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What We Talk About When We Talk About Shareholder Primacy

Ann M. Lipton[†]

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Introduction

In January 2013, activist investor Potomac Capital Partners took a stake in a company called PLX Technology and, via a series of open letters, urged it to find an acquirer.[1] When the board of directors balked, Potomac launched a proxy contest, seeking to replace three members of PLX's board with its own nominees. One of these nominees was Eric Singer, a Potomac managing member.[2] During the respective proxy campaigns, Potomac promised a quick sale, while PLX's incumbent board outlined its strategy for long-term improvement.[3] In the end, 70 percent of PLX's stock, including the 9.4 percent stake owned by Potomac, voted in favor of the Potomac slate.[4]

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1. *In re* PLX Tech. Stockholders Litig., No. 9880-VCL, 2018 WL 5018535, at *1 (Del. Ch. Oct. 16, 2018), *aff'd*, 2019 WL 2144476 (Del. May 16, 2019).

2. *Id.*

3. *Id.* at *12.

4. PLX Tech., Inc., Current Report (Form 8-K) (Dec. 20, 2013), https://www.sec.gov/Archives/edgar/data/850579/000085057913000104/plx_body8k122013.htm [https://perma.cc/BF66-ARPE].

Once seated on the board, Singer took over the sales process, ultimately landing a deal for Avago Technologies Wireless to acquire PLX at $6.50 per share.[5] Dissenting stockholders sued the PLX board in connection with the merger, alleging that they had violated their fiduciary duties to PLX by pursuing a short-term firesale at the expense of long-term wealth maximization.[6]

After a trial, Vice Chancellor Laster of the Delaware Chancery Court agreed that Singer, as a member of PLX's board, had breached his duties to PLX stockholders.[7] Underpinning the holding was his conclusion that Singer's interests diverged from those of the other stockholders.[8] As Vice Chancellor Laster explained his reasoning:

> [P]articular types of investors may espouse short-term investment strategies and structure their affairs to benefit economically from those strategies, thereby creating a divergent interest in pursuing short-term performance at the expense of long-term wealth. In particular, "[a]ctivist hedge funds . . . are impatient shareholders, who look for value and want it realized in the near or intermediate term. They tell managers how to realize the value and challenge publicly those who resist the advice, using the proxy contest as a threat."
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> The record in this case convinces me that Singer and Potomac had a divergent interest in achieving quick profits by orchestrating a near-term sale at PLX.[9]

This was a curious statement. Only eight months earlier, the shareholders of PLX had made it very clear by voting to seat Potomac's nominees that they *rejected* the incumbent board's long-term plans and preferred a short-term sale of the company. Even if Potomac's own votes are discounted, a convincing majority of PLX shareholders, as of the December 2013 stockholder vote, expressed a preference for a strategy that maximized short-term gains at the (potential) expense of longer-term benefits. Yet despite this obvious history, Vice Chancellor

5. *In re PLX Tech.*, 2018 WL 5018535, at *23.

6. *Id.* at *12.

7. *Id.* at *56.

8. *Id.* at *44 ("Absent divergent interests, the Board's sale process in this case would fall within a range of reasonableness.").

9. *Id.* at *41–42 (quoting William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. Pa. L. Rev. 653, 682 (2010)).

Laster confidently asserted that the interests of "the stockholders as a whole" were to pursue more long-term strategies.[10]

The *PLX* case illustrates 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. That puzzle is what I address in this Article.

Debates about corporate purpose are often shot through with an air of futility. After all, the duties of corporate directors, whatever they may be, are only legally enforced in the event of a dispute among shareholders; to the extent shareholders have no disputes, they are free to choose their own purpose. In that sense, then, shareholder preferences dictate corporate behavior so long as they are uniform. Where there is disagreement—which, we may assume, will always be present for public corporations—the business judgment rule and the high barriers to bringing a derivative action function to prevent courts' (and thus the state's) intrusion into the matter in all but the most extreme circumstances.

Still, there is a reason the theoretical question of the nature of directors' duties continues to fascinate. First, it informs the regulatory design, both at the state and federal level, and thus is influential in setting both default and mandatory rules. Second, there are the difficult-to-quantify, but still very real, psychological effects that an understanding of corporate purpose has on directors.[11]

More generally, the issue whether corporate purpose is selected by shareholders or imposed by government fiat has broader implications for the proper role of corporations in society. As a tool of the state, corporations must be subjected to mechanisms of accountability and control similar to those of government actors; as an entirely private entity, corporations by default may be presumed to be entitled to considerable freedom.[12]

Though this debate is an old one, it has new urgency today due to the changing nature of the shareholder base. So long as shareholders were docile and silent, their preferences could be presumed in a manner that preserved state authority over corporate purpose while simultaneously attributing the state's choices to private ordering. Then, inconveniently, institutional investors made it known that their actual preferred outcomes often diverged from the ones predicted by corporate

10. *Id.* at *41.

11. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 582 (2003); Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 Fla. L. Rev. 771, 810 (2007).

12. David Millon, *Theories of the Corporation*, 1990 Duke L.J. 201, 203.

theory.[13] As this Article discusses, that shift has prompted a round of corporate soul-searching, resulting in inconsistent legal regimes both at the state and federal levels, and renewed attempts to identify a "true" set of shareholders whose private preferences perfectly map to the governmental policy sought to be advanced.

I. THE INDEFINITE DEFINITION OF SHAREHOLDER PRIMACY

Corporate law is often characterized as "private" law, meaning that it concerns the ground rules for voluntary relationships among individuals.[14] Much of modern corporate theory is built on the notion that corporations represent a type of contract (literal or metaphorical)[15] among shareholders setting the terms and conditions under which they will supply capital to finance a business. The corporate "contract" includes the obligation of corporate directors to pursue shareholders' interests (within the boundaries of the law) on the theory that, as residual claimants, shareholders would be unwilling to invest absent such assurances.[16] This theory of corporate purpose is commonly known as "shareholder primacy," and though there are continuing debates about whether the law mandates shareholder primacy—and even more debates about whether the law *should* place shareholder welfare at the center of corporate purpose—most commenters would likely agree that shareholder primacy, whatever its faults, accurately describes the legal regime today, either as a formal matter or in practical effect.[17]

Shareholder primacy, then, would seem to describe a regime in which shareholders themselves identify their own interests, and privately determine the ultimate purposes toward which their capital should be directed. Yet—at least until recently[18]—that is not how it

13. Joseph A. McCahery, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, J. AM. FIN. 2905, 2928–29 (Dec. 2016).

14. Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 781, 807 (2002).

15. *Id.* at 794.

16. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 449 (2001); Bainbridge, *supra* note 11, at 600.

17. Hansmann & Kraakman, *supra* note 16, at 443**.**

18. *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017); Paul Weitzel & Zachariah J. Rodgers, *Broad Shareholder Value and the Inevitable Role of Conscience*, 12 N.Y.U. J.L. & BUS. 35, 43–44 (2015); Adi Libson, *Taking Shareholders' Social Preferences Seriously: Confronting a New Agency Problem*, 9 UC IRVINE L. REV. 699, 701 (2019); Barnali Choudhury, *Serving Two Masters: Incorporating Social*

has been described. In most theoretical discussions of corporate purpose, shareholder primacy has been equated with the notion that corporate directors have a fiduciary duty to maximize the long-term wealth of the stockholders,[19] with little consideration paid to the possibility that shareholders themselves may prefer a different outcome.

To a naïve observer, it might seem that a legally *imposed* corporate purpose of long-term stockholder wealth maximization is anything but "private" law or private choice; it is a state dictate that governs the conduct of business entities on which it bestows a charter. Yet many commenters have resisted that characterization by the simple expedient of assuming that long-term wealth maximization itself represents shareholders' chosen corporate purpose.[20] Though some may acknowledge that this purpose can be modified by shareholders themselves,[21] in public companies, it has usually been assumed that shareholders are dispersed, unsophisticated, and passive, and thus incapable of even expressing a preference; therefore, the default assumptions control.[22]

But even as the "wealth maximization" view of corporate law gained ascendancy, the nature of shareholding changed. Whereas once most shares were held by natural persons—retail investors—by the 1980s, institutions owned more than 40 percent of public corporate equity.[23] Today, that figure it as high as 70–80 percent of the

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Responsibility into the Corporate Paradigm, 11 U. Pa. J. Bus. L. 631, 648–49 (2009).

19. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 745 (2005).

20. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 70 (1991).

21. *Id.* at 36; Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times, Sept. 13, 1970, at 17 ("In a free-enterprise, private-property system, a corporate executive is an employe [sic] of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society . . . .").

22. William T. Allen, *Ambiguity in Corporation Law*, 22 Del. J. Corp. L. 894, 896–97 (1997) ("[M]uch of the utility of the publicly traded corporate form derives from the fact that shareholders will be passive . . . . Therefore, it can be seen that the proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm.") (emphasis omitted); Jack B. Jacobs, *Does the New Corporate Shareholder Profile Call for a New Corporate Law Paradigm?*, 18 Fordham J. Corp. & Fin. L. 19, 21 (2012).

23. Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 Stan. L. Rev. 1465, 1521–22 (2007); Ronald J. Gilson & Jeffrey N.

outstanding equity in the 1,000 largest U.S. corporations.[24] Moreover, institutional ownership is increasingly concentrated: the biggest mutual fund companies, taken together, hold the largest block of stock in 40 percent of all United States listed companies, and 88 percent of the S&P 500.[25] Though these companies hold their stock across many different funds, sponsoring firms often rely on a centralized governance office to decide voting policy.[26] As a result, the actual preferences of shareholders are visible (in some cases, visibility is legally mandated[27]) and difficult to ignore. That fact makes it more obvious that many shareholders' preferences do not extend to the hypothesized desire for long-term wealth maximization.

First, many shareholders may operate on shorter terms. If markets are not perfectly efficient and therefore do not fully price the long-term potential of the firm,[28] shareholders who seek immediate payoffs—either because they need to liquidate their investment or because they are agents who need to justify their choices to their ultimate beneficiaries—may prefer strategies that, in effect, eat the seed corn.[29]

Second, some shareholders may be guided by ethical principles in addition to their desire for returns on their investment. These shareholders invest in search of a return, but they are also willing to forego the maximum possible return if doing so advances other values, such as protecting the environment and respecting the human rights of communities in which the corporation operates.[30]

Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and Revaluation of Governance Rights*, 113 Colum. L. Rev. 863, 874 (2013).

24. Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 Neb. L. Rev. 688, 729–30 (2018) (explaining that institutional investors held an aggregate 73 percent of equity in the 1,000 largest U.S. corporations).

25. Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 Bus. & Pol. 298, 313 (2017).

26. Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 Transactions 175, 187 (2017).

27. Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investing Companies, Paperwork Reduction Act Release Nos. 33-8188, 34-47304, IC-25922, 17 C.F.R. 239, 249, 270, 274 (Apr. 14, 2003) [hereinafter Disclosure of Proxy Voting].

28. Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 Minn. L. Rev. 1822, 1847 (2011).

29. *Id.* at 1823; Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. Rev. 561, 579 (2006).

30. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1288 (1999); *see* Max M. Schanzenbach & Robert H. Sitkoff, *The Law and Economics of Environmental, Social, and Governance Investing by a Fiduciary* 36

Third, shareholders may have different tax considerations, and may find that some actions that diminish wealth at the firm level nevertheless maximize their individual after-tax wealth, or vice-versa.[31]

Fourth, shareholders may have *other* investments—in their jobs, in stock of other firms, in company debt—and therefore prefer that a firm *not* maximize returns if doing so would reduce the wealth of these other claimants. In the most obvious example, shareholders who own stock in both a target firm and an acquiring firm may favor one over the other.[32] Hedge funds may use derivatives to shed their economic interest in their shares, even to the point where they benefit more if the value of the shares declines.[33] Labor funds may prefer high wages and a strong union to increases in the value of company stock.[34] And this is a limited set

(Harvard John M. Olin Ctr. For Law, Econ., and Bus., Discussion Paper No. 971, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244665 [https://perma.cc/LX3F-XUUU]; Elhauge, *supra* note 19, at 784.

31. Omri Marian, *Is All Corporate Tax Planning Good for Shareholders?*, 52 U.C. DAVIS L. REV. 905, 930–31 (2019).

32. *See* Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 311–13 (2019).

33. Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 815 (2006); Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL L. REV. 775, 779 (2005).

34. Rodrigues, *supra* note 28, at 1835. Not surprisingly, labor funds often use their power as shareholders to agitate for worker-friendly corporate policies. *See* Michael Katz, *NYC Comptroller Calls on CBS, Alphabet to End 'Inequitable Practices'*, CHIEF INV. OFFICER (Dec. 19, 2018), https://www.ai-cio.com/news/nyc-comptroller-calls-cbs-alphabet-end-inequitable-practices/ [https://perma.cc/JY4V-KJ27]; PJ Himelfarb & Howard Dicker, *Institutional Investors and Advisors Pursue Expanded CEO Pay Ratio Disclosure*, GOVERNANCE & SEC. WATCH (Dec. 21, 2018), https://governance.weil.com/latest-thinking/institutional-investors-and-advisors-pursue-expanded-ceo-pay-ratio-disclosure/ [https://perma.cc/7SPC-ZXTP]; Emily Chasan & John Gittelsohn, *California Pension Trustees Call for Disclosures of #MeToo Costs*, BLOOMBERG (Jan. 14, 2019, 10:21 AM), https://www.bloomberg.com/news/articles/2019-01-14/california-pension-trustees-call-for-disclosures-of-metoo-costs; *Comptroller Stringer, NYC Funds Call on Portfolio Companies to Immediately End Exploitative Labor Practices*, N.Y.C. COMPTROLLER (Dec. 14, 2018), https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-call-on-portfolio-companies-to-immediately-end-exploitative-labor-practices [https://perma.cc/YVR7-PELR]; *see also* DAVID H. WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON 91–97, 161–62 (2018). When employees have a greater voice in corporate governance, they may be paid more while helping insulate management from market discipline, suggesting an implicit bargain between the two groups. *See, e.g.*, Ronald Masulis et al., *Employee-Manager Alliances and Shareholder Returns from Acquisitions*, J. FINANCIAL & QUANTITATIVE

of examples; there are countless other reasons why shareholders themselves may have priorities that conflict with a goal of long-term wealth maximization at a single firm.[35]

Thus, in recent years, the distinction between *wealth maximization* and *shareholder choice* has been increasingly laid bare. As a result, if we accept the shareholder primacy conception of corporate purpose, we must grapple with the question of what, precisely, shareholder primacy entails.

II. Current State of the Law

A. Delaware Law

Though states may vary in their approaches to shareholder primacy, Delaware is unquestionably the market leader in terms of generating corporate law, and thus is a useful focal point for analysis. As it turns out, there is an extensive literature devoted to debating whether Delaware law mandates shareholder primacy, or instead permits directors in a public company to advance the interests of other constituencies for their own sake.[36] Assuming, however, that Delaware subscribes to shareholder primacy, its articulation of what that means has been wavering.

In the mine-run of cases, of course, Delaware need not specify the nature of directors' duties at all. This is because, absent evidence of self-dealing or gross negligence, courts usually defer to directors' business decisions under an extreme form of deference known as the business judgment rule.[37] That deference makes it unnecessary for courts to articulate the exact contours of directors' obligations; in the event of a shareholder challenge, once the most obvious forms of misconduct have been eliminated, courts can simply refuse to inquire further and dismiss the matter.

At the same time, when the decision is one recognized as likely to skew directors' incentives—usually, one involving potential mergers or changes of control—courts apply a more searching scrutiny to directors'

Analysis (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2895745 [https://perma.cc/2R3U-23AV].

35. *See generally* Anabtawi, *supra* note 29, at 577–93 (describing five common tensions that arise between shareholders); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 Cardozo L. Rev. 445, 477–98 (2008).

36. Leo E. Jr. Strine, *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, 767–74 (2015).

37. Lipton, *supra* note 32, at 301–02.

conduct;[38] thus, it is in that setting that Delaware courts offer a more fulsome portrait of directors' obligations. And when they do, they describe directors as operating under a fiduciary duty to maximize the long-term wealth of the stockholders.[39] In fulfilling these duties, directors are not required to take instruction from stockholders themselves; to the contrary, "directors may take good faith actions that they believe will benefit stockholders, even if they realize that the stockholders do not agree with them."[40] Delaware judges have expressed similar sentiments in their personal writings and speeches outside of the courtroom.[41] These sources suggest that corporate purpose—long-term wealth maximization—is imposed by the state.

Yet more recent case law suggests that Delaware courts may be inching toward the view that shareholders—especially the institutional shareholders who dominate in today's public companies—should be given a measure of autonomy in selecting their own corporate ends. The most important decision in this regard is *Corwin v. KKR Financial Holdings*.[42] There, breaking with a line of precedent that allowed courts to scrutinize mergers to ensure that directors obtained the best possible price for target companies,[43] the Delaware Supreme Court held that so long as fully informed shareholders approve a transaction, courts will not disturb their judgment that the deal "is in their best interests."[44] A

38. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1446–50 (2014).

39. TW Services, Inc. v. SWT Acquisition Corp., Nos. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); Virtus Capital L.P. v. Eastman Chem. Co., No. 9808-VCL, 2015 WL 580553, at *16 n.5 (Del. Ch. Feb. 11, 2015); *see generally* J. B. Heaton, *The Long Term in Corporate Law*, 72 BUS. LAW. 353, 353–57 (2017) (describing Delaware case law).

40. *In re* Lear Corp. S'holder Litig., 967 A.2d 640, 655 (Del. Ch. 2008); *see also* Robert S. Saunders, *Why Majority Voting in Director Elections Is a Bad Idea*, 1 VA. L. & BUS. REV. 107, 118 (2006) ("[D]irectors are not merely permitted to, but their fiduciary duty requires them to ignore the clear will of shareholders if their good faith business judgment is to the contrary." (quotations omitted)).

41. Strine, *supra* note 36, at 778; Allen, *supra* note 22, at 896–97; Myron T. Steele, *Continuity and Change in Delaware Corporate Law Jurisprudence*, 20 FORDHAM J. CORP. & FIN. L. 352, 360 (2015) ("[E]ngaged . . . stockholders add positive value as a check on director authority and are a catalyst for corrective accountability, *so long as their efforts focus on improved performance and not the advancement of political or personal agendas.*") (emphasis added).

42. 125 A.3d 304 (Del. 2015).

43. Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 169–76 (2019).

44. *Corwin*, 125 A.3d at 306, 314. The Delaware Supreme Court has also extended the rule to mergers accomplished via tender offers. *See In re*

similar rule was adopted in the context of controlling shareholder buyouts, where the informed vote of disinterested stockholders, coupled with negotiations by independent directors, were also held to eliminate any need for judicial review.[45]

The shift was plainly predicated on a recognition that institutional shareholders in particular are capable of understanding the issues at stake and making their own choices about corporate destiny; in many of the cases that presaged *Corwin*, Delaware courts were explicit on this point.[46] As Myron Steele, former Chief Justice of the Delaware Supreme Court, put it, "when you have a seventy-five percent institutional stockholder base, it's not like you're their guardian. They're perfectly capable of making their own decisions . . . ."[47]

Corwin and its progeny represent a significant step toward allowing shareholders to direct corporate purpose. Even if corporate directors did *not* negotiate a wealth maximizing deal, shareholders—armed with that knowledge—are licensed to accept it and absolve the directors of any fault. And (some) shareholders have good reasons for doing so: for example, the massive diversified funds that dominate today's investing often have various interests in a single transaction and recognize that a less-than-maximizing target share price may be better for their acquirer-side or target-debt holdings.[48] Directors know this as well; therefore, they can allow shareholder preference to influence their initial negotiations, safe in the knowledge that the shareholder vote will relieve them of any responsibility to maximize wealth.[49]

In practical effect, then, these decisions suggest that shareholders' *expressed* preferences should hold more sway over corporate purpose than an abstract duty of wealth maximization.

B. Federal Law

Theoretically, outside of a few unique areas like banking,[50] the federal government has no role in corporate chartering and therefore does not define corporate purpose. That said, the federal government has increasingly inserted itself into the corporate governance space via its regulation of federal securities trading and national securities

Volcano Corp. Stockholder Litig., 143 A.3d 727, 743–47 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017).

45. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644–45, 653–54 (Del. 2014).

46. Lipton, *supra* note 32, at 317–19.

47. Steele, *supra* note 41, at 362.

48. Lipton, *supra* note 32, at 311–13.

49. *See id.* at 313; Anabtawi, *supra* note 43, at 169–72.

50. Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 Fla. St. U. L. Rev. 317, 320–21 (2009).

exchanges.[51] Through a combination of direct controls on corporate behavior and indirect disclosure requirements that nudge corporations in particular directions,[52] these rules can push for a wealth maximization rule, or a rule requiring obedience to shareholders. And, as with Delaware, they often seem to do both.

The most obvious evidence of federal dictate of corporate purpose can be found in the concept of "materiality" under the federal securities laws. Information is material if there is a "substantial likelihood that a reasonable shareholder would consider it important" when making an investment decision or casting a corporate vote.[53] Materiality has been described as the "cornerstone" of the securities disclosure system,[54] because it operates as "a principle for inclusion and exclusion of information in investor oriented disclosure documents,"[55] while falsity (and thus federal securities fraud liability) is gauged by a *failure* of such disclosure.[56]

The materiality standard, on its face, suggests that shareholders themselves may control corporate purpose, for it is their interests—and not some other standard—that dictates whether information is fit for disclosure. Yet in practice, matters are not quite so simple.

First, the U.S. Securities and Exchange Commission ("SEC") has frequently offered its own interpretations of the definition of materiality, often narrowing it to include only matters that have financial significance. For example, in response to pressure to require companies to disclose information about their social performance, in 1975 the Commission stated that required disclosures must be "primarily addressed" toward information relevant to earning a "satisfactory return."[57] A few years later, the SEC staff again

51. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1527 (2005); MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 6 (2018).

52. Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 358–60 (2013); Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1049–63 (2019).

53. Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

54. A.A. SOMMER, JR. ET AL., ADVISORY COMM. ON CORP. DISCLOSURE, REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION 320 (1977).

55. *Id.*

56. *See, e.g.*, 15 U.S.C. § 77k(a) (2018); 17 C.F.R. § 240.10b-5(b) (2018).

57. Notice of Commission Conclusions and Rulemaking Proposals, Securities Act Release Nos. 5627, 11733, 8 SEC Docket 38, 49 (Oct. 14, 1975). Furthermore:

emphasized that information about a corporation's social performance would only need to be disclosed if it increased the company's exposure to financial or operational risk.[58] As a result, SEC disclosure requirements frequently specify that they hinge on the materiality of information from a financial point of view.[59]

Second, enforcement of the materiality standard—typically in the context of a claim that material information was omitted or mischaracterized—usually depends on establishing its financial importance. This is partly because courts have built up a body of case law defining a concept of materiality that tends to exclude matters that solely bear on the corporation's ethical commitments,[60] and partly because investors who bring private fraud actions must prove that the misstatement caused financial losses,[61] which again tends to elevate

> The Acts and the relevant legislative history also suggest that a prime expectation of the Congress was that the Commission's disclosure authority would be used to require the dissemination of information which is or may be economically significant.
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> . . . .
>
> [T]he basic decision of the Congress [is] that, insofar as investing is concerned, the primary interest of investors is economic.

Id. at 43, 49.

58. Staff of Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, 96th Cong., Report on Corporate Accountability: A Re-examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally 247–48, 287–88 (Comm. Print 1980) [hereinafter SEC Staff Report on Corporate Accountability].

59. *See, e.g.*, 17 C.F.R. § 229.303 cmt. 3 (2018) (focusing on "material events and uncertainties . . . that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."); Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6294 (Feb. 8, 2010) ("Registrants drafting MD&A disclosure should focus on material information and eliminate immaterial information that does not promote understanding of registrants' financial condition, liquidity and capital resources, changes in financial condition and results of operations."); *see also* Mary Jo White, Chairwoman, Sec. & Exch. Comm'n, Keynote Address at the International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability (June 27, 2016) ("[T]o the extent issues about sustainability are material to a company's financial condition or results of operations, they must be disclosed.").

60. Ann M. Lipton, *Reviving Reliance*, 86 Fordham L. Rev. 91, 101, 112–16 (2017).

61. 15 U.S.C. § 78u-4(b)(4) (2012). Some types of claims put the burden on defendants to *disprove* that their actions caused a financial loss but still

financially relevant information above information that advances other values. What these standards suggest, then, is that the federal securities laws are designed only to satisfy investors' *financial* interests in subject companies; while investors are entitled to take other concerns into account, the securities laws will not facilitate or protect those choices.[62]

There is another mechanism by which the federal securities laws explicitly enshrine wealth maximization as corporate purpose. In the wake of the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[63] In addition to several other amendments to the securities laws, Dodd Frank mandates that corporations disclose compensation paid to top corporate executives as a function of total return to shareholders.[64] The SEC has not yet drafted rules implementing the requirement, but the fact that it exists at all suggests that Congress believes that managers should be encouraged to elevate generating returns to shareholders over other corporate goals.[65]

Indeed, the very structure of financial reporting for securities law purposes has been criticized for encouraging not only wealth maximization as corporate purpose but wealth maximization on a short-term basis. The SEC requires that public companies issue financial reports every quarter[66]; this fact, it is argued, encourages investors to

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do not permit recovery if there has been a lack of economic harm caused by the defendants' actions. *See, e.g.*, 15 U.S.C. §§ 77k(b), (e) (2012).

62. Similarly, though investors may be concerned about the performance of an entire portfolio of investments rather than the performance of a single company, Lipton, *supra* note 32, at 309–14, the federal securities laws generally will not allow investors to recover for damage to one company due to misstatements concerning another. *See* Ontario Pub. Serv. Emps. Union Pension Trust Fund v. Nortel Networks Corp., 369 F.3d 27 (2d Cir. 2004); *but see* Semerenko v. Cendant, 223 F.3d 165 (3rd Cir. 2000). *See generally* Urska Velikonja, *The Cost of Securities Fraud*, 54 Wm. & Mary L. Rev. 1887, 1891–92 (2013) (describing how Worldcom's fraud impacted the performance of other companies).

63. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5301 (2012).

64. 15 U.S.C. § 78n-1(a)(1) (2012).

65. Francine McKenna, *A Decade After the Crisis, the SEC Still Hasn't Passed Executive Compensation Rules*, Mkt. Watch (Sept. 14, 2018, 3:37 PM), https://www.marketwatch.com/story/a-decade-after-the-crisis-the-sec-still-leaves-executive-compensation-rules-unwritten-2018-09-10 [https://perma.cc/XR9G-9D7F]; *see also* John Filar Atwood, *Jackson Calls on Commission to Complete Dodd-Frank Rulemaking*, Wolters Kluwer Sec. Reg. Daily (Nov. 12, 2018), http://www.dailyreportingsuite.com/securities/news/SRD20181112 [https://perma.cc/UEJ5-CZD4] ("SEC Commissioner Robert Jackson called on the Commission to finalize the rules on clawbacks, pay versus performance, and employee and director hedging as soon as possible.").

66. 17 C.F.R. § 240.13a–13.

focus on short-term performance to the exclusion of long-term value.[67] Investors might be free to prioritize other matters, but the salience of quarterly reporting—mandated by federal law—guides their focus and redirects the attention of management toward short-term performance.[68]

That said, federal law also sends mixed messages, beginning again with the disclosure requirements imposed in Dodd Frank. While requiring disclosure of compensation relative to shareholder return, the Act *also* requires that companies disclose the ratio of CEO to median worker pay, a measure that almost certainly was intended to direct attention to the problem of income inequality.[69] When coupled with Dodd Frank's "say on pay" provisions requiring advisory shareholder votes on pay packages,[70] the suggestion seems to be that Congress is encouraging shareholders to take corporations' social performance into account when voting their proxies. SEC regulations also require corporations to disclose the extent to which diversity considerations inform boards' selection of director candidates,[71] again suggesting that federal law seeks to encourage shareholders to consider aspects of corporate performance *other than* wealth maximization when casting their votes.

Federal law has also steadily increased shareholder power within the corporation. Though shareholder power does not precisely map to corporate purpose,[72] it is at least suggestive of an intent to permit shareholders to select corporate ends. In addition to Dodd Frank's "say on pay" provisions, both Dodd Frank and the earlier Sarbanes Oxley Act of 2002 mandate the use of independent directors on key board committees,[73] presumably in hopes that these directors will be more responsive to shareholders. Additionally, a series of changes to the

67. *See* James J. Park, *Do the Securities Laws Promote Short-termism?*, 10 U.C. Irvine L. Rev. (forthcoming 2020).

68. *See id.*; *see also* Jeff Schwartz, *De Facto Shareholder Primacy* (working draft on file with the author) (arguing that SEC disclosure requirements enable specific shareholders with a short-term, wealth-maximizing focus to hijack managerial attention).

69. Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. Rev. 1123, 1140–41 (2019); Langevoort & Thompson, *supra* note 52, at 378.

70. 15 U.S.C. § 78n-1 (2012).

71. 17 C.F.R. § 229.407(b)(3)(vi) (2018).

72. Some argue, for example, that a limited expansion of shareholder power will enable them to enhance their wealth. *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833, 835 (2005).

73. 15 U.S.C. §§ 78j-1, 3 (2012).

proxy rules have made it far easier for shareholders to communicate—and thus coordinate—with each other to challenge management.[74]

Finally, there is Exchange Act Rule 14a-8, which permits shareholders to propose resolutions (usually nonbinding ones) to be included on the corporate proxy ballot for all shareholders to vote upon. The rule hands yet more power to shareholders: in recent years, it has been used to demand governance changes such as removal of staggered boards, separation of Chair and CEO roles, and adoption of majority voting requirements, all of which make it harder for boards to insulate themselves from shareholder demands.[75] A recent amendment to 14a-8 now allows shareholders to propose changes to corporate bylaws that would permit shareholders to include their own director candidates on corporate proxies, and many corporations (bowing to shareholder pressure) have done just that.[76]

Yet the rule has also been interpreted in ways that reinscribe a wealth maximization purpose into the corporate form, and ironically has done so via the use of social and environmental proposals. These proposals, which have been offered since the rule was created in 1942,[77] request that the corporation review or change some behavior deemed to pose social or ethical problems, such as the sale of semiautomatic weapons,[78] discrimination on the basis of sexual orientation,[79] or the use of pay practices that disadvantage women relative to men.[80]

Two issues pertaining to social proposals, and the norms surrounding their use, come down on the "wealth maximization" side of the scale. First, the rule bars proposals that concern matters constituting less than 5 percent of the corporation's earnings, assets, or sales.[81] The rule has an exception, however: the proposal is permissible if it is "otherwise significantly related" to the business.[82] For many years, the SEC interpreted social proposals to raise issues that were

74. *See generally* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. Corp. L. 545 (2016).

75. *Id.* at 571.

76. *See* Press Release, Sec. & Exch. Comm'n, Facilitating Shareholder Director Nominations, Release Nos. 33-9259; 34-65343 (Sept. 15, 2011).

77. Joel Seligman, The Transformation of Wall Street 270 (2003).

78. Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323, 329–30 (3d Cir. 2015).

79. New York City Emps.' Ret. Sys. v. Sec. & Exch. Comm'n, 45 F.3d 7, 9–10 (2d Cir. 1995).

80. Citigroup, Inc., SEC No-Action Letter, 2015 WL 9460205, app. A (Feb. 2, 2016).

81. 17 C.F.R. § 240.14a-8(i)(5) (2018).

82. *Id.*

"otherwise significantly related," even if they concerned rather minor aspects of corporate operations.[83] Recently, however, the SEC has revised its guidance to make clear that a proposal defended as "otherwise significantly related" to the issuer's business must have the potential for a significant operational impact; the mere fact that an ethical issue alone is involved will not suffice.[84] The guidance revision, then, is evidence that the SEC interprets the securities laws to prioritize financial matters over other concerns that shareholders may raise.

Additionally, the rule bars any proposal that management is either powerless to implement or that would cause management to violate the law.[85] As though in concession to the notion that it would be illegal for managers to act for non-wealth-maximizing reasons, it is practically *de rigueur* for shareholder proposals—even those plainly grounded in ethical concerns—to offer up some fig leaf of a financial justification. For example, As You Sow, an advocacy group for corporate social responsibility, recently sponsored a proposal requesting that Starbucks report on its progress toward developing environmentally friendly coffee cups.[86] In so doing, it justified the request on the ground that failure to improve cup recyclability could lead to "backlash by [Starbucks's] environmentally aware customer base,"[87] even though it is fair to say that As You Sow's main concern is likely not Starbucks's sales figures.

To be sure, it is not obvious that the SEC would conclude that a proposal couched solely in moral terms violates Rule 14a-8,[88] but proponents—apparently persuaded that the SEC would, or at least unwilling to take the risk—almost never do so, contributing to the expectation that corporate managers are prohibited from veering from wealth maximization *even if shareholders would prefer they did*.

In sum, as is the case with Delaware law, federal law points in both directions.

83. SEC Staff Legal Bulletin No. 14I (Nov. 1, 2017).

84. *Id.*

85. 17 C.F.R. §§ 240.14a-8(i)(2), (6) (2018).

86. *Starbucks Corporation: Request for Report on Consumer Packaging*, As You Sow (Sept. 29, 2018), https://www.asyousow.org/resolutions/2018/09/27/starbucks-corporation-request-for-report-on-consumer-packaging [https://perma.cc/JW36-P4M9].

87. *Id.*

88. In its 1980 Staff Report, the SEC suggested that rather than require corporate disclosure of social information unrelated to corporate performance, it would be better if shareholders used the 14a-8 process to indicate the types of disclosure they required from companies on a case by case basis. *See* SEC Staff Report on Corporate Accountability, *supra* note 58, at 277–78 (1980).

III. Wealth Maximization: Private Choice or Public One?

A. *Long-Term Wealth Maximization as Hypothetical Bargain*

Those who favor wealth maximization argue that all shareholders invest to earn returns; wherever else their goals may conflict, on this point, there is general agreement. For that reason, directors should be tasked with advancing that common interest.[89] Frequently, the hypothetical bargain methodology is invoked; investors, it is assumed, cannot specify in advance the precise obligations of directors, and therefore will be unwilling to place their capital at risk without the assurance that directors have a duty to advance their interests.[90] Absent the promise that directors will pursue wealth maximization, shareholders risk being exploited not only by other corporate constituencies who can enforce more precise terms,[91] but also by other *shareholders* who hold divergent preferences.[92]

But hypothetical bargains are just that: hypothetical. We can imagine other, more nuanced, bargains that investors might prefer. For example, if investors believe that the pursuit of firm wealth will damage other constituencies of which shareholders are a part, they may be reluctant to endorse a wealth maximization norm. Investors, ex ante, might recognize that if they are broadly diversified, they would prefer that individual firms not externalize costs in a manner that injures their other holdings.[93] Investors, ex ante, may recognize that in their capacities as laborers they may be injured by poor wages and working conditions, or in their capacities as residents, they may be injured by corporate abuse of the environment; they might also recognize that

89. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 Stan. L. Rev. 923, 961 (1984).

90. Bainbridge, *supra* note 11, at 600; William T. Allen et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. Chi. L. Rev. 1067, 1089 (2002).

91. Choudhury, *supra* note 18, at 631, 637 (2009); William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 Seattle U. L. Rev. 489, 500–01 (2013); Hansmann & Kraakman, *supra* note 16, at 449.

92. Hansmann & Kraakman, *supra* note 16, at 462; D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. Corp. L. 277, 279 (1998); Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 Colum. L. Rev. 767, 791, 802 (2017).

93. Jarrad Harford et al., *Institutional Cross-Holdings and Their Effect on Acquisition Decisions*, 99 J. Fin. Econ. 27, 37 (2011); Madison Condon, *Externalities and the Common Owner*, Wash. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378783 [https://perma.cc/V2HL-NC2E]; Jim Hawley & Jon Lukomnik, *The Long and Short of It*, 41 Seattle U. L. Rev. 449, 450 (2018).

corporations are likely to be *politically* powerful and thus able to interfere with attempts to protect these constituencies via the legislative process.[94] They might therefore prefer to bargain for a corporate arrangement whereby shareholder priorities may be invoked to curb managerial excess.

It is, in fact, relatively plausible to assume that investors—the majority of whom, directly or indirectly, are ordinary workers saving for retirement[95]—would recognize the limits of the political regime in protecting non-shareholder constituencies and prefer that managers share some of the corporate surplus with those constituencies, at least up to a point.[96] And if we hypothesize that investors in the minority, who fear excess "sharing," will be less willing to invest in such a regime, we might also hypothesize that investors who fear corporate rapaciousness will be less willing to invest if they believe their capital will hand managers more power to victimize them in their non-shareholder capacities.

We can also look to the *actual* bargains struck by commercial actors to determine if our intuitions are correct—precisely as advocates of the hypothetical bargain methodology suggest.[97] In recent years, labor funds have been increasingly aggressive in their insistence that their portfolio companies protect worker interests. For example, they have refused to invest in funds that advocate for the elimination of defined benefit retirement plans, that seek to replace union with nonunion labor, and they have pushed for greater protections for workers in the event of corporate bankruptcies.[98] The fact that private equity firms have

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94. Those who favor the notion that firms should be run for the benefit of stockholders generally argue that employees and other constituencies can more efficiently protect themselves through external regulation, contracting, and other societal constraints than by affecting the corporate purpose itself. *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1432–34 (2006).

95. Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1872 (2017) ("[T]ypical Americans who are investors in the equity markets remain primarily dependent on wage employment for their wealth . . . .").

96. Weitzel & Rodgers, *supra* note 18, at 49; Elhauge, *supra* note 19, at 783–85; *cf.* Ben Maiden, *Retail Investors Eye ESG Factors, Survey Finds*, CORPORATE SECRETARY (Apr. 26, 2019), https://www.corporatesecretary.com/articles/esg/31589/retail-investors-eye-esg-factors-survey-finds [https://perma.cc/CZW8-A38E] (retail investors are concerned about corporate social performance).

97. EASTERBROOK & FISCHEL, *supra* note 20, at 34.

98. WEBBER, *supra* note 34, at 79–110, 160–62, 190–91; *see* Michael Corkery, *Pensions Get Bolder in Challenging Private Equity on Investments' Human Cost*, N.Y. TIMES (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/business/toys-r-us-workers-public-pensions-private-equity.html

accommodated these demands—whatever the preferences of their other clients or their own managers (who themselves have financial interests in the funds)—demonstrates that in contexts where bargaining is possible, equity investors can and do bargain for something other than shareholder wealth maximization and may seek to protect nonequity constituencies.[99]

The point, then, is that a variety of hypothetical bargains can be envisioned, and it is not at all clear that the traditional wealth maximization norm is even the most plausible among them.[100]

B. Long-Term Wealth Maximization as Government Planning

Occasionally, defenders of the long-term wealth maximization norm skip over the hypothetical bargain and go directly to an argument rooted in government policy: corporations *should* be run to maximize long-term wealth because of the societal benefits that follow. For example, it has been argued that a high stock price is prima facie evidence that a corporation is a net contributor to society, and that alone justifies directors' focus on that goal in the long term.[101] It is also argued that a short-term focus can lead to excessive risk-taking with associated systemic shocks to the economy.[102] Companies run for the long term may engage in more socially responsible behavior, providing better working conditions for laborers and minimizing harm to the

[https://perma.cc/2Q5P-P3VQ]; *see also* Mark Vandevelde, *KKR and Bain to Pay $20m to Former Toys R Us Employees*, Fin. Times (Nov. 20, 2018), https://www.ft.com/content/3d6ba4dc-ec6d-11e8-8180-9cf2126 77a57 [https://perma.cc/6NCA-DMRU] (state pension fund enlisted to pressure private equity firms into to making payments to laid off workers).

99. To be fair, equity owners may bargain differently in the context of limited-life private equity funds than indefinitely-lived corporations because they are aware that the short time horizon of the fund acts as its own type of constraint on managerial misbehavior. *See* Jarrod Shobe, *Misaligned Interests in Private Equity*, 2016 B.Y.U. L. Rev. 1435, 1440.

100. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021, 1103–04 (1996) (arguing for a reconfiguration of managerial duties in light of the stylized nature of the wealth maximization norm to better reflect society's values); Hayden & Bodie, *supra* note 35, at 449 (challenging shareholder primacy in light of the reality of shareholder heterogeneity and the weaknesses of the wealth maximization norm).

101. Hester M. Peirce, *My Beef with Stakeholders: Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance*, Sec. & Exch. Comm'n (Sept. 21, 2018), https://www.sec.gov/news/speech/speech-peirce-092118 [https://perma.cc/ZZY2-4NPA].

102. Rodrigues, *supra* note 28, at 1848.

environment.[103] In this respect, then, the corporate purpose of "long-term shareholder wealth maximization" may simply be another way of saying that corporations should be run for constituents *other than* their shareholders, while retaining a veneer of shareholder primacy.[104] Indeed, there is a long history of assuming away any conflicts between the investor class and other corporate constituents by insisting that any fleeting benefits investors may derive from the exploitation of labor and consumer groups will be swept away in the inevitable crash that follows.[105]

There is nothing inherently illegitimate about the idea that corporations should be run to further some governmentally selected purpose; to the contrary, such an implicit bargain between corporate founders and chartering states has been identified, in one way or another, since the earliest days of the business corporation.[106] Though some question the *wisdom* of allowing the state to displace the choices of private actors,[107] few would doubt that it is within the state's *power* to do so.

The difficulty here lies in the state's attempt to *mask* its choices by attributing them to private actors. As a privately selected goal, long-term wealth maximization needs no further justification; it represents one aspect of citizens' freedom to arrange their affairs as they like, and, for adherents of market ideology, may even be assumed to be the best choice for all participants in the corporate project. A government-mandated purpose, however, is—or should be—open to question. By hiding behind the notion of shareholder choice, the state creates the impression that is attempting to insulate its own policy determinations from challenge.

This is precisely the argument of those who reject shareholder primacy in the first instance: if shareholder primacy simply represents a state mandate that corporate directors prioritize advancing stockholder wealth *even over stockholder objection*, there is no reason that a different purpose could not be selected to further different

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103. *Id.* at 1826; *see* Emeka Duruigbo, *Tackling Shareholder Short-Termism and Managerial Myopia*, 100 Ky. L.J. 531, 574–76 (2011).

104. Heaton, *supra* note 39, at 364.

105. H.R. Rep. No. 57-3375, at 4, 18 (1903); *see generally* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 Ind. L.J. 53, 53–54 (1990) (discussing objections to overcapitalization in the Progressive era).

106. *See* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 Okla. L. Rev. 327, 331–34 (2014); William Z. Ripley, Main Street and Wall Street 8–10, 66 (1927).

107. Hansmann & Kraakman, *supra* note 16, at 446–47.

societal goals—such as a stakeholder-oriented purpose that focuses as much on distribution of wealth as the creation of it.[108]

A truly privately ordered system may therefore have to defer to actual shareholder choices as to corporate purpose, even if these deviate from wealth maximization. Yet if shareholders do not all agree, there must be rules for resolving those disagreements. In some entities, such as the LLC, even those rules themselves may be selected by equity holders, but in the corporate form, rules for resolving disagreement are to a large extent set by the state.[109] And those rules themselves pose new challenges.

IV. Implementing Corporate Purpose

Whichever purpose we select—long-term wealth maximization, or shareholder preference—we must determine the best way to design the legal rules governing the corporate form so as to implement that purpose. And here another dilemma is posed: if corporate purpose is something *other* than shareholder preference, it is difficult to explain why shareholders should be able to vote for corporate directors or have any role in corporate governance at all. Otherwise, shareholders are tasked with selecting directors to effectuate preferences that directors are, by law, forbidden to pursue.[110]

The contradiction was illustrated in recent remarks by SEC Commissioner Hester Peirce. She is a strong advocate for long-term

108. Greenwood, *supra* note 100, at 1023–26; Hayden & Bodie, *supra* note 35, at 505.

109. There is a longstanding debate over the extent to which corporate law rules are mandatory, and thus state-required, or whether they may be modified. *See* John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 Brook. L. Rev. 919, 939–40 (1988). For example, the state sets minimum voting requirements for various types of corporate action and imposes fiduciary duties as well as mechanisms for cleansing fiduciary breaches both via statutory and common law. These are not entirely flexible, but they can be modified up to a point, at least ex ante; corporations may choose to issue nonvoting or supervoting stock, which will give some stockholders more weight than others in corporate decision-making. Shareholders can thereby choose to tie themselves to the mast of a unified decisionmaker in order to pursue a common purpose. Goshen & Squire, *supra* note 92, at 772; *see* Dorothy Shapiro Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 Stan. L. Rev. 687, 716 (2019). Yet—as discussed below—whether such structures have or have not been adopted does not fully answer the question of what sorts of interests voting shareholders are permitted to pursue.

110. This is why there is a literature devoted to the question why shareholders are permitted to vote at all. *See, e.g.*, Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. Rev. 601, 616 (2006).

shareholder wealth maximization as the only legitimate corporate purpose,[111] but also recognizes that some investors may prefer that a corporation be managed to attend to the interests of other stakeholders, such as employees and local communities. A number of investment funds have sprung up to cater to these investors by promising to attempt to effectuate these preferences, and—as Commissioner Peirce recognizes—these funds are obligated by the securities laws to live up to their promises to their own investors.[112] Thus, in Commissioner Peirce's view, certain shareholders are legally obligated to attempt to redirect corporate behavior away from long-term wealth maximization, while the corporations in which they invest are, themselves, legally obligated to ignore these efforts. As she put it:

> An individual investor is certainly free to make trade-offs to risk lower returns for whatever other interest she may have. Nor is there a problem with certain funds pursuing stated social interest goals. Many such funds exist. Assuming they have disclosed their objectives as a part of their investment strategies they not only may, but *must* pursue the ESG guidelines they have set for themselves. Such funds have proliferated in recent years, and investors seeking to apply ESG standards to financial interests will find many options available to them. I am not taking issue with these arrangements as long as ESG investors do not force the companies in which they invest to take steps that harm the company's long-term value.[113]

It is a somewhat quixotic approach to corporate governance that would legally require shareholders and directors to be at odds. (One would think that if corporate directors must pursue long-term stockholder wealth maximization, any fund that advertises its attempts to pursue social goals might very well be misleading its own investors in violation of the securities laws.)

Recognizing the irony, many advocates for long-term wealth maximization simultaneously argue for a reduction in shareholder power.[114] Yet rather than lay bare the state-imposed nature of the long-term wealth maximization goal itself, they may justify the shift by claiming that shareholders—though desirous of long-term wealth

111. Peirce, *supra* note 101 ("Directors of corporations . . . have a fiduciary duty to their shareholders to maximize the value of the corporation.").

112. *Id.*

113. *Id.*

114. Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1764–66 (2006); *see* Rodrigues, *supra* note 28, at 1840–41; *see also* Bainbridge, *supra* note 11, at 557–58.

maximization as the ultimate goal—are too uninformed or unsophisticated to meaningfully contribute to corporate governance.[115] Either way, advocates for long-term wealth maximization must grapple with the apparent inconsistency of *Corwin* and similar strands in corporate law.

On the other hand, if shareholder preference is the overriding purpose, then we may wish to grant shareholders more power to direct corporate behavior.[116] This would not necessarily turn them into mini-managers; we can assume that directors have more skills and information to actually *effectuate* corporate purpose, whatever purpose that may be. But shareholders may be granted sufficient power to select from among appropriate goals, or otherwise indicate priorities, to which directors would then be bound to defer.

That leads us to the next difficult choice: avoiding shareholder exploitation. The risk of exploitation by directors is high when shareholder power is minimized,[117] and the risk of shareholders exploiting *other shareholders* is high when they are granted more power.[118] Director malfeasance in the form of self-aggrandizing behavior may be curtailed, however imperfectly, by the judiciary, but there is no clear guidance for courts addressing differences among shareholders themselves, other than to revert to the requirement that corporations be run for the single purpose of long-term wealth maximization.[119]

In other words, it is easy enough to imagine a rule whereby the preferences of a majority of the stock dictate corporate purpose, but a majority of voting power may not be equivalent to a majority of *shareholders*. For example, a single controlling shareholder may hold a majority of voting power and seek to redirect corporate purpose toward tunneling assets to one of its other investments. To shrug our shoulders and simply say "majority rules" would invite majority appropriation of minority wealth, with all of the market dysfunction and dislocation that would follow.[120]

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115. Bainbridge, *supra* note 11, at 557–58; Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 532 (2018).

116. Hart & Zingales, supra note 18, at 19–20 (recommending that shareholders guide director behavior via shareholder proposal); Libson, *supra* note 18 (manuscript at 2).

117. Bebchuk, *supra* note 72, at 850.

118. Strine, *supra* note 114, at 1764–65; Rodrigues, *supra* note 28, at 1829; *see also* Goshen & Squire, *supra* note 92, at 770.

119. Gordon Smith argues that this is the origin of the shareholder primacy norm: the need to resolve conflicts among shareholders themselves, however the hypothetical bargain methodology may have developed later. *See* Smith, *supra* note 92, at 315–20.

120. *See* Hansmann & Kraakman, *supra* note 16, at 460.

One possibility—following the logic of *Corwin* and its ilk—is to require that self-interested moves by a powerful shareholder be ratified by a majority of the disinterested remainder. Yet once we explicitly acknowledge the differing priorities of differently situated stockholders—many of whom are dependent on their other investments or sources of income—there is no mechanism for determining whose votes are the "disinterested" ones. Labor funds may resist a merger because they fear a loss of jobs; diversified investors may prefer one because they hold stock in both target and acquirer. Any of these shareholders might be deemed "interested" and thus incapable of offering an objective opinion.[121]

This is precisely the dilemma that Delaware courts have faced after handing more power to stockholders in *Corwin*.[122] In a recent challenge to the merger of Tesla and SolarCity, unhappy Tesla shareholders sued, alleging that Elon Musk's involvement with both firms incentivized Tesla to overpay for SolarCity stock.[123] When the defendants countered that any fiduciary breaches had been cleansed by the vote of Tesla shareholders in favor of the deal, the plaintiffs pointed out that many Tesla shareholders were also SolarCity shareholders, and thus would personally benefit from the overpayment.[124] As such, their votes in favor on the Tesla side were not disinterested and could not cleanse the directors' fiduciary breaches.[125] The court avoided ruling on the issue,[126] but it is only a matter of time before it arises again. Now that Delaware is relying more on shareholder votes to determine how a company is run, it has opened a Pandora's box in terms of investigating shareholders' *actual* motivations for their votes.

The same problem plagues the proposal from Iman Anabtawi and Lynn Stout that fiduciary obligations should attach to influential shareholders who are in a position to exercise control over specific corporate actions.[127] The difficulty is that where shareholder preferences

121. *See* Lipton, *supra* note 32, at 325 (discussing the impossibility of resolving these disputes in a principled fashion).

122. *See id.* at 321–25.

123. Second Amended Verified Class Action and Derivative Complaint at 4, *In re* Tesla Motors S'holder Litig., 2018 WL 1560293 (Del. Ch. Mar. 8, 2018) (No. 12711-VCS) [hereinafter Tesla Class Action].

124. *Id.*; *In re* Tesla Motors S'holder Litig., No. 12711-VCS, 2018 WL 1560293, at *10 n.183 (Del. Ch. Mar. 8, 2018).

125. Tesla Class Action, *supra* note 123, at 5.

126. *In re* Tesla Motors S'holder Litig., 2018 WL 1560293, at *10 n.183.

127. Iman Anabtawi & Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, 60 Stan. L. Rev. 1255 (2008).

diverge, it is not obvious what the content of this duty should be.[128] Moreover, many shareholders may exercise control; in addition to paradigmatic activist investors, even mutual fund companies often have considerable influence on corporate behavior and may coordinate with activists or at least offer their support.[129] A focus on activists, then, draws a distinction between purportedly influential and biased shareholders on the one hand, and purportedly uninfluential and unbiased ones on the other, in a manner that may not accurately reflect the shareholder base.

That said, the news is not all bad. In some instances, shareholder freedom to direct corporate purpose may result in bargains to achieve outcomes that benefit a wide range of constituencies. Take activist hedge funds. These entities earn profits by acquiring significant, but minority, stakes in target companies and persuading other shareholders to endorse their turnaround plans; in this respect, they are information and governance intermediaries who have the resources and incentives to conduct company-specific interventions that more diversified shareholders cannot.[130] At the same time, many activists have discovered that the mutual funds and pension funds on whose allyship they rely are interested in certain types of corporate governance reforms, and are resistant to some of the financial engineering techniques likely to harm non-shareholder constituencies like creditors and employees. Thus, the two groups have begun to work out

128. Additionally, Anabtawi and Stout propose that disinterested shareholders be called upon to ratify any self-interested acts by a fiduciary shareholder. *See* Anabtawi & Stout, *supra* note 127, at 1302. This poses the same problem as arose in *Tesla*: if all shareholders have personal interests that are recognized by courts, there is no way to identify a "disinterested" shareholder. In a related vein, it has been proposed that shareholders should lose their rights to vote entirely if they have hedged their economic interest in their shares. *See, e.g.*, Lawrence Summers, *Ending Quartley Reports Will Not Stop Corporate Short-Termism*, Fin. Times. (Sept. 3, 2018), https://www.ft.com/content/893fa038-af51-11e8-87e0-d84e0d934341 [https://perma.cc/5258-A42Z]; Martin & Partnoy, *supra* note 33, at 793–94. But hedging is a scale, not a bright line. *See* Frank Partnoy, *U.S. Hedge Fund Activism*, *in* Research Handbook on Shareholder Power 99, 106 (Jennifer Hill & Randall Thomas eds., 2015). This raises the question, do we eliminate the vote when there is a partial hedge? A hedge using similar companies? *See, e.g.*, Henry T.C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 Bus. Law. 1011, 1034 (2006); *see also* Hu & Black, *supra* note 33, at 889 (describing "the technical difficulties" associated with such a rule as "fearsome").

129. Sarah Krouse et al., *Meet the New Corporate Power Brokers: Passive Investors*, Wall St. J. (Oct. 25, 2016, 10:41 AM), https://www.wsj.com/articles/the-new-corporate-power-brokers-passive-investors-1477320101 [https://perma.cc/3SKC-5HT4]; Gilson & Gordon, *supra* note 23, at 896.

130. Gilson & Gordon, *supra* note 23, at 896.

compromises. One hedge fund is partnering with CalSTRS, a pension fund, to focus on minimizing some of the negative externalities associated with corporate conduct,[131] while others have pulled back on financial interventions and sought more governance reforms.[132] The new regime of shareholder power, coupled with the concentrated and institutionalized shareholder base, allows for the formation of coalitions that respect each other's priorities.

This is not to say we've reached a shareholder nirvana; logrolling may be a basis for compromise but also may neglect the interests of shareholders who are not deemed significant enough to bargain with,[133] and could result in significant real-world distortions of economic activity.[134] That said, in a world where institutions hold 70 to 80 percent of corporate equity and often represent ordinary workers saving for retirement—while others increasingly invest with a view toward advancing social or environmental agendas[135]—a system of bargaining among shareholders may in fact produce a reasonable set of outcomes.

V. Hypothetical Bargain, Redux

Perhaps because the reality of shareholders' divergent preferences is too cacophonous to manage, and the tension of openly allowing the state to impose a corporate purpose is too much for a system (ostensibly) predicated on private ordering to bear, some have sought to cut through the din by focusing on retail investors specifically rather

131. Anne Sheehan, *Letter from JANA Partners & CalSTRS to Apple, Inc.*, Harv. L. Sch. F. Corp. Governance & Fin. Reg. (Jan. 19, 2018), https://corpgov.law.harvard.edu/2018/01/19/joint-sh=areholder-letter-to-apple-inc/ [https://perma.cc/BFA4-BCEF].

132. Ian Appel et al., *Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism 3–4*, Rev. of Fin. Stud. (forthcoming), https://ssrn.com/abstract=2693145 (finding that activists propose more governance changes, and fewer policy changes such as increased payouts, for target companies with a large passive investor base); Cara Lombardo, *Elliot Management Goes on Charm Offensive*, Wall St. J. (Oct. 8, 2018, 5:30 AM), https://www.wsj.com/articles/elliott-management-goes-on-charm-offensive-1538991001 [https://perma.cc/8YZV-GM38]; Matt Levine, *Don't Steal the Bribe Money*, Bloomberg (Nov. 2, 2018, 11:09 AM), https://www.bloomberg.com/opinion/articles/2018-11-02/don-t-steal-the-bribe-money (describing a hedge fund that has adopted more cooperative, less confrontational tactics than its peers).

133. Anabtawi, *supra* note 29, at 595.

134. *See* Jeffrey N. Gordon, *Shareholder Initiative: A Social Choice and Game Theoretic Approach to Corporate Law*, 60 U. Cin. L. Rev. 347, 377 (1991) (explaining how logrolling distorts economic gains).

135. Silvia Merler, *The Rise of 'Ethical' Investing*, Bruegel (Oct. 29, 2018), http://bruegel.org/2018/10/the-rise-of-ethical-investing/ [https://perma.cc/75Z2-JFDQ].

than the institutional vehicles through which they invest. Because, as always, retail investors' preferences are impractical to assess—and, for the reasons given above, the hypothetical bargain is indeterminate—we are then left with competing depictions of what these preferences actually are. All, however, share the ultimate goal of achieving both state control and uniformity while maintaining the illusion of private ordering.[136]

For example, many retail investors invest through retirement vehicles regulated by the Employee Retirement Income Security Act ("ERISA"),[137] and so each new presidential administration generates a new interpretation of the fiduciary duties ERISA plan trustees owe their beneficiaries. The Bush and Trump administrations promulgated guidance advising that ERISA trustees should minimize their involvement in corporate governance, and avoid consideration of "social" goals such as the impact corporate activity may have on labor or the environment.[138] The Obama administration, by contrast, took a

136. *See* Greenwood, *supra* note 100, at 1066 (describing the retail investors who are exposed to the market through vehicles as the "fictional shareholders of the institutional investors").

137. Anita Krug, *The Other Securities Regulator: A Case Study in Regulatory Damage*, 92 Tul. L. Rev. 339 (2017).

138. 29 C.F.R. pt. 2509 (2016) ("[T]he responsible fiduciary shall consider only those factors that relate to the economic value of the plan's investment . . . . If the responsible fiduciary reasonably determines that the cost of voting (including the cost of research, if necessary, to determine how to vote) is likely to exceed the expected economic benefits of voting, . . . the fiduciary has an obligation to refrain from voting."); U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Field Assistance Bull. No. 2018-01, Interpretive Bulletins 2016-01 and 2015-01 (Apr. 23, 2018), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01 [https://perma.cc/QU9G-5RU3] ("Fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision . . . . [It is not] appropriate for an individual plan investor to routinely incur significant expenses to engage in direct negotiations with the board or management of publicly held companies with respect to which the plan is just one of many investors . . . [or to] routinely incur significant plan expenses to, for example, fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues relating to such companies."); *see also id.* at n.6 ("[I]n deciding whether and to what extent to make a particular fund available as a designated investment alternative, a fiduciary must ordinarily consider only factors relating to the interests of plan participants and beneficiaries in their retirement income. A decision to designate an investment alternative may not be influenced by non-economic factors unless the investment ultimately chosen for the plan, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments."). In a recent Executive Order, President Trump directed the Department of Labor to generate

more relaxed approach, granting ERISA plan administrators more discretion in the matter.[139]

Commenters have staked out the same territory. Relying on the alternative hypothetical bargain methodology described above, many have used either intuitions about the general population, or even public opinion polls, to argue that retail investors want corporations to behave with a certain measure of social responsibility; therefore, corporations themselves, as well as investment vehicles, should act to advance those interests.[140] Others have gone in the other direction: in order to curb shareholder involvement in corporate governance, they have argued that retail investors "simply want to earn the highest risk adjusted ***financial*** return possible" and, therefore, that mutual funds violate their fiduciary duties to their beneficiaries when they pursue social benefits or otherwise try to take too great a role in directing corporate behavior.[141] The current SEC Chair, Jay Clayton, apparently sympathizes with this latter group: in a recent speech, he announced his concern that "main street investors" may not be adequately represented by the mutual funds who vote on their behalf.[142] In so doing,

new guidance to ERISA plans on proxy voting, apparently to ensure a focus on wealth maximization. Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019). That order was unusually direct in its proclamation that "companies owe a fiduciary duty to their shareholders to strive to maximize shareholder return, consistent with the long-term growth of a company." *Id.*

139. 29 C.F.R. pt. 2509 (2016) (suggesting that the Bush guidance might be "misinterpreted" to require specific cost-benefit analyses with respect to ESG factors when, in fact, fiduciaries may "recogniz[e] the long term financial benefits that, although difficult to quantify, can result from thoughtful shareholder engagement when voting proxies . . . or otherwise exercising rights as shareholders"; acknowledging the growing interest in social factors and benefits of shareholder engagement).

140. Scott Hirst, *Social Responsibility Resolutions*, 43 J. Corp. L. 217, 230–31 (2018) (relying on general polling data); Elhauge, *supra* note 19, at 792–93; Weitzel & Rodgers, *supra* note 18, at 81–86.

141. George David Banks & Bernard Sharfman, *Standing Up for the Retail Investor*, Harv. L. Sch. F. Corp. Gov. Fin. Reg. (June 10, 2018) (emphasis in original). These sentiments were expressed by representatives of Main Street Investors, a corporate lobbying group. *See* Andrew Ross Sorkin, *What's Behind a Pitch for the Little-Guy Investor? Big Money Interests*, N.Y. Times (July 24, 2018), https://www.nytimes.com/2018/07/24/business/dealbook/main-street-investors-coalition.html [https://perma.cc/JA9C-VJKT]; *see also* Phil Gramm & Mike Solon, *Keep Politics out of the Boardroom*, Wall St. J. (July 18, 2018, 6:28 PM), https://www.wsj.com/articles/keep-politics-out-of-the-boardroom-1531952912 [https://perma.cc/E8GP-NAJR].

142. Jay Clayton, Chairman, Sec. Exch. Comm'n, Remarks at the Practicing Law Institute 49th Annual Institute on Securities Regulation: Governance and Transparency at the Commission and in Our Markets (Nov. 8, 2017),

he posed the question, "are voting decisions [by mutual funds] maximizing the funds' value for those shareholders?"[143]

Delaware judges have made a similar rhetorical move. Former Chief Justice Veasey has distinguished between institutional investors, who he characterizes as having short-term interests, and the true "underlying investors," whom he characterizes as having a long-term outlook, in order to justify minimizing shareholder power to avoid undue (short-sighted) risk taking.[144] Current Chief Justice Strine has done the same,[145] recommending that institutional shareholders recognize and accommodate the (presumed) interest of their retail beneficiaries not only in corporate long-term wealth maximization but also in ensuring that the economy generates stable jobs with safe working conditions, while simultaneously protecting and preserving the environment.[146]

The implication, then, is that as shareholders gain more power within the corporate form, new regulation attempts will focus more on the institutional shareholders themselves, under the guise of aligning their behavior more closely with the (imagined) preferences of their own beneficiaries.[147] By controlling the shareholders, a single corporate

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https://www.sec.gov/news/speech/speech-clayton-2017-11-08 [https://perma.cc/G5J9-7ACE].

143. *Id.* In this, Chair Clayton has support in the structure of mutual fund regulation itself. When mandating that mutual funds disclose their proxy voting behavior, the SEC explained that doing so would enable retail investors to "determine . . . whether their existing fund managers are adequately maximizing the value of their shares." *See* Disclosure of Proxy Voting, *supra* note 27.

144. E. Norman Veasey, *The Stockholder Franchise Is Not a Myth: A Response to Professor Bebchuk*, 93 Va. L. Rev. 811, 815–16 (2007).

145. Strine, *supra* note 114, at 1764.

146. Leo E. Strine, Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in the United States*, 71 Bus. Law. 1081, 1082, 1094–95 (2016); Leo E. Strine, *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending* 45–49 (Univ. Pa. Law Sch. Inst. Law & Econ., Research Paper No. 19-03, Dec. 20, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304611 [https://perma.cc/42HF-HSUA].

147. Chief Justice Strine has detailed a number of specific policy proposals on this point. *See* Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 Bus. Law. 1 (2010). Of course, Chief Justice Strine's intuitions may be mistaken. For example, though Chief Justice Strine has assumed that retail investors would prefer that "big tobacco" and various environmentally unfriendly industries be corralled by their institutional investment vehicles, *see* Strine, *Fiduciary Blind Spot*, *supra* note 146 at

purpose can once again be written into law, and the possibility of divergent preferences can again be safely put aside.[148] So the argument ends where it began, using the silent retail shareholder as a blank canvas onto which an ideal—and manageable—corporate purpose can be projected.

Conclusion

Vice Chancellor Laster's *PLX* decision can be viewed as a natural extension of an endless corporate law dialectic. Left without a satisfactory mechanism for resolving the inevitable differences among shareholders, there is a continuing impulse to impute to them a uniform set of goals. And when institutions' real-life preferences are too obtrusive to ignore entirely, they can be discounted by appealing to the purported preferences of the investors whom they represent. Thus, we might imagine that the PLX "shareholders" from whose interests Singer and Potomac diverged were not the voting shareholders whose desires were apparent but the "true" shareholders who stood behind them, quiescent and malleable.

The hypothesized preferences of retail investors may restore the corporate governance debate to more familiar footing, but they may also be a temporary solution. Partially, this is because so long as the institutions are themselves diversified, there will at least be an argument that even a wealth-maximizing focus at the fund level will not be equivalent to a wealth-maximizing focus at the corporate level.[149] But more generally, it is because retail shareholders may not remain quiet for much longer. Several commenters have argued that new technologies may be harnessed to amplify retail investors' voices, typically by allowing them to preprogram a set of voting instructions or general preferences into an electronic platform that would cast their

45–49, he makes no allowance for the possibility that many retail investors may be employed in those very industries. *Id.*

148. Among other things, the SEC is currently considering whether to impose greater restrictions on the activities of proxy advisors, i.e., those entities that guide institutions on how to vote their shares. *See* Gabriel T. Rubin, *Companies Call for Oversight of Firms That Advise Shareholders*, Wall St. J., Mar. 19, 2019, https://www.wsj.com/articles/companies-target-firms-that-advise-shareholders-11552987800 [https://perma.cc/MQB9-J26X]. Proxy advisors make it easier and more cost-efficient for institutions to take a role in corporate governance. *See* Andrew F. Tuch, *Why Do Proxy Advisors Wield So Much Influence? Insights from U.S.-U.K. Comparative Analysis*, B.U. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=366342 [https://perma.cc/H6VN-5T7B].

149. Condon, *supra* note 93; Hawley & Lukomnik, *supra* note 93, at 450.

proxy ballots automatically.[150] These platforms may also allow retail investors to direct the votes of shares held in mutual funds or similar vehicles.[151] A new startup, Say, has even begun to aggregate the questions of retail investors so that they can be posed directly to corporate management during earnings conference calls.[152]

If and when these ideas come to fruition, corporate law will have to confront even more cacophonous voices. It remains to be seen whether a new type of underlying investor will then be identified to represent the "true" preferences of the equity holders or whether the façade of private ordering will finally crack open to reveal the state control beneath.

150. Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 Minn. L. Rev. 11, 37 (2017); Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 Del. J. Corp. L. 55, 99 (2016).

151. Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. Corp. L. 843, 855 (2009); George S. Geis, *Traceable Shares and Corporate Law*, 113 Nw. U. L. Rev. 227, 270 n.243 (2018); John C. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 Bus. Law. 1195, 1197 (1997); *see also* Sean J. Griffith, *Opt In Stewardship: Toward a Default Rule for Mutual Fund Voting*, Tex. L. Rev. (forthcoming) (proposing that retail investors preregister their preferences on various topics and for their proportionate share of mutual fund votes to be cast accordingly); Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, Maryland L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365222 [https://perma.cc/BG4B-26LW] (same).

152. Andrea Vittorio, *Tesla's Once 'Boring' Earnings Q&A Opens up to Small Holders*, Bloomberg L. (Jan. 30, 2019, 7:11 PM), https://news.bloomberglaw.com/corporate-law/teslas-once-boring-earnings-q-a-opens-up-to-small-holders-1 [https://perma.cc/BYN7-742K]; *see also* Andrea Vittorio, *Shareholder Apps Aim to Replace Companies' Paper Ballots,* Bloomberg L. (Apr. 29, 2019, 4:31 AM), https://news.bloomberglaw.com/corporate-law/shareholder-apps-aim-to-replace-companies-paper-ballots [https://perma.cc/9E4X-UK9V] (reporting on apps to facilitate retail shareholder voting).