Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge's *Why We Should Keep Teaching* Dodge v. Ford Motor Co.

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For decades eminent law professors have published articles claiming that Delaware law permits directors to consider the interests of non-stockholder constituencies, even if doing so harms the stockholders in the long term, or, at least, that Delaware law is unclear on whether directors may do so. This is shocking, because the Delaware Supreme Court has clearly settled this issue long ago. In Unocal*, the court affirmed "the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders," and in* Revlon *the court held that directors may consider the interests of other corporate constituencies only subject to the fundamental limitation that "there are rationally related benefits accruing to the stockholders." As a result, in Delaware, the rule is that directors must always manage the corporation for the benefit of the stockholders and may consider the interests of other corporate constituencies only instrumentally to that end.*

In stating this rule, the Delaware Supreme Court was merely repeating fundamental principles that arose at the dawn of modern corporate law in the early nineteenth century when courts of equity, in both America and England, asserted equity jurisdiction over directors and imposed on them fiduciary duties to act for the benefit of their beneficiaries, i.e., the stockholders. Thus, in Dodge v. Woolsey *(1855), the U.S. Supreme Court held that directors must manage the corporation to benefit the stockholders, and in* Taunton v. Royal Ins. Co. *(1864) and* Hampson v. Price's Patent Candle Co. *(1876) English courts held that directors may consider the interests of non-stockholder constituencies such as customers or employees only instrumentally as a means to the end of benefiting stockholders. Most remarkably, in* Hutton v. W. Cork Ry. Co. *(1883), another English court held that, while such instrumental consideration of other constituencies is permissible when the business is a going concern, it becomes impermissible when the company ceases to be a going concern and is winding up its business, thus fully anticipating the Delaware Supreme Court's holding in* Revlon *more than a hundred years later. Early corporate law treatises cite these and similar cases and explain the law in accordance with their holdings. Furthermore, long before* Unocal *and* Revlon*, the Delaware Court of Chancery accepted the relevant principles as a matter of course in* Kelly v. Bell *(1969), which cites* Hutton,

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and Theodora Holding Corp. v. Henderson *(1970). After* Unocal *and* Revlon*, the Delaware Supreme Court repeated and elaborated these principles in* Mills Acquisition *and* Gheewalla*, and the Court of Chancery has done likewise in* Oak Industries, TW Services, Toys "R" Us, eBay, Trados, Rural Metro, Frederick Hsu *and other cases. The Delaware judges who have affirmed these principles in their opinions include Chancellor Marvel, Justice Moore, Chancellor Allen, Justice Holland, former Chief Justice Strine, Chancellor Chandler, Vice Chancellor Laster, Vice Chancellor Slights, and Vice Chancellor Zurn. Leading treatises on Delaware law cite these cases and explain Delaware law accordingly. The law is so clear on these points that any attorney who advised a client that directors of a Delaware corporation are not always required to manage the corporation for the purpose of benefiting the stockholders would undoubtedly commit malpractice. This makes the scholarly articles misstating Delaware law on this fundamental issue entirely incomprehensible.*

I. INTRODUCTION

Under Delaware law, are directors always required to manage the corporation for the purpose of maximizing value for shareholders in the long term, or may they sometimes direct value to other corporate constituencies, even when doing so does not produce long-term net benefits for shareholders? This question, which is probably the most important and fundamental question in corporate law, has a perfectly clear answer. In Delaware, when directors make a business decision, it is at the core of their fiduciary duty of loyalty that directors act *in good faith*, meaning that they act for the sincere purpose of maximizing value for shareholders within the law. Directors are not permitted to pursue other ends or purposes; they are not permitted to act for the end of benefiting either themselves or anyone else other than the shareholders. This does not mean, of course, that directors must always act for the immediate and proximate end of delivering value to shareholders. Rather, they may adopt complicated, multi-step plans for the ultimate end of maximizing value for shareholders in the long term. In the simplest of cases, directors may, for example, expend corporate funds to purchase raw materials today in order to manufacture products that will be sold tomorrow at a profit, thus maximizing value for shareholders. Or they may invest corporate funds in research and development today in order to develop better products down the road in order to generate greater profits for shareholders long in the future.

Similarly, directors may direct value to non-shareholder constituencies (such as employees, customers, creditors, or suppliers) today if, by doing so, they hope to produce greater value for shareholders in the future. Notably, Delaware law affords great deference to directors on the question of the *means* they may adopt in furtherance of the ultimate end of maximizing shareholder value, including the timeframe (or investment horizon) related to those means.[1] But the rule about the ultimate end for which directors must act—maximizing value for shareholders—is absolute and unremitting. The Delaware case law on these points is so clear, so univocal, so consistent, and so abundant that any lawyer who advised a client otherwise—that is, any lawyer who counseled a client that directors could consciously choose a course of action that they believed did not maximize value for shareholders, even in the long run—would certainly be committing legal malpractice.

Nevertheless, there is an ongoing discussion among eminent corporate law scholars concerning exactly this question of Delaware law. The latest important contribution to this discussion is Professor Bainbridge's impressive article on *Why We Should Keep Teaching* Dodge v. Ford Motor Co.,[2] which is nominally about a century-old decision of the Michigan Supreme Court but which really concerns this ongoing discussion of Delaware law. That discussion, it must be said, is rather bizarre. The question under consideration is a simple question of positive law; it is the kind of question that a very junior lawyer, applying skills that law students are expected to master in law school, can usually answer by conventional methods of legal research, such as looking up cases, reading them carefully, and synthesizing their holdings in a memorandum of law. Of course, when there is little or no law on a topic, such questions can turn out to be difficult, but just the opposite is the case here. The sources of law are abundant, clear, and univocal. There is one and only one reasonable answer to this question, and any competent lawyer ought to be able to find it.

Indeed, it is hard to imagine how the matter could be any clearer, for the Delaware Supreme Court has spoken on the issue in question in what is probably the most famous case in the history of American corporate law, *Revlon v. MacAndrews & Forbes Holdings, Inc.*[3] There, in accordance with the traditional common-law rule that corporations are to be managed for the benefit of their shareholders, the Delaware Supreme Court said, "Although such considerations [i.e., for other corporate constituencies] may be permissible, there are

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1. *See infra* Part VI–VII (discussing Delaware corporate law). This is a necessary qualification because the question of whether an expenditure made in the present maximizes value for shareholders "in the long term" is really the question of whether the expenditure, when made, is expected to have *net present value* for the shareholders and so involves a judgment not only about future cashflows to the corporation but also as to investment horizon and the appropriate discount rate (and thus about the riskiness of those future cashflows as well).

2. Stephen M. Bainbridge, *Why We Should Keep Teaching* Dodge v. Ford Motor Co., 48 J. CORP. L. 77 (2022). I agree with all of Professor Bainbridge's conclusions, and so I shall take his article as my point of departure in addressing more directly the primary question of Delaware law at issue.

3. Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (oral decision announced in 1985). *Revlon* is one of the four epoch-making cases that the Delaware Supreme Court decided in the miracle year of 1985, the others being *Smith v. Van Gorkom*, 488 A.2d 858, 858 (Del. 1985), *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 946 (Del. 1985), and *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1346 (Del. 1985). For discussion of the miracle year in Delaware law, see Robert T. Miller, Smith v. Van Gorkom *and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WM. & MARY BUS. L. REV. 65, 72–73 (2017) (discussing Delaware corporate law in "the miracle year of 1985").

fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."[4] That is, a board may confer on a non-shareholder constituency a benefit to which that constituency is not legally entitled *only if* the board believes that the action will produce a net benefit for the shareholders in the long term.[5] A standard example involves severance payments to which employees are not legally entitled; if the board believes making such payments will help the corporation attract and retain talented and hardworking employees in the future and so maximize corporate profits in the long term, such payments are permissible. The Delaware Supreme Court's opinion in *Revlon* is perfectly clear on all this.

Of course, *Revlon* is much better known for stating an exception to this general rule than for stating the rule itself. That is, the Supreme Court said that, once the board decides to sell control of the company, the directors may no longer consider the interests of other constituencies even in this instrumental way but must try to get the best price for the shareholders without regard to effects on other groups.[6] But this is just to adapt the general rule to those contexts in which there is no long term in which value directed to other constituencies could ultimately result in a net benefit for shareholders.[7] Both the general rule and the exception assume the basic principle that the corporation is to be run for the benefit of the shareholders.[8] Normally, the directors should maximize value for the shareholders, taking account of the interests of other constituencies in those cases where doing so redounds to the benefit of the shareholders in the long term. In the change-of-control context, where the shareholders' interest in the corporation is about to be terminated and so does not extend to the long term, the directors should maximize value for the shareholders in the immediate term by getting the best price available for them without regard to effects on other corporate constituencies. None of this is mysterious in the least, and, as discussed below, the well-known English case of *Hutton v. West Cork Railway*

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

5. To be perfectly clear, the standard of conduct required of directors is that they act in good faith and on an informed basis for the purpose of maximizing the value of the corporation for the benefit of the shareholders. *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013) (noting that, in exercising their "statutory responsibility" to manage the business and affairs of the corporation, "the standard of conduct requires that directors seek to promote the value of the corporation for the benefit of its stockholders"); Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners."); N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (citing *Malone*). Therefore, when the directors act in a way that directly benefits a non-shareholder constituency, the standard of conduct requires that the directors act in good faith and on an informed basis for the ultimate purpose of maximizing the value of the corporation for the benefit of the shareholders. Here, and elsewhere in the text, I often speak elliptically, saying, for example, that the directors may benefit a non-shareholder constituency if doing so maximizes value for shareholders in the long term. I should be understood to mean the precise formulation given in this footnote.

6. *Revlon*, 506 A.2d at 182–83; *see also* Paramount Commc'ns., Inc. v. QVC Network, Inc., 637 A.2d 34, 45–48 (Del. 1994) (discussing the duty imposed on directors by *Revlon*).

7. *See* Hutton v. W. Cork Ry. Co. [1883] 23 Ch D 654 (explaining the general rule about considering other constituencies only to the extent that doing so increases value for shareholders and the exception to that rule that applies when the company has no long-term future when shareholders might benefit from directing value to other constituencies).

8. *Id.*

Co.,[9] had explained it all—the general rule and the exception applicable when the shareholders' investment in the corporation will soon be terminated—in 1883, more than a hundred years before *Revlon*.

Revlon is surely the most famous Delaware case to hold that directors should operate the corporation for the benefit of its shareholders and may confer benefits on other constituencies only when doing so produces net benefits for the shareholders, but it is hardly the only one. Indeed, the Delaware courts had articulated this rule in multiple cases before *Revlon*,[10] and the *Hutton* case mentioned above is merely one among a great many cases in which both American and English courts had stated and restated the rule for more than a century before *Revlon*.[11] Even more, the rule has been affirmed and reaffirmed by both the Delaware Supreme Court and the Court of Chancery in numerous cases since *Revlon*.[12] All of the most famous Delaware judges from the last half century have, at some point or other, stated the rule in their opinions or academic articles, including William Marvel, William Allen, Randall Holland, William Chandler, Leo Strine, and Travis Laster.[13] The rule is about as settled as a rule of law can ever be. Anyone unsure about it need only consult any of the leading treatises on Delaware corporate law, for they all state and explain the rule very clearly.[14] In short, the rule is not one about which reasonable lawyers can disagree.

So how is it, then, that eminent law professors still dispute this question? More precisely, why is one side of this debate arguing for—it must be said—a wholly untenable position?[15] The answer, of course, is that while the relevant rule of law has long been settled, it also plays a part in a much wider and decidedly *unsettled* controversy about the proper role of corporations in society.[16] This wider controversy is not a legal one, at least

9. *Id.*

10. *See* discussion *infra* Part II and sources cited therein.

11. As we shall see below, even the exception to the general rule, the exception we today would think of in connection with *Revlon* duties, had been stated and explained in an English case *more than a hundred years* before *Revlon*. *See Hutton*, 23 Ch D at 654 (holding that the corporation could not pay compensation to directors not legally required to be paid because the "company was no longer a going concern, and only existed for the purpose of winding-up").

12. *See* discussion *infra* Part VII and sources cited therein.

13. *See infra* Parts VI–VII. As Professor Yosifon says, the "Delaware jurists . . . make no bones about the fact that Delaware law requires corporate directors to pursue the interests of shareholders, and allows them to do nothing else." David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKLEY BUS. L.J. 181, 195 (2014).

14. *See* discussion *infra* Part VIII and sources cited therein.

15. *Cf.* Yosifon, *supra* note 13, at 181 (stating that it "is shocking, and troubling, for corporate law scholarship to evince such confusion about the most important black letter matter in the field").

16. *E.g.*, JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW 13–57 (1970) (discussing evolution of the understanding of incorporation during the nineteenth century from a "special privilege" to source of "general utility"); RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 1 (1978) (discussing opposing views regarding the relationship between corporations and society generally); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) (discussing differences between the "property conception" of corporation, in which it is essentially the property of the shareholders, and the "social entity" conception of the corporation, in which it is "tinged with a public purpose"); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012) (arguing that it is naïve and dangerous to imagine that for-profit corporations will act for the common good of society if doing so would reduce their profits and thus that governmental regulation has a crucial role in regulating activities that are profitable for the corporation but that generate significant negative externalities for society generally). Professor Bainbridge discusses that debate in

not in the sense of positive law; it is not about what the law actually is, whether in Delaware or any other jurisdiction. On the contrary, it is a normative controversy in political economy—and very often a political controversy as well—that has implications for what the law *ought to be*.[17] Nowadays, it is common to think of the contending sides in this debate as being those who favor the *shareholder model* of corporate governance (i.e., the view that corporations should be run for the benefit of their shareholders) and those who support the *stakeholder model* of corporate governance (i.e., the view that corporations should be run for the benefit of all their corporate constituencies, even when this sometimes works to the ultimate detriment of shareholders). But, in various forms, the debate goes back at least as far as Adam Smith. Indeed, in the famous passage in *The Wealth of Nations* about the invisible hand, Smith said that he has "never known much good done by those who affected to trade for the public good" and argued that "by pursuing his own interest," a man "frequently promotes that of society more effectually than when he really intends to promote it."[18] In its modern form, the controversy is conventionally dated from the famous exchange between Adolf Berle and Merrick Dodd in the *Harvard Law Review* for 1932, in which Berle argued for the shareholder model[19] and Dodd for the stakeholder model.[20] Since then, the debate has ebbed and flowed down the decades. Some of the more important moves in the debate have included Milton Friedman's famous essay, *The Social Responsibility of Business Is to Increase Its Profits*, published in 1970,[21] and Edward Freeman's influential book, *Strategic Management: A Stakeholder Approach*, published in 1984.[22] Also critically important in keeping the controversy alive has been a steady stream of client memoranda from Martin Lipton, probably the most influential corporate lawyer in America for the last 50 years, strenuously supporting the stakeholder model.[23] In 2001, two eminent law professors, Professors Hansmann and Kraakman, declared that the debate

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even greater detail in his new book, from which his article discussed here was taken. *See generally* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION (2023).

17. Dodd, for example, was clear about this: he hoped that the law, which he acknowledged did not comport with his normative views, would change in order that it might comport with them. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1157 (1932) (noting the difference between "the orthodox theory that the managers are elected by stockholder-owners to serve their interests exclusively" and his own view that directors "are guardians of all the interests which the corporation affects and not merely servants of its absentee owners").

18. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edwin Cannan ed., 1937) (1776). Curiously, Smith was also convinced that "trad[ing] for the public good" is "an affectation . . . not very common among merchants" and that "very few words need to be employed in dissuading them from it." *Id.*

19. A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

20. Dodd, *supra* note 17, at 1157.

21. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://websites.umich.edu/~thecore/doc/Friedman.pdf [https://perma.cc/8QAU-NAHL].

22. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

23. *E.g.*, Martin Lipton, Karessa L. Cain & Kathleen C. Iannone, *Stakeholder Governance and the Fiduciary Duties of Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 24, 2019) ("Delaware law does not enshrine a principle of shareholder primacy or preclude a board of directors from considering the interests of other stakeholders."); Martin Lipton & Kevin S. Schwartz, *Reclaiming "Value" in the True Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 10, 2020) (citing *Unocal* for the proposition that the Delaware Supreme Court "has been clear that, outside the cabined sale-of-control setting, the board of directors can and should take the interests of all relevant stakeholders into account in assessing and pursuing the corporation's long-term value").

was over and had been definitively settled in favor of the shareholder model,[24] and this seemed correct at the time. But the stakeholder model, like the villain in a horror movie franchise, is never really dead, and the financial crisis of 2007–2008 marked the beginning of its latest revival. In 2019, the Business Roundtable very publicly renounced its former support for the shareholder model and endorsed the stakeholder model,[25] a move that has invigorated the debate in ways never seen before. At the more fanciful end of the spectrum, there have been proposals for legislation that would radically reshape American capitalism, such as Senator Warren's so-called Accountable Capitalism Act.[26] At the more practical and influential end of the spectrum, there is the contemporary Environmental, Social, and Governance (ESG) movement, as embodied in corporate pronouncements and policies (and occasionally in actions as well), the expressed desires of the Big Three (especially Blackrock) and other institutional investors, the recommendations of the proxy-advisory firms Institutional Shareholder Services and Glass Lewis, and so on.[27]

Now, as everyone involved in corporate governance today knows, the ESG movement is gigantic and multifaceted. Some ESG advocates insist that the policies they champion will in fact increase shareholder value in the long run, and, in a very broad range of cases, they are obviously correct: *everyone* involved in corporate governance has long recognized that treating non-shareholder stakeholders such as employees, customers, creditors, and suppliers fairly and even generously tends to maximize value for shareholders in the long-term. If this were all ESG meant and ESG advocates desired, then ESG would not be controversial and certainly would not involve anything like a new paradigm of corporate governance. Moreover, Delaware law as it currently exists would pose no problem for the ESG agenda. The trouble, of course, is that, for many ESG initiatives, including some of those dearest to the hearts of the most fervent ESG advocates, the claim that implementing these initiatives will maximize value for shareholders is, even on the most charitable reading, highly implausible.[28] Nor could it be otherwise. For, when there really are important strategies that confer significant benefits on *both* shareholders *and* other corporate constituencies, managers quickly identify and implement them. If they happen to overlook such a strategy, then as soon as someone else points it out, the market can be counted upon to do what it does best—pursue promising opportunities for profit. Corporate

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24. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001).

25. *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/7VJR-HDB2] ("Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.").

26. Accountable Capitalism Act, S. 3215, 116th Cong. (2020).

27. *See* Silla Brush, *BlackRock, State Street Among Money Managers Closing ESG Funds*, BLOOMBERG (Sept. 21, 2023), https://www.bloomberg.com/news/articles/2023-09-21/blackrock-state-street-among-money-managers-closing-esg-funds#xj4y7vzkg [https://perma.cc/45G3-8J5A] (discussing recent ESG movement from "The Big Three").

28. *See generally* Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37 (2023) (finding that ESG-based compensation "poses significant perils" with little benefits); Eugene F. Fama, *Market Forces Already Address ESG Issues and the Issues Raised by Stakeholder Capitalism*, PROMARKET (Sept. 25, 2020), https://www.promarket.org/2020/09/25/market-forces-esg-issues-stakeholder-capitalism-contracts [https://perma.cc/6M6T-9M4N] ("[M]arket forces address the issues raised by the stakeholder capitalism and ESG movements.").

America does not need to be lectured and hectored into making larger profits. The most controversial ESG initiatives, however, are quite different. If these initiatives really did produce benefits for shareholders, and other stakeholders too, then there would be no need for a quasi-political movement in favor of such initiatives, a movement that, tellingly, tends to fall back on regulation when it cannot persuade market actors of the value of its proposals.[29] No, the obvious truth is that in a wide range of important cases, ESG goals conflict with the goal of maximizing value for shareholders in the long run.

And there's the rub. If a robust implementation of the ESG agenda does not really maximize value for shareholders in the long run, then a collision between that agenda and the requirements of Delaware law is inevitable.[30] Either the more extreme aspects of the ESG movement will eventually founder on Delaware law, or else Delaware law will have to change.[31] The honest and correct position for ESG advocates is to candidly admit that

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29. *E.g.*, RULEBOOK § 5605(f) (The Nasdaq Stock Mkt. 2023) (imposing a comply-or-explain requirement concerning gender, racial, and sexual-orientation diversity on boards of listed companies); The Enhancement and Standardization of Climate-Related Disclosures for Investors, Exchange Act, 87 Fed. Reg. 21334 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts 210, 229, 232, 239, 249) (proposing enhanced and standardized climate-related disclosure obligations for public companies).

30. Directors who make a business decision implementing the stakeholder model—i.e., intending by their action to transfer value to a corporate constituency without thereby intending to benefit the shareholders even in the long run—would breach the standard of conduct (in particular, their duty of loyalty) even if the directors were disinterested and independent and used due care in making such a decision. The applicable standard of review under Delaware law would thus be "entire fairness." *See* Peter A. Atkins, Marc S. Gerber & Kenton J. King, *A Brief Response Regarding Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 22, 2020), https://corpgov.law.harvard.edu/2020/09/22/a-brief-response-regarding-stakeholder-governance/ [https://perma.cc/C2V8-2WJ6] ("We believe that the Delaware courts . . . may apply the more rigorous entire fairness standard of review."). Moreover, unless the action unexpectedly redounded to the benefit of the shareholders (i.e., actually produced benefits for the shareholder in excess of its costs), it is hard to see how such an action could pass entire fairness review. Sometimes one hears the argument that, regardless of their true intentions, the directors could always plausibly *claim* that they approved the challenged action for the purpose of benefiting shareholders in the long term and thus keep the protections of the business judgment rule and avoid a shift in the standard of review to entire fairness. In many cases, this may be true, but it is not to the point. The fact that a person can likely perjure himself without detection and thus cover up his unlawful conduct hardly makes that conduct lawful. Indeed, if the likelihood of successful perjury is the best defense that can be made for the stakeholder model, it serves as a *reductio ad absurdum* of the whole project. See *infra* Part IX for further discussion of this point.

31. Compare the case of the Department of Labor's rules for plan fiduciaries under ERISA. We have already seen this at the pension fund level with the Department of Labor under President Trump issuing rules that required plan fiduciaries to make investment decisions based solely on financial considerations relevant to risk-adjusted economic value. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72847 (Nov. 13, 2020) (codified at 29 C.F.R. pts. 2509, 2550) (providing that "fiduciaries violate ERISA if they accept reduced expected returns or greater risks to secure social, environmental, or other policy goals"). The same department under President Biden revised those rules to allow plan fiduciaries to make such decisions to consider environmental, social, and governance factors. 29 C.F.R. § 2550.404a-1(b)(4) (2023). More precisely, the new rules provide that, although a fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis, nevertheless such factors may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action. *Id.* Just how much of a change this is from the prior rule is unclear. *See* Max M. Schanzenbach & Robert H. Sitkoff, *ESG Investing After the DOL Rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,"* HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 2, 2023), https://corpgov.law.harvard.edu/2023/02/02/esg-investing-after-the-dol-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights [https://perma.cc/7CPY-

significant parts of their agenda are inconsistent with Delaware law and then to argue that Delaware law should be changed. The actual position of many ESG advocates, however, has been to deny that Delaware law requires directors to manage the corporation for the benefit of shareholders. The motive for such a denial is clear: it would be much more convenient for robust ESG policies (and the stakeholder model it ineluctably presupposes) if their agenda were consistent with Delaware law. Thus, beginning with a law review article by Professors Blair and Stout in 1999,[32] there have appeared article after article from respected law professors[33] that assert, in the face of utterly overwhelming evidence to the

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2MRS] (describing the differences between the rules and attempting to clarify ongoing confusion). Public perception signals that the change was significant. *See, e.g.*, Greg Iacurci, *Biden Administration Loosens Trump-era Investing Rules Around Environment, Social and Governance Funds for 401(k) Plans*, CNBC (Nov. 22, 2022), https://www.cnbc.com/2022/11/22/biden-administration-loosens-trump-era-esg-rules-for-401k-plans.html [https://perma.cc/LRF7-X2AZ] (reporting the new Biden administration changes amid ESG investing that "has broadly become more popular"); Daniel Wiessner, *New Biden Rule Allows Socially Conscious Investing by Retirement Plans*, REUTERS (Nov. 22, 2022), https://www.reuters.com/world/us/new-biden-rule-allows-socially-conscious-investing-by-retirement-plans-2022-11-22 [https://perma.cc/LY4X-GTF7]. More recently, President Biden vetoed legislation that would have overturned his administration's regulations on this issue. Ken Thomas, *Joe Biden Issues First Veto, Rejecting Attempt to Block ESG Effort*, WALL ST. J. (Mar. 20, 2023), https://www.wsj.com/articles/biden-issues-first-veto-rejecting-attempt-to-block-esg-effort-63c2f969 [https://perma.cc/W5A4-YWT3].

32. *E.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 303, 308 (1999) ("[C]ase law interpreting the business judgment rule often explicitly authorizes directors to sacrifice shareholders' interests to protect other constituencies," and "*Unocal* squarely rejects shareholder primacy in favor of the view that the interests of the 'corporation' include the interests of nonshareholder constituencies." (emphasis omitted)). Tellingly, although Blair and Stout *say* that there are cases that "explicitly authorize" directors to harm shareholders to benefit other corporate constituencies, they do never actually produce a quotation from a case saying this; they merely cite *Theodora Holding Corp. v. Henderson*, 257 A.2d 398 (Del. Ch. 1969), *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968), and *Credit Lyonnais Bank v. Nederland, N.V. v. Pathe Comm. Corp.*, Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991), and *assert* that the cases support their claim. *Id.* at 303 & nn.140–43. In fact, they do nothing of the kind, and, as discussed below, *Theodora Holding Corp.* actually expressly says the opposite of what Blair and Stout claim. *Theodora Holding Corp.*, 257 A.2d at 400–05. As to their treatment of *Unocal*, see *infra* Part VI.

33. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 850 (2005) ("Delaware case law in fact does not make shareholder interests controlling and thus allows consideration of nonshareholder interests other than just when that happens to maximize shareholder value."); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1415–16 & n.161 (2008) (citing *Unocal* for the proposition that "case law governing the board's response to a hostile takeover attempt explicitly permits consideration of the interests of non-shareholder constituencies," and claiming that *Unocal* "requires the board to assess the effects of the bid on the corporate enterprise, which analysis could include 'the impact on constituencies other than shareholders,'' while asserting "[i]t is only in this narrow set of circumstances [i.e., when *Revlon* duties are triggered] where Delaware courts speak of maximizing return to shareholders and will not permit boards to impede it out of regard for interests of other constituencies," but finally conceding in a footnote that "*Revlon* makes clear that the board's regard for various constituencies under *Unocal* must be accompanied by rationally related benefits accruing to the stockholders."); Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 172 (2008) (stating that, although "[u]pon first inspection, *Revlon* appears to affirm the notion that maximizing shareholder wealth is the corporation's proper purpose," nevertheless "the Delaware Supreme Court has systematically cut back on the situations in which *Revlon* supposedly applies," with the result that "[t]he case has become nearly a dead letter," and even if "the Delaware Supreme Court has not explicitly repudiated *Revlon* (at least not yet)," still "for practical purposes the case is largely irrelevant to modern corporate law and practice"); M. Todd Henderson, *The Story of* Dodge v. Ford Motor Co.: *Everything Old Is New Again*, *in* CORPORATE LAW STORIES 37, 75 (J. Mark Ramseyer, ed. 2009) ("The *Dodge* case is often misread or mistaught as setting a legal rule of shareholder wealth maximization. This was not and is not the law."); LYNN

contrary, that Delaware law does *not* require directors to maximize value for the benefit of stockholders but, rather, allows them to transfer value to other corporate constituencies even if the directors do not believe that doing so will, even in the long run, result in greater benefits for the stockholders. These claims have met with determined opposition from knowledgeable practitioners[34] as well as devastating refutations in the scholarly literature,[35] including Professor Bainbridge's article on *Dodge*,[36] but these refutations seem to have had no practical effect, and misstatements and mischaracterizations of Delaware law keep appearing.

This is a dismal situation. If there were only one voice loudly misstating the law, then that person could be dismissed as a crank, but in fact there are many such voices, and all of them belong to extremely able and talented individuals whose good faith is beyond question.[37] How can they have gone so wrong? A cynic would say that, in a way, the situation is not surprising after all. For, the question of the proper role of corporations in society is not merely a normative one in political economy but a political one in the real world. How the controversy turns out will affect the allocation of power and money in society. In controversies such as this, human nature being what it is, many individuals succumb to the temptations of motivated reasoning, and standards of argumentation tend to collapse. Indeed, as Princess Ida says, although the narrow-minded pedant still believes that two and two make four, she can prove that "two and two make five—or three—or seven . . . if the case demands."[38] The absurdity of saying that Delaware law does not require directors to maximize value for shareholders is not as great as that of saying two

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STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 31 (2012) (stating that "Delaware cases have made clear that, so long as a public corporation intends to stay public, its directors have no *Revlon* duty to maximize shareholder wealth," and only in *Revlon* contexts must directors "embrace shareholder wealth as their only goal"); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 432–33 (2013) [hereinafter Johnson, *Unsettledness in Delaware Corporate Law*] ("The Delaware Supreme Court has held only that corporate directors do not typically have an obligation to maximize the share price in the short term [and then] only in one narrow setting [when *Revlon* duties are triggered, and] [b]eyond that, the Delaware Supreme Court has mandated nothing, or even spoken."; Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 286 (2013) (stating that, in Delaware, "only when the demise of the corporation is at hand or control over its direction shifts away from dispersed shareholders does stockholder wealth become the sole purpose."); Dalia T. Mitchell, *Shareholder Wealth Maximization: Variations on a Theme*, 24 U. PA. J. BUS. L. 700, 749 (2022) ("Shareholder wealth maximization has been and will remain *dicta*, a rhetoric, not an edict"); Lynn M. LoPucki, *The End of Shareholder Wealth Maximization*, 56 U.C. DAVIS L. REV. 2017, 2029–30 (citing *Unocal* to support the proposition that Delaware law permits directors to consider non-shareholder constituencies and arguing that Delaware's law is "confused" and does not clearly require directors to operate the corporation for the benefit of its shareholders).

34. *E.g.*, Atkins, Gerber & King, *supra* note 30 (advocating for an "entire fairness" standard of review).

35. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 175 (2020); 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, 765–67 (2015); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180 (2008); Yosifon, *supra* note 13, at 181.

36. Bainbridge, *supra* note 2.

37. *See infra* notes 193–214 and accompanying text (listing and criticizing various scholars who endorse and promote the stakeholder theory).

38. W.S. GILBERT & ARTHUR SULLIVAN, *Princess Ida*, *in* 2 THE ANNOTATED GILBERT AND SULLIVAN 211, 245 (Ian Bradley ed., Penguin Books 1984) (1884).

and two make five (or three or seven), but it is close. Still, I reject the cynical explanation. The abilities and honesty of the individuals involved forbid it.

The question thus becomes how to ameliorate the situation. In what follows, I trace the history of the shareholder primacy norm in Delaware law, both before and after *Revlon*. In so doing, I shall pay special attention to what, even regarded in the most charitable light possible, must be recognized as an outrageous imposition—the claim by stakeholder advocates that the *Unocal* case supports their contention that Delaware law licenses boards to consider the interests of non-shareholder constituencies even when doing so would not promote shareholder value in the long run.

Preeminent scholars of corporate law such as Professor Bainbridge,[39] former Chief Justice Strine,[40] Professor Macey,[41] and Professor Yosifon,[42] have already made many of the points that I intend to make. My only claim to originality, I fear, is that I have dared to consider the matter so exhaustively, citing at length every passage in every Delaware case bearing on the issue, that I will no doubt try the reader's patience more than all my worthy predecessors combined. I hope, however, that if some people may go about repeatedly *misstating* the law, there can be no objection if other people go about repeatedly stating it correctly. In a final section, I shall return to the question of how so many able and honest scholars have for so long denied the obvious and asserted the untenable on this elementary question of Delaware corporate law.

II. THE ORIGINS OF THE SHAREHOLDER PRIMACY NORM

The doctrine that directors have a fiduciary duty to manage the corporation for the benefit of its shareholders goes back to the very beginnings of modern corporate law, in both the United States and England, in the nineteenth century. In 1811, New York became the first state to enact a corporate enabling statute.[43] The United Kingdom had a similar

39. Bainbridge, *supra* note 2, at 119 ("Law professors thus should have no qualms about continuing to teach *Dodge*. It remains . . . a clear statement of the mainstream of American corporate law); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1424 n.3 (1993) ("*Revlon* expressly forbids management from protecting nonshareholder interests at the expense of shareholder interests. Rather, anything directors do to make nonshareholders better off must also make shareholders better off."); Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 291 n.41 (2021) (arguing that, under *Revlon*, "even when the board is not in *Revlon*-land, it can protect the interests of non-shareholder constituencies but only if there are rationally related benefits accruing to the stockholders.") (internal quotation marks omitted).

40. Strine, *supra* note 35, at 768 (arguing that "within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare").

41. *See* Macey, *supra* note 35, at 180–81 (stating that "corporate law requires directors to maximize shareholder value" and shareholder wealth maximization "is still at least the law on the books," even if there is a "lack of enforceability").

42. *See generally* Yosifon, *supra* note 13, at 181 (arguing that statutory law and case law strongly support shareholder wealth maximization).

43. An Act Relative to Incorporations for Manufacturing Purposes, NY Laws, 34th Session (1811) ch. LXVII, at 151 (Mar. 22, 1811). The act was not perfectly general but, as the title indicates, was limited to certain manufacturing corporations, including companies "for the purpose of manufacturing woollen [sic], cotton or linen goods, or for the purpose of making glass, or for the purpose of making from ore bar-iron, anchors, mill-irons, steel, nail-rods, hoop-iron and ironmongery, sheet-copper, sheet-lead, shot, white lead and red lead." *Id.* at I. The

statute by 1844.[44] Courts of equity in both countries quickly assumed jurisdiction over the directors of corporations formed under these statutes on the theory that the directors were trustees *for the benefit of the corporation's shareholders*. Thus, in 1832, the New York Court of Chancery explained that "joint stock companies . . . are mere partnerships, except in form," and so, "[t]he directors are the trustees or managing partners, and the stockholders are the *cestui que trust*, and have a joint interest in all the property and effects of the corporation. And no injury the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."[45] Similarly, in England, in 1853 the Court of Chancery considered a case in which shares of a corporation were entrusted to the company's chairman, who proceeded to sell at least some of them for his personal benefit.[46] In holding that the chairman had to account to the corporation for any profits he realized from the shares, the court stated,

> [T]he directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by the shareholders therefore, that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons intrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their *cestuis que trust*.[47]

Thus, from the very beginning of modern corporate law, the fiduciary duties of directors were duties imposed on them by courts of equity on analogy with the traditional duties of trustees.[48] As the Rhode Island Supreme Court put it in 1850, "the jurisdiction of a Court

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United Kingdom would not have a comparable enabling statute until the Joint Stock Companies Act of 1844. An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 1884, 7 & Vict. c. 110 (U.K.).

44. An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 1884, 7 &Vict. c. 110 (U.K.).

45. Robinson v. Smith, 3 Paige Ch. 222, 231 (N.Y. Ch. 1832).

46. York & N. Midland Ry. Co. v. Hudson, (1853) 51 Eng. Rep. 866.

47. *Id.* at 868.

48. Since the fiduciary duties of directors—all of those duties, including the duty to maximize value for shareholders—arise in equity, it is thus odd in the extreme that some scholars have argued that the absence of a statutory mandatory requiring directors to maximize value for shareholders somehow suggests that there is no such duty or is even relevant to the question of the existence of such a duty. *E.g.*, Elhauge, *supra* note 33, at 738 ("None of the fifty states has a statute that imposes a duty to profit-maximize or that makes profit-maximization the sole purpose of the corporation"); Bruner, *supra* note 33, at 1400, 1426 (observing that "[t]he claim that shareholder wealth maximization is the corporate end . . . is undercut by the fact that no state statute explicitly mandates the maximization of shareholder wealth," and "[b]ecause the Delaware legislature itself has never clarified whether the corporation's primary purpose is to maximize the wealth of shareholders or the aggregate well-being of all its stakeholders, judges have inevitably been thrust into the middle of patently political questions"); Johnson, *Unsettledness in Delaware Corporate Law*, *supra* note 33, at 432 ("No corporate statute in the United States . . . requires a corporation to advance a particular purpose, such as profit or share price maximization, [and] consistent with an expansive, enabling philosophy on company powers and purposes, corporate statutes—including Delaware's—are wholly agnostic on corporate purpose."). Since the fiduciary duties of directors are creatures of equity, not statute, such arguments get the fundamental point about the relation of law and equity precisely backward. What can intelligently be said here is that the failure of the Delaware General Assembly to overrule by statute the clear holdings of *Revlon* and similar cases "must be read to express legislative acquiescence in" those holdings. Yosifon, *supra* note 13, at 194.

of Chancery over corporations [is] limited to the directors and officers of the corporation, in their character of trustees, for a breach of trust."[49] Since trustees, of course, have to act solely for the benefit of the beneficiaries of a trust, so too did directors have to act solely for the benefit of the shareholders of the corporation.[50] This is the general principle—that directors must act for the benefit of shareholders. The principle that directors may not act to benefit themselves at the expense of the shareholders is merely a corollary—a special case, albeit the most common kind of case, in which directors violate the general principle.

Thus, from the very beginning, it was perfectly well understood that directors may not act for the purpose of benefiting third parties (what we would call today other constituencies) to the detriment of the shareholders. For example, in 1855, the United States Supreme Court decided *Dodge v. Woolsey*.[51] In that case, a shareholder challenged the corporation's paying certain taxes that the directors admitted they thought were not legally due.[52] In finding for the shareholder plaintiff, the Supreme Court stated,

> It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to *prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares*, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a *breach of trust*.[53]

Notice that, even at this early date, the Court says it is well-established ("no longer doubted, either in England or the United States") that *courts of equity* have jurisdiction over the directors of corporations.[54] The Court gives the reason for this as well: actions by directors of corporations involve a traditional concern of equity—possible "breaches of trust."[55] Again, the express assumption here is that directors are trustees in a *cestui que* trust—or as would later be made clear, are sufficiently similar to such trustees as to justify equity jurisdiction over them.[56] And if the directors are like trustees of such a trust, there must be

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49. Hodges v. New Eng. Screw Co., 1 R.I. 312, 351 (1850), *petition for rehearing dismissed*, 3 R.I. 9 (1853).

50. *See, e.g.*, Dodge v. Woolsey, 59 U.S. 331, 339–42 (1855) (holding that directors who caused the corporation to pay certain taxes admittedly not legally due violated their duty of loyalty).

51. *Id.*

52. *Id.* at 339.

53. *Id.* at 341 (emphasis added).

54. The principle goes back at least as far as the 1742 case of *Charitable Corp. v. Sutton*, where Lord Hardwicke stated that "a court of equity" can "lay hold of every breach of trust, let the person be guilty of it either in a private, of a public capacity," and, "[t]he tribunals of this kingdom are wisely formed both of courts of law and equity," and "for this reason there can be no injury, but there must be a remedy in all or some of them." Charitable Corp. v. Sutton, (1742) 26 Eng. Rep. 642, 645. By the time of Chancellor Kent, the jurisdiction of the courts of equity over corporate directors was well settled in the United States as well. *See, e.g.*, Att'y Gen. v. Utica Ins. Co., 2 Johns. Ch. 371 (N.Y. Ch. 1817) ("[T]he persons who, from time to time, exercise the corporate powers, may, in their character of trustees, be accountable to this Court for a fraudulent breach of trust; and to this plain and ordinary head of equity, the jurisdiction of this Court over corporations ought to be confined.").

55. *Woolsey*, 59 U.S. at 339–41, 365.

56. *See* discussion *infra* Part VII. On the possible ancient origins of such concepts, see STEPHEN M. BAINBRIDGE, *Parable of the Talents*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 97 (Edward Elgar Publishing; D. Gordon Smith & Andrew S. Gold eds. 2018).

one or more beneficiaries of the trust as well, and indeed there are—the *shareholders*. As noted above, it is elementary that, in a *cestui que* trust, the trustee may not direct value out of the trust to benefit a non-beneficiary, unless perhaps doing so redounds to the greater benefit of the beneficiary.[57] Hence, in the passage quoted above, the Supreme Court states that it would be "a breach of trust" if the directors ("those who administer" the corporation) were to misapply the corporation's "capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares."[58]

A second thing to notice about this passage from *Dodge v. Woolsey* is that, although, as is common in early cases, the Court is concerned with actions that violate the corporate charter,[59] nevertheless the Court clearly distinguishes between the directors' "doing acts which would amount to a violation of charters" and their "misapplication of [the corporation's] capital or profits."[60] This makes perfect sense: if a corporation is organized for operating a railroad, the directors could easily take an action that is indisputably within the corporate purpose and certainly not *ultra vires* (e.g., buying locomotives) but that they did not believe was in the long-term interest of the shareholders (e.g., because they knew they could buy better locomotives from another vendor at a lower price). The distinction the Court is drawing (again, between acts violating the charter and acts misapplying corporate funds) is the precursor of the now elementary doctrine that corporate actions must be *twice-tested*: once to make sure they are legal, in the sense of complying with the statutory corporation law and charter, and a second time to make sure they are equitable.[61] It is the second test—the test that we today associate with the fiduciary duties of directors—that involved the norm that directors should operate the corporation for the benefit of the shareholders: equity jurisdiction over the directors was founded on the notion that the corporation is, or is like, a trust—meaning that the directors are, or are like, trustees; and the shareholders are, or are like, beneficiaries of the trust. Absent that notion, there would have been no basis for equitable jurisdiction in corporate cases.

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57. *E.g.*, RESTATEMENT OF TRUSTS § 170(1) (AM. L. INST. 1935) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."), cmt. p ("The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefiting the third person rather than the trust estate.").

58. *Woolsey*, 59 U.S. at 341.

59. *Id.* at 339–41.

60. *Id.* at 336–41.

61. Berle, *supra* note 19, at 1049. Delaware has long followed the twice-tested doctrine. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("The answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible."); Moran v. Household Int'l Inc., 500 A.2d 1346, 1350 (Del. 1985) ("[T]he business judgment rule can only sustain corporate decision making or transactions that are within the power or authority of the Board. Therefore, before the business judgment rule can be applied it must be determined whether the Directors were authorized to adopt the Rights Plan."); *In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1222 (Del. 2017) ("[D]irector action is 'twice-tested,' first for legal authorization, and second by equity."); Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 633 (2010) (stating that the Delaware General Corporation Law "gives directors capacious authority to undertake lawful actions of various kinds in the pursuit of profit, subject to two important constraints: (1) a discrete set of mandatory statutory rules, such as requirements for director elections and stockholder votes and (2) the requirement that director actions authorized by law be undertaken in conformity with equity."); *Id.* at 643 ("The makers of Delaware statutory and common law have spent the seventy-five years since Berle wrote these words [about actions by directors being twice-tested] putting his policy prescription into action.").

Nor can there be any doubt that all this was widely understood by the mid-nineteenth century, for treatise writers of the time expressly took it as an axiom that corporations should be run for the benefit of their shareholders.[62] Thus, in 1861, noting that chancery has jurisdiction over joint-stock corporations, Angell and Ames stated in their treatise on *The Law of Private Corporations Aggregate*, "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation; and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon general principles of equity, be suffered to pass without a remedy."[63] The United States Supreme Court would later quote this passage in *Koehler v. Black River Falls Iron Co.*[64] in 1862.

Similarly, in 1882, in his *Treatise on the Law of Private Corporations*, Victor Morawetz says, *in the very first sentence* of his discussion of the rights of shareholders, "The ultimate object for which every ordinary business corporation is formed is the pecuniary profit of its individual members."[65] He also says,

> The relation between a corporation and its several members [i.e., shareholders] may, for all practical purposes, be treated as that of trustee and *cestui que trust*. In contemplation of law, the property and rights of an incorporated association belong to the united association acting in the corporate name, and not to its stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be enforced by the courts of equity.[66]

This, of course, is exactly the teaching of the Supreme Court in *Dodge v. Woolsey* from 1855, and, unsurprisingly, *Dodge* is one of more than ten cases Morawetz cites in support of this proposition.[67]

Given that the directors are to manage the corporation for the benefit of the shareholders, it follows immediately that they may not manage the corporation for the benefit of anyone else—e.g., as we would say today, for the benefit of other corporate constituencies. Since corporations are constantly dealing with members of such constituencies, however, it is natural and to be expected that questions would arise as to whether such dealings were appropriate or perhaps crossed the line into an inappropriate diversion of value from the corporation (and thus the shareholders) to other parties. And, in fact, such cases did arise, as we shall see in the next section.

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62. *Cf.* Bainbridge, *supra* note 2, at 83 (stating that "by the middle part of the 19th Century, the law recognized that the rationale of existence for business corporations was private profit rather than public benefit").

63. JOSEPH K. ANGELL & SAMUEL AMES, LAW OF PRIVATE CORPORATIONS AGGREGATE § 312 (John Lathrop ed., 7th ed. 2005) (1861).

64. Koehler v. Black River Falls Iron Co., 67 U.S. 715, 721 (1862) (replacing a semicolon with a common after "effects of the corporation").

65. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 344, at 346 (1882).

66. *Id.* § 381, at 385–86.

67. *Id.* Chancellor Allen agrees that, at the end of the nineteenth century, there is no doubt that the law was that directors should operate the corporation for the benefit of the shareholders. He writes that "if towards the close of the last [i.e., the nineteenth] century one would have asked to whom directors owe a duty of loyalty, a confident answer could have been expected: . . . . The directors are elected by the shareholders and it is unquestionably on *their* behalf that the directors are bound to act. This view, with its genesis in the mid-nineteenth century, was plainly expressed in the law." Allen, *supra* note 16, at 267.

III. THE PRE-HISTORY OF *REVLON* IN THE COMMON LAW TRADITION

Although courts were holding as early as 1855 that directors should operate the corporation for the benefit of the shareholders and not other corporate constituencies,[68] they did not imagine that this meant that directors should be tight-fisted hands at the grindstone, squeezing, wrenching, grasping, scraping, clutching, covetous old sinners in the manner of Ebenezer Scrooge.[69] Such a style of management is so manifestly self-destructive that it invited parody even in 1843.[70] Rather, from the very beginnings of corporate law, it was perfectly well understood that directors *may* direct value to other corporate constituencies *if doing so results in net benefits to the shareholders in the long run*, and that such instances are routine and commonplace. Thus, in 1864, an English court held in *Taunton v. Royal Insurance Co.* that an insurance company could pay claims by policyholders even though the losses incurred were excluded from the policies and the company had no legal obligation to pay the claims, because "by paying these small losses, rather than risk the character of the company and the loss of these or other customers,"[71] the expenditure was "designed to secure to the Company the largest possible amount of profits in its own proper business."[72] In 1876, another English court held, in *Hampson v. Price's Patent Candle Co.*, that a corporation could pay a gratuitous bonus of a week's wages to employees because the directors had concluded that "giving this gratuity to workmen in a prosperous year [will] induce the workmen . . . to work better—to carry on the factory in a better way in future."[73] And in 1883, in *Hutton v. West Cork Railway Co.*,[74] the most thoroughly-reasoned case enunciating the relevant rule, Lord Bowen said the following:

> It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors . . . are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is bona fide, but whether, as well as being done bona fide, it is done within the ordinary scope of the company's business, and *whether it is reasonably incidental to the carrying on of the company's business for the company's benefit*. Take this sort of instance. A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a

68. Dodge v. Woolsey, 59 U.S. 331, 339–41 (1855).

69. *See* CHARLES DICKENS, A CHRISTMAS CAROL, at Stave I (1843) ("But he was a tight-fisted hand at the grindstone, Scrooge! a squeezing, wrenching, grasping, scraping, clutching, covetous, old sinner! Hard and sharp as flint, from which no steel had ever struck out generous fire; secret, and self-contained, and solitary as an oyster!").

70. *Id.*

71. Taunton v. Royal Ins. Co. (1864) 71 Eng. Rep. 413, 415.

72. *Id.*

73. Hampson v. Price's Patent Candle Co. [1876] 34 LT 711, 712.

74. Hutton v. W. Cork Ry. Co. [1883] 23 Ch D 654.

> matter which is reasonably incidental to the carrying on of the business of the company, and a company which always treated its employees with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted—at all events, unless labour was very much more easy to obtain in the market than it often is. *The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company*.
>
> Now that I think is the principle to be found in the case of *Hampson v. Price's Patent Candle Company*. The Master of the Rolls there held that the company might lawfully expend a week's wages as gratuities for their servants; because that sort of liberal dealing with servants eases the friction between masters and servants, and is, in the end, a benefit to the company. It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose.[75]

This is manifestly the same rule about directors being permitted to consider non-shareholder constituencies only instrumentally that the Delaware Supreme Court would repeat in *Revlon* more than a century later.[76] Indeed, the *Hutton* court even anticipates the more famous holding in *Revlon* that, once the board has decided to sell the company for cash, even such limited, instrumental consideration of the interests of other corporate constituencies as is generally permissible becomes forbidden.[77] For, the corporation in *Hutton* had sold its assets to another entity and was winding up its affairs, and for that reason the court held that the usual rule from the *Hampson* case was not applicable and the company was *not* permitted to make payments to employees that were not legally required.[78] As Lord Cotton explained,

> It was said [by counsel for the company] that it is within the powers of the directors of a trading or business company to grant gratuities to its servants, and that this case comes within that principle, as the directors of this company retained such powers as were incident to a company of this kind, notwithstanding that its railway had been handed over to the purchasing company—the *Bandon Company*. I think that the directors did continue to have powers, so far as they were necessary for or incidental to the winding-up of the company. But, in my opinion, they had not such powers as only are impliedly given to general meetings or to directors because they are carrying on a business for the purpose of carrying on its business, and for the purpose of making a profit from it. Cases were referred to in which the late Master of the Rolls and Vice-Chancellor *Wood* had determined that matters which were not under the powers expressly given to the directors or the general meeting were within the powers of the directors of a

75. *Id.* at 672–73 (emphasis added) (footnote omitted).
76. Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).
77. *Id.* at 182–83
85. *Hutton*, 23 Ch D at 664–66.

> going concern. One was *Taunton v. Royal Insurance Co.*, where it was held that an insurance company might pay losses arising from lightning, which were not within the loss which they professed to insure against; and the other case, *Hampson v. Price's Patent Candle Co.*, where the Master of the Rolls held that the directors of Price's Patent Candle Company were at liberty to make, and could not be restrained from making, a gratuity to their servants when there had been a very good year, by giving each of them who was in their service and was of good character a gratuity equal to a week's wages. In my opinion those cases went on a principle which is not applicable to the existing state of this company, from the time when it handed over its railway to another company, and existed only for the purpose of winding-up the concern. The principle of those cases, as I understand, is this, that where there are directors of a trading company, those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business, with a view to getting either better work from their servants, or with a view to attract customers to them, as in the case of an insurance company. In the last-mentioned case the Master of the Rolls refers to this—that although it is said that nothing of this kind is to be expected again, yet when such a gratuity is given to servants in a good year, the servants then in the company's service, whom the directors may reasonably expect to stay, naturally look forward, not as a matter of right but as a matter of liberality, to this, that they will probably be dealt with in a similar way if by their exertions they get a good profit, and that, therefore, that was a reasonable mode of carrying on the business of the company for the purpose of making it most profitable. But that assumes that it is a going concern, that it is a continuing business, and it is with reference to the effect upon the continuing business that the directors are said to have that power incidentally. And so in the case before Vice-Chancellor Wood. There it was shewn that what the insurance company did was a reasonable way of conducting the business of an insurance office, in order to attract customers, by paying losses which were not strictly within the terms of the policy, and therefore could not be said to be legally enforceable against the company. But here the company was gone as a company carrying on business for the purpose of making profit, and the sums paid, therefore, to its officials and managing directors, could not be looked upon as an inducement to them to exert themselves in future, or as an act done reasonably for the purpose of getting the greatest profit from the business of the company, but must be looked upon simply as a gratuity, perhaps reasonable in itself, but without any prospect of its in any way reasonably conducing to the benefit of the company. In my opinion, therefore, under these circumstances, neither the directors nor the general meeting had any power in the circumstances which are before us, as I understand the facts of the case, of granting that compensation to the officials and other servants.[79]

Lord Bowen and Lord Cotton thus present a very coherent doctrine: corporations are, in all cases, to be managed for the benefit of their shareholders; when the corporation is a going concern, this can include directing value to non-shareholder constituencies if the purpose

79. *Id.*

of doing so is to generate profits for shareholders in the future, but when the interest of the shareholders in the corporation is terminating, so that there is no future when such profits could be captured, the directors may *not* direct value to non-shareholder constituencies. Of course, this is also precisely what the Delaware Supreme Court said in *Revlon* more than a century later in 1986.

Unsurprisingly, courts continued to state and restate the same principle. A couple of decades after *Hutton*, a New York court held in 1909 that a corporation could own and operate a hospital to care for those of its employees suffering from tuberculosis because doing so ultimately redounded to the benefit of the company.[80] It said,

> These acts are not to be defended upon the ground of gratuity or charity, but they enter into the relation of the employer and employé, become as it were a part of the inducement for the employé to enter the employment and serve faithfully for the wage agreed upon, and become a part of the terms of employment. The considerate employer, who treats his employés well, *is thus able to secure better service, and upon more satisfactory terms*, than the unwilling, illiberal employer.[81]

Thus, "the company has the right to care for and treat its employés so afflicted, and may do this in the manner which promises the best result to the patient *and consequently to the company itself*."[82]

Ten years later, we come to *Dodge v. Ford Motor Co.*, in which the Michigan Supreme Court famously stated,

> 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, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[83]

To my mind, that holding is perfectly clear, but those who deny that Delaware law (or traditional corporate law generally) requires directors to manage the corporation for the benefit of its shareholders adduce a seemingly endless array of arguments to show that *Dodge v. Ford* does not say what it plainly says.[84] Since Professor Bainbridge disposes of all these arguments quite effectively,[85] I will not repeat his refutations here. I will, however, note what I think ought to be called the "*Dodge* Dodge": that is, the double fallacy of (a) implicitly assuming that *Dodge* is the only case, or at least the only important case, that holds that corporations are to be managed for the benefit of their shareholders,[86] and then

80. People *ex rel.* Metro. Life Ins. Co. v. Hotchkiss, 120 N.Y.S. 649, 651 (N.Y. App. Div. 1909).

81. *Id.* at 651 (emphasis added).

82. *Id.* at 652 (emphasis added).

83. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

84. *E.g.*, Blair & Stout, *supra* note 32, at 301–02 (arguing that *Dodge* "was a highly unusual case" and even if *Dodge* stated the law correctly in 1919, "case law has evolved significantly since 1919, and in a direction that disfavors the shareholder primacy view").

85. Bainbridge, *supra* note 2, at 92–116.

86. Professor Yosifon observes perceptively that the Michigan Supreme Court cited no authorities for the proposition that business corporations are organized and carried primarily for the profit of the shareholders "as if

(b) somehow explaining *Dodge* away. Both halves of the fallacy are preposterous impositions, but the first half is worse, for, as noted above, the most famous and most important case holding that directors have a duty to maximize value for shareholders (outside the change of control context as well as inside it) is, of course, *Revlon*,[87] the most important case ever decided by the most important court of the most important corporate law jurisdiction in the world. And as I have been showing (and will continue to show), there are a great many other cases, besides *Revlon* and *Dodge*, that hold the same.

Indeed, three years after *Dodge*, in 1922, a federal district court in New York held that a corporation could make donations to universities to fund business education programs because "it would in all probability inure to the future advantage of the company to be able to secure employees trained and skilled in corporate business and industrial affairs" and because "the company would receive advertisement of substantial value, including the good will of many influential citizens and of its patrons."[88] Again, this is exactly the rule from *Revlon*: the company may direct value to other corporate constituencies (here employees), provided that doing so is not a gratuity or charity but for the ultimate benefit of the shareholders.[89]

IV. Early Corporate Law Treatises Say That Directors Are Required to Manage the Corporation for the Benefit of the Shareholders

Given the significant amount of caselaw on the topic, all the great early treatises on corporate law repeat the rule that directors are required to manage the corporation for the benefit of the shareholders. As noted above, Morawetz states categorically, "The ultimate object for which every ordinary business corporation is formed is the pecuniary profit of its individual members."[90] Twenty years after Morawetz, in the 1902 edition of *Marshall on Private Corporations*, we find the authors thinking of directors more as agents than trustees, but their duty to manage the corporation for the benefit of the shareholders remains the same. They state,

> It is sometimes said that the directors and other officers of a corporation are trustees for the corporation, or for the shareholders collectively. They are not "trustees," however, in the strict sense of the term. Properly speaking, the relation is that of principal and agent, and their liability to the corporation for mismanagement is determined by substantially the same principles which determine the liability of any other agent to his principal for failure to perform the duties which had undertaken.[91]

That said, "as agents," directors "occupy a fiduciary relation" and are "intrusted with the management of the corporation, *for the benefit of the stockholders collectively*."[92] Moreover, the authors understand this relation between shareholder interests and the

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the court considered [the matter] obvious." Yosifon, *supra* note 13, at 188. Based on the history recounted here, I suggest that it *was* obvious.

87. Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).
88. Armstrong Cork Co. v. H.A. Meldrum Co., 285 F. 58, 58–59 (W.D.N.Y. 1922).
89. *Revlon*, 506 A.2d at 182.
90. Morawetz, *supra* note 65, at 346.
91. Wm. L. Clark & Wm. L. Marshall, Marshall on Private Corporations § 373 (1902).
92. *Id.* § 376 (emphasis added).

interests of other corporate constituencies in exactly the way the Delaware Supreme Court would in *Revlon*.[93] Thus, they write, "Ordinarily, a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders, and is *ultra vires*, however worthy of encouragement or aid the object of the gift may be."[94] But, when directors confer value on another party in order to benefit the shareholders in the long run (i.e., consider the other constituency instrumentally, as in *Revlon*), then there is no breach of duty:

> There may be circumstances, however, under which a gift of property by a corporation would be a legitimate means of increasing or carrying on its business, and in such a case it would not be *ultra vires*. It has been held, for example, that an insurance company, for the purpose of increasing its business, may properly pay a consumer a loss not covered by his policy, and for which it could not be held liable; that a corporation may pay extra wages to its workmen or other employees out of its undivided profits, for the purpose of advancing its interests.[95]

These two examples should sound familiar, for the authors are referring, respectively, to the *Taunton* and *Hampson* cases discussed above. They go on to mention several similar cases, including ones involving companies that paid for doctors or nurses for injured employees, companies that gave away products for the purpose of advertising, or companies that sponsored fairs or festivals in order that their "business will be increased" thereby.[96]

Six years later, Arthur W. Machen, Jr., writing in the 1908 edition of his *A Treatise on the Modern Law of Corporations*, states that "any action which directors take for any other purpose than to promote their company's prosperity is deemed fraudulent in law."[97] As to directors acting to benefit what we could call other corporate constituencies, Machen reiterates the entire doctrine of *Hutton* that the Delaware Supreme Court would state in *Revlon*.[98] He writes,

> As all business corporations are formed for the acquisition of gain, they have no power, out of mere generosity or public spirit, to expend their funds for charitable or philanthropic objects . . . . But although business corporations cannot contribute to charity or benevolence, yet they are not required always to insist on the full extent of their legal rights. They are not forbidden from recognizing moral obligations of which strict law takes no cognizance. They are not prohibited from establishing a reputation for broad, liberal, equitable dealing which may stand them in good stead in competition with less fair rivals. Thus, an incorporated fire insurance company whose policies except losses from explosions may nevertheless pay a loss from that cause when other companies

93. *Revlon*, 562 A.2d at 182–83.
94. CLARK & MARSHALL, *supra* note 91, § 62.
95. *Id.*
96. *Id.*
97. ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS WITH REFERENCE TO FORMATION AND OPERATION UNDER GENERAL LAWS § 1527 (1908).
98. Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–83 (Del. 1986).

> are accustomed to do so, such liberal dealing being deemed conducive to the prosperity of the corporation.
>
> The extent of this power of corporations has been questioned most frequently with respect to gifts and gratuities to servants and agents. It is settled that a corporation may bestow reasonable gratuities on its employees in addition to the compensation to which they may be legally entitled. Thus, a manufacturing company may give a gratuity of one week's extra pay to each of its laborers who have worked for the company faithfully for more than a year. So, a bank may grant a five years' pension to the family of one of its officers. In all cases of these sorts, the amount of the gratuity rests entirely within the discretion of the company, unless indeed it be altogether out of reason and fitness. But where the company has ceased to be a going concern, this power to make gifts or presents is at an end. Thus, where a company has sold out its business and undertaking, and is about to be wound-up, a general meeting has no power to vote a portion of its funds to its directors, officers, and servants, in consideration of their past services and loss of positions. The reason for this is that where the company is about to discontinue its business those interested in it cannot be benefited by such gratuities, for no reputation for fair-dealing and generosity can further advantage them. As many American courts would say, the assets have become a "trust-fund" for the benefit of creditors and shareholders. Lord Bowen, with a homely Shakespearean phrase, has tersely indicated the reason of the law thus: "The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."[99]

Of course, the cases Machen cites include again *Taunton v. Royal Insurance Co.* and *Hampson v. Price's Patent Candle Co.*, and the quotation from Lord Bown is from *Hutton v. West Cork Railway. Co.*[100]

Nine years after Machen, in 1917, in perhaps the greatest corporate law treatise of the era, William Meade Fletcher takes up the by then well-worn question of in what way directors are trustees, explaining in his *Cyclopedia of Corporations*,

> In order to determine the rights, duties and liabilities of corporate directors, the courts often predicate their holding upon the statement that the directors or other officers are agents or are trustees, or both. Sometimes directors or other officers are stated to be, or are considered as, agents. On the other hand, it is sometimes said that the directors, trustees and other officers of a corporation are trustees for the corporation, or for the stockholders collectively, and in a certain sense this is true. They are not "trustees," however, in the strict sense of the term. Directors, said Justice Lurton when a member of the Supreme Court of Tennessee, "are not express trustees. . . . It is a statement often found in opinions, but is true only to a limited extent. They are mandataries. They are agents. They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith. They do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the

99. MACHEN, *supra* note 97, § 87 (footnotes omitted).
100. *Id.*

> corporate property. They are equally interested with those they represent. They more nearly represent the managing partners in a business firm than a technical trustee. At most, they are implied trustees, in whose favor the statutes of limitation do run."
>
> Still other decisions refer to directors as agents "and" trustees. In other cases, instead of being considered either trustees or agents, they have been regarded merely as mandatories, i.e., persons who have gratuitiously [sic] undertaken to perform certain duties.[101]

Of course, if directors are agents, then in accordance with elementary principles of agency law, they are under a duty to act solely for the benefit of their principal in all matters connected with their agency.[102] In other words, the end result is the same. As Fletcher puts it,

> But whether or not directors and other corporate officers are strictly trustees, there can be no doubt that their character is that of a fiduciary so far as the corporation and the stockholders as a body are concerned. In other words, it is unquestionably true that, as agents intrusted with the management of the corporation, *for the benefit of the stockholders collectively*, they occupy a fiduciary relation, and in this sense the relation is one of trust.[103]

That is, just as the relationship between directors and shareholders may be understood as (or analogized to) the relationship between trustees and beneficiaries of a *cestui que* trust, so too may it be understood as the relationship between agents and principals. In either case, the relationship is that of persons having a fiduciary duty and the persons to whom that duty is owed. In either case, therefore, those in the first group must act exclusively for the benefit of those in the second.[104]

Given all this, and given especially that Fletcher was saying in 1917 that directors are "agents intrusted with the management of the corporation *for the benefit of the shareholders*," it is hardly surprising that the Michigan Supreme Court said exactly the same thing in *Dodge v. Ford Motor Co.* two years later in 1919. As noted above, the court said,

> 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, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[105]

The notion that this holding in *Dodge v. Ford Motor Co.* was thus somehow novel or unusual is manifestly absurd; indeed, it is a travesty. The holding was, rather, the merest

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101. WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2261, at 3507–09 (1917) (footnotes omitted).

102. *E.g.*, RESTATEMENT OF AGENCY § 387 (AM. L. INST. 1933) ("[A]n agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

103. FLETCHER, *supra* note 101, § 2261, at 3507–09 (emphasis added) (footnote omitted).

104. *E.g.*, AGENCY, *supra* note 102.

105. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

repetition of a principle of law familiar to all competent corporate lawyers—a fundamental principle of trust and agency law as applied in the corporate context.

Unsurprisingly, treatise writers continued to state and explain the principle in the years after *Dodge* as well. Thus, in the 1927 edition of his treatise on corporate law, Henry Winthrop Ballantine writes,

> It is sometimes said that the directors and other officers of a corporation are trustees for the corporation, or for the shareholders collectively. If this means no more than that directors in the performance of their duties and the exercise of their agency on behalf of the corporation stand in a fiduciary relationship to the company, it is true enough. But the statement is misleading as a description of what the duties of a director are. There may be little resemblance between the duties of a trustee under a will and the duties of a director. These duties will vary with the size of the business, the kind of corporation and what matters are properly delegated to the manager and other officials. They are not 'trustees' in the strict sense of the term. Properly speaking, the relation is that of principal and agent. As agents in control of affairs, the directors of a corporation occupy a fiduciary relation to it which imposes upon them the duty to use the authority given them solely for the benefit of the corporation and its stockholders. The law does not permit them to appropriate its property to themselves *nor to divert it* to others nor suffer others to misappropriate it.[106]

Like so many before him, Ballantine also explains that directors may confer value on other corporate constituencies, provided that they do so instrumentally in furtherance of the end of ultimately benefiting shareholders.[107] Thus, he says, "A business corporation is organized and carried on primarily for the profit of the stockholders. The discretion of directors does not extend to the devotion of capital or profits to humanitarian purposes to benefit mankind at the expense of the stockholders."[108] Nevertheless,

> There may be circumstances . . . under which a gift of property by a corporation would be *a legitimate means of increasing or carrying on its business*, and in such cases it would not be *ultra vires*. There is a clear distinction between a pure gift and a donation made *with a view of receiving material benefits therefrom*. It has been held, for example, that an insurance company, for purposes of increasing its business, may properly pay a customer loss not covered by his policy, and for which it could not be held liable; that a corporation may pay extra wages to its workmen or other employees out of its undivided profits, for the purpose of advancing its interests.[109]

As in Machen, the examples Ballantine mentions are, respectively, the *Taunton* and *Hampson* cases discussed above.[110] Again as in Machen, Ballantine goes on to mention many other examples as well, including cases involving companies that paid for doctors or

106. HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS, FOUNDED ON CLARK AND MARSHALL CORPORATIONS § 114 (1927).

107. *Id.* § 58.

108. *Id.*

109. *Id.* (emphasis added)

110. *Id.*

nurses for injured employees; gave away products for the purpose of advertising; supported libraries, churches or schools "to gain good will of [their] employees"; contributed funds to colleges and universities to support the training of possible employees or to advance scientific research "where in the discretion of the directors the advantage to the corporation maybe direct and substantial"; or sponsored fairs and festivals if their "business will be increased" thereby.[111]

It is no wonder, then, that, in 1932, in the Berle-Dodd exchange on the purpose for which the corporation should be managed, Professor Dodd, who was arguing for the *stakeholder* model, referred to "the orthodox theory that the managers are elected by stockholder-owners to serve their interests exclusively."[112] It was *exactly* that—the "orthodox" view in the sense that it had long been accepted by courts and treatise-writers as axiomatic.

V. THE *REVLON* RULE IN DELAWARE BEFORE *REVLON*

Against this background, it is hardly surprising that the rule from *Revlon* that directors may consider other corporate constituencies only instrumentally in the effort to maximize shareholder value had been adopted by Delaware courts long before *Revlon*. As former Chief Justice Strine says, "*Revlon* did not invent the notion that consideration of other constituencies had to be tied to the end of advancing stockholder welfare. That was a venerable principle of our corporate law long before the Delaware Supreme Court issued its decision" in that case.[113]

From the beginning, the Delaware Court of Chancery, just like other courts of equity, assumed jurisdiction over corporate directors and imposed upon them fiduciary duties to manage the corporation for the benefit of the shareholders. Thus, in 1921, in *Cahall v. Lofland*, Chancellor Curtis said that "the directors and officers of a corporation are stewards, or trustees, for the stockholders," and so, "their acts are to be tested as such according to the searching, drastic and far-reaching rules of conduct which experience has found to be salutary to protect trustee beneficiaries."[114] A director "stands in a fiduciary relation which requires him to exercise the utmost good faith in managing the business affairs of the company with a view to promote . . . the common interests" of the shareholders.[115] The Delaware Supreme Court confirmed the view that directors would be treated as trustees, saying in landmark case of *Guth v Loft*, "While technically not trustees," corporate directors and officers "stand in a fiduciary relation to the corporation and its stockholders."[116] Hence, the law

> demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing

111. BALLANTINE, *supra* note 106, § 58.
112. Dodd, *supra* note 17, at 1157.
113. Strine, *supra* note 35, at 779 ("Revlon did not invent the notion that consideration of other constituencies had to be tied to the end of advancing stockholder welfare. That was a venerable principle of our corporate law long before.").
114. Cahall v. Lofland, 114 A. 224, 228 (Del. Ch. 1921).
115. *Id.* (quoting DuPont v. DuPont, 242 F. 98, 136 (D. Del. 1917)).
116. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

> anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.[117]

Indeed, as recently as 2021, the Delaware Court of Chancery stated, "Delaware law has long treated directors as analogous to trustees for the stockholders."[118]

Against this background, in 1969, in *Kelly v. Bell*, Chancellor Duffy considered a case in which a stockholder of United States Steel Corporation (U.S. Steel) sued the company's directors, claiming that certain payments that the company had made to local taxing authorities in Allegheny County, Pennsylvania, amounted to waste.[119] For many years, Allegheny County had imposed an *ad valorem* tax on certain personal property in the county, and U.S. Steel, which maintained several large facilities there, paid millions of dollars in taxes annually to the county.[120] Eventually, U.S. Steel agreed, though not (as the court found) in a legally binding way, to continue to pay about $5 million annually to the country even after the Pennsylvania legislature eliminated the county's ability to impose the *ad valorem* tax.[121] In rejecting the plaintiff's claim that these payments amounted to waste, Chancellor Duffy stated that the corporation had been "making donations to the local communities," but "to call these payments 'donations' is not to say that they were made out of corporate Largess or that they were accompanied by only the most general of corporate purposes."[122] Rather, "they were made with a recognition of [U.S.] Steel's responsibility to the communities in which it was established *and of its self-interest* in having [the law eliminating the county's ability to tax U.S. Steel] remain unaltered on the statute books."[123] Citing the *Hutton v. West Cork Railway Co.* case discussed above, the Chancellor concluded that "the payments were at least reasonably incidental to the carrying on of the Company's business *for its benefit*."[124] On appeal, the Delaware Supreme Court affirmed, stating, "There is no evidence that any director or officer was motivated . . . by any consideration other than that of *doing what was best for* [*U.S.*] *Steel*," and so, "For the reasons set forth in the Chancellor's opinion, we agree with his decision that these acts are governed by the 'business judgment' rule, and were in fact the result for the exercise by them of honest business judgment."[125]

In another case from the same year, *Theodora Holding Corp. v. Henderson*,[126] the Court of Chancery applied exactly the same principle.[127] In that case, a shareholder challenged a gift by the corporation of shares of its own stock to a charitable organization

117. *Id.*

118. Firefighters' Pension Sys. of Kan. City, Mo. Tr. v. Presidio, Inc., 251 A.3d 212, 286 (Del. Ch. 2021).

119. Kelly v. Bell, 254 A.2d 62, 64 (Del. Ch. 1969), *aff'd* 266 A.2d 878 (Del. 1970).

120. *Id.* at 64–67.

121. *Id.* at 68.

122. *Id.* at 74.

123. *Id.* (emphasis added). U.S. Steel was paying less with these so-called voluntary donations than it had been paying in *ad valorem* taxes, and had U.S. Steel stood on its rights and paid nothing to the county, the effects on the county would likely have been so severe as to lead to the reimposition of taxes in some form; the fear was, apparently, that U.S. Steel would then be worse off than it was before. *See id*.

124. *Kelly*, 254 A.2d at 74 (emphasis added).

125. Kelly v. Bell, 266 A.2d 878, 879 (Del. 1970).

126. Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969) (Mavel, V.C.).

127. *Id.* at 405. Professor Yosifon reads *Theordora* in the same way argued for here. Yosifon, *supra* note 13, at 214–17.

providing services to underprivileged children.[128] After noting that section 122 of the Delaware General Corporation Law provides that Delaware corporations shall have power to make donations for charitable purposes (i.e., that the gift was *legal*), Chancellor Marvel went on to say that "the test to be applied in passing on the validity of a gift such as the one here in issue [(i.e., the test in *equity*)] is that of reasonableness."[129] After estimating the cost of the gift to the shareholders of the corporation, Chancellor Marvel upheld the gift because

> the relatively small loss of immediate income otherwise payable to plaintiff and the corporate defendant's other stockholders, had it not been for the gift in question, is far out-weighed by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, *thereby benefiting plaintiff* [i.e., a stockholder of the corporation] *in the long run*.[130]

In other words, just as in *Kelly v. Bell*, the test was whether the gift benefited the corporation's shareholders in the long term.[131] As former Chief Justice Strine says, "[W]hen approving contested charitable gifts, Delaware courts have emphasized that the stockholders would ultimately benefit from the gift in the long run."[132]

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128. *Theodora*, 257 A.2d at 402.

129. *Id.* at 405.

130. *Id.* (emphasis added).

131. Later corporate gifts cases in Delaware are similar. In *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991), although the plaintiffs did not challenge the good faith of the directors authorizing the gift (i.e., did not argue that the directors were making the challenged decision for a purpose other than long-term benefit of the shareholders), the court still noted, in reciting the facts, that the directors concluded that making the gift "would provide benefits to" the company. *Id.* at 54. More generally, the court cited *Theodora* and approved its holding that, while section 122(9) of the Delaware General Corporate Law authorizes corporations to make charitable donations, such donations will still be tested by the courts for their reasonability, thus imposing equitable limitations on such gifts. *Id.* at 61. Again, Professor Yosifon reads the case in the way indicated here. Yosifon, *supra* note 13, at 218–19.

132. Strine, *supra* note 35, at 779 ("[W]hen approving contested charitable gifts, Delaware courts have emphasized that the stockholders would ultimately benefit from the gift in the long run."). Some scholars have argued that the statutory authority for a corporation's making charitable donations somehow limits or impairs the directors' fiduciary duty to manage the corporation for the benefit of the shareholders. *E.g.*, Bruner, *supra* note 33, at 1396 ("It is often said that the aim of the corporation is shareholder wealth maximization. Yet, corporate statutes—even in Delaware—explicitly permit charitable donation of corporate assets." (footnote omitted)). As suggested by the text, this is simply to forget the fundamental principle of Delaware law that corporate actions are twice tested—once to determine if they are legal (i.e., comply with the statute and the corporation's articles and bylaws) and a second time to determine if they are equitable (i.e., comply with the directors' fiduciary duties, including the primary duty to manage the corporation for the benefit of the shareholders). Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("The answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible."); *In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1222 (Del. 2017) ("[D]irector action is 'twice-tested,' first for legal authorization, and second by equity."). As Professor Yosifon explains, the Delaware General Corporation Law provides that corporations have various powers, including the power to make charitable contributions, but "the question still remains as to what principle should govern the *exercise* of these powers," Yosifon, *supra* note 13, at 214, and "although the corporation has the power to make charitable contributions, it may not use that power in a fashion that neglects or deviates from the abiding purpose of corporate governance, the interests of the shareholders." *Id.* Delaware (and other states) passed statutes authorizing corporate donations not to modify the duty, arising in equity, of directors to manage the corporation for the benefit of the shareholders, but to make clear that such donations were

VI. *UNOCAL*, *REVLON*, AND *REVLON*'S INTERPRETATION OF *UNOCAL*

Then came the miracle year of Delaware corporate law, 1985, when the Delaware Supreme Court decided *Smith v. Van Gorkom*[133] in January, *Unocal v. Mesa Petroleum*[134] in June, and *Revlon v. MacAndrews & Forbes*[135] and *Moran v. Household International*[136] in November.

As everyone knows, in *Unocal*, the Unocal board had implemented a selective self-tender offer to thwart a hostile takeover bid from Mesa Petroleum, thus prompting a fiduciary challenge from the raider.[137] After articulating what we would today call the *Unocal* standard (i.e., the heightened standard of review applicable when a board implements antitakeover devices),[138] the Delaware Supreme Court began its application of that standard of review by returning to first principles, stating, "In the board's exercise of corporate power to forestall a takeover bid our analysis begins with the basic principle that corporate directors have a fiduciary duty to act *in the best interests of the corporation's stockholders*."[139] *Unocal* thus reaffirms unequivocally the basic principle of corporate law that directors have a duty to maximize value for the corporation's stockholders, a principle that the Delaware Supreme Court would repeat in coming years in such cases as *Cede & Co. v. Technicolor*,[140] *Malone v. Brincat*[141] and *Gheewalla*.[142] In *Unocal*, however, in explaining how that principle was to be implemented in the facts of the case, the court went on to say the following:

> If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, *the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees,*

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not illegal as being ultra vires. *See id.* (noting that, since some early cases held that all charitable donations were ultra vires, "[t]he statute clarifies that firms may make donations," but "[w]hen and how they make them is governed by background fiduciary principles").

133. Smith v. Van Gorkom, 488 A.2d 858, 858 (Del. 1985).

134. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 946 (Del. 1985).

135. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 173 (Del. 1986). The case was submitted on October 31, 1985, and the Supreme Court rendered an oral decision the next day, November 1, 1985. *Id.* The written opinion did not appear until March 13, 1986. *Id.*

136. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1346 (Del. 1985).

137. *Unocal*, 493 A.2d at 951.

138. *Id.* at 953–55.

139. *Id.* at 955 (emphasis added).

140. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) ("Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.").

141. Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) (Holland, J.) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners.").

142. N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (Holland, J.) ("The directors of Delaware corporations have 'the legal responsibility to manage the business of a corporation for the benefit of its shareholders owners.'" (quoting *Malone*, 722 A.2d at 9)).

> *and perhaps even the community generally)*, the risk of nonconsummation, and the quality of securities being offered in the exchange.[143]

Now, defenders of the stakeholder view have quoted this passage for decades, attempting to argue that it permits directors to consider the interests of non-shareholder constituencies even in instances when doing so would not involve benefits to the shareholders in the long run.[144] For example, quoting the language above, Professor Blair and Stout assert, "*Unocal* squarely rejects shareholder primacy in favor of the view that the interests of the 'corporation' include the interests of nonshareholder constituencies."[145] Also quoting *Unocal*, Professor Elhauge says, "Even the supposedly conservative Delaware . . . authorize[s] managers to reject a takeover bid based on 'the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).'"[146] Professor Stout says, "In *Unocal*, the court . . . state[d] that in evaluating the interests of 'the corporate enterprise,' directors could consider 'the impact on "constituencies" other than shareholders (that is, creditors, customers, employees, and perhaps even the community generally).'"[147] And in a very recent article, Professor LoPucki says that *Unocal* "authorizes directors to consider 'the impact [of a transaction] on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).'"[148] It is not too much to say that this passage from *Unocal* is the primary proof-text of those who argue that Delaware law employs the stakeholder model.[149]

But the notion that this passage from *Unocal* supports the stakeholder model was untenable, if not downright absurd, even the day *Unocal* was decided. For, as noted above, just before the passage in question, *on the very same page of the case*, the Delaware Supreme Court had expressly said that "our analysis begins with the *basic principle* that corporate directors have a fiduciary duty to act *in the best interests of the corporation's stockholders*."[150] Having begun by saying that the directors must act in the best interests of the stockholders, is the court to be understood as saying two paragraphs later that directors may act in the best interests of some other constituency even when this is *not* in the best interest of the stockholders? The idea is quite absurd, and so the text of the *Unocal*

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143. *Unocal*, 493 A.2d at 955 (emphasis added).

144. Yosifon, *supra* note 13, at 190 (noting that this passage from *Unocal* "has been cited many times by scholars claiming that Delaware allows directors to attend to non-shareholder interests and does not require shareholder primacy in firm governance").

145. Blair & Stout, *supra* note 32, at 308.

146. Elhauge, *supra* note 33, at 764. As Bainbridge points out, Elhauge quotes the language from *Unocal* without referring to *Revlon* and then, almost 100 pages later, finally mentions the language from *Revlon* only to "dismiss[] it essentially out of hand." Bainbridge, *supra* note 2, at 108; *see* Elhauge, *supra* note 33, at 764, 849–50 (containing Elhauge's quotation of the *Unocal* language and then dismissing the *Revlon* language nearly 100 pages later).

147. Stout, *supra* note 33, at 170.

148. LoPucki, *supra* note 33, at 2029 (quoting STOUT, *supra* note 33, at 30–31) (alterations in original).

149. Other examples include Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 651 (2006) (citing the other-constituencies language from *Unocal* but ignoring the qualifying language from *Revlon* for the proposition that "even in the takeover context, so long as the company has not entered the Revlon mode, Delaware law permits directors to consider the interests of 'creditors, customers, employees, and perhaps even the community generally.'" (quoting Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985)).

150. *Unocal*, 493 A.2d at 955 (emphasis added).

opinion, all by itself, rules out a stakeholder reading of the passage referring to other constituencies. The reference to other constituencies must mean something, however, and, both on the day *Unocal* was decided and today, there was and is no mystery as to what it means: it means that directors may consider the interests of other constituencies in exactly the way that directors have always been permitted to do so, the way that traditional corporate principles enunciated in famous cases like *Hampson*[151] and *Hutton*[152] and in prior Delaware cases like *Kelly v. Bell*[153] and *Theodora Holding Corp. v. Henderson*[154] said they could—that is, instrumentally, as a means to the end of maximizing value for shareholders.[155]

Indeed, in the context of *Unocal*, this makes perfect sense. *Unocal* articulates a standard of review that applies when directors cause the corporation to engage in defensive maneuvers to fend off a hostile takeover. Hence, *Unocal* applies only in circumstances in which the directors have determined that a takeover proposal is not in the best interest of the shareholders and that the corporation ought to remain independent—that is, in situations in which there is a long term for the shareholders' investment in the corporation. As we have seen, in such situations, directors may (indeed should) consider the effects of various actions on non-shareholder constituencies in order to determine what is best for shareholders in the long term. It is easy to imagine examples that would fit perfectly into this pattern. For instance, imagine that a board has rejected a takeover bid, made privately, as being not in the best interest of the shareholders (e.g., because the price is inadequate). Imagine further that if the raider launches a hostile tender offer, the corporation's employees may begin to desert the company in fear of what will happen to them if the bid succeeds. If the bid does not succeed, as the board hopes, then losing these employees would hurt the interests of the company's shareholders in the long term as the company continues as an independent business. An antitakeover device, such as a poison pill, could deter the hostile offer or at least make its success less likely, thus preventing or blunting the adverse effect of the offer on employees and so in turn preventing or blunting the adverse effect on shareholders. In such a case, the directors could properly take account of the effect of the offer on the corporation's employees, albeit only in an instrumental way for the ultimate purpose of doing what is best for the corporation's stockholders.

In any event, however, there can be no doubt at all what the Delaware Supreme Court meant in *Unocal* when it referred to the board's considering other constituencies, for, just six months later, the Supreme Court itself took up exactly this question in *Revlon* and definitively interpreted the relevant passage from *Unocal*.[156] *Revlon*, as is well known,

151. Hampson v. Price's Patent Candle Co. [1876] 34 LT 711 (U.K.).

152. Hutton v. W. Cork Ry. Co. [1883] 23 Ch D 654 (U.K.).

153. Kelly v. Bell, 266 A.2d 878 (Del. 1970).

154. Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969) (Mavel, V.C.).

155. *Unocal*, 493 A.2d at 955.

156. That *Revlon* definitively interprets *Unocal* in a way that absolutely excludes a stakeholder reading of *Unocal* is well-known and has been pointed out numerous times. *E.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate*, 69 U. CHI. L. REV. 1067, 1090 n.71 (2002) ("In *Unocal* . . . the Court indicated that a board's decision to block a tender offer could be based on the impact on constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)[,] *Revlon* . . . cut back on this language by establishing that while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders." (internal quotation marks omitted)); Strine, *supra* note 16, at 147 n.34

began when Ronald Perelman's Pantry Pride made a hostile offer for Revlon.[157] After initially attempting to fend off Perelman's offer, the Revlon board opened negotiations with Forstmann Little and eventually accepted an offer from that firm, justifying this decision in part on the basis that the Forstmann Little offer protected the value of certain notes that Revlon has issued.[158] It is worthwhile to consider the court's opinion in detail. In particular, in the very first paragraph of the opinion, after stating the facts in a summary fashion, the Delaware Supreme Court said,

> The Court of Chancery found that the Revlon directors had breached their duty of care by entering into [certain defensive] transactions and effectively ending an active auction for the company. The trial court ruled that such arrangements are not illegal *per se* under Delaware law, but that their use under the circumstances here was impermissible. We agree. Thus, we granted this expedited interlocutory appeal to consider for the first time the validity of such defensive measures in the face of an active bidding contest for corporate control. *Additionally, we address for the first time the extent to which a corporation may consider the impact of a takeover threat on constituencies other than shareholders*. *See Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946, 955 (1985).[159]

Note the emphasized text: referring to the very passage in *Unocal* mentioning other constituencies, the Supreme Court said that one of its purposes in taking the *Revlon* case was to "*address for the first time*" the extent to which a corporation may consider the impact of a takeover threat on constituencies other than shareholders.[160] This should signal to any competent lawyer that, as a matter of legal analysis, it would be a grave mistake to consider the passage in *Unocal* except in relation to what the Delaware Supreme Court says about it in *Revlon*. On the contrary, any competent lawyer who interprets the relevant passage in *Unocal* would have to do so in light of what *Revlon* says about it.[161]

(explaining that the "Delaware Supreme Court's contrasting treatment of the consideration directors can give to other constituencies in its famous *Unocal* and *Revlon* decisions" shows that "the cases, when read together, mean stockholders' best interests must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end"); Strine, *supra* note 35, at 771 ("The understanding in Delaware is that Revlon could not have been more clear that directors of a for-profit corporation must at all times pursue the best interests of the corporation's stockholders, and that the decision highlighted the instrumental nature of other constituencies and interests. Non-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefiting the stockholders.").

157. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).

158. *Id.* at 182. Revlon made the same argument in the Court of Chancery. MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239, 1249–50 (Del. Ch. 1985).

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

160. *Id.* (emphasis added); *see also* Strine, *supra* note 35, at 771 (observing that the court in *Revlon* stated it was addressing "for the first time" the extent to which directors could consider the interests of constituencies other than shareholders); Yosifon, *supra* note 13, at 191 (stating that the Delaware Supreme Court "took the opportunity [afforded by *Revlon*] to clarify its *Unocal* language" and emphasizing the court's statement that it was considering the extent to which directors may consider the interests of non-shareholder constituencies "for the *first time*," thus "repudiate[ing] the view that the Court had *already* addressed the other-constituencies issue in any substantive way in *Unocal*").

169. Hardly surprisingly, many of those who have preceded me in refuting the stakeholder interpretation of *Unocal* have emphasized that *Revlon* definitively interprets the relevant passage from *Unocal* in a manner that

It is thus critically important to consider carefully what the Supreme Court says in *Revlon* about the passage from *Unocal* referring to the board's consideration of other constituencies. In full, the Supreme Court said the following:

> This brings us to the lock-up with Forstmann and its emphasis on shoring up the sagging market value of the Notes in the face of threatened litigation by their holders. Such a focus was inconsistent with the changed concept of the directors' responsibilities at this stage of the developments. The impending waiver of the Notes covenants had caused the value of the Notes to fall, and the board was aware of the noteholders' ire as well as their subsequent threats of suit. The directors thus made support of the Notes an integral part of the company's dealings with Forstmann, even though their primary responsibility at this stage was to the equity owners.
>
> The original threat posed by Pantry Pride—the break-up of the company—had become a reality which even the directors embraced. Selective dealing to fend off a hostile but determined bidder was no longer a proper objective. Instead, obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action. Thus, the Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders. The rights of the former already were fixed by contract. The noteholders required no further protection, and when the Revlon board entered into an auction-ending lock-up agreement with Forstmann on the basis of impermissible considerations at the expense of the shareholders, the directors breached their primary duty of loyalty.
>
> The Revlon board argued that it acted in good faith in protecting the noteholders because *Unocal* permits consideration of other corporate constituencies. Although such considerations may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. *Unocal*, 493 A.2d at 955. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.
>
> Revlon also contended that by *Gilbert v. El Paso Co.*, Del. Ch., 490 A.2d 1050, 1054–55 (1984), it had contractual and good faith obligations to consider the noteholders. However, any such duties are limited to the principle that one may not interfere with contractual relationships by improper actions. Here, the rights of the noteholders were fixed by agreement, and there is nothing of substance to suggest that any of those terms were violated. The Notes covenants specifically

excludes the stakeholder understanding. *E.g.*, Bainbridge, *supra* note 2, at 107 ("Stout nowhere acknowledges the limitation *Revlon* puts on consideration of non-shareholder interests in cases falling outside *Revlon*-land."); Yosifon, *supra* note 13, at 191 (stating that the Delaware Supreme Court's language in *Revlon* "repudiates the view that the Court had already addressed the other-constituencies issue . . . in *Unocal*" and "laid down the law in no uncertain terms" by holding that "concern for various corporate constituencies . . . is limited by the requirement that there be some rationally related benefit accruing to the shareholders") (emphases omitted).

> contemplated a waiver to permit sale of the company at a fair price. The Notes were accepted by the holders on that basis, including the risk of an adverse market effect stemming from a waiver. Thus, nothing remained for Revlon to legitimately protect, and no rationally related benefit thereby accrued to the stockholders. Under such circumstances we must conclude that the merger agreement with Forstmann was unreasonable in relation to the threat posed.[162]

To be sure, the court's primary point here is that, since the Revlon board had decided to sell the company ("the break-up of the company . . . had become a reality which even the directors embraced"[163]), or as we would say today, because the board's *Revlon* duties had been triggered, the directors were thus no longer permitted to consider the interests of other corporate constituencies ("concern for non-stockholder interests is inappropriate"[164]) but had to concentrate exclusively on obtaining the best price for the stockholders ("the object . . . is . . . to sell . . . to the highest bidder"[165]).

But in reaching this conclusion, the Delaware Supreme Court also considered and rejected an objection made by the Revlon directors. In particular, "The Revlon board argued that it acted in good faith in protecting the noteholders because *Unocal* permits consideration of other corporate constituencies."[166] In other words, in *Revlon*, the Revlon board argued that, under *Unocal*, it was entitled to consider the interests of other corporate constituencies. The Delaware Supreme Court flatly rejected that argument, in both oral arguments[167] and then in its written opinion. In particular, the Court said two things.

First, the court said that, *in general*, "such considerations may be permissible," subject to "fundamental limitations," for, "[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders,"[168] and to this sentence the court appended a citation to the passage in *Unocal* referring to other corporate constituencies.[169] Therefore, the Delaware Supreme Court is here expressly interpreting the passage from *Unocal*—the passage that stakeholder advocates say means that directors may consider the interests of other corporate constituencies without regard to the effect of such consideration on shareholders—as meaning that directors may consider other corporate constituencies only in the traditional

162. *Revlon*, 506 A.2d at 182–83 (citations omitted).

163. *Id.* at 182.

164. *Id.*

165. *Id.*

166. *Id.*; *see also* Strine, *supra* note 35, at 770 ("The Revlon board had argued that it acted in good faith in protecting the noteholders because *Unocal* permits consideration of other corporate constituencies.")

167. A. Gilchrist Sparks, III, representing the Revlon directors, stated in oral argument that "the board under this court's *Unocal* decision . . . had a right . . . to look at all the constituencies here. And one of those constituencies . . . was the creditors." Transcript at 21. Judge Moore interrupted Mr. Sparks, saying, "You were the successful attorney in *Unocal*. You understood what was being addressed there, the coercive two-tiered tender offer," and then adds, "That particular language is addressed to that particular issue." Mr. Sparks replies, "Your Honor has authored the opinion. If your Honors say that was what it was addressed to, I can't quarrel with that." Id. According to former Chief Justice Strine, soon after the case, at public events at the Harvard Law School and the University of Pennsylvania Law School, Mr. Sparks "indicated that the Justices quickly dispensed with this argument [i.e., that *Unocal* permitted the board to consider other constituencies] at oral argument when Justice Moore said in words or substance that *Unocal* did not mean that." Strine, *supra* note 35, at 769–70.

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

169. *Id.*

way explained in *Hampson*,[170] *Hutton*,[171] *Kelly*,[172] and *Theodora*,[173] that is, subject to the "fundamental limitation" that "there are rationally related benefits accruing to the stockholders."[174] Thus, the Delaware Supreme Court expressly considered the stakeholder interpretation of the passage from *Unocal* and expressly rejected it. It held, on the contrary, that directors of a Delaware corporation have a fiduciary duty always to act for the sole purpose of benefiting shareholders, considering the welfare of other corporate constituencies only instrumentally, i.e., as a means to the sole and exclusive end of benefiting for shareholders.[175] As former Chief Justice Strine has written, "The understanding in Delaware is that *Revlon* could not have been more clear that directors of a for-profit corporation must at all times pursue the best interests of the corporation's stockholders, and that the decision highlighted the instrumental nature of other constituencies and interests."[176]

Second, having thus reiterated the traditional rule about considering other constituencies, the Delaware Supreme Court held that an exception to that rule applies when the board has decided to sell the company, which was what in fact had occurred in *Revlon*. Thus, immediately after saying, "A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders," the court continues, stating, "However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."[177] In such circumstances, "nothing remained for Revlon to legitimately protect, and no rationally related benefit thereby accrued to the stockholders," which is why "concern for non-stockholder interest [was then] inappropriate."[178]

What emerges from *Revlon*, and from *Unocal* as *Revlon* interprets it, is thus an entirely coherent, entirely traditional account of the relationship between shareholders and other corporate constituencies. In accordance with the early common law cases, the paramount rule is that, in all instances, corporations are to be managed for the benefit of their shareholders,[179] but this rule can mean different things in different circumstances. In

170. Hampson v. Price's Patent Candle Co. [1876] 34 LT 711 (U.K.).

171. Hutton v. W. Cork Ry. Co. [1883] 23 Ch D 654 (U.K.).

172. Kelly v. Bell, 266 A.2d 878 (Del. 1970).

173. Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (Mavel, V.C.).

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

175. *Id.* at 182–83.

176. Strine, *supra* note 35, at 771.

177. *Id.*

178. *Id.* at 182–83. As Professor Yosifon points out, Professor Stout and others simply ignore the wider holding of *Revlon*, acknowledging the corollary that, once the board has decided to sell the company, it may no longer take other constituencies into account, but ignoring the more general principles asserted in the case that, under all circumstances, directors may consider the interests of other constituencies only instrumentally toward to goal, mandatory in all contexts, of managing the corporation for the benefit of the shareholders. Yosifon, *supra* note 13, at 199 (arguing that "Stout does discuss *Revlon*, but, like many other scholars, she misconstrues its point" and "argues that *Revlon* stands for the proposition that directors are *only* obligated to maximize shareholder value when a firm is about to be sold").

179. *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013) ("[D]irectors [must] promote the value of the corporation for the benefit of its stockholders." (quotation omitted)); Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) ("The board of directors has the legal responsibility to manage the business of a corporation for the

general, when the corporation is a going concern and is expected to remain such (as in *Unocal*), managing the corporation for the benefit of its shareholders may include directing value to non-shareholder constituencies (just as it may include making any other types of investments) if the purpose of doing so is to generate even greater profits for shareholders in the long term. In the special circumstances in which the interest of the shareholders in the corporation is terminating (e.g., because the business is being wound up or because the business is going to be sold, as in *Revlon*), there is no future when such profits (or returns on investments) could be captured, and so directors may *not* direct value to non-shareholder constituencies but must consider only the immediate interests of the shareholders in getting the highest price for their shares.[180] Of course, this is exactly the traditional account articulated by Lord Bowen and Lord Cotton in *Hutton* more than a hundred years before *Revlon*.[181] It is the classic shareholder model.[182]

Furthermore, that *Revlon* excluded a stakeholder reading of *Unocal* was clearly understood and widely discussed at the time, both by law professors and by practitioners. Thus, within months of *Revlon* being decided, Professor Oesterle noted that, in *Revlon*, the Delaware Supreme Court "modified its *Unocal* position by adding the caveat that a board may consider various nonshareholder constituencies 'provided there are rationally related benefits accruing to the stockholders,'"[183] and two leading practitioners wrote that although "the court repeated its earlier statement that when responding to an actual hostile bid, a board may consider the interests of corporate constituencies other than the stockholders," nevertheless "the court made it plain that these interests may be considered *only* if 'there are rationally related benefits accruing to the stockholders.'"[184] Stephen Lamb, who would later serve as a Vice Chancellor on the Court of Chancery, wrote that the Delaware Supreme Court "noted that, while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that 'there are rationally related benefits accruing to the

benefit of its shareholder owners."); N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (discussing the principle that corporations are to be managed for the benefit of their shareholders).

180. *See* Yosifon, *supra* note 13, at 192–93 (reaching similar conclusions about the relation of *Unocal* and *Revlon*).

181. Hutton v. W. Cork Ry. Co. [1883] 23 Ch D 654 (U.K.).

182. Arguments that the duty of directors under *Revlon* to get the best price available for the shareholders when selling the corporation is an aberration or deviation from the usual rule, e.g., Bruner, *supra* note 33, at 1400 n.84 ("Although Delaware case law mandates the maximization of the price received by the shareholders [in *Revlon* contexts], this is itself best understood as a deviation from the norm permitting *de facto* deviations from shareholder wealth maximization." (citations omitted)), thus get things exactly backwards. As shown in the text, directors are always under a duty to do what is best for shareholders, but what that duty requires varies with the circumstances: it requires a long-term view when there is a long term and a short-term view when there is only a short term.

183. Dale Arthur Oesterle, *The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 CORNELL L. REV. 117, 142 (1986).

184. Herbert S. Wander & Alain G. LeCoque, *Boardroom Jitters: Corporate Control Transactions and Today's Business Judgment Rule*, 42 BUS. LAW. 29, 35 (1986).

stockholders.'"[185] Professor Lowenstein[186] and Professors Gilson and Kraakman[187] made similar observations. The point was so obvious that it was even made in multiple student notes.[188]

Finally, the Delaware Supreme Court has, in subsequent cases, expressly emphasized the importance of reading the passage in *Unocal* about other constituencies in light of *Revlon*. Thus, in 1989, in *Mills Acquisition v. MacMillan*, the court said,

> In assessing the bid and the bidder's responsibility, a board may consider, among various proper factors, the adequacy and terms of the offer; its fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; *the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests*; the risk of nonconsummation; the basic stockholder interests at stake; the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.[189]

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185. Stephen P. Lamb & Andrew J. Turezyn, Revlon *and* Hanson Trust*: Unlocking the Lock-Ups*, 12 DEL. J. CORP. L. 497, 510 (1987).

186. Mark J. Loewenstein, *Toward an Auction Market for Corporate Control and the Demise of the Business Judgment Rule*, 63 S. CAL. L. REV. 65, 80 n.53 (1989) (stating that, although "[t]he *Unocal* court gave some examples of takeover bids that might qualify as threatening: 'inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange,'" nevertheless "[t]he Delaware court clarified its reference to other 'constituencies' in *Revlon*, when it said that a target board may take into account such constituencies 'provided there are rationally related benefits accruing to the stockholders'").

187. Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?* 44 BUS. LAW. 247, 259 n.41 (1989) ("A possible exception concerns the impact of a hostile offer on the target's non-shareholder constituencies. If directors could prefer the interests of these constituencies over those of shareholders, a hostile offer that shareholders would wish to accept in their own interest could pose a threat to non-shareholder interests. However, the Delaware Supreme Court seems to have foreclosed such a preference for non-shareholder interests in *Revlon*, when it observed: 'A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.'").

188. Steven G. Bradbury, *Corporate Auctions and Directors' Fiduciary Duties: A Third-Generation Business Judgment Rule*, 87 MICH. L. REV. 276, 276 (1988) ("In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court created a two-prong test that put the burden on target directors to show (1) that they have reason to believe a takeover bid poses a threat to the corporate enterprise, and (2) that their defensive actions are reasonable in relation to the threat. In *Revlon, Inc. v. MacAndrews & Forbes Holdings* the court tightened the second prong of the *Unocal* test by adding the requirement that any defensive measures be rationally related to shareholder benefit." (footnotes omitted)); Thomas C. Pelto, Sr., Note, *False Halo: The Business Judgment Rule in Corporate Control Contests*, 66 TEX. L. REV. 843, 862 n.112 (1988) (holding that "[t]he *Unocal* court suggested that concerns for corporate constituencies besides shareholders were appropriate" but "The *Revlon* court distanced itself from this position: 'A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder'").

189. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 n.29 (Del. 1989) (emphasis added) (citing Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341–42 (Del. 1987); then *Unocal*, 493 A.2d at 955–56; and then *Revlon*, 506 A.2d at 182–83).

Of course, the italicized language, most of which comes from *Unocal*, includes as well the key language from *Revlon* that interprets *Unocal*, which makes it clear that, outside of the change-of-control context, a board's consideration of the interests of non-shareholder constituencies is limited to the instrumental consideration explained in *Revlon* and does not extend to the full stakeholder model. This passage from *Mills Acquisition* thus shows, beyond any doubt, that quoting the "other constituencies" language from *Unocal* without reference to its interpretation in *Revlon* is simply to misstate Delaware law.[190]

The way those who would deny that Delaware law requires directors to maximize value for shareholders handle the relation between *Unocal* and *Revlon* is extremely revealing. Professors Blair and Stout, for example, state in their article, "*Unocal* squarely rejects shareholder primacy in favor of the view that the interests of the 'corporation' include the interests of nonshareholder constituencies."[191] They append to this sentence, however, a footnote conceding, "In a subsequent case," by which they mean *Revlon*, "the Delaware Supreme Court suggested that directors could consider other constituencies only when doing so ultimately provided some benefit to shareholders as well."[192] This is a little like saying Benedict Arnold was a great American patriot who later lived in England, or that Einstein was a patent clerk in Switzerland who later published some papers in physics.

Professor Bruner's treatment of the relationship between *Unocal* and *Revlon* is similar. He cites *Unocal* for the proposition that "case law governing the board's response to a hostile takeover attempt explicitly permits consideration of the interests of non-shareholder constituencies," and he claims that *Unocal* "requires the board to assess the effects of the bid on 'the corporate enterprise,' which analysis could include 'the impact on "constituencies" other than shareholders.'"[193] On the next page, he discusses *Revlon* and states, without qualification, "It is only in this narrow set of circumstances [i.e., when *Revlon* duties are triggered] where Delaware courts speak of maximizing return to shareholders and will not permit boards to impede it out of regard for interests of other constituencies."[194] In the next paragraph he finally appends a footnote that contains the critical information: he concedes that "*Revlon* makes clear that the board's 'regard for various constituencies' under *Unocal* must be accompanied by 'rationally related benefits accruing to the stockholders,'' and then provides the surprising revelation that in his article he is merely contending that "the focus on long-term performance, coupled with the extraordinary deference of the board's judgment, renders deviations from shareholder wealth effectively unpoliceable."[195] Imagine the surprise of a client who, advised by his attorney that he is legally permitted do something, discovers that what his attorney really meant is that he is *not* legally permitted to do that thing but the chances of getting caught and punished for it are low.

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190. The reference to *Ivanhoe Partners*, *supra* note 189, is also significant. In that case, the Delaware Supreme Court had repeated the language from *Unocal* that mentioned other corporate constituencies without including the language from *Revlon* that limits the consideration of such constituencies to merely instrumental consideration as a means to maximizing value for shareholders. *Ivanhoe*, 535 A.2d at 1341–42 (Del. 1987). The Supreme Court's statement in *Mills Acquisition* thus shows quite clearly that, whenever it uses the *Unocal* language, the qualification from *Revlon* is to be understood.

191. Blair & Stout, *supra* note 32, at 308.

192. *Id.* at 308 n.157 (citing *Revlon*).

193. Bruner, *supra* note 33, at 1415.

194. *Id.* at 1416.

195. *Id.* at 1416 n.161.

Professor Elhauge cites the familiar language from *Unocal* about the board considering other corporate constituencies[196] but does not mention the critical language from *Revlon* until 85 pages later, where he says that "some of the *Revlon* language suggests that the Delaware Supreme Court thought that normally nonshareholder interests could be considered only when rationally related to shareholder interests."[197] It would be an understatement to call this an understatement. Even worse, however, Professor Elhauge thinks the Delaware Supreme Court's "language from *Revlon*" is unimportant because "Delaware case law in fact does not make shareholder interests controlling and thus allows consideration of nonshareholder interests other than just when that happens to maximize shareholder value."[198] It seems lost on Professor Elhauge that, when the Delaware Supreme Court says the what law is, that just *is* the law in Delaware.[199]

But all of these maneuvers are better than what Professor Stout does in her book on *The Shareholder Value Myth*, for there she cites *Unocal* for the proposition that, "in weighing the merits of a business transaction, directors can consider 'the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally),'"[200] and *never mentions Revlon at all*. Given that her book was published more than a dozen years after her article with Professor Blair, which does mention the key point from *Revlon*, this is difficult to understand. Moreover, the book is aimed at a readership broader than corporate law scholars and thus at persons who could not be expected to know that, in *Revlon*, the Delaware Supreme Court expressly rejected the reading of *Unocal* that Professor Stout gives.

Then there is Professor LoPucki. His recent article shows that he has read both cases[201] and articles[202] that both cite *Revlon* for the proposition that directors are under a duty to maximize value for shareholders and explain how *Revlon* qualified *Unocal* to exclude any stakeholder reading of the case. Nevertheless, he quotes the familiar language from *Unocal* about directors considering the impact of takeover proposals on other

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196. Elhauge, *supra* note 33, at 764 ("Even the supposedly conservative Delaware . . . by case law authorize[s] managers to reject a takeover bid based on 'the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)." (citing Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985)).

197. *Id.* at 849–50.

198. *Id*. Needless to say, Professor Elhauge cites no authorities for the proposition.

199. Professor Elhauge also deserves special mention for his treatment of *Ivanhoe*. After quoting the language from *Unocal* about other constituencies, he quotes the similar language in *Ivanhoe* referring to *Unocal*. Elhauge, *supra* note 33, at 764 n.66. As discussed in footnote 190, however, both before *Ivanhoe* (in *Revlon*) and after *Ivanhoe* (in *Mills Acquisition*), the Delaware Supreme Court explained that the language from *Unocal* must be understood as being subject to the larger principle that directors must always act for the benefit of shareholders. In a remarkable bit of bad luck, Professor Elhauge's research yielded the one relatively obscure case that might be taken to support his interpretation of *Unocal* but neither of the landmark cases that conclusively refute it.

200. STOUT, *supra* note 33, at 29; *see* Yosifon, *supra* note 13, at 199 (stating that Stout "inexplicably . . . never follows up . . . with *Revlon's* clarification" of *Unocal* and "*never* quotes the Delaware Supreme Court's crucial statement in *Revlon* that there must be rationally related benefits to the stockholders before the consideration noted in *Unocal* would be permissible" (internal quotation marks omitted)).

201. LoPucki, *supra* note 33, at 2028 n.36 (citing eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 333 n.105 (Del. Ch. 2010)), and (citing Frederick Hsu Living Tr. v. ODN Holdings. Corp., No. CV 12108, 2017 WL 1437308 (Del. Ch. Apr. 14, 2017)).

202. *Id.* (citing Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015)).

constituencies and simply never mentions *Revlon* at all.[203] He then attempts to bolster the authority of the relevant passage from *Unocal*, saying, "*Unocal* is important because the principal [shareholder wealth-maximization] cases are from lower courts."[204] Here, presumably, he is referring to cases in the Court of Chancery, such as *eBay*[205] and *Frederick Hsu Living Trust*,[206] both of which he had previously cited and both of which, as discussed below, clearly state that directors are required to manage the corporation for the benefit of its shareholders.[207] So, in order to lend weigh to a stakeholder reading of *Unocal*, Professor LoPucki ignores the Delaware Supreme Court's own explicit rejection of that reading in *Revlon* and then depreciates cases from the Court of Chancery that cite and apply the Supreme Court's holding in *Revlon* because they are Chancery cases, not Supreme Court cases. Professor LoPucki claims that Delaware law is confused on this issue.[208] He is half right: something is confused here, but it is not Delaware law.

Finally, Professor Johnson deserves honorable mention. To my knowledge, he never relies on *Unocal* to argue for a stakeholder interpretation of Delaware law, which is very much to his credit, but he manages to outdo all others in his treatment of *Revlon*. Whereas all the others at some point grudgingly concede that *Revlon* requires directors in all circumstances to manage the corporation for the benefit of its shareholders, or else at least maintain a discrete, if grossly misleading, silence about the case, Professor Johnson passes from misleading omission to bold denial. Discussing *Revlon*, he writes, "The Delaware Supreme Court has held only that corporate directors do not typically have an obligation to maximize the share price in the short term," except "in one narrow setting" when *Revlon* duties are triggered.[209] "Beyond that," Professor Johnson says, "the Delaware Supreme Court has mandated nothing, or even spoken."[210] This is, of course, flatly false. No matter what else one thinks about *Revlon*, it undeniably at least *spoke* to this issue. Given that Professor Johnson cites and discusses articles treating the holding from *Revlon* at length, including articles by Professor Yosifon and former Chief Justice Strine,[211] his assertion here is incomprehensible.[212] In a more recent article, after referring to articles by Chief Justice Strine, Professor Bainbridge, and Professor Yosifon that explain the importance of *Revlon*, as well as to Vice Chancellor Laster's similar opinion in *Trados*,[213] Professor Johnson repeats this incomprehensible assertion, stating, "The Delaware Supreme Court

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203. *Id.* at 2029.

204. *Id.*

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

206. Frederick Hsu Living Tr. v. ODN Holdings. Corp., No. CV 12108, 2017 WL 1437308 (Del. Ch. Apr. 14, 2017).

207. *eBay*, 16 A.3d at 333 n.105 (citing *Revlon* for the proposition that "promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders"); *Frederick Hsu Living Tr.*, 2017 WL 1437308, at *17 n.15 (citing *Revlon* for the proposition that "under Delaware law, for directors to act loyally to advance the best interests of the corporation means that they must seek 'to promote the value of the corporation for the benefit of its stockholders'").

208. LoPucki, *supra* note 33, at 2026.

209. Johnson, *Unsettledness in Delaware Corporate Law*, *supra* note 33, at 432–33.

210. *Id.* at 433.

211. *Id.* at 432 & n.203, 433 (citing Yosifon, *supra* note 13, and Strine, *supra* note 16).

212. *Id.* at 433.

213. Lyman Johnson, *Why Corporate Purpose Will Always Matter,* 17 U. ST. THOMAS L.J. 862, 866–67 (2022).

has refrained from definitively settling the issue."[214] He argues that the existence of a debate in the scholarly literature proves that the matter is uncertain.[215] Especially given the political salience of the issue, it does no such thing. As Cicero recognized long ago, *nihil tam absurde dici potest quod non dicatur ab aliquo philosophorum*.[216]

VII. OTHER DELAWARE CASES AFTER *REVLON*

It may seem curious that, in reiterating in *Revlon* the traditional rule about the limited and instrumental way in which directors may consider the interests of non-shareholder constituencies, the Delaware Supreme Court cited no prior cases, even though cases like *Kelly* and *Theodora Holdings*, not to mention *Hutton* and *Hampson*, were there to be cited if the court had wanted to cite them.[217] Moreover, the Delaware judges were certainly familiar with these cases, for recall that *Kelly* cited *Hutton*, which treated the problem exhaustively and fully anticipates everything the Supreme Court said in *Revlon*.[218] Very likely, the Supreme Court did not cite these cases merely because it regarded citations as superfluous. As the Delaware Supreme Court said even in *Unocal*, the "basic principle" of Delaware fiduciary law is "that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders."[219] The rule that directors may consider non-shareholder constituencies only instrumentally as means to pursuing the end of maximizing shareholder value is merely an immediate corollary of this basic principle. Just as the directors may invest corporate funds in new plants or equipment in order to generate profits for shareholders in the future, so too may they invest corporate funds in goodwill with customers, employees, creditors, or other corporate constituencies in order to generate profits for shareholders in the future. In each case, directors expend corporate funds in the present with the hope that the expenditures will produce net benefits for shareholders in the future. Long before the days of *Unocal* and *Revlon*, this was traditional, well-settled law, and Delaware lawyers knew it.

214. *Id.* at 872.

215. *Id.* at 867 ("The very fact of the debate, reflecting good faith disagreement among knowledgeable experts, reveals that the law is far from crystal clear."). Professor Johnson also attempts to distinguish between a principle of law that would require directors to "maximize" value for shareholders and one that would require them always to act for the benefit of shareholders. *Id.* This seems to concede the point that directors may not take an action that benefits another corporate constituency unless it also benefits shareholders. If Professor Johnson is making this concession, the debate is effectively over, for the difference between "maximizing" and "benefiting" would seem to matter only in a very limited range of cases—that is, when the directors were choosing between (a) one course of action that would benefit another constituency and also benefit shareholders in the long run, and (b) another course of action that would benefit another constituency and also benefit shareholders in the long run, but would not benefit the shareholders as much as the first course of action. Even in such cases, however, adopting the second course of action would amount to making the shareholders worse off than they otherwise would have been (i.e., if the directors had adopted the first course of action) and so is impermissible under *Revlon*. Under any plausible understanding of fiduciary duties, there is no tenable distinction between a duty to act always for the benefit of shareholders and a duty to maximize value for shareholder.

216. "Somehow or other no statement is too absurd for some philosopher to make." CICERO, *De Divinatione*, *in* ON OLD AGE. ON FRIENDSHIP. ON DIVINATION 222, 504–05 (Jeffrey Henderson ed., William Armistead Falconer trans., Harvard Univ. Press 1923) (44 BC).

217. *See supra* Parts III–IV (discussing relevant caselaw preceding *Revlon* both in Delaware and in other common law jurisdictions).

218. Kelly v. Bell, 254 A.2d 62, 74 (Del. Ch. 1969).

219. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985).

Indeed, it is certainly beyond peradventure that the Delaware judges knew it. Thus, a few months after the Delaware Supreme Court decided *Revlon* from the bench but a few days *before* that court even issued its written opinion, Chancellor Allen decided *Katz v. Oak Industries, Inc.*,[220] a case in which a corporation's bondholders challenged an exchange offer for their bonds.[221] In rejecting the bondholders' argument that the offer was designed to benefit the corporation's shareholders at the expense of the bondholders, Chancellor Allen stated, "It is the *obligation* of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders," even when this comes "'at the expense' of others," such as the corporation's creditors.[222] Indeed, Chancellor Allen observed that it "seems likely that corporate restructurings designed to maximize shareholder values may in some instances have the effect of requiring bondholders to . . . in effect transfer economic value . . . to stockholders."[223] Thus, so far from permitting directors to benefit other corporate constituencies at the expense of shareholders, Chancellor Allen said that, since directors have an obligation "to maximize the long-run interests of the corporation's stockholders," they may sometimes, operating within the law, have a duty *to impose losses* on other corporate constituencies in order to benefit shareholders.[224]

Nor was this the only time that the legendary Chancellor Allen held that directors have a duty to operate the corporation for the benefit of the shareholders. About three years after *Revlon*, in March of 1989, Chancellor Allen said the following in *TW Services, Inc. v. SWT Acquisition Corp.*:

> *I take it as non-controversial that, under established and conventional conceptions*, directors owe duties of loyalty to the corporation and to the shareholders; that this conjunctive expression is not usually problematic because *the interests of the shareholders as a class are seen as congruent with those of the corporation in the long run*; that directors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected, and thus *directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other "corporate constituencies."* Thus, broadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and *in a way intended to maximize the long run interests of shareholders*.[225]

This is clearly the same rule that the Delaware Supreme Court had stated in *Revlon*. Chancellor Allen elaborates on the rule in a footnote, explaining that "decisions that are

220. Katz v. Oak Indus., Inc., 508 A.2d 873 (Del. Ch. 1986). The Court of Chancery issued its opinion on March 10, 1986, while the Delaware Supreme Court, which had decided *Revlon* from the bench on November 1, 1985, issued its written opinion in that case on March 13, 1986. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

221. *Oak Indus.*, 508 A.2d at 875–76.

222. *Id.* at 879 (emphasis added).

223. *Id.*

224. *Id.*

225. TW Servs., Inc. v. SWT Acquisition Corp., No. 10427, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) (emphasis added) (footnote omitted).

expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected,"[226] "might touch upon every aspect of running the business" and may include "research and product development; personnel training and compensation; [and] charitable and community financial support."[227] This covers essentially the entire field: directors may invest corporate assets for any lawful purpose—purchasing plant, property or equipment, funding research and development, compensating employees, making charitable donations, or benefiting local communities—*provided that by so doing they are aiming at benefiting shareholders in the long run.* Although Chancellor Allen does not cite *Revlon* in this passage, he does cite both *Kelly v. Bell* and *Theodora Holdings.*[228]

Former Chief Justice Strine, beginning when he was a Vice Chancellor, understood the rule in the same way.[229] Thus, in 2000, in *Chesapeake Corp. v. Shore*,[230] in considering a target board's argument that the price offered in a tender offer was too low and thus substantively coercive, the then-Vice Chancellor stated that "one must remember that the substantive coercion rationale is not one advanced on behalf of employees or communities that might be adversely affected by a change of control,"[231] for these are "[c]onstituencies to which one, as a matter of social policy, might be extremely sympathetic but whose

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226. *Id.*

227. *Id.* at *7 n.6.

228. *Id.* In fairness, it should be noted that, soon after the Delaware Supreme Court decided *Paramount Communications Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990), Chancellor Allen concluded that the case "might be interpreted as constituting implicit judicial acknowledgement of the social entity conception," i.e., a stakeholder view, of the corporation, William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 276 (1992), even though the effect of the case "should . . . be seen as provisional, not final." *Id.* at 280. Perhaps more to the point, Chancellor Allen was the judge in the trial court in this case, and in deciding the case, he stated that "while the record suggests that the 'Time culture' importantly includes directors' concerns for the larger role of the enterprise in society, there is insufficient basis to suppose at this juncture that such concerns have caused the directors to sacrifice or ignore their duty to seek to maximize in the long run financial returns to the corporation and its stockholders." Paramount Commc'ns, Inc. v. Time Inc., Civ. Act. Nos. 10866, 10670, 10935, 1989 WL 79880, at *7 (Del. Ch. July 14, 1989); *but see* the discussion in footnote 382 *infra*.

229. The former Chief Justice has, of course, written multiple articles demonstrating—though not as tediously as I am doing here—that Delaware law requires directors to operate the corporation for the benefit of the shareholders and permits consideration of other corporate constituencies only instrumentally as a means to that end. *See, e.g.*, Strine et al., *supra* note 61, at 634 ("[I]t is essential that directors take their responsibilities seriously by actually trying to manage the corporation in a manner advantageous to the stockholders."); Strine, *supra* note 35, at 771 ("Non-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefiting the stockholders."); Strine, *supra* note 35, at 147 n.34 ("[A] corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term . . . [S]tockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."); Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 107 (2015) ("Delaware case law is clear that the board of directors of a for-profit corporation chartered under the Delaware General Corporation Law . . . must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.").

230. Chesapeake Corp. v. Shore, 771 A.2d 293 (Del. Ch. 2000).

231. *Id.* at 328.

interests are of little, if no relevance, under Delaware corporate law."[232] This may seem to leave open just how the then-Vice Chancellor understood the relationship between shareholders and other constituencies, but his opinion in *Production Resources Group v. NCT Group*[233] in 2004 leaves no doubt. There, he wrote, the following:

> Given that these legal tools exist to protect creditors, our corporate law (and that of most of our nation) expects that the directors of a solvent firm will cause the firm to undertake economic activities that maximize the value of the firm's cash flows primarily for the benefit of the residual risk-bearers, the owners of the firm's equity capital. So long as the directors honor the legal obligations they owe to the company's creditors in good faith, as fiduciaries they may pursue the course of action that they believe is best for the firm and its stockholders. Indeed, in general, creditors must look to the firm itself for payment, rather than its directors or stockholders, except in instances of fraud or when other grounds exist to disregard the corporate form.
>
> *These realities, of course, do not mean that the directors are required to put aside any consideration of other constituencies, including creditors, when deciding how to manage the firm. But it does mean that the directors—as fiduciaries in equity—are primarily focused on generating economic returns that will exceed what is required to pay bills in order to deliver a return to the company's stockholders* who provided equity capital and agreed to bear the residual risk associated with the firm's operations.[234]

He further explains this last point in a footnote, citing *Revlon* for the proposition that the "board can consider interests of other constituencies if they are rationally related to furthering the interests of stockholders."[235] And if that were not sufficiently explicit, in the *Toys "R" Us* case[236] the next year, the then-Vice Chancellor said,

> *Revlon* tempered language in *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946 (Del.1985), that had indicated that directors, in the context of responding to a takeover bid, could consider the impact the bid would have on other corporate constituencies, such as employees and communities in which the corporation operated. *Revlon*, 506 A.2d at 176. In the context of a decision to sell the whole company, the directors could only consider those constituencies if doing so is rationally related to some benefit to the stockholders, which in that special context must have a relation to price. *Id.* Precisely how stockholder-focused directors must be is not entirely clear but the predominance of the stockholders' interest in receiving the highest, practically available bid in our Supreme Court's *Revlon* jurisprudence is undeniable.[237]

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232. *Id.* at 328 n.82.

233. Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772 (Del. Ch. 2004).

234. *Id.* at 787 (emphasis added).

235. *Id.* at 787 n.48.

236. *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975 (Del. Ch. 2005).

237. *Id.* at 999 n.32. For more on former Chief Justice Strine's views on this issue at this time, *see* Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1175–76 (2002) (discussing the effect of *Revlon* on other constituencies).

Of course, both before and after leaving the bench, the former Chief Justice has argued at length in a series of articles that Delaware law requires directors to manage the corporation for the benefit of the shareholders and, in accordance with *Revlon*, permits directors to consider the interests of non-shareholder constituencies only instrumentally as a means to this end.[238] Thus, in 2010, in his article on *Loyalty's Core Demand*, he said that it "is essential that directors take their responsibilities seriously by actually trying to manage the corporation in a manner advantageous to the stockholders."[239] Indeed, even the Delaware General Corporation Law itself contains "mandatory provisions [that] play a critical role in ensuring that directors manage corporations in a responsible way because they hold directors accountable . . . for actions that are contrary to the stockholders' best interests."[240] And again, commenting on Berle, the former Chief Justice says, "By requiring that director action be justified in reference to whether it was undertaken in the best interests of the corporation's stockholders, equity would police the broad powers granted to managers by law."[241] He then quotes the following passage from Berle and Gardiner's *The Modern Corporation and Private Property*:

> All the powers granted to management and control are powers in trust. Tracing this doctrine back into the womb of equity, whence it sprang, the foundation becomes plain. Wherever one man or a group of men entrusted another man or group with the management of property, the second group became fiduciaries. *As such they were obliged to act conscionably, which meant in fidelity to the interests of the persons whose wealth they had undertaken to handle.* In this respect, the corporation stands on precisely the same footing as the common-law trust.[242]

Commenting on this passage, the former Chief Justice then says, "The makers of Delaware statutory and common law have spent the seventy-five years since Berle wrote these words putting his policy prescription into action."[243]

In 2012, in *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, the former Chief Justice said that "corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders," and "stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."[244] In 2015, in *The Dangers of Denial*, he said, "Non-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefiting the stockholders."[245]

Justice Holland understood the rule in the same way as Chancellor Allen and former Chief Justice Strine. Thus, in *NACEPF v. Gheewalla*,[246] the issue concerned whether

238. *See supra* note 229 (citing sources).
239. Strine et al., *supra* note 61, at 634.
240. *Id.* at 641.
241. *Id.* at 642.
242. *Id.* at 642–43 (quoting A.A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 336 (1939)) (emphasis added by Strine).
243. *Id.* at 643.
244. Strine, *supra* note 16, at 155, 147 n.34.
245. Strine, *supra* note 35, at 765–67.
246. N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 94 (Del. 2007).

creditors may bring direct claims for breach of fiduciary duty against corporate directors, thus implicating the question of which corporate constituencies are owed fiduciary duties.[247] The court held that creditors *never* have standing to bring direct claims against the directors, whether the corporation is solvent, in the zone of insolvency, or actually insolvent.[248] In deciding the case, the Delaware Supreme Court began from first principles:

> It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders. While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights. Delaware courts have traditionally been reluctant to expand existing fiduciary duties. Accordingly, the general rule is that directors do not owe creditors duties beyond the relevant contractual terms.[249]

As to what it means to say that, under Delaware law, directors owe fiduciary duties to the corporation and its shareholders (but not to creditors), the court explained as follows:

> Delaware corporate law provides for a separation of control and ownership. The directors of Delaware corporations have "the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners." Accordingly, fiduciary duties are imposed upon the directors to regulate their conduct when they perform that function.[250]

Furthermore,

> When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation *for the benefit of its shareholder owners*.[251]

Thus, since directors of a solvent corporation have a fiduciary duty to manage the corporation for the benefit of its shareholder owners, members of other corporate

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247. *Id.* at 97.

248. *Id.* at 98–99 (solvent or in the zone of insolvency), 101–03 (insolvent).

249. *Id.* at 99 (footnotes omitted).

250. *Id.* at 99 (emphasis added) (quoting Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998)). *Malone* concerned whether the directors' duty of candor applied to disclosures even when the directors were not seeking shareholder action, not whether directors should manage the corporation for the benefit of one constituency rather than another. *Malone*, 722 A.2d at 8–9. Nevertheless, the Delaware Supreme Court began its analysis from first principles, stating,

> An underlying premise for the imposition of fiduciary duties is a separation of legal control from beneficial ownership. Equitable principles act in those circumstances to protect the beneficiaries who are not in a position to protect themselves. One of the fundamental tenets of Delaware corporate law provides for a separation of control and ownership. *The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners*. Accordingly, fiduciary duties are imposed on the directors of Delaware corporations to regulate their conduct when they discharge that function.

Id. (footnotes omitted) (emphasis added).

251. *Gheewalla*, 930 A.2d at 101 (internal quotations and footnotes omitted) (emphasis added).

constituencies, such as the creditors, cannot state a direct claim against the directors for a breach of fiduciary duty. When the corporation is *insolvent*, however, creditors do have standing to assert *derivative* (not direct) claims against the directors:

> It is well settled that directors owe fiduciary duties to the corporation. When a corporation is solvent, those duties may be enforced by its shareholders, who have standing to bring derivative actions on behalf of the corporation because they are the ultimate beneficiaries of the corporation's growth and increased value. When a corporation is insolvent, however, its creditors take the place of the shareholders as the residual beneficiaries of any increase in value.
>
> Consequently, the creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties. The corporation's insolvency makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value. Therefore, equitable considerations give creditors standing to pursue derivative claims against the directors of an insolvent corporation. Individual creditors of an insolvent corporation have the same incentive to pursue valid derivative claims on its behalf that shareholders have when the corporation is solvent.[252]

In other words, in all cases, the residual claimants (the shareholders of a solvent corporation, the creditors of an insolvent one) have standing to bring a derivative suit against the directors. Rights, of course, are correlative to duties. To say that the residual claimants (usually shareholders, but creditors too when the corporation is insolvent) have a *right* against the directors is to say that the directors have a *duty* to the residual claimants. That duty is a duty to manage the corporation for the benefit of the residual claimants, meaning the shareholders when the corporation is solvent and the creditors when it is insolvent. In other words, the holding in *Gheewalla* that creditors sometimes have standing to bring fiduciary claims against directors presupposes the rule in *Revlon* that directors have a duty to manage the corporation for the benefit of its shareholders.[253]

Chancellor Chandler understood and applied the *Revlon* rule regarding consideration of non-shareholder constituencies in exactly the same way as did Chancellor Allen, former Chief Justice Strine, and Justice Holland. In the *eBay* case,[254] the Chancellor had to consider a poison pill implemented by Craigslist's controlling shareholders, Craig

252. *Id.* at 101–02 (internal quotations and footnotes omitted).

253. *Gheewalla* also rejected the idea, suggested in such cases as *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, Civ. A. No. 12150, 1991 WL 277613, at *34 & n.55 (Del. Ch. Dec. 30, 1991), that the duties of directors may run to creditors when the corporation is solvent but operating in the so-called zone of insolvency. *Gheewalla*, 930 A.2d at 101. On the contrary, *Gheewalla* held that, even in the zone of insolvency, directors are to manage the corporation for the benefit of its shareholders. *Id.* "When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners." *Id.* Since those who argue that Delaware law does not require directors to maximize shareholder value have often relied on *Credit Lyonnais* to suggest that "directors' fiduciary duties 'to the corporation enterprise' go beyond a simple duty to maximize shareholder wealth," Blair & Stout, *supra* note 32, at 296, *Gheewalla* forecloses this argument.

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

Newmark and Jim Buckmaster.[255] Of course, the decision to implement a pill is reviewed under *Unocal*, and so the court reviews director actions not merely for their rationality as under business judgment review but for their reasonability, with the burden of proof being on the directors.[256] Prior to the reasonability inquiry, however, "the directors must . . . identify the proper corporate objectives served by their actions."[257] As Chancellor Chandler explained, this requires that the directors adopt the pill "in a good faith effort *to promote stockholder value*."[258] In the *Moran*[259] case, for example, the Delaware Supreme Court upheld the poison pill implemented by the board in part because the directors adopted it in order to protect shareholders against coercive tender offers.[260]

In *eBay*, the directors argued that they adopted the pill to preserve Craigslist's "values, culture and business model," including its "public-service mission."[261] In referring to the company's culture, the directors were appealing to the Supreme Court's upholding of a defensive maneuver by the Time board that the board justified, at least in part, as being undertaken to preserve Time's unique corporate culture.[262] On that issue, however, Chancellor Chandler noted that "*Time* did not hold that corporate culture, standing alone, is worthy of protection as an end in itself. Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders."[263] At this point, in a footnote, the Chancellor cited *Revlon* for the proposition that "Although such considerations [of non-stockholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders,"[264] and he noted that "making a charitable contribution, paying employees higher salaries and benefits," or even "promoting a particular corporate culture" must "ultimately promote stockholder value."[265] In the case at hand, however, the defendants directors "did not make any serious attempt to prove that the craigslist culture," which their adoption of the pill was designed to protect, "translates into increased profitability for stockholders."[266] In particular, "The defendants also failed to prove at trial that when adopting the Rights Plan, they concluded in good faith that there was a sufficient connection between the craigslist 'culture' (however

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255. *Id.* at 32.

256. *Id.* at 28 (stating that *Unocal* enhanced scrutiny "requires directors to bear the burden to show that their actions were reasonable").

257. *Id.*

258. *Id.* (emphasis added).

259. Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).

260. *Id.* at 1357.

261. *eBay*, 16 A.3d at 32.

262. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1149–53 (Del. 1990) (holding that, in an appropriate case, directors may act to preserve their company's corporate culture). On that issue, see Joel Edan Friedlander, *Overturn* Time-Warner *Three Different Ways*, 33 DEL. J. CORP. L. 631 (2008) ("This article proposes three statutory limits on the current permissive model of corporate governance."); Joel Edan Friedlander, *Corporation and* Kulturkampf*: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31 (1996) ("Th[e] trend towards limitlessness in the management of corporate affairs, and its cultural significance, are the twin subjects of this Article.").

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

264. *Id.* at 33 n.105 (alterations in original).

265. *Id.* at 33

266. *Id.*

amorphous and intangible it might be) and the promotion of stockholder value."[267] In other words, the director's adoption of the rights plan failed review under *Unocal* because the directors had adopted it for a purpose other than promoting stockholder value (and not, for example, because the plan was objectively unreasonable in some respect, though it may well have been that too). The ultimate end of director actions must be increasing stockholder value, and that was not the end for which the Craigslist directors had acted in adopting the plan. The Chancellor continued,

> Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim's and Craig's desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a for-profit Delaware corporation and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. *Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders*—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce.[268]

Reorganizing Chancellor Chandler's conclusions, we thus see, *first*, that in the "corporate form . . . the fiduciary duties and standards that accompany that form . . . include acting to promote the value of the corporation for the benefit of its stockholders."[269] This is the fundamental principle of corporate law that the Delaware Supreme Court articulated in *Unocal* and *Revlon* and repeated in subsequent cases such as *Gheewalla*.[270] Continuing, we see, *second*, that "promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders."[271] This is the corollary to the fundamental principle that the Delaware Supreme Court articulated in *Revlon*[272] and repeated in subsequent cases such as *Mills Acquisition*.[273] Chancellor Chandler thus restates in *eBay* the entire teaching of *Unocal* and *Revlon*. As Professor Yosifon says,

267. *Id.* at 33–34 (emphasis added).
268. *eBay*, 16 A.3d at 34 (emphasis added) (footnote omitted).
269. *Id.*
270. N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007).
271. *eBay*, 16 A.3d at 33.
272. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).
273. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 & n.29 (Del. 1989).

although "*Revlon* left no doubt on this subject," *eBay* "makes the point in language that is even clearer."[274]

But although Chancellor Allen, former Chief Justice Strine, Justice Holland, and Chancellor Chandler all stated and restated the foundational fiduciary principle that directors are required to act for the sole purpose of maximizing value for shareholders, nevertheless in articulating and explaining this principle, Vice Chancellor Travis Laster has excelled them all.[275] Thus, in the *Trados* case[276] from 2013, he begins his analysis by noting that directors derive their authority to manage the business and affairs of the corporation from section 141(a) of the Delaware General Corporation Law, but "[w]hen exercising their statutory responsibility, the standard of conduct requires that directors seek '*to promote the value of the corporation for the benefit of its stockholders*.'"[277] Quoting an article by former Chief Justice Strine, Vice Chancellor Laster next explains the corollary to this fundamental principle, the *Revlon* rule that directors may consider the interest of other corporate constituencies, but only instrumentally as a means to the end of maximizing value for shareholders:

> "It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term." Decisions of this nature benefit the corporation as a whole, and by increasing the value of the corporation, the directors increase the share of value available for the residual claimants.[278]

The Vice Chancellor then explains, in relation to the foregoing, the commonly used formula that directors owe a fiduciary duty to the corporation and its shareholders:

> Judicial opinions therefore often refer to directors owing fiduciary duties "to the corporation and its shareholders." This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants. Nevertheless, "stockholders' best

274. Yosifon, *supra* note 13, at 193. Yosifon also notes that, in her book on *The Myth of Shareholder Value*, Professor Stout "does not even discuss *eBay*," *id.* at 200, and he understandably comments that this "omission is particularly troubling given that Stout's book is aimed not just at scholars and corporate insiders, but also 'informed laypersons,' who would have no reason to note or decide for themselves about the significance of omitting a case so obviously relevant to the discussion." *Id.* (footnotes omitted).

275. In *Louisiana Municipal Police Employees' Retirement System v. Pyott*, the Vice Chancellor gave several reasons why directors are generally best positioned to make decisions on behalf of the corporation and concluded, "Perhaps most significantly, the board can take into consideration and balance the interests of multiple constituencies *when determining what outcome best serves the interests of stockholders*." La. Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 339 (Del. Ch. 2012), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013). This might be regarded as an offhand comment, not a statement of a principle of law, but, as explained in the text, Vice Chancellor Laster has expounded the relevant principle so often and at such great length that I believe this passage from *Pyott* should be understood as, at the very least, a clear foreshadowing of what Vice Chancellor Laster would hold in subsequent cases. It is notable for being what I believe is the Vice Chancellor's first word on the issue.

276. *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013).

277. *Id.* at 36 (emphasis added) (quoting eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010)).

278. *Id.* (citation omitted) (quoting Strine, *supra* note 16, at 147 n.34).

> interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."[279]

Going beyond stating the rule, Vice Chancellor Laster enquires into its basis and finds it in the nature of the shareholders' permanent capital in an entity with indefinite existence. He says,

> A Delaware corporation, by default, has a perpetual existence. Equity capital, by default, is permanent capital. In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment. When deciding whether to pursue a strategic alternative that would end or fundamentally alter the stockholders' ongoing investment in the corporation, the loyalty-based standard of conduct requires that the alternative yield value exceeding what the corporation otherwise would generate for stockholders over the long-term. Value, of course, does not just mean cash. It could mean an ownership interest in an entity, a package of other securities, or some combination, with or without cash, that will deliver greater value over the anticipated investment horizon.[280]

Now, *Trados* involved a transaction in which directors appointed to the board by venture capital investors who held preferred stock in the company initiated and approved a merger in which the preferred shareholders received value for their shares but the common shareholders did not.[281] After noting that the preferences of preferred shares are contractual in nature, Vice Chancellor Laster applied the principles set forth above to the facts of the case, stating,

> To reiterate, the standard of conduct for directors requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants, the ultimate beneficiaries of the firm's value, not for the benefit of its contractual claimants. In light of this obligation, "it is the duty of directors to pursue the best interests of the corporation and its common stockholders, if that can be done faithfully with the contractual promises owed to the preferred." Put differently, "generally it will be the duty of the board, where discretionary judgment is to be exercised, to prefer the interests of the common stock—as the good faith judgment of the board sees them to be—to the interests created by the special rights, preferences, *etc.* . . . of preferred stock." *This principle is not unique to preferred stock; it applies equally to other holders of contract rights against the corporation*.[282]

This is a very important application of the *Revlon* rule concerning the relationship of shareholders to other corporate constituencies. For, if there were ever any constituency to which the directors were permitted to divert value to the detriment of the common

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279. *Id.* at 36–37 (citations omitted) (first quoting N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007); then quoting Strine, *supra* note 16, at 147 n.34)).

280. *Id.* at 37–38 (footnotes omitted) (citations omitted).

281. *In re Trados Inc.*, 73 A.3d at 40–41.

282. *Id.* at 40–41 (omission in original) (footnotes omitted) (citations omitted) (emphasis added).

shareholders, it would be preferred shareholders, to whom (other than when they are asserting their contractually protected preferences) the directors owe fiduciary duties as they do to the common shareholders. But this passage expressly excludes that idea, as "it will be the duty of the board, where discretionary judgment is to be exercised, to prefer the interests of the common . . . to the interests created by the special rights, preferences, *etc.* . . . of [the] preferred."[283] But if this is true about preferred stockholders, *a fortiori* it is true about non-stockholder constituencies. No wonder, then, that the Vice Chancellor concludes by noting that the "principle is not unique to preferred stock" but "applies equally to other holders of contract rights against the corporation."[284]

Vice Chancellor Laster has had occasion to repeat these doctrines in very similar language in many subsequent cases. Thus, in *Rural Metro*,[285] a fiduciary suit against the company's directors and its investment banker, the Vice Chancellor said,

> Judicial decisions often describe [directors'] duties as running "to the corporation and its shareholders." "This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants."
>
> In substance, the directors' fiduciary duties require that they seek "to promote the value of the corporation for the benefit of its stockholders." "[S]tockholders' best interest must always, within legal limits, be the end. Other [corporate] constituencies may be considered only instrumentally to advance that end." Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 147 n.34 (2012). More concretely, the fiduciary relationship between the Board and Rural's stockholders required that the directors act prudently, loyally, and in good faith to maximize Rural's value over the long-term for the benefit of its stockholders. In considering whether to pursue a strategic alternative that would end or fundamentally alter the stockholders' ongoing investment in Rural, this relationship required that the directors seek an alternative that would yield value "exceeding what the corporation otherwise would generate for stockholders over the long-term."[286]

283. *Id.* at 41 (second omission in original) (quoting Equity-Linked Invs., L.P. v. Adams, 705 A.2d 1040, 1042 (Del. Ch. 1997)).

284. *Id.* Indeed, in a similar case involving a limited liability company and senior noteholders, Vice Chancellor Lamb reached a similar result for similar reasons. Thus, in *Blackmore Partners, L.P. v. Link Energy LLC*, 864 A.2d 80 (Del. Ch. 2004), the plaintiff equity unitholders alleged that the company, which was apparently solvent at the time, sold substantially all its assets and distributed all the proceeds of the sale to the senior noteholders, even paying them more than they were due, but leaving nothing for the equity unitholders. *Id.* The Vice Chancellor held that the complaint stated a good cause of action, as it sufficiently pled "intentional misconduct" by the directors because it was possible to infer that they acted without regard to the best interest of the equity noteholders. *Id.* at 86.

285. *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54 (Del. Ch. 2014).

286. *Id.* at 80–81 (alterations in original) (footnotes omitted) (citations omitted).

In *Allen v. El Paso Pipeline*,[287] the Vice Chancellor contrasted the contractual duties that the general partner owed the limited partners under a master limited partnership with the duties that directors of a corporation owe to the corporation's shareholders.[288] He said,

> The contractual standard of "best interests of the Partnership" departs from the fiduciary standard of conduct that applies in the corporate arena and which would apply by default absent the contractual modification or elimination of fiduciary duties in an alternative entity agreement. A board of directors owes fiduciary duties to the corporation for the ultimate benefit of its residual risk bearers, viz., the class of claimants represented by the undifferentiated equity. When exercising their authority, directors must seek "to promote the value of the corporation for the benefit of its stockholders." "It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term." Decisions of this nature benefit the corporation as a whole and, by increasing the value of the corporation, increase the share of value available for the residual claimants. The resulting relationship is an instrumental one in which directors may promote the interests of other corporate constituencies for the ultimate benefit of the entity's residual claimants. "[S]tockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."
>
> Because of the obligation to maximize the value of the corporation for the benefit of the undifferentiated equity, directors must consider how their decisions affect the common stockholders. When making decisions that have divergent implications for different aspects of the capital structure, a board's fiduciary duties call for the directors to prefer the interests of the common stock, so long as that can be done in compliance with the corporation's commitments to contractual claimants.[289]

In *Virtus Capital L.P. v. Eastman Chemical Company*,[290] Vice Chancellor Laster said,

> The directors of a Delaware corporation . . . owe fiduciary duties of loyalty and care to the corporation, which require that the directors exercise their managerial authority on an informed basis in the good faith pursuit of maximizing the value of the corporation for the benefit of its residual claimants, *viz.*, the stockholders.[291]

Explaining the content of this duty, he added,

> The fiduciary obligation to maximize the value of the corporation for the benefit of its stockholders does not mean that directors must sacrifice greater value that can be achieved over the long term in pursuit of short-term strategies, and it certainly does not mean that directors must attempt to maximize a public

287. Allen v. El Paso Pipeline GP Co., 113 A.3d 167 (Del. Ch. 2014).
288. *Id.* at 179.
289. *Id.* at 180–81 (alteration in original) (footnotes omitted) (quoting Strine, *supra* note 16, at 147 n.34).
290. Virtus Cap. L.P. v. Eastman Chem. Co., C.A. No. 9808, 2015 WL 580553 (Del. Ch. Feb. 11, 2015).
291. *Id.* at *16.

> company's stock price on a daily or quarterly basis. The fiduciary relationship requires that directors act prudently, loyally, and in good faith to maximize the corporation's value over the long-term for its stockholders' benefit.[292]

Although Vice Chancellor Laster has thus dealt with these issues very thoroughly in several cases, nevertheless it is in *Frederick Hsu Living Trust v. ODN Holding Corp.*[293]that he has treated them most elaborately. There, he wrote,

> In the standard Delaware formulation, fiduciary duties run not only to the corporation, but rather "to the corporation and its shareholders.'" The conjunctive expression "captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants." "It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term." Decisions of this nature benefit the corporation as a whole, and by increasing the value of the corporation, the directors increase the quantum of value available for the residual claimants. Nevertheless, "Delaware case law is clear that the board of directors of a for-profit corporation . . . must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare."[294]

Once again, he explained the fundamental principle that directors are to operate the corporation for the benefit of the shareholders as being tied to the permanent nature of equity capital and the perpetual existence of the corporation:

> Consequently, under Delaware law, for directors to act loyally to advance the best interests of the corporation means that they must seek "to promote the value of the corporation for the benefit of its stockholders." In a world with many types of stock—preferred stock, tracking stock, common stock with special rights, common stock with diminished rights (such as non-voting common stock), plain vanilla common stock, etc.—and many types of stockholders—record and beneficial holders, long-term holders, short-term traders, activists, momentum investors, noise traders, etc.—the question naturally arises: which stockholders? The answer is the stockholders in the aggregate in their capacity as residual claimants, which means the undifferentiated equity as a collective, without regard to any special rights.
>
> A Delaware corporation, by default, has a perpetual existence. Equity capital, by default, is permanent capital. In terms of the standard of conduct, therefore, the fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital, as warranted

292. *Id.* at *16 n.5.

293. Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, 2017 WL 1437308 (Del. Ch. Apr. 25, 2017).

294. *Id.* at *17 (omission in original) (citations omitted) (first quoting Strine, *supra* note 16, at 147 n.34; then quoting Strine, *supra* note 229, at 107)).

> for an entity with a presumptively perpetual life in which the residual claimants have locked in their investment.[295]

And once again Vice Chancellor Laster emphasized that, in maximizing shareholder value, the directors should generally maximize such value in the long term:

> It also bears emphasizing that a duty to maximize long-term value does not always mean acting to ensure the corporation's perpetual existence. A fiduciary might readily determine that a near-term sale or other shorter-horizon initiative, such as declaring a dividend, is value-maximizing even when judged against the long-term. A trade bidder with access to synergies, for example, may offer a price for a corporation beyond what its standalone value could support. Or fiduciaries might conclude that continuing to manage the corporation for the long-term would be value-destroying because of external market forces or other factors. The directors who managed the proverbial maker of horse-and-buggy whips would have acted loyally by selling to a competitor before the new-fangled horseless carriage caught on. Writing as a Vice Chancellor, Chief Justice Strine provided an example in the extreme case of insolvency, explaining that the value-maximization mandate may require directors to favor liquidation over continuing the business:
>
>> The maximization of the economic value of the firm might . . . require the directors to undertake the course of action that best preserves value in a situation when the procession of the firm as a going concern would be value-destroying. In other words, the efficient liquidation of an insolvent firm might well be the method by which the firm's value is enhanced. . . .
>
> The same is true for a solvent corporation. "[D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon." What the fiduciary principle requires in every scenario is that directors strive to maximize value for the benefit of the residual claimants.[296]

Note, especially, the phrasing of the final sentence. Using the definite article, Vice Chancellor Laster says that "*the* fiduciary principle requires [directors] in every scenario . . . to maximize value for the benefit of the residual claimants."[297] He uses very similar language in the *McDonald's* oversight case,[298] when he says,

> The fiduciary principle requires that directors and officers act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the holders of its undifferentiated equity, who have presumptively committed their permanent capital to an entity with a presumptively permanent existence.[299]

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295. *Id.* at *17–18 (footnotes omitted) (citations omitted).
296. *Id.* at *19–20 (omissions in original) (alteration in original) (footnotes omitted).
297. *Id.* at *20.
298. *In re* McDonald's Corp. S'holders Derivative Litig., 291A.3d 652 (Del. Ch. 2023).
299. *Id.* at 680.

The use of the definite article—*the* fiduciary principle—is significant. The point is that the essence of a fiduciary relationship lies in the duty of the fiduciary to act for the benefit of the beneficiary—and not for the benefit of anyone else, including, but by no means limited to, the fiduciary himself.

Vice Chancellor Laster makes this basic understanding of the fiduciary relationship perfectly explicit in *Glidepath Limited v. Beumer Corporation*.[300] That case involved a limited liability company, not a corporation, but one in which the operating agreement "did not eliminate or modify the principles of equity that impose fiduciary duties on whose who control an enterprise."[301] Thus, speaking of fiduciary principles generally, the Vice Chancellor said,

> When determining whether a fiduciary has breached its duties, Delaware law distinguishes between the standard of conduct and the standard of review. The standard of conduct describes what the fiduciary is expected to do and is defined by the content of the duties of loyalty and care. The standard of review is the test that a court applies when evaluating whether a fiduciary has met the standard of conduct.
>
> In terms of the standard of conduct, the duty of loyalty requires that fiduciaries act in the best interests of their beneficiaries. To satisfy the standard of conduct, fiduciaries must act in good faith, meaning they must subjectively believe that they are advancing the interests of their beneficiaries. And fiduciaries must in fact pursue the interests of their beneficiaries, rather than succumbing to conflicting or divergent interests . . . .
>
> By default, a Delaware LLC exists perpetually—from formation until cancellation. Consequently, unless their fiduciary duties are eliminated or modified, the fiduciaries who control a Delaware LLC must strive to maximize the value of the LLC over a long-term horizon, as warranted for an entity with a presumptively perpetual life.[302]

In *Glidepath*, the subject limited liability company had been acquired by the defendants from the plaintiffs, who were pursuing claims against the company and the defendants under earnout provisions in the acquisition agreement.[303] The plaintiffs were thus *contractual* creditors of the company, which led the Vice Chancellor to expound on how the relationship between a fiduciary and an equityholder differs from that between a fiduciary and a contractual claimant:

> The fiduciary principle does *not* require that fiduciaries maximize the value of a beneficiary's contractual claim against the firm. A holder of a contract claim[] must rely on its contractual rights. When making a decision, fiduciaries can and should consider its implications for contractual claimants and evaluate what actions those claimants may take in response. Based on this analysis, fiduciaries may decide not to pursue a particular course of action *because of the resulting implications for the firm and its residual claimants*. But fiduciaries do

300. Glidepath Ltd. v. Beumer Corp., C.A. No. 12220, 2019 WL 855660 (Del. Ch. Feb. 21, 2019).
301. *Id.* *18.
302. *Id.* at *18–19 (footnotes omitted) (emphases added).
303. *Id.*

> not owe duties to contractual claimants. To the contrary, *a fiduciary violates the standard of conduct if the fiduciary seeks to maximize the value of a contractual claim at the expense of the fiduciary's beneficiaries*.[304]

Here, it is the fundamental rule from *Revlon* that the Vice Chancellor is calling *the* fiduciary principle: directors are to manage the corporation for the benefit of shareholders, not other constituencies ("a holder of a contract claim[] must rely on its contractual rights"[305]), and while directors may consider the interests of such claimants ("fiduciaries can and should consider" the "implications [of their business decisions] for contractual claimants"[306]), they do so as part of determining what maximizes value for shareholders in the long run ("fiduciaries may decide not to pursue a particular course of action because of the resulting implications for the firm and its residual claims"[307]). It is always the interests of the shareholders—first, last, and always—that determine what directors may do, for "a fiduciary violates the standard of conduct if the fiduciary seeks to maximize the value of a contractual claim at the expense of the fiduciary's beneficiaries."[308]

There is a point, besides mere repetition, in assailing the reader with these long and very similar quotations from *Trados*, *Rural Metro*, *El Paso Pipeline*, *Virtus Capital*, *Frederick Hsu Living Trust*, *McDonald's*, and *Glidepath Limited*. That point is that, in the decades following *Unocal* and *Revlon*, these principles have been so well established that their invocation has been routinized. They are repeated verbatim or almost verbatim, in opinion after opinion, much like other unchallengeable principles of law, such as the standards required to obtain a preliminary injunction. Indeed, Vice Chancellor Laster's discussion in *Frederick Hsu* of the duty of the directors of a Delaware corporation to maximize value for the shareholders has become something of a *locus classicus*, being cited in treatises and other cases.

This is confirmed, as if any additional confirmation were needed, from opinions authored by the judges joining the Court of Chancery only more recently. Thus, Vice Chancellor Slights, in 2018, said in *New Senior Investment Group*,[309]

> "In performing their duties the directors [of Delaware corporations] owe fundamental fiduciary duties of care and loyalty." "[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." Thus, "Delaware law is clear that *the board of directors of a for-profit corporation . . . must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare*.[310]

304. *Glidepath Ltd.*, 2019 WL 855660, at *19 (footnotes omitted) (emphases added).
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. Cumming *ex. rel.* New Senior Inv. Grp., Inc. v. Edens, C.A. No. 13007, 2018 WL 992877 (Del. Ch. Feb. 20, 2018) (alterations in original) (omission in original) (footnotes omitted) (emphasis added).
310. *Id.* at *18 (emphasis added) (explaining Vice Chancellor Slights's holding regarding the standards of conduct owed by directors for stockholder welfare) (internal quotations and citations omitted, emphasis added).

In substantially identical language, Vice Chancellor Zurn said in *Pattern Energy Group*,[311]

> Under Delaware law, for a director to act loyally to advance the best interests of the corporation, she "must seek to promote the value of the corporation for the benefit of its stockholders." "Delaware case law is clear that the board of directors of a for-profit corporation must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare."[312]

Here both vice chancellors restate both the fundamental principle that directors must always act for the benefit of the corporation's shareholders ("directors of a for-profit corporation must . . . treat stockholder welfare as the only end" (Slights), and "a director . . . must seek to promote the value of the corporation for the benefit of its stockholders"[313] (Zurn)), as well as the *Revlon* rule that directors may consider the interests of non-shareholder constituencies only to the extent that by doing so they promote long-term shareholder value (directors may "consider[] other interests only to the extent that doing so is rationally related to stockholder welfare"[314] (Slights and Zurn)).[315]

VIII. THE LEADING TREATISES ON DELAWARE LAW

To summarize, as corporate law developed in the nineteenth century, the rule quickly emerged that directors had a fiduciary duty always to act for the benefit of the corporation's shareholders. Even in this period, this rule had a corollary: directors could direct value to other corporate constituencies if they judged that doing so would produce more value for shareholders in the long term. Courts in both the United States and England stated and restated both the rule and the corollary, and treatises on corporate law routinely did the same. Both the rule and the corollary about other constituencies were expressly adopted by the Delaware Court of Chancery at least as early as the 1960s. In 1985, the miracle year of Delaware corporate law, the Delaware Supreme Court spoke clearly and definitively on these issues in *Unocal* and *Revlon*, holding in *Unocal* that it was a "basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders,"[316] and in *Revlon* that although directors "may have regard for various constituencies in discharging its responsibilities," their doing so is permissible only subject to the "fundamental limitation[]" that "there are rationally related benefits accruing to the stockholders."[317] These principles have been stated and restated, applied and reapplied, ever since in Delaware, both by the Supreme Court and the Court of Chancery, so much so

311. *In re* Pattern Energy Grp. Inc. S'holders Litig., C.A. No. 2020-0357, 2021 WL 1812674 (Del. Ch. May 6, 2021).

312. *Id.* at *47 (alteration in original) (emphasis added) (footnote omitted).

313. *Id.*

314. *Id.*

315. *Id.* (comparing the language used by Vice Chancellors Zurn and Slights concerning directors' duty to manage the corporation for the benefit of the stockholders, considering other constituencies only instrumentally towards that end).

316. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985) (citing Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

317. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (explaining the roles of directors in relation to stockholder welfare).

that nowadays that are repeated in verbatim formulations copied from case to case practically by rote.

Unsurprisingly, the major treatises on Delaware corporate law confirm all this.[318] Thus, in *Folk on the Delaware General Corporation Law*, we read, "Directors of a Delaware corporation are required, within the limits of their legal discretion, to "treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare."[319] This, of course, is the basic principle about shareholder wealth maximization from *Unocal* along with the corollary about other constituencies from *Revlon*. The authors go on to quote at length from Chancellor Chandler's opinion in *eBay*:

> "Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The 'Inc.' after the company name has to mean at least that."[320]

As to the corollary from *Revlon* about the instrumental consideration of other constituencies in the pursuit of maximizing shareholder value, the authors of the treatise state,

> However, the Court of Chancery has stated that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently "because such activities . . . benefit the corporation as a whole, and by increasing the value of the corporation, the directors increase the quantum of value available for the residual claimants."[321]

Furthermore, the authors also note how subsequent cases have interpreted the language in *Unocal* permitting directors to consider the impact of takeover offers on non-shareholder constituencies.[322] Thus, after quoting the relevant passage from *Unocal*, the authors explain that the Supreme Court formulated the rule somewhat differently in *Mills Acquisition*, where it stated that directors could consider "the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable

318. More general treatises on corporate law confirm it as well. Thus, Dean Clark says that "corporate managers (directors and officers) are supposed to make corporate decisions so as to maximize the value of the company's shares, subject to the constraint that the corporation must meet all its other legal obligations to others who are related to or affected by it." ROBERT C. CLARK, CORPORATE LAW § 1.2 at 17–18 (1986). Similarly, Professor Dooley says that "it is generally agreed that management's principal fiduciary duty is to maximize the return to the common shareholders. The interests of bondholders and other creditors are protected by their prior contractual rights, and maximizing the value of the common is consistent with maximizing the value of the firm because of the residual nature of the common's interest." MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 97 (1995). Professor Bainbridge states flatly, "It is well-settled that directors have a duty to maximize shareholder wealth." STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 306 (2002).

319. 1 ROBERT S. SAUNDERS ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 141.02[A][1], at 4–33 (7th ed. Supp. 2022-1) (quoting Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, slip op. at 34–35 (Del. Ch. Apr. 14, 2017).

320. *Id.* (quoting eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010)).

321. *Id.* (quoting Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, slip op. at 34 (Del. Ch. Apr. 14, 2017)).

322. *Id.* § 141.02[E][1], at 4-217–250.

relationship to general shareholder interests."[323] The authors do not cite *Revlon* in this passage, but the key language from *Mills* ("bears some reasonable relationship to general shareholder interests"[324]) obviously derives from *Revlon* ("provided there are rationally related benefits accruing to the stockholders"[325]).

The treatment of these questions in Balotti and Finkelstein is similar.[326] Thus, quoting from Vice Chancellor Laster's opinion in *Frederick Hsu Living Trust*, the authors write,

> The fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital, as warranted for an entity with a presumptively perpetual life in which the residual claimants have locked in their investment.[327]

Balotti and Finkelstein also explain the relationship between *Unocal* and *Revlon* in exactly the same terms as given above.[328] Hence, quoting *Unocal*, the authors say that, in evaluating a takeover proposal "the board may consider a number of factors, including the 'inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.'"[329] Citing *Revlon*, they add, however, that "the Delaware Supreme Court stated that the concern for the impact on constituencies other than stockholders is proper only if there is some rationally related benefit accruing to the stockholders."[330]

On the issue of the relationship of *Unocal* and *Revlon*, the most extensive treatment is in Fleischer, Weinstein and Luftglass. They say,

> In 1985 in the *Unocal* case the Delaware Supreme Court, in reviewing the factors directors may in good faith consider in opposing a takeover bid, identified as a legitimate concern "the impact on 'constituencies' other than shareholders (*i.e.*, creditors, customers, employees, and perhaps even the community generally)." However, in the *Revlon* decision, the propriety of considering other constituencies was explicitly qualified by requiring that "there are rationally related benefits accruing to the stockholders" and that "such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress."[331]

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323. *Id.* § 141.02[E][1][a] at 4222 n.789.

324. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 (Del. 1989).

325. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (quoting Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985)).

326. .R. FRANKLIN BALOTTI & JESSE A FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS (2022).

327. *Id.* at § 4.14 (quoting Frederick Hsu Living Tr. v. ODN Holding Corp., C.A. No. 12108, 2017 WL 1437308, at *37 (Del. Ch. Apr. 14, 2017, corrected Apr. 25, 2017)).

328. *Id.*

329. *Id.* at § 4.20[A][3] (quoting *Unocal*, 493 A.2d at 955).

330. *Id.* at § 4.20[A][3] n.1281. The authors make essentially the same point, though restricted to the context of the board considering the interests of creditors (not other constituencies generally), in § 4.16[E][4].

331. ARTHUR FLEISCHER, JR., GAIL WEINSTEIN & SCOTT B. LUFTGLASS, TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 4.07 (9th ed. 2022) (footnotes omitted).

They refer to "what has become the standard articulation of the rule with respect to the consideration of non-stockholder constituencies by Delaware corporate boards—namely, that, as stated in *Revlon*, consideration of other constituencies is permissible to the extent that there is a 'rational relationship' to the interests of the stockholders."[332] They explain,

> Thus, a decision to measure the desirability of an action based primarily on what is in the interests of another stakeholder group, or without regard to (and even if contrary to) the interests of the shareholders, in our view would not be accorded the protections of the business judgment rule in Delaware.[333]

Nevertheless,

> [I]t is clearly permissible under Delaware law to consider the interests of non-shareholder constituencies so long as that consideration is "rationally related" to what is in the best interests of the shareholders. For example, a decision to pay employees more would generally be justifiable if the board believes it prudent for the purpose of sustaining and enhancing the company's value over the long-term (because it attracts and retains good employees, incentivizes them to do good work, and/or enhances the company's general reputation). We note, however, that, to the extent that stakeholderism, as some propound, means instead that corporate leaders can and should regard stakeholder interests as ends in themselves, without regard to shareholders' interests, that view of the theory, in our view, would be inconsistent with existing Delaware law.
>
> In sum, it appears to us non-controversial that any action that a board believes will advance the long-term value of the corporation will obtain business judgment rule deference under Delaware law—but the board's decision-making must reflect that it was not based on promoting the interests of a non-shareholder constituency over the primacy of the shareholders' interests (or, put differently, without regard to the longterm value of the corporation which will inure to the benefit of the shareholders).[334]

And that summarizes the whole subject quite well: it is *non-controversial*—not in the sense that it is not controverted but in the sense that it *ought not be* controverted and *cannot reasonably be controverted*—that, under Delaware law, a board's decision-making must be based on promoting the long-term interests of the corporation's shareholders and not on the interests of non-shareholder constituencies to the detriment of those interests.

IX. THE QUESTION OF ENFORCEABILITY

Given that the pertinent caselaw is so clear, so univocal, and so abundant, those who deny that Delaware law requires directors act for the sole purpose of maximizing value for shareholders within the law and in the long term tend to fall back on arguments about the supposed unenforceability of this rule. That is, some people argue that, while courts sometimes *say* that directors should maximize value for shareholders, nevertheless there

332. *Id.*
333. *Id.* (footnotes omitted).
334. *Id.* (footnotes omitted).

are no (or virtually no) cases *enforcing* this rule.[335] Moreover, if a shareholder brought a case alleging a violation of the supposed duty, the shareholder would surely lose, for, leaving aside cases of directors acting in their own self-interest, directors could in practice justify virtually any business decision as being in the long-term interest of shareholders, and given the great deference to directorial decisions shown by Delaware courts under the business judgment rule, the directors would always prevail.[336] On this view, the supposed rule is more aptly characterized as hortatory rhetoric than a rule of law enforceable against directors. At this point, Holmes's bad man sometimes puts in an appearance to prove that a rule not actually enforced by courts is no real law at all.

Now, there are in fact several different but related arguments about unenforceability here, and although all of them fail, it is instructive to sort them out and state each of them clearly. Perhaps the most important version of the argument is based on an outright misunderstanding of the relevant rule of law. For, recall that the rule is that, when directors make a business decision, they are required to act with the subjective intention of (i.e., for the subjective purpose of) maximizing value for shareholders; if they aim at any other end, then they breach their duty. In other words, the rule is a rule about the end-in-view that directors must have when they act. Speaking elliptically, courts and others—myself included, throughout this article—sometimes paraphrase the rule by saying that directors have a duty to manage the corporation for the benefit of the shareholders. Thus stated, the rule can reasonably be understood to mean that directors have to exert a certain (presumably high) level of effort to maximize value for shareholders, and so if they are not sufficiently diligent in pursuing this end, they will breach their duty.[337] The existence of such a duty finds some support in Delaware case law, for the Delaware courts have

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335. *E.g.*, STOUT, *supra* note 33, at 32 ("As far as the law is concerned, maximizing shareholder value is not a requirement; it is just one possible corporate objective out of many," and "Maximizing shareholder value is not a managerial obligation, it is a managerial choice."); Bruner, *supra* note 33, at 1416 n.161 (finding that under *Revlon*, "the focus on long-term performance, coupled with extraordinary deference to the board's judgment, renders deviations from shareholder wealth maximization effectively unpoliceable"); LoPucki, *supra* note 33, at 2030 ("Courts that have imposed a duty to [maximize shareholder wealth] do not enforce it, except in the rare cases in which managers volunteer that they are not maximizing shareholder wealth" (footnote omitted)); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 527 (2011) (pronouncements of Delaware courts regarding a duty to maximize shareholder value "are of no practical importance, because shareholders lack the ability to challenge management policies that favor nonshareholder interests even if the result is reduction of profits"); Elhauge, *supra* note 33 at 770–71, 856 (stating that "under the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) on the ground that they may conceivably maximize profits (at least in the long run), [and b]ecause just about any decision to sacrifice profits has a conceivable link to long-term profits, this suffices to give managers substantial de facto discretion to sacrifice profits in the public interest."); Mitchell, *supra* note 33, at 749 ("Shareholder wealth maximization has been and will remain *dicta*, a rhetoric, not an edict.").

336. *E.g.*, Allen, *supra* note 16, at 272–73 ("Corporate expenditures which at first blush did not seem to be profit maximizing, could be squared with the [rule that directors should manage the corporation for the benefit of the shareholders] by recognizing that they might redound to the long-term benefit of the corporations and its shareholders.").

337. That is, they would have a duty somewhat like that under an efforts covenant in a merger agreement. *See, e.g.*, LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.06 (2018) (discussing best efforts, reasonable best efforts and similar obligations); *see also* Strine et al., *supra* note 61, at 643–44, 646–49 (discussing and criticizing efforts by some advocates and scholars to argue that when directors fail to exert a certain level of effort, they fall short of some objective standard of "good faith").

sometimes said that the duty of loyalty "embodies . . . an affirmative duty to protect the interests of the corporation"[338] or "imposes an affirmative obligation to protect and advance the interests of the corporation,"[339] which such duty is "broad and encompassing, demanding of a director the most scrupulous observance."[340] Such language suggests that a shareholder could state a claim by alleging that the directors merely did not try hard enough to maximize shareholder value, but whatever this affirmative duty amounts to and regardless of how enforceable or unenforceable it may be,[341] this duty is clearly distinct from the duty at issue in this article. The reason is that the duty relevant here does not concern some objective standard of effort but the subjective state of mind of the director when acting, i.e., whether the director acted for a certain purpose, viz., maximizing shareholder value. It is a rule about the end for which directors act, not a rule about how much effort they put into achieving that end. The language of some older cases notwithstanding, it almost certainly does not state a claim under Delaware law to say that the directors did not try hard enough to maximize value for shareholders, but it certainly states a claim to say that the directors made a particular business decision for some subjective purpose other than maximizing value for shareholders in the long term—i.e.,

338. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987).

339. *In re* The Walt Disney Co. Deriv. Litig., C.A. No. 15452, 2004 WL 2050128, at *5 n.49 (Del. Ch. Sept. 10, 2004) (quoting BelCom, Inc. v. Robb, No. Civ. A, 14663, 1998 WL 229527, at *3 (Del. Ch. 1998)).

340. *Id.* (emphasis deleted); *see also* Strine et al., *supra* note 61, at 635–36 (stating that "the director's job demands affirmative action—to protect and to better the position of the corporation" and "[a] faithful fiduciary is duty-bound to try to act with care") (emphasis deleted).

341. No doubt the confusion arises from conflating the standard of conduct with the standard of review: that is, the standard of conduct *does* require a certain (indeed, high) level of effort, but the business judgment standard of review does not. In lieu thereof, Delaware law includes the concept of oversight liability. That is, in Delaware, a director is liable for omitting to act when the director believes acting would be in the best interest of the corporation and shareholders but consciously chooses not to act. Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) ("A failure to act in good faith may be shown . . . where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." (quoting *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 67 (2006)). A director may also be liable for inaction if the inaction amounts to an "utter failure" to act when action is required. *In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 971 (Del. Ch. 1996). But the Delaware Supreme Court has said that such failures are included in the kind of omissions mentioned above—i.e., failures to act when one knows one ought to act. *Stone* 911 A.2d at 369. And, even when the claim is that the director utterly failed to perform his duty, the "imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligation." *Id.* at 370; *cf.* ATR-Kim Eng. Fin. Corp. v. Araneta, No. Civ.A. 489-N, 2006 WL 3783520, at *19-21 (Del. Ch., Dec. 21, 2006) (holding directors who "failed to take any steps to perform their duties as fiduciaries" liable because "they consciously abandoned any attempt to perform their duties independently and impartially, as they were required to do by law"); Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003) ("Although the *Caremark* decision is rightly seen as a prod towards the greater exercise of care by directors in monitoring their corporations' compliance with legal standards, by its plain and intentional terms, the opinion articulates a standard for liability for failures of oversight that requires a showing that the directors breached their duty of loyalty by failing to attend to their duties in good faith. Put otherwise, the decision premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs." (footnote omitted)); *see generally*, Strine et al., *supra* note 61, at 688–96 (discussing the development of Delaware law leading to *Stone v. Ritter* and its rejection of the notion that gross negligence (including a failure to monitor), without more, can support a claim for breach of the duty of loyalty); Robert T. Miller, *Wrongful Omissions by Corporate Directors:* Stone v. Ritter *and Adapting the Process Model of the Delaware Business Judgment Rule*, 10 U. PA. J. BUS. & EMP. L. 783 (2008) (discussing various ways the law could treatment failures by directors to act and explaining why the good faith standard of *Caremark* and *Stone v. Ritter* is justified).

that they made a business decision consciously believing that the decision would ultimately harm shareholders and not benefit them.

Another version of the unenforceability argument based on a misunderstanding of the relevant rule holds that, if the directors have managed the corporation in a manner that any reasonable person could see would not maximize value for shareholders in the long term and, as a result, the corporation has incurred losses, then the directors have breached the standard of conduct. This is to confuse a rule about the end for which directors must act with the reasonability of the means they have adopted in pursuit of that end. It is an attempt to smuggle into Delaware law a substantive duty of care that is foreign to that law.[342] As Chancellor McCormick recently said in rejecting such an argument, this amounts to asking "the court to presume bad faith based on the merits of the deal alone."[343] But, at least in the great majority of cases, the objective, substantive badness of a business decision will not support an inference that the directors took that decision for any purpose other than the maximization of value for the corporation and its shareholders. As Chancellor Allen explained,

> What should be understood, but may not widely be understood by courts or commentators who are not often required to face such questions, is that compliance with a director's duty of care can never appropriately be judicially determined by reference to *the content of the board decision* that leads to a corporate loss, apart from consideration of the good faith *or* rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in *a good faith* effort to advance corporate interests. To employ a different rule—one that permitted an "objective" evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests.[344]

Put yet another way, the rule in question concerns the end for which an action by the directors was taken—i.e., whether the action was taken for the purpose of maximizing shareholder value; the rule does not concern the objective connection between that action and this intended end—i.e., whether the action *in fact* maximized shareholder value, *was reasonably likely* to maximize shareholder value, *could reasonably be expected* to maximize shareholder value, etc.—and no matter how tenuous that objective connection may be, the tenuousness of the connection will not generally support an inference that the directors did not really have the end in mind after all when they undertook the action. The only exception is when the action is so extreme as to lack a "rational business purpose"

342. Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("[A] concept [of substantive due care] is foreign to the business judgment rule. Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decisionmaking context is *process* due care only." (footnote omitted)).

343. City of Coral Springs Police Officers' Pension Plan v. Dorsey, C.A. No. 2022-0091, 2023 WL 3316246, at *10 (Del. Ch. May 9, 2023).

344. *In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 978–68 (Del. Ch. 1996) (footnote omitted).

and so amount to waste or else support an inference that the directors did not really act for the purpose of benefiting the shareholders.[345]

Another version of the unenforceability argument understands the rule correctly but contends that, leaving aside cases involving director self-interest, there are few or no cases in which shareholders have alleged, much less succeeded in proving, that directors have undertaken business decisions for illicit purposes—i.e., for purposes other than maximizing shareholder value. Hence, while courts will enforce the rule when directors are acting in their own interests, they will not enforce the rule when disinterested and independent directors are acting for a purpose other than maximizing shareholder value. The obvious answer to this version of the argument is that there simply *are* some very clear cases in which plaintiffs have alleged that disinterested and independent directors have acted for illicit purposes and have prevailed. *Revlon* itself is such a case, as are *Trados*[346] and *Frederick Hsu*.[347] If it is said that these cases do not count because they all involve situations in which the board's *Revlon* duties were triggered, then there is also *eBay*, where the board's *Revlon* duties were certainly *not* triggered. To be sure, it is much more common for shareholders to bring cases in which directors have been affected by self-interest, but a rule of law does not cease to be a rule of law merely because *some other* rule of law generates more litigation. Furthermore, the argument that cases in which directors act for self-interested ends are actionable, but cases in which disinterested and independent directors act for ends other than maximizing shareholder value are not, has actually been directly addressed and rejected by the Delaware courts, for the defendant directors in the *RJR Nabisco* case made precisely this argument and lost.[348] Chancellor Allen's treatment of the argument is caustic, devastating, and highly illuminating:

> [W]ith no detectable conviction, [the defendant directors] say that even if it were true that they secretly intended to pursue a plan that favored one bidder over another for private reasons, that would not constitute bad faith under Delaware law for purposes of removing from them the protections of the business judgment rule. They say that only pursuit of financial interests opposed to those of the corporation or the shareholders counts in the evaluation of director good faith.
>
> The Supreme Court authorities cited for this proposition, however, do not support it and the assertion is inconsistent with cases in this court and fundamental notions of fiduciary duty . . . . Neither case [cited by the defendants] . . . can be read to hold that the protections of the business judgment rule would be available to a fiduciary who could be shown to have caused a transaction to be effectuated (even one in which he had no financial interest) for a reason unrelated to a pursuit of the corporation's best interests. Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed any human

345. Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Irrationality," which is the absence of a rational business purpose, "is the outer limit of the business judgment rule. Irrationality may be the functional equivalent of the waste test or it may tend to show that the decision is not made in good faith").

346. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013).

347. Frederick Hsu Living Tr. v. ODN Holdings. Corp., No. CV 12108, 2017 WL 1437308 (Del. Ch. Apr. 14, 2017).

348. *In re* RJR Nabisco, Inc. S'holder Litig., No. CV. 10389, 1989 WL 7036 (Del. Ch. Jan. 31, 1989).

> emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation. But if he were to be shown to have done so, how can the protection of the business judgment rule be available to him? In such a case, is it not apparent that such a director would be required to demonstrate that the corporation had not been injured and to remedy any injury that appears to have been occasioned by such transaction?[349]

Indeed, as Chancellor Allen here implies, the argument's attempt to distinguish cases in which directors are pursuing their own financial interests from cases in which they are pursuing some other interest unrelated to maximizing value for shareholders involves a fundamental mistake. The unspoken assumption in the argument that Chancellor Allen is rejecting is that a fiduciary duty is essentially a duty to abstain from self-interested conduct. That assumption, of course, is not correct. A fiduciary duty is a duty to act *only for the benefit of the beneficiary*.[350] As fiduciaries, directors are not permitted to pursue their own interests, but *the reason that directors are not permitted to pursue their own interests is that they are required to act solely in the interest of the shareholders*.[351] The same principle that prohibits directors from pursuing their interests prohibits them from pursuing other non-shareholder interests as well, even ones the directors may honestly believe to be more morally worthy.[352] It is entirely artificial to except cases of self-interest here and attempt to distinguish them from cases in which directors pursue other interests unrelated to shareholder value. The fundamental rule, from which the rule against pursuing their own interests can be deduced, is the rule that directors must act for the sole purpose of benefiting shareholders.

Notice, too, that there is an obvious reason why, when directors act for illicit purposes, they are almost always acting in their own self-interest rather than the interests of some other non-shareholder group. The reason is that human beings tend to be selfish; we are naturally much more likely to act to benefit ourselves than others.[353] Hence, when a person fails in a moral or legal duty, the usual reason is that he is benefiting himself, not engaging in a disinterested effort to benefit some unrelated third party. Moreover, violating a duty typically exposes the violator to some kind of sanction, and so the violator's own self-interest cuts in favor of adhering to his duty when he has no self-interested reason for violating it. Thus, bank tellers who embezzle from banks almost always keep the embezzled funds for themselves; they do not generally give them away to worthy causes.

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349. *Id.* at *15.

350. *See supra* Parts II–IV (outlining the long history of this rule); RESTATEMENT OF TRUSTS. § 170(1) (AM. L. INST. 1935) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."); *id.* cmt. p ("The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person."); RESTATEMENT OF AGENCY § 387 (AM. L. INST. 1933) ("[A]n agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

351. *See* Strine et al., *supra* note 61, at 666 (in agency law, "it is the agent's general duty to act loyally—that is, in the interests of the principal—that gives rise to the more specific duty to avoid taking positions in which the agent's interests are in conflict with those of the principal").

352. *Id.* at 633 ("Delaware law has traditionally subjected the protection of the business judgment rule . . . to the important condition that fiduciary power be exercised for proper corporate reasons and not to advance a personal agenda of any kind"); Strine, *supra* note 16, at 151 ("[A]s a matter of corporate law, the object of the corporation is to produce profits for the stockholders and . . . the social beliefs of the managers, no more than their own financial interests, cannot be their end in managing the corporation.").

353. *E.g.*, RICHARD DAWKINS, THE SELFISH GENE 3 (1976) ("[W]e are born selfish.").

Securities fraudsters engaged in pump-and-dump schemes almost always use the proceeds of their nefarious dealings to live high themselves, not to relieve famine victims on the other side of the world. Shoplifters tend to keep the merchandise they steal for their own use or to sell it for a profit; they do not generally donate it to a local homeless shelter. The same is true for corporate directors. When they defect from their duty by acting for a purpose other than benefiting shareholders, the usual reason is that they are pursuing some personal interest of their own. But just as charitable embezzlers, altruistic securities fraudsters, and generous shoplifters still act contrary to law, so too do directors who pursue interests other than maximizing value for shareholders. Hence, in the very nature of things, it is much more likely that a director violating his duty to act only for the benefit of shareholders will be engaged in self-interested conduct than in a disinterested attempt to divert value to some other corporate constituency. The relative paucity of the latter kind of cases arises primarily from the inherent rarity of the conduct that would violate the rule.

Yet another version of the unenforceability argument says that although *in theory* there may be a rule requiring that directors act solely for the benefit of shareholders, nevertheless, other than in cases involving director self-interest, this rule is unenforceable *in practice*.[354] The reason for this discrepancy between theory and practice, according to this version of the argument, is that the directors will always be able to argue, with considerable plausibility, that the challenged decision does in fact maximize value for shareholders in the long run,[355] and, given the deference that Delaware courts show to directors' decisions under the business judgment rule, the directors will always prevail in such cases.[356] Now, the first thing to see about this argument is that it concedes the primary point: directors have a legal duty to act for the purpose of maximizing value for shareholders.[357] That is why, when challenged, directors always defend the claim by

354. *E.g.*, Elhauge, *supra* note 33, at 770–71, 856 ("[U]nder the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) on the ground that they may conceivably maximize profits (at least in the long run), [and since] just about any decision to sacrifice profits has a conceivable link to long-term profits, this suffices to give managers substantial de facto discretion to sacrifice profits in the public interest"); LoPucki, *supra* note 33, at 12 ("Courts that have imposed a duty to [maximize shareholder wealth] do not enforce it, except in the rare cases in which managers volunteer that they are not maximizing shareholder wealth" (footnote omitted)); STOUT, *supra* note 33, at 32 ("As far as the law is concerned, maximizing shareholder value is not a requirement; it is just one possible corporate objective out of many," and "Maximizing shareholder value is not a managerial obligation, it is a managerial choice"); *see also* Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEX L. REV. 911, 920 (2013) ("Managers are virtually free to ignore shareholder value in what they do (though perhaps not in what they say).").

355. *E.g.*, Strine et al., supra note 61, at 632 n.4 ("It is very difficult to prove that a fiduciary acted for an improper purpose.").

356. *E.g.*, Elhauge, *supra* note 33, at 770–71 ("[U]nder the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) on the ground that they may conceivably maximize profits (at least in the long run)."); Bruner, *supra* note 33, at 1416 n.161 (conceding that Delaware law does not "permit wholesale abandonment of shareholders' interests" but "the focus on long-term performance, coupled with extraordinary deference to the board's judgment, renders deviations from shareholder wealth maximization effectively unpoliceable").

357. Those attempting to deny that Delaware law requires directors to maximize value for shareholders often make grudging concessions that entirely undermine their position. For instance, Professor Bruner says, "Although Delaware case law mandates the maximization of the price received by the shareholders" in *Revlon* contexts, "this is itself best understood as a deviation from the norm permitting *de facto* deviations from shareholder wealth maximization." Bruner, *supra* note 33, at 1400 n.84. But if deviations from shareholder wealth maximization are

arguing that, in fact, *they acted for the purpose of maximizing value for shareholders*. Directors do *not* come into court and argue that they acted for other purposes and were legally entitled to do so.[358] This version of the argument thus concedes that the rule is indeed that directors have a duty to act solely for the benefit of shareholders; it merely asserts that this rule does not matter, or does not matter much, in practice. Why not? The answer is actually rather shocking: the rule is said not to matter in practice because directors who are prepared to perjure themselves and lie in court about why they made the challenged decision stand a good chance of not getting caught.[359] This is the type of answer one expects from a mobster, not a lawyer. Lawyers are expected to take the law seriously. They are expected to obey it themselves and counsel their clients to do likewise.

Of course, there is a sense in which this version of the unenforceability argument is true: if the directors made a business decision for illicit purposes, and *if* they took the precaution of falsifying any minutes of the meeting at which the decision was made, and *if* they could corrupt their legal counsel who would normally prepare those minutes and get the counsel to participate in the fraud, and *if* they are prepared to risk a criminal conviction by perjuring themselves when the case is litigated, then, *yes*, they would stand a good chance of winning a suit brought by a shareholder challenging the decision as having been made for an end other than maximizing shareholder value.[360] But, in a larger sense, this

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really made in accordance with a "norm permitting" such deviations, then the deviations are *de jure*, not *de facto*; deviations that are properly described as *de facto* are deviations in violation of a norm, not ones in accordance with it. Conceding the deviations are *de facto* implies, as described in the text, a concession that the rule of law is to the contrary—that directors have a duty to maximize value for the benefit of shareholders. *See also* Elhauge, *supra* note 33, at 771 (employing a similar use of the phrase "de facto").

358. As is well known, in *Dodge v. Ford*, Ford did not argue that his actions maximized shareholder value. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 683–84 (Mich. 1919) ("[Mr. Ford's] testimony creates the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken."). Instead, Ford apparently conceded that he did *not* act to maximize shareholder value. *Id.* Yet, the court did not question, even for a minute, whether Ford was legally entitled to disregard his shareholders. *See id.* at 684 ("[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.").

359. *See, e.g.*, Bruner, *supra* note 33, at 1418 (stating that the business judgment rule "functions every day to insulate countless decisions from second-guessing of any sort, permitting corporate decision-makers to deviate from the path of shareholder wealth maximization without fear of judicial intervention or negative consequences—so long as they can come up with some form of rationalization phrased in terms of 'long-term' shareholder interests"). He does not think this implies there is no actual rule requiring directors to maximize value for shareholders but merely that "by placing by this entirely with the board's discretion, [the business judgment rule] permits *de facto* . . . deviations from shareholder interests that cannot be effectively policed." *Id.* at 1418 n.171. Hence, the argument turns on what can be "effectively policed." *Id*. As Professor Yosifon aptly says, "The enduring ambivalence that Bruner purports to describe is therefore not a statement about Delaware law, but about what lawless directors might get away with." Yosifon, *supra* note 13, at 224. In other places in his article, however, Professor Bruner appears to say the rule itself allows directors to benefit other constituencies at the expense of shareholders, as when he says that "deviations [from the rule requiring directors to maximize shareholder wealth] are explicitly endorsed in certain circumstances in jurisdictions like Delaware." Bruner, *supra* note 33, at 1429.

360. As Professor Yosifon puts it, "Because of the business judgment rule, directors have near total discretion to run firms the way they see fit," and so "it is nearly impossible to enforce the shareholder primary norm through litigation, absent, essentially, an explicit statement by directors that they are managing the firm towards some

shift of focus to the probability of enforcement through litigation is palpably absurd. It is absurd on a practical level because it is nearly impossible to imagine so many people, all sophisticated and well-advised, committing so many crimes and risking so much time in prison in order to cover up a non-crime that could, at most, result in civil liability.[361] On the contrary, directors are fiduciaries of the corporation and its shareholders, and as fiduciaries they have a legal obligation to speak truthfully to the shareholders[362] and the market generally about what they doing and why. Needless to say, the great majority of corporate directors take these obligations seriously and attempt to live up to them. In any event, they are not likely to commit perjury and other crimes in order to engage a taste for stakeholderism in corporate governance.

More important, the shift in focus from the legal rule to its practical enforceability is absurd on an intellectual level as well because the fact that a rule of law can likely be evaded if people go to extreme lengths to conceal the fact that they have violated the rule simply does not make the rule any less of a law.[363] Insider trading is very difficult to detect; that does not make insider trading legal. "Perjury," as Nixon famously said, "is an awful hard wrap to prove,"[364] but that does not make perjury legal. As Professor Yosifon observes, "sometimes getting away with something to some extent is by no means the same thing as being always authorized to do it."[365] When Holmes said that, if you want to know what the law is, you must look at it as a bad man, who cares only for the material consequences of his actions,[366] he did not mean that, in addition, you should reckon those

other goal." Yosifon, *supra* note 13, at 223. Thus, some of the most important cases actually enforcing the norm, such as *Revlon*, *eBay*, and, much earlier, *Dodge v. Ford*, involve exactly such an admission by the directors. *E.g.*, *Dodge*, 170 N.W. at 684.

361. Absurd to imagine in practice but not too absurd for law professors to discuss in their articles, for just such an illegal scheme is what Professor Elhauge is suggesting when he says that, even when *Revlon* duties have been triggered, management "still enjoys some degree of discretion to sacrifice shareholder profits to further the interests of other constituencies" because it "need only, if it wants to do so, make sure that the winning bid is structure to include some securities whose future value *can be claimed* to bear some rational relationship to effects on other constituencies" and ultimately to shareholder value. Elhauge, *supra* note 33, at 852 (emphasis added). The italicized words in the passive voice are critical, however, for they in fact refer to the directors both lying in securities filings related to the transaction (illegal under Rule 10b-5 and other provisions of the federal securities law) and then perjuring themselves in affidavits or testimony in any subsequent litigation in Delaware (illegal under state law).

362. *E.g.*, Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. 1985) ("[C]orporate directors owe to their stockholders a fiduciary duty to disclose all facts germane to the transaction at issue in an atmosphere of complete candor."); *see also* Yosifon, *supra* note 13, at 225 ("To behave in good faith, as the law requires them to do, directors must say what they believe and believe what they say. Directors, as fiduciaries, cannot lie about what they are doing and they are doing it.").

363. *See* Strine, *supra* note 35, at 776 (stating that although "the business judgment rule provides directors with wide discretion, and thus enables directors to justify—by reference to long-run stockholder interests—a number of decisions that may in fact be motivated more by a concern" for a non-stockholder constituency "rather than long-run stockholder wealth," nevertheless "that does not alter the reality of what the law is"); Yosifon, *supra* note 13, at 223 ("But just because shareholder primacy cannot be easily enforced through lawsuits does not alter the fact that it is the prevailing law of corporate governance in Delaware.").

364. Transcript of a Recording of a Meeting Among the President, John Dean, and H.R. Haldeman in the Oval Office, NIXON LIBR., at 37 (Mar. 21, 1973), https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/watergate/trial/exhibit_12.pdf [https://perma.cc/W8P6-2CJ4].

365. Yosifon, *supra* note 13, at 223.

366. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

consequences by assuming that the bad man may avoid liability by perjuring himself or bribing the judge or tampering with the jurors, even if he might well be able to do these things. Applying the rule that directors may act only for the purpose of maximizing shareholder value turns essentially on the director's state of mind—the subjective intention he or she had in mind when making a business decision—and since we never have direct access to the states of other people's minds but must always infer these states from circumstantial evidence, *of course* this rule of Delaware law is often difficult to enforce, but this no more makes this rule a non-rule than any other rule of law with a scienter requirement. Delaware corporate law does not permit, nor does it contemplate, that directors of Delaware corporations will go about lying about their intentions and motives in making corporate decisions. Like all fiduciary law with which I am familiar, Delaware law requires fiduciaries to act with honesty in fact and to tell the complete truth—to their fellow fiduciaries, to the shareholders, to courts and regulators, and to the market.[367] No morally respectable system of corporate governance could expect anything less.

This is so obvious when stated clearly that it raises the question why intelligent lawyers would ever argue otherwise, and it turns out that there is a good answer to that question. That is, this version of the unenforceability argument often refers to the deference that courts show to decisions by disinterested and independent directors, and that reference involves a subtle but important confusion that is worth exposing. Thus, when shareholders challenge a business decision by the board, Delaware courts begin from a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[368] Now, the rule that directors are required to act for the sole purpose of maximizing shareholder value concerns the directors' duty of loyalty: it goes to the "honest belief that the action taken was in the best interests of the company."[369] The presumption involved here, however, is nothing more than the fact that, if plaintiff shareholders wish to argue that the directors were acting with the subjective intention of pursuing some interest other than maximizing shareholder value, the burden is on the plaintiffs to prove this by a preponderance of the evidence. True, as explained above, carrying this burden is difficult—not because the burden is higher than the ordinary civil law standard and not because the court is applying any special presumptions, but merely because the facts to be proved involve the state of mind of the directors, and it is inherently difficult to prove anyone's state of mind about anything. Carrying the burden is thus difficult, but not impossible, as cases like *eBay* show.[370] Further, if the plaintiffs carry this burden, then, as Chancellor Allen said in *RJR Nabisco*, the directors "would be required to demonstrate that the corporation had not been injured and to remedy any injury that appears to have been

367. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (fiduciaries are "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior").

368. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

369. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 927–28 (Del. 2003) (quoting Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995)).

370. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010) (describing how eBay's shareholder plaintiffs overcame the business judgment rule presumption that the directors were acting in the best interest of the shareholders).

occasioned by such transaction."[371] In other words, the standard of review would become entire fairness, and the burden would be on the directors to prove that the transaction was entirely fair to the corporation—a tall order since we are assuming that the transaction diverted value to non-shareholders for some purpose other than benefiting the shareholders in the long term. On the other hand, if the plaintiffs *fail* to carry their burden, then the challenged decision would be reviewed under the business judgment standard of review, meaning that courts would not disturb the decision if it could be attributed to any rational business purpose—a test that the Delaware Supreme Court has said is equivalent to the corporate waste standard.[372] This standard of review is indeed extremely deferential, but the deference involved concerns the *means* adopted by the directors, not the *end* they were pursuing:[373] that is, if the plaintiff fails to show that the directors acted for an illicit end (i.e., any end other than maximizing shareholder value), *then*, having concluded that the directors were acting for the sake of maximizing value for shareholders, the court will defer to the board about the *means* adopted to pursue that end. After that, as long as the transaction chosen has a rational connection to shareholder value, or, equivalently, is not "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration,"[374] the court will not question whether the action *in fact* serves the end for which it was adopted, i.e., maximizing shareholder value.[375] Hence, versions of the unenforceability argument that rely on the highly deferential nature of the business judgment standard of review are falling into a mistake: they are confusing the initial inquiry about the director's state of mind and the purpose for which the director acted with the secondary inquiry that follows *if* the court finds that the directors were acting for the proper purpose of maximizing shareholder value. The rule that directors are required to act for the sole purpose of maximizing value for shareholders is the rule at issue in the first inquiry, and there is nothing at all deferential about that inquiry beyond the fact that, in that inquiry, the burden of proof is on the plaintiffs to prove by a preponderance of the evidence that the directors acted for some other purpose.

There are several other fallacies common to various versions of the unenforceability argument that are worth exposing. Perhaps the most common involves pointing to cases in which the Delaware courts have upheld board decisions that seem *not* to maximize value for shareholders.[376] The great favorite here is the *Time-Warner* case, in which the Delaware Supreme Court upheld the Time board's defensive maneuvers to forestall an all-shares, all-

371. *In re* RJR Nabisco, Inc. S'holders Litigation, No. CIV. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989).

372. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 73–74 (Del. 2006) ("A plaintiff who fails to rebut the business judgment rule presumptions is not entitled to any remedy unless the transaction constitutes waste, [and the] . . . onerous standard for waste is a corollary of the proposition that where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'" (footnote omitted)).

373. *Id.*

374. *Id.* at 74.

375. Strine, *supra* note 16, at 147–48 (stating that, under the business judgment rule, "the judiciary does not second-guess the decision of a well-motivated, non-conflicted fiduciary. Fundamental to the rule, however, is that the fiduciary be motivated by a desire to increase the value of the corporation for the benefit of the stockholders" (footnote omitted)).

376. *E.g.*, Bruner, *supra* note 33, at 1416–17 (arguing that the *Time-Warner* case poses a serious challenge to the view that Delaware requires directors to manage the corporation for the benefit of shareholders).

cash offer from Paramount at a 59% premium to market.[377] In Professor Bruner's view, "an adequate descriptive theory of corporate law cannot rest at citing the court's nominal commitment to long-term shareholder wealth maximization in such cases" because it "must also account for what this verbal formulation translates into in concrete cases," and *Time-Warner* "presents a supreme challenge for those who accept the 'long-term' device as a means of squaring the cases with shareholder wealth maximization."[378] Frankly, it is hard to know exactly what to make of arguments like this. Clearly, such arguments assume that cases like *Time-Warner* involve situations in which directors have failed to manage the corporation for the benefit of the shareholders; the further, tacit assumption is that, if Delaware law requires directors to manage the corporation for the benefit of the shareholders, then the Delaware courts have should intervened in such cases, which they of course did not. But this tacit assumption involves what any Delaware lawyer should recognize as an obvious mistake—a confusion between the standard of conduct and the standard of review.

That is, as everyone knows, in Delaware there is a fundamental distinction between the standard of conduct demanded of directors and the standard of review under which courts review decisions by directors.[379] The standard of conduct describes what fiduciaries such as directors and officers are required to do and is defined by the duties of loyalty and care. The duty to act exclusively for the benefit of the shareholders is at the core of the duty of loyalty and so is at the very center of the standard of conduct. Delaware's three standards of review—business judgment review, enhanced scrutiny under *Unocal* or *Revlon*, and entire fairness—are all "more forgiving of directors and more onerous for stockholder plaintiffs than the standard of conduct."[380] The fact that the standard of review is more lenient to directors than the standard of conduct creates the possibility of cases in which directors violate the standard of conduct but nevertheless pass review under the applicable standard of review, and the more forgiving the standard of review is, the greater the possibility of such cases will be. This means that cases like *Time-Warner* (assuming it is everything Professor Bruner says it is) are not the challenge or embarrassment that Professor Bruner thinks they are. On the contrary, because Delaware's standards of review are more forgiving than its standard of conduct, we should *expect* that there will be some cases like *Time-Warner*. Indeed, precisely because Delaware's standards of review, even its most exacting standard of entire fairness, are considerably more forgiving than its unremitting standard of conduct (Professor Bruner himself describes the deference Delaware courts give to boards as "extraordinary"),[381] we should expect that there would be a good many cases in which directors make decisions that violate the standard of conduct and nevertheless survive under the applicable standard of review. It is thus not at all

377. Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990).

378. Bruner, *supra* note 33, at 1417.

379. *E.g.*, *In re* Columbia Pipeline Grp., Merger Litig., 299 A.3d 393, 453 (Del. Ch. 2023) ("Delaware law distinguishes between the standard of conduct and the standard of review. Although Delaware traditionally did not acknowledge that distinction, Delaware jurists now do so openly to explain the divergence between the normative framing of what fiduciary duties require and their practical application to the facts of a case." (footnote omitted)); *see also id.* at 453 n.19 (collecting cases).

380. Chen v. Howard-Anderson, 87 A.3d 648, 667 (Del. Ch. 2014).

381. Bruner, *supra* note 33, at 1416 n.161.

surprising that there are some cases like *Time-Warner*. On the contrary, if there is anything surprising here, it is that there are not many more such cases.[382]

Another fallacy about the enforceability of the shareholder wealth maximization rule is the idea that laws matter only to the extent that they are actually enforced by courts—i.e., that laws that do not generate a lot of actual cases have no effect in the world. On the contrary, laws operate on many levels, with enforcement in courts being only one of these, albeit a very important one. Another important one is deterrence: laws have practical effects in the world not only through enforcement actions when they are violated but also through their deterrent effects when they are observed. That is, if a law deters a certain kind of conduct so effectively that such conduct never (or only rarely) occurs, then there will be no (or very few) enforcement actions related to the law; nevertheless, that law is still having important effects in the world. The fact that Delaware law requires directors to act for the benefit of shareholders may well prevent a significant amount of misconduct because directors fear that the rule would be enforced against them if they violated it. This deterrent effect can exist and be material even though directors know that the probability of such enforcement is very low because the deterrent effect is determined by the *ex ante* (i.e., expected) cost of violating the rule—that is, by the product of the probability of being caught multiplied by the damages the directors would have to pay if they are caught.[383]

382. This is not the place for an extended discussion of *Time-Warner*, but, in my view, (a) the standard of review applicable to the Time board's decision to reject Paramount's offer and restructure the Time-Warner transaction to ensure Paramount could not disrupt it was enhanced scrutiny under *Unocal*, and (b) applying that standard, it seems likely that the Time directors acted reasonably (if not correctly, under the standard of conduct) in concluding that the Time shareholders would be better off holding shares in a combined Time-Warner than accepting Paramount's $200 per share cash offer. True, the board could probably not reasonably conclude that the Time-Warner combination offered the Time shareholders value in excess of $200 per share, but the board could *easily* reasonably conclude that the Paramount offer was not really worth $200 per share. Paramount's offer was highly-contingent, Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1990) ("Time viewed the conditions attached to Paramount's offer as introducing a degree of uncertainty that skewed a comparative analysis."), being dependent on, among other things, Paramount's being satisfied "in its sole discretion" that "all material approvals, consents and franchise transfers relating to Time's programming and cable television business had been obtained on terms satisfactory to Paramount." Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1147 (Del. 1990). Given the number of approvals involved in the transaction, this "sole discretion" language created a significant probability that Paramount would have a right to terminate the offer without closing if it later chose to do so. For this reason, Time's board understandably thought Paramount's offer was illusory. Paramount Commc'ns Inc. v. Time Inc., Civ. Act. Nos. 10866, 10670, 10935, 1989 WL 79880, at *11 (Del. Ch. July 14, 1989) (reporting that one of Time's directors called Paramount's offer "smoke and mirrors"). Worse, based on Time's experience in obtaining approvals from the Federal Communications Commission required to close the Warner transaction, the Time directors believed that obtaining approvals required to close the Paramount offer would take a substantial period of time, Affidavit of Donald S. Perkins at ¶ 53, Civ. Act. Nos. 10866, 10670, 10935, 1989 WL 79880 (Del. Ch. July 7, 1989), and so Paramount's public statements claiming that its offer could close in a month, Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1147 (Del. 1990), led the Time directors to question Paramount's honesty. As it happened, Paramount later admitted that the Paramount board had been advised that closing the offer could take up to a year and none of its directors actually believed the offer could close in a month. *Id*. Thus, the danger was that, even if Time could terminate its agreement with Warner, Paramount would later terminate its $200 cash offer and then renew it at a lower price. Under these circumstances, I would think that it was entirely reasonable for the Time directors to conclude that the Paramount offer was not really worth $200 per share and the Time-Warner transaction offered the Time shareholders greater value than the Paramount offer.

383. Since the claim would sound in loyalty, not care, any section 102(b)(7) charter provision eliminating the directors' liability in damages would not apply.

Hence, even when the probability of being caught is low, if the damages involved could easily be very large, then the expected cost for violating the rule could well be significant and so have practical effects on the world. For instance, imagine that, in an effort to reduce economic inequality, the board of directors of Apple decided to double the wages of the company's workers without regard to the effect this would have on shareholders and then in fact paid the increased salaries for one year. In such a case, the damages payable by the directors could easily exceed $12 billion.[384] Even if the chance of being caught were only 1 in 1,000, the expected cost to the directors would exceed $12 million.

Law operates on yet another level as well. That is, many people conform their conduct to the law regardless of whether they think they will ever be caught and sanctioned if they fail to do so. They do this because they are moral people and think they have a moral duty to obey the law. That is, they are not Holmesian bad men. This is hardly surprising, since anyone who really was a Holmesian bad man would be a psychopath, and psychopaths are happily few and far between. Such moral effects are very difficult to measure, but they are undoubtedly real, and they apply as much to the rule of Delaware law that directors are required to act for the sole purpose of maximizing value for shareholders as to any other rule of law.[385]

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384. *See* Apple Inc., Annual Report (Form 10-K) 29 (Oct. 28, 2022) (showing selling, general, and administrative expense of $25,094 million for the 2022 fiscal year of the company). Presumably, not all of this amount is compensation to employees, but a large fraction of it certainly is. The figure in the text assumes only half of this approximately $25 billion in employee compensation.

385. Those who deny that Delaware law requires directors to manage the corporation for the benefit of its shareholders adduce many other arguments to support their view, but all of these are both transparently fallacious and conspicuous for their failure to cite Delaware caselaw or standard reference works on Delaware law to support them. Thus, some argue that the phrase, commonly repeated by Delaware courts, that directors owe fiduciary duties to "the corporation and its stockholders" (or "shareholders"), e.g., *Guth v. Loft, Inc.* 5 A.2d 503, 510 (Del. 1939); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985); *Moran v. Household Int'l., Inc.*, 500 A.2d 1335, 1357 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1985), coupled with the concept of the separate legal personality of the corporation, somehow implies that fiduciary duties of directors comprehend not only the shareholders but also other corporate constituencies. *E.g.*, Blair & Stout, *supra* note 32, at 293–94 (noting that "case law makes clear that directors owe their fiduciary duties primarily *to the corporation itself*," which should be understood to mean that "directors should be viewed as owing fiduciary duties to the corporation as a separate legal entity, apart from any duties they might also owe to shareholders"); Bruner, *supra* note 33, at 1425 ("Perhaps the clearest expression of corporate law's ambivalence regarding intended beneficiaries of corporate production . . . is the fact that corporate boards . . . owe fiduciary duties to shareholder and the corporation simultaneously"); Millon, *supra* note 335, at 526 ("Delaware law is not committed to shareholder primacy. Management's duties are owed to 'the corporation and its stockholders,' rather than to the shareholders alone." (footnote omitted)); Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1097–98 (2012) ("[A]lthough the Delaware courts will sometimes just refer to duties owed to shareholders or to duties owed to the corporation, the phrasing alternates with frequency. The result is substantial ambiguity." (footnote omitted)). The Delaware courts, however, have expressly rejected this fanciful idea: "Judicial opinions . . . often refer to directors owing fiduciary duties 'to the corporation and its shareholders.' This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants," which are normally its shareholders. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36–37 (Del. Ch. 2013) (citations omitted). Nor is this a new idea; in England, the Court of Chancery said quite the same thing as early as 1853. York & N. Midland Ry. Co. v. Hudson, (1853) 51 Eng. Rep. 866, 870 (U.K.) (referring to what was "best for the interest of the company; that is, for the interest of the shareholders of the company"). In the unusual situation in which the corporation is insolvent and the residual claimants thus become the

X. CONCLUDING REMARKS

At this point, we may return to Professor Bainbridge and his argument that we should keep teaching *Dodge v. Ford Motor Co.* As I noted above, I agree with every major point Professor Bainbridge makes.[386] In fact, that rather understates my agreement. Professor Bainbridge is not only right about *Dodge* but *obviously* right. More than that, he is obviously right in every particular. He is obviously right that, on the only reasonable reading of the opinion, *Dodge v. Ford Motor Co.* expressly held that corporate directors have a duty to manage the corporation for the benefit of the corporation's shareholders and that it is a breach of this duty if they choose to pursue other objectives.[387] He is obviously right that, in so holding, the Michigan Supreme Court was not breaking new ground but merely restating what had already been settled law for many decades.[388] He is obviously right that Delaware continues to follow this rule today, with the Delaware Supreme Court and the Delaware Court of Chancery having affirmed and reaffirmed this rule in a long line of cases.[389] It is not too much to say that it is *obvious* that he is *obviously* right about all of this.

For all the same reasons, those Professor Bainbridge is arguing against, starting with Professor Stout, are *obviously* wrong. They are *obviously* wrong about the common-law rule, *obviously* wrong about *Dodge*, and *obviously* wrong about Delaware law today. On the issue of Delaware law in particular, which is the most consequential issue, they are so wrong that any lawyer who advised a client that directors of a Delaware corporation are permitted to benefit non-shareholder constituencies other than in an instrumental way as a means to the end of benefiting the corporation's shareholders as permitted by *Revlon*,

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corporation's creditors, the duties of the directors run to the corporation *and its creditors*. Thus, in *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, the Delaware Supreme Court said,

> It is well settled that directors owe fiduciary duties to the corporation. When a corporation is *solvent*, those duties may be enforced by its shareholders, who have standing to bring *derivative* actions on behalf of the corporation because they are the ultimate beneficiaries of the corporation's growth and increased value. When a corporation is *insolvent*, however, its creditors take the place of the shareholders as the residual beneficiaries of any increase in value. Consequently, the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties.

N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (footnotes omitted); *see also* Yosifon, *supra* note 13, at 208–13 (explaining why the phrase "the corporation and its shareholders'. . . 'cannot plausibly be read as blackletter support for mandatory or permissive multi-stakeholder governance"). Similarly insubstantial is the argument that, since under the Delaware General Corporation Law, a corporation may be formed "for any lawful purpose," DEL. CODE tit. 8, § 101(b) (2023), the duties of directors need not run to only to shareholders. This ignores the well-known history that lawful purpose (or lawful business) statutes were enacted across the United States (in Delaware, as part of the 1967 revision of the Delaware General Corporation Law) in order to allow corporations to exit and enter different lines of business without fear of suits based on the now archaic *ultra vires* doctrine. *See* Strine, *supra* note 35, at 783–84 and sources cited therein. Finally, Professor Elhauge has a set of arguments, as ingenious as they are fallacious, which Professor Yosifon utterly demolishes. *See* Yosifon, *supra* note 13, at 201–08 (recounting and refuting various arguments from Elhauge, *supra* note 33).

386. Banbridge, *supra* note 2.

387. *Id.* at 93.

388. *Id.* at 79–90 (stating that *Dodge* "was good law when handed down in 1919 and remains good law today").

389. *See supra* Parts B–F.

would surely commit legal malpractice. Although it is not malpractice for a lawyer merely to make a mistake about what the law is, it *is* malpractice for lawyers not to know and understand (or, worse, knowingly disregard) established principles of law. As stated in the leading treatise on legal malpractice, attorneys have a "nearly absolute responsibility . . . to educate themselves about general laws, statutes, and legal propositions considered well defined."[390] As to which laws count as well defined, "[s]uch laws include established principles found in textbooks, published decisions of the courts, and advance sheets,"[391] which exactly describes the principle of Delaware law in question, for, as noted above, the principle is plainly stated in famous decisions of the Delaware Supreme Court, numerous other published decisions of the Delaware Court of Chancery, and leading legal treatises.[392] As former Chief Justice Strine says, it is "hornbook law."[393] Hence, "ignorance of such general legal principles is not excusable,"[394] and ignorance of such principles or misunderstanding them would thus be legal malpractice.[395]

A final word about the continuing attempts by stakeholder advocates to claim that *Unocal* supports a stakeholder interpretation of Delaware law. Regardless of how the court's opinion in *Unocal* might be read if taken in isolation, it would be a grave mistake in legal analysis to read that case apart from its definitive interpretation by the Delaware Supreme Court in *Revlon*. In *Revlon*, the Delaware Supreme Court referred to the very passage in *Unocal* on which the stakeholder advocates base their argument, expressly considered exactly the argument the stakeholder advocates make, and expressly rejected that argument, saying instead that any consideration by directors of the interests of non-shareholder constituencies is subject to the fundamental limitation that actions benefiting such constituencies must result in benefits to the shareholders.[396] *Revlon* thus definitively excludes a stakeholder reading of *Unocal*. This was recognized immediately after *Revlon* was decided, and the matter was widely discussed at the time.[397] Chancellor Allen noted the point in an article in 1992.[398] Many subsequent cases, in both the Delaware Supreme Court[399] and the Delaware Court of Chancery[400] have confirmed the point, citing *Revlon*

390. 2 RONALD E. MALLEN, LEGAL MALPRACTICE § 19:4, at 1247 (2023 ed.).

391. *Id.* § 19:4, at 1248 (footnotes omitted).

392. *See supra* Parts II–V (collecting these relevant sources of law).

393. Strine, *supra* note 35, at 776.

394. *Id.* § 19:4, at 1247.

395. *E.g.*, Gimbel v. Waldman, 84 N.Y.S.2d 888, 891 (N.Y. Sup. Ct. 1948) ("Thus the rule generally accepted is that if the law on the subject is well and clearly defined, has existed and been published long enough to justify the belief that it was known to the profession, 'then a disregard of such rule by an attorney at law renders him accountable for the losses caused by such negligence or want of skill; negligence, if knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule.'" (citing Goodman & Mitchell v. Walker, 30 Ala. 482, 495–96 (1857))).

396. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

397. *See supra* Part VI and notes 183–88 and sources cited therein.

398. Allen, *supra* note 16, at 275 n.48 (stating that the language in *Unocal* "apparently endorsing a multi-constituency view of the corporation was countered with the [shareholder-centric] vision of [*Revlon*]").

399. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 n.29 (Del. 1989) ("In assessing the bid and the bidder's responsibility, a board may consider, among various proper factors, . . . the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests.").

400. La. Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 339 (Del. Ch. 2012) ("Perhaps most significantly, the board can take into consideration and balance the interests of multiple constituencies when

when they cite *Unocal*. Former Chief Justice Strine,[401] and many other eminent scholars, have continued to draw attention to the critically important connection between the cases.[402] The point is discussed in all the leading treatises on Delaware law. But, to this very day, stakeholder advocates continue to argue that *Unocal* implies a stakeholder view of Delaware law,[403] and when such advocates argue in this way, they virtually always simply pass over *Revlon* in silence. It seems impossible, however, that stakeholder advocates who base their argument on *Unocal* are genuinely unaware that *Revlon* interpreted *Unocal* in a way that excludes their reading of the case. Indeed, it surpasses credibility that eminent stakeholder advocates are unaware of the relevance of *Revlon* to their argument about *Unocal*, especially since the key language in the case has been called to their attention so often and for so long. On the other hand, it may seem strange that such eminent scholars know well that *Revlon* definitively excludes their interpretation of *Unocal* and simply keep quiet about this, counting on the ignorance of the many non-lawyers to whom they speak to allow them to advocate for an essentially normative and political position that they fervently support. If that is what is actually happening, it would amount to dishonesty, and I absolutely refuse to believe people whom I admire are being dishonest. The thing is thus a mystery and cannot be explained, and what cannot be explained must be passed over in silence.

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determining what outcome best serves the interests of stockholders.”), *rev’d on other grounds*, 74 A.3d 612 (Del. 2013); *In re* Trados Inc. S’holder Litig., 73 A.3d 17, 36, 44 (Del. Ch. 2013) (stating other constituencies may be considered but only when doing so advances the best interests of shareholders); Cumming *ex. rel.* New Senior Inv. Grp., Inc. v. Edens, C.A. No. 13007, 2018 WL 992877, at *18 (Del. Ch. Feb. 20, 2018) (“Delaware law is clear that the board of directors of a for-profit corporation . . . must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.”) (omission in original) (quoting Strine, *supra* note 202, at 107); *In re* Pattern Energy Grp. Inc. S’holders Litig., C.A. No. 2020-0357, 2021 WL 1812674, at *47 (Del. Ch. May 6, 2021) (“Delaware case law is clear that the board of directors of a for-profit corporation must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.”).

401. Strine et al., *supra* note 61, at 634 (“[I]t is essential that directors take their responsibilities seriously by actually trying to manage the corporation in a manner advantageous to the stockholders.”); Strine, *supra* note 35, at 771 (“Non-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefiting the stockholders.”); Strine, *supra* note 16, at 147 n.34 (“[S]tockholders’ best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end.”); Strine, *supra* note 202, at 107.

402. *E.g.*, Bainbridge, *supra* note 2, at 105–06 (discussing *Revlon* and *Unocal*); Yosifon, *supra* note 13, at 191–92.

403. *E.g.*, LoPucki, *supra* note 33, at 2029–30 (citing *Unocal* to support the proposition that Delaware law permits directors to consider non-shareholder constituencies and arguing that Delaware’s law is “confused” and does not clearly require directors to operate the corporation for the benefit of its shareholders).