liability when it puts the interests of non-shareholder constituencies ahead of those of shareholders, but den[ied] that that is the rule's *intent*."[125] The *true* purpose of the business judgment rule, he argued, is to favor the authority of the board in the interest of efficient governance over judicial second-guessing in the interest of greater accountability.[126] That is a clever, even fair, ascription of *a*, if not *the*, purpose of the rule. But it reflects a philosophical point I have previously called the "illusory noumena of positive law."[127] I cannot even refer to the "body" of Delaware corporate law doctrine without invoking the corpus metaphor that pervades the thinking of even the most anti-metaphysical proponents of positive law. Not only is there a metaphoric body, but a metaphoric purposive mind that inhabits it.[128] What

123. JEFFREY M. LIPSHAW, BEYOND LEGAL REASONING: A CRITIQUE OF PURE LAWYERING 28–31 (2018).

124. "In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and . . . makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it." DAVID HUME, A TREATISE ON HUMAN NATURE 521 (1739) (Ernest C. Mossner ed., 1985).

125. Stephen M. Bainbridge, *The Relationship Between the Shareholder Wealth Maximization Norm and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (May 5, 2012, 12:58 PM), https://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-relationship-between-the-shareholder-wealth-maximization-norm-and-the-business-judgment-rule.html [https://perma.cc/9TWD-KV3H].

126. *Id.*

127. Jeffrey M. Lipshaw, *Cognition and Reason: Rethinking Kelsen in the Context of Contract and Business Law*, *in* HANS KELSEN IN AMERICA-SELECTIVE AFFINITIES AND THE MYSTERIES OF ACADEMIC INFLUENCE 265, 288–94 (D.A. Jeremy Telman ed., 2016).

128. LIPSHAW, *supra* note 123, at 96:

> As practitioners *and* academics, we have never given up metaphors of subjective willfulness as in "the law demands . . ." or "the law requires . . . ." Professor Steven D. Smith called this "law's

I observed once about the contract law canon is equally true of attempts to distill an ideal conception of the corporate law of Delaware:

> We do not know the law; we use its tools to reason to conclusions about experience or possible experience, to create theories that explain descriptively or theories that adjudge normatively. And because reason itself does not distinguish between descriptions of experience and normative imperatives, our understanding of the kind of law the parties make for themselves quite naturally melds the empirical and the ideal.[129]

There is no "natural law" of corporations, no platonic ideal out there in the ether, that can be articulated as an ideal and coherent body of doctrine. Until a rule comes to be applied to real facts on the ground, it is only an argument about what the law *ought to be*. And even after its application, it *is* only law, in a sense, on the singularity that constitutes that set of material facts. In short, there is no intent; there are only effects.[130]

Indeed, Chief Justice Strine's academic defense of the SWMP as "hornbook law" is puzzling and, notwithstanding the title of his *Wake Forest Law Review* article, unclear.[131] The article purported to state the "actual rules" in Delaware[132]—in short, a "pure" SWMP—and yet, it disregarded actual holdings in favor of an amalgam of dicta and extra-judicial sentiment, albeit from esteemed former Delaware judges. Whatever else that rhetoric might be, it is simply not law, despite Chief Justice Strine's assertions about what "the reality of . . . the law is."[133] For example, with all appropriately due respect to Chancellor Allen, what he wrote in non-judicial articles may be an indication of what he thought the law *ought to be* were the issue to be presented in the future, but his pronouncements there were not law.[134]

The third argument from jurisprudence is based on the maxim that hard cases make bad law.[135] Here it has to do with the appropriate reconciliation of a corporation's

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> quandary." Smith posits we all are now legal positivists and realists believing, in a Holmesian way, that the law is what the judge says it is, based on all the predilections, prejudices, mores, and standards prevalent at the time of the decision. If so, he asks, why do we continue to speak of the law, metaphorically or otherwise, as though it were something that is the product of some transcendent Author, existed before the onset of the present dispute, and which must, upon discovery through argument and application, inexorably apply to the present matter?

See STEVEN D. SMITH, LAW'S QUANDARY 157–59 (2004).

129. Lipshaw, *supra* note 127, at 288.

130. *Id.* at 266–67. Indeed, in the interest of getting past absolutist dichotomies like "shareholder versus stakeholder," one scholar has recently posited what I would call a teleological noumena of corporate law—that the corporation be conceived of as a person, separated from any constituency including shareholders, and having its own purpose, including to pursue profit. Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 523 (2020).

131. Strine, *supra* note 12, at 776–77.

132. *Id.* at 768.

133. *Id.* at 776. In that same passage, Chief Justice Strine was particularly dismissive of deconstructionists and critical legal scholars who he thought were saying that Chancellors Chandler and Allen and Justice Moore did not understand the import of their own writing about Delaware law. *Id.* I, on other hand, think what those eminent jurists had to say was clear and thoughtful. I simply do not think their dicta, or their extra-judicial theorizing, constitutes law in Delaware or anywhere else.

134. *Id.* at 773–74.

135. N. Sec. Co. v. United States, 193 U.S. 197, 400 (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the

obligation to its shareholders, on one hand, versus the broad discretion vested in management through the business judgment rule. Chief Justice Strine highlights that very distinction:

> When the corporation is not engaging in a sale of control transaction, the directors have wide leeway to pursue the best interests of stockholders as they perceive them, and need not put any specific weight on maximizing current share value. As a means to the end of increasing stockholder welfare, directors may consider the interests of other constituencies, such as the corporation's employees, but only as a means, and not as an end.[136]

All the 2019 Statement says is that the signatories share a "fundamental" commitment to all of the corporate constituencies. The *only* times Delaware courts have found that to be an end rather than a means is in the confession and auctioneer cases.[137]

In the ordinary balancing of constituency interests, the kind the 2019 Statement contemplates, the business judgment rule applies. Chief Justice Strine once described that rule as "something as close to non-review as our law contemplates."[138] The chestnut case is *Shlensky v. Wrigley*.[139] A minority shareholder of the Chicago Cubs baseball organization filed a derivative suit against Philip Wrigley, among others, alleging negligence and mismanagement on account of Wrigley's refusal to permit the installation of lights at Wrigley Field for night games. The basis for the claim was that Wrigley's refusal was not based on his interest in the welfare of the corporation, but instead on Wrigley's personal opinions "that baseball is a 'daytime sport' and that the installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood."[140] Suggesting an even more cynical motivation, the plaintiffs alleged

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future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.").

136. Strine, *supra* note 12, at 773.

137. Professor Bainbridge and I agree about a fact pattern that, if challenged, would not be the basis for a confession case. Stephen M. Bainbridge, *Can Tim Cook Ignore ROI When Deciding How to Design an iPhone?*, PROFESSORBAINBRIDGE.COM (Mar. 7, 2014, 8:46 PM), https://www.professorbainbridge.com/professor bainbridgecom/2014/03/can-tim-cook-ignore-roi-when-deciding-how-to-design-an-iphone.html [https://perma.cc/NS7R-SW2S]. At Apple's 2014 annual meeting, CEO Tim Cook angrily responded to a question from "a radical right-wing think tank" about Apple's commitment to profitability in its investments. "When we work on making our devices accessible by the blind, I don't consider the bloody ROI[.]" Cook said, adding that the same sentiment applied to environmental and health and safety issues. Jessica Shankleman, *Tim Cook Tells Climate Change Sceptics to Ditch Apple Shares*, GUARDIAN (Mar. 3, 2014), https://www.theguardian.com/environment/2014/mar/03/tim-cook-climate-change-sceptics-ditch-apple-shares?CMP=share_btn_tw [https://perma.cc/M8A7-S86E]. Professor Bainbridge thought it was perfectly acceptable for Cook to say that Apple considered ROI among other things when making decisions. Professor Bainbridge chided Cook for the lack of temperance in the broader statement regarding "the bloody ROI;" nevertheless, he concluded that the enhanced scrutiny of *eBay* would not apply and "there's no prospect of liability here." Bainbridge, *supra* note 137. I agree. But for a contrary view to the effect that Cook's statement was political in nature and a "disavowal" of shareholder wealth maximization, and therefore constituted a breach of fiduciary duty, compare Stefan J. Padfield, *Corporate Governance and the Omnipresent Specter of Political Bias: The Duty to Calculate ROI*, MARQ. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623407 [https://perma.cc/S3XQ-69LE].

138. Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 257 (Del. Ch. 2013) (Strine, C.).

139. 237 N.E.2d 776 (Ill. App. Ct. 1968).

140. *Id.* at 778.

Wrigley's concerns for the lights and the neighborhood were themselves a ruse, in light of Wrigley's willingness to play night games if Chicago were to build a new stadium.[141] Distinguishing *Dodge*, the court concluded that Wrigley's motives, even if accurately described and if incorrect, were at least not inconsistent with the interest of the corporation.[142] The appellate court affirmed a motion to dismiss; hence, the facts alleged would have been taken as true for purposes of determining whether the complaint stated a claim. While the appellate court gave a facially unenthusiastic nod to the possibility Wrigley's motives and concerns might be consistent with the best interests of the corporation and the stockholders, it did so only to express the extent of its unwillingness to consider *anything* about the motives without a showing of fraud, illegality, or conflict of interest.[143] In short, the extreme deference of the business judgment rule, and not the SWMP, is the law applicable to a routine balancing of corporate constituency interests in all but the "bad cases."[144]

Taking all of these considerations into account—dictum, the "is/ought" distinction, "bad cases"—I am hard-pressed to come up with a realistic circumstance in which the SWMP would be the rule of decision under the usual norms of judicial economy and restraint. The rule emanates, on one hand, from unrealistic and antiseptic conditions of thought experiments like the Bainbridge Hypothetical or, on the other, actual cases in which corporate management either (a) misguidedly, ill-advisedly, or ineptly says publicly that it has no duty at all to the shareholders (confession cases), or (b) has no corporate future left to manage (*Revlon*). In the instance of the Hypothetical, why would corporate management ever not close an obsolete plant under those circumstances? And if it did keep it open, management would almost certainly justify the action in some kind of language that rationalized it in terms of the long-term interest of the enterprise and its shareholders.

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141. *Id.*

142. *Id.* at 780.

143. *Id.*

> By these thoughts we do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability. We are merely saying that the decision is one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in their making of that decision.

See also Kamin v. American Express Co., 383 N.Y.S.2d 807, 810–11 (N.Y. Sup. Ct. 1976), *aff'd*, 387 N.Y.S.2d 993 (App. Div. 1976) ("The directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations, or tax advantages.").

144. Professor Bainbridge has persuasively argued that extreme deference shown by the *Shlensky* and *Kamin* courts is the appropriate standard in light of later Delaware cases that suggest courts might review the merits of a board's business decision. In contrast to what he described as "the modern trend . . . to treat the business judgment rule as a substantive standard of liability," Professor Bainbridge argued the rule "is better understood as a doctrine of abstention pursuant to which courts in fact refrain from reviewing board decisions unless exacting preconditions for review are satisfied." Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87–90 (2004). My jurisprudential point is not to confuse the business judgment rule with, for example, constitutional standards that a court may employ when undertaking due process or equal protection review of a statute. There is a continuing and arguably cycling Delaware business judgment rule jurisprudence in which the bounds are, on one hand, *Shlensky*-like abstention, and, on the other, still an exceedingly limited scope of after-the-fact inquiry, primarily in duty of care cases arising out of corporate acquisitions. *Id.* at 91 n.45; Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 198 (2019); Johnson, *supra* note 12, at 430–31.

No, the only circumstances in which the zero-sum decision arises in the case law are those in which management articulates the metaphorical middle finger to the shareholders in favor of some other social goal.

Perhaps bad cases do not necessarily make bad law, but they do lend themselves to the articulation of zero-sum rules that really ought to apply only in zero-sum cases. Focusing on the bad cases transposes the ordinary and the exception. In ordinary circumstances rather than in hypothetical thought experiments or real-world outliers, corporations have a wide berth in deciding how they will act in the best interest of the corporation and its shareholders. After a lengthy defense of the SWMP in his treatise, Professor Bainbridge acknowledges as much, characterizing the law as "somewhat schizophrenic": whatever aspirational standard the law sets for director responsibility, the business judgment rule is going to insulate the directors from liability as to any decision short of the metaphoric middle finger to the shareholders.[145]

Finally, speaking from my own experience as a senior manager of large corporations, abstract principles like the duty to maximize value to the shareholders, when not applied in zero-sum circumstances, approach meaninglessness. Anybody who has ever drafted an organizational mission statement knows that dynamic. By the time you get past the short term tactics, long term strategies, and multiple goals of any dynamic organization, you end with pap like: "XYZ Corporation will provide stellar returns to investors by focusing on innovative products, incomparable service to customers, and employees who are vested in the success of the organization." Moreover, management can rationalize almost any decision to favor any stakeholder in terms of the long-term return to the shareholders. Nobody (except maybe old Chainsaw Al Dunlap, and he was disgraced[146]) operates in the Bainbridge Hypothetical. "Let's see here. The Topeka Art Museum would like a $100,000 corporate contribution, but if we do that we can't use the cash to buy back shares or issue a dividend." No, management looks at the dashboard with all dials measuring the value going out to customers, employees, communities, suppliers, and shareholders, and adjusts them. For example, we have that request from the museum. To return value to the shareholders, we need good employees. Hence, we might conclude, "It's hard to recruit to Topeka. It will help if we have first-rate cultural institutions. To whom do we make out the check?"

To be clear, I am not saying the directors can ignore the shareholders. Rather, I am saying the only time it is necessary to state a rule is when the constituencies decide to litigate among each other. Hence, the only time courts actually announce rules alluding to the zero-sum game is when CEOs like Henry Ford or Craig Newmark are either so bullheaded or insufficiently counseled that they stray during testimony from the usual trope that maximizing the shareholders' return is inextricably linked to significant accommodations to the other constituencies. Here is how I would more appropriately state the moral of the Bainbridge Hypothetical: "when the choice between a social commitment and a commitment to the shareholders is presented so starkly as to make it clear that the directors have no concern for the shareholders, the directors have violated their duty to

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145. BAINBRIDGE, *supra* note 89, at 248.

146. Richard Sandomir, *Albert J. Dunlap, Tough Executive Known as Chainsaw Al, Dies at 81*, N.Y. TIMES (Feb. 5, 2019), https://www.nytimes.com/2019/02/05/obituaries/al-dunlap-dead.html [https://perma.cc/U5PJ-NT9Z].

have at least as much commitment to the shareholders as to any other constituency."

V. CONCLUSION – FALSIFYING THE PLATITUDE PROPOSITION

Let us therefore quickly consign the Bainbridge Hypothetical to its proper place in the pantheon of philosophical imponderables like Theseus's ship, the Russell Paradox, and its closest analog, the Trolley Problem. Indeed, make me a liar. The Platitude Proposition is falsifiable. All we need to see is (a) a shareholder derivative action in the Delaware courts, (b) a fact pattern otherwise similar to *Dodge* or *eBay*, (c) no confession of dominant managers a la Henry Ford or Craig Newmark but instead the thinnest possible veneer of a claim (a la *Shlensky*) that, in the long run, the action benefits the enterprise, and (d) a determination that those facts take the matter out of the ambit of the business judgment rule and, thus, a final judgment in favor of the shareholders. At the conclusion of her thorough and thoughtful summary of the current state of Delaware corporate law doctrine on the SWMP, Professor Joan MacLeod Heminway wondered whether the SWMP was, in effect, platitude or "doctrinal truth," suggesting that the jury was still out.[147] I agree; it is still out. But I also believe that the Platitude Proposition, like many other truths capable of being falsified, never will be.

147. Heminway, *supra* note 13, at 971–72.

APPENDIX A

2017 Annual Reports

The sample consisted of corporate annual reports, selected randomly but non-scientifically, covering fiscal year 2017. The source for the reports was AnnualReports.com.[148] For each company selected, we downloaded a PDF of the annual report and reviewed the "letter to shareholders." If the corporation did not issue such letter, we excluded it from the sample. Our original plan was to select 101 reports in four categories: (A) thirty-three companies whose CEOs signed the 2019 Statement: (B) thirty-three companies who CEOs were then members of the Business Roundtable but did not sign the 2019 Statement; (C) seventeen NYSE-traded companies whose CEOs were not members of the Business Roundtable; and (D) seventeen NASDAQ-traded companies whose CEOs were not members of the Business Roundtable.

The results are collected on a free internet-based database application called Airtable.[149] The entire database is available for public review.[150] Our database fields were:

- Company name
- CEO name
- CEO gender
- Company categories (A, B, C, or D as described above)
- Company industry (financial, manufacturing, technology, business services, or other)
- Evidence of customer commitments in the letter (Y/N) (e.g., delivering value; meeting or exceeding expectations)
- Excerpt of customer commitment text
- Evidence of employee commitments in the letter (Y/N) (e.g., fair compensation and benefits; training; dignity; respect)
- Excerpt of employee commitment text
- Evidence of suppler commitments in the letter (Y/N) (e.g. fair and ethical treatment)
- Excerpt of supplier commitment text
- Evidence of environmental commitments (Y/N)
- Excerpt of environmental commitment text
- Evidence of community commitments (Y/N)
- Excerpt of community commitment text
- Evidence of shareholder commitments (Y/N)
- Evidence of inclusion/diversity commitments (Y/N)
- Excerpt of inclusion/diversity commitment text

As we were collecting the data, we discovered that there were not thirty-three companies in the "B" category—that is, companies whose CEOs were members of the Business Roundtable but did not sign the 2019 Statement. Indeed, we only found four such companies with 2017 letters to shareholders. We therefore added companies to the "C" and

148. ANNUALREPORTS.COM, http://annualreports.com [https://perma.cc/2TMW-L3MZ].

149. AIRTABLE, https://airtable.com [https://perma.cc/3D8C-7PTS].

150. *Database for Appendices A and B—"The False Dichotomy of Corporate Governance Platitudes"*, AIRTABLE (July 2020), https://airtable.com/universe/expvUzS9CcYg2x32P/database-for-appendices-a-and-b-the-false-dichotomy-of-corporate-governance-platitudes. [https://perma.cc/AJQ3-5VHU].

"D" categories, ending up with thirty-three NYSE-traded companies and thirty NASDAQ traded companies, for a total of 100. Those companies are listed in Table 1.

TABLE 1
Companies Included in the Database

Category A	**Category B**	**Category C**	**Category D**
Ameriprise Financial	Caterpillar	Chase	Ulta Beauty
American Tower	Synchrony Financial	Shake Shack	1-800-Flowers.com
American Express	Telephone and Data Sys	Lowe's	Columbia Sportswear
Anthem	VISA	Delta Air Lines	eBay
Ball Corporation		Hasbro	Pathfinder Bancorp
ExxonMobil		GrubHub	SpartanNash
FedEx		General Mills	T-Mobile
Goldman Sachs		Estée Lauder	Zillow Group
AT&T		Darden Restaurants	Mattel
The Home Depot		Actuant	Analog Devices
Honeywell Int'l		Advance Auto Parts	Ocean Power Tech'y
Aflac		Colgate-Palmolive	Microsoft
Best Buy		Ares Comm'l RE	Lululemon Athletica
Marriott Int'l		Big Lots	Endurance Int'l Group
Ford Motor Company		CarMax	Scholastic
McKesson		Domino's Pizza	Potbelly
JPMorgan Chase		Arthur J. Gallagher	Papa John's
PepsiCo		AutoZone	LogMeIn
CBRE Group		Carter's	BJ's Restaurants
Pitney Bowes		Chipotle Mexican Grill	Citi Trends
Raytheon		Edgewell Personal Care	CME Group
AON		Flowserve	GoPro
ConocoPhillips		Foot Locker	Enterprise Bancorp
Target		Frank's Int'l	Bottomline Tech'y
CVS Health		GoDaddy	Cytokinetics
Edison Int'l		Goodyear Tire	Griffin Industrial Realty
Walmart		Halliburton	J.B. Hunt Transport Serv
Xerox Holdings		Kansas City Southern	Sotherly Hotels
Stanley Black &		Lindsay	Dentsply Sirona
Decker		Berry Global	Etsy
WESCO Int'l		Biglari Holdings	
Whirlpool		Delphi Automotive	
3M		Ecolab	
Coca-Cola Bottling			

Table 2 summarizes the results:

TABLE 2
Percentages of Sampled 2017 Letters Showing Commitment
(By Category of Company and Type of Commitment)

	A		B		C		D		BCD		Total
Customer	30/33	91%	3/4	75%	30/33	91%	23/30	77%	56/67	86%	86%
Employee	20/33	61%	2/4	50%	14/33	42%	11/30	37%	27/67	40%	47%
Supplier	1/33	3%	0/4	0%	3/33	9%	1/30	3%	4/67	6%	5%
Environmental	19/33	58%	1/4	25%	7/33	21%	4/30	13%	12/67	18%	31%
Community	15/33	45%	3/4	75%	13/33	39%	7/30	23%	23/67	34%	38%
Shareholder	30/33	91%	4/4	100%	29/33	88%	25/30	83%	58/67	87%	88%
Inclusion/Diversity	13/33	39%	1/4	25%	6/33	18%	4/30	13%	11/67	16%	24%

In addition, ninety-one of the 100 sample letters contained at least one commitment to a constituency other than the shareholders. Excluding customers and suppliers, sixty-seven of the letters contained commitments to at least one of employees, the environment, the community, or inclusion/diversity.

Table 3 includes examples of commitment language from several companies in each of the categories:

TABLE 3
Examples of Stakeholder and Shareholder Commitment Language in Sampled 2017 Letters

Company/Category	Stakeholders	Shareholders
Aflac (A)	Aflac is committed to making business decisions that balance the needs of our many constituencies, including our policyholders, employees, distribution network and shareholders, while recognizing the obligation we have to the global community. We are dedicated to the health and well-being of the people we serve and also to the health and well-being of the environment. As such, we strive to balance effective and efficient management of our operations with responsible environmental stewardship. We don't seek recognition for the sake of recognition, but when we receive accolades, it lets us know we're doing the right things.	While policyholders are always top of mind, we also strive to enhance shareholder value through capital deployment. . . This accelerated resetting of the dividend demonstrates our commitment to rewarding our shareholders.

Company/Category	Stakeholders	Shareholders
Goldman Sachs (A)	**We offer our people the opportunity to move ahead more rapidly than is possible at most other places.** Advancement depends on merit and we have yet to find the limits to the responsibility our best people are able to assume. For us to be successful, our men and women must reflect the diversity of the communities and cultures in which we operate. That means we must attract, retain and motivate people from many backgrounds and perspectives. Being diverse is not optional; it is what we must be.	Through it all, we assess opportunities through a framework that responds to a clear client need, leverages the firm's core competencies including risk management and advice, and provides attractive, long-term shareholder returns.
Ball Corporation (A)	As we strive to make the aluminum beverage container the most sustainable choice in the value chain from an economic, environmental and social standpoint, sustainability remains a top priority. In June, we announced our major achievements and progress toward our sustainability priorities—product stewardship, operational excellence, talent management and community ambassadors—and ambitious 2020 goals . . . . This May, we will release our 2018 sustainability report with updated data and additional progress toward our goals. As part of this, we have aligned our plants and employees to further enhance the sustainability profile of our organization, our processes and our products. Because our long-term success also depends on our ability to have "the best" in terms of people and their creativity, we continue to make deliberate and intentional strides to further drive a more inclusive culture and diverse workforce. In 2017, for the third consecutive year, we received a perfect score on the Corporate Equality Index, a national benchmarking survey and report on corporate policies and practices related to lesbian, gay, bisexual, transgender and queer workplace equality, administered by the Human Rights Campaign Foundation. We also have increased the diversity of our U.S. workforce from 40 to 45 percent over the past two years, while increasing the diversity of our management from 36 to 42 percent during that same time frame . . . . The end markets around us are always changing, and we must be the most responsive and flexible in developing solutions to our customers' challenges to	In 2017, Ball Corporation had another strong year, thanks to our 18,300 employees around the world. By staying true to our culture, Drive for 10 vision and disciplined EVA® (economic value added) approach, we embraced the unique opportunities in each of our businesses and overcame challenges to deliver significantly higher comparable operating earnings, diluted earnings per share and free cash flow.

Company/Category	Stakeholders	Shareholders
Ball Corporation (continued)	help them be successful. At Ball, we are constantly looking ahead.	
Stanley Black & Decker (A)	We have amplified our efforts to advance diversity and inclusion and have launched five Employee Resource Groups across the company over the last two years, including our Women's Network, our African Ancestry group and our most recent one, Pride & Allies, in support of the LGBT+ community . . . And we have increased our commitment to sustainability with new strategies and goals, including pledges to become carbon positive by 2030 and to stand up for human rights and equality.	Our historical practice, which we intend to continue, has been to return 50% of our capital to shareholders in the form of dividends and/or opportunistic share repurchases, with the remaining 50% earmarked for acquisitions to further strengthen our business portfolio and fuel growth. Our well-established value creation model had produced strong shareholder returns.
3M (A)	In partnership with our customers, we use science to improve lives and help solve society's toughest challenges – from improving air quality and worker safety, to advancing health care and enabling the transportation of tomorrow. Underlying 3M's success are our fundamental strengths: our 46 technology platforms, state-of-the-art manufacturing capabilities, global reach and brand equity. Yet as I often say, 3M's most valuable resource is the curiosity, passion and skill of our 91,000 people around the world. I salute our team for their hard work and contributions to 3M, and for making 2017 a fantastic year for our enterprise. In summary, 2017 was a successful year as we executed the 3M Playbook, delivered strong results and bolstered our foundation for the future. Importantly, we did so while staying true to our company's core values. Last year, in fact, 3M was again named one of the world's most ethical companies by Ethisphere Institute, while also receiving the prestigious Catalyst Award for our work to advance diversity and inclusion. We also continue to lead in sustainability, which includes helping our customers reduce their emissions by more than 10 million metric tons every year through use of 3M products.	Research and development remains the heartbeat of 3M. It enables us to deliver premium value to our customers and premium returns to our shareholders. In 2017 we increased investments in R&D to $1.9 billion, or about 6 percent of sales. As is evident in our results, these investments are paying off – in terms of organic growth, and also our strong margins and return on invested capital.
Caterpillar (B)	The Caterpillar Foundation is making progress toward our goal of alleviating extreme poverty. Since 1952, the Foundation has invested more than $715 million in communities around the world and invested more than $33 million in 2017 alone. By investing in water, shelter, access to food, energy and education, disaster relief and preparedness, and a cleaner environment,	Our overriding objective is to grow profitably by reinvesting in our strengths, which will deliver value to our shareholders.

Company/Category	**Stakeholders**	**Shareholders**
Caterpillar (continued)	the Foundation's grants empower people to develop resilient and sustainable communities.	
Hasbro (C)	Our Corporate Social Responsibility efforts center around the key pillars of Product Safety, Environmental Sustainability, Human Rights and Ethical Sourcing, and Philanthropy and Social Impact. During the year, we added an additional pillar of focus: Diversity and Inclusion.	Our commitment to returning excess cash to you, our shareholders, is evident. Over the past 10 years, we've returned approximately $4.5 billion. We will continue to review our capital strategies as we gain better visibility to the ultimate impact of tax reform. Our goal remains to deploy capital strategically to create long-term value for our shareholders and continue to allow you to enjoy in the success of the company.
Estee Lauder (C)	We continue to follow in our founder's footsteps to empower women at all levels of the Company . . . . This year and every year, we strive to be welcoming and inclusive workplace for all of our diverse talent, encompassing a wide range of identities, points of view, and orientations. In December 2016, The Estée Lauder Companies achieved a perfect 100 score on the 2017 Corporate Equality Index, the most distinguished U.S. benchmarking report on corporate policies and practices related to LGBTQ workplace equality, administered by the Human Rights Campaign. In satisfying all the criteria in the 2017 Corporate Equality Index, the Company is recognized among "Best Places to Work for LGBT Equality."	In fiscal 2017, we delivered net sales of $11.82 billion, net earnings of $1.25 billion and diluted earnings per share of $3.35. In constant currency, net sales rose 7 percent, which was ahead of global prestige beauty growth, and adjusted constant currency diluted earnings per share increased 11 percent (footnote omitted). During fiscal 2017, we returned $899 million to our stockholders through dividends and stock repurchases; we increased our common stock dividend 13 percent and repurchased 4.7 million shares of our Class A Common Stock. We expect the great momentum we built throughout the past year to continue in fiscal 2018. Our full-year outlook in constant currency reflects net sales growth of 7 to 8 percent, including incremental sales from our fiscal 2017 acquisitions, and double-digit adjusted earnings per share growth. Looking out over the next three years, we continue to target constant currency net sales growth of 6 to 8 percent and double-digit adjusted EPS growth.
Advance Auto Parts (C)	During the first full year of focus on the critical Inclusion and Diversity initiative we made substantial progress . . . . I am extremely proud of the growth in the first year, but remain committed to further evolution as we continue to advance our cultural beliefs.	Throughout 2017, we made investments in our Customers, Team Members, and technology to solidify our Value Proposition and build the foundation for long-term growth for the business and shareholders. This will remain our highest priority as we transform Advance.

Company/Category	Stakeholders	Shareholders
Enterprise Bank (D)	A true passion for and commitment to community service is deeply entrenched in the Enterprise Bank culture. This reflects our deep sense of purpose as a community bank. We hold ourselves to a responsibility beyond our own success through our core belief that business should be a force for good, serving a social purpose and making a positive contribution to society. Working with non-profits, our team members become invested in the communities we serve, strengthening their character and sense of values. They feel rewarded and fulfilled by the relationships they build, which leads to gaining new customers and strengthening existing customer loyalty, which, in turn, leads to greater success for team members and our Bank. This volunteerism is not only of participation, but also of leadership. Our team members and trusted advisors serve in key positions on more than 100 non-profit boards	At Enterprise Bank, it all starts with hiring highly competent, caring, and purpose-driven people who embrace our culture and genuinely care about our Bank, our customers, and our community. Working together and creating a positive, rewarding, and inspiring working environment translates directly to outstanding service to our customers, leading to financial success and shareholder value. This "people-first" equation creates tangible and measurable results.

APPENDIX B

2020 COVID-19 Responses

Database

The database includes the first quarter 2020 earnings releases as well as other COVID-19 related releases or official corporate communications available on the corporate website.[151] The database records the URL for any earning release or other communication reviewed.

As to all the communications issued by each company:

- Reference to shareholder wealth as priority (check if yes)
- Text of any such reference

For the earnings release, the fields included the following references:

- Date
- Access to credit
- Access to equity
- Balance sheet strength
- Change in 2020 outlook
- Cost cutting
- Focus on employees and customers
- Focus on health and safety
- Layoffs–yes
- Layoffs–no
- Liquidity strength
- Liquidity weakness
- Long term reference
- Non-shareholder interest as first/highest/prime
- Rescind earnings guidance
- Short term concern
- Significant negative impacts
- Suspend or reduce dividends
- Suspend share buyback
- Sample text from the release related to corporate constituencies, if any

For other corporate communications specifically related to COVID-19, the field included the following references:

- Date (if available)
- Non-Shareholder Interest as “First/Highest/Prime” (check if yes)
- Text of “First/Highest/Prime” Statement
- Employees
  Concern for health and safety

151. *See id.* and accompanying text.

Health care benefits
Layoffs or furloughs announced
No layoffs or furloughs
Work from home
- Communities
  Charitable contributions
  Volunteering
  Business redeployment
  In kind support
- Customers
  Health and safety
  Continuation of services
  Limitations on services
  Extension of services or benefits
  Fee or other cost waivers

Findings

98 of 100 companies mentioned the COVID-19 pandemic either in the earnings release or in another communication.

83 of 100 companies stated explicitly that the health or safety of employees and/or customers was the highest/first/primary priority of the company.

19 of 100 referred explicitly in their earnings releases to a commitment to shareholder value or returns to shareholders. Of those 19, 16 were among the 83 companies stating that the health or safety of employees and/or customers was the highest/first/primary priority of the company. Hence, we could find only three companies committing to shareholder value and not committing to the health or safety of customers or employees as the highest/first/primary priority.

TABLE 4
Specific Considerations Mentioned in 1st Quarter 2020 Earnings Releases (Percentage of Sampled Companies)

Consideration	Company Category A (% of 33)		Company Category B, C, and D (% of 67)		All (%)
Access to credit	2	6%	27	40%	29
Access to equity	0	0%	2	3%	2
Balance sheet strength	16	48%	27	40%	43
Change in 2020 outlook	5	15%	3	4%	8
Cost cutting	9	27%	28	42%	37
Focus on employees and customers	23	70%	51	76%	74
Focus on health and safety	17	52%	52	78%	69
Layoffs – no	15	45%	39	58%	54
Layoffs – yes	1	3%	10	15%	11
Liquidity strength	13	39%	33	49%	46
Liquidity weakness	0	0%	1	1%	1
Long term reference	6	18%	12	18%	18
Non-shareholder interest as first/highest/priority	12	36%	40	60%	52
Rescind earnings guidance	18	55%	25	37%	43
Short term concern	1	3%	5	7%	6
Significant negative impacts	2	6%	17	25%	19
Suspend or reduce dividends	1	3%	5	7%	6
Suspend share buyback	4	12%	12	18%	16

TABLE 5
Specific COVID Responses Mentioned (Percentage of Sampled Companies)

COVID Responses	Company Category A (% of 33)		Company Category BCD (% of 67)		All (%)
Non-shareholder interest as first/highest/primary	**27**	**82%**	**56**	**84%**	**83**
Employees	**30**	**91%**	**59**	**88%**	**89**
Concern for health and safety	29	88%	55	82%	84
Health care benefits	1	3%	8	12%	9
Layoffs or furloughs announced	4	12%	15	22%	19
No layoffs or furloughs	12	36%	38	57%	50
Work from home	12	36%	25	37%	37
Other employee support	8	24%	25	37%	33
Communities	**19**	**58%**	**22**	**33%**	**41**
Charitable contributions	18	55%	21	31%	39
Volunteering	3	9%	3	4%	6
Business redeployment	2	6%	4	6%	6
In kind support	3	9%	0	0%	3
Customers	**23**	**70%**	**60**	**90%**	**83**
Health and safety	21	64%	50	75%	71
Continuation of services	16	48%	57	85%	73
Limitations on services	1	3%	2	3%	3
Extension of services or benefits	2	6%	2	3%	4
Fee or other cost waivers	5	15%	6	9%	11