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The Legitimation of Shareholder Primacy

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Abstract

We are living in a particularly polarized era, and corporate governance is no exception. With controversies raging over "environmental, social, governance" (ESG) investing, diversity, equity, and inclusion initiatives, climate change as an investment concern, and even Elon Musk's pay package at Tesla, it seems as though corporate governance has never been so starkly divided along partisan lines. The divisions have threatened to spill over to Delaware, the preferred jurisdiction for incorporation in the United States. Several high profile cases-including those involving Elon Musk-have called Delaware's neutrality into question. Commenters have argued that Delaware's newly-politicized approach threatens to splinter the corporate governance universe, driving corporations to other states that are more reliable (or that follow different corporations' preferred politics). This Article argues that, in some ways, the critics are correct: Delaware law is on a path toward politicization. But it is not because of any particular bias of its judges or its law; to the contrary, the pressures toward politicization are inherent in any system that purports to guide how vast aggregations of capital will be deployed. What is unique about the current moment is that the trends toward politicization result from tensions inherent in shareholder primacy. Shareholder primacy was conceived, in large part, as a compromise to keep politics out of business management; what the modern controversies reveal is the futility of that effort.

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This Article argues that, in some ways, the critics are correct: Delaware law is on a path toward politicization. But it is not because of any particular bias of its judges or its law; to the contrary, the pressures toward politicization are inherent in any system that purports to guide how vast aggregations of capital will be deployed. What is unique about the current moment is that the trends toward politicization result from tensions inherent in shareholder primacy. Shareholder primacy was conceived, in large part, as a compromise to keep politics out of business management; what the modern controversies reveal is the futility of that effort.

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* Professor of Law and Laurence W. DeMuth Chair, University of Colorado Law School. I am grateful for the comments of Matteo Gatti, Usha Rodrigues, the participants in the Michigan Law and Economics Workshop, the Tulane Corporate and Securities Roundtable, the Seattle University Faculty Development Workshop, the National Business Law Scholars Conference, the Tulane Faculty Workshop, the UCLA Business Law Workshop, the NYU Law & Economics Workshop, and the DePaul Faculty Workshop, as well as for the research assistance of Zach Stevenson.

INTRODUCTION

We are living in a particularly polarized era, and corporate governance is no exception. Though corporate law has always been deployed to promote various preferred policies,[1] it has rarely been as blatantly partisan as it is today. Specifically, with controversies raging over "environmental, social, governance," (ESG) investing,[2] diversity, equity, and inclusion initiatives,[3] climate change as an investment concern,[4] and even Elon Musk's takeover of Twitter[5] and his pay package at Tesla,[6] it seems as though corporate governance has never been so starkly divided along partisan lines.[7]

The divisions have spilled over to Delaware, the preferred jurisdiction for incorporation in the United States. For over a century, Delaware has dominated the market for corporate charters, in large part—it is argued—because of its commitment to nonpartisanship in the development of its law.[8] Nonetheless, several high profile cases—including those involving Elon Musk—have called Delaware's neutrality into question.[9] Commenters have

1. *E.g.*, William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008); Kent Greenfield, *Proposition: Saving the World With Corporate Law*, 57 EMORY L.J 947 (2008); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1197 (2011).

2. Saijel Kishan, *What Is ESG Investing and Why Is It Under Fire?*, BLOOMBERG (Apr. 22, 2024), https://www.bloomberg.com/news/articles/2024-04-22/what-is-esg-investing-what-are-the-risks-and-why-is-it-facing-a-backlash (on file with the *Journal of Corporation Law*).

3. Joseph Pisani & Chip Cutter, *The Activist Pushing Companies to Ditch Their Diversity Policies*, WALL ST. J. (Aug. 3, 2024), https://www.wsj.com/business/the-activist-pushing-companies-to-ditch-their-diversity-policies-aeb82873 [https://perma.cc/X9CA-LT4A].

4. David Gelles, *How Republicans Are 'Weaponizing' Public Office Against Climate Action*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html [https://perma.cc/EWS8-GNUL].

5. Ann M. Lipton, *Every Billionaire Is a Policy Failure*, 18 VA. L. & BUS. REV. 327, 343–45 (2024).

6. Anan Ashraf, *Investor Naval Ravikant Threatens to Sell All Tesla Holdings if CEO Musk's Pay Plan Is Rejected but Says He'll Buy More if Approved*, BENZINGA (June 10, 2024), https://www.benzinga.com/markets/equities/24/06/39246807/investor-naval-ravikant-threatens-to-sell-all-tesla-holdings-if-ceo-musks-pay-plan-is-rejected-b [https://perma.cc/5GCQ-73QU].

7. Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543, 543 (2020).

8. *See e.g.*, Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177; Brian D. Feinstein & Daniel J. Hemel, *The Market Value of Partisan Balance*, 119 NW. U. L. REV. 1201 (2025).

9. *See, e.g.*, William P. Barr & Jonathan Berry, *Delaware Is Trying Hard to Drive Away Corporations*, WALL ST. J. (Nov. 24, 2023), https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a [https://perma.cc/USU7-27GF]; Robert Anderson (@ProfRobAnderson), TWITTER (Jan. 31, 2024) https://x.com/ProfRobAnderson/status/1752703982169104656 [https://perma.cc/U84Z-RER3] (arguing that "the Chancellor's seeming feud with Musk" has injected "ideological 'culture wars'" into Delaware's law); Robert Anderson (@ProfRobAnderson), TWITTER (June 20, 2024), https://x.com/ProfRobAnderson/status/1803893416360554648 [https://perma.cc/NG4V-AFXH] ("One thing I think all corporate law experts should agree on: Delaware corporate law becoming politicized is not good for Delaware's chartering business."); Erica Grieder, *5 Reasons Why Elon Musk Might Want to Incorporate Tesla in Texas*, HOUS. CHRON. (Feb. 1, 2024), https://www.houstonchronicle.com/business/article/tesla-musk-incorporation-18641875.php [https://perma.cc/4BWV-8PQN]; Lauren Hirsch, *Delaware Law Has Entered the Culture War*, N.Y. TIMES: DEALBOOK (Feb. 8, 2025), https://www.nytimes.com/2025/02/08/business/dealbook/delaware-law-has-entered-the-culture-war.html [https://perma.cc/6R4G-9G44]; Liz Hoffman, *MAGA Offers Corporations Cover to Flee Delaware*, SEMAFOR (Mar. 5, 2025), https://www.semafor.com/article/03/05/2025/maga-offers-corporations-cover-to-flee-delaware [https://perma.cc/DQV3-5MQU].

warned that Delaware's newly politicized approach threatens to splinter the corporate governance universe, driving corporations to other states that are more reliable (or that follow different corporations' preferred politics).[10] Acting in something of a panic, Delaware's legislature responded by tearing out critical features of Delaware law root and branch, though the threatened decampments continue.[11]

This Article argues that, in some ways, the critics are correct: Delaware law has been on a path toward politicization. But it is not because of any particular bias of its judges or its law; to the contrary, the pressures toward politicization are inherent in any system that purports to guide how vast aggregations of capital will be deployed. What is unique about the current moment is that the trends toward politicization result from tensions inherent in shareholder primacy—which is a doctrine that was developed and championed to *avoid* corporate governance politicization in the first place. Shareholder primacy was conceived, in large part, as a compromise to keep politics *out* of business management; what today's controversies reveal is the futility of that effort.

Ever since the rise of the great corporations in the early 20th century, the question of corporate purpose has bedeviled corporate theory, namely, what goals corporate managers should aspire to attain.[12] Our legal system facilitates the concentration of resources within state-chartered entities, whose managers then are permitted to wield great power over our economic landscape, our political system, and our day to day lives as consumers and employees and citizens. For that kind of power to be accepted as legitimate—and for businesses to retain their social license to operate[13]—there must be the perception that his power is channeled in a prosocial direction, which is to say, with due regard for the multiple constituencies—shareholders, creditors, employees, consumers, and communities—who may be affected by corporate behavior.

In the period following World War II, the legitimating narrative that justified the exercise of managerial power was a faith in the skill, expertise, and character of the men who

10. Anthony Rickey, *Politics as a New Differentiator Between American Business Courts: A View on the Debate Between Former Attorney General Barr and Vice Chancellor Laster*, BUS. L. PROF. BLOG (Dec. 21, 2023), https://www.businesslawprofessors.com/2023/12/guest-post-politics-as-a-new-differentiator-between-american-business-courts-a-view-on-the-debate-be/ [https://perma.cc/YD5S-ZPDB].

11. *See* Dillard's, Inc., Definitive Proxy Statement (Schedule 14A) (July 29, 2025) (describing a notice of special meeting of stockholders to discuss reincorporation from Delaware to Texas); Jai Ramaswamy, Andy Hill & Kevin McKinley, *We're Leaving Delaware, and We Think You Should Consider Leaving Too*, ANDREESSEN HOROWITZ (July 9, 2025), https://a16z.com/were-leaving-delaware-and-we-think-you-should-consider-leaving-too/ [https://perma.cc/R5F9-32YD]; *Reincorporation Considerations for Late-Stage Private and Pre-IPO Companies*, COOLEY (June 20, 2025), https://capx.cooley.com/2025/06/20/reincorporation-considerations-for-late-stage-private-and-pre-ipo-companies/ [https://perma.cc/6DDV-UAWG].

12. C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 77–79 (2002); *see also* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049–50 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1152–53 (1932); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367–68 (1932).

13. It has frequently been recognized that the power wielded by corporate managers must be recognized as legitimate for businesses to function effectively. *See, e.g.*, Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785 (2021); Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159 (2007); Patrick Jahnke, Asset Manager Stewardship and the Tension Between Fiduciary Duty and Social License (Jan. 28, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3307172.

held these positions.[14] At the time, it was expected that business leaders would manage their companies for the benefit of the community at large, as living proof of capitalism's superiority to communism in terms of providing for the general welfare.[15] That vision faltered, however, with the business scandals of the 1960s and 1970s.[16] As belief in managers' superior judgment declined, the doctrine of shareholder primacy—the principle that corporate governance should orient around encouraging managers to maximize profits for the equity holders—became the preferred source of constraint on the exercise of managerial power.[17]

This does not mean a shareholder primacist system has no concern for non-shareholder constituencies; rather, under shareholder primacy, these constituencies are believed to be better protected through contracts (markets) and external regulation, rather than through the internal levers of corporate governance.[18] The expectation is that market mechanisms, as well as regulatory penalties, will make it expensive for corporations to exploit non-shareholder constituencies. If corporations pollute their surroundings, or make unsafe products, or abuse employees, they will pay a price, via governmental sanction, consumer aversion, and employee attrition. Therefore, simply as a result of natural profit seeking, corporations will engage in prosocial behavior. Markets, coupled with governmental regulation, will sufficiently align the interests of shareholders and non-shareholders to ensure that corporations responsive to shareholder interests will serve society as a whole.[19]

14. *See* Dalia T. Mitchell, *Proceduralism: Delaware's Legacy*, 2 U. CHI. BUS. L. REV. 333, 334–35 (2023); James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 446–47 (2022).

15. Mitchell, *supra* note 14, at 345–46; Bratton & Wachter, *supra* note 1, at 113–14; 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, 1512 (2007); *see also* A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 582–83 (N.J. 1953).

16. Mitchell, *supra* note 14, at 349–51; Gordon, *supra* note 15, at 1514–15.

17. Mitchell, *supra* note 14, at 369; *see also* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/QXJ2-VQR7]. I have previously explained that "shareholder primacy" can also be defined to mean that shareholders select corporate goals other than wealth maximization. *See* Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RSRV. L. REV. 863, 867–70 (2019). For the purposes of this Article, however, I use the phrase in its traditional sense, to mean that corporate managers are obligated to maximize value for the equity.

18. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001).

19. *Id.* at 441; Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1269–71 (1982); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 37–39 (1991); Greenfield, *supra* note 1, at 966–67; Marcel Kahan & Edward B. Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANALYSIS 108, 110 (2023). The argument goes back at least as far as Adam Smith, who claimed that "By pursuing his own interest [an individual] frequently promotes that of the society more effectually than when he really intends to promote it." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell, A.S. Skinner & W.B. Todd eds., 1976) (originally published in 1776). To be sure, part of our system relies on enforcement against individual actors within corporations who incur penalties personally for lawbreaking. Shareholders do not suffer when specific officers are jailed or fined; instead, the assumption is that those individuals will be personally deterred regardless of the benefits to the firm. However, because of the difficulty of identifying guilty individuals, our system threatens penalties against the corporation itself unless the entity takes steps to detect and prevent wrongdoing. *See generally* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

In large part, this system has become the default for lack of a viable alternative.[20] Shareholder primacy, it is contended, offers a simple, clear metric for assessing managerial performance: shareholder returns. Any other system would grant managers nearly unchecked discretion to balance the interests of multiple competing constituencies with no comparably determinate goal. The result would be to enable America's CEOs to deploy the vast resources of the corporation to serve their own notion of the social good, a task for which they have neither expertise nor democratic legitimacy.[21] Shareholder primacy, by contrast, does not rely on the moral instincts of America's business elite. Contested political choices about how corporate surplus should be distributed are instead left to the democratic process and the invisible hand of a market that reflects popular sentiment. Shareholder primacy, in other words, is championed as the better system because it is the only one that offers a meaningful, societally determined constraint on managerial behavior.[22]

Slotting neatly into this system is the state of Delaware. Corporate managers can select any jurisdiction in which to incorporate, and that jurisdiction's law will control its internal governance.[23] For over a century, Delaware has been the preferred jurisdiction for incorporators.[24] As a result, Delaware—home to only 0.3% of America's population—exerts outsized influence over the country's corporate law and, consequently, the principles that guide the allocation of billions or trillions of dollars of capital. Delaware's legitimacy to serve this inescapably political function rests, ironically, on its fierce commitment to keeping political concerns out of its law.[25] Among other things, it has enshrined party balance into its courts via its state constitution, and has adopted special procedures to keep amendments to its business code in the hands of technocrats rather than politicians.[26] Delaware is able to position itself as apolitical because shareholder primacy itself is treated as apolitical; just as shareholder primacy is supposed to take corporations out of the business of making social policy, enforcing shareholder primacy keeps Delaware out of the business of making social policy, which allows Delaware to stay above the partisan fray.

20. Hansmann & Kraakman, *supra* note 18, at 449.

21. Berle. Jr., *supra* note 12, at 1367; Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model?*, 77 BUS. LAW. 773, 798–99 (2022); STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 115–17 (2023).

22. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 128 (2020); *See* Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37, 43–44 (2022); Robert P. Bartlett III & Ryan Bubb, *Corporate Social Responsibility Through Shareholder Governance*, 97 S. CAL. L. REV. 417, 421 (2024).

23. Jens Dammann, *A New Approach to Corporate Choice of Law*, 38 VAND. J. TRANSNAT'L L. 51, 53 (2005).

24. Eldar & Rauterberg, *supra* note 8, at 181.

25. McRitchie v. Zuckerberg, 315 A.3d 518, 573 (Del. Ch. 2024) (explaining that "[r]eformers who look to Delaware law to address externalities must acknowledge the larger political environment . . . . Among the fifty states, Delaware has one of the smaller human populations . . . . Delaware must identify niches where it has a comparative advantage—like corporate law—so that entrepreneurs want to use its corporations, legal practitioners want to choose its law, and parties want to litigate in its courts. Delaware has traditionally filled the corporate law niche by taking a distinctively nonpartisan, technocratic approach . . . . Depending on an observer's political leanings, there are any number of salient issues that Delaware might use its corporate law to address. But to the extent the General Assembly sought to intervene on any of them, entrepreneurs who did not like the answer could incorporate their firms elsewhere.").

26. Eldar & Rauterberg, *supra* note 8, at 213.

Especially in recent years, Delaware judges have aggressively communicated the shareholder-centric nature of its law. Delaware courts have explicitly referred to nonshareholder constituencies as mere "instrument[s]" for the achievement of stockholder wealth,[27] and declared that "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[28] Decontextualized, the elevation of shareholder wealth maximization above all other values seems almost sociopathic; in fact, it is best read as something like a cry for help, to be provided in the form of generalized acknowledgment that Delaware's corporate law cannot be relied upon to exercise social control over corporations, and in fact, regulation among those lines must occur externally.[29]

That said, for shareholder primacy to serve its legitimating function, it must not only channel corporate and managerial behavior in a prosocial direction, but it must be *seen* to do so. The corporate governance system must *visibly* operate along two dimensions: first, procedurally, it must be seen to constrain corporate managers, and second, substantively, these constraints must be perceived to produce prosocial outcomes.[30] Corporate governance must, in other words, perform prosociality—which of course requires that the social concerns that shareholder primacy excised now be imported back into the system. The paradox is one that has come under increasing pressure, culminating in perhaps the gravest threat to Delaware's dominance in the market for corporate charters decades.

I. THE TESLA TRAP

As stated above, the first purported virtue of shareholder primacy is that it meaningfully constrains the behavior of corporate managers. These constraints are theoretically enforced through a variety of procedures around which regulators, courts, and commenters have coalesced as representing "good" corporate governance. They include a corporate board that is majority independent,[31] with key committees that are entirely independent,[32]

27. *In re* Toys "R" Us, Inc., S'holder Litig., 877 A.2d 975, 999 (Del. Ch. 2005) ("[S]tockholders are the only corporate constituency whose best interests are an end, rather than an instrument, of the corporate form."); *In re* Rural Metro Corp., S'holders Litig., 88 A.3d 54, 80 (Del. Ch. 2014) ("Stockholders' best interest must always, within legal limits, be the end. Other [corporate] constituencies may be considered only instrumentally to advance that end.") (citations omitted).

28. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

29. Former Chief Justice of the Delaware Supreme Court Leo Strine has been fairly explicit on this point. He has argued that "plain acknowledgment that corporate managers' primary duty is to seek as much profit as can be achieved within the limits of the law," also requires acknowledgment of the "importance of the law in channeling corporate behavior." Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 152 (2012),

30. *Cf.* Coglianese, *supra* note 13, at 161 (arguing that legitimacy comes from two places: procedural and substantive).

31. Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 377 (2016); ISS, PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 9 (2025), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/V43F-QB3T].

32. 15 U.S.C. § 78j-1(m)(3) (2010); 17 C.F.R. § 240.10C-1(b) (2012); N.Y. STOCK EXCH., LISTED COMPANY MANUAL §303A.04 (2024) [hereinafter N.Y. STOCK EXCH.]; GLASS LEWIS, 2024 BENCHMARK POLICY GUIDELINES 15 (2023), https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf [https://perma.cc/5FY2-2L8B].

and procedures to facilitate responsiveness to shareholders, such as a single-class board,[33] access to the corporate proxy,[34] and commitments to modesty when fending off hostile acquirers (such as poison pills that require shareholder approval after some period of time).[35] "Good" boards might separate the chair and CEO roles,[36] adopt ethics codes,[37] oversee and minimize related party transactions,[38] and avoid purchasing non-audit services from firms that conduct financial audits.[39]

Many of these structures have been imposed on corporations via the federal securities laws, either as a requirement for all public companies or as a requirement for all companies listed on registered stock exchanges.[40] Still others have been advocated by shareholders, and adopted by companies more or less voluntarily, as a result of investor pressure.[41] Under state (Delaware) corporate law, deployment of these devices is not mandatory, but is strongly encouraged, via favorable judicial treatment in the event of a stockholder challenge to board action. For example, the fact that an independent rather than inside board employed a takeover defense will contribute to a finding that the defense was reasonable;[42] similarly, independent board approval, or disinterested shareholder approval, will cleanse most board action from the specter of self-dealing or disloyalty.[43] Even when ideal procedures are not used—and the court is forced to evaluate the substantive fairness of a decision—the procedural path by which it was reached contributes to the court's analysis of its correctness.[44] In other words, one way or another, the procedures deployed in corporate decisionmaking heavily influence a court's evaluation of the merits of that decision.[45]

At the same time, there is a longstanding debate as to whether these "good" governance provisions do, in fact, protect shareholder interests.[46] There are some obvious reasons

33. *See generally* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 783 (2009) (evaluating 24 provisions to determine which corporate governance arrangements "play a key role in the link between corporate governance and firm value"); ISS, *supra* note 31, at 13–14.

34. ISS, *supra* note 31, at 23.

35. *Id.* at 14.

36. Yaron Nili, *Successor CEOs*, 99 B.U. L. REV. 787, 833 (2019).

37. Dan Byrne, *What Is a Code of Conduct?*, CORP. GOVERNANCE INST., https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-a-board-code-of-conduct/ [https://perma.cc/49QB-X78Q].

38. N.Y. STOCK EXCH., *supra* note 32, § 314.00.

39. John C. Coffee, Jr., *Understanding Enron: 'It's About the Gatekeepers, Stupid,'* 57 BUS. LAW. 1403, 1410–12 (2002).

40. 15 U.S.C. § 78j-1 (2010); 17 C.F.R. § 240.10C-1 (2012); N.Y. STOCK EXCH., *supra* note 32, §303A.04; 17 C.F.R. §229.406 (2018); 15 U.S.C. § 78n-2 (2010).

41. Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353, 1363 (2023).

42. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985).

43. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 306 (Del. 2015).

44. William Penn P'ship v. Saliba, 13 A.3d 749, 755–56 (Del. 2011); *see also* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 30–31 (Del. 2017) (valuation for appraisal purposes depends in part on the integrity of the process by which the deal was negotiated).

45. Mitchell, *supra* note 14, at 387–90.

46. *See e.g.*, Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1358–59 (2013); Pargendler, *supra* note 31, at 395–97; *see also* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779 (2011); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Yakov Amihud, Markus Schmid & Steven Davidoff Solomon, *Settling the Staggered Board Debate*, 166 U. PA. L. REV. 1475 (2018); K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*,

why they would fail: independent directors, for example, are frequently uninformed about corporate operations,[47] and are likely to feel generally beholden to others in their circle even without identifiable personal ties.[48] And, as it turns out, the evidence that these measures contribute to higher shareholder returns is sufficiently ambiguous that some have argued that they are not intended to benefit shareholders at all. Instead, these provisions are intended to legitimate the exercise of corporate power in the eyes of society as a whole.[49] When firms adopt a certain level of formality and transparency with respect to

126 J. FIN. ECON. 422 (2017); Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855 (2014); Zohar Goshen & Doron Levit, *Irrelevance of Governance Structure* (Eur. Corp. Governance Inst., Fin. Working Paper No. 606/2019, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3340912; Claire Hill & Yaron Nili, *Independence Reconceived*, 2023 COLUM. BUS. L. REV. 589; Jens Frankenreiter et al., *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1 (2021); Emiliano Catan & Marcel Kahan, *Corporate Governance and Firm Value* (Eur. Corp. Governance Inst., L. Working Paper No. 824/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5127297; Robert Bartlett & Frank Partnoy, *The Misuse of Tobin's q*, 73 VAND. L. REV. 353 (2020); David F. Larcker, Allan L. McCall & Gaizka Ormazabal, *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J.L. & ECON. 173 (2015); Caleb N. Griffin, *Mass Corporate Governance*, 103 WASH. U. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5227132; James D. Cox, Tomas J. Mondino & Randall S. Thomas, *Understanding the (Ir)relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. 503 (2019); Jing Lin et al., Why Majority-of-the-Minority Voting Rule Doesn't Improve the Governance of Related Party Transactions? (Apr. 23, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5226909; Yifat Aran, Brian Broughman & Elizabeth Pollman, *CEO Turnover at Dual-Class Firms* (Eur. Corp. Governance Inst., L. Working Paper No. 839/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5063277; Fernán Restrepo, *Judicial Deference, Procedural Protections, and Deal Outcomes in Freezeout Transactions: Evidence from the Effect of* MFW, 6 J.L. FIN. & ACCT. 353, 385 (2021) ("[T]here were no significant changes in deal outcomes among the treated observations after *MFW*. These results therefore provide preliminary evidence that minority approval does not seem to be meaningfully associated with deal premiums, abnormal returns or frustration rates."); Dan R. Dalton & Catherine M. Dalton, *Integration of Micro and Macro Studies in Governance Research: CEO Duality, Board Composition, and Financial Performance*, 37 J. MGMT. 404 (2011). In a recent paper, Benjamin Bennett, Rene M. Stulz and Zexi Wang argue that when Nevada amended its corporate law in 2017 to "weaken" shareholder primacy, the governance of Nevada-incorporated firms deteriorated along a number of dimensions, such as CEO pay, board entrenchment, board independence, and cost of debt. Benjamin Bennett, René M. Stulz & Zexi Wang, *What Are the Costs of Weakening Shareholder Primacy? Evidence from a U.S. Quasi-Natural Experiment* (Eur. Corp. Governance Inst., Fin. Working Paper No. 1064/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5252884. The precise implications of this study are difficult to determine, however, because the 2017 amendments were mostly non-substantive wording changes to the Nevada legislative code. *See, e.g.*, Exhibits to Nevada S.B. 203 (describing the bill as offering "clarifying" amendments), https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/5077/Exhibits [https://perma.cc/WD2G-FLRU]. Years prior, Nevada had already provided that directors are permitted to consider a variety of stakeholders when making decisions on behalf of the firm, and that directors would only be liable for monetary damages for "intentional misconduct, fraud or a knowing violation of law"; the 2017 amendments did not seem to change much beyond emphasizing to courts that the statute should be read to mean what it says. The Bennett, Stultz & Wang study also, surprisingly, found that fewer federal securities actions were filed against Nevada firms following the 2017 amendments; the causal mechanism, however, is left unclear, as state law limitations on liability do not affect the standards for liability under federal law. Bennett, Stulz & Wang, *supra* note 46, at 4.

47. Usha Rodrigues, *A Conflict Primacy Model of the Public Board*, 2013 U. ILL. L. REV. 1051, 1060–01.

48. Hill & Nili, *supra* note 46, at 641; Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 867–68 (2004); Nicola Faith Sharpe, *Process Over Structure: An Organizational Behavior Approach to Improving Corporate Boards*, 85 S. CAL. L. REV. 261, 275–76 (2012).

49. ROBERT CHARLES CLARK, CORPORATE LAW 95 (1986) (shareholder voting is "a mere ceremony designed to give a veneer of legitimacy to managerial power"); Mitchell, *supra* note 14, at 354, 368; Velikonja, *supra* note 46, at 893–94; Donald C. Langevoort & Robert B. Thompson, '*Publicness' in Contemporary*

their decisionmaking, the control of a staggering aggregation of financial and human resources, concentrated in the hands of a small number of unelected private citizens, becomes acceptable in the eyes of the general public.[50] The "good governance" requirements civilize firms by cloaking their decisionmaking with a veneer of professionalism.[51] This would explain, for example, why many of the more voluntary "good" governance provisions seem only to be adopted at the largest companies.[52] If they increase shareholder value, one would expect more companies to select them; if they are intended to legitimate corporate power, however, they would only be needed at the most powerful and visible firms.[53]

These two conceptions of "good" corporate governance—substantively for investors, or as a performance for society as a whole—are not entirely at odds. Even if the presence of independent directors, for example, does not directly improve operational functioning, it may still maximize shareholder wealth systemically, by contributing to corporations' social license to operate and thereby staving off more robust regulation of corporate behavior.[54] Still, these measures are adopted—ostensibly—because they benefit shareholders by controlling managerial agency costs;[55] if they do not, if their real purpose is to cleanse

Securities Regulation After the JOBS Act, 101 GEO. L.J. 337, 340 (2013); Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817, 1831 (2007).

50. Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2034 (2014) (stating that "we need to believe that in even—and especially—the largest corporations, there are individual shareholders who collectively own and control those corporations. Because shareholders exercise control over managers, perhaps mediated through markets, it is acceptable that a small group of managers control huge concentrations of capital for which they are paid princely sums."); Langevoort & Thompson, *supra* note 49, at 340.

51. An additional data point suggesting that these standards add little value *for shareholders* comes from the fact that scholars have not been able to identify any shareholder benefit arising from incorporation in Delaware versus incorporation in any other state. *See, e.g.*, Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049 (2015); Lucian A. Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383 (2003); Robert J. Rhee, *The Irrelevance of Delaware Corporate Law*, 48 J. CORP. L. 295 (2023). To be fair, that is a messy signal; states' laws trend in similar directions and so many states look to Delaware that there may not be much variation for comparison. Still, the lack of detectable differences is suggestive.

52. Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. 782, 786–89 (2022).

53. I am perhaps overstating. Just because some idiosyncratic companies may benefit from more individualized corporate governance standards does not mean the standards are merely cosmetic across the board. If they add value at a critical mass of firms, it may be simplest and cheapest to require them at all firms, rather than have diversified shareholders incur the costs of investigating the precise standards that would suit each firm individually. *Cf.* Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1798–1800 (2020); *see also* Gordon, *supra* note 15, at 1469 (arguing that the benefits of independent boards operate systemically, by requiring companies to either adopt the practice or substantively improve their businesses to compete). That said, shareholders have tolerated such extraordinary variance in corporate governance arrangements in recent years that it no longer seems plausible that they find value in a stable, familiar form. *See, e.g.*, Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017); Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155 (2019); Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REG. 1124 (2021); Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. ON REG. 1343 (2022); Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057 (2019).

54. Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 802 (2001) (arguing that one board function is to "assist the company in claiming and protecting its shares of external resources. Carefully chosen board members help make the company more legitimate in the eyes of key resource providers such as governments, customers, labor, and so on").

55. Adam B. Badawi, *Influence Costs and the Scope of Board Authority*, 39 J. CORP. L. 675, 702 (2014).

corporate action in society's eyes, that only begs the question why they are not directly tasked with representing societal interests—not to mention, calling into question the merit of an economic system that relies on pantomime in order to garner public acceptance.

Which brings us to Tesla. By any conceivable measure of "good" corporate governance, Tesla's is abysmal. In addition to having a staggered board and a two-thirds majority vote requirement to amend the entrenching provisions of its charter, board members have comically close financial, personal, and even familial ties to its "superstar" CEO, Elon Musk.[56] Musk runs Tesla along with four other companies, and reallocates resources among them at will, with—according to the eventual findings of Chancellor McCormick of the Delaware Court of Chancery, (and contrary to representations in Tesla's SEC filings)—almost no board oversight.[57] Tesla's auditor, PwC, also performs significant consulting work for Musk's other companies.[58] Until a settlement with the SEC in late 2018, Musk was both Tesla's Chair and CEO,[59] and even after he was forced to relinquish the chair position, he openly boasted that the new chair had no power over him.[60] In 2016, Musk was the driving force behind Tesla's purchase of another of his companies, SolarCity, after SolarCity ran into serious financial trouble; shareholders voted in favor of that deal just after Musk staged a presentation of its "Solar Roof" product.[61] It was eventually revealed that the solar roof was nonfunctional.[62]

Despite these facts, Musk has built an army of investor fans who believe fiercely in his engineering skills and visions for the future. Tesla shareholders have expressed confidence in his leadership through their dollars, triggering financial losses for any number of doubting short sellers along the way.[63]

In 2018, the Tesla board awarded Musk a new compensation package that would pay him a maximum of $55.8 billion in stock options—"250 times larger than the contemporaneous median peer compensation plan and over 33 times larger than the plan's closest comparison, which was Musk's prior compensation plan,"[64] but only if he was able to increase Tesla's market capitalization from $50 billion to $650 billion, a feat generally

56. Kimbal Musk, Elon Musk's brother, is a Tesla board member. *See* Tesla, Inc., Preliminary Proxy Statement (Schedule 14A) 43 (Sept. 5, 2025).

57. Tornetta v. Musk, 310 A.3d 430, 506 (Del. Ch. 2024); Tesla, Inc., Definitive Proxy Statement (Schedule 14A) (Apr. 6, 2023).

58. Lora Kolodny, *Tesla Whistleblowers Filed a Complaint to the SEC in 2021, but the Agency Never Interviewed Them. Here's What the Complaint Said*, CNBC (Oct. 12, 2023), https://www.cnbc.com/2023/10/12/tesla-whistleblowers-filed-complaint-to-sec-in-2021-what-it-said.html [https://perma.cc/8DBC-YZ7F].

59. *Tornetta*, 310 A.3d at 449.

60. Lesley Stahl, *Tesla CEO Elon Musk: The 60 Minutes Interview*, 60 MINUTES—NEWSMAKERS (Dec. 9, 2018), https://www.cbsnews.com/news/tesla-ceo-elon-musk-the-2018-60-minutes-interview/ [https://perma.cc/G469-GC8X].

61. Bethany McLean, *'He's Full of Shit': How Elon Musk Fooled Investors, Bilked Taxpayers, and Gambled Tesla to Save SolarCity*, VANITY FAIR (Aug. 25, 2019), https://www.vanityfair.com/news/2019/08/how-elon-musk-gambled-tesla-to-save-solarcity [https://perma.cc/PWC2-NQWM].

62. *Id.*

63. Carmen Reinicke, *Short Sellers Lost $195 Billion in 2023 Despite Wins on Regional Banks*, BLOOMBERG (Jan. 4, 2024), https://www.bloomberg.com/news/articles/2024-01-04/shorts-lost-195-billion-in-2023-despite-wins-on-regional-banks (on file with the *Journal of Corporation Law*).

64. *Tornetta*, 310 A.3d at 445.

perceived to be "laughably impossible."[65] Shareholders holding 73% of Tesla's votes (excluding those held by Musk and his brother) approved the package, after being fully informed of its financial terms. Showing up the naysayers, Musk was able to meet those goals well ahead of the 10-year timeline for completion. Nonetheless, a Tesla shareholder sued, claiming that the pay package—negotiated by Musk's captured board—was unfair to public Tesla investors.

Tornetta v. Musk presented a fundamental problem for the Delaware courts. On the one hand, it is difficult to argue with success: Musk had led the company to an astronomical value that most shareholders would be glad to pay $56 billion to achieve. On the other, the pay package had not been negotiated in accordance with best practices: the board members were, in various ways, beholden to Musk personally, and the affirming shareholder vote had been marred by incomplete disclosures regarding the process by which it had been negotiated. Chancellor McCormick thus had the unenviable choice of either affirming the package—thus conceding the lack of importance of procedural safeguards—or striking it down, despite the obvious benefits shareholders had enjoyed. On January 30, 2024, she issued a decision rescinding the entirety of the options grant, about a quarter of Musk's total wealth, largely reasoning that because of the absence of procedural protections that would render board and shareholder judgment reliable, she would have to substitute her own.[66] In her judgment, given that Musk already owned 21% of Tesla at the time the grant had issued, there could be no assurances that the board could not have wrung a similar performance out of him for a much smaller price tag.[67]

For sure, there were always legitimate arguments that the 2018 options grant was not, in fact, ideal for shareholders. The grant, predicated on the temporary achievement of stock price milestones, largely disconnected from actual increases in profit,[68] may have encouraged Musk to make wild projections, and cut manufacturing and regulatory corners,[69] in a manner that could hurt Tesla's stock in the long term.[70] Moreover, the inconceivable wealth that the grant bestowed upon Musk may have fueled his recklessness, inspiring and

65. Andrew Ross Sorkin, *Tesla's Elon Musk May Have Boldest Pay Plan in Corporate History*, N.Y. TIMES: DEALBOOK (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/business/dealbook/tesla-elon-musk-pay.html [https://perma.cc/AF42-QXRK].

66. *Tornetta*, 310 A.3d at 546–48.

67. *Id.* at 538.

68. *Id.* at 539–40.

69. Geoffrey A. Fowler, *Elon Musk's Road to Twitter is Paved with Broken Promises*, WASH. POST (Apr. 15, 2022), https://www.washingtonpost.com/technology/2022/04/15/elon-musk-promises (on file with the *Journal of Corporation Law*); WALTER ISAACSON, ELON MUSK 249–50, 334 (2023); Hyunjoo Jin et al., *Tesla Blamed Drivers for Failures of Parts it Long Knew Were Defective*, REUTERS (Dec. 20, 2023), https://www.reuters.com/investigates/special-report/tesla-musk-steering-suspension/ [https://perma.cc/7XLH-YDHJ]; Steve Stecklow & Norihiko Shirouzu, *Tesla Created Secret Team to Suppress Thousands of Driving Range Complaints*, REUTERS (July 27, 2023), https://www.reuters.com/investigates/special-report/tesla-batteries-range/ [https://perma.cc/FB2N-XZ8P]; Ronan Farrow, *Elon Musk's Shadow Rule*, NEW YORKER (Aug. 21, 2023), https://www.newyorker.com/magazine/2023/08/28/elon-musks-shadow-rule [https://perma.cc/536T-XY2P].

70. Faiz Siddiqui, Rachel Lerman & Jeremy B. Merrill, *Teslas Running Autopilot Involved in 273 Crashes Reported Since Last Year*, WASH. POST (June 15, 2022), https://www.washingtonpost.com/technology/2022/06/15/tesla-autopilot-crashes/ (on file with the *Journal of Corporation Law*); *see* Stecklow & Shirouzu, *supra* note 69; *see also* Kirsten Korosec, *Feds Expand Tesla Investigation to Include Vehicle Range, Personal Benefits*, TECHCRUNCH (Oct. 23, 2023), https://techcrunch.com/2023/10/23/feds-expand-tesla-investigation-to-include-vehicle-range-personal-benefits/ [https://perma.cc/PZ4P-DQSD].

enabling his ill-advised takeover of Twitter, which not only has apparently distracted him from Tesla, but also may be damaging the brand in the eyes of potential consumers.[71] Indeed, in 2022, after Musk's acquisition of Twitter, Tesla's stock price plummeted, reducing its market capitalization to under $400 billion in January 2023. And though Tesla's stock price soared on Musk's promises that its future was AI, he has recently begun to develop AI in a separate, privately-held company—relying, in part, on data generated by Tesla cars[72] (two potential breaches of his fiduciary obligations of loyalty under Delaware law). Certainly, then, a case could be made that—especially in hindsight—the options grant traded short term gains for long term viability.[73]

But the gains to Tesla have been undeniable, as has been the continuing support of Tesla shareholders (many of whom wrote to the court to express their unhappiness with the ruling).[74] Board member Antonio Gracias testified that the compensation plan was designed to give Musk "dopamine hits," with incremental options awards doled out every time Musk achieved a particular milestone on the journey to the $650 billion market capitalization.[75] Given Musk's known preference for risk taking, it seems plausible that by gamifying his pay package—presenting him with impossible goals and then, when he met them, ringing bells and showering confetti and gold coins—the board really did extract maximum performance. Under these circumstances, to fault the pay package for sacrificing Tesla's "long term" value in favor of "short term" stock price boosters is, fundamentally, to argue that state authorities (in this case, the Delaware Court of Chancery) should substitute their judgment as to how to manage a company for the judgment of actual investors who hold the company's stock. It positions shareholder primacy as a form of government regulation as to how capital should be deployed.[76] If Delaware's version of shareholder primacy is viewed through that lens, it explodes the myth that the doctrine of shareholder primacy removes contested allocative choices from the law of corporate governance (and

71. KURT WAGNER, BATTLE FOR THE BIRD 281 (2024). Of course, as of this writing, it is anticipated that Elon Musk's manipulation of the Twitter platform to support the election of Donald Trump may result in regulatory changes that ultimately benefit Tesla. *See, e.g.*, David Ingram, Dan De Luce & Laura Strickler, *Elon Musk Could Be the Biggest Winner of a Second Trump Term*, NBC News (Nov. 5, 2024), https://www.nbcnews.com/tech/tech-news/elon-musk-trump-endorses-pac-administration-cabinet-connection-rcna178549 [https://perma.cc/R7S7-3BBM]. In that sense, then, the takeover of Twitter may have been wealth maximizing for Tesla after all, by increasing Musk's political influence.

72. Tim Higgins, *Tesla Was Once About Climate Change, Driverless Cars, AI. Now What?*, WALL ST. J. (Feb. 10, 2024), https://www.wsj.com/business/autos/tesla-has-long-been-a-hope-stock-but-what-are-investors-hoping-for-now-7031171f [https://perma.cc/SW9R-YBF3]; Layan Odeh, Gillian Tan & Kurt Wagner, *Musk's Track Record, OpenAI Success Are Focus of Potential xAI Investors*, BLOOMBERG (Feb. 5, 2024), https://www.bloomberg.com/news/articles/2024-02-05/xai-potential-investors-focus-on-muskonomy-openai-success (on file with the *Journal of Corporation Law*); Lora Kolodny, *Elon Musk Plans Tesla and Twitter Collaborations with xAI, His New Startup*, CNBC (July 14, 2023), https://www.cnbc.com/2023/07/14/elon-musk-plans-tesla-twitter-collaborations-with-xai.html [https://perma.cc/N7N6-U3M2].

73. *Cf.* Bryce Elder, *What Might Explain Tesla's Night Moves?*, FIN. TIMES (Jan. 31, 2025), https://www.ft.com/content/9cc311b7-676b-4539-a682-b3533a76b0fc [https://perma.cc/JNS5-R8LU] (explaining how Tesla trades more on "vibes" and shareholder support than fundamentals).

74. Jef Feeley & Dana Hull, *Tesla Investors Are Flooding Judge Who Threw Out Elon Musk's $56bn Pay Package with Complaints About Winning Lawyers' Request for $6bn in Company Stock*, FORTUNE (Mar. 13, 2024), https://fortune.com/2024/03/13/tesla-investors-flooding-judge-threw-out-elon-musk-56bn-pay-package-complaints-winning-lawyers-demand-6bn-stock/ [https://perma.cc/2HEQ-44ER].

75. Tornetta v. Musk, 310 A.3d 430, 539 (Del. Ch. 2024).

76. *See* Lipton, *supra* note 17, at 881.

from the State of Delaware). From a lay perspective, then, the *Tornetta* decision must have seemed inexplicable: Musk had delivered tremendous value, against all odds, and a court had declared it knew better than the board or the market or Tesla investors themselves.[77]

One particular aspect of the decision stood out. In recounting the evidence that the Tesla board was incapable of acting independently of Musk, Chancellor McCormick highlighted that in March 2021, Musk had unilaterally created for himself the new official title of "TechnoKing," without prior board approval.[78] The title, which he announced by adding to his Twitter profile,[79] undoubtedly amused many of Tesla's customers and retail investors, and was exactly the kind of behavior that inspired their admiration. But notwithstanding this shareholder approval—or at least indifference—McCormick wrote, "Musk testified that the title was intended as a joke, but that is a problem in itself. Organizational structures, including titles, promote accountability by clarifying responsibilities. They are not a joke."[80]

The scold was striking, and not only because of its emphasis on procedural formalities that shareholders themselves apparently did not value. Given the insignificance of the "TechnoKing" title—it had no effect on Tesla's actual operations or organizational structure, and no one suggested it created any confusion about responsibilities—there was almost an aesthetic quality to the rebuke. Musk had hung a clown face on the very corporate governance standards that Delaware has spent over a century perfecting, and his open disrespect defied one of their signature purposes: to polish corporate *manners*. Musk's refusal to perform his duties with sufficient gravitas undermined the legitimating function of corporate governance.

But Delaware does not, and to some extent cannot, recognize the social role that its own law plays in civilizing corporate behavior in the eyes of the broader public, because the foundation of Delaware's law—and the source of its own legitimacy—is its focus on the welfare of shareholders alone. At the same time, the more that Delaware courts insist that its law concerns shareholder value alone, the more difficult that is to square with corporate governance rules that are unnecessary to protect shareholder interests, as the *Tornetta* case perhaps unwittingly revealed.

At least in some corners, the decision to strike Musk's compensation was greeted with approval if not glee.[81] And many of those commenters would likely justify their reaction

77. *Tornetta*, 310 A.3d at 548.

78. *Id.* at 493–94.

79. TWITTER, https://twitter.com/melaniemadri/status/1371558267567099904 (on file with the author). There was also an 8-K filing. Tesla, Inc., Disclosure of Material Event (Form 8-K) (Mar. 15, 2021).

80. *Tornetta*, 310 A.3d at 506.

81. *See, e.g.*, Timothy Noah, *How Elon Musk's Zany Compensation Arrangement Got Blown Up in Court*, NEW REPUBLIC (Jan. 31, 2024), https://newrepublic.com/article/178631/elon-musk-tesla-compensation-ruling [https://perma.cc/86W9-LNV5]; Scott Lemieux, *There's No Dealing Like Self-Dealing*, LAWS., GUNS, & MONEY (Jan. 30, 2024), https://www.lawyersgunsmoneyblog.com/2024/01/theres-no-dealing-like-self-dealing [https://perma.cc/9V42-RN6M]; Maxwell Zeff, *Relatable: Elon Musk Is Mad About His Paycheck*, GIZMODO (Jan. 31, 2024), https://gizmodo.com/elon-musk-tesla-mad-about-his-paycheck-1851211791 [https://perma.cc/WTL4-LX4E]; Michael Hiltzik, *A Judge Voids Musk's Huge Tesla Pay Package as Dishonest, and Hoo Boy, is Musk Steamed*, L.A. TIMES (Jan. 31, 2024), https://www.latimes.com/business/story/2024-01-31/elon-musk-pay-package-tesla-delaware-judge [https://perma.cc/S3DN-GZQC]; Felix Salmon, Emily Peck & Elizabeth Spiers, *Why Musk Lost $56 Billion*, SLATE MONEY (Feb. 3, 2024), https://slate.com/podcasts/slate-money/2024/02/elon-musk-tesla-ceo-court-judgment-texas-delaware [https://perma.cc/R2XR-MLJG].

by reference to Tesla's shareholders—McCormick had shown, they would perhaps argue, that the grant had been a pure wealth transfer from the company to Musk. But one cannot help but suspect that, to those who celebrated the decision, their reaction was less about concern for Tesla's shareholders than concern for *society*. A pay package of that size—especially coupled with his previous Tesla pay package, which also awarded him multiple billions of dollars[82]—was simply irresponsible from a *societal* standpoint, as its practical effect was to confer on Musk sufficient material resources as to largely free him from any legal or social constraints on his behavior. Since becoming the richest person on the planet (on some days), Musk not only bought a social network with global influence and turned it into a hotbed of misinformation, harassment, and conspiracy theorizing,[83] but he has publicly adopted increasingly anti-immigrant stances that code as racist[84] while advocating for appeasement of dictators opposed to America's interests.[85] He has become infamous for defying regulations intended to keep employees, consumers, and the general public safe,[86] and his financial support of Donald Trump's presidential campaign—trivial in light

82. *Tornetta*, 310 A.3d at 454.

83. Jim Rutenberg & Kate Conger, *Elon Musk Is Spreading Election Misinformation, but X's Fact Checkers Are Long Gone*, N.Y. TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/us/politics/elon-musk-election-misinformation-x-twitter.html [https://perma.cc/E965-8VY6]; Sarah Ellison, Amy Gardner & Clara Ence Morse, *Elon Musk's Misleading Election Claims Reach Millions and Alarm Election Officials*, WASH. POST (Sept. 10, 2024), https://www.washingtonpost.com/politics/2024/09/10/elon-musk-illegal-immigrant-voting-misinformation/ (on file with the *Journal of Corporation Law*).

84. Miles Klee, *Elon Musk All but Endorses the Great Replacement Conspiracy Theory*, ROLLING STONE (Jan. 5, 2024), https://www.rollingstone.com/culture/culture-news/elon-musk-great-replacement-conspiracy-theory-1234941337/ [https://perma.cc/W3JS-PV4B]; Aimee Picchi, *Elon Musk Faces Growing Backlash Over His Endorsement of Antisemitic X Post*, CBS NEWS (Nov. 20, 2023), https://www.cbsnews.com/news/elon-musk-actual-truth-antisemitic-post-backlash-advertisers/ [https://perma.cc/7XX8-ESMJ]; Max Boot, *Musk Is a MAGA Megaphone and a Federal Contractor. That's a Problem.*, WASH. POST (Mar. 18, 2024), https://www.washingtonpost.com/opinions/2024/03/18/elon-musk-defense-contractor/ (on file with the *Journal of Corporation Law*); Jamelle Bouie, *Elon Musk Is Preoccupied with Something He Doesn't Understand*, N.Y. TIMES (Mar. 23, 2024), https://www.nytimes.com/2024/03/23/opinion/elon-musk-great-replacement.html [https://perma.cc/F6A4-Q5WQ].

85. Steven T. Dennis & John Harney, *Musk Says Putin Can't Lose in Ukraine, Opposes Senate Bill*, BLOOMBERG (Feb. 12, 2024), https://www.bloomberg.com/news/articles/2024-02-13/musk-predicts-putin-can-t-lose-in-ukraine-opposes-senate-bill (on file with the *Journal of Corporation Law*); David Ingram, *Musk Suggests Ukraine Should Cede Crimea, Draws Rebuke from Zelenskyy*, NBC NEWS (Oct. 3, 2022), https://www.nbcnews.com/tech/tech-news/musk-suggests-ukraine-cede-crimea-draws-rebuke-zelenskyy-rcna50528 [https://perma.cc/KMW5-U959]; Boot, *supra* note 84; Andrew Stanton, *NATO Ally Leader Confronts Elon Musk on Claim About Alliance*, NEWSWEEK (Mar. 4, 2024), [https://perma.cc/J57M-JJ4Q].

86. *See* Jacob Bogage & Faiz Siddiqui, *California Sues Tesla, Alleging Racial Discrimination and Harassment*, WASH. POST (Feb. 10, 2022), https://www.washingtonpost.com/business/2022/02/09/tesla-california-lawsuit/ (on file with the *Journal of Corporation Law*); Stephen Rodrick, *How Many Women Were Abused to Make That Tesla?*, ROLLING STONE (Sept. 19, 2022), https://www.rollingstone.com/culture/culture-features/tesla-sexual-harassment-lawsuit-investigation-elon-musk-1234590697/ [https://perma.cc/66DQ-Q4JY]; Josh Eidelson & Dana Hull, *Tesla Left Hundreds of Injuries Out of Its Workplace Reports, California Regulator Says*, L.A. TIMES (Mar. 6, 2020), https://www.latimes.com/business/story/2020-03-06/tesla-left-injuries-out-of-reports-california-safety-regulator-says [https://perma.cc/N9FS-HC86]; Matthew Field, *Musk Accused of Polluting German Rivers with Tesla Gigafactory*, TELEGRAPH (Feb. 27, 2024), https://www.telegraph.co.uk/business/2024/02/27/musk-accused-polluting-german-rivers-tesla-gigafactory (on file with the *Journal of Corporation Law*); Susan Pulliam, Emily Glazer & Becky Peterson, *Musk Says He Wants to Save the Planet. Tesla's Factories Are Making It Dirtier*, WALL ST. J. (Nov. 24, 2024), https://www.wsj.com/business/autos/elon-musk-tesla-environment-1263cd60 [https://perma.cc/P3FL-LU67]; Farrow, *supra* note 69.

of Musk's overall wealth, but massive in terms of resources provided to the candidate, and unprecedented in terms of political involvement by a public company CEO[87]—may well have changed the course of American history. It is very hard to believe these are not the knock-on effects of a supine board willing to confer unimaginable wealth on a single individual based on metrics that incentivize the worst kind of short-term manipulative behavior.

Senator Elizabeth Warren is among those who have repeatedly called upon Tesla's board to police Elon Musk's conflicts more vigorously. She has written multiple letters on the subject, each time extolling the need to protect Tesla shareholders.[88] But it is very hard to believe that Senator Warren is dissatisfied with the returns to Tesla shareholders; she is almost certainly far more concerned about the *public* power that Musk is able to exercise as a result of a pliant board. Tesla's corporate governance *failed*, but it did not fail *Tesla*—it failed everyone else. But *that* reasoning was impossible to relate via Delaware corporate law; to maintain shareholder primacy's legitimacy, rejection of the pay package had to be cloaked in the language of shareholder protection. In a perverse sense, then, the decision might be viewed as an *affirmation* of shareholder primacy's utility: one takeaway might be that shareholder interests and societal interests *are in fact* aligned, and that by vindicating shareholder interests, society's interests are also protected. But the jarringly poor fit between the ruling's shareholder-protective rationale, and the actual outcomes shareholders had experienced under Musk's stewardship, only laid bare the ceremonial nature of "shareholder primacist" procedure. No wonder, then, accusations of "politicized" decisionmaking flew.[89]

Other decisions from Delaware courts have had a similar flavor, in that they imposed constraints on corporate managers that may appeal to public sensibilities but do not necessarily offer corresponding benefits to shareholders. These decisions share a theme: they concern governance arrangements that became commonplace among private companies but suddenly found themselves under attack when adopting firms began to sell shares to the public and became subject to public scrutiny.

Beginning in 1996, a series of changes to the securities laws made it possible for companies to raise enormous amounts of capital while remaining privately held, meaning, with shares held by a small number of investors who rarely litigate against each other, and

87. *See* Brian Slodysko, Thomas Beaumont & Tom Krisher, *Musk Tests the Role of Money in U.S. Politics with Multimillion Dollar Effort to Back Trump*, AP NEWS (Nov. 1, 2024), https://apnews.com/article/elon-musk-donald-trump-election-2024-28d023d2ea2d06a8be99add994feb4aa [https://perma.cc/2LRD-MU3Z] (describing Elon Musk's wealth and his involvement in the 2024 election); Whizy Kim, *Elon Musk and the Age of Shameless Oligarchy*, VOX (Nov. 25, 2024), https://www.vox.com/money/387348/elon-musk-trump-president-billionaire-oligarchy [https://perma.cc/C7J3-7FD9].

88. *See* Letter from Elizabeth Warren, U.S. Sen., to Dr. Robyn Denholm, Chairman of the Bd., Tesla, Inc. (Dec. 18, 2022); Letter from Elizabeth Warren, U.S. Sen., to Hon. Gary Gensler, Chair, SEC (July 17, 2023); Letter from Elizabeth Warren, U.S. Sen., to Dr. Robyn Denholm, Chairman of the Bd., Tesla, Inc. (Aug. 8, 2024).

89. Robert Anderson (@ProfRobAnderson), TWITTER (Jan. 31, 2024), https://x.com/ProfRobAnderson/status/1752703982169104656 [https://perma.cc/66W7-JNF4] (arguing that "the Chancellor's seeming feud with Musk" has injected "ideological 'culture wars'" into Delaware's law); Ashraf, *supra* note 6; Michael Toth, *Why the Corporations are Fleeing Delaware*, THE HILL (June 12, 2024), https://thehill.com/opinion/finance/4715117-why-the-corporations-are-fleeing-delaware/mlite [https://perma.cc/RMY6-GKSY].

without the scrutiny that accompanies public disclosure of their financials.[90] In this space, Silicon Valley firms, backed by private equity and venture capital, adopted an idiosyncratic set of governance practices. First, they rely heavily on thick social networks and a small cadre of repeat players to develop their businesses,[91] and second, they liberally use shareholder agreements—personal contractual arrangements—to grant founders and significant investors any number of management rights, including the right to nominate specific directors, and to review and approve major corporate transactions.[92] Operating out of public view, these firms (and their managers) apparently saw little need to design their governance structures with an eye toward appealing to public sensibilities.

Once these firms started to become public, however—and the extraordinary wealth and political and social influence wielded by this sector of the economy became more visible—their governance practices collided with the performative constraints of shareholder primacy. For example, just as these firms were becoming public, Delaware courts reinvigorated their general analysis of director independence. Whereas previously courts tended to focus solely on family ties and direct financial relationships,[93] in a series of decisions, the Delaware Supreme Court signaled that longstanding personal friendships and professional networks should also factor into the independence inquiry.[94] Given the obvious *political* power wielded by Silicon Valley firms, then-Delaware Chief Justice Strine may very well have been correct that Delaware decisions would be viewed with "skepticism" if courts accorded corporate directors too much leeway, and that to maintain the "integrity" of Delaware's law, courts needed to be "cautious about according deference to directors unable to act with objectivity."[95] Yet, given the paucity of evidence that director independence does, in fact, contribute to shareholder wealth in the first place, it is unclear that the shift materially advances shareholder interests. What it may accomplish, however, is to contribute to a public narrative that a shareholder primacist approach professionalizes and meaningfully constrains managerial behavior.[96]

90. Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 520 (2020); Danielle A. Chaim & Asaf Eckstein, *A Theory of Trust-Based Governance in Startups* 8 (Bar Ilan Univ. Fac. of L. Rsch. Paper, Paper No. 4952630, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4952630.

91. *E.g.*, Abraham J.B. Cable, *Does* Trados *Matter?*, 45 J. CORP. L. 101, 114 n.100 (2019); Anat Alon-Beck, *Unicorn Stock Options—Golden Goose or Trojan Horse?*, 2019 COLUM. BUS. L. REV. 107, 122 n.47; Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L.Q. 1375, 1421 (2004); Jennifer Kay, *Judge Leaves Top Business Court Legacy of 'Glasscockian Prose'*, BLOOMBERG L. (Aug. 26, 2024), https://news.bloomberglaw.com/litigation/judge-leaves-top-business-court-legacy-of-glasscockian-prose [https://perma.cc/K864-8A72].

92. Rauterberg, *supra* note 53, at 1140, 1150; Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 930–32 (2021).

93. *E.g.*, Beam v. Stewart, 845 A.2d 1040 (Del. 2004).

94. Del. Cnty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1021 (Del. 2015); Sandys v. Pincus, 152 A.3d 124, 130 (Del. 2016); Marchand v. Barnhill, 212 A.3d 805, 820 (Del. 2019).

95. *Sandys*, 152 A.3d at 133.

96. The Delaware Supreme Court recently exhibited unusual frankness in its acknowledgement of how public perception shapes Delaware law. In *In re Dell Tech., Inc. Class V S'holder Litig.*, 326 A.3d 686 (Del. 2024) certain stockholders objected to the $266.7 million fee sought by plaintiffs' attorneys for securing a $1 billion settlement. In approving the fee, the court noted, "it is also legitimate to ask, outside our somewhat insular legal universe, whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation or to discourage counsel from settling cases for less than they are worth." *Id.* at 702.

Shareholder agreements, as well, became a point of contention. Delaware law has historically centered the board of directors as the managing body of the corporation,[97] and while specific areas of board authority may be carved out in the corporate charter,[98] boards are otherwise granted overweening discretion to make decisions on the corporation's behalf as they see fit. In *West Palm Beach Firefighters' Pension Fund v. Moelis*, Vice Chancellor Laster held that the shareholder agreements that had become de rigueur among private equity and venture capital backed firms functionally usurped the board's authority and therefore were inconsistent with Delaware law.[99]

Though Laster's analysis was firmly grounded in Delaware precedent,[100] it is worth contemplating how shareholders are *actually* served by prohibiting these agreements. Theoretically, of course, the *Moelis* rule ensures that boards—who have fiduciary obligations to all shareholders—have the freedom to exercise their business judgment in the best interests of the corporation rather than act on behalf of the desires of a single shareholder alone. In reality, however, as even Laster admitted, many if not all of the same powers granted in the prohibited agreements could be conferred upon the favored stockholders through charter provisions or even preferred share issuances—the latter of which may be issued at board discretion without shareholder input.[101] Moreover, firms have increasingly adopted dual-

97. Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956); *see generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

98. DEL. CODE ANN. tit. 8, § 141(a) (2020).

99. W. Palm Beach Firefighters' Pension Fund v. Moelis, 311 A.3d 809, 881 (Del. Ch. 2024).

100. *Id*. at 831–855; *see also* Sujeet Indap, *The Battle Over Who Makes the Rules for US Companies*, FIN. TIMES (Aug. 4, 2024), https://www.ft.com/content/9effb213-6ec7-4f3a-9f81-b235bfc0c108 (on file with the *Journal of Corporation Law*) (reporting that "[f]ew believed [Laster's] reasoning—that boards of directors cannot give up certain powers through contract—was technically incorrect."); Joel E. Friedlander, *William Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does it Signify?* 37 (July 21, 2024) (U. Pa., Inst. for L. & Econ. Rsch. Paper, Paper No. 24–24) (forthcoming in J. CORP. L., 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4901375 ("*Moelis* was widely viewed as having been decided correctly on the merits.").

101. *See Moelis*, 311 A.3d at 822 ("Although some might find it bizarre that the [Delaware General Corporation Law] would prohibit one means of accomplishing a goal while allowing another, that is what the doctrine of independent legal significance contemplates."); DEL. CODE ANN. tit. 8, § 102(a)(4) (2025); *Id.* § 151(a) (2017). A shareholder agreement might be easier to amend than a preferred share or charter provision, as by default, the charters and preferred shares can only be amended with a shareholder vote. *Id.* § 242(b) (2023). That said, a charter could also provide that common shareholders are not entitled to vote on amendments to preferred share issuances, and that written consent of the rights holder is all that is required for amendment. *See* C. Stephen Bigler & Jennifer Veet Barrett, *Words That Matter: Considerations in Drafting Preferred Stock Provisions*, A.B.A. (Jan. 23, 2014), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-january/words-that-matter-considerations-in-drafting [https://perma.cc/6L9Z-FUFU]; Patrick Hurley, *Avoiding Common Pitfalls in Preferred Stock Transactions*, JDSUPRA (Nov. 19, 2014), https://www.jdsupra.com/legalnews/avoiding-common-pitfalls-in-preferred-st-97436/ [https://perma.cc/FQ27-9C2R]. In the end, while the two perhaps would not be entirely equivalent, careful drafting could render them reasonably similar. *Cf.* Matt Levine, *The Board of Directors Is in Charge*, BLOOMBERG (Feb. 29, 2024), https://www.bloomberg.com/opinion/articles/2024-02-29/the-board-of-directors-is-in-charge (on file with the *Journal of Corporation Law*) ("Now, at some level, none of this matters. As a 40% shareholder (by voting rights), and the founder, CEO, chairman of the board and namesake of the firm, Ken Moelis probably *can* get the board to do most of what he wants, with or without a contract.").

class share structures, which often confer functionally the same rights on insiders.[102] Thus, though there may be some additional benefits to ordinary shareholders by prohibiting the transfer of control rights through agreements—for example, in private companies, agreements may be less transparent[103]—the protections championed in *Moelis* could also be viewed as an exercise in elevating form over substance.[104]

Why bother with the formalities, then? One possibility is that they construct nominal procedural guardrails on the raw exercise of power by single individuals over large, important companies, in a manner that satisfies the public. When decisions remain in the hands of a board—even a board that remains practically beholden to particular stockholders through dual class share structures—there are formal records of their meetings, and public disclosures regarding their deliberations, all of which contribute to the display of constraints on managerial discretion (and may even substantively provide an avenue for popular influence and input).[105] And that is true even if those constraints actually confer minimal benefits on the shareholders they are intended to protect.[106]

Viewed through that lens, it is perhaps unsurprising that *Tornetta*, *Moelis*, and the general shift in standards for evaluating independence all led to enormous outcry,[107] with the corporate bar and corporate managers accusing Delaware courts of being "skeptical of the governance of venture-backed private companies and many Silicon Valley-based companies," and "adopt[ing] an increasingly suspicious or negative tone toward corporate boards and management, and toward the corporate bar."[108] Critics accused Delaware of

102. Fisch & Solomon, *supra* note 53, at 1060. Dual class rights do not directly confer interference with managerial decisionmaking but may have the same effect, especially when the rights holder is also a director and CEO, as was the case in *Moelis*, and is frequently true for other companies with dual-class shares, such as Meta.

103. Fisch, *supra* note 92, at 946.

104. This is particularly so if the objection VC Laster voiced in *Moelis* could be avoided by simply including a "fiduciary out" in the relevant shareholder agreement, explicitly giving the board the right to refuse to honor the contract if it believed its fiduciary duties so required. The language of the opinion—which criticized the fact that boards were *entirely* constrained by the agreement—would suggest a fiduciary out would indeed remedy the problem. *Cf.* Transcript of Hearing on a Motion to Expedite and for a TRO, Miller v. Bartolo, 2024-0176 (Del. Ch. Mar. 8, 2024) (allowing for the possibility that a fiduciary out might save an otherwise illegal shareholder agreement). Yet such an "out" would do substantive work only in the rarest of circumstances; most boards would be hesitant to buck an influential blockholder, especially one who also held an officer and board role. Its role, then, would be to create the appearance of preserving board discretion.

105. Ann M. Lipton, *Beyond Internal and External: A Taxonomy of Mechanisms for Regulating Corporate Conduct*, 2020 WIS. L. REV. 657, 680.

106. *Cf.* Langevoort, *supra* note 49, at 1829–30 (arguing that the reforms passed in the wake of the Enron scandal were described as investor protection measures but designed to increase transparency and formalize decisionmaking procedures for the benefit of the general public).

107. Olivia Cahill et al., *Another Magnificent Seven Contemplates Texas: Will Meta Pursue Re-Domiciling in Texas After the* TripAdvisor *Decision?*, JD SUPRA (Feb. 13, 2025), https://www.jdsupra.com/legalnews/another-magnificent-seven-contemplates-9390459/ [https://perma.cc/86HW-MWVJ].

108. Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html [https://perma.cc/Z5A9-TL6C]; *see also* Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. 823, 889 (2025) ("[C]oncerns about both the application of the law and the tone of the opinions are mounting."); Ramaswamy, Hill & McKinley, *supra* note 11 ("Delaware courts can at times appear biased against technology startup founders and their boards."); Sabrina Willmer, *Musk's War on Delaware Spurs Law Pushed by Private Equity*, BLOOMBERG (Mar. 25, 2025),

"activist" and politicized decisionmaking,[109] implicitly recognizing the rightward shift of the firms whose governance structures were most impacted by these decisions. There have been open discussions about corporations organizing in other states,[110] culminating with Tesla's extraordinary attempt to reinstate Musk's pay package by putting it to a *second* shareholder vote, along with a proposal to re-domesticate the company out of Delaware to Texas, where—the perception was—courts were less likely to second-guess Tesla's decisions.[111] Both resolutions passed by a significant margin, reflecting the support of major institutional investors such as BlackRock and Vanguard.[112] Commenters observed that Tesla had, fundamentally, rejected Delaware's standards of good governance[113]—and, it turned out, shareholders rejected them as well.

Now, one potential interpretation of the second vote was that it was not, in fact, entirely free and fair; at the time, Musk made clear that if shareholders bucked his wishes, he would develop AI in his outside ventures, using—as above—Tesla resources to do so.[114] Shareholders may have believed that the only way to prevent these potential breaches of fiduciary duty was to acquiesce to his demands.[115] But, even if shareholders were reacting to these threats, they must have believed that these fiduciary breaches could *not* be cured

https://www.bloomberg.com/news/articles/2025-03-25/private-equity-joins-fight-to-overhaul-delaware-corporate-law (on file with the *Journal of Corporation Law*).

109. *See supra* note 89 and accompanying text; Friedlander, *supra* note 100, at 6; Robert Anderson (@ProfRobAnderson), TWITTER (Apr. 17, 2024), https://x.com/ProfRobAnderson/status/1780616990471966978 [https://perma.cc/336A-XZMM].

110. Sujeet Indap, *Why the Tesla Shareholder Vote Won't be the End of Elon Musk's Delaware Fight*, FIN. TIMES (June 9, 2024), https://www.ft.com/content/70d99ef8-fa1a-4b4f-9f7b-7964f40ee1f8 (on file with the *Journal of Corporation Law*); Bainbridge, *supra* note 108, at 827; Katie Balevic, *Billionaire Hedge Fund Manager Bill Ackman Says He Will Move Management Company Out of Delaware*, BUS. INSIDER (Feb. 1, 2025), https://www.businessinsider.com/bill-ackman-pershing-square-capital-management-delaware-nevada-2025-2 [https://perma.cc/Y4TA-Q9SK]; Hannah Murphy et al., *Facebook Parent Meta in Talks to Reincorporate Outside Delaware*, FIN. TIMES (Jan. 31, 2025), https://www.ft.com/content/b4d136a2-c4b3-4b49-bfc7-3b5c0a1f7b49 (on file with the *Journal of Corporation Law*).

111. Matt Levine, *Texas Tempts Tesla*, BLOOMBERG (Feb. 1, 2024), https://www.bloomberg.com/opinion/articles/2024-02-01/texas-tempts-tesla (on file with the *Journal of Corporation Law*) ("[T]he bet here for Elon Musk is reasonable . . . is the Texas business court, in its first real high-profile case, going to say 'actually it's illegal to pay Elon Musk that much'? It absolutely is not."); Michael Hiltzik, *Elon Musk Thinks Tesla's Investors Love Him. He's Very Wrong*, L.A. TIMES (June 18, 2024), https://www.latimes.com/business/story/2024-06-18/elon-musk-thinks-teslas-investors-love-him-hes-very-wrong [https://perma.cc/U2RN-WXCS] ("The Tesla board instantly executed the change of incorporation, which is evidently rooted in Musk's conviction that Texas courts, which have little experience in adjudicating corporate governance issues, will be more pliant in his hands than the very experienced Delaware judiciary.").

112. Ross Kerber, *Vanguard Vote Switch Helped Pass Tesla CEO Elon Musk's $56 Billion Pay Package*, REUTERS (June 14, 2024), https://www.reuters.com/business/autos-transportation/vanguard-vote-switch-helped-pass-tesla-ceo-elon-musks-56-billion-pay-package-2024-06-14 [https://perma.cc/3RYL-YGZX]; BLACKROCK, VOTE BULLETIN: TESLA, INC. (2024).

113. Lucian A. Bebchuk, *Tesla Should Take the Court Decision Seriously, Not Dismissively*, HARV. L. SCH. F. CORP. GOVERNANCE (June 10, 2024), https://corpgov.law.harvard.edu/2024/06/10/tesla-should-take-the-court-decision-seriously-not-dismissively/ [https://perma.cc/GLN2-DGDM] ("[T]he Board seems to be following an approach of dismissal and defiance.").

114. Chandni Shah & Hyunjoo Jin, *Musk Wants 25% Voting Control at Tesla Before Fulfilling AI Goal*, REUTERS (Jan. 17, 2024), https://www.reuters.com/technology/musk-seeks-25-voting-share-tesla-2024-01-16/ [https://perma.cc/UY6B-6L9J].

115. Lucian Bebchuk & Robert Jackson, *The Elephant in Tesla's Boardroom*, PROMARKET (June 6, 2024), https://www.promarket.org/2024/06/06/the-elephant-in-teslas-boardroom/ [https://perma.cc/NU68-DDUQ].

by additional Delaware litigation—as at least three groups of shareholders are currently attempting[116]—leaving an affirming shareholder vote as their only option to protect Tesla's value. In other words, however you slice it, the vote suggests shareholders did not believe that Delaware's formal legal standards were providing them many benefits at all.[117]

Unwilling to risk any threat to its status as the dominant jurisdiction for corporate chartering, Delaware's legislature responded in dramatic fashion. Mere months after *Moelis* was decided—and while the case was still pending on appeal to the Delaware Supreme Court—the Delaware State Bar Association's Corporation Law Section proposed, and the Delaware legislature adopted, statutory amendments to overrule *Moelis* and legalize governance via shareholder agreement.[118] The following year, employing a rushed process that initially bypassed the DSBA entirely,[119] the Delaware legislature enacted drastic revisions to the Delaware corporate code in order to relax the standards for cleansing conflicted transactions (like Musk's pay package), adopt new statutory presumptions of director independence drawn from federal stock exchange listing standards, and limit shareholder access to internal documents.[120]

The revolutionary nature of these changes cannot be overstated. Described as "seismic"[121] and "sweeping,"[122] they were widely interpreted as offering a direct rebuke to the Delaware judiciary.[123] More than that, by broadly authorizing contractual usurpation of

116. *See generally* Ball v. Tesla, Inc., No. 2024-0622 (Del. Ch. June 6, 2024); Cleveland Bakers & Teamsters Pension Fund v. Musk, No. 2024-0646 (Del. Ch. June 13, 2024); Emps.' Ret. Sys. Rhode Island v. Musk, No. 2024-0631 (Del. Ch. June 10, 2024).

117. This would explain why shareholders have generally supported charter amendments—newly authorized by Delaware corporate law—that would insulate corporate officers from shareholder lawsuits alleging negligence. *See* Assaf Hamdani & Kobi Kastiel, *Courts, Legislation and Delaware Corporate Law* 23 (Eur. Corp. Governance Inst., L. Working Paper No. 869/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5391963. Significantly, the adoption—or not—of these amendments have had little effect on corporate stock prices. *See* Jens Frankenreiter & Eric L. Talley, *Sticky Charters? The Surprisingly Tepid Embrace of Officer-Protecting Waivers in Delaware* 42 (Eur. Corp. Governance Inst., L. Working Paper No. 762/2024, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4764290.

118. Jeff Montgomery, *Delaware's Corporate Law Debate Left 'Blood On The Floor'*, LAW360 (June 21, 2024), https://www.law360.com/articles/1850449 [https://perma.cc/9AWK-BJ69].

119. Delaware's ordinary practice is for corporate law amendments to be first proposed by the DSBA. Eldar & Rauterberg, *supra* note 8, at 213.

120. *See* S. Substitute 1 for S.B. 21, 153d Gen. Assemb., 1st Sess. (Del. 2025) (amending Title 8 of the Delaware Code detailing General Corporate Law).

121. *Seismic Change Proposed in Delaware: Summarizing S.B. 21's Proposals and Initial Reactions from Legal Community*, VILL. L. REV. (Feb. 27, 2025), https://www.villanovalawreview.com/post/2989-seismic-change-proposed-in-delaware-summarizing-s-b-21-s-proposals-and-initial-reactions-from-legal-community [https://perma.cc/VUY3-HC7G].

122. Eric Talley, Sareth Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform—or the Beginning of an Unraveling?*, CLS BLUESKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/ [https://perma.cc/XFB8-W5NN].

123. *Id.*; Franklin A. Gevurtz, The Oxymoron at the Heart of Delaware's Making Elon Happy Legislation 1 (July 17, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5357961 (describing the amendments as a "slap at the Delaware courts"); Letter from Jeffrey B. Maloney, Council of Institutional Investors, to The Honorable Matt Meyer, Governor of Del. (Mar. 6, 2025); Jacob Owens, *Chief Justice Seitz Warns Lawmakers Against Reducing Courts' Independence*, SPOTLIGHT DEL. (Feb. 21, 2025), https://spotlightdelaware.org/2025/02/21/chief-justice-warns-lawmakers-against-reducing-courts-independence/ [https://perma.cc/L9AE-4BEL].

board authority, and by codifying the standards for director independence and the manner for cleansing conflicted transactions, the legislature seemingly abandoned, or at least sharply narrowed, Delaware's common law approach to developing corporate governance standards. For decades, commenters—including practitioners and Delaware judges—have argued that Delaware's case-by-case lawmaking is superior to code-based systems, and have touted Delaware's judiciary and its rich body of common law as the "secret sauce"[124] that advantages Delaware over competing jurisdictions.[125] By rejecting this tradition and replacing judicial nuance with legislative safe harbors (with language drawn, remarkably, from non-Delaware sources like the MBCA,[126] and deferring to the federal stock exchange definition of independence), the legislature not only eschewed what had previously been extolled as Delaware's unique strength, but also explicitly recognized other actors as offering an equal, if not superior, corporate law "product."

But the most striking aspects of the changes are their toothlessness. Though the amendments impose a dizzying array of procedural requirements on corporate boards engaged in conflicted transactions, the *substance* of these requirements is almost comically undemanding. For example, the amendments explicitly permit conflicted transactions to be cleansed by committees dominated by close associates of interested parties.[127]

124. Mike Leonard, *Move to Change Delaware Law After Musk Attacks Called Knee-Jerk*, BLOOMBERG L. (May 15, 2024), https://news.bloomberglaw.com/esg/move-to-change-delaware-law-after-musk-attacks-called-knee-jerk (on file with the *Journal Corporation Law*).

125. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1749–50 (2006); Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 735 (2013); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 673 (2005); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013–14 (1997); Theodore N. Mirvis & William Savitt, *Shifting the Focus: Let the Courts Decide*, 53 BANK & CORP. GOVERNANCE L. REP. 8, 9 (2015); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1129 (2008); Hamdani & Kastiel, *supra* note 117, at 9 ("[T]here is a general agreement that Delaware courts are a cornerstone of the state's success.").

126. Stephen M. Bainbridge, *The Good, the Bad, and the Lost Opportunities of Delaware's Proposal on Deal Conflicts Involving Directors and Officers*, CLS BLUE SKY BLOG (Feb. 25, 2025), https://clsbluesky.law.columbia.edu/2025/02/25/the-good-the-bad-and-the-lost-opportunities-of-delawares-proposal-on-deal-conflicts-involving-directors-and-officers/ [https://perma.cc/HQ2E-AZMB].

127. The new language is complex. Under the statute, if a majority of the board has no conflicts, then a conflict transaction will be cleansed if it is approved by a majority of the unconflicted board members. If, however, the board is majority conflicted, the transaction can only be cleansed by a committee that consists of at least two directors. The majority-conflicted board must select board members that, in its judgment, are not conflicted; in other words, the conflicted board makes the determination as to which directors are conflicted, and that determination is not, apparently, subject to second-guessing by a court. After that, the committee so constituted can cleanse a conflicted transaction so long as a majority of the (actually) independent members on the committee support the deal. Thus, if the board creates a committee of three directors that, in its judgment, are independent, but a later shareholder challenge establishes that two of the three are not independent, the transaction will still be cleansed so long as the remaining independent director—who then constitutes "[a] majority of the [disinterested] directors then serving on [the] committee"—approved it. DEL. CODE ANN. tit. 8, § 141(c)(4) (2024). Additionally, the federal stock exchange standards for independence are widely recognized as weak sauce; so much so that the main proxy advisors, Glass Lewis and ISS, typically employ their own definition of independence. Lipton, *supra* note 105, at 683 n.131. Thus, by adopting a strong presumption of independence for any director deemed so (by the board itself) under exchange standards, the amendments weaken the cleansing regime even further. Moreover, the stock exchange standards—which inquire about a director's independence from the *company*—are orthogonal to the independence inquiry relevant in cleansing, namely, whether the director has close ties to *another director*

Alternatively, boards may cleanse conflicts with an affirming stockholder vote, but the statute pointedly does not require (as it does for board-level cleansing) that stockholders be informed of "[t]he material facts as to the director's or officer's relationship or interest and as to the act or transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction."[128] The new law, then, functions mainly to launder managerial power.

In sum, Delaware's legislative retrenchment evidenced a fundamental lack of commitment to the entire system on which Delaware had built its reputation. The curtain was pulled back to reveal Delaware's skin-deep fidelity to its own law, which would last only so long as the legal regime, while guiding managers to put on a *display* of deliberative action, does not *in fact* limit their prerogatives.[129]

Significantly, the reaction of investor-aligned groups to these amendments was relatively muted[130]—and some investors offered limited support.[131] Only the 2025 amendments, which weakened the standards for cleansing conflicted transactions, received serious opposition from shareholders—mostly (though not exclusively) pension funds, who sent objecting letters.[132] But investors' acquiescence was perhaps not surprising, when one

who is interested in a transaction. *See* United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1058 (Del. 2021). The amendments also impose new barriers to stockholders obtaining internal information to investigate wrongdoing and create a new statutory definition of a "controlling stockholder" that excludes anyone who does not have at least 1/3 of the corporate voting power or, alternatively, the power to seat at least half of the board. Under this definition, then, a stockholder who enters into one of the legislatively authorized stockholder agreements granting overweening governance rights will still not be deemed "controlling" if the contract does not include appointment rights. Because controlling stockholders (unlike ordinary stockholders) have fiduciary obligations to the company, and their interested transactions are subject to heightened scrutiny absent cleansing, these amendments will likely have the effect of encouraging stockholders to exert control by contract rather than through voting rights. DEL. CODE ANN. tit. 8, § 144(a)(1)–(2) (2024).

128. *Id.* § 144(a)(1); The *lack* of a requirement that stockholders be fully informed of the details of transactions before their votes can have a cleansing effect is likely because, prior to the law's passage, Delaware courts had rejected multiple shareholder votes on the grounds that the proxy statements did not fully describe board-level conflicts or the details of transaction negotiations. *See, e.g.*, Sarasota Firefighters' Pension Fund v. Inovalon Holdings, 319 A.3d 271, 302 (Del. 2024); City of Dearborn Police & Fire Revised Ret. Sys. (Chapter 23) v. Brookfield Asset Mgmt., Inc., 314 A.3d 1108, 1139 (Del. 2024); Morrison v. Berry, 191 A.3d 268, 287 (Del. 2018); Tornetta v. Musk, 310 A.3d 430, 543–44 (Del. Ch. 2024).

129. Christine Hurt, *Texas*, *Delaware, and the New Controller Primacy*, 67 ARIZ. L. REV. 693, 697 (2025) (explaining the impetus for the sudden dissatisfaction with Delaware law, "[w]hat happened was that Delaware shareholders 'won.' A little").

130. The Council of Institutional Investors, an advocacy group that largely consists of pension funds, was the only investor group to object to the 2024 amendments authorizing shareholder agreements. *See* Letter from Jeffrey P. Mahoney, Gen. Couns., Council of Institutional Invs., to Kate Harmon, President, Del. State Bar Ass'n. (May 14, 2024); Letter from Jeffrey P. Mahoney, Gen. Couns., Council of Institutional Invs., to The Hon. John C. Carney, Governor of Del. (July 10, 2024). No other investor group, such as the Investment Company Institute (the trade association for mutual funds) took a public position.

131. Jason Booth, *In-Depth: Boards Make More Settlements with Activists Amid Rising Legal Opposition*, DILIGENT (July 17, 2024), https://www.diligent.com/resources/blog/in-depth-boards-make-more-settlements-with-activists-amid-rising-legal-opposition [https://perma.cc/7LTY-2XF7].

132. *See, e.g.*, Letter from Carlton W. Lenoir, Sr., Exec. Dir., Chi. Tchrs.' Pension Fund, to Del. Legislators; Letter from Jeffrey P. Mahoney, Gen. Couns., Council of Institutional Invs., to The Hon. Matt Meyer, Governor of Del. (Mar. 6, 2025); Letter from Matthew G. Jacobs, Gen. Couns., CalPERS, to Del. Legislators (Mar. 14, 2025). An additional letter was sent by the International Corporate Governance Network, *see* Letter from Jen Sisson, Chief Exec. Officer, Int'l Corp. Governance Network, to Del. Sen. Bryan Townsend (Mar. 11, 2025), and a joint letter was sent by the Council of Institutional Investors and the Managed Funds Association., s*ee* Letter

recalls that, not long ago, major index providers proposed to exclude dual-class firms from their indices, purportedly to protect shareholders and yet, almost immediately, most providers dropped or watered-down the requirement,[133] because the reality was, many investors valued access to opportunities over whatever benefits "good governance" structures provide.[134] This was, in hindsight, of a piece with the fact that, once upon a time, the largest asset managers had to be more or less dragged by regulators into concerning themselves with corporate governance at all.[135]

This is not to say investors are indifferent when particular firms confront specific corporate governance challenges. For example, Nevada has long competed with Delaware by insulating corporate managers from liability unless shareholders establish that they engaged in "intentional misconduct, fraud, or a knowing violation of the law," regardless of whether they acted under an uncleansed conflict of interest.[136] So, when the controlling shareholder of TripAdvisor—who had been a repeat defendant in Delaware lawsuits accusing him of participating in tunneling transactions [137]—sought to reincorporate his firm from Delaware to Nevada, apparently for the explicit purpose of avoiding future lawsuits over his related party deals,[138] public shareholders overwhelmingly opposed the move (a futile effort, because of the controller's dominating votes).[139] Similarly, when Fidelity

from Jillien Flores Chief Advoc. Officer, Managed Funds Ass'n, and Jeffrey P. Mahoney, Gen. Couns., Council of Institutional Invs., to Christella St. Juste, Legis. Assistant, Office of Sen. Darius J. Brown, Chair, Senate Judiciary Comm. (Mar. 18, 2025). A representative of the New York City Comptroller also offered one minute of testimony in opposition to the bill during the public remarks at the House Judiciary Committee meeting. *See* Tr. 153rd Del. Gen. Assemb., House Judiciary Comm. Meeting (Mar. 19, 2025). As I have observed elsewhere, it is likely that pension funds (and sovereign wealth funds), as representatives of labor, have regulatory concerns that go beyond shareholder wealth maximization. *See* Lipton, *supra* note 105, at 676.

133. *Index Providers and Dual-Class Stock*, COUNCIL OF INSTITUTIONAL INVS., https://www.cii.org/index-providers-dual-class-stock [https://perma.cc/HX5Z-N525].

134. Notably, the London Stock Exchange recently lifted its ban on dual-class listings. Chris McGahan, *New Rules for the London Stock Exchange's Main Market*, LSEG (Jan. 18, 2022), https://www.lsegissuerservices.com/spark-insights/new-rules-for-the-lse-main-market [https://perma.cc/9YRT-V5NM]. Though certain pension and sovereign wealth funds objected, their concerns did not carry the day at least in part because these investors did not hesitate to invest in other markets that offered fewer formal shareholder protections. *See* Tom Inchley, *The Introduction of Multiple Class Share Structures to the UK Market*, ISS INSIGHTS (Aug. 8, 2024), https://insights.issgovernance.com/posts/the-introduction-of-multiple-class-share-structures-to-the-uk-market/ [https://perma.cc/9AQN-FX53]. *Cf.* Chaim & Eckstein, *supra* note 90, at 25–28 (noting that large investors do not demand strong control rights when investing in private companies). As above, most of the objections to the DGCL amendments came from pension funds. *See supra* note 130.

135. *See* Griffin, *supra* note 46, at 4; Edwin Hu, Joshua Mitts & Haley Sylvester, *The Index-Fund Dilemma: An Empirical Study of the Lending-Voting Tradeoff* (Colum. Ctr. for L. Econ., Working Paper No. 647, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3673531 (demonstrating that mutual funds will lend shares for fees rather than vote them when permitted to do so by regulators).

136. Guzman v. Johnson, 483 P.3d 531, 533 (Nev. 2021).

137. *See, e.g.*, Atallah v Malone, No. 2021-1116, 2023 WL 4628774 (Del. Ch. July 19, 2023); New Orleans Empls. Ret. Sys. v. The DIRECTV Grp., Inc., No. 4606 (Del. Ch. 2009); Blackthorn Partners LP vs Malone, No. 5260 (Del. Ch. 2010); *In re* Sirius XM S'holder Litig., Consol. No. 7800 (Del. Ch. 2012); *In re* Starz S'holder Litig., No. 12584 (Del. Ch. 2016); Tornetta vs. Maffei, No. 2019-0649, 2023 WL 2808436 (Del. Ch. Feb. 23, 2023); Fishel v. Liberty Media Corp., No. 2021-0820 (Del. Ch. 2021); Sciabacucchi v. Liberty Broadband, No. 11418, 2023 WL 4157103 (Del. Ch. June 22, 2023).

138. Maffei v. Palkon, 339 A.3d 705, 712 (Del. 2025). The move was proposed prior to the changes to Delaware law, which would, of course, have made conflicted deals much easier to accomplish. *Id.*

139. *Id.* at 717.

National Financial (FNF)—which does not have a controlling shareholder—proposed a similar move, public shareholders refused to approve reincorporation to Nevada until FNF adopted a charter provision waiving the protections of Nevada law, and adopting a liability standard similar to Delaware's.[140] Thus, in these cases, shareholders appeared to value Delaware's (pre-2025) legal standards over Nevada's hands-off regime. That said, it is notable that, while FNF shareholders insisted that its directors remain subject to liability for breaches of the duties of loyalty and good faith, they also acquiesced to Nevada's lax *cleansing* regime, which provides that conflict transactions can be cleansed with a simple approval of the disinterested members of the board or committee, regardless of whether they constitute a majority of those members.[141] In other words, FNF shareholders apparently demanded the formal appearance of "good governance," while approving a move that required very little substantive commitment.[142]

Certainly, this is not the first time in Delaware's history that managers have threatened to revolt against what they believed to be unduly constraining law.[143] During the hostile takeover era of the 1980s, for example, corporate raiders offered to buy out public shareholders at a healthy premium, with the intention of breaking up larger conglomerates.[144] These buyouts often ended in bankruptcy for the targeted firm, and layoffs of substantial numbers of employees.[145] Delaware became trapped in the middle, faced with a choice between corporate governance rules that would either *enable* these takeovers (which would benefit shareholders financially while harming everyone else), or inhibit them, by giving corporate boards tools to resist unwanted takeover bids.[146] At the time, Delaware defused that tension by insisting that boards consisting of independent directors—i.e., ones that adhered to procedural formalities—could legitimately employ antitakeover devices to

140. *See* Fidelity National Financial, Inc., Disclosure of Material Event (Form 8-K) (June 12, 2024); Fidelity National Financial, Inc., Preliminary Proxy Statement (Schedule 14A) (Apr. 14, 2025). FNF also agreed to grant shareholders the greater appraisal rights available under Delaware law. *See id.*

141. NEV. REV. STAT. § 78.140 (2015). This would mean, for example, that a majority-conflicted board could approve a transaction so long as the unconflicted members (even if only a single director was unconflicted) approved it.

142. After the DGCL amendments were proposed, one study found a drop in the market valuation of Delaware companies, especially those with the kind of blockholder and dual-class share structures most likely to experience easing of constraints on self-dealing. *See* Kenneth Khoo & Roberto Tallarita, The Price of Delaware Corporate Law Reform (Oct. 22, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5318203. The authors conclude that the amendments therefore reduced shareholder value. *Id.* at 1. An alternative interpretation, however, at least at this early date, is that the drop reflected uncertainty regarding the amendments' effects, including the potential for ongoing disputes and future litigation. For example, shortly after the amendments went into effect, several shareholders sued to invalidate them on state constitutional grounds. *See* Plumbers & Fitters Loc. 295 Pension Fund v. Dropbox, Inc., No. 2025-0354, 2025 WL 1627254 (Del. Ch. June 9, 2025); Roofers Loc. 149 Pension Fund v. Magnus Holdings Co., No. 2025-0466 (Del. Ch. 2025); Rutledge v. Clearway Energy Grp. LLC, No. 2025-0499, 2025 WL 1604186 (Del. Ch. 2025). The constitutional issues are currently pending before the Delaware Supreme Court.

143. *See* Michael Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* 37 (Eur. Corp. Governance Inst., L. Working Paper No. 677/2251, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746878.

144. John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 1–2 (1986).

145. *Id.* at 3 & n.4.

146. Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 876 (1990).

protect the corporation's "long term" value, which just so happened to coincide with the interests of non-shareholder constituencies.[147] In other words, Delaware adopted a legal standard that protected societal interests while purporting to favor shareholders—or, rather, the board's expertise in determining what would be good for shareholders.

But in those hostile takeover disputes, the interests of incumbent corporate managers, concerned with maintaining their jobs, were aligned with those of employees and creditors, and arrayed against the demands of shareholders. Because, ultimately, managers alone are responsible for selecting where to incorporate, in the 1980s, managerial interests prevailed. Since that era, however, managerial contracts have come to include stock awards and "golden parachutes" that provide windfall financial benefits in response to a change in control, thus loosening resistance to takeovers.[148] Meaning, in today's disputes, managerial and shareholder interests are more likely in accord, while other corporate stakeholders stand on the other side of the table. Thus, it is perhaps unsurprising that, when Delaware's formalities turned out to protect the latter more than the former, it was the formalities that gave way.

But if it is true that the *performance* of the formalities provides firms with the intangible benefit of societal acceptance, while only mildly curtailing managerial behavior, a question arises: Why are we now seeing a rebellion?

One possibility is that the prospect of new regulation—the kind that a social license to operate is meant to forestall—has dimmed. Delaware lawmakers—and, presumably, managers of Delaware-chartered corporations—have long understood that Delaware operates in the shadow of federal law. When corporate governance externalities create major catastrophes, the federal government steps in with new, mandatory rules that preempt Delaware's standards.[149] Delaware has in the past offered its own (milder) regulation as an alternative to more intrusive proposed federal rules,[150] and, so long as the state's oversight is recognized as sufficiently robust, federal regulators avoid invading Delaware's domain.[151] The prospect of federal preemption presumably limits the accommodations that Delaware can offer managers, and that managers demand of the Delaware legal system.

147. *Id.* at 923–24.

148. Gordon, *supra* note 15, at 1533–34; Peer C. Fiss, Mark T. Kennedy & Gerald F. Davis, *How Golden Parachutes Unfolded: Diffusion and Variation of a Controversial Practice*, 23 ORG. SCI. 1077, 1080 (2012).; Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1917–18, 1924 (2013).

149. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 597 (2003); Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 80 (2008).

150. Mark J. Roe, *The Corporate Shareholder's Vote and Its Political Economy, in Delaware and in Washington*, 2 HARV. BUS. L. REV. 1, 31 (2012); William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619 (2006).

151. For example, the federal Securities Litigation Uniform Standards Act of 1998, requires certain stockholder actions to be litigated exclusively in federal court, but contains a provision colloquially known as the "Delaware carve-out" to except the types of actions that Delaware traditionally hears. *See* Cecilia A. Glass, Note, *Sword or Shield? Setting Limits on SLUSA's Ever-Growing Reach*, 63 DUKE L.J. 1337, 1347 (2014). Similarly, the National Securities Markets Improvement Act prohibits states from regulating certain communications with investors regarding publicly traded securities, with an exception for regulations imposed by the state of incorporation. *See* 15 U.S.C. § 77r (2018). During the debates over the recent amendments to Delaware law, Professor Charles Elson warned that the changes might invite federal intrusion. *See* Del. S. Judiciary Comm., 152d Gen. Assemb. (2024).

Today, however, political gridlock has made it very difficult for Congress to pass new legislation, and a conservative judiciary has dramatically curtailed the powers of the regulatory state.[152] The Trump administration—backed by private equity and venture capital[153]—is likely to be particularly averse to imposing new constraints on corporate internal governance structures. Without the threat of federal preemption looming, neither Delaware lawmakers, nor managers of Delaware companies, have a use for modesty.[154]

But if that's right, there is a final irony. The more freedom Delaware accords corporate managers, and the less scrutiny it applies to their transactions, the less there is for Delaware to, well, actually do. That threat is particularly stark in light of the recent amendments to Delaware law, because shareholder agreements—unlike Delaware charters—are not subject to the internal affairs doctrine and may not be governed by Delaware law.[155] In other words, these newly-authorized shareholder agreements may be interpreted, and enforced, according to a law *other than* Delaware's. The more that corporate governance moves into personal contracts (and other states are likely to follow Delaware's lead), the less important the state of incorporation may become, which erodes Delaware's dominance. And, as if to bring that point home more clearly, disputes regarding these contracts may be decided in non-Delaware courts, including arbitral courts, where Delaware will be powerless to control the standards applied.[156]

II. THE STEWARDSHIP SOLUTION

If the first premise of shareholder primacy is that it offers meaningful constraints on corporate managers, the second is that, in a properly functioning system, those constraints channel corporate behavior in a prosocial direction. That creates a curious dilemma for proponents of shareholder primacy, because its logic requires them to continually equate societal interests with shareholder interests. The effort only ends up replicating the problems that shareholder primacy was intended to solve.

The contradictions surfaced at least as far back as the 1970s, with the waning of the managerial era. The country was rocked by a series of corporate scandals, some of which were financial and directed at investors, but others of which involved political bribery and other forms of illegal behavior that were intended to—and possibly had the effect of—

152. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); West Virginia v. EPA, 597 U.S. 697 (2022); Nat'l Ass'n of Priv. Fund Managers v. SEC, 103 F.4th 1097 (5th Cir. 2024); Chamber of Com. v. SEC, 88 F.4th 1115 (5th Cir. 2023).

153. William A. Birdthistle, *How Private Funds Could Hurt Americans Under Trump*, N.Y. TIMES (Dec. 3, 2024), https://www.nytimes.com/2024/12/03/opinion/trump-presidency-billionaires.html [https://perma.cc/NHH5-P79U].

154. For example, the Business Roundtable—an association of Chief Executive Officers—endorse independent director requirements when regulatory threats loom and pull back when the threat recedes. Pargendler, *supra* note 31, at 376–78, 384.

155. *See* Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 372–73 (2023).

156. The reason for this is twofold. First, the statutory amendments authorizing stockholder agreements explicitly permit signatories to select any forum, including an arbitral forum, for resolving disputes see DEL. CODE ANN. tit. 8 §§ 122(2), (18) (2024). And second, the Federal Arbitration Act prohibits states from limiting agreements to arbitrate in ordinary contracts, see Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016).

benefitting shareholders.[157] The SEC quickly moved to render management more "accountable" by improving corporate governance, namely by increasing shareholder voice, indirectly via independent directors, and directly by increasing both the power and responsibilities of institutional shareholders.[158] The initiatives were of a piece with the SEC's general approach of the era, which was to assume that managerial ethics and character factor in to investor decisionmaking, and seek disclosure of information relevant to those qualities.[159]

The SEC's views were controversial and opposed by many shareholder primacists, who argued that the Commission's mission was to protect investors, and not society at large.[160] For example, Professor Daniel Fischel, writing in 1982, criticized the SEC's corporate governance reforms, on the ground that the Commission had conflated harms to investors with harms to society more generally.[161] But in the same article, not two pages later, Professor Fischel defended a core premise of shareholder primacy: that, in fact, investor interests *are* coextensive with society's interests, because corporations are forced to internalize the costs of the harms they inflict.[162] In other words, what Professor Fischel unwittingly revealed is that once shareholder primacy's fundamental axioms are accepted, it is difficult to avoid the full implications, such as an expectation that reforms of corporate governance—and in particular, reforms that focus managerial attention more tightly on shareholder interests—work as a corrective to general corporate malfeasance.

From there, the next logical step is to turn to corporate governance as an all-purpose regulatory tool. And so politicians have done, regularly filtering reforms intended for the general public through the language of investor protection, such as combatting income inequality by giving shareholders an advisory vote on corporate pay packages and requiring disclosure to investors of the ratio of CEO pay to median worker pay,[163] requiring disclosure to investors of how diversity considerations factor in to director nominations,[164] and requiring disclosure to investors of how risk-taking factors in to compensation decisions.[165] The 2010 Dodd-Frank Act, passed in the wake of the Great Financial Crisis, limited the

157. Gordon, *supra* note 15, at 1511–17; Lewis D. Solomon, *Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise?*, 76 MICH. L. REV. 581, 594 (1978).

158. DIV. OF CORP. FIN., SEC, STAFF REPORT ON CORPORATE ACCOUNTABILITY 31 (1980) (printed for the use of S. Comm. on Banking, Hous., and Urb. Affs., 96th Cong., 2d Sess.), https://www.sechistorical.org/collection/papers/1980/1980_0904_CorpFinStaffReport.pdf [https://perma.cc/AP8D-CH6J] [hereinafter STAFF REPORT]; *see also* Fischel, *supra* note 19, at 1260; Pargendler, *supra* note 31, at 376.

159. *See* Lipton, *supra* note 90, at 499.

160. *See, e.g.*, Bevis Longstreth, *SEC Disclosure Policy Regarding Management Integrity*, 38 BUS LAW. 1413, 1424–26 (1983); Milton V. Freeman, *The Legality of the SEC's Management Fraud Program*, 31 BUS. LAW. 1295, 1301 (1976).

161. Fischel, *supra* note 19, at 1267 ("[Q]uestionable foreign payments and noncompliance with environmental laws, in all probability are explainable as attempts by managers to boost profitability, shareholders are far more likely to be beneficiaries of these practices rather than victims.").

162. *Id.* at 1269 ("Although potential conflict exists between profit maximization and pursuit of other goals, far more consistency is present between the two than generally assumed . . . Substantial overlap exists, therefore, between the pursuit of profit maximization and other social goals.").

163. Pargendler, *supra* note 31, at 390.

164. 17 C.F.R § 229.407(c)(2)(vi) (2019).

165. 17 C.F.R § 229.402(s) (2023). This type of disclosure is of especially questionable benefit for equity holders, who are likely diversified and therefore prefer risk-taking. *See* Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1073 (1996).

ability of brokers to cast ballots on behalf of shareholders who did not vote themselves; as brokers default to voting with management, the move was intended to enhance shareholder oversight.[166] Frequently, independent directors—who, with their lack of ties to corporate management, are one of the procedural mechanisms employed to (purportedly) render corporate management more responsive to shareholders—are enlisted to the project of making corporations more socially responsible.[167] Businesses, of course, enthusiastically insist that shareholder profits are unattainable absent prosocial behavior,[168] while accepting or even advocating for independent directors as a substitute for more robust regulation.[169] The popular press plays into the same narrative, laying the blame for corporate scandals at the feet of captured boards.[170]

The flaw in this logic is that shareholder primacy is not self-executing; the theory posits that the regulatory system will render antisocial behavior unprofitable, not that antisocial behavior will be curbed by shareholders as a substitute for regulation. To the contrary, absent regulation, an empowered institutional shareholder base may very well urge equity-price maximizing actions that do significant damage to other corporate constituencies, such as creditors, employees, or customers.[171] But that inconvenient truth tends to be

166. Pargendler, *supra* note 31, at 387.

167. *Id.* at 376; Velikonja, *supra* note 46, at 904; Langevoort, *supra* note 49, at 1831 (explaining that shareholders were not the main beneficiary of post-Enron reforms, including director independence requirements); Fischel, *supra* note 19, at 1266–68 (arguing that the SEC's 1980 report on corporate governance reforms—which included a call for greater directorial independence—was intended for the public despite claims they would benefit shareholders); Hill & Nili, *supra* note 46, at 597–99, 629–30.

168. *Redefined Purpose of a Corporation: Welcoming the Debate*, MEDIUM (Aug. 25, 2019), https://bizroundtable.medium.com/redefined-purpose-of-a-corporation-welcomingthe-debate-8f03176f7ad8 [https://perma.cc/G8D8-9RAP] ("[F]or corporations to be successful, durable and return value to shareholders, they must consider the interests and meet the fair expectations of a wide range of stakeholders in addition to shareholders.").

169. *See supra* note 153; Velikonja, *supra* note 46, at 906. Recently, for example, United Health—which has endured multiple civil and criminal investigations as well as public backlash over its claims denials—announced it was creating a "public responsibility committee" of directors to "monitor and oversee financial, regulatory, and reputational risks . . . ." United Healthgroup Inc., Disclosure of Material Event (Form 8-K) (Aug. 20, 2025).

170. *See, e.g.*, Douglas MacMillan, *'Safety Was Just a Given': Inside Boeing's Boardroom Amid the 737 Max Crisis*, WASH. POST (May 6, 2019), https://www.washingtonpost.com/business/2019/05/06/safety-was-just-given-inside-boeings-boardroom-amid-max-crisis/ (on file with the *Journal of Corporation Law*); Matt Egan, *Boeing Has a 'Crisis of Confidence.' It's Time for the Board to Step Up*, CNN (May 16, 2019), https://www.cnn.com/2019/05/16/business/boeing-737-max-crisis-faa/index.html [https://perma.cc/PP86-CJAE]; James B. Stewart, *Problems at Volkswagen Start in the Boardroom*, N.Y. TIMES (Sept. 24, 2015), https://www.nytimes.com/2015/09/25/business/international/problems-at-volkswagen-start-in-the-boardroom.html [https://perma.cc/K33L-8U69]; Russell Adams & Joann S. Lublin, *News Corp. Board Challenged*, WALL ST. J. (July 26, 2011), https://www.wsj.com/articles/SB10001424053111903591104576468332122262092 [https://perma.cc/A737-HZJY]; David Carr, *The Cozy Compliance of the News Corp. Board*, N.Y. TIMES (May 6, 2012), https://www.nytimes.com/2012/05/07/business/media/the-cozy-compliance-of-the-news-corp-board.html [https://perma.cc/CZ4S-RBK8]; Geoff Colvin, *Who's to blame at BP? The Board*, CNN (July 28, 2010) (on file with the *Journal of Corporation Law*). This has also been true in some private companies. *See, e.g.*, Reuters, *A Challenge to Finding Uber's New COO: Its CEO*, FORTUNE (Apr. 13, 2017), http://fortune.com/2017/04/13/ceo-kalanick-coo-search-culture [https://perma.cc/G8FX-L7HB]; Jennifer Reingold, *Theranos' Board: Plenty of Political Connections, Little Relevant Expertise*, FORTUNE (Oct. 15, 2015), https://fortune.com/2015/10/15/theranos-board-leadership/ [https://perma.cc/TF8B-QHNC].

171. Pargendler, *supra* note 31, at 386–87; Strine, Jr., *supra* note 29; Rock, *supra* note 147, at 1917–18, 1921.

skipped over in favor of regulatory moves that imply the system *already works*, such that the only problem to be solved is a corporate governance apparatus that does not make the appropriate calculus.[172]

No doubt, the choice to filter regulation intended to benefit society through an "investor protection" rationale represents a political compromise in situations where more direct regulation may not be politically feasible.[173] And that compromise may serve some limited purpose; for example, independent directors, with fewer ties to the corporation, may be more responsive to legal guardrails, and more concerned about their own—and consequently the firm's—image in the eyes of the public (which is precisely why more independent directors at Tesla might have restrained Elon Musk's compensation package).[174] But of course, that line of thinking posits that the value of independent directors comes from their *lack* of responsiveness to shareholders, rather than their alignment with them, which contradicts the entire premise of shareholder primacy. Thus, the overt rationale for these kinds of regulatory responses is that independent directors will be more vigorous in their pursuit of shareholder interests.[175]

All of which has culminated in the recent push toward, and controversy surrounding, "environmental, social, governance" ("ESG") investing. As I have explained elsewhere,[176] "ESG" sometimes describes a values or impact-based style of investing, but other times, especially among the professional investment community, refers to a financial strategy that posits prosocial corporate behavior is ultimately more profitable for investors.[177] In that form, ESG can be understood as gesture of profound faith in shareholder primacy's viability. After all, if shareholder primacy is operating as expected, it is only natural that profit-seeking investors should go further and make prosociality the actual investment thesis—indeed, it is *necessary* that they do so. To demand otherwise is to concede that shareholder primacy has failed, and that external regulation has not, in fact, aligned the interests of shareholders with the interests of the general public at all.[178] And because most investors

172. Frequently, the claim is something like "short-termism," namely, an insistence that companies engage in socially harmful behavior because their governance structures prevent them from rationally identifying the superior profits to be gained longer term by prosocial behavior. In fact, the evidence of an irrational "short-term" market focus is mixed at best. *See generally* Mark J. Roe, Stock Market Short-Termism: What the Empirical Evidence Tells Policymakers (Apr. 29, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4087746; Michal Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104.

173. Velikonja, *supra* note 46, at 906; Pargendler, *supra* note 31, at 367.

174. *See* Hill & Nili, *supra* note 46, at 629–30 (independent directors associated with fewer incidents of corporate misconduct); Gordon, *supra* note 15, at 1509 ("Independent directors may be more likely to promote the firm's compliance with legal norms."); Rock, *supra* note 124, at 1103–04 (arguing that professionalized directors are more responsive to public shaming via exposure of misconduct than are entrepreneurs who run businesses on a day to day basis); Langevoort, *supra* note 54, at 804 (independent directors protect their reputations with regulators).

175. *E.g.*, STAFF REPORT, *supra* note 158, at 123, 528.

176. *See* Ann M. Lipton, *ESG Investing, or, If You Can't Beat 'Em, Join 'Em*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., 2021).

177. Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 403 (2024); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 398 (2020); Miller, *supra* note 21, at 776 n.8; PITCHBOOK, SUSTAINABLE INVESTMENT SURVEY (2024).

178. David G. Yosifon, *The* Citizens United *Gambit in Corporate Theory: A Reply to Bainbridge on Strine and Walter* 2 (Santa Clara Univ. Sch. of L., Working Paper No. 4-14, 2014), https://ssrn.com/abstract=2510967;

are institutions, with fiduciary obligations toward their natural-person beneficiaries, the next step is for the regulatory apparatus surrounding these institutions to encourage or even require that they affirmatively demand prosocial behavior from their portfolio firms.

The seeds of this were again sown in the 1970s, when the public company shareholder base began to transform from retail shareholders—natural persons—to institutions, such as pension and mutual funds.[179] In the wake of the corporate scandals of the era, the SEC's push for greater corporate accountability included a new emphasis on the fiduciary obligations of institutional shareholders to use their voting power to influence the behavior of their portfolio companies.[180] From there, shareholder power—and institutional shareholder responsibilities—have only ramped up, largely through the securities laws, but also through labor law, in the form of oversight of private pension plan investors. In the 1990s and 2000s, the SEC and the Department of Labor promulgated rules requiring that institutional investors disclose their policies for proxy voting.[181] In 2003, the SEC began to require disclosure of how mutual funds exercise their votes, explaining:

> Recent corporate scandals have . . . underscored the need for mutual funds and other institutional investors to focus on corporate governance. The increased equity holdings and accompanying voting power of mutual funds place them in a position to have enormous influence on corporate accountability. As major shareholders, mutual funds may play a vital role in monitoring the stewardship of the companies in which they invest.[182]

The Supreme Court even got into the act when it relied on shareholder "voice" to control corporate political spending.[183] Thus, when the United Nations developed the concept of ESG investing (originally as a means to encourage responsible industrialization of the developing world),[184] the infrastructure was in place to enlist large asset managers as stewards of the *social* behavior of their portfolio companies. Mutual fund companies leaned in to the idea—much like operating companies embraced independent directors—likely because they believed it would forestall more intrusive regulation of their activities.[185] Certainly, their commitment to ESG did not smack of true belief; evidence of "greenwashing," both in portfolio assembly and voting behavior, abounded.[186] Nonetheless, the *logic*

Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 379–82 (2015).

179. Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 729–31 (2018); STAFF REPORT, *supra* note 158, at 381.

180. STAFF REPORT, *supra* note 157, at 53.

181. Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 TRANSACTIONS: TENN. J. BUS. L. 175, 184–85 (2017).

182. Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Release No. 33-8188, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003).

183. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010).

184. Pollman, *supra* note 177, at 409–13 .

185. Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 432–34 (2022); Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1824–25 (2021).

186. *E.g.*, Shane Shifflett, *Funds Go Green, but Sometimes in Name Only*, WALL ST. J. (Sept. 9, 2021), https://www.wsj.com/articles/funds-go-green-but-sometimes-in-name-only-11631179801 [https://perma.cc/PYC6-TS39]; Roni Michaely, Guillem Ordonez-Calafi & Silvina Rubio, *Mutual Funds' Strategic Voting on Environmental and Social Issues*, 28 REV. FIN. 1575, 1588 (2024). A recent contretemps involving the Exxon Corporation stands out. The shareholder proposal mechanism, created by federal Rule 14a-8, 17 CFR

of shareholder primacy—that ultimately profitability is achieved via prosociality—lent the project a veneer of legitimacy.[187] Political activists leaped on the bandwagon, almost certainly because of the potential for policy wins that an unresponsive federal bureaucracy made difficult to achieve via substantive regulation.[188] And they, too, could emphasize the shareholder primacist logic—that shareholder wealth maximization can only be achieved via prosociality—that at this point had been woven into the system.[189] Climate change, gun violence, racial, gender, and sexual orientation diversity, have all become corporate governance concerns, promoted by advocates ostensibly for the financial value they add to firms,[190] while opponents insist they represent the pet political concerns of corporate "elites" rather than any sincere strategy for maximizing profits.[191]

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§ 240.14a-8 (2025), is one of the key avenues by which shareholders express a preference for ESG initiatives. Recently, Exxon brought a lawsuit against two shareholders who filed a proposal pertaining to climate change, alleging that the proposal violated the proxy rules. *See* Exxon Mobil Corp. v. Arjuna Cap., 735 F. Supp. 3d 709, 717 (N.D. Tex. 2024). The case was widely viewed as an attempt to deter future proposals, and, in response, a handful of institutional shareholders—and one proxy advisory firm—publicly argued that investors should punish Exxon for attempting to minimize shareholder voice by voting against various Exxon directors at the next annual meeting. *See* Ross Kerber, *Glass Lewis Recommends Votes Against Exxon Director Hooley, Citing Lawsuit*, REUTERS (May 13, 2024), https://www.reuters.com/sustainability/boards-policy-regulation/glass-lewis-recommends-votes-against-exxons-hooley-citing-lawsuit-2024-05-13/ [ttps://perma.cc/M8XM-4MHJ]. Despite the campaign, few shareholders withheld their votes, suggesting many were not interested in defending shareholder voice on ESG topics after all. S*ee* Exxon Mobil Corp., Disclosure of Material Event (Form 8-K) (May 29, 2024).

187. This is why some of the most vigorous defenders of shareholder wealth maximization as the sole corporate purpose concede that ESG is simply an expression of shareholder primacy *See* BAINBRIDGE, *supra* note 21, at 104 (quoting Miller, *supra* note 21, at 776 n.8).

188. Lipton, *supra* note 5, at 422–24.

189. *See, e.g.*, Letter from Amazon Watch & First Peoples Worldwide, to The Honorable Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n (June 16, 2022) (arguing that investors need corporations to disclose the risks their activities pose to indigenous communities); *Coca-Cola Co: Mitigation of Risks Related to Restrictive Public Health Care Policies*, AS YOU SOW (Nov. 9, 2023), https://www.asyousow.org/resolutions/2023/11/9-coca-cola-mitigation-risks-reproductive-healthcare-policies [https://perma.cc/AEF5-4B6R] (arguing that investors need the company to disclose its strategy to ameliorate employee harm caused by restricted access to reproductive healthcare); Trinity Wall St. v. Wal-Mart Stores, 792 F.3d 323 (3d Cir. 2015) (addressing a shareholder proposal seeking that Wal-Mart develop a policy for oversight of gun sales, out of concern for the firm's reputation and brand).

190. *E.g.*, *Climate Change and Social Responsibility: Helping Corporate Boards and Investors Make Decisions For a Sustainable World*, 117th Cong. (2021) (Testimony of James Andrus, Investment Manager, Board Governance and Sustainability); *Aligning the Financial System and Capital Markets with Long-Term Economic and Public Interest Outcomes: Hearing on Climate Change and Social Responsibility*, 117th Cong. (2021); ANDY GREEN, ALIGNING THE FINANCIAL SYSTEM AND CAPITAL MARKETS WITH LONG-TERM ECONOMIC AND PUBLIC INTEREST OUTCOMES (2021), https://democrats-financialservices.house.gov/uploadedfiles/hhrg-117-ba16-wstate-greena-20210225.pdf [https://perma.cc/PY5H-ZG8C]; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Release No. 34-90574, 85 Fed. Reg. 80,472 (Dec. 11, 2020); John A. Zecca, Exec. Vice President, Chief Legal Officer & Chief Regul. Officer, Nasdaq, Inc., Response to Comments and Notice of Filing of Amendment No. 1 of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (Feb. 26, 2021), https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf [https://perma.cc/T9EC-VZJP].

191. James Call, *Gov. Ron DeSantis Moves to Prohibit State Investments in 'Woke' Agenda*, TALLAHASSEE DEMOCRAT (Aug. 23, 2022), https://www.tallahassee.com/story/news/politics/elections/2022/08/23/florida-retirement-fund-frs-governor-ron-desantis-pension-fund-woke/7866802001/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epti=z117464e005300v117464b0083xxd118365&gca-ft=137&gca-ds=sophi [https://perma.cc/XBD7-GHL7]; VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM 111 (2021); Lawrence Cunningham et al., *The SEC's Misguided Climate Disclosure Rule*

The issue soon escalated into regulatory warfare, with Democrats and Republicans ping ponging back and forth about how much leeway—if any—asset managers should be given to consider these issues when making investment decisions.[192] Nineteen Republican state attorneys general accused asset manager BlackRock of violating its fiduciary obligations by encouraging portfolio companies to combat climate change,[193] and five Democratic Senators accused BlackRock of violating its fiduciary obligations by opposing efforts to encourage portfolio companies to combat climate change.[194] A Republican-appointed federal district judge in Texas concluded after a bench trial that American Airlines violated its fiduciary obligations to 401(k) plan members by including BlackRock funds with ESG voting policies on the investment menu.[195] The SEC amended its rules to require more granular public disclosure of mutual funds' proxy votes, including on issues pertaining to environmental matters, human rights, and diversity,[196] and four Republican-led states petitioned to vacate the rule, arguing that disclosure would enable activists to pressure asset managers into violating their fiduciary obligations.[197]

Proposal, 41 BANKING & FIN. SERVS. POL'Y REP. no. 10, 2022, at 1, 1; Jay Ashcroft, *Opinion: It's Time to Rein in ESG*, MO. TIMES (July 18, 2023), https://themissouritimes.com/opinion-its-time-to-rein-in-esg/ [https://perma.cc/A2JE-NMPQ] ("ESG and the Corporate Equality Index (CEI) are part of the so-called 'ethical investing' movement being pushed by progressives, activist shareholders, and proxy voters, driving investments toward liberal priorities that are in conflict with investors' interests.").

192. Dep't of Lab., Interpretive Bulletin Relating to Exercise of Shareholder Rights (Oct. 17, 2008), 2008 WL 4600732 at *61735; Dep't of Lab., Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments (Oct. 26, 2015), 2015 WL 6438622 at *65136; Dep't of Lab., Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines (Dec. 29, 2016), 2016 WL 7453352 at *95881; Memorandum for Mabel Capolongo, Director of Enforcement Regional Directors on Interpretive Bulletins 2016-01 & 2015-01 (Apr. 23, 2018), 2018 WL 2387479 at *3; Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113-02, 39116 (proposed June 30, 2020); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55219, 55220 (proposed Sept. 4, 2020); Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846-01, 72848 (Nov. 13, 2020); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658, 81660 (Dec. 16, 2020); Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73826 (Dec. 1, 2022) (codified at 29 C.F.R. § 2550); Diego Areas Munhoz & Ben Miller, *Anti-ESG 401(k) Republican Bills Package Passed by the House*, BLOOMBERG L. (Sept. 18, 2024), https://news.bloomberglaw.com/daily-labor-report/anti-esg-401k-republican-bills-package-passed-by-the-house (on file with the *Journal of Corporation Law*).

193. Letter from Mark Brnovich, Arizona Att'y Gen. et al., to Laurence D. Fink, CEO, BlackRock Inc. (Aug. 4, 2022).

194. Letter from Brian Schatz, U.S. Senator, et al., to Larry Fink, Chairman & CEO, BlackRock (Oct. 8, 2020). Asset managers' support for diversity initiatives has also been attacked as a violation of their fiduciary obligations. *See* Letter from Ken Paxton, Att'y Gen. of Tex., et al., to JP Morgan Chase, et al., Re: Apparent Legal and Contractual Violations by Financial Institutions (Jan. 23, 2025).

195. Spence v. Am. Airlines, Inc., 775 F. Supp. 3d 963, 1011 (N.D. Tex. 2025).

196. 17 C.F.R § 240.14Ad–1 (2024). *See also* Press Release, SEC, SEC Adopts Rules to Enhance Proxy Voting Disclosure by Registered Investment Funds and Require Disclosure of "Say-on-Pay" Votes for Institutional Investment Managers (Nov. 2, 2022); Reporting of Executive Compensation Votes by Institutional Investment Managers, 87 Fed. Reg. 78770 (Dec. 22, 2022).

197. *See generally* Brief for Petitioners, Texas v. SEC., 2023 WL 5985329 (5th Cir. Sept. 5, 2023) (No. 23-60079). The challenge was rejected by the Fifth Circuit. Texas v. SEC, No. 23-60079, 2024 WL 2106183, at *1 (5th Cir. May 10, 2024).

The controversy has mostly raged with respect to regulation of institutional investors, both at the federal and state levels,[198] but has also expanded to the realm of corporate governance. A proxy contest at Disney was waged in part over whether the company had gone "woke" by developing films with women and nonwhite leads.[199] Writing as the investment adviser to the New York City Retirement Systems pension funds, Comptroller Brad Lander urged Walmart and other retailers to begin dispensing the abortion drug mifepristone, arguing that the failure to take advantage of a "market opportunity" threatened "long-term shareholder value."[200] In response, a consortium of religious investors urged Walmart *not* to dispense mifepristone, in order to avoid "alienating its diverse customers and potential customers" for its remaining products.[201] And the whole mess has landed in Delaware's lap, via accusations over whether corporations do—or do not—violate fiduciary duties to shareholders when they adopt diversity programs and other political stances. In *Kiger v. Mollenkopf*, a shareholder (unsuccessfully) alleged that Qualcomm violated its fiduciary duties to investors by overstating its efforts to diversify its board.[202] In *Simeone v. Walt Disney Company*, a shareholder sought internal corporate documents to investigate then-Disney CEO Bob Chapek's opposition Florida's parental rights law, colloquially known as "Don't Say Gay," which had goaded Florida's governor into revoking certain Disney corporate privileges.[203] The claim was denied due to Delaware's well-established deference to corporate managers,[204] but that only fueled charges that Delaware had become politicized and was bowing to liberal pressure.[205] Other high profile disputes—such as Target's marketing of Pride merchandise and Bud Light's courting of a transgender influencer, both

198. In addition to the controversies described above, various states have restricted their public pension funds from adopting ESG investing strategies. *See, e.g.*, David Hood, *DeSantis Signs Sweeping Anti-ESG Bill Targeting Funds, Banks*, BLOOMBERG L. (May 2, 2023), https://news.bloomberglaw.com/esg/desantis-signs-sweeping-anti-esg-bill-targeting-funds-banks (on file with the *Journal of Corporation Law*). This has prompted at least one lawsuit. *See* Brenna Goth, *Oklahoma Judge Blocks Anti-ESG Law Targeting Financial Firms*, BLOOMBERG L. (July 22, 2024), https://news.bloomberglaw.com/esg/oklahoma-judge-blocks-anti-esg-law-that-targets-financial-firms (on file with the *Journal of Corporation Law*). Meanwhile, New York pensioners (unsuccessfully) sued various city retirement plans, alleging that the plans' ESG investments threatened the plans' financial health. Wong v. NYC. Emps.' Ret. Sys., No. 652297/2023, 2024 WL 3276803 (N.Y. Sup. July 2, 2024).

199. Rebecca Alter & Savannah Salazar, *Nelson Peltz Lost the Battle for Disney*, VULTURE (Apr. 3, 2024), https://www.vulture.com/article/disney-proxy-fight-shareholder-meeting-nelson-peltz.html [https://perma.cc/B2GQ-8UAV].

200. *See* Brad Lander, *NYC Comptroller Presses Pharmacy Giants to Provide Abortion Medication or Risk Losing Investor Confidence*, N.Y.C. COMPTROLLER (July 17, 2024), https://comptroller.nyc.gov/newsroom/nyc-comptroller-presses-pharmacy-giants-to-provide-abortion-medication-or-risk-losing-investor-confidence [https://perma.cc/N2S9-ADXJ].

201. *See* Letter from Robert Netzly, CEO, Inspire Inv. et al., to CEOs of Walmart, et al. (Aug. 2, 2024), https://storage.googleapis.com/vds_storage/document/Investor%20Mifepristone%20Letters%20080524.pdf [https://perma.cc/SB66-SJFR].

202. Kiger v. Mollenkopf, No. 21-409, 2021 WL 5299581, at *1 (D. Del. Nov. 15, 2021). In another case, a shareholder settled claims that a healthcare trust refused to appoint Black individuals to top management roles and directorships. *See* Katryna Perera, *Healthcare Co. to Pay Atty Fees in Suit Over Board Diversity*, LAW360 (Aug. 12, 2024), https://www.law360.com/securities/articles/1868867 [https://perma.cc/QQG6-TK22].

203. Simeone v. Walt Disney Co., 302 A.3d 956, 961–65 (Del. Ch. 2023).

204. *Id.* at 971–72.

205. Toth, *supra* note 89; Barr & Berry, *supra* note 9; Rickey, *supra* note 10.

of which resulted in boycotts and stock price drops[206]—have drawn additional claims of breach of fiduciary duty (though those companies are not incorporated in Delaware).[207] The State Board of Administration of Florida, represented by the Florida Attorney General and the conservative advocacy firm America First Legal, is currently seeking control of litigation alleging that Target misled shareholders about the risks associated with its efforts to market to an LGBTQ+ customer base—arguing, among other things, that competing plaintiffs and their counsel are too sympathetic to diversity initiatives to effectively represent shareholders.[208] The upshot of all of this is that shareholders have now been drawn into the precise political thicket that an emphasis on "stewardship" over direct regulation was intended to avoid in the first place.[209]

There is no obvious escape from the trap, because, ultimately, under shareholder primacy, profitability is treated as proof of market preferences, and market preferences are taken as a kind of popular vote. Profitability, in other words, becomes a proxy for the *mainstream* of America.[210] And, especially in highly polarized times, a claim to represent the mainstream enjoys an enormous amount of political currency.[211] Political actors are thus incentivized to establish that particular business strategies are, or are not, profitable, which transforms the adoption or abandonment of those strategies into both an investment, and a corporate governance, concern.

In sum, the shareholder primacist conceit that profitability will ultimately align with prosociality invites politicians to treat antisociality as a problem of corporate governance. And when the very definitions of prosociality and antisociality are contested, corporate

206. *See* Nick Halter, *Target, in the Crosshairs, Is Taking a Beating on Wall Street*, AXIOS (June 2, 2023), https://www.axios.com/local/twin-cities/2023/06/02/target-stock-prices-tumble-pride-boycotts [https://perma.cc/YL3D-LNK8]; Emily Stewart, *The Bud Light Boycott, Explained as Much as Is Possible*, VOX (June 30, 2023), https://www.vox.com/money/2023/4/12/23680135/bud-light-boycott-dylan-mulvaney-travis-tritt-trans (on file with the *Journal of Corporation Law*).

207. *See* McCollum v. Target Corp., No. 2:25-cv-00021, 2025 WL 1952037, slip op. at *1 (M.D. Fla. July 16, 2025); Letter from Todd Rokita, Att'y Gen. of Ind., et al., to Brian C. Cornell, Chairman & CEO, Target Corp. (July 5, 2023) (accusing Target's management of breaching fiduciary duties to shareholders by marketing Pride merchandise); Letter from Ron DeSantis, Governor of Fla., to Lamar Taylor, Interim Exec. Dir., State Bd. of Admin. (Jul. 20, 2023) (asking the head of Florida's state pension system to investigate potential breaches of fiduciary duty by the directors of InBev, Bud Light's parent company, to investors).

208. *See* Response for Petitioner, Rivera Beach Police Pension Fund v. Target Corp., No. 2:25-cv-00085, 2025 WL 2306535, at *2 (M.D. Fla. filed Apr. 15, 2025).

209. *See* David A. Cifrino, *The Politicization of ESG Investing*, HARV. ALI SOC. IMPACT REV. (Jan. 24, 2024), https://www.sir.advancedleadership.harvard.edu/articles/politicization-of-esg-investing [https://perma.cc/ZCT2-Y4FF].

210. The point is obvious for product markets, such as the markets for merchandise marketed as trans-inclusive, but applies equally, if more subtly, to aspects of corporate functioning such as diversity of the workforce or the management team. If profitably is tied to demographic diversity, that fact demonstrates the importance of fostering an inclusive environment, either because diverse teams are inherently more innovative, or because a diverse team has more social legitimacy with an increasingly diverse American population. *See* Transcript of Oral Argument and Rulings of the Court on Defendants' Motion to Dismiss the Class Action Complaint at 43–44, Kiger v. Mollenkopf, No. 2023-0444 (Del. Ch. May 9, 2024) (hypothesizing that because "[t]he United States has a diverse population," then "[w]hen people look at a group, whether it be a company, a board, or a group of judges, then if they don't see anyone who looks like them, or maybe they only see very few people who look like them, they can lose confidence in the organization.").

211. Jamelle Bouie, *The Real Reason Trump and Vance Hate Being Called 'Weird'*, N.Y. TIMES (Aug. 9, 2024), https://www.nytimes.com/2024/08/09/opinion/trump-vance-harris-walz-weird.html [https://perma.cc/5DU8-AJST].

governance itself becomes the new political battlefield, with Delaware's role now squarely in the crosshairs.

III. THE *CAREMARK* CONUNDRUM

The shareholder primacist system posits that corporations will be incentivized to engage in prosocial behavior because antisocial behavior is rendered *expensive*, either through regulatory penalties or rejection by the market.[212] For many proponents, that is sufficient; the only role for corporate law, then, is to protect investors and ensure that corporate management is sufficiently focused on maximizing shareholder wealth.[213] Yet state corporate law contains an additional stricture: corporations—as state created organizations, enjoying state-conferred privileges (such as legal personhood, unlimited life, and limited liability)—are authorized only to engage in "lawful" activity.[214] That is, states do not generally treat it as sufficient that profit-seeking corporations are already incentivized by the external regulatory system to avoid expensive antisocial behavior; state corporate law itself conditions the grant of a charter on legal compliance.[215] As Elizabeth Pollman has explained, corporate law's internal prohibition on illegality is another legitimating principle.[216] It is one of the visible ways that the corporate law system can publicly communicate its prosociality; after all, it would be intolerable to suggest that the state-conferred privileges of the corporate form do not carry with them some basic obligation to obey the law.

As a result, state corporate regulators are empowered to dissolve the charters of any organization that has abused its privileges.[217] A corollary principle has been that shareholders may bring derivative actions against corporate directors for damages and expenses incident to intentional lawbreaking, even if that lawbreaking was undertaken to increase profits.[218] As one Vice Chancellor memorably put it in response to a shareholder lawsuit, "Delaware law does not charter law breakers."[219] Some earlier cases recognized a degree of tension in allowing shareholders to advance such allegations, given that the conduct was for their benefit and they may even have acquiesced in it,[220] but nonetheless allowed the claims to proceed on the grounds of public policy.

In *In re Caremark International Derivative Litigation*, Chancellor Allen expanded that principle with a further corollary: that directors may be liable to shareholders for a

212. Fischel, *supra* note 19, at 1269; EASTERBROOK & FISCHEL, *supra* note 19, at 37–39.

213. *E.g.*, Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, 77 BUS. LAW. 651 (2022).

214. DEL. CODE ANN. tit. 8, § 101(b) (2025); MODEL BUS. CORP. ACT § 3.01(a) (AM. BAR ASS'N. 2002).

215. *See* McRitchie v. Zuckerberg, 315 A.3d 518, 572–73 (Del. Ch. 2024) ("By explicitly rejecting the notion that a board of directors can act loyally when consciously deciding to violate positive law in pursuit of greater profits, Delaware ensures that positive laws and regulations have bite. Through those laws and regulations, governments can impose meaningful restrictions on externalities. Through its corporate law, Delaware supports those efforts.").

216. Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2028–29 (2019).

217. DEL. CODE ANN. tit. 8, § 284 (2018).

218. Roth v. Robertson, 64 Misc. 343, 345 (N.Y. Sup. Ct. 1909); Miller v. Am. Tel. & Tel. Co., 507 F.2d 759, 762 (3rd Cir. 1974); Abrams v. Allen, 74 N.E.2d 305, 306 (N.Y. 1947).

219. *In re* Massey Energy Co., No. 5430, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011).

220. *Roth*, 64 Misc. at 343–44; *Miller*, 507 F.2d at 762. *Miller*, which concerned illegal corporate campaign donations, justified the lawsuit by recognizing that prohibitions on corporate political spending were intended to protect shareholders. *Id.* At 762–63.

breach of fiduciary duty not only if they intentionally break the law, but also if they fail to properly oversee compliance with the law (by, for example, failing to adopt an internal reporting system or failing to monitor that system for signs of illegal activity).[221] *Caremark*, however, was subtly different than what came before: as Jennifer Arlen points out, the *Caremark* decision assumed that in an age of increased penalties for corporate criminality, the costs of ignoring potential lawbreaking would exceed the profits to be gained, and therefore a failure of oversight would, in fact, harm shareholders themselves.[222] Like the stewardship displays in Part II, then, Allen's legitimating assumption in *Caremark* was that *corporate lawbreaking is unprofitable*, and therefore that shareholders' interest in preventing corporate criminality is roughly equivalent to society's interest. Allen did not entertain the possibility that directors may set up sub-par oversight systems because, given mild penalties and the low risk of detection, corporate lawbreaking *is wealth-maximizing* from an ex ante perspective. Thus, in the view of Chancellor Allen, there was no tension or irony in the fact that shareholders themselves would be permitted to bring such claims. The *Caremark* decision, then, reframed the issue of corporate lawbreaking to bring it back within the traditional shareholder primacist framework.

It would not remain there long, however, because, when it comes to corporate illegality, boards are not permitted to offer the usual defense of their actions, namely, that they made a calculated decision to assume a risk.[223] Thus, the typical *Caremark* scenario involves some kind of corporate lawbreaking that is intended to boost profits but ultimately results in a disaster for the firm, such as the defects in the design of Boeing's 737 Max.[224] The harm to shareholders is obvious; however, what is less obvious, and *cannot even be the focus of inquiry*, is whether the directors made a rational ex ante calculation that the profits to be gained from lawbreaking outweighed the foreseeable harms to the corporation.[225] Nor can any inquiry be made into whether the firm gained more financially during the period of criminality than it later lost due to exposure of the wrongdoing.[226] Even if the claim is that *no* system was in place to monitor for illegal activity, or that monitoring was "woefully inadequate,"[227] there is not (and cannot be) any interrogation of whether the expected gains from lawbreaking exceeded the expected losses from failing to adopt a detection system. The fact that there can be no evaluation along these lines removes *Caremark* illegality cases from the usual frames within which allegations of board misconduct

221. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

222. Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under* Caremark*: Using Enhanced Information-Acquisition Duties in the Public Interest*, *in* RESEARCH HANDBOOK ON CORPORATE LIABILITY 194–97 (Martin Petrin & Christian A. Witting eds., 2023).

223. For example, in *Citigroup*, shareholders attempted to advance a *Caremark* claim that Citigroup board members were aware of, but failed to respond to, "red flags" of overexposure to the subprime mortgage market. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 129–31 (Del. Ch. 2009). In rejecting the claim, Chancellor Chandler explained that boards have discretion to take business risks—and thus are permitted to decide how to respond to signs of brewing problems—but do not have discretion to take *legal* risks. *See id.* at 131; *see also In re* Goldman Sachs Grp. Inc. S'holder Litig., No. 5215, 2011 WL 4826104, at *20–23 (Del. Ch. Oct. 12, 2011); Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton, 2021-0827, 2023 WL 3093500, at *34 (Del. Ch. Apr. 26, 2023).

224. *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *1 (Del. Ch. Sept. 7, 2021).

225. *Ontario Provincial*, 2023 WL 3093500, at *34.

226. *But cf.* Ritchie ex rel. Corcept Therapeutics, Inc. v. Baker, No. 2022-0102, 2025 WL 2048014, at *9 (Del. Ch. July 22, 2025) (discussed further below).

227. Rich ex rel. Fuqi Int'l, Inc. v. Yu Kwai Chong, 66 A.3d 963, 982 (Del. Ch. 2013).

are analyzed and demonstrates that *Caremark* has very little to do with protecting shareholders, and shareholder harm in the traditional sense is not its focus.

Thus, though Delaware courts have recognized the distinction between intentional illegality and failure to monitor,[228] the claims are often brought in the alternative, with plaintiffs using a single set of facts, such as the Board's inaction in the face of signs of illegality, to argue multiple theories, blurring the line between a failure to monitor for lawbreaking and acquiescence in its commission.[229] As a result, though Delaware courts commonly recognize that the "true" victims of corporate illegality are the injured members of the public rather than the shareholders,[230] little remains of the direct confrontation, seen in earlier cases, with the fact that if lawbreaking was intended to benefit shareholders, shareholders may not be best positioned to challenge it.[231] That conflation of shareholder harm and societal harm renders the doctrine unstable and increasingly difficult for Delaware courts to navigate.

A. Standards for Liability

Traditionally, the standards for liability under *Caremark* are quite high: *Caremark* has been described as "possibly the most difficult theory in corporation law" for a plaintiff to advance,[232] because the plaintiff must either establish that the board completely failed to exercise oversight, or that the board engaged in intentional lawbreaking. As a result, the potential additional penalties that corporate managers may realistically incur are slight compared to the penalties offered by the external regulatory system (and likely covered entirely by insurance in most cases).[233] *Caremark*'s functional "irrelevance"[234] is precisely what has given rise to the accusation of symbolism.[235] Some have speculated that much

228. *E.g.*, City of Detroit Police & Fire Ret. Sys. v. Hamrock, No. 2021-0370, 2022 WL 2387653, at *17 (Del. Ch. June 30, 2022).

229. *E.g.*, *Ontario Provincial*, 2023 WL 3093500, at *31–34. At least one Vice Chancellor has sought to erase the line entirely. *See In re* Transunion Derivative S'holder Litig., 324 A.3d 869, 887 (Del. Ch. 2024) (collapsing the different theories into a single "fundamental rule that Delaware corporations operate lawfully").

230. Marchand v. Barnhill, 212 A.3d 805, 807 (Del. 2019); *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *1 (Del. Ch. Sept. 7, 2021); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816, 2020 WL 5028065, at *1 (Del. Ch. Aug. 24, 2020).

231. One exception to this principle came in *In re Massey Energy Co.*, where the court opined, in a footnote:

> It may well be that the corporate law does not make stockholders whole in situations like this when it is alleged that corporate managers skirted laws protecting other constituencies in order to generate higher profits for the stockholders . . . . [I]f stockholders come out a bit worse, then justice is in fact done. Remember that to the extent that Massey kept costs lower and exposed miners and the environment to excess dangers, Massey's stockholders enjoyed the short-term benefits in the form of higher profits. The very reason for laws protecting other constituencies is that those who own businesses stand to gain more if they can keep the operation's profits and externalize the costs. Thus, the stockholders of corporations, especially given the short-term nature of holding periods that now predominate in our markets, have poor incentives to monitor corporate compliance with laws protecting society as a whole and may well put strong pressures on corporate management to produce immediate profits.

No. 5430, 2011 WL 2176479, at *29 n.185 (Del. Ch. May 31, 2011).

232. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

233. Angela N. Aneiros & Karen E. Woody, Caremark*'s Butterfly Effect*, 72 AM. U. L. REV. 719, 770 (2022).

234. Mercer Bullard, Caremark's *Irrelevance*, 10 BERKELEY BUS. L.J. 15, 23 (2013).

235. Pollman, *supra* note 216, at 2035.

like the *procedural* aspects of shareholder primacy, which function by making constraints on managers visible, shareholder claims for legal violations are also communicative. Shareholders obtain access to internal documents, which are then aired in court, and judicial opinions detail corporate failings even if those fall short of what is required for liability.[236] *Caremark*, therefore, functions as a kind of soft discipline by exposing corporate misconduct to public scrutiny.

That impression is buttressed by some of the doctrinal oddities that result from *Caremark*'s tension with traditional shareholder primacy. For example, *Caremark* claims are derivative actions, which means, they are brought by shareholders to remedy an offense against the corporate entity.[237] A fundamental principle of derivative actions is that the litigation right belongs to the entity itself, and therefore the board of directors would ordinarily be in charge of whether and how to file a claim. Thus, if the claim is to be brought by shareholders over board objection, the shareholders must first demonstrate to the court that the board cannot fairly make a decision on the company's behalf. Typically, this is accomplished by demonstrating that the board is likely implicated in the wrongdoing, and therefore too conflicted to make a determination as to the corporate best interests.[238] Boards, however, can defeat a shareholder claim by demonstrating either that the board is not majority-conflicted—i.e., that only a minority of the board is conflicted, and the majority of members can therefore act on the company's behalf—or by forming a special litigation committee that investigates the claim and evaluates whether it would be in the corporate best interests to pursue it.[239]

These lines of inquiry, however, make no sense in the context of a claim for lawbreaking, especially one that resulted in net gains to shareholders. Even untainted board members should perceive no *corporate* interest in pursuing a claim that resulted in a positive gain to shareholders, or even one that represented a rational ex ante calculation that benefits exceeded costs. Untainted boards would also likely perceive no *corporate* interest in litigation that might uncover additional lawbreaking and result in further regulatory penalties.[240] In other words, notwithstanding Chancellor Allen's efforts, the typical analysis to determine whether a *Caremark* claim should proceed fits poorly within the shareholder primacist framework. As a result, courts have issued opinions that identify serious potential lawbreaking while barring any (corporate law) remedy.[241]

236. Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1883–86 (2021).

237. United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1040 (Del. 2021).

238. *E.g.*, *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *24 (Del. Ch. Sept. 7, 2021).

239. *E.g.*, Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816, 2023 WL 7986729, at 34 (Del. Ch. Nov. 17, 2023).

240. Roy Shapira, *Conceptualizing* Caremark, 100 IND. L.J. 467, 515–17 (2025) (discussing the problem in the context of special litigation committees and claims against corporate officers).

241. For example, in *Bricklayers Pension Fund*, the company settled over $1 billion worth of claims by multiple states for violation of Medicaid rules. Bricklayers Pension Fund of W. Pa. v. Brinkley, No. 2022-1118, 2024 WL 3384823, at *1 (Del. Ch. July 12, 2024), The scheme had been orchestrated by the company's CEO. *Id.* at 3. Out of 13 board members, the plaintiffs alleged wrongdoing by eight. *Id.* at 13. Of those eight, three had only joined the board after the scheme was well underway. *Id.* at 14. The court therefore focused solely on whether the newly-added board members could be said to have violated their *Caremark* dutes, and concentrated its analysis on the relatively limited information that they had received. *Id.* at 14–19. The court concluded that those board

The difficulty that arises, then, is the same one that plagued courts in the context of determining director independence: if *Caremark* claims exist as a public display of corporate law prosociality, that display is weakened if they also are demonstrably toothless. Which is to say, if *Caremark* claims expose corporate wrongdoing while offering weak justifications for allowing directors to escape liability, its legitimating function is undermined.

That dynamic may explain the Delaware Supreme Court's recent decision in *Marchand v. Barnhill*,[242] which has largely been read as reinvigorating *Caremark* claims.[243] Though the *Caremark* doctrine ordinarily gives boards wide discretion to design compliance systems, in *Marchand*, the Delaware Supreme Court made clear that boards have a duty to monitor for "mission critical" legal risks that cannot be delegated to officers at lower levels of the company.[244] *Marchand* has been widely interpreted as relaxing the standards plaintiffs need to meet to bring a *Caremark* claim, and, sure enough, since it was decided, a remarkable number of *Caremark* claims have survived initial motions to dismiss.[245]

That newly-reinvigorated approach to *Caremark*, however, now pressures Delaware corporate law, in large part because of the distance between the justifying assumption—that corporate criminality is a harm to shareholders—and the reality that shareholders may benefit from and encourage such behavior. And if compliance with the legal system is treated as an aspect of corporate law, it draws corporate law itself—and, consequently, the (Delaware) courts that adjudicate corporate law issues—back into the political thicket they were trying to avoid.

B. Identifying the Victim

Because *Caremark* claims are at least as much about protecting society as protecting shareholders, it is not clear what kinds of harms give rise to a claim. As above, Chancellor Allen's formulation placed harm to shareholders front and center; yet, because of the hard prohibition on even wealth maximizing illegal conduct, courts cannot inquire whether the gains to shareholders exceeded eventual losses (such as profits earned that dwarfed any eventual regulatory penalties), or whether boards made a rational *ex ante* calculation that the benefits of lawbreaking outweighed the risks. The lack of a requirement of *shareholder* harm has begun to encourage lawsuits with an openly political agenda, such as against Starbucks for implementing allegedly discriminatory diversity policies,[246] and Smith &

members were not at risk of liability, and therefore, a majority of the board was not at risk—without an inquiry into the complicity of the remaining directors. *Id.* at 19.

242. Marchand v. Barnhill, 212 A.3d 805, 805 (Del. 2019).

243. Shapira, *supra* note 240, at 477. Notably, *Marchand* was authored by then-Chief Justice Leo Strine, Jr.. Two years earlier, Strine had faulted his colleagues for dismissing a *Caremark* claim against Duke Energy, hinting that public suspicions of wrongdoing by Duke Energy's board demanded a judicial response. *See* City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47, 69 (Del. 2017) (Strine, C.J., dissenting) (warning that "[i]t may be that after the daylight of discovery shines for some time, the rancid whiff that arises from the pled facts dissipates and turns into the bracing freshness of a new Carolina day. But, without that, the off-putting odor will linger and so too will rational suspicions that the defendants caused the smell.").

244. Arlen, *supra* note 222, at 197.

245. Shapira, *supra* note 236, at 1866.

246. Nat'l Ctr. for Pub. Policy Rsch. v. Schultz, No. 2:22-CV-00267, 2023 WL 5945958, at *1 (E.D. Wash. Sept. 11, 2023).

Wesson for allegedly illegally marketing its AR-15.[247] (Neither of these are Delaware companies, but, in both cases, the shareholders alleged that the organizing state's law is similar to Delaware's). The *Starbucks* court dismissed the case on the ground that the plaintiff's nakedly partisan agenda was at odds with the interests of other shareholders,[248] but that is exactly what these sorts of claims envision: holding directors accountable for lawbreaking that is intended to profit the entity.[249] As a result, the current state of *Caremark* doctrine encourages the shift of highly contestable political disputes into the realm of corporate governance. Even when no lawsuit is filed, the possibility of one provides an opening for intrusive document requests.[250] For example, the Freedom of the Press Foundation (FPF), a Paramount shareholder, recently sought internal documents pertaining to Paramount's settlement of a lawsuit filed by President Donald Trump alleging that CBS's "60 Minutes" had misleadingly edited an interview with then-presidential candidate Vice President Kamala Harris. FPF was investigating whether the settlement qualified as an illegal bribe to persuade President Trump's FCC to approve Paramount's merger with Skydance—quite openly viewing the matter less as an issue of shareholder wealth maximization than one of free speech.[251]

To be sure, Delaware courts have emphasized that a *Caremark* claim must include some sort of realized corporate trauma before shareholders can bring a lawsuit,[252] often traceable to public exposure of the wrongdoing and subsequent financial damage. But that requirement not only fits poorly with the general prohibition on even *wealth-maximizing* illegal behavior—*Caremark* does not serve its legitimating function if shareholders suing over lawbreaking are told that their claims must be dismissed because shareholders were not harmed by it—but, in the absence of a requirement of *shareholder* harm, there are no doctrines for assessing what kind of trauma is sufficient; presumably, even the legal expenses incurred by a corporation defending itself should count.[253]

247. Complaint, Adrian Dominican Sisters of Bon Secours USA v. Smith, A-23-882774-B (Clark Cnty, Nev. filed Nov. 6, 2023). The district court dismissed the complaint against Smith & Wesson, and the plaintiff refiled in federal court. *See* Complaint, Adrian Dominican Sisters v. Smith & Wesson Brands Inc., No. 2:25-cv-00236 (D. Nev. filed Feb. 4, 2025).

248. *Nat'l Ctr. for Pub. Policy Rsch.*, 2023 WL 5945958, at *4–5.

249. Indeed, one Delaware case upheld *Caremark* claims while acknowledging that shareholders had known about, and acquiesced in, misconduct for years before disaster struck. *See In re Massey Energy Co.*, No. 5430, 2011 WL 2176479, at *29 n.185 (Del. Ch. May 31, 2011).

250. Mike Leonard, *Investor Scrutiny Lawsuits Snarl Business Court's Breakneck Norm*, BLOOMBERG L. (Nov. 12, 2024), https://news.bloomberglaw.com/esg/investor-scrutiny-lawsuits-snarl-business-courts-breakneck-norm (on file with the *Journal of Corporation Law*).

251. *See* Kyle Paoletta, *The Fight for Free Speech Goes Corporate*, COLUM. JOURNALISM REV. (July 25, 2025), https://www.cjr.org/feature-2/paramount-trump-lawsuit-settlement-skydance-merger-press-freedom.php [https://perma.cc/3GG3-LFVC] (discussing how FPF has investigated the settlement with President Trump and the coinciding merger) .

252. Firefighters' Pension Sys. v. Found. Bldg. Materials, 318 A.3d 1105, 1183 (Del. Ch. 2024).

253. Or perhaps not. Especially after the conflagration that precipitated the recent amendments to Delaware law, some Delaware judges may be ready relent on aspects of *Caremark*, if only slightly. *See* Ritchie ex rel. Corcept Therapeutics, Inc. v. Baker, No. 2022-0102, 2025 WL 2048014, at *9 (Del. Ch. July 22, 2025) (noting that "oversight liability under *Caremark* is an ill fit for the facts alleged here because Corcept has not suffered 'enormous legal liability,' or indeed any corporate trauma. To the contrary, the Complaint alleges that off-label marketing practices dramatically increased the Company's revenue from $81 million in 2016 to $251 million in 2018. The notion that the corporation should recover for that 'harm'—when the alleged misconduct at issue has not resulted in civil or criminal fines or penalties, and the Securities Class Action resolved in exchange for a $14

Moreover, it is not clear how far the doctrine extends: *Caremark* claims have been brought against Fox News, alleging that it committed a common law tort, namely, defamation of Dominion Voting Systems, for the purposes of preserving a conservative audience disappointed with Donald Trump's electoral loss, i.e., in order to *maximize wealth* by *preserving market share*.[254] The overtly political nature of that case has already drawn further challenges that Delaware has abandoned political neutrality,[255] and expanding *Caremark* to these kinds of torts only invites political cherry picking of lawsuits.[256] Yet there is no obvious way out: the legitimating function of *Caremark* would be at odds with an open declaration that corporations are permitted consciously to choose to injure people for stockholders' benefit, let alone a declaration that such an action *would in fact* benefit stockholders more than it would harm them through subsequent penalties, i.e., that shareholders' interests are not, in fact, aligned with those of the public.

C. Delaware as Regulator

The final morass created by the *Caremark* line of cases concerns the role of Delaware vis-a-vis the primary regulators who have responsibility for making initial determinations of lawbreaking. In most cases, *Caremark* claims are brought after such determinations are made, and there is no conflict, but not always. For example, *Lebanon County Employees' Retirement Fund v. Collis* concerned AmerisourceBergen's (ABC) settlement of various federal and state enforcement actions concerning its role in the opioid crisis and its failure to comply with DEA regulations for handling controlled substances.[257] At least two congressional reports also singled out the company for its mishandling of opioids. In addition to those cases, a city and a county in West Virginia brought claims alleging that the company had caused a public nuisance by fueling the opioid epidemic. After a bench trial, one court decided the matter in favor of the defendants, concluding they had "substantially complied with their duties" under federal law.[258]

Shareholders of ABC sued the company on a *Caremark* theory, alleging that the company had ignored red flags of misconduct. A Delaware Court of Chancery concluded that

million payment funded entirely by carriers—defies common sense.") (citations omitted). The effort, nonetheless, seems futile; Delaware would hardly disentangle itself from politics if its judges were forced to conduct trials to determine whether the profits gained from illegal conduct exceeded the ultimate penalties. Similarly, a recent gesture by Vice Chancellor Will toward limiting *Caremark* claims to those involving significant societal harm, see *In re* Transunion Derivative S'holder Litig., 324 A.3d 869, 886 (Del. Ch. 2024), seems unlikely to solve the problem; imagine a Delaware Vice Chancellor ruling on whether attempts to cast doubt on the results of a presidential election create sufficient societal harms to justify a shareholder lawsuit.

254. Complaint, *In re* Fox Corp. Derivative Litig., No. 2023-0418, 2023 WL 2954864 (Del. Ch. Apr. 11, 2023).

255. Toth, *supra* note 89. Significantly, the stockholder plaintiffs selected by the court to lead the case—New York and Oregon retirement funds—both are led by public officials who had previously offered political criticism of Fox News's programming. Nonetheless, they were selected to lead the case in part because the court believed their status as public officials rather than private investors lent "legitimacy" to the lawsuit. *See In re* Fox Corp. Derivative Litig., 307 A.3d 979, 995–97 (Del. Ch. 2023).

256. Barr & Berry, *supra* note 9 ("It is no coincidence that the board-level *Caremark* 'risks' that both the plaintiffs' bar and companies' legal advisers stress correspond to du jour ESG issues like climate change, DEI, and #MeToo—or even the 2020 presidential election.").

257. Lebanon Cnty. Emps.' Ret. Fund v. Collis, 311 A.3d 773 (Del. 2023).

258. *Id.* at 792.

the complaint stated a claim *but for* the conclusions in the West Virginia action, which had been reached after a thorough review of the facts. On appeal, the Delaware Supreme Court reversed, holding that it was improper for the Chancery court to functionally adopt the factual findings of another court as its own.

As a matter concerning preclusion and the rules of evidence, the decision was likely correct. As a matter of practicality, though, the decision further threatens to draw Delaware into hot button regulatory issues—and contested political disputes—as its courts are now authorized to decide not only whether corporate directors violated their fiduciary duties by authorizing legal violations, but also whether such violations actually took place in the first instance, regardless of the findings of other regulators.[259] The shareholder lawsuit against Fox News exemplifies the problem: there, Fox settled with Dominion before a court could decide whether Fox had committed the tort of defamation;[260] therefore, if the case in Delaware proceeds that far, the Court of Chancery will have to decide whether defamation did in fact occur in the context of a shareholder lawsuit. And even if the technical standards for defamation were not met, shareholders will likely argue that Fox executives walked *close enough to the line* of lawbreaking to endanger the company, in breach of fiduciary duty, which will present another opportunity for *Caremark* creep.

Caremark has been championed as a means by which flaws in the regulatory process can be corrected,[261] but this is exactly the problem. It turns state corporate courts—and Delaware courts in particular—into a secondary regulator for the United States (and, potentially, the world, to the extent violations of *foreign* law are alleged).[262] There is no possibility that Delaware can adopt such a regulatory function while avoiding the appearance of taking a political—and partisan—bent, which once again undermines the justification for shareholder primacy in the first instance, as well as Delaware's role in the system.

CONCLUSION

If cosmetic corporate governance is used as a tool to stave off more robust regulation of corporate behavior, there seem to be two possibilities. The *most* benign explanation is that shareholder primacy *genuinely is* the most efficient mechanism for arranging economic affairs, but that its virtues are not fully appreciated by the general public. As a result, special efforts must be made to appeal to public sensitivities via a performance of sobriety and professionalism. That explanation, however, is not only inherently dishonest, but antidemocratic as well: it assumes the public cannot comprehend the issues at stake.

259. Contrary authority may be found in *Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47 (Del. 2017), where the plaintiffs alleged that regulators colluded with Duke Energy to allow the company to avoid legal responsibility. The Delaware Supreme Court held that plaintiffs had not alleged sufficient facts to demonstrate such collusion, qualified by a devastating dissent laying out, in far more detail than the majority, evidence that that the board was aware of the company's lawbreaking and pursued a political strategy to avoid penalties. *Id.* at 64–69. However, the *Good* case was decided pre-*Marchand*, which was widely viewed as altering the judicial landscape. *See supra* note 245 and accompanying text.

260. David Bauder, Randall Chase & Geoff Mulvihill, *Fox, Dominion Reach $787M Settlement Over Election Claims*, ASSOC. PRESS (Apr. 18, 2025), https://apnews.com/article/fox-news-dominion-lawsuit-trial-trump-2020-0ac71f75acfacc52ea80b3e747fb0afe [https://perma.cc/2PR5-5ECQ].

261. *See e.g.*, Shapira, *supra* note 240; Arlen, *supra* note 222; William J. Moon, *Transnational Corporate Law Litigation*, 74 DUKE L.J. 901 (2025).

262. Moon, *supra* note 261, at 901–02.

The *less* benign explanation, of course, is that shareholder primacy is *not*, in fact, the most efficient economic arrangement, and that the public would be better served by a corporate law designed more for the benefit of all stakeholders. In that alternative, legitimacy-washing is a tool to maintain a system that benefits a few at the expense of the many.

The open question is how long profit-maximizing corporations will tolerate incurring real expenses as the price of public acceptance. The recent contretemps over Delaware law suggests they no longer will. But if Delaware (or alternative jurisdictions) refuse to exercise any discipline at all, or if corporations even shift governance to contractual arrangements that are litigated out of public view, the pitchforks—via more robust federal regulation, if nothing else—may in fact reveal themselves. Or, more unsettlingly, corporate managers may reach the rational calculation that they have amassed enough political influence and power so as to no longer need legitimizing symbols to maintain their dominance after all.

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