# CORPORATE LAW AND THE BUSINESS ROUNDTABLE: ADDING TO THE DEBATE ON SHAREHOLDER PRIMACY VS. STAKEHOLDER THEORY

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## I. INTRODUCTION

Business Roundtable is an organization of chief executive officers of America's leading companies that is aimed at promoting a thriving United States economy and expanding opportunities for all Americans.[1] On August 19, 2019, Business Roundtable issued a new statement redefining the purpose of a corporation.[2] Roundtable CEOs announced that the purpose of a corporation should no longer be solely to serve shareholders by maximizing shareholder value, but instead the goal should be "to create value for all . . . stakeholders" of the corporation.[3]

Since 1978, Business Roundtable has periodically issued statements including Principles of Corporate Governance, and since 1997, all of these statements regarding corporate governance have validated the idea of Shareholder Primacy—that a corporation exists primarily to serve its

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[1] *About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us [https://perma.cc/S5R4-4GPW].

[2] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/VD5Y-EKET] ("Business Roundtable today announced the release of a new Statement on the Purpose of a Corporation signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities, and shareholders.").

[3] Lawrence H. Summers, *If Business Roundtable CEOs are Serious About Reform, Here's What They Should Do*, WASH. POST (Sept. 2, 2019), https://www.washingtonpost.com/opinions/if-business-roundtable-ceos-are-serious-about-reform-heres-what-they-should-do/2019/09/02/53b05014-cdc0-11e9-8c1c-7c8ee785b855_story.html [https://perma.cc/J2EG-4T92] ("The Business Roundtable recently announced a major policy change declaring that the purpose of a corporation is not just to serve shareholders (its official position since 1997) but 'to create value for all our stakeholders.'").

shareholders.[4] While the August 2019 proposal steering away from Shareholder Primacy could potentially signal meaningful change in the United States economy,[5] it may also indicate significant legal changes in corporate law.

### A. *Background—Shareholder Primacy vs. Stakeholder Theory*

The debate between Shareholder Primacy and Stakeholder Theory is nothing new in the world of corporate governance. Over the history of public corporations, a consistent topic of dispute has been the proper purpose of a corporation.[6] The biggest question of this debate is whether a corporation should exist to serve the shareholders, an idea known as Shareholder Primacy, or if a corporation should consider the needs of all stakeholders in the company.[7]

Shareholder Primacy is a foundational concept in Corporate Governance, and since about the 1970s,[8] it has consistently held the crown in the United States corporate world.[9] The concept revolves around the idea

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[4] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, *supra* note 2 ("Since 1978, Business Roundtable has periodically issued Principles of Corporate Governance. Each version of the document issued since 1997 has endorsed principles of shareholder primacy—that corporations exist principally to serve shareholders.").

[5] Summers, *supra* note 3 ("At a time of considerable disillusionment with U.S. capitalism, this is a significant statement that could signal meaningful change in the operation of the American economy.").

[6] LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 16 (2012) ("Of all the controversies surrounding this new economic creature, the most fundamental and enduring has proven the debate over its proper purpose.").

[7] *Id.* ("Should the publicly held corporation serve only the interests of its atomized and ignorant shareholders, and should directors and executives focus only on maximizing those shareholders' wealth through dividends and higher share prices?").

[8] *Id.* at 18 ("[S]hareholder-primacy thinking began to resurface in the halls of academia. The process began in the 1970s with the rise of the so-called Chicago School of free-market economists.").

[9] *Id.* at 19 ("Thus, shareholder value thinking quickly became central to the so-called Law and Economics School of legal jurisprudence, which has been described as 'the most successful intellectual movement in the law in the last thirty years.'").

that corporations exist to serve shareholders, so the primary goal of directors and executives should be to maximize shareholder value.[10]

On the other side of the debate sits Stakeholder Theory. This is a concept in which corporations are geared towards serving the interests of all their stakeholders, rather than just shareholders.[11] The term "stakeholder" includes "customers, suppliers, employees, shareholders, local communities," or any other individual that has a connection with the corporation.[12] Under Stakeholder Theory, "a company's purpose is to create long-term value, and not to maximize [shareholder] profits . . . at the cost of other stakeholder groups."[13]

### B. *Model Business Corporations Act § 8.30*

Over the history of this debate, professionals in the industry have looked to corporate law to answer this highly disputed question of who the corporation should aim to serve.[14] The Model Business Corporation Act (MBCA), as well as many similar state statutes, offer specific rules for corporations to follow regarding the fiduciary duties that directors and officers owe to the corporation.[15] These statutes have been used in the shareholder vs. stakeholder debate to argue that the law directly tells us the proper purpose of the corporation already.[16]

According to MBCA § 8.30, when directors are acting within the realm of their directorship role, they have a fiduciary duty of loyalty to act "(i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation."[17] At first glance, this rule may seem straight forward, but in practice, it becomes difficult to determine exactly what it means to act "in the best interests of the corporation." Official

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[10] *Id.* at 18 ("This meant that corporate managers' only legitimate job was to maximize the wealth of the shareholders (supposedly the firm's only 'residual claimants') by every means possible short of violating the law.").

[11] Deborah D'Souza, *Stakeholder Capitalism*, INVESTOPEDIA (Jan. 22, 2020) https://www.investopedia.com/stakeholder-capitalism-4774323 [https://perma.cc/MU2J-7YTR] ("Stakeholder capitalism is a system in which corporations are oriented to serve the interests of all their stakeholders.").

[12] *Id.* ("Among the key stakeholders are customers, suppliers, employees, shareholders and local communities.").

[13] *Id.*

[14] *Infra* Part III.

[15] *Infra* Part II.

[16] *Infra* Part III.

[17] MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2016).

Comment 1 to MBCA § 8.30(a) provides a bit more clarification, stating that, "[t]he term 'corporation' is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body."[18] This comment further explains that directors have a wide range of discretion with regard to determining the corporation's "best interests."[19] In other words, although the MBCA comment helps to explain that the term "corporation" is used as a frame of reference to automatically include the shareholder body, the MBCA comment also leaves the door open by adding that directors still have wide discretion when making corporate decisions.[20]

Over the years, this language has made for a hefty debate over what directors legally must do in order to act within the best interests of the corporation. As an already highly debated issue, it seems that the Business Roundtable's recent statement pushing the focus of corporate goals toward Stakeholder Theory only blurs the lines even more in defining a director's legal obligations.[21] If directors must act in the best interests of the corporation, and corporate law history suggests that the corporation is a proxy for the shareholders of the corporation, what does this mean for directors' fiduciary duties if a corporation's purpose now is to serve the interests of all its stakeholders?

## II. CORPORATE LAW STATUTES OF THE STATES

Throughout the United States, many states have adopted their own versions of MBCA § 8.30 and implemented language similar to the best interests of the corporation requirements of MBCA.

### A. *State Statutes Mirroring MBCA § 8.30*

Under Kentucky's Corporate Law, directors must act in good faith, on an informed basis, and in a manner the director honestly believes to be in the best interests of the corporation.[22] An interesting addition to this statute's

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[18] MODEL BUS. CORP. ACT § 8.30(a) cmt. 1 (AM. BAR ASS'N 2016) ("The phrase 'best interests of the corporation' is key to an understanding of a director's duties.").

[19] *Id.* ("In determining the corporation's 'best interests,' the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups of shareholders or other corporate constituencies may differ.").

[20] *Id.*

[21] *See About Us*, *supra* note 1.

[22] KY. REV. STAT. ANN. § 271B.8-300(1) (West 2020) ("A director shall discharge his duties as a director, including his duties as a member of a committee: (a) In good faith; (b)

(*continued*)

language is the "on an informed basis" subsection. The statute expands on the meaning of this phrase by stating that a director satisfies this provision "if he makes, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, inquiry into the business and affairs of the corporation, or into a particular action to be taken or decision to be made."[23] In other words, Kentucky's statute uses this phrase, "on an informed basis," to require that directors make decisions with the care that a reasonable person in a like position would, just like MBCA § 8.30 and other state statutes, such as Ohio, require under their corporate statutes.[24] Still, no comments or further explanations are given by the language of the statute to demonstrate exactly what actions a director must take to act within the best interests of the corporation.[25]

In Pennsylvania, a director is required to perform his or her duties "in good faith, in a manner [the director] reasonably believes to be in the best interests of the corporation."[26] Further, the statute states that a director must perform these tasks "with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances."[27] Within its language, the statute provides more details on how the director can act in good faith, such as the types of documents or statements the director may reasonably rely on.[28] Further, like Kentucky and

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On an informed basis; and (c) In a manner he honestly believes to be in the best interests of the corporation.").

[23] § 271B.8-300(2).

[24] *Id.*; *see also* OHIO REV. CODE ANN. § 1701.59(B) (West 2020) ("[A]nd with the care that an ordinarily prudent person in a like position would use under similar circumstances.").

[25] KY. REV. STAT. ANN. § 271B.8-300(2) (West 2020).

[26] 15 PA. CONS. STAT. § 512(a) (2020) ("A director of a domestic corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.").

[27] *Id.*

[28] *Id.* ("In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following: (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented. (2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert

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other states, Pennsylvania requires the director to perform tasks with care and to complete a reasonable inquiry when necessary, but the statute still fails to provide any clarification into the meaning of the "best interests of the corporation."[29]

In Michigan, the state's corporate law states that directors shall conduct his or her duties in good faith, with the care of a person under similar circumstances, and in the best interests of the corporation.[30] The statute provides examples of information that a director may reasonably rely on in good faith,[31] but there is no mention of specific individuals the directors should consider when making corporate decisions in order to act in the best interests of the corporation, or any further explanation of the meaning.[32] Thus, Michigan's statute does very little to elaborate further on the exact requirements of directors and officers.

According to West Virginia's corporate law, directors must act in good faith, and in a manner believed to be in the best interests of the corporation.[33] Further, when conducting a reasonable inquiry before making a decision, directors are tasked with acting with the care of a reasonable person in a like

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competence of such person. (3) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.").

[29] *Id.* ("[W]ith such care, including reasonable inquiry, skill and diligence . . . .").

[30] MICH. COMP. LAWS § 450.1541a(1) (2020) ("A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner: (a) In good faith. (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances. (c) In a manner he or she reasonably believes to be in the best interests of the corporation.").

[31] *Id.* § 450.154a(2) ("In discharging his or her duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following: (a) One or more directors, officers, or employees of the corporation, or of a business organization under joint control or common control, whom the director or officer reasonably believes to be reliable and competent in the matters presented. (b) Legal counsel, public accountants, engineers, or other persons as to matter the director or officer reasonably believes are within the person's professional or expert competence. (c) A committee of the board of which he or she is not a member if the director or officer reasonably believes the committee merits confidence.").

[32] *Id.*

[33] W. VA. CODE § 31D-8-830(a) (2020) ("Each member of the board of directors, when discharging the duties of a director, shall act: (1) In good faith; and (2) in a manner the director reasonably believes to be in the best interests of the corporation.").

position.[34] Like many other states, West Virginia's statue provides detail into information that directors may reasonably rely on in making corporate decisions, but the language does not provide detail into acceptable considerations for directors to act according to the best interests of the corporation.[35]

### B. *State Statutes That Include Stakeholder Interests*

In Ohio, directors of a corporation are required to perform their duties in good faith, in the best interests of the corporation, and with the care that a person in a like position would use under similar circumstances.[36] Unlike MBCA § 8.30(a), the Ohio statute provides further explanation of what a director can or cannot do to advance the interests of the corporation within the language of this subsection.[37] The statute provides that "in determining what the director reasonably believes to be in the best interests of the corporation, [the director] shall consider the interests of the corporation's shareholders."[38] The statute further offers a list of acceptable considerations, including "(1) [t]he interests of the corporation's employees, suppliers, creditors, and customers; (2) [t]he economy of the state and the nation; [and]

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[34] *Id.* § 31D-8-830(b) ("The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.").

[35] *Id.* § 31D-8-830(e) ("A director is entitled to rely, in accordance with subsection (c) or (d) of this section, on: (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided; (2) Legal counsel, public accountants or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters: (A) Within the particular person's professional or expert competence; or (B) as to which the particular person merits confidence; or (3) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.").

[36] OHIO REV. CODE ANN. § 1701.59(B) (West 2020) ("A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.").

[37] *Id.* § 1701.59(F) ("For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders . . . .").

[38] *Id.*

(3) [c]ommunity and societal considerations."[39] Thus, Ohio's statute seems to have expressly named "shareholders" in its language, much like the comments to MBCA § 8.30(a), but unlike MBCA, the Ohio statute also gives more insight into how a director may act according to these interests by providing a list of acceptable considerations, which includes other stakeholders of the corporation.[40]

Under Illinois law, directors are first tasked with "considering the best long term and short term interests of the corporation" when making corporate decisions, which is slightly different language from the statutes we have examined thus far.[41] In making decisions in the best long- and short-term interests of the corporation, the directors may "consider the effects of any action upon . . . employees, suppliers, and customers of the corporation," as well as its surrounding community, "and all other pertinent factors."[42] As such, the language allows directors to consider the interests of corporate stakeholders in corporate decisions.[43]

Interestingly, Illinois' statute does not state that the director has a duty to act with care or in good faith as we have seen in many other state statutes.[44] Nonetheless, directors are still held to the best interests of the corporation standard when making decisions, and the verbiage of the statute seems to reflect a stakeholder mindset in allowing the interests of employees, suppliers, customers, and the community to be considered.[45]

Under Indiana's corporate statute, a director is once again required to act in good faith, with the care of an ordinarily prudent person in a similar

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[39] *Id.* § 1701.59(F)(1)-(3).

[40] *Id.*

[41] 805 ILL. COMP. STAT. 5/8.85 (2020) ("In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation . . . .").

[42] *Id.* ("[C]onsider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.").

[43] *Id.*

[44] *See id.*

[45] *Id.*

position, and in a manner that is in the best interests of the corporation.[46] Similar to Ohio, Indiana's statute does provide a bit more insight into what a director should consider when acting in the best interests of the corporation, including "the effects of any action on shareholders, employees, suppliers, and customers of the corporation."[47] By this language, it would seem to suggest that Indiana's statute allows for consideration of all stakeholders to the corporation, and not just shareholders.[48]

Something worth noting about the language of Indiana's statute is that it allows consideration of "any other factors the director considers pertinent."[49] In other words, despite providing more explanation than other state's statutes have provided by listing examples of acceptable considerations, by allowing "any other factors" to be considered, the statute once again blurs the lines.[50]

A further reading of Indiana's corporate statute uncovers even more explanation into its meaning than any other state's statutes have provided. For example, Subsection (f) of § 23-1-35-1 explains that, in enacting this article, the general assembly intended to leave open a considerable amount of discretion so that directors can truly exercise their business judgment when making decisions for the corporation.[51] The statute explains that, in making these decisions, "directors are not required to consider the effects of

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[46] IND. CODE § 23-1-35-1(a) (2020) ("A director shall, based on facts then known to the director, discharge the duties as a director, including the director's duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.").

[47] *Id.* § 23-1-35-1(d) ("A director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and customers of the corporation . . . .").

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* § 23-1-35-1(f) ("In enacting this article, the general assembly established corporate governance rules for Indiana corporations, including in this chapter, the standards of conduct applicable to directors of Indiana corporations, and the corporate constituent groups and interests that a director may take into account in exercising the director's business judgment. The general assembly intends to reaffirm certain of these corporate governance rules to ensure that the directors of Indiana corporations, in exercising their business judgment, are not required to approve a proposed corporate action if the directors in good faith determine, after considering and weighing as they deem appropriate the effects of such action on the corporation's constituents, that such action is not in the best interests of the corporation.").

a proposed corporate action on any particular corporate constituent group or interest as a dominant or controlling factor."[52] Under this subsection, the statute concludes that the general assembly intended to allow directors full discretion in weighing whatever enumerated factors they deem necessary, and to protect the directors and the validity of their actions taken in good faith after conducting a reasonable investigation.[53] Thus, despite providing specific factors for directors to consider, this language leaves directors with a large amount of discretion in how they choose to consider those factors, just like the official comment to MBCA § 8.30(a) does, as well.[54]

Perhaps the most comprehensive corporate law statute is that of Wyoming.[55] Under this statute, directors must act in good faith and in a manner reasonably believed to be in the best interests of the corporation.[56] Directors are also charged with performing their duties "with the care that a person in a like position would reasonably believe appropriate under similar circumstances."[57]

What makes this statute so comprehensive is the language of subsection (g), in which the drafters directly laid out specific constituencies that the directors may consider when determining what is in the best interests of the corporation.[58] Similar to other state statutes analyzed in this Comment, this list includes employees of the corporation, suppliers, creditors, customers,

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[52] *Id.*

[53] *Id.* ("Therefore, the general assembly intends: (1) to reaffirm that this section allows directors the full discretion to weigh the factors enumerated in subsection (d) as they deem appropriate; and (2) to protect both directors and the validity of corporate action taken by them in the good faith exercise of their business judgment after reasonable investigation.").

[54] *Id.*; *see also* MODEL BUS. CORP. ACT § 8.30(a) cmt. 1 (AM. BAR ASS'N 2016).

[55] Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 833–34 (2003) ("Wyoming's statute is an example of a comprehensive stakeholder statute . . . .").

[56] WYO. STAT. ANN. § 17-16-830(a) (2020) ("Each member of the board of directors, when discharging the duties of a director, shall act: (i) In good faith; and (ii) In a manner he reasonably believes to be in or at least not opposed to the best interests of the corporation.").

[57] *Id.* § 17-16-830(b) ("The members of the board of directors or a committee of the board, when becoming informed in connection with their decision making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.").

[58] *Id.* § 17-16-830(g).

the economy of the state and nation, and the impact on the surrounding communities.[59]

What is interesting about the way the drafters laid out this list is where the shareholder's interests fall in correlation to the other stakeholders. Specifically, the statute states that directors "shall consider the interests of the corporation's shareholders, and, in his discretion, may consider any of the following . . . ."[60] Put another way, directors are expressly required to consider shareholder interests, but directors may use their discretion to decide whether the interests of the remaining stakeholders included in the statute will be considered.[61] This would suggest that shareholders are viewed as the most important stakeholder to the drafters of this statute, while other stakeholders' interests may or may not be considered in every corporate decision.[62] Nonetheless, it is still noteworthy that the language of this statute includes such a comprehensive list of acceptable considerations.

Further, another interesting point about subsection (g) of Wyoming's statute is that it allows directors to consider the "long-term interests of the corporation and its shareholder, including the possibility that those interests may be best served by the continued independence of the corporation."[63] This language seems to suggest that the drafters intended to leave open the possibility that, in carrying out business in the best interests of the corporation and its shareholders, there may be times where the interests of the shareholders and the corporation are independent, rather than intertwined.[64] This is something rather unique compared to the language of other state statutes, as it appears to immediately refute potential arguments about whether directors may make corporate decisions that are in the best interests of the corporation but which may not provide the highest benefit to the corporation's shareholders.

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[59] *Id.* § 17-16-830(g)(i)–(iii) ("For purposes of subsection (a) of this section, a director, in determining what he reasonably believes to be in or not opposed to the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following: (i) The interests of the corporation's employees, suppliers, creditors and customers; (ii) The economy of the state and nation; (iii) The impact of any action upon the communities in or near which the corporation's facilities or operations are located . . . .").

[60] *Id.* § 17-16-830(g).

[61] *Id.*

[62] *Id.*

[63] *Id.* § 17-16-830(g)(iv).

[64] *Id.*

Lastly, Wyoming's statute ends by providing that directors may consider "any other factors relevant to promoting or preserving public or community interests."[65] This appears to, once again, give the directors a great deal of discretion in what they may or may not consider when making corporate decisions.[66] Thus, the language of Wyoming's statute is very specific in that it provides the most comprehensive list of stakeholders whose interests may be taken into consideration, but it also leaves the door open for directors to make the final call on any other information that may be pertinent to the corporation's operations.[67]

Finally, it is worth analyzing the corporate statute of Delaware. Delaware is an important state in the world of corporate law because of the significant number of businesses that call Delaware their "legal home."[68] Today, more than one million businesses have incorporated in Delaware[69], including many large and well-known corporations "whose shares are listed on major stock exchanges."[70] For example, "more than 60 percent of the Fortune 500 companies are incorporated in Delaware."[71] Further, even companies world-wide have chosen Delaware as their place of incorporation.[72] As such, the corporate law statute of Delaware is of high importance in the best interests of the corporation debate.

Interestingly, the language of Delaware's corporate statute differs from many other state's statutes, as it does not mention the fiduciary duties that directors owe to the corporation until nearly the end of the statute.[73] The

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[65] *Id.* § 17-16-830(g)(v) ("A director . . . shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following: . . . (v) Any other factors relevant to promoting or preserving public or community interests.").

[66] *Id.*

[67] *Id.*

[68] *Why Businesses Choose Delaware*, DEL. CORP. L., https://corplaw.delaware.gov/why-businesses-choose-delaware/ [https://perma.cc/T5PA-858C] ("Delaware has been the premier state of formation for business entities since the early 1900s.").

[69] *Id.* ("Today, more than one million business entities have made Delaware their legal home.").

[70] *Id.* ("Although the number of entities organized in Delaware is impressive, even more important is the fact that so many large and important corporations whose shares are listed on major stock exchanges are incorporated in Delaware.").

[71] *Id.* ("Indeed, more than 60 percent of the Fortune 500 companies are incorporated in Delaware.").

[72] *Id.* ("But organization in Delaware is not only for U.S. entities—companies around the world can take advantage of Delaware's benefits.").

[73] DEL. CODE ANN. tit. 8, § 102 (2020).

statute states that the certificate of incorporation of a corporation may include "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director."[74] Under this subsection, a director may avoid some liability, but cannot avoid liability for "breach of the director's duty of loyalty to the corporation or its stockholders" and "for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law."[75] The language of the statute does not directly mention the fiduciary duties of corporate directors, but they are implied to exist by the statute which states that the corporation can provide a provision in its certificate of incorporation that limits some liability for its directors, but that liability for breaching the duty of loyalty or good faith cannot be avoided.[76]

While the structure of the Delaware statute differs from that of many other states, it still works in the same way: it provides directors with a standard of conduct for how they must act when discharging their duties as directors.[77] Further, it is worth noting that while Delaware's statute mentions the duty of loyalty directors owe to the corporation and its stockholders, the language does not use the common "in the best interests of the corporation" phrase that so many other state statutes have.[78] In addition, the Delaware statute does not provide much more insight into this ambiguous phrase or what a director really must do to act according to his or her fiduciary duties than any other state statutes have.[79]

With the corporate law statutes of multiple states laid out, it is immediately apparent that there are many different approaches to how director fiduciary duties are constructed. This makes it unsurprising that there exists such a historic debate over what exactly directors are intended

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[74] *Id.* § 102(b)(7) ( "[T]he certificate of incorporation may also contain any or all of the following matters: . . . (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director . . . .").

[75] *Id.* ("[P]rovided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.").

[76] *Id.*

[77] *See id.*

[78] *Id.*

[79] *Id.*

to take away from these statutes. As such, many legal scholars have chimed in to provide their own conclusions on the topic.

## III. PICKING SIDES: SHAREHOLDER PRIMACY, STAKEHOLDER THEORY, OR A COMBINATION?

Over the years, there has been a considerable amount of commentary written about the meaning of this ambiguous phrase, "in the best interests of the corporation." Seemingly, the majority of authors have taken one of two positions on the topic: either interpreting the phrase as furthering the views of Shareholder Primacy or, just the opposite, Stakeholder Theory.

### *A. The Shareholder Primacy View*

From the shareholder side of the argument, some authors are of the opinion that the majority of state corporate law is already imparted with the views of shareholder primacy.[80] For example, in his article *Socially Conscious Corporations and Shareholder Profit*, author Kevin Tu provides an explanation of how the duty of loyalty, one fiduciary duty generally recognized in corporate law, naturally infuses shareholder primacy into the law on its own.[81] Tu explains that, although typically framed as a duty owed to the corporation as a whole, the duty of loyalty "extends to acting in the best interests of the corporation's shareholders."[82] In support of this view, Tu begins by explaining that corporate law is set up to separate corporate control and corporate ownership, so the director's duty of loyalty is a necessity in order to protect shareholders' interests from any abuse of authority.[83] From this, we are left with the understanding that directors and officers are expected to run a corporation with the interests and concerns of

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[80] Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 132 (2016) ("Shareholder primacy permeates state corporate codes and case law in the form of fiduciary duties owed by corporate managers to the corporation.").

[81] *Id.* ("Corporate law generally recognizes a 'triad' of duties that are owed to the corporation—the duty of care, duty of loyalty, and duty of good faith.").

[82] *Id.* at 132–33 ("Though the duty of loyalty is frequently framed as a duty owed to the corporation, it is well established that this duty extends to acting in the best interests of the corporation's shareholders.").

[83] *Id.* at 133 ("Because corporate law separates control and ownership, the duty of loyalty is a legal necessity to protect shareholders from corporate managers who might abuse their authority for private gain.").

the shareholders in mind.[84] Under Tu's view, the very fact that the duty of loyalty exists in corporate law leads to the conclusion that corporate law and the best interests of the corporation standard both support the views of Shareholder Primacy.[85]

As further support, Tu offers that existing case law on the topic exemplifies how the best interests of the corporation can be understood as a requirement that shareholder profit maximization should be the main goal of a corporation, "to the exclusion of other purposes."[86] In support, Tu cites a number of cases, the most well-known of which is likely *Dodge v. Ford Motor Co.*[87] In *Dodge*, the court decided that a corporation exists primarily to maximize profits for its shareholders.[88] In its frequently-quoted opinion, the court wrote, "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[89] This language indicates that the *Dodge* court supports the shareholder profit maximization goals of Shareholder Primacy.[90]

Tu concludes that, based on corporate law statutes and existing case law such as *Dodge*, corporate law and the duty of loyalty naturally supports a

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[84] *Id.* ("As a result, corporate law contains an affirmative mandate that directors and officers manage the corporation on behalf of the shareholders, and exercise their discretion to advance the best interests of the corporation and its shareholders.").

[85] *Id.* ("Accordingly, the existence of the duty of loyalty can be viewed as corporate law not only supporting, but also explicitly compelling, the shareholder primacy model of the corporation.").

[86] *Id.* ("In addition, caselaw addressing shareholder objections to corporate decisionmaking show how the 'best interests' standard can be further construed as concomitant with requiring shareholder profit maximization to the exclusion of other purposes.").

[87] *Id.* at 134.

[88] *Id.* ("Read alone, the foregoing excerpt of the court's decision in *Dodge* could seemingly support the position that corporate managers must always maximize shareholder profit and that the pursuit of any other corporate purpose violates corporate law."); *see also* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919).

[89] *Dodge*, 170 N.W. at 684 ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.").

[90] Tu, *supra* note 80, at 134.

Shareholder Primacy model.[91] The author writes that corporate law "imposes fiduciary obligations on directors to act in the best interests of the corporation and its shareholders."[92] Thus, Tu's writing is one example of the opinion that the best interest of the corporation standard is understood to mean that directors are required by law to maximize shareholder profit.[93]

Similarly, in his article *The Law of Corporate Purpose*, David Yosifon, a professor at Santa Clara University School of Law, provides more perspective on the opinion that the phrase "best interests of the corporation" necessarily refers to the best interests of the shareholders of the corporation.[94] Much like Tu, Yosifon points to case law to support his finding that, despite a number of cases in which the corporation and its shareholders are treated as separate beings, the directors duties to the corporation are still generally the same duties owed to the shareholders.[95]

Yosifon explains that while sometimes case law has treated the corporation as a separate entity from its shareholders, these court opinions have never suggested that the directors have a right to act outside of or in contrast to the shareholders' best interests.[96] Further, the author clarifies that in cases which make a distinction between "the corporation" and "its shareholders," the distinction is made only in controversies over whether the shareholders themselves or the directors get to decide what is in the best interests of the shareholders.[97] In other words, Yosifon's main point is "the 'corporation' and the 'shareholders' become meaningfully distinct interests

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[91] *Id.* at 136 ("In sum, corporate law undeniably reflects the concept of shareholder primacy in many respects. Structurally, corporate law statutes highlight the foundational nature of corporate managers directing the affairs of corporation on behalf of shareholders.").

[92] *Id.*

[93] *Id.*

[94] David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 184 (2014) ("My own view is that shareholder primacy is indeed the law, but I would advocate reforms that would impose broader responsibilities on corporate boards.").

[95] *Id.* at 211 ("There are indeed some passages in some Delaware cases where 'the corporation' and the 'shareholders' are treated as meaningfully separate things.").

[96] *Id.* ("However, even where the distinction is seen as significant, the cases *never* suggest that directors have the right to do anything with or for the corporation other than manage it in the best interests of shareholders.").

[97] *Id.* ("The distinction that *is* made in the cases between 'the corporation' and 'its shareholders' emerges only in controversies over *who* gets to decide what is in the shareholders' best interest—shareholders themselves, or directors on behalf of shareholders.").

only with respect to questions of 'who decides,' rather than 'what is decided.'"[98]

Finally, Yosifon argues that the "double formulation" of the "corporation and its shareholders" controversy cannot be read as a black letter rule in support of a mandatory Stakeholder Theory corporate governance model.[99] Yosifon offers what he calls "the better reading" of this commonly disputed phrase, stating that "it emphasizes rather than detracts from the norm of shareholder primacy."[100] Yosifon argues that, if the law only stated that directors owed an obligation to "the corporation," without any mention of the shareholders, then it would make sense to argue over which stakeholders are included in that phrase.[101] Instead, the formulation emphasizes the norm of Shareholder Primacy, as "[s]hareholders are the only stakeholder group that is singled out."[102] The corporate law statutes and jurisprudence never refer to "the corporation and its workers" or "the corporation, its shareholders, and its workers."[103] Therefore, if the corporate law were intended to reflect a stakeholder-centric model, more stakeholder groups would be expressly singled out in the statutory language.[104]

To conclude, Yosifon states, "the directors' attention is to be devoted to doing things aimed at increasing the value of the corporation . . . for the shareholders."[105] Thus, in Yosifon's opinion, the best interests of the corporation naturally supports a Shareholder Primacy model.

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[98] *Id.*

[99] *Id.* at 212–13 ("The 'corporation and its shareholders' double formulation is a little obscure, but as this sub-section makes clear, it cannot plausibly be read as black letter support for mandatory or permissive multi-stakeholder governance.").

[100] *Id.* at 213.

[101] *Id.* ("If Delaware just said that directors had obligations to 'the corporation' then we might fruitfully argue about which stakeholders count in Delaware's conception of the corporation.").

[102] *Id.*

[103] *Id.* ("We never see in Delaware jurisprudence, 'the corporation and its workers,' 'the corporation, its shareholders, and its workers,' or 'the corporation and its stakeholders.' It is always, 'the corporation and its shareholders.'").

[104] *See id.* at 212–13.

[105] *Id.* at 213 ("The better interpretation of this phrase is to view it as expressing a unified, coherent set of obligations, rather than distinct, serial, or disjunctive ones. The directors' attention is to be devoted to doing things aimed at increasing the value of the corporation (a distinct legal entity) for the shareholders. The cases cannot support any other construction.").

### *B. The Stakeholder Theory View*

On the other side of the best interests of the corporation debate sits a considerable number of scholars and professionals that share the opinion that this infamously ambiguous phrase should be understood to include all stakeholders of the corporation, and not just the shareholders.[106] In his article, *The Corporation as Imperfect Society*, author Brian McCall provides some insight into the views of those scholars on the stakeholder side of the argument. McCall explains that the biggest question in this debate is to whom the director's fiduciary duties run, specifically "[i]n whose interests are the directors to act with care and loyalty?"[107]

To date, courts have generally expressed that "directors hav[e] a duty to act in the best interests of the corporation and its shareholders, not just solely the shareholders."[108] McCall notes, however, that directors clearly should not act against the shareholders' interests, but since "it is a conjunctive phrase," it does not only include the shareholders.[109]

Further, McCall explains that directors are expected to "act in a way that harmonizes the common good of the entire corporation with the individual good of the shareholder."[110] In other words, directors must balance the interests of individual constituencies, which would include both shareholders and other stakeholders of the company.[111]

Currently, thirty states have adopted what McCall refers to as "constituency" statutes.[112] McCall describes such statutes as reinforcing "the common law conception of acting in the interest of both the whole (the

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[106] Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 521–22 (2011) ("A group of scholars can generally be discerned as sharing a common opinion that, to a varying degree, boards of directors ought to consider the interests of identifiable groups of interests parties other than shareholders.").

[107] *Id.* at 562 ("Generally, courts have spoken of directors having a duty to act in the best interests of the corporation and its shareholders, not just solely the shareholders.").

[108] *Id.* at 562–63 ("Clearly, directors should not act against shareholder interests but it is a conjunctive phrase, the corporation *and* its shareholders.").

[109] *Id.*

[110] *Id.* at 563 ("The directors are to act in a way that harmonizes the common good of the entire corporation with the individual good of the shareholders.").

[111] *Id.*

[112] *Id.* ("To date, thirty states had adopted some form of 'constituency' statutes.").

corporation) and the part (the shareholders)."[113] Further, these "statutes confirm that, in exercising [its] authority, boards may consider all the interests that comprise the common good of the corporation and not just those of shareholders."[114] Thus, under this McCall's these statutes inevitably require directors to consider all stakeholders of the corporation when making decisions in the best interest of the corporation, rather than only the corporation's shareholders.[115]

In a similar vein, author David Millon shares his view on constituency statutes and corporate governance in his article, *Two Models of Corporate Social Responsibility*.[116] Millon focuses much of his argument on Delaware's corporate statute, which is one of very few states to forgo adopting a constituency statute.[117]

Millon explains how, despite the lack of constituency statute, Delaware's law still charges corporate management with duties owed to the corporation and its stakeholders, rather than strictly shareholders alone.[118] Millon understands the formulation of Delaware's statute to mean that "the corporation is something other than—and presumably more than—simply the shareholders alone."[119] To explain, Millon provides an example, stating that the corporation could "be thought of as an entity existing separately from its shareholders and other stakeholders, or perhaps as an aggregation of its various constituencies."[120]

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[113] *Id.* ("Delaware, though lacking a similar statute, did adopt a common law rule permitting directors to consider other interests in very circumscribed scenarios. Such statutes reinforce this common law conception of acting in the interest of both the whole (the corporation) and the part (the shareholders).").

[114] *Id.*

[115] *Id.*

[116] David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 526 (2011).

[117] *Id.* ("Delaware—the state of incorporation for nearly two-thirds of U.S. publicly traded companies—has not enacted a constituency statute.") (citing Hale, *supra* note 55, at 833).

[118] *Id.* ("Nevertheless, Delaware law is not committed to shareholder primacy. Management's duties are owed to 'the corporation and its stockholders,' rather than to the shareholders alone.").

[119] *Id.* ("Delaware courts have done little to explicate the meaning of this distinction but at least this formulation must indicate that the corporation is something other than—and presumably more than—simply the shareholders alone.").

[120] *Id.*

Further, Millon highlights the fact that, although the Delaware Chancery Court has acknowledged that directors are obligated to attempt to "maximize the long-run interests of the corporation's stockholders," the Chancery Court has never suggested that management's fiduciary duties require directors to maximize shareholder profits without considering the interests of other stakeholders.[121] Millon offers that the "reference to 'long-run interests' is vague enough to accommodate policies that favor nonshareholder interests as long as there may be some plausibly asserted long-run benefit to the shareholders."[122] Thus, the language "long-run interests" is open ended enough that a director may take actions to accommodate the interests of other stakeholders, but still satisfy shareholder interests if such action could plausibly benefit shareholders as well.[123]

Additionally, Millon argues that the debate over whether long-run interests can satisfy both shareholder and stakeholder interests is of little importance anyways, because shareholders cannot rightfully challenge management policies simply for favoring stakeholder interests, even if those policies result in a reduction of shareholder profit.[124] Millon supports this proposition with the Business Judgment Rule, explaining that "courts will not second-guess decisions—including decisions that appear to benefit nonshareholders at the expense of shareholders—as long as management can assert some plausible connection with the corporation's long-run best interests."[125]

As support for his findings, Millon points to a Delaware Supreme Court decision, *Unocal Corp. v. Mesa Petroleum Co.*[126] In this case, the court reviewed corporate directors' authority to consider stakeholder interests, and

[121] *Id.* at 527 ("Although the Delaware Chancery Court has stated that directors are obligated 'to attempt, within the law, to maximize the long-run interest of the corporation's stockholders,' the Delaware courts have never stated plainly that management's fiduciary responsibilities—the duties of care and loyalty—imply a general duty to maximize profits without regard to competing nonshareholder considerations." (quoting Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986))).

[122] *Id.* ("Even the quoted language, with its reference to 'long-run interests,' is vague enough to accommodate policies that favor nonshareholder interests as long as there may be some plausibly asserted long-run benefit to the shareholders.")

[123] *Id.*

[124] *Id.* ("In any event, such pronouncements are of no practical importance, because shareholders lack the ability to challenge management policies that favor nonshareholder interests even if the result is reduction of profits.").

[125] *Id.*

[126] *Id.* (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)).

the court declined to follow a Shareholder Primacy mindset.[127] Specifically, as Millon notes, this case dealt with hostile takeover bids, which often creates a conflict between shareholder interests and stakeholder interests,[128] and the court questioned when a target company's management can legally defend against a hostile bid.[129]

As Millon explains, in this case the court concluded that "management can take into account 'the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).'"[130] Further, shareholder profit maximization is only required where management "voluntarily chooses to abandon its own long-run business strategy by undertaking a transaction that will result either in change of corporate control or break-up of the corporate entity."[131] Without such circumstances, management is free to decline a hostile bid that would threaten future corporate plans, even if that bid would provide a significant benefit to the corporation's shareholders.[132]

Put another way, Millon is reaching the conclusion that the fiduciary duties of directors naturally allow for a Stakeholder Theory, rather than strictly requiring Shareholder Primacy.[133] This is true, not only because the Delaware Supreme Court has declined to endorse Shareholder Primacy in

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[127] *Id.* ("In the one situation in which the Delaware Supreme Court has directly addressed management's authority to consider nonshareholder interests, the court has declined to endorse shareholder primacy.").

[128] *Id.* ("Hostile takeover bids typically present a clear conflict between the interests of shareholders (in unrestricted access to takeover premia, which are typically of substantial value) and those of nonshareholders (in defeat of an offer that threatens their well-being, for example, due to major cost-cutting initiatives).").

[129] *Id.* ("Defining the circumstances under which a target company's management can lawfully defend against a hostile bid, the court stated in *Unocal Corp. v. Mesa Petroleum Co.* . . . .").

[130] *Id.* (quoting *Unocal Corp.*, 493 A.2d at 955).

[131] *Id.* at 527–28. ("The court will require maximization of shareholder value only if management voluntarily chooses to abandon its own long-run business strategy by undertaking a transaction that will result either in change of corporate control or break-up of the corporate entity." (citing Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 38 (Del. 1994))).

[132] *Id.* at 528 ("Otherwise, management may resist a hostile bid that would threaten management's plans for the corporation's future, however attractive the bid might be to the corporation's shareholders." (citing Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1994))).

[133] *Id.*

previous cases,[134] but because these court decisions have shown that considering the interests of other stakeholders, such as in cases involving hostile takeover bids, sometimes leads to a better outcome for the corporation than if the directors had only considered the shareholder's interests in the decision.[135] Thus, Millon's views suggest that the law necessarily supports Stakeholder Theory in the debate over what it means for directors to act in the best interests of the corporation.[136]

### C. *A Moderate View from the Middle*

While many scholars have taken a strong stance on one side or the other of this debate, some professionals have taken a more moderate stance, acknowledging the arguments of both sides as relevant, and concluding that there could be a way to meet in the middle.[137]

In their article, *A Statutory Model for Corporate Constituency Concerns*, authors Edward S. Adams and John H. Matheson,[138] discuss a more middle-ground view: that corporations should follow a corporate governance model that incorporates both views.[139] To set the foundation of their proposal, Adams and Matheson highlight the big argument of both sides of the debate.[140]

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[134] *Id.* at 526.

[135] *Id.* at 527.

[136] *Id.*

[137] Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1086 (2000) ("While we will provide a form of model corporate constituency statute, we do not advocate one position over another. Instead, we advocate the idea that corporations should begin as stakeholder-centered, but then have a choice to focus on the shareholder if they decide to do so.").

[138] Edward S. Adams is a Howard E. Buhse Professor of Finance and Law at the University of Minnesota Law School. John H. Matheson is an S. Walter Richey Professor of Law at University of Minnesota Law School. The two are Co-Directors of the Center for Business Law and Entrepreneurship at the University of Minnesota Law School. *Id.* at 1085 (citing the author descriptions).

[139] *Id.* at 1086 ("This Article posits that the best solution is to simply offer a choice to corporations, corporate management, shareholders, and stakeholders by enacting an opt-out statute. An opt-out statute would create a default rule that makes consideration of nonshareholder interests mandatory upon incorporation, but allows shareholders to amend the articles to favor themselves if they so choose.").

[140] *Id.* ("This Article will give a description of both the shareholder primacy model and constituency statutes.").

On the shareholder side, Adams and Matheson acknowledge the validity of this viewpoint, explaining that the traditional shareholder view demands a focus on only one stakeholder group—the shareholder—because considering the interests of so many stakeholder groups creates more potential for conflicts of interest to arise.[141] A big argument against this idea is the simple notion that the corporation consists of far more relevant players than just the shareholders.[142] But, as the authors note, scholars on the shareholder side of the argument fight against a stakeholder model with the belief that a stakeholder-focused model complicates the decision-making process that directors must go through before reaching a corporate decision.[143] Further, the authors note that many scholars argue that existing law already adequately protects the interests of other stakeholders, and no further changes are necessary.[144]

On the other hand, Adams and Matheson run through the stakeholder viewpoint, highlighting the biggest, most common arguments regarding Stakeholder Primacy. They explain that, although it has traditionally been understood that shareholders are the owners of the corporation and thus, their interests are superior to those of other stakeholders, state corporate law statutes do not suggest that directors owe fiduciary duties only to shareholders.[145] As we have seen, this realization has been foundational in

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[141] *Id.* at 1090 ("Because a conflict of interest arises when directors and officers consider interests other than those of shareholders, the traditionalist viewpoint demands that only one group's interests—the shareholders'—constitute the focus of director decisionmaking.").

[142] *Id.* ("They recognized that the corporation consists of many individuals with a stake in the firm's welfare, such as employees, suppliers, and creditors, and the general public. Accordingly, the constructionists sought to include the interests of these individuals in decisionmaking in addition to the interests of shareholders." (citing Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 973 (1992))).

[143] *Id.* at 1091 ("While constructionist viewpoint broadens the interests informing directors' decisions, it also complicates decisionmaking by increasing the factors directors must consider before arriving at corporate decisions." (citing William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385, 419 (1990))).

[144] *Id.* at 1095 ("Not only do opponents believe constituency statutes are contradictory to notions of shareholder supremacy, some argue that existing law already adequately protects the interests of stakeholders." (citing James J. Hanks, Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97, 115 (1991))).

[145] *Id.* at 1088 ("Despite the traditional view of shareholders as 'owners' of corporations whose interests are superior to all others, no state corporation code in existence specifies that the directors of a corporation owe a fiduciary duty solely to the shareholders." (citing Steven

(*continued*)

the creation of constituency statutes, as it shows how such statutes minimize ambiguity in fiduciary duties.[146]

With the background arguments laid out, Adams and Matheson move into their own opinions on the debate. The two authors explain that, overall, constituency statutes are needed in corporate law because they "force directors to consider strategies which may be more complex and the results more difficult to see" rather than "making decisions that only take into consideration shareholder interests."[147] In Adams' and Matheson's opinion, constituency statutes promote corporate growth, which in the end, benefits the shareholders.[148]

Despite these positives, Adams and Matheson acknowledge that constituency statutes also come with some drawbacks. Specifically, many critics raise the concern that constituency statutes are too broad,[149] and are extremely permissive in the sense that they give directors the opportunity to ignore other stakeholders if it is determined, in that director's discretion, that doing so is in the best interests of the corporation.[150] Thus, the authors argue that despite the benefits of a stakeholder model, as the statutes are currently written, director accountability is arguably sacrificed, and it is difficult to say whether the stakeholder's interests will actually be adequately considered.[151]

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M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 166 (1991))).

[146] *Id.* ("Accordingly, each state implicitly recognizes that a broader group of interests may be considered even absent any constituency statute in its code. Constituency statutes transform this implicit principle into an explicit proviso of the law, minimizing ambiguity as to the breadth of directors' responsibilities by explicitly delineating the groups of individuals to whom directors are accountable.").

[147] *Id.* at 1109.

[148] *Id.* ("Consequently, constituency statutes promote corporate growth and vitality, which benefits shareholders in the long-term." (citing Wallman, *supra* note 145, at 168)).

[149] *Id.* at 1100 ("As a final assault against constituency statutes, opponents argue that they are too broad, and that if constituency statutes are going to achieve their goals, stakeholders need to be able to enforce their rights under the statutes.").

[150] *Id.* at 1101 ("Moreover, constituency statutes as they exist today are permissive and discretionary, permitting directors to ignore the interests of stakeholders in an attempt to keep satisfied those parties that are supplying the capital for operations—the shareholders.").

[151] *Id.* ("In this sense, constituency statutes arguably sacrifice director accountability for diminished consideration of shareholder interests and unenforceable consideration of stakeholder interests.").

As such, Adams and Matheson offer a solution. The authors suggest that instead of one model over the other, the two should be combined for an opt-in constituency statute in which corporations would start by following a stakeholder-focused model but would then have the opportunity to focus on the shareholders if they decide to do so later down the road.[152]

In order to cover the interests of all necessary players, the authors explain that the constituency statute must balance the need for consideration of a number of varying interests with the need for shareholders to have a voice in corporate governance.[153] As such, the authors explain that the opt-in constituency statute must combine mandatory language with the opportunity to opt-out of the constituency model.[154]

Under Adams and Matheson's formulation, the statute would require "consideration of all constituents of the corporation in a manner the directors deem appropriate."[155] Put another way, the statute would keep the common "at the discretion of the director" language so that the directors may decide whether the interests of a certain stakeholder will be a factor in a particular corporate decision.[156] Then, the shareholders of the corporation would get the chance to vote on whether the corporation will continue functioning under the opt-in statute, and only a supermajority vote by the shareholders will allow for the constituency regime to be opted-out of.[157]

Adams and Matheson believe that this structure will ensure that the statute would apply to a large number of corporations, but that the influence of the statute will be controlled by the voting option.[158] Specifically under

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[152] *Id.* at 1086 ("While we will provide a form of model corporate constituency statute, we do not advocate one position over another. Instead, we advocate the idea that corporations should begin as stakeholder-centered, but then have a choice to focus on the shareholder if they decide to do so.").

[153] *Id.* at 1116 ("A constituency statute that properly balances the need for consideration of varied interests and the need for shareholders to have the ultimate voice in the governance of the corporations . . . .").

[154] *Id.* ("[It] requires combining mandatory language with the potential for shareholders to opt-out of the constituency regime.").

[155] *Id.* ("First, this model statute creates a presumption requiring consideration of all constituents of the corporation in a manner the directors deem appropriate.").

[156] *Id.*

[157] *Id.* ("Moreover, a supermajority vote of the shareholders is required to alter the presumption away from the interests of constituents.").

[158] *Id.* ("This structure ensures that this statute will apply to the largest possible number of corporations and will not face extinction except at the will of a supermajority of the shareholders.").

the voting option, alteration or abolition of the statute can only be made by either the board or a supermajority of shareholders.[159] With both of these features, the authors believe that this proposed model constituency statute would be the best way to ensure acceptance of the statute, while also allowing shareholders to keep their stake in the conversation.[160] Thus, Adams and Matheson are of the opinion that both the stakeholder- and shareholder-focused models both have important features and, if combined, corporations may be able to achieve the best of both worlds.

## IV. CONCLUSION

In the world of corporate governance and corporate law, perhaps the most long-standing, influential, and most highly disputed topic is the Stakeholder Primacy versus Shareholder Theory debate. Many scholars have dialed in on this debate and provided their own commentary, and as time goes on and the law of corporate governance continues to grow and change, more and more arguments have surfaced, further complicating the path to any clear resolution.

Under the traditional view, authors such as Kevin Tu,[161] and David Yosifon,[162] believe that the existing corporate law statutes have already answered this buzzing question of who the corporation should exist to serve, and the answers is the shareholders.[163] These authors highlight the fact that within the language of many corporate law statutes, shareholders are often the only stakeholder groups that are expressly "singled out," and this would suggest that the drafters intended a shareholder-focused corporate governance model.[164] Further, it is often argued that maximizing shareholder profit has been the main focus for corporate directors in the past, and shifting the focus onto multiple stakeholder groups does nothing but

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[159] *Id.* ("The force of the statute, however, is tempered by the fact that a proposal for its alteration or abolition may be made by either the board of directors or the holders of at least ten percent of the corporation's outstanding capital stock entitled to vote on the matter.").

[160] *Id.* ("Perhaps the best way to ensure amicable acceptance of constituency statutes is to allow promoters and shareholders to choose whether constituency states will apply to the management of their firm." (citing Richard B. Tyler, *Other Constituency Statutes*, 59 MO. L. REV. 373, 424–25 (1994))).

[161] Tu, *supra* note 80, at 132.

[162] Yosifon, *supra* note 94, at 183.

[163] *See id.* at 181.

[164] *Id.* at 213; *see also* Tu, *supra* note 80, at 132.

confuse the system and blur the lines even more as to who the directors should truly be aiming to serve.[165]

Although it is true that Shareholder Primacy has been the leading model for years in the corporate world and it has served its time well, those scholars on this side of the argument seem to be focusing on a narrow view of the entire issue. It is true that shifting the focus to all corporate stakeholders adds many more factors to the equation and can complicate decision-making at times, but if considering more stakeholder's interests leads to a more effective solution for a corporation, then it seems the extra effort is well worth it.

Additionally, the assumption that a stakeholder model would not work because shareholders would not be interested in corporate decisions that do not solely benefit shareholder interests is also a rather limited view. More often than not, most likely, a decision that benefits another stakeholder group, such as customers or the surrounding community, would also benefit the shareholders of the corporation.

This idea is frequently the argument that scholars who believe in a stakeholder-focused model, such as Brian McCall,[166] and David Millon,[167] focus much of their opinion around. Specifically, these authors believe that even if you focus on the argument that other stakeholder groups are not singled out in corporate statutes in the way that shareholders are, these statutes do not expressly *exclude* the interests of other stakeholder groups.[168] Thus, an analysis of the statutory language would show that, in carrying out their duties, even in the interests of shareholders, directors are not prohibited in considering other stakeholders when trying to reach a decision in the best interests of the corporation.

Additionally, authors like Millon have supported the stakeholder argument simply with the Business Judgment Rule.[169] In other words, courts will not second-guess a board's corporate decision if it is truly in the best interests of the corporation just because that decision does not provide the highest benefit to the corporation's shareholders.[170] As such, it follows that such views support a stakeholder model, because this argument shows how consideration of other stakeholder interests may still be in the best interests

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[165] Tu, *supra* note 80, at 124.

[166] *See* McCall, *supra* note 106, at 512.

[167] *See* Millon, *supra* note 116, at 525.

[168] *See* McCall, *supra* note 106, at 538–39.

[169] Millon, *supra* note 116, at 527.

[170] *Id.*

of the corporation even if it leads to a reduction in the profit of the shareholders.[171]

Finally, falling somewhere in the middle of the debate, some professionals have argued that corporations could have the best of both worlds by adopting an opt-in constituency statute.[172] According to this view, corporations would start out following a stakeholder-focused system and then, by a supermajority vote of the shareholders, the corporation may opt-in to a shareholder-driven system.[173] Under this approach, while it is respectful to consider both sides of the debate to try and reach a solution on the matter, it seems that an opt-in system would only further complicate the decision-making process, which is one argument that Shareholder Primacy supporters have against a stakeholder-centric model. Thus, it appears this approach would not truly eliminate the disadvantages of one approach over the other and may just create more issues.

Overall, it seems that the best approach to handle the debate on corporate governance structure is exactly what the Business Roundtable has proposed. As the corporate law landscape continues to progress and change with society, the push towards a stakeholder-centered model is felt with more force now more than ever. Despite the truth behind the argument that consideration of more corporate stakeholders makes for a more complex decision-making process, the possibility of an outcome that is most beneficial for the corporation, the shareholders, and the stakeholders of the corporation far outweighs the downsides. Thus, in progressing the future goals for corporations in the United States, the Business Roundtable's proposal to shift corporate focus away from Shareholder Primacy and toward Stakeholder Theory feels like a step in the best direction.

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[171] *Id.*

[172] Adams & Matheson, s*upra* note 137, at 1086.

[173] *Id.* at 1086, 1116.