THE ROLE OF CORPORATE PERSONALITY THEORY IN OPTING OUT OF SHAREHOLDER WEALTH MAXIMIZATION

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ABSTRACT

In her article, Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents, Professor Joan Heminway notes that efforts to guide the decision-making of corporate directors away from shareholder wealth maximization are suspect, whether by way of charter, bylaw, shareholder agreement, or board policy. This is because when board decision-making serves the interests of non-shareholder constituencies, or pursues corporate objectives with no shareholder wealth benefits, directors run the risk of violating positive law or public policy that prioritizes shareholder wealth maximization. Meanwhile, in his article, The Origins of Corporate Social Responsibility, Professor Eric Chaffee presents what he calls a new "essentialist" theory of the corporation, which he labels "collaboration theory." According to Professor Chaffee, this new theory explains why corporations have a duty to act in socially responsible ways, except when to do so would obviously destroy shareholder value.

In this Essay, I build on the aforementioned work of Professors Heminway and Chaffee in order to analyze to what extent corporate personality theory, including Professor Chaffee's collaboration theory, has a role to play in determining the extent to which for-profit corporations may use private ordering to limit the constraints of any shareholder wealth maximization norm. Professor Heminway argues that there exists uncertainty about the ability of corporate stakeholders to use private ordering in this way, and the validity and enforceability of related bylaws, shareholder agreements, and board policies is therefore in doubt. At the same time, courts and legislatures often rely on theory and policy to resolve the existing uncertainty, and thus theory and policy may

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be decisive. In this Essay, I hope to show that corporate personality theory can be one of the relevant theoretical tools that may be used to bring additional clarity to this area.

I. INTRODUCTION

Corporate governance can be understood as encompassing the theories, norms, and rules that determine (1) who decides how scarce corporate resources will be allocated, and (2) what the goal of that decision-making should be. Three of the most dominant theories of corporate governance are director primacy, shareholder primacy, and team production theory.[2] Director primacy is generally understood to argue that the board of directors is the ultimate decision-maker, and that the goal of the board's decision-making should be shareholder wealth maximization.[3] Meanwhile, shareholder primacy also (unsurprisingly) favors shareholder wealth maximization as the goal, but argues that shareholders should have more decision-making power than they currently do.[4] Finally, team production theory aligns with director primacy in locating decision-making power in the board, but conceives of the goal as mediating the often conflicting interests of the various corporate stakeholders in order to allow the corporation to optimally fulfill its various obligations in an arguably sustainable way.[5]

While two of these three dominant theories of corporate governance identify shareholder wealth maximization as the goal of

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[2] *See* Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 6 (2015) (discussing "three competing models of corporate governance: director primacy, shareholder primacy, and team production").

[3] *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U.L. REV. 547, 550 (2003).

[4] *See* Padfield, *supra* note 2, at 11–13.

[5] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 257–58 (1999); *id.* at 249 ("In this Article we take issue with both the prevailing principal-agent model of the public corporation and the shareholder wealth maximization goal that underlies it."); *id.* at 253 ("[B]oards exist not to protect shareholders *per se*, but to protect the enterprise-specific investments of *all* the members of the corporate 'team,' including shareholders, managers, rank and file employees, and possibly other groups, such as creditors.").

corporate governance, there is a surprising amount of disagreement among corporate governance experts as to the extent to which boards are actually subject to a duty to maximize shareholder value.[6] In her article, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, Professor Joan Heminway reviews the possible sources of such a duty,[7] and concludes that there is reason to be

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[6] Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 972 (2017).

> *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 29 (2012) (denying the existence of a pervasive shareholder wealth maximization norm); Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 10–15 (2015) (surveying academic literature on the shareholder wealth maximization norm and concluding that there is none); Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 393–99 (2014) (describing shareholder wealth maximization as a norm of corporate governance and an objective of corporate law); Stephen M. *Bainbridge, Director v. Shareholder Primacy in the Convergence Debate*, 16 Transnat'l LAW. 45, 45 (2002) (describing the shareholder wealth maximization norm as "well-established in U.S. corporate law" and treating it "as given").

Id. at 940 n.3.

[7] In this Essay, I will speak of shareholder wealth maximization as a duty, rule, and norm. For purposes of this Essay, I use these labels interchangeably. *Cf.* Heminway, *supra* note 6, at 939 n.1 (2017) (discussing various definitions of "norm"/"norms" including "a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by the threat of legal sanctions," and "standards of behavior defined in terms of rights and obligations" (first quoting JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 32–33 (2008), and then quoting Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983))).

suspicious about pronouncements that shareholder wealth maximization is the dominant corporate governance norm. Nonetheless, she assumes practitioners cannot ignore the evidence in favor of such a norm, and proceeds to ask what forms of private ordering may be available to opt out of it. Ultimately, Professor Heminway concludes that even here there is a tremendous amount of uncertainty.

This Essay builds on Professor Heminway's article by exploring the extent to which corporate personality theory can be used to further our understanding both of the shareholder wealth maximization norm in general, and the extent to which parties may opt out of it. Corporate personality theory tends to come up more frequently in discussions of the government's ability to regulate corporations, as opposed to discussions of the allocation of power among the primary private corporate stakeholders, which tends to be more the domain of corporate governance. However, the lines between external regulation of corporations and their internal affairs can quickly blur,[8] and this Essay will argue, among other things, that corporate personality theory has a role to play in the corporate governance debates surrounding shareholder wealth maximization.

The three dominant theories of corporate personality are artificial entity, aggregate, and real entity theory.[9] Generally speaking, artificial entity theory views the corporation as a creature of the state, and tends to presume the government has more power to regulate corporations

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[8] *See* Ann Lipton, *Unicorn Governance and Power*, BUS. L. PROF. BLOG (Oct. 14, 2017), http://lawprofessors.typepad.com/business_law/2017/10/unicorn-governance-and-power.html (noting that corporate governance obligations "placed on firms ostensibly for the protection of investors have very tangible effects on employees, customers, competitors, and general compliance with the rule of law" and that it "is not clear that external regulation alone can carry this responsibility").

[9] Stefan J. Padfield, *A New Social Contract: Corporate Personality Theory and the Death of the Firm*, 101 MINN. L. REV. HEADNOTES 363, 373 (2017) (reviewing theories); Padfield, *supra* note 2, at 20 ("I have sought in my recent scholarship to align the dominant theories of corporate governance with the primary theories of corporate personality.") (citing Stefan J. Padfield, *Rehabilitating Concession Theory* 66 OKLA. L. REV 327, 331 (2014); Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 835 (2013); Stefan J. Padfield, *The Dodd-Frank Corporation: More Than A Nexus-of-Contracts* 114 W. VA. L. REV. 209, 215 (2011)).

than either the aggregate or real entity theories, which tend to view the corporation as standing more in private shoes – be that by way of the shareholders under aggregate theory or the directors under real entity theory.[10] In his article, *The Origins of Corporate Social Responsibility*, Professor Eric Chaffee presents what he calls "a new essentialist theory of the corporation," which he terms "collaboration theory."[11] According to Professor Chaffee, this new theory "explains why the collaborating parties have an obligation to manage the corporation in a way that is socially responsible."[12] In this Essay, I also will build on Professor Chaffee's article by applying his discussion of corporate personality theory—including his collaboration theory—to the issue of corporations opting out of shareholder wealth maximization.

Following this Introduction, Part II will review the evidence for and against a shareholder wealth maximization norm, relying heavily on Professor Heminway's *Shareholder Wealth Maximization* article. Part III will then lay out in more detail the various corporate personality theories, this time relying heavily on Professor Chaffee's *Corporate Social Responsibility* article. Part IV will then seek to advance the discussion by applying the corporate personality lessons to the issue of private ordering around the shareholder wealth maximization norm. Ultimately, I offer two conclusions. First, the corporate personality theories discussed can be ranked in terms of their support for private ordering and opting out of any shareholder wealth maximization norm,[13] and advocates on either

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[10] *But cf.* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 365 (2017) ("The work of German legal theorist Otto von Gierke played a key role in the development of real entity theory. Gierke posited that groups have a 'collective spirit' that gives them an identity separate and apart from the individuals composing them.").

[11] *Id.* at 356.

[12] *Id.*

[13] One should generally expect that the more a particular theory of corporate personality views the corporation as a private rather than a public construct, the more freedom that theory should support granting to corporations to opt out of regulatory

side of the debate risk ceding precious ground to their opponents if they ignore these theories in the course of making their arguments.[14] Second, collaboration theory, in particular, provides unique support for a particular form of at least minimizing the constraints of shareholder wealth maximization via private ordering without directly undermining shareholder wealth maximization.[15] Finally, I will provide concluding remarks in Part V.

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default rules. Thus, one might rank the theories from most to least supportive of private ordering as follows: (1) aggregate theory, (2) real entity theory, (3) collaboration theory, and (4) artificial entity theory. Of course, context matters, and thus, for example, collaboration theory might be more supportive of opting out of shareholder wealth maximization due to its fundamental support of corporate social responsibility.

[14] *Cf.* Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 833 (2013) ("Despite protestations to the contrary, . . . a closer reading of the *Citizens United* opinion reveals that both the majority and dissent not only adopted diverging theories of the corporation, but that those theories were likely dispositive."); *id.* at 857 ("[R]eview of the primary campaign finance cases leading up to, and relied upon in, *Citizens United* should make clear that an on-going debate about the nature of corporations has been central to the resolution of these cases, despite the fact that none of the opinions have expressly referenced corporate theory.").

[15] Specifically, the following guidelines, which Professor Chaffee argues necessarily flow from collaboration theory, may form the basis of charter amendments and bylaws that provide the greatest freedom to pursue social ends while not directly conflicting with shareholder wealth maximization:

> [B]eyond engaging in socially responsible behavior when it supports profit maximization, those organizing, operating, and owning corporations should engage in such behavior in two additional circumstances to fulfill their implied duty of good faith. First, in instances in which the socially responsible behavior neither financially benefits nor financially harms the corporation, which means it is cost neutral, the corporation should engage in socially responsible behavior to fulfill the implied duty of good faith within the collaboration. Second, in instances in which the financial benefit to the business entity is uncertain, the corporation should engage in socially responsible behavior to fulfill the implied duty of

II. SHAREHOLDER WEALTH MAXIMIZATION

In her article, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, Professor Heminway tries to locate the duty to maximize shareholder value in both statutory law and court opinions. The following two sub-parts A and B will summarize her findings, and provide some additional commentary. Sub-part C will then review Professor Heminway's discussion of the likelihood that organic documents such as a corporation's charter or bylaws can provide an effective means of opting out of any duty to maximize shareholder value.

A. Statutes

In Professor Heminway's survey of the relevant statutory law, she found that none expressly codify a duty to maximize shareholder value,[16] whether in provisions governing the charter's statement of purpose,[17] or in provisions setting forth director and officer standards of conduct.[18] Meanwhile, Professor Heminway identifies statutory

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> good faith within the collaboration. Because the future is often uncertain, this means that in many instances corporations should engage in the socially responsible course of action.

Chaffee, *supra* note 10, at 376.

[16] Heminway, *supra* note 6, at 946. *But cf.* James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1598 (2013) ("[T]the American Law Institute's (ALI) Principles of Corporate Governance declares that 'a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.'") (quoting 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(a) (1994)).

[17] Heminway, *supra* note 6, at 946 ("These state statutory provisions on corporate charters, even with their differences, do not mandate or expressly invoke an emphasis on shareholder wealth maximization or even shareholder value or primacy.").

[18] *Id.* at 947–48 ("These standards prescribe that actions be taken in good faith, with due care, and in the best interest of the corporation. Yet, none of these statutory frameworks regarding officer and director management or conduct mention—no less

provisions that expressly disavow a corporate duty to maximize shareholder wealth, such as constituency statutes.[19] Of course, the fact that legislatures felt it necessary to promulgate such statutes at least suggests they assumed a default shareholder wealth maximization norm existed. The same could be said of benefit corporation statutes.[20]

B. *Decisional Law*

In the 1919 case of *Dodge v. Ford Motor Co.*, the Supreme Court of Michigan famously asserted:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The

require—management action in a manner that maximizes shareholder wealth or value or compels shareholder primacy."). *But cf.* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 285 (1998) ("'[T]he best interests of the corporation' are generally understood to coincide with the best long-term interests of the shareholders."); COMM. ON CORP. LAWS, AM. BAR ASSOC., *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2265 (1990) ("[T]he 'best interests of the corporation' are equated with 'corporate profit and shareholder gain.'"). The drafters' intent when using "best interests of the corporation" may thus have been to create a default rule in favor of shareholder wealth maximization, while maintaining the flexibility to cover subsequent adjustments derived from other sources like constituency statutes.

[19] Heminway, *supra* note 6, at 948 ("[A] significant number of states have adopted 'other constituency' legislation—statutes that emphasize management's ability to consider the effects of corporate action on a variety of stakeholders."); *cf. id.* at 949 ("Neither the DGCL [Delaware General Corporation Law] nor the MBCA [Model Business Corporation Act] includes other constituency provisions."); Stephen Bainbridge, *The Shareholder Wealth Maximization Principle Versus Non-Shareholder Constituency Statutes*, PROFESSORBAINBRIDGE.COM (May 5, 2012, 12:34 PM), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-shareholder-wealth-maximization-principle-versus-non-shareholder-constituency-statutes.html ("[T]he shareholder wealth maximization norm may survive even in states with nonshareholder constituency statutes.").

[20] Heminway, *supra* note 6, at 949–50 ("One could argue that benefit corporation statutes, which typically do not permit the corporation's board to prioritize shareholder wealth over other corporate interests, have become popular largely because of concern that a shareholder wealth maximization norm does exist . . .").

> discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes. [21]

Many years later, in *eBay Domestic Holdings, Inc. v. Newmark*, Chancellor Chandler, writing for the Court of Chancery of Delaware, applied a similar principle when he held:

> Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[22]

These are two of the cases most often cited as evidence of a common law duty to maximize shareholder value.[23] According to a

[21] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). It may be worth noting here that identifying shareholder profit as the primary purpose of a for-profit corporation does not preclude other secondary purposes.

[22] EBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); *see also id.* ("I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . .").

[23] Heminway, *supra* note 6, at 950–51 ("The list of judicial decisions that support corporate shareholder wealth maximization is short and has been well trod in the literature. Typically, summaries of the court opinions in this area begin with the iconic early twentieth-century Michigan case *Dodge v. Ford Motor Company* and extend through *eBay Domestic Holdings, Inc. v. Newmark*, sometimes stopping along the way to note other cases, including *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* and its progeny, and perhaps another case or two, like *Katz v. Oak Industries Inc.*"); *cf.* Robert P. Bartlett, III,

Westlaw search on August 12, 2017, *Dodge* has been cited in seventy-one subsequent cases, with only two being characterized as providing a "Negative Treatment" of *Dodge*.[24] Meanwhile, on the same date *eBay* was reported as having been cited by thirty-one cases, with only one providing negative treatment.[25] Furthermore, Professor Robert Rhee recently conducted "the first empirical review of judicial discussion of shareholder profit maximization in the era of the modern corporation, the period 1900–2016," and found that "courts have pervasively embraced the concept that corporate managers should maximize shareholder wealth."[26]

One source of vigorous pushback on this point is the business judgment rule, which allows boards to force plaintiffs to overcome a judicially recognized presumption that the board acted in good faith, on a fully informed basis, and in the best interests of the corporation. The degree of discretion this grants boards is contested,[27] but it seems fair to

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Shareholder Wealth Maximization as Means to an End, 38 SEATTLE U.L. REV. 255, 295 (2015) ("*eBay* and *Trados* . . . are in tension with long-standing doctrine concerning the standard of conduct for Delaware directors."); *id.* at 292 (citing *In re Trados Inc. S'holder Litig.,* 73 A.3d 17, 41 (Del. Ch. 2013)) ("generally it will be the duty of the board, where discretionary judgment is to be exercised, to prefer the interests of the common stock—as the good faith judgment of the board sees them to be—to the interests created by the special rights, preferences, *etc* . . . of preferred stock.").

[24] On file with author.

[25] On file with author.

[26] Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. (forthcoming 2017).

[27] *Compare* Stephen Bainbridge, *Can Tim Cook Ignore ROI When Deciding How to Design an iPhone?*, PROFESSORBAINBRIDGE.COM (Mar. 7, 2014, 8:46 AM), http://www.professorbainbridge.com/professorbainbridgecom/2014/03/can-tim-cook-ignore-roi-when-deciding-how-to-design-an-iphone.html (arguing that business judgement rule limits courts to following questions: "Did the board commit fraud? Did the board commit an illegal act? Did the board self-deal?"), *with* Stephen Bainbridge, *Al Franken, Shareholder Wealth Maximization, and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (July 27, 2010, 4:07 PM), http://www. professorbain-bridge.com/professorbainbridgecom/2010/07/shareholder-wealth-maximization-and-the-business-judgment-rule.html (suggesting failure to advance the best interests of the shareholders might constitute bad faith). It is this author's belief that brazenly ignoring ROI (return on investment) implicates not only good faith, but also the duty of care

say that it at least makes it relatively easy for boards to avoid accountability for ignoring any duty to maximize shareholder value by simply appending a colorable pro-shareholder-value story to any action taken.[28]

(which requires a board to assess all material information reasonably available) as well as the waste doctrine. *Cf.* Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1241 (2017) ("Respected judges have downplayed waste as a 'vestige' and described it as 'possibly non-existent,' the Loch Ness monster of corporate law; but waste survives.").

[28] *Cf.* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U.L. REV. 269, 285–86 (2013).

> Judges address only the particular claims and desired relief that are brought before them. They cannot and do not mandate that governing officials maximize shareholder wealth. They can only prohibit them from taking particularized actions. In *Dodge*, the plaintiffs sought more dividends. In *eBay*, the plaintiffs sought the nullification of certain anti-takeover measures. Neither plaintiff sought an injunction or other remedy that would have prohibited directors from pursuing the criticized business strategy, and neither the *Dodge* nor the *eBay* court altered corporate strategy. For judges who routinely recite the vaunted business judgment rule, moreover, one core rationale for which is that directors, not judges, govern corporations, the granting of such extraordinary and meddlesome relief would seem quite unlikely. Judges may be expressing their views about a corporate purpose as they fashion remedial relief, but they leave that purpose intact. Moreover, the unelected judges in Delaware have been, historically speaking, very reluctant to equate corporate purpose with stockholder wealth, as the turbulent takeover era of the 1980s revealed. In fact, only when the demise of the corporation is at hand or control over its direction shifts away from dispersed shareholders does stockholder wealth become the sole purpose.

One case frequently cited in support of the preceding proposition is *Shlensky v. Wrigley*, wherein the Appellate Court of Illinois refused to impose liability on the board of the entity that owned the Chicago Cubs for failing to install lights so that night games could be played even though there was evidence that this caused the team to lose money and the rationale for the decision was as contrary to shareholder wealth maximization as Ford's in the *Dodge* case:

> Plaintiff . . . alleges that defendant Wrigley has refused to install lights, not because of interest in the welfare of the corporation but because of his personal opinions "that baseball is a 'daytime sport' and that the installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood." It is alleged that he has admitted that he is not interested in whether the Cubs would benefit financially from such action because of his concern for the neighborhood . . . .[29]

The *Shlensky* court, however, concluded that "the decision is one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in their making of that decision."[30] Thus, no liability would be imposed for failing to install lights because, "[w]hile all the courts do not insist that

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Id. A couple of points are likely worth making here. First, business strategy arguably ultimately only matters in application. Thus, the fact that judges do not overturn broad strategies is cold comfort to boards pondering a particular action. Second, the fact that there exists a unique duty to maximize shareholder value in the context of a change-of-control does not undermine a claim that a broader duty to maximize shareholder value exists as well. Generally, a board should be able to sacrifice short-term shareholder value in exchange for greater long-term shareholder value (in fact, one could argue it is obligated to do so), and it is arguably only the option of pursuing such a tradeoff that is limited by the change-of-control scenario.

[29] Shlensky v. Wrigley, 237 N.E.2d 776, 778 (Ill. App. Ct. 1968).

[30] *Id.* at 780.

one or more of the three elements [of fraud, illegality or conflict of interest] must be present for a stockholder's derivative action to lie, nevertheless we feel that unless the conduct of the defendants at least borders on one of the elements, the courts should not interfere."[31]

A California Court of Appeal later stated that, "*Shlensky* interpreted *Dodge* to mean that 'there must be fraud or a breach of that good faith which directors are bound to exercise toward the stockholders in order to justify the courts entering into the internal affairs of corporations.'"[32] However, a few points are worth making here. First, there is at least some reason to believe that *Shlensky* misinterpreted *Dodge*. The *Dodge* court ruled that

> [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.[33]

This arguably states a much higher bar than limiting review to fraud, illegality or conflict of interest.

Second, the *Shlensky* court felt the need to provide a shareholder wealth maximization motive to support its conclusion:

> [W]e are not satisfied that the motives assigned to Philip K. Wrigley, and

[31] *Id.*

[32] Hill v. State Farm Mut. Auto. Ins. Co., 83 Cal. Rptr. 3d 651, 692 (Cal. Ct. App. 2008) (quoting *Shlensky*, 237 N.E.2d at 779–80).

[33] *Dodge*, 170 N.W. at 684.

> through him to the other directors, are contrary to the best interests of the corporation and the stockholders. For example, it appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood. Furthermore, the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating.[34]

While this commentary is generally viewed as dicta, the fact that the court felt it necessary to provide such a defense for the board at all is telling.

Finally, a review of the language used by the *Shlensky* court in its opinion reveals the relevant test is at least broader than fraud, illegality or conflict of interest. By way of example, the *Shlensky* court says both that "there must be fraud *or a breach of that good faith* which directors are bound to exercise toward the stockholders,"[35] and that "unless the conduct of the defendants at least *borders on* [fraud, illegality or conflict of interest], the courts should not interfere."[36] Certainly, an argument can be made, in light of all the foregoing, that preferring non-shareholder interests to shareholder wealth maximization "borders" on a traditional conflict of interest, at least when not supported by a reasonable long-term shareholder wealth maximization story.[37]

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

35 *Id.* at 779–80 (emphasis added).

36 *Id.* at 780 (emphasis added).

37 *Cf.* Susan Pace Hamill, *Untangling the Mystery of Teaching Business Organizations*, 59 ST. LOUIS U.L.J. 793, 806 n.51 (2015) ("Because Henry Ford may have been trying to thwart the Dodge brothers from competing with him when he refused to authorize dividends, arguably this [*Dodge*] decision could have been overturned on the grounds of

Another point of contention revolves around what to make of courts' predilection for speaking both in terms of duties "to the corporation" as well as duties "to the corporation and its shareholders."[38] As Professor Heminway notes,[39] Vice Chancellor Travis Laster has recently explained the distinction as follows:

> [B]y increasing the value of the corporation, the directors increase the share of value available for the residual claimants. Judicial opinions therefore often refer to directors owing fiduciary duties "to the corporation and its shareholders." This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants. Nevertheless, "stockholders' best interest must always, within legal limits, be the end. Other

a conflict of interest."); Arthur B. Laby, *The Fiduciary Obligation As the Adoption of Ends*, 56 BUFF. L. REV. 99, 144 (2008). ("In deciding whether the business judgment rule applied, the [*Shlensky*] court was forced to assess Wrigley's motives. Was he out for the corporation or was he out for himself? If the latter were the case, Wrigley would have a conflict of interest with the shareholders and the business judgment rule would not protect him.").

38 *See* Heminway, *supra* note 6, at, 952–53 (2017) ("Adding to the complexity is some doctrinal confusion--or perhaps just a lack of clear expression--in decisional law about the institution or constituencies to which or whom director and officer fiduciary duties are owed. Some decisional law describes fiduciary duties owed to the corporation and other court opinions refer to duties owed to the corporation and its shareholders. Although anecdotal observation reveals that the latter cases may predominate more in change-of-control settings (where shareholder value primacy plays a more leading role), the shareholder beneficiary language also occurs in other settings.").

39 *See id.* at 953.

> constituencies may be considered only instrumentally to advance that end."[40]

Professor Heminway has noted elsewhere that most frequently, "courts find that the duties owed to the corporation operate for the primary benefit of shareholders, as the corporation's owners and, more specifically, for the financial benefit of shareholders. Yet even this formulation is ambiguous, since shareholders are not a monolithic group."[41] However, the heterogeneity of shareholders may actually support a shareholder wealth maximization norm. Given expected differences in preferences, shareholders should arguably prefer the managers of their investments in for-profit corporations to maximize the return on those investments, which will then maximize the ability of the shareholders to use their newfound wealth for whatever idiosyncratic purposes they desire.

Professor Robert Rhee has listed some additional arguments against a duty to shareholders, at least one that rests on par with, if not superior to, a duty to the corporation.

> Courts have frequently commented that "the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders." This formulation implies that the duty owed to shareholders ranks *pari passu* with that owed to the corporation. But this is not the case. The board's duty to the corporation is unwavering and unqualified, but its duty to shareholders is not so absolute. For example, in takeovers, actual shareholder preference is no basis to impose liability if the board disagrees with it. In insolvency, the

[40] In re Trados Inc. S'holder Litig., 73 A.3d 17, 36–37 (Del. Ch. 2013) (internal citations omitted) (quoting Gheewalla, 930 A.2d at 99; Leo E. Stine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n. 34 (2012)).

[41] Joan MacLeod Heminway, *Women in the Crowd of Corporate Directors: Following, Walking Alone, and Meaningfully Contributing*, 21 WM. & MARY J. WOMEN & L. 59, 74 (2014).

> board's fiduciary duty is no longer to shareholders, but pivots to creditors. When shareholders threaten the interest of the corporation, the board may take hostile actions against them to advance the corporation's interest. Ultimately, directors owe their fiduciary duty to the corporation as a legal entity. Shareholders are one group of multiple constituencies, including creditors, employees, customers, and suppliers, and by virtue of their residual claim they best stand to represent the corporation's interest in a derivative suit. Thus, we can say that the duty running from a director to the shareholder is not direct, but flows through the corporation. The linearity of the contractual nexus among the board, the corporation, and the shareholder is important from the standpoint of legal duty. A quick review of seminal cases in tort law shows that the lack of a direct contractual privity precludes the finding of duty.[42]

It may be worth addressing these points in turn. First, Professor Rhee states that "in takeovers, actual shareholder preference is no basis to impose liability if the board disagrees with it." In support of this proposition, Professor Rhee cites *Paramount Communications Inc. v. Time Inc.*, wherein the court stated the following: "That many, presumably most, shareholders would prefer the board to do otherwise than it has done does not . . . afford a basis to interfere with the effectuation of the

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[42] Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1183–84 (2013) (quoting Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994)).

board's business judgment."[43] However, *Time* may be better understood as empowering the board to pursue long-term shareholder wealth maximization even when the shareholders would prefer a transaction increasing their wealth in the present.[44] This change in perspective matters because it upholds, rather than undermines, a duty to shareholders. The duty is not to prioritize their preferences without qualification. Rather, the duty is to maximize their wealth. Thus, rather than concluding that the duty to shareholders is weaker than the duty to the corporation, we conclude that the duty to shareholders remains primary. Arguably supporting this view, in *Air Products and Chemicals, Inc. v. Airgas, Inc.*, Chancellor Chandler of the Delaware Court of Chancery relied on evidence that "a large number—if not all—of the arbitrageurs who bought into Airgas's stock at prices significantly below the $70 offer price would be happy to tender their shares at that price regardless of the potential long-term value of the company" to justify a board's defensive measures under *Time* because otherwise the shareholders would "take a smaller harvest in the swelter of August over a larger one in Indian Summer."[45]

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[43] Paramount Commc'ns Inc. v. Time Inc , Nos. 10866, 10670, and 10935, 1989 WL 79880, at *30 (Del. Ch. July 14, 1989).

[44] *Cf.* John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 951 (1988) ("[W]e need some anchoring point upon which to rest a theoretical foundation. One approach that others have suggested utilizes a hypothetical bargaining game. To do this, one asks: What would rational shareholders have agreed upon in a world of low transaction costs? What rules would they reach as to self-dealing, permissible takeover defensive tactics, or due care liability? My own guess is that the rules they would reach would pretty closely approximate the existing law of fiduciary duties with respect to self-dealing, but might be quite different with respect to due care liability and takeover defensive tactics."); Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, U.C. DAVIS L. REV. 645, 650 (2002) ("[B]y and large, courts have not scrutinized business decisions to see whether directors sacrificed profit maximization to advance the interests of employees, creditors, customers, and the community. Instead, the courts almost invariably accept some rationale as to how the business decisions were in the long-range interest of the shareholders.").

[45] Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 111 (Del. Ch. 2011) ("The next question is, if a majority of stockholders *want* to tender into an inadequately priced offer, is that substantive coercion? Is that a threat that justifies continued maintenance

Second, Professor Rhee states that in insolvency, "the board's fiduciary duty is no longer to shareholders, but pivots to creditors."[46] Of course, by definition the shares of an insolvent company should be worthless, so directing management to not also leave the corporation's creditors with nothing does not necessarily undercut a shareholder wealth maximization duty outside insolvency.

Third, we are told that when shareholders "threaten the interest of the corporation, the board may take hostile actions against them to advance the corporation's interest."[47] The case cited to support this proposition is *Orban v. Field*.[48] On this point, it may be worth reviewing some relevant commentary from Chancellor Laster in *Trados*:

> Some scholars have interpreted *Orban v. Field*, 1997 WL 153831 (Del. Ch. Apr. 1, 1997) (Allen, C.), as supporting a "control-contingent approach" in which a board elected by the common stock owes duties to the common stockholders but not the preferred stock, but a board elected by the

of the poison pill? Put differently, is there evidence in the record that Airgas stockholders are so 'focused on the short-term' that they would 'take a smaller harvest in the swelter of August over a larger one in Indian Summer'?") (quoting Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786, 815 (Del. Ch. 2007)). Complicating matters, when one takes into account rate of return in addition to stock price, one may find that the short-term preference expressed by shareholders in these cases may in fact also be maximizing their value in terms of rate of return, even assuming a higher stock price later. This certainly makes more sense from the perspective of rational actor theory, but it also weakens the justification for finding the relevant coercion to uphold a board's defensive measures. Nonetheless, this complication is arguably more about application of the duty to maximize shareholder value, as opposed to a change in that duty. My thanks to Professor Rhee for this insight.

[46] Rhee, *supra* note 43, at 1183.

[47] *Id.*

[48] Orban v. Field, No. 12820, 1997 WL 153831, at *1 (Del. Ch. Apr. 1, 1997).

> preferred stock can promote the interests of the preferred stock at the expense of the common stock. *See, e.g.*, Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. Rev. 967, 990–93 (2006) . . . . The control-contingent interpretation does not comport with how I understand the role of fiduciary duties or the ruling in *Orban*, which I read as a case in which the common stock had no economic value such that a transaction in which the common stockholders received nothing was fair to them.[49]

Thus, to the extent the relevant conflict is between shareholder wealth maximization and corporate survival in *Orban*, the preference for corporate survival does not necessarily undermine shareholder wealth maximization.[50]

Finally, Professor Rhee concludes that "[a] quick review of seminal cases in tort law shows that the lack of a direct contractual privity precludes the finding of duty."[51] However, Proessor Rhee makes clear in the beginning of his article that he is not arguing that "a breach

[49] In re Trados Inc. S'holder Litig., 73 A.3d 17, 42 n.16 (Del. Ch. 2013).

[50] *But cf.* Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1 (2010) ("I believe that the generation of durable wealth for its stockholders through fundamentally sound economic activity, such as the sale of useful products and services, is the primary goal of the for-profit corporation.") (emphasis added).

[51] Rhee, *supra* note 43, at 1184.

of fiduciary duty is a tort,"[52] and lack of a duty under tort law does not preclude a fiduciary duty.[53] As Professor Salar Ghahramani has noted:

> The breach of these duties – which could be caused by conflict of interest or gross negligence – is treated as an equitable wrong, as opposed to the legal wrongs of tort, breach of contract, or the breach of a statutory obligation. The distinction matters not only because of the different remedial regimes that are triggered under law and equity, but also because tortious claims, as common law civil wrongs, guaranteed a jury trial under the unincorporated Seventh Amendment, while breach of fiduciary duty claims generally carry no such protection when invoked as actions in equity.[54]

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52 *Id.* at 1142 ("To be clear, I do not argue that a breach of fiduciary duty is a tort, just the way it is not a breach of contract, notwithstanding the contractarian view of corporate governance.").

53 *Compare* RESTATEMENT (SECOND) OF TORTS § 874, cmt. b (1979) ("A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act.") *and* Long v. Lowe's Companies., Inc., No. 6:16–cv–00932–AA 2017 WL 1217155, at *7 (D. Or. Mar. 29, 2017) ("[F]iduciary duties ring in tort and arise out of common law, regardless of defendants' corporate form.") *with* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370 (Del. 1993) ("The tort principles of *Barnes* have no place in a business judgment rule standard of review analysis.") (citing Barnes v. Andrews, 298 F. 614 (S.D.N.Y.1924)) *and* MCG Capital Corp. v. Maginn, No. 4521-CC, 2010 WL 1782271, at *12 n.68 (Del. Ch. May 5, 2010) ("Fiduciary duties exist independent of tort obligations."); *see also* J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 DEL. L. REV. 71, 71 (2010) ("We conclude that a breach of a fiduciary duty is in fact a tort, although a unique species historically called an 'equitable tort.'").

54 Salar Ghahramani, *Professors as Corporate Fiduciaries: Implications for Law, Organizational Ethics, and Public Policy*, 10 VA. L. & Bus. Rev. 237, 246–47 (2016).

Ultimately, the issue here is whether corporate directors are subject to a duty to maximize shareholder value and, if so, whether that duty is subordinate to a distinct duty to the corporation. Meanwhile, Professor Rhee's goal in the article discussed above is to answer the question: "If there was no corporation law of fiduciary duty of care and tort law applied instead, what would the legal framework of a director's duty and standard of liability look like?"[55] Thus, we may at least conclude for now that the result of such a thought experiment may well be a diminished duty to shareholders, but current law has not reached that conclusion.

Returning to the general question before us here, it is also worth noting that to "economically oriented corporate law professors, distinguishing between directors' fiduciary duty to shareholders and a duty to the corporation itself smacks of reification – treating the fictional corporate entity as if it were a real thing."[56] Reification of the corporation is contrary to the popular contractarian view of the firm, and the issue implicates corporate personality theory, which will be discussed further below. Suffice it to say for now that while a foolish consistency may be the "hobgoblin of little minds,"[57] the foregoing at least suggests that proponents of shareholder wealth maximization should align themselves with associational conceptions of corporate personhood, rather than conceptions distinguishing the corporate entity from its owners/shareholders.[58] In other words, to the extent a duty to the

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[55] Rhee, *supra* note 43, at 1142.

[56] Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 895 n.86 (2012).

[57] RALPH WALDO EMERSON, *Self Reliance, in* ESSAYS: FIRST SERIES (1841).

[58] *Cf.* Bainbridge, *supra* note 3, at 547–48 (2003) ("[T]he 'nexus of contracts' or 'contractarian' model . . . denies that shareholders own the corporation. Instead, it argues that shareholders are merely one of many factors of production bound together in a complex web of explicit and implicit contracts. Contractarian theory nevertheless continues to treat directors and officers as contractual agents of the shareholders, with fiduciary obligations to maximize shareholder wealth.").

corporation is held out as competing with a duty to shareholders, the fictional nature of corporations undermines the claim.[59]

Near the end of this section of her paper, Professor Heminway concludes that, "[t]o derive a single, broadly applicable norm or rule of law on shareholder wealth maximization from these decisions likely would be reckless."[60] Furthermore, "it would be over-claiming to assert that U.S. state decisional law–any more than U.S. state statutory law–articulates a clear, legally enforceable shareholder wealth maximization norm as a matter of substantive corporate doctrine."[61] Yet, in what jurisdiction would an attorney advise his or her client to proceed as Henry Ford did in the *Dodge* case?[62] Putting aside constituency statutes[63] (and courts that provide shareholder wealth maximization stories for defendants before them), I doubt anyone experienced in these matters would risk money that mattered to them retrying the *Dodge* case on behalf of Ford. So long as we define shareholder wealth maximization more broadly than short-term shareholder wealth maximization, as I believe we should,[64] the idea that any practicing lawyer would be

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[59] *Cf.* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 n.2 (1981) ("In the thirteenth century Pope Innocent IV forbade the practice of excommunicating corporations on the unassailable logic that, since the corporation had no soul, it could not lose one.").

[60] Heminway, *supra* note 6, at 954.

[61] *Id.* at 955.

[62] *Cf.* Stephen Bainbridge, *Is* Dodge v Ford Motor Company *a Close Corporation/Controlling Shareholder Case?*, PROFESSORBAINBRIDGE.COM (May 5, 2012, 12:07 PM), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/is-dodge-v-ford-motor-company-a-close-corporationcontrolling-shareholder-case.html ("[T]he court's own analysis in Dodge is not limited to close corporations.").

[63] *Cf.* Bainbridge, *supra* note 19 ("[T]he shareholder wealth maximization norm may survive even in states with nonshareholder constituency statutes.").

[64] *Cf.* Tim Hodgson, *The Search for a Long-Term Premium*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 17, 2017), https://corpgov.law.harvard.edu/2017/07/17/the-search-for-a-long-term-premium/ ("Our conclusion is that a sizeable

uncertain of the outcome in a case where the board admitted to destroying shareholder value in pursuit of some other goal strikes me as unlikely.[65] Of course, Professor Heminway acknowledges all this, but she views it as a "persistent common perception" rather than a rule of law.[66] I would argue that the perception is so persistent and common that it is law.[67]

C. Organic Documents

Assuming that the default rule of corporate governance is shareholder wealth maximization, can parties opt out? At first blush, it

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net long-term premium does exist, and we have quantified its size as lying between 0.5% to 1.5% per annum (pa), depending on an investors' size and governance arrangements."). *But cf.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–36 (1991) ("[W]hat is the goal of the corporation? . . . Our response . . . is: who cares? If the New York Times is formed to publish a newspaper first and make a profit second . . . . Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective.").

[65] *Cf.* Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 875 (2013) ("It is axiomatic that directors of a corporation are fiduciaries of its shareholders under federal insider trading law . . . .").

[66] Heminway, *supra* note 6, at 955–56 ("'Despite all of the academic debate, the *persistent common perception* seems to be that directorial duties require placing shareholder wealth at the forefront. . . .' [and] it impacts the advice that a lawyer gives to a corporate client when the client's board is meeting to engage in decision making or oversight.") (quoting J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 17–18 (2012)).

[67] *Cf.* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 752 (2005) (quoting Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1059–60 (2001)) ("Since as early as sixteenth-century England, the common law has drawn duties 'from pre-judicial community-defined obligations, based on the accepted coordination norms of the community.'").

would seem that a charter provision should be effective,[68] but at least some have argued that policy considerations may block such plans.

On the one hand, Professor David Yosifon has noted that:

> The Delaware common law that has established shareholder primacy as the default governance rule for business corporations neither states nor implies any public policy indicating that the rule should be unalterable by charter provision. Neither does there seem to be a clearly implied policy of the General Corporation Law to prohibit alteration of the shareholder primacy rule in firm governance.[69]

In addition, as Professor Heminway notes, "corporations have, in the past (during the takeover heyday of the mid-1980s), 'adopted charter provisions specifying management's right to consider the interests of nonshareholder constituencies.'"[70]

On the other hand, Chancellor Chandler's comments in the *eBay* decision suggest that "there is little room for private ordering around the shareholder wealth maximization norm in Delaware corporations that attract outside investment."[71] Specifically, Chancellor Chandler noted that:

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[68] *Cf.* EASTERBROOK & FISCHEL, *supra* note 67, at 36 ("If the New York Times is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective.").

[69] David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 479 (2017).

[70] Heminway, *supra* note 6, at 958 (quoting Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 41 (1987)).

[71] Heminway, *supra* note 6, at 959.

> The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. . . . Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . .[72]

Of course, "purely philanthropic ends" and shareholder wealth maximization aren't the only two options. Shareholder wealth maximization does not preclude pursuing philanthropic ends,[73] and one can imagine situations where ignoring philanthropic ends would actually preclude maximizing shareholder value. In addition, Chancellor Chandler's recognition that if the decision-makers in *eBay* "were the only stockholders affected by their decisions, then there would be no one to object"[74] suggests that at least a unanimously adopted charter amendment opting out of shareholder wealth maximization would succeed.[75] Finally, the requirement that a policy must "specifically, clearly, and admittedly seek[] *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders" in

[72] *eBay Domestic Holdings*, 16 A.3d at 34.

[73] *Cf.* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986) ("[C]oncern for various corporate constituencies is proper when addressing a takeover threat, [provided] that . . . there be some rationally related benefit accruing to the stockholders."); A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 584 (1953) ("In many instances [charitable] contributions have been sustained by the courts within the common-law doctrine upon liberal findings that the donations tended reasonably to promote the corporate objectives.").

[74] *eBay Domestic Holdings*, 16 A.3d at 34.

[75] *Cf.* Heminway, *supra* note 6, at 960 ("Observers may wonder whether these words from the Chancellor in and about the *eBay* opinion can be taken or may be used to mean that a Delaware corporation must adopt any corporate policy or initiative that contravenes the shareholder wealth maximization norm *ab initio* or with unanimous shareholder approval.").

order to run afoul of the duty to maximize shareholder wealth reminds us how rare cases like *eBay* and *Dodge* should be, given how relatively easy it is to provide a shareholder wealth maximization rationale for most corporate actions, which suggests only the most extreme forms of opting out of shareholder wealth maximization should fail.

Professor Heminway also cites Chief Justice Strine as giving "credence to the possibility that a charter provision could successfully agree around the shareholder wealth maximization norm," but "his words are less than certain."[76] Specifically, Chief Justice Strine has remarked that: "It may well be the case that a certificate of incorporation that said that a for-profit corporation would put other constituencies' interests on par with stockholders would, in view of § 101(b) [which allows a corporation to pursue any lawful purpose], be respected and supersede the corporate common law."[77]

The openings for opting out of shareholder wealth maximization via charter provisions just discussed receive further pushback from those who argue that shareholder wealth maximization is a policy of the state, at least in Delaware, that trumps otherwise recognized avenues for private ordering. For example, Professor Stephen Bainbridge has noted that:

> [S]tate law arguably does not permit corporate organic documents to redefine the directors' fiduciary duties. In general, a charter amendment may not derogate from common law rules if doing so conflicts with some settled public policy. In light of the well-settled shareholder wealth maximization policy, nonmonetary

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[76] *Id.* at 962.

[77] Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 783 (2015).

> factors charter amendments therefore appear vulnerable.[78]

Professor Heminway notes that policy considerations created sufficient judicial hostility to private ordering around board management that it required legislative action to validate shareholder agreements to that end,[79] and in this case the legislative response may already have been issued in the form of benefit corporations.[80]

It is worth repeating here that at least some of the shareholder wealth implications of benefit corporations may be over-stated. For example, Professor Heminway quotes a student note wherein it is claimed that:

> States, by creating benefit corporations, . . . are . . . unnecessarily reinforcing current beliefs by establishing a dichotomy in which there are only two entities: (1) regular corporations, which cannot take into consideration social factors and must maximize shareholder wealth; and (2)

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[78] Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 985 (1992); *cf.* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U.L. REV. 547, 575–77 (2003) ("[S]hareholder wealth maximization is not only the law, but also is a basic feature of corporate ideology.").

[79] Heminway, *supra* note 6, at 960–61, at ("A hostile judicial reaction of this kind to corporate private ordering is reminiscent of the judicial reception to shareholder agreements before statutes expressly validated them as a means of agreeing around the directors' managerial authority over the corporation.").

[80] *See id.* at 963–64 ("Two additional factors provide a cause for pause in endorsing the validity of charter-based private ordering relating to the shareholder wealth maximization norm. The first is the State of California's repeated rejection of a corporate charter provision that included a social purpose clause …. The second additional factor that may affect the validity of charter-based private ordering that is determined to be inconsistent with the shareholder wealth maximization norm is the legislative adoption of benefit corporations and other statutory forms of social enterprise entity."); *cf. id.* at 964 ("The only saving grace, although perhaps it provides little comfort, is that benefit corporation statutes typically include a provision disclaiming any effect of benefit corporation statutes on the validity or interpretation of the for-profit corporate law outside the benefit corporation context.").

> benefit corporations, which can take into consideration social factors and do not have to maximize shareholder wealth.[81]

However, it is incorrect to say that "regular corporations … cannot take into consideration social factors" because social factors impact the shareholder wealth analysis, and not always negatively. In fact, in determining the best path to maximizing shareholder value, corporations arguably must consider social factors in order to satisfy their duty of care to become informed of all material information reasonably available. The only thing a for-profit corporation cannot do in a shareholder wealth maximization regime is knowingly sacrifice shareholder value, whether calculated in the short- or long-term, in pursuit of some social end.

Professor Heminway concludes that "[t]he accumulated evidence is at best unclear about whether a public or private firm incorporated in or outside Delaware can engage in private ordering in its charter to include a corporate purpose that may be interpreted in a manner inconsistent with the shareholder wealth maximization norm."[82] Furthermore, "[g]iven this uncertainty about charter-based private ordering, prospects for the validity and enforceability of corporate bylaws, shareholder agreements, and board policies also may be in doubt."[83] Thus, the debate continues, and this opens the door for corporate personality theory to play a role.

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[81] *Id.* (quoting Jessica Chu, Note*, Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization,* 22 S. CAL. INTERDISC. L.J. 155, 185–86 (2012)).

[82] *Id.* at 966.

[83] *Id.* at 967; *cf* Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts*", HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sep. 11, 2017), https://corpgov.law.harvard.edu/2017/09/11/forum-selection-provisions-in-corporate-contracts/ ("Treating corporate charter and bylaw forum-terms as a matter of ordinary contract doctrine is neither logical nor justified. While there is a family resemblance, a corporation's charter and bylaws are no ordinary contracts. Rather, they are hybrid legal structures that provide a mechanism for collective choice in the context

III. CORPORATE PERSONALITY THEORY

Corporate personhood addresses when corporations should be treated as persons under applicable law. Assuming corporate personhood, corporate personality theory addresses what type of person the corporation should be treated as. The traditional theories of corporate personality are: (1) artificial entity or concession theory, (2) aggregate or contractarian theory, and (3) real entity theory.[84] Professor Eric Chaffee has recently argued for a fourth theory: collaboration theory. According to Professor Chaffee, collaboration theory is "a new theory of the corporation that . . . mandates that corporations engage in socially responsible behavior."[85] The following sub-parts will explain the differences between these four theories, as well as examine the argument that corporate personality theories are too indeterminate to form the basis for legal analysis. This will lay the foundation for exploring how corporate personality theory may inform the debate about the shareholder wealth maximization norm, as well as attempts to opt out of the norm via private ordering.

A. Artificial Entity / Concession Theory

Artificial entity theory (also known as concession theory) is typically associated with the famous description of corporations delivered by Chief Justice John Marshall in the 1819 case of *Trustees of Dartmouth College v. Woodward*:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.

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of substantial state regulation and straddle the public-private divide in ways that make them quite dissimilar from ordinary contracts.").

84 *See, e.g.*, Reuven S. Avi-Yonah, *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 767 (2005).

85 Chaffee, *supra* note 10, at 357.

> These are such as are supposed best calculated to effect the object for which it was created . . . . The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.[86]

As can be surmised from the foregoing, concession theory tends to take a broad view of the government's ability to regulate corporations, and views the corporation as standing more on the public, rather than private, side of citizen/state divide – at least as compared to other theories of the corporation.[87]

B. *Aggregate / Contractarian Theory*

As I have written elsewhere, "[t]he aggregate view rejected the fiction of the corporation as an artificial entity, which had been promoted by concession theory, and instead focused on the property rights of the underlying shareholders to conceive of the corporation as simply an association of individuals."[88] It places the corporation squarely on the private side of the citizen/state divide, and supports granting corporations many of the same rights to resist government regulation as natural persons. The aggregate view is typically associated with the

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86 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636–37 (1819).

87 *See generally* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 342–43 (2014) (addressing "four arguments frequently advanced to undermine concession theory," and arguing that "none of these arguments creates an insurmountable obstacle for the application of concession theory").

88 Stefan J. Padfield, *A New Social Contract: Corporate Personality Theory and the Death of the Firm*, 101 MINN. L. REV. HEADNOTES 363, 374 (2017).

modern nexus-of-contracts (or contractarian) view of the firm.[89] However, by viewing the corporation as nothing more than an association of individuals, aggregate theory risks undermining the theoretical justification for granting shareholders limited liability when it comes to the debts of the corporation. Real entity theory, which is discussed next, may be viewed as a solution to this problem.

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[89] *See generally* Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 819–22 (1999) (describing the history and limitations of the nexus of contracts conception):

> In 1976 Michael Jensen and William Meckling first formulated the conception that the corporation is a nexus of contracts . . . . Since that time, the conception has dominated the law-and-economics literature in corporate law . . . . [T]he intellectual history of . . . Jensen and Meckling . . . begins with Ronald Coase[] . . . [who] characterized the boundaries of the firm as the range of exchanges over which the market system was superseded and resource allocation was accomplished instead by authority and direction . . . . Armen Alchian and Harold Demsetz objected to the Coasian conception of the firm, and emphasized instead the role of team production within the firm and the role of agreement and monitoring in team production . . . . Jensen and Meckling applauded Alchian and Demsetz's objection to Coase's theory of the firm, but concluded that Alchian and Demsetz had not gone far enough in rejecting Coase . . . . [Jensen and Meckling] therefore substituted, for Coase's conception of the firm, the competing conception that the firm was a nexus of contracts--and, more particularly, "that most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals . . . ."

(internal footnotes omitted) (quoting Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) (citing R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972))).

C. Real / Natural Entity Theory

By positing a "real" (as opposed to artificial), non-governmental entity standing between shareholders and the state, real entity theory can be understood as a solution to the problem of possibly undermining limited liability with aggregate theory, while still providing a strong bulwark against regulation.[90] Professor Chaffee notes:

> The work of German legal theorist Otto von Gierke played a key role in the development of real entity theory. Gierke posited that groups have a "collective spirit" that gives them an identity separate and apart from the individuals composing them. Therefore, according to Gierke, when individuals unite, including to organize, operate, and own corporations, a real entity is created that is independent and distinct.[91]

If collective spirits seem a bit too nebulous for a theory of corporations, one might also consider the board of directors as constituting the real entity,[92] similar to how the shareholders constitute the aggregate in at least some versions of contractarian theory.[93]

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[90] *Cf.* John C. Coates IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 823 (1989) ("[T]he natural entity theory developed as certain aspects of corporate practice began to bring into question the adequacy of the aggregate theory, which had dominated the law during the mid- to late-nineteenth century."); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 221 (1985) ("The main effect of the natural entity theory of the business corporation was to legitimate large scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state.").

[91] Chaffee, *supra* note 10, at 365.

[92] Cf. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 560 (2003) ("[T]o the limited extent to which the corporation is

D. Collaboration Theory

Professor Chaffee's collaboration theory views the corporation as similar to a joint venture or partnership to the extent that "the state and the individuals organizing, operating, and owning a corporation are collaborating within the corporate form, i.e., they are '[j]oint adventurers' within the contractual relationship that generates the corporation."[94] This characterization differentiates collaboration theory by imposing a requirement that corporations seek pro-social ends whenever the expected value of a transaction is unknowable or the contemplated pro-social action is shareholder wealth neutral.[95] This is necessary to fulfill the obligation of good faith imposed on joint-venturers.[96]

From the perspective of those seeking to advance the cause of corporate social responsibility, collaboration theory may offer the best

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properly understood as a real entity, it is the board of directors that personifies the corporate entity.").

93 Of course, identifying the board with the real entity of the corporation creates potential problems from a governance perspective to the extent a duty corporation becomes a board's duty to itself.

94 Chaffee, *supra* note 10, at 374.

95 *Id.* at 376 ("[B]eyond engaging in socially responsible behavior when it supports profit maximization, those organizing, operating, and owning corporations should engage in such behavior in two additional circumstances to fulfill their implied duty of good faith. First, in instances in which the socially responsible behavior neither financially benefits nor financially harms the corporation, which means it is cost neutral, the corporation should engage in socially responsible behavior to fulfill the implied duty of good faith within the collaboration. Second, in instances in which the financial benefit to the business entity is uncertain, the corporation should engage in socially responsible behavior to fulfill the implied duty of good faith within the collaboration.").

96 *Id.* at 375–76. ("[I]ndividuals organizing, operating, and owning the corporation are required to treat the state government well, i.e., with good faith, because these parties have agreed to collaborate. Exploring what 'treating the state government well' means, in a democracy, the government is supposed to represent the will of the people, which can be interpreted as the will of society because society is the aggregate of the people. Although debatable, one can assume that society wants to be treated in a way that supports its well-being, i.e., in a way that is socially responsible. Thus, when not seeking profit maximization, those organizing, operating, and owning corporations should engage in socially responsible behavior.").

hope when it comes to theories of corporate personhood. This is because, while the social responsibility of the corporation depends on the predilections of the owners, board, or state under aggregate, real entity, or concession theory respectively, collaboration theory has social responsibility built into its framework.

E. Indeterminacy

In 1926, John Dewey published *The Historic Background of Corporate Legal Personality*, wherein he sought to show that "[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends."[97] His critique was so powerful that "[m]any commentators view John Dewey's 1926 Yale Law Journal article as having put an end to the corporate personhood debate."[98] However, the emergence of the nexus-of-contracts theory of the firm, along with cases like *Citizens United* and *Hobby Lobby*, have left us with an extremely invigorated corporate personhood debate. Professor Chaffee identifies three reasons for rejecting Dewey's call to ignore corporate personality theory:

> First, avoiding complexity should not justify failing to seek knowledge . . . . Second, understanding the essential nature of corporations has become important because it impacts how these

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[97] John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926).

[98] Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1650 (2011). *But see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 106 (1992) ("[J]ohn Dewey...could not, I believe, have demonstrated successfully that each theory of corporate personality could have equally legitimated the practices of emergent large-scale business enterprise."); DAVID A. WESTBROOK, BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION 135 (2007) ("[A]lthough theories [of the corporation] are not determinative, from time to time and in place to place, they tend to have certain specific associations.").

> business entities can and should interact with society. As the Supreme Court of the United States' recent opinions in cases such as *Citizens United* and *Hobby Lobby* evidence, understanding the essential nature of the corporation has never been more important . . . . Without understanding the nature of the corporate form, understanding the rights of a corporation and how it should be regulated is impossible. Third, a better essential theory of the corporation is possible.[99]

IV. CORPORATE PERSONALITY THEORY & SHAREHOLDER WEALTH MAXIMIZATION

Professor Heminway notes that, "[w]hile corporate law statutory rules may, in fact, also represent or codify norms, decisional law often relies on theory and policy to fill gaps in meaning."[100] Therefore, "theory and policy may 'push' the law in individual settings one way or another when the issue is perceived to be one of first impression or otherwise creates legal uncertainty."[101] This at least suggests a role for corporate personality theory in resolving the issue of whether corporations may opt out of the duty to maximize shareholder value. While the bulk of this Essay has been devoted to examining the foundations of the claim that private ordering to opt out of the shareholder wealth maximization norm in corporate law is both necessary and risky, it is hoped that the following brief suggestions regarding ways forward can spur further inquiry and creative problem solving.

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[99] Chaffee, *supra* note 10, at 370–71.

[100] Heminway, *supra* note 6, at 941.

[101] *Id.*

Assuming shareholder wealth maximization is required by law, which corporate personality theory best supports opting out via private ordering? If one assumes that private citizens are granted the most liberty vis-à-vis the state, then the aggregate and real entity theories should provide more support for private ordering, since they align the corporation more with private citizens than concession theory.[102] Collaboration theory is arguably more state-focused than aggregate or real entity theory, though less than concession theory. Thus, characterizing the corporation as an association of individuals, be that in the form of the shareholders or the board, should be more likely to support private ordering. However, context matters, and thus, for example, collaboration theory might be more supportive of opting out of shareholder wealth maximization due to its fundamental support of corporate social responsibility.

Of course, the protestations of the indeterminacy advocates have weight, and one should carefully consider the particular facts of each situation before choosing the best theory of corporate personality to rely on in making one's case. However, anyone in doubt of the power of corporate personality theory in cases like this would do well to read, or re-read, the U.S. Supreme Court's opinion in *Citizens United*. I am not alone in having argued that corporate personality theory had a major role to play in the disposition of that case.[103] Imagine showing up to argue

[102] *Cf.* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 8–10, 64 (1990) (discussing the concession theory and presumption in favor of regulation).

[103] *See, e.g.*, Padfield, *supra* note 9, at 833–34 (2013) (arguing that a close reading of Citizens United "reveals that both the majority and dissent not only adopted diverging theories of the corporation, but that those theories were likely dispositive," and that corporate personality theory "played the same silent and dispositive role" in many of the cases leading up to Citizens United); Stephen Bainbridge, *Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory*, PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 4:05 PM), http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html; *cf.* Padfield, *The Role of Corporate Personality Theory in Hobby Lobby*, BUS. L. PROF BLOG (Jul. 6, 2014), http://lawprofessors.typepad.com/business_law/2014/07

that case having dismissed any role for corporate personality theory as too indeterminate, only to find the justices engaging in a heated debate about whether the corporation is better treated as a mere association of citizens or creature of the state, along with opposing counsel ready to defend his or her preferred view of the firm.[104] One ignores corporate personality theory in such cases at one's own risk.

As an alternative to opting out of shareholder wealth maximization, proponents of socially responsible corporate behavior may leverage Professor Chaffee's collaboration theory to emphasize, perhaps by way of corporate charter or bylaw, that socially responsible corporate behavior should only be found to violate the shareholder wealth maximization norm when it clearly undermines shareholder wealth. In all other situations, including where the corporate socially responsible behavior is shareholder wealth enhancing, neutral, or has an uncertain impact on shareholder wealth, a board may pursue the socially responsible behavior without violating its obligation to maximize shareholder value, and may even pre-commit to pursuing socially responsible behavior in all these cases.[105] Thus, in both these situations

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/the-role-of-corporate-personality-theory-in-hobby-lobby.html (noting that while Justice Alito's majority opinion equated the closely held corporation with its controlling shareholders, and thus granted the corporation standing to claim interference with its free exercise rights, Justice Ginsburg argued in dissent that the corporation could not, as an artificial entity, exercise religion).

[104] *See* Transcript of Oral Argument at 7, 33, 81, Citizens United v. FEC, 558 U.S. 876 (2010), SUPREMECOURT.GOV, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205[Reargued].pdf ("JUSTICE SOTOMAYOR: . . . what you are suggesting is that the courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with, not *Austin* or *McConnell*, but the fact that the Court imbued a creature of State law with human characteristics"; "JUSTICE BREYER: Actually I read that sentence that you just read as meaning the corporation is an artificial person in respect to which the State creates many abilities and capacities, and the State is free also to create some disabilities and capacities."; JUSTICE STEVENS: But if there is a compelling government -- can there be any case in which there is a different treatment of corporations and individuals in your judgment?").

[105] I am not aware of any charter or bylaw provision setting forth such a commitment. A October 1, 2017 Westlaw search of "EDGAR Articles of Incorporation & Bylaws" for ("socially responsible" OR "social responsibility") in 10-Ks of Delaware

corporate personality theory has a role to play in determining the scope of socially responsible behavior available to corporations.[106]

V. CONCLUSION

In this Essay, I have hopefully advanced the scholarship of both Professors Joan Heminway and Eric Chaffee by demonstrating that the recent shareholder wealth maximization analysis of Professor Heminway can be viewed through the lens of Professor Chaffee's recent work on corporate personality theory in a way that can provide direction to counsel dealing with issues of corporate wealth maximization and the limits on corporate social responsibility imposed thereby. I conclude that corporate personality theory can be useful both in debates about the viability of opting out of shareholder wealth maximization, as well as in providing a framework for maximizing the ability of corporations to engage in socially responsible behavior within the shareholder wealth maximization framework.[107]

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corporations with market caps of $5 million or more returned seven documents, all of which referenced the relevant text in connection with a Corporate Social Responsibility Committee (or similar body) under the bylaws. Of course, this was an extremely limited search, and further efforts may be more fruitful.

106 *Cf. How Two Rulings Are Removing Roadblocks from Impact Investing*, KNOWLEDGE@WHARTON (Feb. 18, 2016), http://knowledge.wharton.upenn.edu/article/how-two-federal-rulings-are-removing-the-roadblocks-from-impact-investing/ ("new guidance . . . reaffirms that private pension plans . . . can take social factors into account as long as returns are not compromised . . . . [F]iduciaries may take social impact into account as 'tie-breakers' when investments are otherwise equal.").

107 *Cf.* John Rapley, *How Economics Can Free Itself from Religious Dogmatism*, EVONOMICS (July 13, 2017), http://evonomics.com/economics-religion-dogmaticism- rapley/ ("Narratives will remain an inescapable part of the human sciences for the simple reason that they are inescapable for humans.").