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# Corporate Governance and the Omnipresent Specter of Political Bias

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# CORPORATE GOVERNANCE AND THE OMNIPRESENT SPECTER OF POLITICAL BIAS

STEFAN J. PADFIELD*

*Subject to important qualifications, corporate decision-makers are duty-bound to maximize shareholder value. However, there is reason to believe corporate decision-makers are allowing their political biases to corrupt their decision-making. This Essay posits two related fact patterns that should concern advocates of good corporate governance. The first occurs when decision-makers expressly disavow any duty to maximize shareholder value, such as when Apple CEO, Tim Cook, told shareholders, "When we work on making our devices accessible by the blind, I don't consider the bloody ROI [return on investment]," or when Ed Stack, the chairman and chief executive of Dick's Sporting Goods, decided that Dick's should "take a stand" on gun violence by foregoing the sale of assault-style weapons, and said in connection therewith, "I don't really care what the financial implication is." This type of situation arguably breaches at least the duties of care and good faith without any change to current law. Importantly, breach of the duty of good faith may not be immunized by the seemingly ubiquitous contractual waivers of the duty of care. The second relevant fact pattern occurs when a decision-maker does not expressly disavow shareholder wealth maximization, but rather points to other arguably political goals as the basis for the decision, and is silent as to the impact on shareholder value. For example, when Gillette launched its advertising campaign challenging "toxic masculinity," it publicly justified the decision not on the basis of an expectation of increasing sales, but rather on*

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* Professor, University of Akron School of Law. The idea for this Essay was presented at a Works in Progress Panel at the 22nd Annual Federalist Society Faculty Conference in Washington, DC, on Jan. 3, 2020, and a draft of this paper was presented at a faculty workshop at the University of Akron School of Law on April 27, 2020. My thanks to both sets of attendees for their helpful comments. Thanks also to Stephen Bainbridge, Eric Chaffee, Jeffrey Lipshaw, and Brett McDonnell for helpful comments related to an earlier draft. Finally, thanks to my co-bloggers at the Business Law Prof Blog: Colleen Baker, Benjamin Edwards, Joshua P. Fershee, Joan MacLeod Heminway, Ann M. Lipton, Marcia Narine Weldon, Douglas Moll, J. Haskell Murray, and Anne Tucker. Much of this Essay can be traced back to countless email exchanges among us discussing many of the issues raised herein.

*the grounds that it wanted to spark "a lot of passionate dialogue" and get people "to stop and think about what it means to be our best selves." In order to address the corrupting influence of political bias to the extent it is manifest in this latter type of conduct, a change in the law may be required. This Essay argues that a ready blueprint for such a change already exists in the response of the Delaware judiciary to the omnipresent specter of directorial self-interest when adopting anti-takeover defenses. Specifically, cases like* Unocal Corp. v. Mesa Petroleum Co. *apply enhanced judicial scrutiny in such cases before granting decision-makers the benefit of the deferential business judgment rule. Finally, this Essay addresses criticisms of the proposed approach, including the view that the proposed approach would subject too many business decisions to an inefficient risk of enhanced scrutiny and that the challenged proclamations should be treated as mere puffery or are perhaps even necessary to maximize shareholder value.*

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## I. INTRODUCTION

In 1985, the Delaware Supreme Court, in *Unocal Corp. v. Mesa Petroleum Co.*, held that the "omnipresent specter" of a conflict of interest sufficiently clouds judicial review of anti-takeover measures to require application of

enhanced scrutiny.[1] Notably, the court essentially took judicial notice of the inherent nature of the conflict that "of necessity" confronts the directors in these cases.[2] Thus, the court delayed application of the deferential business judgment rule[3] until directors could satisfy the court that a threat to the corporation existed[4] and that adopted anti-takeover devices were reasonably related to the perceived threat.[5]

Today, political divisiveness has risen to the point that many believe they must resist opposing political ideologies (and advance their own) at all times and in all places—including in the workplace.[6] Furthermore, the intensity of

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1. 493 A.2d 946, 954 (Del. 1985) ("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."); *cf.* Joseph K. Leahy, *Intermediate Scrutiny for Corporate Political Contributions*, 44 FLA. ST. U. L. REV. 1119, 1131 (2017) (discussing "the so-called 'intermediate' or 'enhanced business judgment rule' announced in *Unocal*"); *id.* at 1140 ("The court had twice before addressed the question of defensive measures—and the use of repurchases to thwart hostile takeovers—in *Cheff v. Mathes* and *Bennett v. Propp*) (citing 199 A.2d 548 (Del. 1964) and 187 A.2d 405 (Del. 1962)). Leahy's article is excellent in many ways, and highly relevant to my discussion here. Thus, I cite it frequently herein.

2. *Unocal,* 493 A.2d at 955 ("We must bear in mind the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved. The directors are of necessity confronted with a conflict of interest, and an objective decision is difficult.") (quoting Bennett v. Propp, 187 A.2d 405, 409 (Del. 1962)). *Cf.* Leahy, *supra* note 1, at 1148 ("[B]eyond this famous phrasing, the *Unocal* court did little explaining—leaving lawyers and litigants to guess at the exact nature of the supposed 'inherent conflict' faced by target directors").

3. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled* on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."). *Cf.* Leahy, *supra* note 1, at 1134 ("The business judgment rule stands in stark contrast to the test that Delaware courts apply to conflicted transactions. Transactions in which a director or officer has a material conflict of interest are reviewed for 'entire' or 'intrinsic'—i.e., objective—fairness.").

4. *Unocal*, 493 A.2d at 955 ("In the face of this inherent conflict directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership.").

5. *Id.* ("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.").

6. *Cf.* Scott Shepard, *Covington Settlement Warns Corporations That Bias Can Cost Big Bucks*, FEDERALIST (Jan. 10, 2020), https://thefederalist.com/2020/01/10/covington-settlement-warns-corporations-that-bias-can-cost-big-bucks/ [https://perma.cc/JK3S-XGUX] ("[E]very single director of a Fortune 1–10 company who has been elected or has worked for an administration has been (or worked for) a Democrat. The ratio shifts to two Democrats for every Republican in the Fortune 100 generally, and to 5:1 for financial or tech firms within that group."); Irina Ivanova, *What Facebook's*

the political debates, and the echo chambers that magnify them, have led people to view the world through a lens of political ideology that rationalizes political action as nothing more than simply doing the "obviously" right thing.[7] In light of the foregoing, this Essay argues that we now confront an omnipresent specter of political bias in at least some instances of corporate decision-making and that courts should respond to this problem by subjecting relevant business decisions to enhanced scrutiny in a manner similar to *Unocal*.[8]

This Essay focuses generally on two situations that warrant additional judicial scrutiny. The first is whenever corporate decision-makers expressly disavow any duty to maximize shareholder wealth, such as when Apple CEO Tim Cook told shareholders, "When we work on making our devices accessible by the blind, I don't consider the bloody ROI [return on investment],"[9] or when

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*Anti-Conservative Bias Charge Says About Work*, CBS NEWS (Aug. 30, 2018, 12:19 PM), https://www.cbsnews.com/news/facebook-employee-alleging-anti-conservative-bias-points-to-common-workplace-issue/ [https://perma.cc/U7WB-WQ7S] ("[A] senior engineer at [Facebook] . . . claim[ed] the company had 'a political monoculture' . . . . [that] discouraged criticism of social justice, immigration, diversity and equality . . . .").

7. *Cf.* Lloyd Hitoshi Mayer, *When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement*, 45 J. LEGIS. 194, 194 (2018) ("political divisions have sharpened, causing candidates, political parties, and their supporters to scramble more aggressively for any possible edge in winner-take-all political contests"); Zachary Yost, *This Crisis Will Not Bring Americans Together and Maybe That Is a Good Thing*, MISES INST. (Apr. 30, 2020, 2:22 PM), https://mises.org/wire/crisis-will-not-bring-americans-together-and-maybe-good-thing [https://perma.cc/5AA3-ZQ55] ("Politics is increasingly becoming a high-stakes zero-sum game where the losers fear destruction at the hands of their enemies. This can incentivize desperate action if the situation becomes dire enough.").

8. *Cf. Unocal*, 493 A.2d at 957 ("[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."); Leahy, *supra* note 1, at 1119 ("This Article departs from the scholarly consensus that courts should apply the business judgment rule to review corporate political contributions. Instead, courts should apply the intermediate level of scrutiny—the *Unocal* test—that is applied whenever management adopts defensive measures in the face of a hostile takeover. Delaware courts apply *Unocal* to defensive measures due to the 'omnipresent specter' that management will promote its own interests over the corporation's best interests.").

9. Jessica Shankleman, *Tim Cook Tells Climate Change Sceptics to Ditch Apple Shares*, GUARDIAN (Mar. 3, 2014, 11:23 AM), https://www.theguardian.com/environment/2014/mar/03/tim-cook-climate-change-sceptics-ditch-apple-shares?CMP=share_btn_tw [https://perma.cc/BDW5-XCS9]. *Cf.* David Goldman, *Zuckerberg Has His Tim Cook Moment*, CNN MONEY (Jan. 29, 2015, 6:35 PM), https://money.cnn.com/2015/01/28/technology/social/zuckerberg-internet-cook/ [https://perma.cc/EDK3-HBA9] ("Zuckerberg echoed [Cook's] sentiment . . . . 'If we were only focused on making money we might put all of our energy on just increasing ads . . . .' he said. 'But that's not the only thing that we care about here.' . . . 'We are here because our mission is to connect the world, and I just think it's really important that investors know that.'"); *id.* ("Zuckerberg said

Ed Stack, the chairman and chief executive of Dick's Sporting Goods Inc., decided that Dick's should "take a stand" on gun violence by foregoing the sale of assault-style weapons and said in connection therewith, "I don't really care what the financial implication is."[10] The second is when corporate decision-makers don't expressly disavow concern with shareholder wealth maximization, but nonetheless, provide a rationale that excludes any reference to shareholder wealth maximization, while providing a rationale that is reasonably characterized as political. A possible example of this is when Gillette launched an ad campaign challenging "toxic masculinity" and justified the decision not on the basis of an expectation of increasing sales, but rather because it wanted to spark "a lot of passionate dialogue" and get people "to stop and think about what it means to be our best selves."[11] The next paragraph provides a roadmap for how this Essay proposes to deal with these two situations.[12]

Following this introduction, Part II argues that not only is shareholder wealth maximization the optimal goal of corporate governance, but it is also fairly characterized as the current rule of corporate governance in many relevant jurisdictions including, importantly, Delaware. Thus, adherence to fiduciary duties in these jurisdictions must be analyzed in terms of shareholder wealth maximization, except when pursuit of another goal is expressly authorized. Part III argues that, at least in some jurisdictions, disregard of shareholder value in corporate decision-making violates existing fiduciary duty law and that acknowledgement of this may be understood as constituting a duty to calculate the expected return-on-investment (ROI) associated with competing business decisions. Importantly, failure to calculate the ROI (or, when ROI calculations

connecting the unconnected could ultimately be a good investment opportunity for Facebook, though he conceded that he doesn't know when—or if—that would happen.").

10. Sarah Nassauer, *How Dick's Sporting Goods Decided to Change Its Gun Policy*, WALL ST. J. (Dec. 4, 2018, 3:27 PM), https://www.wsj.com/articles/how-dicks-sporting-goods-decided-to-change-its-gun-policy-1543955262 [https://perma.cc/E4VS-XAV6].

11. Alexandra Bruell, *P&G Challenges Men to Shave Their 'Toxic Masculinity' in Gillette Ad*, WALL ST. J. (Jan. 14, 2019, 7:50 PM), https://www.wsj.com/articles/p-g-challenges-men-to-shave-their-toxic-masculinity-in-gillette-ad-11547467200 [https://perma.cc/PFN4-QYBQ].

12. While the choice of examples is important for line-drawing purposes, the bigger issues are the extent to which political bias is a problem in corporate decision-making, and, if so, whether our rules of corporate governance should be updated to address this problem. Were I to re-write this Essay, I might focus more on allegations of censorship aimed at social media companies. *See generally* Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ [https://perma.cc/6YHG-H3QT].

are impractical, to at least identify a rational or reasonable[13] business purpose for the business decision) may constitute a type of conscious disregard of a known duty that implicates the duty of loyalty, and therefore, avoids duty-of-care waiver provisions.[14] Part IV reviews, in more detail, how *Unocal*'s enhanced scrutiny scheme deals with the omnipresent specter of conflict of interest in the takeover context. Part V then lays out the proposed application of enhanced scrutiny to deal with the omnipresent specter of political bias in corporate decision-making,[15] including the identification of triggering facts, the burden directors will need to satisfy, and the directions for courts to follow to maintain the proper balance between accountability and discretion, by applying heightened pleading standards and other protective devices.[16] Specifically as to the burden of proof, it is proposed that once a plaintiff submits evidence of

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13. Reasonableness should be understood as more difficult to demonstrate than rationality. Also, imposing a burden to demonstrate rationality is obviously more onerous than providing a presumption of rationality. Finally, requiring a showing that a rational purpose was identified at the time of making a decision is more onerous than requiring identification of an objective rationality after the fact. For purposes of this Essay, I am leaving the choice of standard relatively open in many instances to allow for efficient balancing of accountability and discretion. *Cf.* Leahy, *supra* note 1, at 1156 ("[R]ather than be protected so long as their 'cover story' is *rational* (i.e., if the transaction does not constitute waste), as they would be under the business judgment rule, the directors [subject to intermediate scrutiny] must show that their actions were *reasonable* in that their defensive measures furthered their stated goal").

14. *Cf.* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.").

15. *Cf.* Rosemary Teele Langford, *Conflicts and Coherence in the Charities Sphere: Would a Conflict By Any Other Name Proscribe the Same*?, 14 J. EQUITY 1, 28–29 (2020).

> The references to impartiality in the ACNC [Australian Charities and Not-for-profits Commission] Conflicts Guidance Note raise an issue of whether public law concepts of bias are being imported into the regulation of conflicts. The clear inclusion of non-pecuniary . . . interests is further evidence that this might be the case. This, in turn, raises the issue of the overlap between proscriptions on conflicts and bias . . . . The public law concept of bias . . . includes . . . political interests. . . .

*Id.*; Matthew Conaglen, *Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias*, 2008 PUB. L. 58, 60 (2008).

16. Examination of how access to books and records might be used to strike the optimal balance between accountability and discretion is beyond the scope of this Essay. *Cf.* Roy Shapira, *How "Books and Records" Rewrote the Rulebook*, CLS BLUE SKY BLOG (June 30, 2020), https://clsbluesky.law.columbia.edu/2020/06/30/how-books-and-records-rewrote-the-rulebook/ [https://perma.cc/V2PR-T8G9] ("[W]hen courts allow shareholders to access even informal electronic communications, they significantly enhance shareholders' chances of showing contradictions between insiders' public and private statements, creating possible grounds for a claim that the shareholder vote was uninformed and so the *Corwin* defense is inapplicable.").

either (1) express disavowal of concern with shareholder wealth, or (2) a non-shareholder-wealth rationale to justify a business decision that can be objectively described as political (because, for example, it generates boycotts), the burden shifts to the board to show that it, in fact, calculated the expected ROI of the decision and found it optimal in light of relevant opportunity costs or, where calculation of ROI is impractical, formally verbalized a rational or reasonable business (i.e., shareholder wealth maximizing) purpose at the time the decision was made. In the end, this "burden" may constitute nothing more than confirming that the board or relevant decision-makers satisfied their duty to become informed of all material information reasonably available in connection with making a business decision.[17] In addition to the foregoing, this Part discusses the role of mixed motives and pretext in justifying enhanced scrutiny.[18] Part VI addresses criticisms of the proposal, including that the proposed rule would harm corporations by forcing them to admit shareholder wealth maximizing motives in a market that rewards virtue signaling, that corporate disavowal of concern with shareholder wealth constitutes inactionable puffery, and that the proposed approach would subject too many business decisions to an inefficient risk of enhanced scrutiny. Finally, Part VII provides concluding remarks.

## II. THE RULE OF SHAREHOLDER WEALTH MAXIMIZATION (SHWM)[19]

This Essay argues that managers may violate their fiduciary duties when they express an intent to ignore the shareholder wealth implications of a

17. In other words, we should no longer presume (or pretend) that politically charged business decisions are made on a fully informed, disinterested basis.

18. *Cf.* Savannah J. Wolfe, *Business Playing Politics: Strengthening Shareholders' Rights in the Age of CEO Activism*, 23 LEWIS & CLARK L. Rev. 1469, 1472 (2020) ("intermediate scrutiny presents a desirable level of review for CEO activism because it allows courts to smoke out mere pretextual justifications for improperly motivated decisions").

19. The phrases "shareholder wealth maximization" and "shareholder primacy" are often used interchangeably but are likely better understood to mean different things, with the former focusing on the end of corporate governance, while the latter includes positive and normative conclusions regarding the locus of corporate governance power. *Cf.* Julian Velasco, *Shareholder Primacy in Benefit Corporations*, *in* FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby & Jacob Hale Russell eds., forthcoming 2020) (at SSRN abstract), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506824 [https://perma.cc/4C5R-8TGU] ("Although benefit corporations were developed to overcome the shareholder wealth maximization norm, it is not fair to say that they also overcome shareholder primacy. Properly understood, benefit corporations are shareholder-centric: they exist to allow shareholders to pursue altruistic goals rather than to require them to do so.").

business decision.[20] In order for this to be correct, shareholder wealth maximization must, in some meaningful sense, constitute the goal of fiduciary duties in the context of corporate governance. Given how central this issue is to corporate law, it may strike newcomers to the field as surprising that it has not yet been resolved in any form approaching unanimity among the relevant experts. However, while the debate continues to rage in many quarters, the outlines of the respective arguments have been well established. This section provides an overview of these arguments,[21] ultimately concluding that shareholder wealth maximization is indeed the rule, at least in some meaningful subset of jurisdictions, including, importantly, Delaware.[22]

### A. *Why Shareholder Wealth Maximization?*

This Essay essentially takes two propositions as given, while acknowledging they are contested. First, that capitalism is the optimal way of organizing an economy because it facilitates the efficient flow of capital to its most productive uses via market pricing signals.[23] Second, that shareholder

20. A review of the "longstanding debate over the nature of purpose and duty in business corporations" is outside the scope of this Essay. Brett McDonnell, The Corrosion Critique of Benefit Corporations 6–9 (Sept. 9, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450747 [https://perma.cc/2VYN-3WYN] (reviewing the debate); *see also* Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 4–14 (2015) (providing "an overview of the . . . competing theories of corporate governance").

21. Theories of corporate personhood (i.e., concession, aggregate, real-entity, etc.) and theories of corporate governance (i.e., director-primacy, shareholder-primacy, team-production, etc.) are certainly relevant to the shareholder wealth maximization debate. However, they are beyond the scope of this Essay. *Cf.* Padfield, *supra* note 20, at 3–4 ("[A]ll three of the primary models of corporate governance have less normatively appealing implications . . . from the perspective of those who favor a mandatory form of corporate social responsibility. In light of this, I conclude that proponents of mandatory CSR should turn to corporate personality theory, particularly concession theory . . . .").

22. *Cf.* Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1049 (2015) ("Delaware dominates the market for company incorporations, which places America's second smallest state in charge of determining the corporate governance framework for most public and private companies.").

23. *See* GARY WOLFRAM, A CAPITALIST MANIFESTO 1 (2012) ("The genius of capitalism is that it is . . . a fluid system with millions of individual exchanges, resulting in the most efficient allocation of resources."); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (1962) ("[A] major source of objection to a free economy is precisely that it . . . . gives people what they want instead of what a particular group thinks they ought to want.").

wealth maximization is the optimal goal of corporate governance within a capitalist system because it minimizes agency costs.[24]

While the policy arguments in favor of shareholder wealth maximization are beyond the scope of this Essay, the following supplemental propositions may provide at least some basis for skeptical readers to suspend their disbelief long enough to consider the subsequent arguments set forth herein. First, the only thing we can be sure of regarding the interests of shareholders is that the vast majority invest in for-profit corporations to generate profit.[25] Second, corporations have a comparative advantage when it comes to maximizing the size of the economic pie due to, among other things, their immortality, capital lock-in, and the limited liability of shareholders.[26] Third, social justice is best served by maximizing the size of the pie, then allowing individuals and the government to allocate their share of the pie as they see fit.[27] Fourth, allowing or requiring managers to consider impacts other than profit provides cover for self-dealing and exacerbates the agency problem.[28] Fifth, there is too much

24. *Cf.* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–09 (1976) (arguing that corporate managers who pursue any goals other than maximizing shareholder wealth are wayward agents who reduce social wealth by imposing "agency costs").

25. *See* George A. Mocsary, *Freedom of Corporate Purpose*, 2016 B.Y.U. L. REV. 1319, 1373 (2016) ("most shareholders invest for profit"). The extent to which shareholder voting, as driven by proxy advisory firms, is diverging from this norm is beyond the scope of this Essay. *Cf.* John G. Matsusaka & Chong Shu, *Why Proxy Advice Might Be Slanted*, CLS BLUE SKY BLOG (Apr. 30, 2020), https://clsbluesky.law.columbia.edu/2020/04/30/why-proxy-advice-might-be-slanted/ [https://perma.cc/QT6Y-GEX4] (providing framework explaining why "ISS' voting recommendations are generally 'to the left' of those of most investors"); *id.* ("[T]he proxy advice market has consolidated into two companies that some believe control as much as 97 percent of that market. . . . The companies [are] ISS and Glass Lewis . . . .").

26. *Cf.* Merritt B. Fox, *The Social Functions of the Stock Market: A Primer*, CLS BLUE SKY BLOG (Apr. 12, 2019), https://clsbluesky.law.columbia.edu/2019/04/12/the-social-functions-of-the-stock-market-a-primer/ [https://perma.cc/VDU8-E6BK] ("a well-functioning stock market does in fact serve a number of important social purposes").

27. *Cf.* 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, 788–89 (2015) ("I fear that pretending that corporate directors, at least those who serve on the boards of Delaware companies, are free to treat the good of society as an end of the for-profit corporation will impede the undertaking of genuinely meaningful measures required if corporations are to operate in the manner most beneficial to society.").

28. *Cf.* Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 461–62 (2010) ("the claim that expanded stakeholder governance leads to diminished accountability of corporate managers is not new"); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 581 (2003)

disagreement about what constitutes social justice and related concepts to allow it to serve as a guide to corporate decision-making that can be expected to operate better than SHWM.[29] Sixth, even if the foregoing concerns weren't compelling, corporate CEOs aren't social justice experts, and it is thus inefficient to put them in charge of managing social justice concerns in addition to pursuing profit.[30]

### B. *The Business Judgment Rule & Other Protective Measures*

Before examining specific cases, it is important to address the business judgement rule, which, in relevant cases challenging directorial decision-making, essentially applies a presumption that the decision-makers acted in good faith, on a fully-informed basis, and in the best interests of the corporation.[31] It has been suggested that the existence of this presumption undermines arguments in favor of a rule of shareholder wealth maximization because of the insulation it provides corporate decision-makers when their

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("The alternative to following the shareholder wealth maximization norm would . . . force directors to struggle with indeterminate balancing standards. In turn, such standards would deprive directors of the critical ability to determine ex ante whether their behavior comports with the law's demands, thereby raising the transaction costs of corporate governance.").

29. John Wilcox & Morrow Sodali, *A Common-Sense Approach to Corporate Purpose, ESG and Sustainability*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 26, 2019), https://corpgov.law.harvard.edu/2019/10/26/a-common-sense-approach-to-corporate-purpose-esg-and-sustainability/ [https://perma.cc/9ZUK-LKY9] (noting "little consistency in the use of terms such as ESG [environmental, social, governance], CSR (Corporate Social Responsibility), climate change, intangibles, culture, character, purpose, long-term focus, non-financial performance metrics, etc. Even the umbrella terms 'corporate purpose' and 'sustainability' can take on different meanings in the context of different companies"); *Cf.* Sanjai Bhagat & Glenn Hubbard, Should the Modern Corporation Maximize Shareholder Value? 6 (Mar. 3, 2020) (unpublished manuscript), https://ssrn.com/abstract=3548293 [https://perma.cc/V6R6-MQEA] (noting that stakeholder governance severely undermines managerial accountability while at the same time creating a measurement challenge that "causes confusion in the public policy debate among investors, policymakers, and scholars regarding the performance of a corporation").

30. *Cf.* Strine, Jr., *supra* note 27, at 786 ("It is counterproductive to pretend that corporate directors—hardly the most representative slice of society—are effective and unbiased champions for workers, communities, the environment, and society generally, given that they are elected solely by stockholders.").

31. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled* on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000) ("The business judgment rule . . . . is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

decisions are challenged.[32] It is important to note, however, that the arguably better view is that the presumption affirms the rule of shareholder wealth maximization precisely because the presumption ultimately rests upon and furthers the goals of that rule. In other words, when we ask, as we must, what defines the relevant good faith, information-gathering, and corporate best interests we are to presume under the business judgment rule, the best answer is that all of these concepts are to be defined in relation to shareholder wealth maximization. As Todd Aman has described the argument, "the business judgment rule incentivizes just the right amount of risk-taking because it helps to align directors' risk preferences with shareholders' risk preferences, assuming that most shareholders are diversified."[33] Put another way, "the business judgment rule is efficient because aligning directors' risk preferences with shareholders' risk preferences furthers the goal of shareholder wealth maximization."[34] This analysis applies as well to other devices of corporate law that insulate corporate decision-makers from liability for mere negligence, including duty-of-care waivers and procedural obstacles to bringing derivative suits.[35]

In light of the foregoing background information, the following sections review some of the specific cases typically cited in the SHWM debate.[36]

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32. *Cf.* Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543, 565 (2019) ("[C]urrent law mandates that directors adopt shareholder wealth maximization as their exclusive maximand, but the business judgment rule's insulative effect gives directors substantial discretion to pursue other interests in most cases.").

33. Todd M. Aman, *Cost-Benefit Analysis of the Business Judgment Rule: A Critique in Light of the Financial Meltdown*, 74 ALB. L. REV. 1, 13 (2010).

34. *Id.* at 14.

35. *Cf.* Stephen Bainbridge, *Ann Lipton Thinks VC Laster's Dell Decision Is About Judicial Primacy Not Director Primacy*, PROF. BAINBRIDGE (July 15, 2020), https://www.professorbainbridge.com/professorbainbridgecom/2020/07/ann-lipton-thinks-vc-lasters-dell-decision-is-about-judicial-primacy-not-director-primacy.html [https://perma.cc/Q8KD-XA7L] ("The shareholders' preference for [judicial] abstention . . . extends only to board decisions motivated by a desire to maximize shareholder wealth. Where the directors' decision was motivated by considerations other than shareholder wealth . . . the question is no longer one of honest error but of intentional misconduct. Despite the limitations of judicial review, rational shareholders would prefer judicial intervention with respect to board decisions so tainted.").

36. *But cf.* Jeffrey M. Lipshaw, *False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. (forthcoming 2021) (manuscript at 4) ("The debates are a war of platitudes based on a false dichotomy having almost no traction worth discussing as a practical matter. In the real world, directors obviously promote the shareholders' interest in returns on their investments, but they do so by mediating the various and often opposed interests of shareholders, employees, customers, suppliers, and communities."); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate*

### C. Dodge v. Ford; eBay Domestic Holdings, Inc. v. Newmark

In the 1919 case, *Dodge v. Ford*, the Supreme Court of Michigan set forth the following rule:

> A business corporation is organized and carried on primarily for the profit of the stockholders.[37] 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 non-distribution of profits among stockholders in order to devote them to other purposes.[38]

Later, in the 2010 case, *eBay Domestic Holdings, Inc. v. Newmark*, Chancellor Chandler, of the Court of Chancery of Delaware, essentially reaffirmed the rule of *Dodge v. Ford* when he wrote:

> The corporate form . . . 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

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*Law*, 85 VA. L. REV. 247, 254 (1999) ("Where progressives have argued that corporate law ought to be reformed to make directors more accountable to stakeholders, the mediating hierarchy approach suggests that directors should not be under direct control of either shareholders *or* other stakeholders.").

37. One may argue that "primarily" is not the same thing as "exclusively." However, focusing on this fact would seem to ignore the text that follows, which makes it clear that the powers of the directors are to be employed for the profit of the stockholders and that the profit of the stockholders is the end to which the discretion of directors is to be exercised. *Cf.* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 164, 176 (2008) ("Corporations seek profits for shareholders, but they seek other things, as well . . . .").

38. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). While at least some commentators have attempted to characterize *Dodge* as a close-corporation case, the opinion itself makes no reference to such corporate status. *Cf.* Dalia T. Mitchell, *From* Dodge *to* eBay*: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 174 (2019) ("In short, *Dodge*'s focus on the protection of shareholders, specifically minority shareholders, against abuses by the control group reflected the common early twentieth-century concern about the power that the control group could exercise over the vulnerable minority shareholders (and the market more broadly).").

> corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[39]

These two cases, *Dodge* and *eBay*, are frequently cited as primary evidence that corporate fiduciaries, like officers and directors, are subject to a duty to maximize shareholder value.[40] However, the existence and scope of the rule is contested.[41] For example, *Dodge* has been characterized as being limited to closely held corporations,[42] while *eBay* has been distinguished as a case focusing on the unique context of anti-takeover defenses.[43] The remainder of this section addresses a number of the most-commonly cited challenges to a rule of shareholder wealth maximization as set forth in *Dodge* and *eBay*.

### D. Shlensky v. Wrigley

*Shlensky v. Wrigley*, a 1968 Illinois case applying Delaware law, is often cited as part of efforts to push back against the duty to maximize shareholder

39. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010). Just as critics of shareholder wealth maximization may point to the limiting role of "primarily" in *Dodge v. Ford* (*see supra* note 38 and accompanying text), so too may they focus on the use of "purely" here. The argument follows that requiring profit-seeking (i.e., avoiding purely philanthropic ends) is not the same thing as requiring shareholder wealth maximization. But this seemingly ignores subsequent text from the opinion, *eBay*, 16 A.3d at 35 ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.").

40. *See* Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 939 (2017) (citing both cases in support of the proposition that "corporate law is often credited with creating, hewing to, or reinforcing a shareholder wealth maximization norm").

41. *See id.* at 940 ("Commentators . . . have taken various views on this asserted norm—ranging from characterizing the norm as nonexistent or oversimplified to maintaining it as simple fact.").

42. *But see Right of Business Corporation to Use Its Funds or Property for Humanitarian Purposes*, 3 A.L.R. 443 (Originally published in 1919) (noting that *Dodge* "is of interest . . . because it brings into clear relief the principle, which earlier decisions had previously recognized, that the fundamental purpose of a business corporation is to earn as large a profit as trade conditions and the business sagacity of its management will permit").

43. *See* Stephen Bainbridge, *Can Tim Cook Ignore ROI When Deciding How to Design an iPhone?*, PROF. BAINBRIDGE (Mar. 7, 2014), https://www.professorbainbridge.com/professorbainbridgecom/2014/03/can-tim-cook-ignore-roi-when-deciding-how-to-design-an-iphone.html [https://perma.cc/WX6V-QJPH] ("The *eBay* case . . . is a takeover case (in part) in which enhanced scrutiny was brought to bear."); *but see* McDonnell, *supra* note 20, at 20 ("But *eBay* does have implications for the application of the business judgment rule . . . . *eBay* tells us that a purpose to help other constituencies that cannot be tied ultimately to benefiting shareholders is not an allowable business purpose. Thus, it would seem that defendants cannot use such a purpose to justify a decision under the waste standard.").

value.[44] In *Shlensky*, a shareholder challenged the decision of the owners of the Chicago Cubs Major League Baseball team to forego installing lights, thereby denying the team the revenue that could be generated by playing at least some home games at night. The *Shlensky* court rejected that challenge and seemingly limited the ability of shareholders to hold corporate fiduciaries accountable for their business decisions to cases involving "fraud, illegality or conflict of interest."[45]

There are a number of reasons, however, to conclude that *Shlensky* cannot stand up under the weight proponents seek to place upon it. First, it is simply not the law of modern corporate governance that fiduciaries can only be held accountable for "fraud, illegality or conflict of interest." For example, failure to inform oneself of all material information reasonably available constitutes a breach of the duty of care, which rebuts the business judgment rule presumption in favor the fiduciary and places upon the fiduciary the burden of proving the entire fairness of the transaction.[46] Likewise, a conscious disregard of a known duty similarly rebuts the presumption, as this constitutes a breach of the duty of good faith and, thereby, at least implicates the duty of loyalty.[47] Second, *Shlensky* itself qualifies the contested proposition, asserting that "unless the conduct of the defendants at least *borders on* one of the elements [of fraud, illegality or conflict of interest], the courts should not interfere."[48] Finally, the *Shlensky* court attempts to present itself as adhering to *Dodge v. Ford*, but arguably misapplies that precedent. It describes the *Dodge* court's holding broadly enough to drive a truck through, stating that the *Dodge* court "felt that there must be fraud *or* a breach of that good faith which directors are bound to

44. 237 N.E.2d 776, 777 (Ill. App. Ct. 1968).

45. *Id.* at 780.

46. *See generally* KDW Restructuring & Liquidation Servs. LLC v. Greenfield, 874 F. Supp. 2d 213, 223 (S.D.N.Y. 2012) ("If the presumption is rebutted, the burden shifts to the defendant to demonstrate the entire fairness of the transaction. . . . A board's decision is not shielded where directors are: (1) interested or lack independence regarding the decision, (2) acting in bad faith, (3) lacking a rational purpose for the decision, or (4) grossly negligent (including failing to consider all available information)."). Some try to argue that the duty to become properly informed constitutes a precondition for the application of the business judgment rule and that once all relevant preconditions are met, the business judgment rule limits liability to fraud, illegality, or conflict of interest. For our purposes, this is a distinction without a difference.

47. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."). *Cf.* Leahy, *supra* note 1, at 1175 ("Today . . . there is a better way to describe transactions that management engages in primarily for its own psychic benefit: bad faith.").

48. *Shlensky,* 237 N.E.2d at 780 (emphasis added).

exercise toward the stockholders in order to justify the courts entering into the internal affairs of corporations."[49] However, nowhere in *Dodge* does the court state the rule as set forth in *Shlensky*, to wit, that only "fraud, illegality, or conflict of interest" will justify judicial interference with corporate decision-making, and the holding of *Dodge* certainly extends beyond that.

The foregoing analysis should seriously undermine the extent to which *Shlensky* constitutes a meaningful obstacle to the claim made herein that express disavowal of any concern with the shareholder-wealth implications of a business decision should be treated as a facial violation of the duties of care and good faith. Specifically, while it could be argued that *Shlensky* appears directly on-point for purposes of our discussion here, when the court notes that "Wrigley has refused to install lights, not because of interest in the welfare of the corporation but because of his personal opinions 'that baseball is a "daytime sport" and that the installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood,'"[50] any relevant precedential value is essentially dissipated by the fact that the *Shlensky* court apparently recognized neither a duty of care or good faith co-extensive with the scope of those duties today. Given that these are the primary duties argued herein to be violated by express disavowals of concern for shareholder value, the impact of *Shlensky* on the argument presented herein is extremely limited.[51]

Perhaps the best that can be said for reconciling *Dodge* and *Shlensky* is that in both cases, the courts asked whether there was a rational business explanation for the challenged conduct.[52] In *Dodge*, the court found none to justify the challenged refusal to pay dividends, and thus, proceeded to place the burden on

49. *Id.* at 779–80 (emphasis added).

50. *Id.* at 778.

51. *Cf.* Strine, Jr., *supra* note 27, at 776–77 ("*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty. And these confession cases illustrate the very foundation for the business judgment rule itself.").

52. As an aside, it is important not to confuse the inquiry into whether a business decision was informed with the inquiry into whether it has a rational basis. Anecdotally, I have routinely witnessed corporate governance experts attempt to brush aside questions about whether a decision was fully informed by providing a rational purpose for the decision—but these are distinct inquiries. *See* Julie Andersen Hill & Douglas K. Moll, *The Duty of Care of Bank Directors and Officers*, 68 ALA. L. REV. 965, 972–73 (2017) ("[T]he duty of care can be divided into three independent obligations: (1) an 'oversight' obligation . . . ; (2) a 'decision-making' obligation to make substantive decisions that can be attributed to a rational business purpose . . . ; and (3) a 'decision-making' obligation to be sufficiently informed . . . .").

the corporation to justify its actions.[53] When the representative decision-maker subsequently refused to provide a shareholder wealth rationale for the challenged conduct, and instead, expressly cited non-shareholder-wealth justifications, such as concern for employees and customers, the court found a breach of duty. Accordingly, the court in *Dodge* said:

> [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.[54]

In *Shlensky*, on the other hand, the court was satisfied that an objective business purpose was readily apparent, and thus, the business judgment rule presumption in favor of the decision-makers was never rebutted. In other words, the *Shlensky* court effectively provided a shareholder-wealth rationale for the defendants:

> [W]e are not satisfied that the motives assigned to Philip K. Wrigley, and through him to the other directors, are contrary to the best interests of the corporation and the stockholders. For example, it appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood. Furthermore, the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating. By these thoughts we do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability. We are merely saying that the decision is one properly before directors and the motives alleged in the amended

53. Dodge v. Ford Motor Co., 170 N.W. 668, 683 (Mich. 1919) ("Considering only these facts, a refusal to declare and pay further dividends appears to be not an exercise of discretion on the part of the directors, but an arbitrary refusal to do what the circumstances required to be done. These facts and others call upon the directors to justify their action, or failure or refusal to act.").

54. *Id.* at 684 (emphasis added).

complaint showed no fraud, illegality or conflict of interest in their making of that decision.[55]

Viewed in this light, *Shlensky* does not undermine the rule of shareholder wealth maximization. Rather, the *Shlensky* court is better understood as simply applying the business judgment rule presumption broadly. Importantly, in the process of applying this presumption, the *Shlensky* court couched its conclusion in shareholder wealth maximizing terms (i.e., revenue losses due to "patrons who . . . would not attend the [night] games if the park were in a poor neighborhood," as well as "the long run interest of the corporation in its property value").[56] As in *Dodge*, the business judgment rule insulated the relevant decision-makers in terms of "the choice of means to attain" the end of "profits among stockholders," but did not "extend to a change in the end itself."[57]

### E. A. P. Smith Mfg. Co. v. Barlow

In the 1953 case, *A. P. Smith Mfg. Co. v. Barlow*, the Supreme Court of New Jersey upheld corporate charitable contributions in the face of a challenge from shareholders questioning the contributions as contrary to the norm of shareholder wealth maximization.[58] The case is often cited as negating a rule of shareholder wealth maximization, but the *Barlow* court is better understood as having ultimately upheld the contributions as consistent with profit maximization. Specifically, the *Barlow* court stated the common law rule as setting forth that "those who managed the corporation could not disburse any corporate funds for philanthropic or other worthy public cause unless the

55. *Shlensky*, 237 N.E.2d at 780.

56. *Id.*; *but see* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 97 (2004) ("[T]he court could have dismissed Shlensky's claim without addressing either the substantive merits of Wrigley's refusal or his motives. . . . Indeed, the court emphasized that its speculations in this regard were mere dicta . . . ."). *Cf.* Josh Blackman, Much Ado About Dictum; Or, How to Evade Precedent Without Really Trying. The Distinction Between Holding and Dictum 1 (Dec. 19, 2008) (unpublished manuscript), https://ssrn.com/abstract=1318389 [https://perma.cc/4CGY-RMPG] ("[T]he holding/dictum distinction is a standardless standard.").

57. *Dodge*, 170 N.W. at 684. *Cf.* Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1345 (Del. 1987) (describing duty of loyalty as including "an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit").

58. 98 A.2d 581 (N.J. 1953).

expenditure would benefit the corporation."[59] Furthermore, in the particular case before it, the *Barlow* court ultimately concluded that the contributions could "readily be justified as being for the benefit of the corporation."[60]

The *Barlow* court also addressed the impact of statutes that expressly authorized charitable contributions. Specifically, New Jersey had passed a statute that "expressly empowered corporations . . . to contribute reasonable sums to [charitable] institutions, provided, however, that . . . the contribution shall not exceed 1% of capital and surplus unless the excess is authorized by the stockholders at a regular or special meeting."[61] The *Barlow* court ruled that this statute could provide independent authority for the charitable contributions at issue in that case, even though the statute was enacted after the corporation had been created because "reserved power permits alterations in the public interest of the contract between the state and the corporation."[62] More importantly for our purposes, the statutory authority was clearly limited to reasonable amounts, and nothing suggests that corporate fiduciaries could breach their duties—such as maximizing shareholder wealth—in exercising their statutory power.[63] In fact, the *Barlow* court made a point of noting that there was no suggestion that the charitable contributions were

> made indiscriminately or to a pet charity of the corporate directors in furtherance of personal rather than corporate ends. On the contrary, it . . . was modest in amount and . . . made in

59. *Id.* at 584 (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)); *see id.* at 583–84 ("the end of private profit became generally accepted as the controlling one in all businesses other than those classed broadly as public utilities"); E. Merrick Jr. Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) ("Several hundred years ago, . . . our law took the position . . . that the business man, far from being free to obtain all the profits which his skill in bargaining might secure for him, owes a legal duty to give adequate service at reasonable rates. [However,] a growing belief in liberty of contract and in the efficacy of free competition to prevent extortion led to abandonment of this theory . . . .").

60. *Barlow*, 98 A.2d at 586.

61. *Id.* at 587.

62. *Id.*

63. To the extent statutory authority for corporate charitable contributions varies in scope, it is important to remember that these provisions are best understood as setting forth the power of corporate decision-makers. That power, however, must still be exercised in accordance with the decision-makers' fiduciary duties. *But cf.* Leahy, *supra* note 1, at 1172 ("The only real limitation on charitable donations is that they must 'be reasonable in amount and be made to a qualifying charitable organization as determined by the Internal Revenue Code.'") (quoting R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 992–96 (1999)).

> the reasonable belief that it would . . . advance the interests of the . . . corporation . . . .[64]

### F. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.

In the 1986 case, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Supreme Court of Delaware held that when a company is put up for sale, the duty of the board changes "from the preservation of [the] corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."[65] Put another way, the directors' role changes "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[66] Furthermore, "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."[67]

Those who seek to deny the existence of a duty to maximize shareholder value often cite *Revlon* for the proposition that the duty to maximize shareholder value only arises in the narrow context of a breakup or change-of-control. However, to say that a board has a duty to maximize the bid received in the context of an auction is not the same thing as saying the board has no

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64. *Barlow*, 98 A.2d at 590; *but see* Ronald W. Masulis & Syed Walid Reza, *Private Benefits and Corporate Investment and Financing Decisions: The Case of Corporate Philanthropy* 3 (Eur. Corp. Governance Inst., Working Paper No. 603/2020, 2020) (noting that "[a]gency concerns about the private benefits of corporate philanthropy have a long history in the corporate finance literature" and setting forth empirical evidence showing that corporate charitable giving essentially constitutes a form of managerial self-dealing "at the expense of shareholder wealth creation"). *But cf.* Leahy, *supra* note 1, at 1174 ("Although an influential early decision from New Jersey once suggested that donations to a 'pet' charity might not pass muster, the Delaware cases seem to reject that view out of hand.").

65. 506 A.2d 173, 182 (Del. 1986). *Cf.* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994).

> The directors of a corporation have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders in at least the following three scenarios: (1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company; (2) where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control. In the latter situation, there is no sale or change in control when control of both companies remains in a large, fluid, changeable and changing market.

*Id.* (internal citations, modifications, and quotation marks omitted).

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

67. *Id.*

duty to maximize shareholder value in other contexts. Rather, the better reading of *Revlon* is that it focuses the otherwise generally applicable duty to maximize shareholder value into a very short-term window in the context of an auction.

To make this clear, imagine a board considering two investment options. One of the investments promises a return of 100, while the other promises a return of 150. However, the project promising a return of 100 provides for realizing that return in 6 months, while the project promising a return of 150 will require 18 months to complete. Comparing these two investments thus requires discounting the longer-term project to reflect the time value of money.[68] This discounting involves making a variety of assumptions, and it provides opportunities for factoring in risk-preferences of various sorts. The resulting calculations are often flexible enough to allow the board to essentially choose the time horizon for realizing the shareholder value it is duty-bound to maximize.[69] However, the relevant assumptions are not limitless in terms of their flexibility, and when a particular project is clearly superior in terms of expected return, then not choosing that project amounts to a breach of duty, given that it is the equivalent of setting shareholder value on fire (i.e., constitutes a waste of corporate assets).[70] *Revlon* simply stands for the proposition that when its duties are triggered, the long-term option in our

68. Managers can perform expected value calculations that account for differing time horizons. These calculations provide a lot, but not limitless, flexibility. *Cf.* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 376 (2017) ("[I]n instances in which the financial benefit to the business entity is uncertain, the corporation should engage in socially responsible behavior . . . ."); Claire A. Hill & Alessio M. Pacces, *The Neglected Role of Justification Under Conditions of Uncertainty*, CLS BLUE SKY BLOG (Mar. 12, 2019), https://clsbluesky.law.columbia.edu/2019/03/12/the-neglected-role-of-justification-under-conditions-of-uncertainty/#.XIhJ7ThuocY.twitter [https://perma.cc/W7HQ-EWXL] ("[W]hether short-termism is a problem in general is impossible to determine. Because the right time horizon for a company is not known, managers who bemoan short-termism might actually suffer from long-termism, postponing the realization that better times will never come.").

69. *Cf.* HENRY G. MANNE, *First Lecture*, *in* 3 THE COLLECTED WORKS OF HENRY G. MANNE: LIBERTY AND FREEDOM IN THE ECONOMIC ORDERING OF SOCIETY 3, 5 (Fred S. McChesney & Jonathan R. Macey eds., 2009) ("selection of the relevant time span for corporate planning is *par excellence* a managerial function").

70. *Cf.* Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1026 (2013) ("[A] board may not deliberately choose to waste the corporation's assets by dedicating them to some explicit purpose other than the promotion of shareholder value . . . ."); MANNE, *supra* note 69, at 5 ("Any working definition of the idea of corporate social responsibility must begin with the idea that the expenditure or activity be one for which the marginal returns to the corporation are less than the returns available from some alternative expenditure.").

hypothetical is off the table, and the board must shift its attention to maximizing the value of the short-term project of selling the company.

Furthermore, the fact that *Revlon* takes consideration of non-shareholder interests off the table in the context of a change-of-control does not mean non-shareholder interests that are shareholder-wealth-destroying may be considered in other contexts. Rather, the *Revlon* court made clear that a board typically "may have regard for various constituencies in discharging its responsibilities, *provided* there are rationally related benefits accruing to the stockholders."[71]

### G. *Constituency Statutes, Benefit Corporations, and Charter Amendments*

Perhaps at least in part in response to *Revlon* and related cases, some states adopted what have come to be known as constituency statutes, which permit corporate decisionmakers to consider the impact on various non-shareholder constituencies in making at least some types of business decisions and, in at least one case, expressly reject any primacy of shareholder interests.[72] While these statutes do appear, at least in some cases, to reject a rule of shareholder-wealth maximization, they may best be viewed as examples of exceptions that prove the rule.[73] If there were no rule of shareholder wealth maximization, there would be no need for constituency statutes.

Similarly, recently enacted benefit corporation statutes have been pointed to as evidence of a rejection of shareholder wealth maximization. In fact, the existence of such statutes was cited as support for granting Hobby Lobby the right to pursue a religious purpose extending so far as to provide a religious free

71. *Revlon*, 506 A.2d at 182 (emphasis added). *Cf.* Rosemary Teele Langford, *Social License to Operate and Directors' Duties: Is There a Need for Change?*, 37 CO. & SEC. L.J. 200, 207 (2019) ("[P]romotion of stakeholder interests requires a nexus with corporate benefit. . . . Examples of promotion of stakeholder interests with no such nexus would be . . . financial sponsorship of a political or social cause that resulted in (or had the potential to result in) public opposition to the company.").

72. *Cf.* 15 PA. STAT. AND CONS. STAT. ANN. § 1715(b) (West 1990) ("The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor.").

73. It may be argued that constituency cannot constitute an exception when they have been adopted in more than half the states. However, the devil is in the details, and not all adopted constituency statutes can properly be framed as broadly rejecting shareholder wealth maximization. Furthermore, when the impact of constituency statutes on public for-profit corporations is compared with the impact of Delaware on those entities, characterizing constituency statutes as an exception is at least defensible. *Cf.* McDonnell, *supra* note 20, at 8 ("thirty-three states have adopted corporate constituency statutes"); *id.* at 17 (noting interpretation of constituency statutes that sees them as consistent with a shareholder-primacy, under which "directors may consider stakeholder interests only to the extent that doing so can be related to benefits to shareholders").

exercise defense against a generally applicable regulation. Justice Alito, writing for the majority in the 2014 United States Supreme Court case, *Burwell v. Hobby Lobby*, laid out the argument as follows:

> Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business. While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. . . . So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well. . . .
>
> In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.
>
> In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious

principles.[74]

None of the foregoing, however, undermines the rule of shareholder wealth maximization. First, to say that a corporation may be formed for any lawful purpose is not the same thing as saying that the purpose can be to destroy shareholder wealth in pursuit of some other goal, at least not without express (and perhaps unanimous) shareholder agreement. Rather, it means that, whereas corporations used to be chartered for extremely narrow purposes, such as building a bridge at a particular intersection—and any activity not in furtherance of that purpose was beyond the corporation's power (i.e., ultra vires)—modern corporations may pursue profit by any lawful means. Justice Alito expressly recognizes this point when he equates the pursuit of any lawful purpose with "the pursuit of *profit* in conformity with the owners' religious principles."[75] Second, Justice Alito's assertion that "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else" does not undermine the rule of shareholder wealth maximization because there are many instances where there are multiple paths a corporation can take for which a defensible argument of profit-maximization can be made, and in those cases other factors can be considered, as the *Revlon* court noted above. Third, as alluded to previously, to the extent the excerpted language can be understood to support the adoption of non-profit purposes by for-profit corporations, Justice Alito expressly limits these cases to those where "its owners agree" and appropriate "ownership approval" has been obtained. Of course, corporate shareholders and owners can agree to waive their right to hold their managers accountable for maximizing profit, but waiving a right necessarily requires the right to exist in the first place. Finally, the fact that many states felt it necessary to enact benefit corporation statutes supports, rather than undermines, the rule of shareholder wealth maximization even more strongly than the existence of constituency statutes.[76]

74. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710–13 (2014) (internal citations and quotation marks omitted).

75. *Id.* at 713 (emphasis added).

76. *Cf.* Joshua P. Fershee, *The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy*, 19 TRANSACTIONS: TENN. J. BUS. L. 361, 362–63 (2017) ("Now that many states have alternative social enterprise entity structures, there is an increased risk that traditional entities will be viewed (by both courts and directors) as pure profit vehicles, eliminating directors' ability to make choices with the public benefit in mind . . . ."). *But cf.* McDonnell, *supra* note 20, at 33 (describing Fershee's claim as a "corrosion critique" and rendering the verdict on its validity "a mixed bag").

Finally, Professor Heminway has noted that "[t]he accumulated evidence is at best unclear about whether a public or private firm incorporated in or outside Delaware can engage in private ordering in its charter to include a corporate purpose that may be interpreted in a manner inconsistent with the shareholder wealth maximization norm."[77] However, even assuming that such charter amendments would be effective under at least some conditions does not alter the conclusion that SHWM should be considered the default rule in at least some important jurisdictions.[78] In addition, claims that non-SHWM ends may be pursued when we "know" the relevant shareholders all desire that result should be treated with healthy skepticism until we can verify the asserted commonality to a high degree of certainty.[79]

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77. Heminway, *supra* note 40, at 966; *see also* Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANSACTIONS: TENN. J. BUS. L. 415, 438–43 (2017) (discussing Prof. Heminway's article). *Cf.* Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RES. L. REV. 863, 865 (2019) (noting "a longstanding (and unresolved) tension in corporate law, namely, the extent to which corporate purpose is a privately ordered one, selected by stockholders themselves, or whether corporate purpose is dictated by the state"); McDonnell, *supra* note 20, at 36 ("One could argue that a certificate provision allowing directors to consider other stakeholders even where doing so goes against the interests of shareholders is exculpating some behavior that is not in good faith.").

78. *Cf.* Padfield, *supra* note 77, at 440 ("Chancellor Chandler's recognition that if the decision-makers in *eBay* 'were the only stockholders affected by their decisions, then there would be no one to object' suggests that at least a unanimously adopted charter amendment opting out of shareholder wealth maximization would succeed." (quoting *eBay Domestic Holdings v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010))).

79. *Cf.* DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (2018) (arguing union pension fund managers should pursue goals typically associated with the labor movement, rather than focus exclusively on fund returns). A full discussion of this issue, which impacts a broad spectrum of institutional investors, shareholders, and funds, is beyond the scope of this Essay. *Cf.* Bernard S. Sharfman, *Now Is the Time to Designate Proxy Advisors as Fiduciaries Under ERISA,* 25 STAN. J.L. BUS. & FIN. 1, 1 (2020) ("Now is the time to designate proxy advisors as investment advice fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA). Such a designation is . . . necessary to . . . make sure voting recommendations are in compliance with the sole objective required by ERISA, shareholder wealth maximization (SWM)."); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 382 (2020) ("We show that ESG investing is permissible under American trust fiduciary law if two conditions are satisfied: (1) the trustee reasonably concludes that ESG investing will benefit the beneficiary directly by improving risk-adjusted return; and (2) the trustee's exclusive motive for ESG investing is to obtain this direct benefit."). However, it may be worth noting as an aside that simply because union members may respond affirmatively to a survey question that asks whether they care about, for example, global warming, does not mean they want to receive a materially smaller pension when they retire in order to allow the pension fund managers to pursue that goal with other people's money (i.e., member funds).

### H. *Stop Pretending SHWM Isn't the Rule*

In light of the foregoing, it is perhaps not surprising that Leo Strine, former Chief Justice of the Supreme Court of Delaware, noted that "advocates for corporate social responsibility *pretend* that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion, under the law of the most important American jurisdiction—Delaware."[80] Drilling down further on the specific points of conflict addressed above, Strine continues:

> They point to Delaware's corporate purpose statute, which states that a corporation may conduct "any lawful business or purpose[]." They claim that *Revlon* and its progeny are anomalies, and that a shareholder-welfare maximization norm only applies when a corporation is for sale. They argue that the business judgment rule is cloaking a system of law that is focused on giving directors the ability to act for any reason they deem appropriate. But, the problem with that argument is that it does not happen to be true; it is inconsistent with judge-made common law of corporations in Delaware . . . .[81]

Corporate governance expert Stephen Bainbridge is even more direct when he asserts that "those commentators who claim Delaware law does not mandate shareholder wealth maximization are either misinformed or disingenuous."[82]

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*Cf.* Alon Brav, Matthew D. Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting* 4 (Eur. Corp. Governance Inst., Working Paper No. 637/2019, 2019), https://ssrn.com/abstract=3387659 [https://perma.cc/V6NK-ZPBH] (finding that "retail shareholders do not support environmental, social, and governance (ESG) proposals to the same degree as institutional investors"); Martin Lipton, *DOL Proposes New Rules Regulating ESG Investments,* HARV. L. SCH. F. ON CORP. GOVERNANCE (July 7, 2020), https://corpgov.law.harvard.edu/2020/07/07/dol-proposes-new-rules-regulating-esg-investments/ [https://perma.cc/9VKY-HBB2] ("[T]he Department of Labor ('DOL') has proposed . . . rules that . . . reflect[] the DOL's continued concern that ESG investment might 'subordinate return or increase risk for the purpose of non-pecuniary objectives.' In terms of defining what would . . . mandate triggering heightened scrutiny . . . the proposed rule casts the net widely . . . .").

80. Strine, Jr., *supra* note 27, at 763 (emphasis added).

81. *Id.* at 781–83.

82. Stephen Bainbridge, *New Delaware Guidance Reaffirming the Shareholder Wealth Maximization Norm*, PROF. BAINBRIDGE (Dec. 5, 2019, 11:53 AM), https://www.professorbainbridge.com/professorbainbridgecom/2019/12/new-delaware-guidance-reaffirming-the-shareholder-wealth-maximization-norm.html [https://perma.cc/48XY-YZQ8].

This statement was made in light of the following judicial proclamation, which further drives home the point.

> 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. 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."[83]

Having hopefully convinced the reader that SHWM is a rule of corporate governance in at least some important jurisdictions[84] (or at least given the reader sufficient reason to keep an open mind on the issue), the next section examines the interplay of that rule with political bias in corporate decision-making.[85]

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83. Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP, No. 2018-0372-JTL, 2019 WL 4927053, at *14 (Del. Ch. Oct. 7, 2019) (citations omitted).

84. *See also* Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others . . . does not for that reason constitute a breach of duty.").

85. While recent provocative statements about a shift to stakeholder governance have garnered a lot of attention, I will herein limit my response thereto to quoting Stephen Bainbridge, who noted (in response to a claim by the Business Roundtable that it was redefining corporate purpose): "You don't get to 'redefine' anything. Only the Delaware courts can change the law of corporate purpose. And, as you ought to know, Delaware comes down square on the side of shareholder wealth maximization." Stephen Bainbridge, *A Tweet to the Business Roundtable re the Law of Corporate Purpose*, PROF. BAINBRIDGE (Aug. 19, 2019, 1:59 PM), https://www.professorbainbridge.com/professorbainbridgecom/2019/08/a-tweet-to-the-business-roundtable-re-the-law-of-corporate-purpose.html [https://perma.cc/7EM3-5NA6]; *See Bandera*, 2019 WL 4927053, at *14 ("In the settled Delaware formulation, fiduciary duties run not only to the corporation, but rather 'to the corporation and its shareholders.' A board of directors thus owes fiduciary duties to the corporation for the ultimate benefit of its residual risk bearers, *viz.*, the class of

## III. THE DUTY TO CALCULATE ROI

This Part explains how applying the rule of shareholder wealth maximization to the facts of managerial disavowal of concern for the financial implications of business decisions results in violation of what can be understood as a duty to calculate the return on investment. It is argued that this conclusion is robust even in the face of the business judgment rule that, as noted above, operates as a presumption that covered managers make business decisions on a fully informed basis, in the best interests of the corporation, and without bad faith or disabling conflict of interest.

When Tim Cook, CEO of Apple, says, "When we work on making our devices accessible by the blind, I don't consider the bloody ROI,"[86] or when Ed Stack, the chairman and chief executive of Dick's Sporting Goods Inc., decided that Dick's should "take a stand" on gun violence by foregoing the sale of assault-style weapons, and in connection therewith said, "I don't really care what the financial implication is,"[87] a number of corporate governance concerns are raised.[88] First, the duty of care requires corporate decision-makers like Cook and Stack to become informed of all material information reasonably available in connection with exercising their business judgment. Statements such as "I don't consider the bloody ROI" or "I don't really care what the financial implication is" are essentially admissions that the duty of care was breached and, at the very least, should be sufficient to rebut the business judgment rule presumption that decisions are fully informed, which then places the burden on the fiduciary to prove the transaction was nonetheless entirely fair to the corporation.[89] Similarly, the statements implicate a breach of the

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

86. Shankleman, *supra* note 9.

87. Nassauer, *supra* note 10.

88. According to SEC filings, Apple is incorporated in California (*see* Apple Inc., Current Report (Form 8k) (May 4, 2020)), and Dick's is incorporated in Delaware (*see* Dick's Sporting Goods, Inc., Current Report (Form 8K) (June 10, 2020)). I am using the statements as examples for purposes of applying Delaware and similar law. The extent to which California and other states' law would change the analysis is beyond the scope of this Essay.

89. There may be good reasons for treating public defiance of shareholder wealth maximization by corporate decision-makers as particularly worthy of heightened scrutiny (special thanks to Stephen Bainbridge for alerting me to this point); *see generally* David B. Guenther, *The Strange Case of the Missing Doctrine and the "Odd Exercise" of* Ebay*: Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. & BUS. REV. 427, 429–30 n.2 (2018).

duty of loyalty by way of bad faith, since they evince a conscious disregard of a known duty, to wit, becoming fully informed of all material information reasonably available.[90] This latter conclusion is particularly important because duty of loyalty violations are not immunized from liability by duty-of-care waiver provisions like Delaware's 102(b)(7).[91]

Thus, even without any modifications to the existing corporate governance framework, an express disavowal by a corporate decision-maker of any concern with the financial implications of their business decisions should, in jurisdictions following Delaware's lead, at the very least rebut the business judgement rule presumption of informed decision-making, and place the burden of proving the transaction was entirely fair on the decision-maker.[92] In application, this conclusion essentially constitutes a duty to calculate the ROI to whatever extent reasonable under the circumstance, which can be used to

> Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 189 (2008) (citing *Dodge v. Ford* for the proposition that "if a CEO *testifies* that he and his board were engaging in certain actions for reasons unrelated to maximizing shareholder value, they would lose a lawsuit challenging those actions, especially if they exhibited indifference to the interests of those shareholders."); 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, 776 (2015) ("*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary *admits* that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.").

*Id.* (emphasis added).

90. *Cf.* Leahy, *supra* note 1, at 1194, 1204 (noting that "absent a smoking gun that revealed management's intent, it would be impossible for a shareholder to prove management's bad faith" but then proceeding to identify "management's . . . public statements" as a "smoking gun"); Strine, Jr., *supra* note 27, at 776–77 ("*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty. And these confession cases illustrate the very foundation for the business judgment rule itself.").

91. Politicized decisions may violate anti-discrimination and other laws, which may provide an additional basis for avoiding exculpation clauses. *Cf.* H. Justin Pace, *Rogue Corporations: Unlawful Corporate Conduct and Fiduciary Duty*, 85 MO. L. REV. 1, 1 (2020) (noting that Dick's and Walmart were sued for violating age discrimination bans in connection with raising the age for gun purchases, and that such a knowing violation of law is expressly excluded from title 8, section 102(b)(7) of the Delaware Code).

92. *But cf.* Bainbridge, *supra* note 43 ("the business judgment rule has the effect—although, in my view, not the intent—of protecting decisions like that made by Tim Cook from judicial review").

rein in the impulse of corporate decision-makers to use their shareholders' money to advance the manager's political agenda.[93]

Nonetheless, express disavowals of informed decision-making are likely rare, and so additional measures may be necessary to ensure managers stay properly focused on shareholder wealth maximization. The next two sections provide a framework for such additional measures by first reviewing the ways in which relevant corporate governance rules were changed to account for increasing awareness of director self-dealing in the context of takeovers, followed by an examination of how these changes could be adopted in the fight against political bias in corporate decision-making.[94]

## IV. The Omnipresent Specter of Self-Interest in Takeovers

In the 1985 case, *Unocal Corp. v. Mesa Petroleum Co.*,[95] the Delaware Supreme Court observed the following:

> When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders. In that respect a board's duty is no different from any other responsibility it shoulders, and its decisions should be no less entitled to the respect they otherwise would be accorded in the realm of business judgment. There are, however, certain caveats to a proper exercise of this function. Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the

93. *But cf.* Lipshaw, *supra* note 36, at 6 ("After . . . more than a quarter century as a real world corporate lawyer and senior officer of a public corporation, I still find myself more amused than educated by the debates between the ideologues on real world subjects that I know, as a practical matter, rarely present themselves in such a binary fashion when those in the corporate management trenches address them.").

94. Among other things, both actual and perceived political bias in corporate decision-making can lead to costly backlash against corporations viewed as politically biased. *Cf.* Scott Shepard, *Under a Fog of Pablum, Google Promises to Keep Censoring Conservative Content*, NAT'L CTR. FOR PUB. POL'Y RSCH. (June 3, 2020, 3:59 PM), https://nationalcenter.org/ncppr/2020/06/03/under-a-fog-of-pablum-google-promises-to-keep-censoring-conservative-content/ [https://perma.cc/2LUN-K8DJ] ("Google benefits mightily from special statutory exemptions from libel, fraud and misrepresentation laws on the basis of its behavior as a supposedly neutral platform, rather than a biased publisher. Now that it has taken on the latter role, its exemptions are—and should be—at risk.").

95. 493 A.2d 946 (Del. 1985).

business judgment rule may be conferred.[96]

This enhanced scrutiny consists of requiring directors to show (1) that "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed,"[97] and (2) that any adopted anti-takeover measures were "reasonable in relation to the threat posed."[98] As Joseph Leahy describes it, "rather than be protected so long as their 'cover story' is *rational* (i.e., if the transaction does not constitute waste), as they would be under the business judgment rule, the directors must show that their actions were *reasonable* in that their defensive measures furthered their stated goal."[99]

While *Unocal's* enhanced scrutiny has evolved significantly since 1985, those changes are, for the most part, beyond the scope of this Essay.[100] What is important for our purposes is to recognize that Delaware law evolved to accommodate a new threat to its corporate governance regime. Likewise, a new type of enhanced scrutiny may be warranted to deal with the omnipresent specter of political bias.

## V. THE OMNIPRESENT SPECTER OF POLITICAL BIAS IN CORPORATE DECISION-MAKING

This Part argues that the increasing risk of "woke"[101] managers prioritizing their political beliefs over their duty to maximize shareholder wealth calls for

96. *Id.* at 954 (citations omitted).

97. *Id.* at 955. *Cf.* Leahy, *supra* note 1, at 1145 ("First, a court must determine whether the board's actions in response to the hostile takeover threat were 'draconian'—that is to say, 'preclusive' or 'coercive.' So long as the directors' defensive action was neither preclusive nor coercive, the court shall not look closely at whether the response was precisely calibrated to meet the threat posed; rather, the proper inquiry is whether the defensive measures were within a 'range of reasonableness.'") (quoting Unitrin Inc. v. American General Corp., 651 A.2d 1361, 1388 (Del. 1995)).

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

99. Leahy, *supra* note 1, at 1156.

100. *Cf.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 308 (Del. 2015) (holding that uncoerced, informed stockholder vote invoked the business judgment rule standard of review "even if *Revlon* applied to the merger"); *Id.* at 312 ("*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*, and with the prevalence of exculpatory charter provisions, due care liability is rarely even available." (citing Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)).

101. The term "woke" is typically associated with the left side of the political spectrum, and many of the examples of corporate conduct I cite herein are arguably left-leaning, but the proposal I

an expansion of established enhanced scrutiny review of business decisions.[102] However, before proceeding to the specific proposal, it is worth highlighting some details from a related proposal put forth in 2017 by Joseph Leahy in his article, *Intermediate Scrutiny for Corporate Political Contributions*.[103]

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am advancing applies across the political spectrum, and is intended to refocus both right- and left-leaning managers on shareholder wealth maximization. For example, Facebook's decision to favor free speech over censorship of speech deemed by at least some to be hateful, racist, biased, or misleading might be characterized as a case of right-leaning bias (and may also be characterized as profiting from hate speech rather than protecting freedom of speech). *See* Shivdeep Dhaliwal, *Facebook CEO Mark Zuckerberg Says He Has No Secret Pact with Trump Administration*, BENZINGA (July 20, 2020, 10:15 PM), https://www.benzinga.com/news/20/07/16700839/facebook-ceo-mark-zuckerberg-says-he-has-no-secret-pact-with-trump-administration [https://perma.cc/M4DF-CXXX] ("[T]here are a lot of people who've said that maybe we're too sympathetic or too close in some way to the Trump administration."). *Cf.* Kari Paul, *'It's Hitting Their Pockets': A Lead Organizer on the Biggest Corporate Boycott in Facebook's History*, GUARDIAN (July 7, 2020, 5:00 PM), https://www.theguardian.com/technology/2020/jul/07/facebook-ad-boycott-rashad-robinson-interview-color-change [https://perma.cc/VEY3-C8PP]. Having said that, shareholder wealth maximization can be described as a right-leaning construct, and thus, this proposal may be more appealing to those on the right. *Cf.* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109, 109 (2004) (discussing "long battle between the conservative, private, shareholder-wealth-maximization school of corporate legal thought and the progressive, public, stakeholder-protection/social-responsibility school"). Finally, to the extent "woke" has its roots in critical race and gender studies, the term appears to have found much broader application. *Cf.* Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 441 (2019) ("The enormous influence corporations wield on both the economic and social fabric of our society due to the legal framework and norms under which they operate make them uniquely positioned to affect the outcome of social movements—for better or worse.").

102. *Cf.* Leahy, *supra* note 1, at 1151 (noting that "not all directors are affected equally by [*Unocal's*] supposedly 'inherent' conflict" because while "the conflict is 'inescapable' for the company's top managers," the "conflict 'is merely a potential problem' for any of the company's directors who are at least nominally independent" and thus, "*Unocal*'s underlying reasoning is better described as simply an 'inherently . . . strong risk' of . . . such a conflict") (quoting Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 819 (2006)); *id.* at 1152 ("by not employing entire fairness review, the *Unocal* decision suggests that defensive measures reflect an *extraordinarily high-risk* of a conflict of interest, but not an *actual* conflict of interest"); *id.* at 1202 ("*Unocal*'s 'omnipresent specter' really refers to directors' *personal* interests, not their *financial* ones.").

103. Leahy, *supra* note 1, at 1127–28 ("This Article provides the first sustained defense of applying intermediate scrutiny to corporate political contributions. That defense consists of two related arguments: (1) a direct analogy to charitable donations; and (2) an argument that corporate political contributions are analogous to, but more problematic than, corporate charity."). *Cf. id.* at 1129 ("[N]early two decades ago, two esteemed members of the Delaware bar, R. Franklin Balotti and James J. Hanks, Jr., argued that management's decision to cause the corporation to make certain corporate charitable donations should (for some such donations) be subject to a more rigorous test than the

Specifically, I want to focus on two related justifications for applying enhanced scrutiny set forth in Leahy's article that have not yet been discussed herein: mixed motives and pretext.[104]

Business decisions giving rise to mixed motives on the part of decision-makers can be contrasted with those giving rise to a direct conflict. As Leahy puts it, citing and quoting Robert Clark, a "mixed motives" situation "differs from traditional self-dealing because the former situation involves a director who has 'some interest in a side effect' of the corporation's transaction with a third party whereas the latter situation involves a director with a direct financial interest in the third party or the transaction itself."[105] While the latter situation justifies entire fairness review, the former supports intermediate scrutiny.[106]

But what differentiates a mixed motive case justifying intermediate scrutiny from an otherwise ordinary business decision deserving the protections of the business judgment rule? At least part of the answer is the ease with which decision-makers can provide plausible but pretextual justifications for their decisions. This is part of the justification (offered by no lesser authority than former Delaware Chief Justice Strine) for intermediate scrutiny in cases

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business judgment rule. Instead of that rule, Balotti and Hanks urged courts should apply a version of the *Unocal* test. Unfortunately, no court or scholar has taken up this proposal." (citing R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 992–96 (1999)); *cf. id.* at 1129 ("corporate philanthropy raises the same issues, albeit inversely, as management stealing a corporate opportunity").

104. *Id.* at 1131–32 (noting "a critical, but underappreciated, policy reason that *Unocal* and its progeny apply intermediate scrutiny rather than the business judgment rule: the serious potential for management pretext posed by defensive measures"); *id.* at 1125 ("Thirty years ago, Dean Robert Clark described situations where management is likely to act both for personal reasons and to benefit the corporation as involving 'mixed motives.'" (citing ROBERT CHARLES CLARK, CORPORATE LAW 146, 148–49 (1986))).

105. *Id.* at 1125 n.23.

106. *Cf.* Cheff v. Mathes, 199 A.2d 548, 554–55 (Del. 1964).

> To say that the burden of proof is upon the defendants is not to indicate, however, that the directors have the same 'self-dealing interest' as is present, for example, when a director sells property to the corporation. The only clear pecuniary interest shown on the record was held by Mr. Cheff, as an executive of the corporation, and Trenkamp, as its attorney. The mere fact that some of the other directors were substantial shareholders does not create a personal pecuniary interest in the decisions made by the board of directors, since all shareholders would presumably share the benefit flowing to the substantial shareholder. Accordingly, these directors other than Trenkamp and Cheff, while called upon to justify their actions, will not be held to the same standard of proof required of those directors having personal and pecuniary interest in the transaction.

*Id.* (citations omitted).

involving the adoption of defensive measures,[107] and why intermediate scrutiny has been advocated for in the context of charitable giving,[108] CEO "activism" outside business decisions,[109] and political contributions.[110]

Basically, we are talking about incentive plus opportunity.[111] Thus, where there is a meaningful incentive on the part of a corporate decision-maker to pursue their own ends, and it is relatively easy to construct a profit-maximizing justification for the self-serving conduct, intermediate scrutiny may be justified. In the context we are discussing here, the argument is that corporate decision-makers in our hyper-politicized times are highly motivated to ensure their actions align with their political ideology in all areas of life, including work, and that if review of those decisions is left to the business judgment rule it will be extremely easy to come up with after-the-fact rational business explanations for the otherwise tainted decisions, particularly in light of the rise of stakeholder and ESG[112] concerns on the part of various influential market participants.[113]

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107. *See, e.g.*, *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598–99 (Del. Ch. 2010) ("[T]he court seeks to . . . smoke out mere pretextual justifications for improperly motivated decisions."). *See also* Leahy, *supra* note 1, at 1155-57 (citing other examples).

108. Leahy, *supra* note 1, at 1171 (discussing "new perspective on charitable donations [that] does a better job of capturing the core problem of pretext that arises with such donations").

109. Wolfe, *supra* note 18, at 1469, 1472 (defining "'CEO activism' [as] the phenomenon where Chief Executive Officers ('CEOs') and other C-Suite members use their executive platforms to speak out on political, social, and environmental topics not directly related to their businesses," and arguing that "intermediate scrutiny presents a desirable level of review for CEO activism because it allows courts to smoke out mere pretextual justifications").

110. Leahy, *supra* note 1, at 1204 (arguing that "pretext comes into play" in the context of political contributions because the "easier it is for management to make up a plausible lie about its motives for causing the corporation to make a political contribution, the less likely it is that management will be caught").

111. *See id.* at 1203 ("even an immoral director who *desperately* wants or needs money will be *less* likely to steal when the chances of being caught are too high—and even a director who has little want or need for the money will be *more* likely to steal when the chances of being caught are incredibly low").

112. ESG stands for environmental, social, and governance.

113. Detailed discussion of the interplay of political bias, the use of ESG factors in corporate decision-making, and growing calls for stakeholder governance, are beyond the scope of this Essay. Both ESG and stakeholderism can be employed to improve shareholder wealth maximization. On the other hand, they can also serve as a means to undermine shareholder wealth maximization. Suspicions about the political bias driving both the ESG and stakeholder movement abound. *Cf.* Benjamin Zycher, *Other People's Money: ESG Investing and the Conflicts of the Consultant Class*, AM. ENTER. INST. (Dec. 17, 2018), https://www.aei.org/articles/other-peoples-money-esg-investing-and-the-conflicts-of-the-consultant-class/ [https://perma.cc/8PYZ-VCPJ] ("ESG investment choices substitute an amorphous range of political goals in place of maximizing the funds' economic value . . . .").

It may also be worth noting a possible connection between the concepts of pretext and arbitrariness. While pretext constitutes part of the justification for applying enhanced scrutiny before the business judgment rule attaches, proof of arbitrariness rebuts the presumption. Thus, in *Dodge v. Ford*, the court refused to allow corporate decision-makers to hide behind the business judgment rule because the refusal to declare and pay further dividends in that case appeared "to be not an exercise of discretion on the part of the directors, but an arbitrary refusal to do what the circumstances required to be done."[114] This led the court to require the directors "to justify their action, or failure or refusal to act."[115] Similarly, advancing a favored political agenda may be viewed as arbitrary vis-à-vis profit maximization. Thus, for example, we might fairly characterize as arbitrary Snapchat's decision to stop promoting President Trump's verified account "after executives concluded that his tweets . . . promoted violence" and because "[w]e will not amplify voices who incite racial violence," if the announced standard is not similarly applied to other accounts.[116] While we may not want to go so far as rebutting the business judgment rule in such cases, due to the difficult line-drawing around vague concepts such as "promoting violence" and "inciting racial violence," arbitrariness may nonetheless provide additional justification for enhanced scrutiny.[117]

In light of all the foregoing, the proposal put forth in this Essay is relatively straightforward.[118] Just as the omnipresent specter of managerial self-dealing warrants enhanced scrutiny of managerial decision-making in the context of resisting a takeover because common sense tells us the self-interest of those managers tilts strongly in favor of preserving their jobs, so too should the omnipresent specter of managerial self-dealing warrant enhanced scrutiny of managerial decision-making in the context of highly-politicized decision-making because common sense tells us the self-interest of those managers tilts strongly in favor of preserving their status (in their own eyes or the eyes of

114. Dodge v. Ford Motor Co., 170 N.W. 668, 683 (Mich. 1919).

115. *Id.*

116. *See* Casey Newton, *Snap Will Stop Promoting Trump's Account After Concluding His Tweets Incited Violence*, VERGE (June 3, 2020, 12:30 PM), https://www.theverge.com/2020/6/3/21279280/snapchat-snap-remove-trump-account-discover-promotion-incite-violence-twitter [https://perma.cc/788C-BWXA].

117. *Cf.* STEPHEN M. BAINBRIDGE, CORPORATE LAW115 (2d ed. 2009) ("[I]nquiry into the rationality of a decision is a proxy for an inquiry into whether the decision was tainted by self-interest.").

118. Note that my proposal does not require any change to the law governing charitable and political contributions, so long as they are expressly designated as such.

relevant others) as being "on the right side of history."[119] Of course, reasonable minds can differ over the risks and costs imposed by the asserted creep of political divisiveness and bias into the corporate boardroom, corner office, and other areas of corporate decision-making.[120] While I believe I provide a number of concerning examples (and the media appears to provide more on a regular basis),[121] making the full-throated empirical case for a need for enhanced scrutiny in cases raising what I am calling the omnipresent specter of political bias in corporate decision-making is ultimately beyond the scope of this

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119. *Cf.* Joseph Pearce, *Who's on the Right Side of History?*, IMAGINATIVE CONSERVATIVE (June 8, 2018), https://theimaginativeconservative.org/2018/06/whos-right-side-history-joseph-pearce.html [https://perma.cc/SSL4-SHFE] ("It has become a commonplace in modern political polemic to talk about being on the right side of history. It is a phrase commonly employed by those who consider themselves 'enlightened' or 'progressive' and is used to condemn political opponents for being on the wrong side of history, or as being historically incorrect."); Leo Gertner & Moshe Marvit, *Where's the Best Place to Resist Trump? At Work.*, WASH. POST (Jan. 31, 2017, 8:00 AM), http://wapo.st/2jCjhVX?tid=ss_tw&utm_term=.ba701e852aba [https://perma.cc/8AB5-49V8] ("[P]eople should not ignore one of the most powerful means of resistance and protest that they have: their roles as workers.").

120. *But cf.* Peter J. Wallison, *The Attorney General and "The Resistance"*, L. & LIBERTY (Dec. 20, 2019), https://www.lawliberty.org/2019/12/20/the-attorney-general-and-the-resistance/ [https://perma.cc/K8K9-Z7ZB] ("[T]he 'Resistance' that has developed during the Trump presidency is something new, said Barr, pointing out that the term itself 'connotes that the government is not legitimate.' There has been bitter opposition to presidents in the past, but perhaps nothing like this since the Civil War era.").

121. After writing this parenthetical on Feb. 22, 2020, I conducted a Google news search for "corporate political bias," which returned three items identified as having been posted in the past day. *See* Scott Shepard, *SEC Decision Raise Specter of Bias, McCarthyism*, NAT'L CTR. FOR PUB. POL'Y RSCH. (Feb. 21, 2020, 4:51 PM), https://nationalcenter.org/ncppr/2020/02/21/sec-decisions-raise-specter-of-bias-mccarthyism/ [https://perma.cc/VJ92-NAWC] ("Discrimination on the basis of political viewpoint is so well-established a problem in American life that it has a name—McCarthyism—and has until recently been almost universally abjured. Now, though, the reality and perception of viewpoint discrimination is reappearing in Apple's industry and at Apple specifically."); Ben Domenech, *Twitter Just Made Ideological Defamation Its Official Corporate Policy*, FEDERALIST (Feb. 21, 2020), https://thefederalist.com/2020/02/21/twitter-just-made-ideological-defamation-its-official-corporate-policy/ [https://perma.cc/5PMW-V89Z] ("Twitter and Jack Dorsey have given us plenty of evidence that they cannot be trusted on bias, shadowbanning, or the company's ideological censorship of political content."); Craig Timberg, *How Conservatives Learned to Wield Power Inside Facebook*, WASH. POST (Feb. 20, 2020, 12:20 PM), https://www.washingtonpost.com/technology/2020/02/20/facebook-republican-shift/ [https://perma.cc/M5P7-83GG] ("Republicans also have leveraged Facebook's fears of alienating conservative Americans to win concessions from a company whose most widely shared news content typically includes stories from Fox News and other right-leaning sources.").

Essay.[122] Rather, the ultimate purpose here is to flag the potential problem and propose a solution for such time as it is deemed needed by those in positions to implement it or some version thereof.

The first step is to identify situations that raise the specter of political bias in managerial decision-making.[123] This is a fact question similar to the question of whether the business judgment rule, or *Unocal*, or *Revlon* apply in the takeover context.[124] Cases necessitating difficult line-drawing are likely inevitable,[125] but objective measures are available,[126] such as news reports describing the business decision as political[127] or calls for boycotts that rise to

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122. *Cf.* David Larcker, Stephen Miles, Brian Tayan & Kim Wright-Violich, *The Double-Edged Sword of CEO Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 27, 2018), https://corpgov.law.harvard.edu/2018/11/27/the-double-edged-sword-of-ceo-activism/ [https://perma.cc/5UNW-S6A8] ("Survey data shows that the cost of CEO activism might be higher than many CEOs, companies, or boards realize.").

123. *Cf.* Leahy, *supra* note 1, at 1183 ("empirical evidence supports the view that corporations that engage in political activity do so for the benefit of management").

124. *Cf. id.* at 1147 ("Although the board's burden under *Unocal* is not terribly onerous . . . the burden of establishing reasonableness is nonetheless squarely on the board, not the plaintiff; the plaintiff's prima facie case for liability is merely a 'showing that the board's action was defensive in nature.'" (quoting Ethan G. Stone, *Business Strategists and Election Commissioners: How the Meaning of Loyalty Varies with the Board's Distinct Fiduciary Roles*, 31 J. CORP. L. 893, 904-05 (2006))).

125. *Cf.* Stefan J. Padfield, *More on Corporate Responses to the Protests and Riots*, BUS. L. PROF. BLOG (June 14, 2020), https://lawprofessors.typepad.com/business_law/2020/06/more-on-corporate-responses-to-the-protests-and-riots.html [https://perma.cc/ED69-XB66] (including comments setting forth examples of business decisions raising difficult line-drawing questions).

126. *Cf.* Leahy, *supra* note 1, at 1212–13 ("to the extent that the shareholder has evidence concerning management's actual political views, in the public record or otherwise, a shareholder might be able to contest management's assertion that it holds, in good faith, the policy outcome it purportedly desired to advance").

127. *Cf.* Kate Conger, *Cloudflare CEO on Terminating Service to Neo-Nazi Site: 'The Daily Stormer Are Assholes'*, GIZMODO (Aug. 16, 2017, 6:00 PM), https://gizmodo.com/cloudflare-ceo-on-terminating-service-to-neo-nazi-site-1797915295 [https://perma.cc/8UH5-THMS] ("Let me be clear: this was an arbitrary decision. . . . I woke up this morning in a bad mood and decided to kick them off the Internet. . . . It was a decision I could make because I'm the CEO . . . ."); Ann Lipton, *Company Town*, BUS. L. PROF. BLOG (Aug. 10, 2019), https://lawprofessors.typepad.com/business_law/2019/08/company-town.html [https://perma.cc/8XYL-L3NC] ("When companies take on public responsibilities, the public demands that they act with the transparency and concern for public values that we ordinarily expect of governments. Or, to put it another way, [Cloudflare CEO] Matthew Prince is right: His company does *not* have legitimacy to make these decisions . . . ."). I leave for another day the issue of whether and to what extent the publicness or quasi-governmental status of at least some corporations provides additional justification for expanding the scope of enhanced scrutiny as proposed herein. *Cf.* Elizabeth

the level of capturing national attention.[128] Business decisions that expressly target a particular politician or political party may also work as a good trigger.[129] On the other hand, given the need for managerial discretion, as embodied in the business judgment rule, an evidentiary standard such as "clear-and-convincing" may be preferable to a preponderance standard.

Once a case has been identified as raising the specter of a politically biased business decision, the burden should be shifted to the decision-makers to show that they, in fact, had calculated the ROI, and that those calculations favored the decision.[130] Alternatively, the defendants could show that calculating the ROI was not practical under the circumstances, in which case the burden would be on the defendants to show they had identified a rational or reasonable[131] business purpose for the decision before embarking on the path they chose.[132]

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Pollman, *Quasi Governments and Inchoate Law: Berle's Vision of Limits on Corporate Power*, 42 SEATTLE U. L. REV. 617, 619 (2019) (arguing that Adolf Berle's conception of corporations as quasi governments "offers a potential logic, albeit a problematic one, for subjecting corporations to additional limits").

128. *Cf.* Áine Cain & Richard Feloni, *The CEO of Dick's Weighs in on Why 'Buycotts' Didn't Help out the Sporting Goods Retailer When It Was Getting Slammed by the NRA*, BUS. INSIDER (Nov. 5, 2019), https://www.businessinsider.com/dicks-ceo-gun-control-boycotts-buycotts-2019-11 [https://perma.cc/2382-LKMU] (noting that Dick's CEO admitted that boycotts following his decision to stop selling certain guns "ended up affecting the company's bottom line, to the tune of a quarter of a million dollars").

129. *Cf.* Henry Olsen, *Twitter's Double Standard Has Become Painfully Clear*, WASH. POST (May 29, 2020, 3:06 PM), https://www.washingtonpost.com/opinions/2020/05/29/twitters-double-standard-has-become-painfully-clear/ [https://perma.cc/TCX8-9Y43] ("Twitter's decision to block direct access to a presidential tweet discussing his policy toward the Minneapolis riots is unconscionable, unwise and justifies every conservative's fears about content-driven censorship of their online views.").

130. *Cf.* Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. L. 247, 272–73 (1989) ("Under an effective proportionality test . . . the difficulty of constructing a plausible but inaccurate account of future value would be increased by the reluctance of secondary participants in a target's decisionmaking to acquiesce in such an effort.").

131. The timing here is important. We aren't asking whether we can come up with a rational business purpose after-the-fact. Rather, we are asking whether the decision-makers had expressly identified at least a rational business purpose before making their decision. Nonetheless, a reasonableness standard may work better here. *Cf.* Bainbridge, *supra* note 102, at 858 ("[T]he enhanced scrutiny test is basically a reasonableness inquiry to be applied on a case-by-case basis . . . .").

132. *Cf.* Daniel Roberts, *Companies Like Nike and Dick's Are 'Finding Their Woke Values'*, YAHOO FIN. (July 10, 2019), https://finance.yahoo.com/news/companies-like-nike-and-dicks-are-finding-their-woke-values-193302624.html [https://perma.cc/EE7H-BADY] ("Dick's management said the move was a business decision prompted by the category underperforming, but it has also

Importantly, neither of these burdens are remotely insurmountable in most cases.[133] In fact, assuming the decision-makers bothered to consider the shareholder-wealth impact of their decision at all, they should be able to make the necessary showing to avoid liability relatively easily.[134] But that is precisely the point—to re-focus decision-makers on the shareholder-wealth impact of their decision-making.[135]

Take for example Nike's decision to make Colin Kaepernick the face of the 30th anniversary celebration of its iconic "Just Do It" ad campaign. The decision was interpreted by many as Nike making a political statement and taking a side in our culture wars.[136] How might a shareholder challenge of that decision be resolved under the proposal set forth in this Essay?

To begin with, the case might simply be dismissed because, while Nike's stock price initially dropped in response to the decision, it more than rebounded shortly thereafter, and it seems fair to say that most objective observers would conclude that Nike suffered no harm in terms of stock price.[137] But even

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largely been seen as a political move in an era of heightened debate over gun safety following multiple school shootings.").

133. To the extent the issue boils down to whether the corporate decision-makers informed themselves of all material information reasonably available, courts could use the materiality threshold as another way to limit frivolous claims. *Cf.* Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 144 (2010) (noting that "courts routinely categorize managerial misstatements as immaterial to dismiss frivolous suits" but arguing that this practice is inefficient in the context of securities regulation).

134. *But cf.* Leahy, *supra* note 1, at 1221 ("[T]he first prong of the intermediate scrutiny . . . requires good faith, and there is strong reason to believe that News Corp.'s official statement about why the contribution was made was not true—i.e., made in bad faith. This is because News Corp.'s outspoken CEO, Rupert Murdoch, provided his own, personal explanation for the RGA contribution in a candid moment with the press . . . .").

135. *Cf.* Gilson & Kraakman, *supra* note 130, at 273 ("[F]orcing management to articulate the concrete link between its plan and shareholder interests can, by its own force, shift management's institutional incentives enough to provide an effective screen against ill-conceived or self-interested defensive tactics.").

136. *See, e.g.*, Clay Travis, *Why I'm Boycotting Nike: Get Woke and Go Broke*, USA TODAY (Sept. 4, 2018, 12:24 PM), https://www.usatoday.com/story/opinion/voices/2018/09/04/colin-kaepernick-ad-boycotting-nike-column/1189989002/ [https://perma.cc/67EH-BGAM] ("Nike, the same company dealing with a discrimination lawsuit, is now the latest company to get woke."); *see generally* Sofia Petkar, *KNEELING ROW What Is the Colin Kaepernick Nike Boycott and What Is the 'Just Do It' Anniversary Advert?*, U.S. SUN (Apr. 25 2020, 12:30 PM), https://www.the-sun.com/news/736787/nike-colin-kaepernick-share-price-knee-national-anthem-nfl-boycott/ [https://perma.cc/53XS-7HNR] ("Social media was flooded with images of people burning their clothing and trainers, alongside the rise of the #BoycottNike Twitter tag.").

137. *Cf.* Larcker, Miles, Tayan & Wright-Violich, *supra* note 122.

assuming, as I do, that positive stock price movement in response to a challenged decision provides a complete defense against political-bias enhanced scrutiny,[138] it should still be worthwhile to examine how the Nike case would be analyzed under the proposed framework had the stock price not recovered (or if a judge deemed the fluctuating stock price too inconclusive to serve as a complete defense).

To the extent, as mentioned above, political-bias enhanced scrutiny is triggered by facts that raise the specter of political bias in managerial decision-making, as evidenced by items such as news reports describing the business decision as political or calls for boycotts that rise to the level of capturing national attention, a plaintiff would have a significant amount of evidence supporting the claim that the Nike case should trigger the relevant enhanced scrutiny, again assuming the stock price movement supports the conclusion that the decision harmed the company.[139] At that point, management shouldn't have

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> The bifurcated impact of CEO activism is exemplified by a recent Nike advertising campaign that includes former NFL quarterback and national-anthem protest leader Colin Kaepernick with the statement: "Believe in something, even if it means sacrificing everything." The weekend following the campaign, the company reportedly experienced a temporary spike in online sales. At the same time, market-research firm Morning Consult found that Nike brand's favorability and purchase-consideration ratings fell sharply across all demographic groups, even when segmented by age, race, and political affiliation. Underscoring the market's uncertain view of CEO activism, Nike stock price fell 3 percent on the news of the ad campaign and subsequently recovered.

*Id.*

138. To the extent this constitutes a modification of *Unocal's* enhanced scrutiny, I consider it appropriate. *Cf.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015) ("*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind . . . ."); Taylor B. Bartholomew, Matthew M. Greenberg & Joanna J. Cline, *Fiduciary Duty of Disclosure Does Not Apply to Individual Transactions with Equityholders*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 7, 2020), https://corpgov.law.harvard.edu/2020/07/07/fiduciary-duty-of-disclosure-does-not-apply-to-individual-transactions-with-equityholders/ [https://perma.cc/VE2D-28E5] ("[A] director must deal honestly with stockholders and refrain from knowingly disclosing false information under the director's fiduciary duties of care and loyalty. To state a claim for breach of fiduciary duty in this context, a plaintiff must establish reliance, causation and damages.").

139. *See, e.g.*, Susan Heavey, *Trump Targets Nike as Kaepernick Ads Spark Boycott Calls*, REUTERS (Sept. 5, 2018, 8:55 AM), https://www.reuters.com/article/us-nike-kaepernick/trump-targets-nike-as-kaepernick-ads-spark-boycott-calls-idUSKCN1LL1WS [https://perma.cc/K64N-EJBH] ("U.S. President Donald Trump on Wednesday criticized Nike Inc for its new advertising campaign featuring Colin Kaepernick, the NFL quarterback who sparked controversy by kneeling in protest during the national anthem.").

much trouble meeting the enhanced scrutiny, assuming they have actually satisfied their duties to become informed of all material information reasonably available and didn't choose a shareholder value destroying path.[140] In other words, all that would be required under my proposal as set forth herein is to show that a defensible ROI calculation was done and that the decision was found to constitute a value-enhancing proposition. (In furtherance of appropriate deference, one might even adopt a rule that required only a showing of expected positive return, as opposed to maximizing return in light of opportunity costs.)[141] Furthermore, if a reasonable argument could be made that an ROI calculation was impractical, then a showing that the relevant decision-makers formulated a rational or reasonable business purpose for the decision, at the time the decision was made, should also be sufficient. One could argue that only if there was a "utter failure" to either calculate ROI or verbalize a reasonable or rational business purpose at the time should the burden rise to entire fairness.[142]

140. Nike is incorporated in Oregon, which may change the fiduciary duty analysis. *See* Nike, Inc., Quarterly Report (Form 10-Q) (2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0000320187/5c52333c-cbe4-4609-9474-354551739163.pdf [https://perma.cc/3VFX-N7WC].

141. In *Unocal*, the court noted that when it came to satisfying the burden of enhanced scrutiny, "proof is materially enhanced . . . by the approval of a board comprised of a majority of outside independent directors." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985). Likewise, one could also envision the presence of a viewpoint diverse board or committee materially enhancing the board's position. *Cf. Walgreens Confronted About Funding Organizations Lobbying for Sanctuary Cities*, NAT'L CTR. FOR PUB. POL'Y RSCH. (Jan. 30, 2020, 2:08 PM), https://nationalcenter.org/ncppr/2020/01/30/walgreens-confronted-about-funding-organizations-lobbying-for-sanctuary-cities/ [https://perma.cc/62A5-8URW] ("Free enterprise project . . . commends drugstore giant for agreeing to include viewport diversity in its board member selection.").

142. An "utter failure" standard obviously differs from a reasonableness or rationality standard. I leave to courts the ultimate determination of which standard best balances accountability and discretion. *Cf.* Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006) (("For the plaintiffs' derivative complaint to withstand a motion to dismiss, 'only a sustained or systematic failure of the board to exercise oversight—such as an *utter failure* to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.'") (emphasis added) (quoting *In re* Caremark Int'l Inc., 698 A.2d 959, 971 (Del. Ch. 1996))). *Caremark* is Delaware's seminal oversight case. The *Caremark* implications of the proposal set forth herein are beyond the scope of this Essay. *Cf.* Larcker, Miles, Tayan & Wright-Violich, *supra* note 122 ("How well do boards understand the advocacy positions of their CEOs? Are they involved in decisions to take public stances on controversial issues . . . ? Should boards be more engaged in these decisions . . . ?").

## VI. Some Additional Thoughts on Self-Interest

Recall that in *Unocal*, the Delaware Supreme Court justified the application of enhanced/intermediate scrutiny as follows: "Because of the omnipresent specter that a board may be acting *primarily in its own interests*, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."[143] Thus, the more forms of self-interest that Delaware corporate law recognizes as potentially problematic, the less radical the proposal set forth herein becomes.[144] Obviously, the context of the independent-versus-interested inquiry matters, but that does not mean we can't draw analysis from different settings.[145]

Travis Laster, Vice Chancellor of the Delaware Court of Chancery, had the following to say about self-interest in a 2014 law review article:

> "It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation." Bad faith can be the result of "any . . . emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . . shame or pride."[146]

Specifically, social ties and friendship have been found to undermine independence in at least some cases.[147] Would anyone seriously argue that in

143. *Unocal,* 493 A.2d at 954 (emphasis added).

144. *Cf.* Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 825 (1981) ("[M]anagement can reject offers beneficial to shareholders to retain the emoluments, both pecuniary and nonpecuniary, that flow from a position of high authority in a public corporation.").

145. *Cf.* London v. Tyrrell, No. 3321-CC, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010) ("The independence inquiry under the *Zapata* [special litigation committee] standard has often been informed by case law addressing independence in the pre-suit demand context and vice-versa. This is a useful exercise but not one without limits." (referencing Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981))).

146. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1455 (2014) (first quoting *In re* Walt Disney Co., 907 A.2d 693, 754 (Del. Ch. 2005); then quoting RJR Nabisco, Inc., No. 10389, 1989 WL 7036, at *1159 (Del. Ch. Jan. 31, 1989)).

147. *See In re* Oracle Corp., 824 A.2d 917, 920, 938 (Del. Ch. 2003) (noting that the "question of independence 'turns on whether a director is, *for any substantial reason*, incapable of making a

today's polarized times political ideology does not, in at least some circumstances, exert a greater influence on us than social ties or friendship?[148]

## VII. CRITICISMS

Two related criticisms of the approach I suggest herein are that the statements deemed worthy of triggering enhanced scrutiny constitute either (1) mere inactionable puffery or (2) a type of protected marketing or salesmanship.[149] These criticisms assume the asserted social justification is being consciously employed for woke-washing purposes.[150] In other words, these criticisms are rooted in denial of a relevant political bias problem.[151]

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decision with only the best interests of the corporation in mind,'" and including "friendship" in list of motives that "influence human behavior.") (citation omitted); Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. 2004) ("A variety of motivations, including friendship, may influence the demand futility inquiry. But, to render a director unable to consider demand, a relationship must be of a bias-producing nature."). *Cf.* Del. City Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1022 (Del. 2015) ("Close friendships of [50 years] are likely considered precious by many people, and are rare. People drift apart for many reasons, and when a close relationship endures for that long, a pleading stage inference arises that it is important to the parties.").

148. *Cf.* Aimee Blanchette, *Families Divided in the Trump Era: 'I Didn't Talk to My Parents for Weeks'*, STAR TRIB. (Mar. 12, 2017, 9:38 AM), https://www.startribune.com/families-divided-in-the-trump-era-i-didn-t-talk-to-my-parents-for-weeks/415957734/ [https://perma.cc/U94R-S8Z8] ("The election has been over for months, but the rancor it spawned among families, friends and couples is not fading. Therapists say they're seeing an unusually high number of clients seeking professional help in dealing with political polarization in their relationships.").

149. The criticism related to line-drawing and inefficient uncertainty regarding what decisions are sufficiently politicized to warrant enhanced scrutiny under the proposal set forth herein was addressed in prior sections. Furthermore, limiting discussion to the criticisms set forth here is not to suggest these are the only possible criticisms. *Cf.* Leahy, *supra* note 1, at 1223 ("The same objections that scholars level against derivative litigation generally could be (and have been, briefly) martialed against applying intermediate scrutiny in a new context . . . .").

150. *See* Erin Dowell & Marlette Jackson, *"Woke-Washing" Your Company Won't Cut It*, HARV. BUS. REV. (July 27, 2020), https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it [https://perma.cc/V6TG-FNEJ] ("While many companies are speaking out because they know the costs of silence are high, they're discovering that the costs of 'woke washing'—appropriating the language of social activism into marketing materials, for instance—can be high, too."). *Cf.* Michael Vargas, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using This Innovative Corporate Form*, 2016 BUS. L. TODAY 1, 1 (2016) ("[M]any large corporations have adopted the language of social impact to disguise and distract the public from very unethical behaviors (a.k.a. 'greenwashing') . . . .").

151. A related issue involves the extent to which political ideologies of investors impact share price, but discussion of which is beyond the scope of this Essay. *Cf.* Michael T. Durney, Joseph A. Johnson, Roshan K. Sinha & Donald Young, *How Investors Respond to CEO (In)Activism*, CLS BLUE SKY BLOG (July 10, 2020), https://clsbluesky.law.columbia.edu/2020/07/10/how-investors-respond-

On the one hand, it is certainly not the case that we assume corporate managers are bias-free and solely focused on rational value-enhancement at all times. This should be clear from the foregoing section. In addition, if that were the case, we would not intervene in corporate governance to ensure racial and gender equity.[152] And, the perception that political bias is infecting corporate decision-making is clearly on the rise.[153] Furthermore, the Delaware Supreme Court has held that "when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty."[154] On the other hand, there are likely good arguments for allowing room for puffery and marketing spin in the name of efficiency[155] and the puffery doctrine, in particular, has been accepted for some time.[156]

Another possible criticism is that expanding the scope of enhanced scrutiny, as proposed, undercuts the market's ability to resolve related issues via private ordering. For example, shareholder proposals calling for viewpoint diversity

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to-ceo-inactivism/ [https://perma.cc/HK5Q-LTVY] ("When the CEO supports or opposes an issue, we find that investors respond more positively if their view aligns with the CEO's than if their view does not.").

152. *Cf.* Steven Davidoff Solomon, A*s California Goes, So Goes the Nation? The Impact of Board Gender Quotas on Firm Performance and the Director Labor Market*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 8, 2019), https://corpgov.law.harvard.edu/2019/03/08/as-california-goes-so-goes-the-nation-the-impact-of-board-gender-quotas-on-firm-performance-and-the-director-labor-market/ [https://perma.cc/4D6V-L8HZ] ("California's . . . SB 826 mandates that a minimum number of female directors serve on public companies headquartered in California.").

153. *Cf.* Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements,* 9 HARV. BUS. L. REV. 441, 441 (2019) ("In the past, corporations were largely silent in the face of [social issues]. Now the opposite is true . . . .").

154. Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998). *Cf.* Leahy, *supra* note 1, at 1221 ("Lying about the purpose for its actions is a classic example of [corporate] bad faith."); *In re* Walt Disney Co., 907 A.2d 693, 745 n.400 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) ("In certain circumstances . . . specific applications of the duties of care and loyalty are called for, such as . . . the duty of candor . . . .").

155. *Cf.* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1434 (2006) ("[E]vidence confirms that puffing speech benefits consumers and that the benefits ought to be included in any analysis of efficient puffery doctrine."). *But cf.* Stefan J. Padfield, *Is Puffery Material to Investors? Maybe We Should Ask Them,* 10 U. PA. J. B. & EMP. L. 339, 357 (2008) ("[I]ncreasing application of the puffery defense may well impede the efficient flow of capital.").

156. *Cf.* Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts,* 94 TRADEMARK REP. 585, 617 (2004) ("By the 19th Century, the term 'puffery' (sometimes called 'sales talk' or 'dealer's talk') had transmogrified into . . . a legal defense for vindicating salespeople accused of common law fraud and deceit.") (citation omitted).

on corporate boards have been appearing, and at least some corporations have adopted such proposals.[157]

In light of the foregoing, perhaps the best response to these criticisms consists of finding some type of middle ground. If everything else points to adoption of the enhanced scrutiny proposed herein, then arguments rooted in puffery and marketing spin should not be sufficient to completely turn the tide.[158] At the same time, making room for puffery and marketing spin in the analysis undertaken as part of the enhanced scrutiny seems reasonable. To some extent, this is already baked into the proposal, since demonstrating a shareholder wealth maximization agenda is precisely what the corporate decision-makers are called upon to provide. In addition, and as has been alluded to previously, nothing prevents courts from structuring the enhanced scrutiny in a way that strikes the right balance vis-à-vis these discretion/authority concerns,[159] such as by perhaps providing some type of safe harbor or burden shifting when a viewpoint-diverse board or committee is involved.

Relatedly, while it certainly seems fair to argue that lack of market discipline may provide independent support for applying enhanced scrutiny under *Unocal*,[160] the presence of market discipline should not preclude

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157. *Cf. Eli Lilly Rejects Call to Increase Viewpoint Diversity on its Board of Directors*, THE NAT'L CTR. FOR PUB. POL'Y RSCH., (May 4, 2020), https://nationalcenter.org/ncppr/2020/05/04/eli-lilly-rejects-call-to-increase-viewpoint-diversity-on-its-board-of-directors/ [https://perma.cc/CQF8-TW26] ("At today's annual meeting of Eli Lilly shareholders, the company's board stood opposed to a Free Enterprise Project (FEP) shareholder proposal that sought to expand the viewpoint diversity of the pharmaceutical giant's leadership.").

158. *Cf.* Padfield, *supra* note 155, at 357 (noting that "realities of securities transactions—such as the . . . presence of fiduciary duty . . . conflict with fundamental assumptions underlying the puffery doctrine." (citing Jennifer O'Hare, *The Resurrection of the Dodo: The Unfortunate Re-emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 OHIO ST. L.J. 1697, 1700 (1998) (stating that "because reasonable investors are entitled to trust a company's vague statements of corporate optimism, the puffery defense is inappropriate in private securities fraud actions."))); B. Fennekohl & Co., Exchange Act Release No. 6898, 1962 WL 68448 (Sept. 18, 1962) ("The concept of 'puffing' is derived from the doctrine of *caveat emptor* and arises primarily in the sale of tangibles where it appears that examination by the purchaser may offset exaggerated statements and expressions of opinion by the salesman. It can have little application to the merchandising of securities.").

159. *Cf.* Brett H. McDonnell, *Professor Bainbridge and the Arrowian Moment: A Review of the New Corporate Governance in Theory and Practice*, 34 DEL. J. CORP. L. 139, 139 (2009) ("Bainbridge posits that achieving an optimal trade-off between authority and accountability is the central problem of corporate law.").

160. *Cf.* Leahy, *supra* note 1, at 1129 (arguing for enhanced scrutiny of corporate political contributions because, among other things, like charitable donations, "political contributions typically

enhanced scrutiny.[161] This seems difficult to deny in light of the fact that *Unocal* was decided in the context of the market for corporate control.[162] Furthermore, "large corporations do not report the financial effects of individual business decisions or even individual lines of business," allowing for self-dealing to be written off as financial noise.[163] Finally, as critical portions of the capital markets increase their focus on social concerns, their ability or willingness to serve a disciplining role when it comes to profit-maximization arguably diminishes.[164]

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do not have a direct impact on a corporation's profitability [and] . . . [a]s a result, just as with charitable donations, it is difficult for the market to evaluate political contributions"); *id.* at 1165 n.263 ("[W]hile it is possible for managers to make ordinary business decisions primarily for their own psychological benefit, the fact that such decisions impact the corporation only in circumscribed ways means that the decisions are relatively easy for the stock market to evaluate. For example, if an automobile manufacturer develops a line of fuel-efficient cars simply because management has an irrational emotional attachment to environmental causes—and if the cars do not sell as well as gas-guzzling SUVs—the stock market can evaluate the decision to manufacture the green car and punish management accordingly.").

161. *Cf. id.* at 1206 (noting that market discipline argument "ignores the possibility of rent-seeking: If management could cause the corporation to support politicians who propose to enact laws to make hostile takeovers more difficult or that make defending against such takeovers easier").

162. *But cf. id.* at 1135 (noting "a critical, but oft-ignored, rationale for the *Unocal* standard of review: the ease with which directors can lie about (1) their reasons for implementing defensive measures; and (2) the benefits of such measures to the corporation").

163. *Id.* at 1167. *Cf. id.* at 1207 ("[T]akeover markets act with regard to the whole, not aggregate, not based on one type of soft benefit or the other . . . . a corporation that pays its CEO at the market rate and provides her with the market rate of perquisites will have more leeway to engage in 'pet' political contributions."). *But see id.* at 1167 n.273 ("stock market analysts or industry analysts may be able to determine how individual decisions affect a corporation's profitability by asking questions about the profitability of a particular line of business").

164. *See* Maggie Fitzgerald, *The CEOs of Nearly 200 Companies Just Said Shareholder Value Is No Longer Their Main Objective*, CNBC (Aug. 19, 2019, 2:07 PM), https://www.cnbc.com/2019/08/19/the-ceos-of-nearly-two-hundred-companies-say-shareholder-value-is-no-longer-their-main-objective.html [https://perma.cc/5VM6-UUQY] ("The Business Roundtable, a group of chief executive officers of nearly 200 major U.S. corporations, issues a statement with a new definition of the 'purpose of a corporation.' The reimagined idea of a corporation drops the age-old notion that they function first and foremost to serve their shareholders and maximize profits."). *Cf.* Jill E. Fisch, *Questioning Philanthropy from a Corporate Governance Perspective*, 41 N.Y. L. SCH. L. REV. 1091, 1098 (1997) ("The market operates as a poor monitor for management decisions that are not tied to profit maximization . . . and traditional deference to management creates the possibility of self-dealing."); Aneesh Raghunandan & Shiva Rajgopal, Do the Socially Responsible Walk the Talk? 4-5 (May 24, 2020) (unpublished manuscript), https://ssrn.com/abstract=3609056 [https://perma.cc/K3SW-2HWF] ("Our evidence questions whether the stocks added and deleted by socially responsible mutual funds (hereafter ESG funds) actually reflect the social values they espouse to target.").

## VIII. CONCLUSION

We live in polarized times. Accordingly, ensuring our capital markets aren't infected by over-zealous partisans becomes a high priority. To further this end, this Essay proposes applying intermediate scrutiny to business decisions raising the specter of political bias. Whether the costs of additional judicial scrutiny are outweighed by its benefits in this context is admittedly difficult to predict, though I have attempted to provide multiple means of striking the right balance throughout this Essay. Hopefully, the discussion herein will spur relevant and productive experimentation and analysis.