Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon

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I am honored to participate in this special symposium for two scholars I have long admired. That the work of Lyman Johnson and David Millon should be honored together is fitting, because although each is unique in important ways, what their scholarship shares is far more critical. That shared core is a deep concern for how corporations and their conduct affect humanity. Unlike so many who call themselves corporate law experts, Professors Johnson and Millon never forget that corporate law was created by and for flesh-and-blood human beings, having the full range of interests that come with being human.

Thus, when they examine issues of corporate law, they are drawn to its larger implications and not the of the moment, micro-issues that draw attention from those modeling the effects of termination fees, matching rights, or the like in merger agreements. This is not to say that those sorts of studies have no utility, but it is to say that what they seek to study is decidedly not what is most important about the effect corporate law and conduct has on human beings, even if one is simply looking at those issues from the narrow perspective of what produces the most wealth for stockholders themselves.

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Another word besides humanity comes to mind when one thinks of Professors Johnson and Millon, and that is conscience. They never yield from the view that no one occupying a position of trust and authority over an organization that affects the many may escape the responsibility to apply one's conscience—one's sense of right and wrong—when deciding how to manage the organization.[1] For Professors Johnson and Millon, there is no rationalizing one's way out of making sure every action taken meets the mirror test of being ethical and not involving imposing unfair harm on others, in order to seek gain for the organization and its owners.

And holding that view, Professors Johnson and Millon have unsurprisingly taken the position that corporations "ought" to have no duty, within the limits of their legal discretion, to make the best interests of their stockholders the end of corporate governance, with other constituencies only being instruments that can be considered when that is useful to stockholders.[2] Even

1. *See, e.g.*, David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 39, 56–58 (2001) ("Perhaps then, the real challenge is to discard both entity- and aggregate-based arguments for responsibility and turn our attention instead to the individual actors and the question of their responsibility, without regard to anyone's status in relation to a corporation."); David Millon, *The Single Constituency Argument in the Economic Analysis of Business Law*, 24 RES. L. & ECON. 43, 53–55, 57–58 (2009). *See generally* Lyman Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1 (2006) [hereinafter Johnson, *Faith and Faithfulness*]; Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012); David Millon, *Enlightened Shareholder Value, Social Responsibility and the Redefinition of Corporate Purpose Without Law* (Wash. & Lee Legal Studies Working Paper No. 2010-11, 2010) [hereinafter Millon, *Enlightened Shareholder*], http://ssrn.com/abstract=1625750.

2. *See* Lyman Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 10–17 (forthcoming 2017) [hereinafter Johnson, *Relating Fiduciary Duties*], http://ssrn. com/abstract=2814231 ("[The corporation] is a business entity and socio-legal person separate and distinct from its associated persons that seeks to advance a collective purpose that may differ from and transcend the individual goals of its participants, even as its success depends on the joint effort of those persons." (quotation at 16)); Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 10–15 (2015) [hereinafter Johnson & Millon, *Corporate Law After* Hobby Lobby] ("All business corporations . . . generate profit in order to survive. That is simply a fact of life. But corporate law confers on them broad discretion to determine the extent to which they choose to temper the pursuit of profit by regard for other values." (quotation at 10)); Lyman

further, they argue that their view of the "ought" is, and that corporations have no duty—even under Delaware law or other statutes that give only stockholders enforceable rights—to make stockholder welfare the end of corporate law.[3]

Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 273–78 (2012) ("Instead, the better view is that the law is (and should be) agnostic on the subject of corporate purpose (quotation at 274)); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 432–38 (2013) [hereinafter Johnson, *Unsettledness in Delaware Corporate Law*]

> Likely, we are now in a period in which societal expectations of the private business sector are shifting. As such, law rightly adopts an enabling and pluralistic approach to corporate purpose, even as the fiduciary obligations of directors and managers can clash with that permissiveness because of the need to hold such persons accountable for their conduct. Often the deference of the business judgment rule becomes a key mechanism for creating the necessary slack between law's agnosticism about corporate purpose and actual governance conduct.

(quotation at 438). *See generally*, David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

3. *See* Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 2, at 13–14

> [W]e see Delaware as providing expressly for broad freedom of choice as to corporate purpose. Those who form a corporation are free to specify particular purposes in the organizational documents, subject only to the requirement that those purposes be "lawful," or they can leave the matter open-ended, stating simply that 'the purpose of the corporation is to engage in any lawful act or activity.' In the latter case, it will be up to the board of directors, exercising its statutory responsibility to direct the corporation's "business and affairs," to determine questions of corporate purpose.

see also Johnson, *Relating Fiduciary Duties, supra* note 2, at 17

> Delaware itself lacks Supreme Court precedent mandating shareholder wealth maximization and its law is agnostic and broadly permissive. A shareholder wealth maximization goal, to be sure, is a permissible objective, and likely it is the predominant one given prevailing business and professional education norms. But the pursuit of other corporate purposes is both possible and common, and results in a more humane and pluralistic business culture.

David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 526 (2011) ("Delaware law is not committed to shareholder primacy. Management's duties are owed to 'the corporation and its stockholders,' rather than to the shareholders alone.").

It comes as no secret that I passionately agree with my friends about the "ought" but do not agree with them about the "is."[4] And I have been open about my fear that claiming that the "is" reflects the "ought" will impede the work that needs to be done to make sure that corporations conduct their affairs in the way that is most productive for society.[5]

In this short essay, I do not wish to challenge my friends on this point, but to encourage them to push their scholarship further by considering the following perspective on their work, a perspective that emphasizes my primary point, which is that corporate power is corporate purpose.

In their writings, Professors Johnson and Millon often highlight examples of for-profit corporations that do not seek to maximize stockholder wealth, as an argument that shows that corporate managers do not have to put the best interests of stockholders first. But, their examples are telling. They cite situations where the corporate electorate is controlled by a singular interest, and that interest has goals it wishes to maximize more than returns. To wit, they take great heart in Hobby Lobby, a corporation controlled by a family with very specific religious views.[6] Likewise, Professor Johnson points to

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4. *See* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 136 (2012) [hereinafter Strine, *Our Continuing Struggle*]; 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, 768–86 (2015) [hereinafter Strine, *The Dangers of Denial*].

5. *See* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 107–14 (2015) [hereinafter Strine, *A Job Is Not a Hobby*]; Strine, *Our Continuing Struggle*, *supra* note 4, at 167–72.

6. *See* Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 2, at 5

> This company was organized in the late 1960s as an Oklahoma business corporation by David and Barbara Green, husband and wife, devout evangelical Christians. All of the voting stock is held by various family trusts, not directly by the Greens themselves. The Greens and their adult children serve as trustees of the trusts and all were required to sign a statement of faith—called a Trust Commitment—before becoming trustees. The express language of the trust instrument itself also affirms the Christian faith. Thus, the

Chick-fil-A,[7] a privately held, family-owned company influenced by its founder's religious beliefs and which closes on Sundays, consistent with its corporate purpose "[t]o glorify God by being a faithful steward of all that is entrusted to us and to have a positive influence on all who come into contact with Chick-fil-A."[8]

But notice the limits of this statement. It does not mean that the corporation is operating in a manner that is fair to all corporate constituencies other than stockholders, or that provides them with any protections. In fact, Hobby Lobby itself won a case—*Burwell v. Hobby Lobby Stores, Inc.*[9]—that involved its controlling stockholders, using their own conscience, denying Hobby Lobby's 13,000 full-time workers the ability to use a personal benefit that comes to them with employment under secular laws.[10] Nothing about *Hobby Lobby* suggests that the corporate board had a distinct obligation to think about other constituencies for itself and to be fair to them. Instead, the U.S. Supreme Court issued a cursory decision conflating Hobby Lobby with those who controlled a majority of its equity—its stock.[11] This was not, to me, convincing corporate or constitutional law.[12] But, the inarguable point is that whatever Hobby Lobby as an entity was doing involved making the interests of its controlling stockholders the end of governance, not the best interests of all

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> controlling shareholders (the trusts), as well as the trustees who control the shareholder-trusts, each memorialized a commitment to the Christian faith. David Green and three of the Greens' children serve as the four directors of Hobby Lobby. They also serve as the company's senior executive officers.

7. *See* Johnson, *Unsettledness in Delaware Corporate Law*, *supra* note 2, at 446–47.

8. *Company Information*, CHICK-FIL-A, https://www.chick-fil-a.com/About/Who-We-Are (last visited Mar. 10, 2017) (on file with the Washington and Lee Law Review).

9. 134 S. Ct. 2751 (2014).

10. *See id.* at 2765 (concluding the Health and Human Services (HHS) contraceptives mandate, as applied to for-profit corporations, burdened the exercise of religion).

11. *See id.* at 2775 ("By requiring the . . . Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.").

12. *See* Strine, *A Job Is Not a Hobby, supra* note 5.

corporate constituencies. And it is no more of a comfort for those other constituencies when a controlling stockholder maximizes its idiosyncratic preferences than when a public company with a diverse base of stockholders puts the best interests of its stockholders first.

Put differently, *Hobby Lobby* illustrates why public companies in fact must put the interests of their equity holders first. In the case of a controlled company like Hobby Lobby, the board of Hobby Lobby—which runs an entity distinct from the Green family[13]—follows the drumbeat of those who elect it. In the case of a public company, the power dynamics are identical. But, what is different is that unlike the Green family, the investor bases of diverse public companies only have one real thing in common: they hope to profit from their investment in the company. These investors most likely have very diverse views about things like how to treat workers, how much to protect the environment, and religion. As things now stand, the direct investors in public companies will not be humans. Instead, they will typically be mutual funds or pension funds, with no mandate to make political, religious, and value judgments for their investors.[14]

To me, these realities mean that if the "ought" that Professors Johnson and Millon desire is to become something more like reality, then changes must be made to the power dynamics under which all corporations operate. That might mean changes within corporate statutory law to require—not permit—the consideration of other constituencies, and to put some teeth behind that idea. That might mean changes to the obligations of institutional investors to consider the full range of their human investors' interests, including their interest in a sustainable, responsible system of wealth creation. That might mean enhanced externality protections for workers, consumers, communities in which the corporation operates, and the

13. The Green family owns and operates Hobby Lobby. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

14. *See* Marshall E. Blume & Donald B. Keim, The Changing Preferences of Institutional Investors for Common Stocks 4 (Mar. 11, 2014) (unpublished manuscript) (noting that in 2010, institutional investors owned 67% of all U.S. public stock) (on file with the Washington and Lee Law Review).

environment. That might mean limiting the ability of corporations to use other people's money in a way that compromises our political system.

For present purposes, less important is the precise how, more important is "the what." And "the what" must involve the power dynamics that act on corporate boards. If the only power within the corporate polity is wielded by equity capital, then the ends of governance will maximize equity's preferences. I do not find it comforting that the Green family, however well intentioned, can use their stockholder power to impose their own religious views on Hobby Lobby's workers and deny 13,000 full-time workers[15]—who need to feed their families—access to health care options that society has said they should have.[16] Nor do I find it comforting that for-profit corporate boards have been unleashed to spend funds in the political process when there is no principled basis to believe that investors bought stock for expressive purposes, and when actual experience—the failure of corporate political action committees (PACs) to be able to raise stockholder funds even though permitted to do so for many years[17]—demonstrates that proposition is false.

Like Adolf Berle,[18] I like the economically powerful to have legally enforceable duties to be socially responsible.[19] In the case

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15. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014).

16. *See id.* at 2762 (explaining the HHS mandate arose from recommendations of the Institute of Medicine).

17. *Citizens United* was decided in part on the ground that corporations are vehicles for expression by the stockholders. *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 342 (2010). But federal law allowed corporations to use corporate funds to raise money from stockholders for their corporate PACs. 2 U.S.C. § 441b(b)(2) (2006) (defining "contribution" to exclude contributions to "separate segregated fund[s]" established by corporations, i.e., PACs); *see also* 11 C.F.R. § 114.2 (2009) (setting out regulations for contributions by corporations, and by and to their PACs). Precisely because stockholders did not buy stock for expressive purposes, this truly voluntary approach did not generate stockholder contributions.

18. *E.g.*, Adolf A. Berle Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). Berle argued that if managers were allowed to consider the interests of constituencies other than stockholders, there would need to be a regulatory system to hold the mangers accountable:

> Now I submit that you can not abandon emphasis on "the view that business corporations exist for the sole purpose of making profits for their stockholders" until such time as you are prepared to offer a clear

of corporations, that means we must do the hard work of not only making corporate boards accountable for treating all corporate constituencies with respect and integrity, but also making corporate stockholders who control corporations do so. And in today's world, most Americans are stockholders not of actual corporations that make products and deliver services, but of mutual funds and other intermediaries through their 401(k) retirement plans.[20] Any increase in the social responsibility of corporations will therefore depend importantly on what obligations institutional investors owe themselves.

As they continue to seek to increase other-regarding approaches to corporate management, I urge my friends to concentrate their lively minds on the ultimate issue of power. Without addressing the power structure to which corporate managers are accountable, the "ought" Professors Johnson and

> and reasonably enforceable scheme of responsibilities to someone else . . . . Either you have a system based on individual ownership of property or you do not. If not—and there are at the moment plenty of reasons why capitalism does not seem ideal—it becomes necessary to present a system (none has been presented) of law or government, or both, by which responsibility for control of national wealth and income is so apportioned and enforced that the community as a whole, or at least the great bulk of it, is properly taken care of. Otherwise the economic power now mobilized and massed under the corporate form, in the hands of a few thousand directors, and the few hundred individuals holding "control," is simply handed over, weakly, to the present administrators with a pious wish that something nice will come out of it all.

Id. at 1367–68.

19. *See generally* Strine, *The Dangers of Denial*, *supra* note 4.

20. John Bogle said in a 2009 speech that: "In our old *ownership* society 92 percent of all stocks were owned by individuals and 8 percent by institutions. But in today's *agency* society, only 24 percent of stocks are owned by individuals, with the remaining 76 percent held by institutions." John C. Bogle, Founder & Former Chief Executive, The Vanguard Grp., Speech Before IA Compliance Summit (March 13, 2009) (transcript available at https://www.vanguard.com/bogle_site/sp20090313.html). As of June 2014, 401(k) plans held $4.8 trillion in assets on behalf of 52 million active participants, and 64% of these assets were invested in mutual funds. *Frequently Asked Questions About 401(k) Plans*, INV. COMPANY INST., https://www.ici.org/policy/retirement/plan/401k/faqs_401k (last visited Mar. 10, 2017) (on file with the Washington and Lee Law Review).

Millon want cannot become reality. It remains a matter of debate whether, as a positive matter, the boards of directors of public companies in the United States must make stockholder welfare the end of corporate governance.[21] For some commentators, even the directors of Delaware corporations may govern the firm on a multi-constituency model, where the stockholders are just one of many corporate constituencies, any one of which may be considered not just a means, but an end of corporate management.[22] They argue this despite the reality that the Delaware General Corporation Law gives only stockholders rights, such as the right to elect directors,[23] vote on major transactions,[24] and enforce fiduciary duties.[25] They argue that legions of Delaware judges have just gotten their own law wrong.[26]

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21. *See* Johnson, *Relating Fiduciary Duties*, *supra* note 2, at 1 (noting that "corporate purpose remains an unsettled topic evoking fierce debate").

22. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 95–115 (2012) (arguing that boards may consider stockholders as just one of several constituencies and interests whose best interests may be an end of corporate governance); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 288 (1999)

> Corporate law does not treat directors as shareholders' agents but as something quite different: independent hierarchs who are charged not with serving shareholders' interests alone, but with serving the interests of the legal entity known as the "corporation." The interests of the corporation, in turn, can be understood as a joint welfare function of all the individuals who make firm-specific investments and agree to participate in the extracontractual, internal mediation process within the firm.

23. *See* DEL. CODE ANN. tit. 8, § 211(b) (2016) (establishing stockholder right to elect directors).

24. *See id.* § 251(c) (requiring stockholder vote for mergers); *id.* § 271 (requiring stockholder vote for sale of all or substantially all assets).

25. *See id.* § 327 (creating stockholder right to initiate a suit on behalf of a corporation).

26. *See, e.g.*, STOUT, *supra* note 22, at 30–31 (arguing that *Revlon* proves that "it is only when a public corporation is about to stop being a public corporation that directors lose the protection of the business judgment rule and must embrace shareholder wealth as their only goal"); Blair & Stout, *supra* note 22,at 308 ("*Unocal* squarely rejects shareholder primacy in favor of the view that the interests of the 'corporation' include the interests of nonshareholder constituencies."); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 849–50 (2005)

In making these arguments, the power structure established by the corporate statute itself is slighted and seen as having no bearing on the duties owed by directors, or of the normative objective of corporate law itself. These arguments, as I have explained elsewhere,[27] have the quality of wish-fulfillment about them, as if saying that what one believes the law "ought" to be is in fact what it "is." Confounding this dream world is the real world, where the realities of the power dynamics created by corporate law itself dictate the ends of corporate governance.

One phenomenon that bears on this question, but has gotten little consideration by those who wish that American corporate directors could in fact make the well-being of other corporate constituencies—such as workers, consumer, or society more generally—an end of corporate governance equal to that of stockholder welfare, is the wave of corporate inversions.[28]

It is widely known that many expenditures most critical to the well-being of actual human beings in our society are made by our government on our collective behalf. Care for the most vulnerable. Schools for children. The military and police who protect us. The regulatory agencies that help keep the environment clean, workers and consumers safe, and the markets

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> [S]ome of the *Revlon* language suggests that the Delaware Supreme Court thought that normally nonshareholder interests could be considered only when rationally related to shareholder interests . . . [but] Delaware case law in fact does not make shareholder interests controlling and thus allows consideration of nonshareholder interests other than just when that happens to maximize shareholder value.

Mohsen Manesh, *Nearing 30, Is* Revlon *Showing Its Age?*, 71 WASH. & LEE L. REV. ONLINE 107, 143–44 (2014) ("[B]eyond *Revlon*'s narrow scope—covering only 'sale or change in control' transactions—the business judgment rule affords corporate directors ample discretion to make decisions that serve the interests of non-shareholder stakeholders.").

27. *See generally* Strine, *The Dangers of Denial*, *supra* note 4 (noting that under the Delaware General Corporation Law, no constituency other than stockholders is given any power).

28. *See Fact Sheet: Additional Treasury Actions to Rein in Corporate Tax Inversions*, U.S. DEPT. OF THE TREASURY, November 19, 2015, available at https://www.treasury.gov/press-center/press-releases/Pages/jl0281.aspx ("A corporate inversion is a transaction in which a U.S. based multinational restructures so that the U.S. parent is replaced by a foreign parent, in order to avoid U.S. taxes.").

free of fraud. The transportation systems, the public parks, the museums, the orchestras. The economic help to disabled workers, the elderly, the poor. The list could and perhaps should go on. But you get the point.

If it were the case therefore—as a positive description of the corporate governance system that we have—that corporate boards actually care about other corporate constituencies, we should not expect that corporate tax avoidance would be a high priority. Most of all, we would not expect that it would rise to such a priority level that the corporation would abandon the nation and state that chartered it in the first place in order to redomicile in another jurisdiction. That is especially the case if redomiciling did not involve a desire to go to another jurisdiction where the corporation would pay more taxes that would then go to benefit more of the corporation's constituencies, but instead redomiciling to known tax havens that seek to attract corporations by not taxing them much at all. It could not be that other-regarding corporate boards would seek to deepen a cycle of international tax arbitrage, where corporations seek to play nations off against each other, with the goal of reducing the extent to which corporations and their equity owners pay taxes, and therefore, forcing governments to either look to others to make up the shortfall or to cut services to its citizens. If in fact corporate boards were in an accountability system that was not exclusively focused on stockholder welfare, how can it be that renunciations of national identity and obligations this stark would occur?

But, in just the past four years, more than twenty American corporations redomiciled into other nations for the purpose of reducing the taxes they would pay.[29] These American corporations were not only incorporated in Delaware,[30] many

29. *See* Zachary Mider & Jesse Drucker, *Tax Inversion*, BLOOMBERG, https://www.bloomberg.com/quicktake/tax-inversion (last updated Apr. 6, 2016, 5:15 PM) (last visited Mar. 10, 2017) (on file with the Washington and Lee Law Review); *see also* Tracking Tax Runaways, BLOOMBERG (Apr. 13, 2015) https://www.bloomberg.com/graphics/infographics/tax-runaways-tracking-inversions.html (last visited Mar. 10 2017) (finding that since 2006, fifty-one U.S. companies have redomiciled) (on file with the Washington & Lee Law Review).

30. A few examples of companies that have recently redomiciled out of

were incorporated in jurisdictions that have statutes that make the interests of other constituencies a discretionary object of the board's beneficence.[31] But, although these states give lip service to other constituencies, their statutes give those constituencies no power.[32] They only give power to stockholders.

Nor is there a conscience-salving retort to this phenomenon. It is not the case that these corporations intend to give the reduced taxes they pay to charities they believe will help the poor more than the government, or to schools, or to those—like the profoundly disabled—who need life-long support. There is only one justification for this conduct, which is to have the corporation reduce the obligations it owes to society.[33]

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states with constituency statutes include the following. Mylan, which redomiciled in 2015, was a Pennsylvania corporation. Mylan Inc., Annual Report Pursuant (Form 10-K) (Apr. 30, 2015). Pennsylvania has a constituency statute, providing that directors may consider "[t]he effects of any action upon any or all groups affected by such action, including shareholders, members, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located." 15 PA. CONS. STAT. § 515 (2016). Medtronic, which redomiciled in 2015, was a Minnesota corporation. Medtronic, Inc., Annual Report (Form 10-K) (June 20, 2014). Minnesota has a statute providing that "a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations." MINN. STAT. § 302A.251 (Subd. 5) (2016). Actavis, which redomiciled in 2013, was a Nevada corporation. Actavis, Inc., Annual Report (Form 10-K) (Feb. 2, 2013). Nevada has a statute providing that directors may consider "(a) The interests of the corporation's employees, suppliers, creditors and customers; (b) The economy of the State and Nation; (c) The interests of the community and of society; and (d) The long-term as well as short-term interests of the corporation and its stockholders . . . ." NEV. REV. STAT. § 78.138(4) (2010).

31. *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 124 (1999) (identifying twenty-nine states with constituency statutes, including Pennsylvania, Nevada, and Minnesota in the appendix); *see also* H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1540–45 (1991) (summarizing constituency statutes in appendix).

32. *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 463–64 (2006) (noting that most constituency statutes are limited in scope, are permissive and do not require the board to give weight to outside interests, and do not give stockholders enforceable rights).

33. Of course, big corporations are not the only ones who talk a good game about social responsibility but take action to avoid paying taxes to the society

Without wishing to condemn any corporation that has "inverted" itself into a citizen of a nation other than our own, I simply wish to point out the obvious. The boards of these corporations believed that the republic they were governing owed its loyalty to its only citizens, and those citizens are called stockholders. The boards of these corporations did not view themselves as having any national loyalties or loyalties to other constituencies, they viewed themselves as elected officials in the republic of equity capital.

If we want a world where that is not the case, then we must do the hard work of giving more power to other corporate constituencies, both within and without corporate law. Using the relative luxury of an academic, journalistic, or legal position to promote the idea that the world would improve for workers, consumers, communities, and the environment if corporate boards simply realized that they could govern corporations by treating these interests as if they were equal to stockholders does nothing but impede the more difficult job of reform that must be done. The only way to make the world be more like it ought to be is to be willing to be clear-eyed about what it is.

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that nurtured it. Consider in that respect, the world's leading Dutch rock band, U2, led by social activist Bono. Mary Anastasia O'Grady, *'Bono Needs to Pay Up,'* WALL ST. J. (June 8, 2011), http://www.wsj.com/articles/SB10001424052702304259304576373771000025408 (last visited Mar. 10, 2017) (on file with the Washington and Lee Law Review). Etsy, a corporation that touts itself as a certified B Corporation committed to goals other than profit, inverted part of its operations to a tax haven. Etsy's decision is difficult to rationalize on any social responsibility grounds, and instead is simply a way to increase profits by cutting the corporation's taxes. Those taxes, of course, fund social services, environmental protection, and other social goods critical to society. Suzanne Kapner, *Etsy Faces Pressure to Abandon Irish Tax Strategy*, WALL ST. J. (Sept. 1, 2015), http://www.wsj.com/articles/etsy-faces-pressure-to-abandon-irish-tax-strategy-1441080008 (last visited Mar. 10, 2017) (on file with the Washington and Lee Law Review).