NOTES

LESSONS LEARNED FROM THE CAPITULATION OF THE CONSTITUENCY STATUTE

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Introduction

The continuously evolving debate over whose interests should be paramount in the eyes of corporate directors has been waged for the better part of a century. Constituency statutes were enacted by state legislatures beginning almost three decades ago. They vary in scope, but all of these statutes purport to allow directors to be able to consider the interests of individuals and groups beyond shareholders. However, courts and directors alike have largely overlooked these statutes and their impact has disappointed many scholars. Constituency statutes represent an opportunity for state legislatures to learn from their mistakes and become more effective in facilitating change in modern corporations law. Even if constituency statutes are relegated to an ineffective and potentially irrelevant role, their story has the potential to improve recent corporations law movements at a time when government, industry, and society as a whole are more attentive to non-shareholder concerns.

Constituency statutes appear to be in some tension with the prevailing common law relating to corporate fiduciary duties and the theory of shareholder primacy. If legislatures intended to maintain shareholder primacy, they should have expressly stated so. Conversely, if they sought to merely allow non-shareholder interests to be considered, legislators should have made this clear. Finally, if legislatures in-

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tended to require directors to consider nonshareholder interests alongside of shareholders' interests, they should have left no doubt as to the expectation of directors. As enacted, constituency statutes contain ambiguities which, as outlined below, encourage courts to construe them in light of existing common law, especially that of Delaware.

Many authors have discussed constituency statutes and their role in modern corporations law. However, unlike previous authors, this article concludes that the best thing constituency statutes can do is to teach a valuable lesson to legislators going forward: when expanding the scope of directors' concerns, especially outside of the takeover context, be intentional and leave no ambiguity. The discussion below begins by explaining what constituency statutes are and why they were developed. Then, it continues by outlining some of the primary criticisms of constituency statutes. Next, the relevant case law, both pre and post-enactment of constituency statutes is examined. Some of the next steps that have been suggested to improve upon constituency statutes are described. After concluding that the suggested improvements are not feasible, this article discusses the lessons to be learned and applied to future movements within corporations law.

Background

The idea that shareholders may not be the only constituency that directors may consider when making significant decisions is not a new argument. Over the course of the 1930s, a debate raged between Adolf Berle and Merrick Dodd over the primacy of shareholder interests.[2] Berle represented the traditionalist argument and Dodd the constructionist.[3] Traditionalists "urged primacy of shareholder interests because shareholders are traditionally the parties to which directors and officers owe a fiduciary duty to return their initial investment . . . the traditionalist viewpoint demands that only one group's interests—the shareholders'—constitute the focus of director decision-making."[4] Constructionists, on the other hand, "urged consideration of the interests of various corporate constituents, including both shareholders and stakeholders. They recognized that the corporation consists of many individuals with a stake in the firm's welfare, such as employees, suppli-

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[2] Edward Adams & John Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 Emory L.J. 1085, 1090 (2000).

[3] *Id.*

[4] *Id.*

ers, and creditors, and the general public."[5] In essence, the constructionist proponents advocated for a broader constituency base beyond shareholders.

This debate would come to a head into the 1980s when a wave of hostile takeovers gripped the corporate world. Hostile takeovers were "commonly viewed as pitting the shareholder's short-term interests in profit maximization against the best long-term interests of the corporation."[6] Aside from shareholders, a corporation's long-term interests often include labor, creditors, employees, suppliers, and other local community constituents integral to the success of the corporation.[7] The increased popularity of unfriendly takeovers left the directors of acquisition targets scrambling to find ways to fend off hostile bidders without breaching the fiduciary duties they owed to shareholders.[8]

In an effort to repel the onslaught of takeover attempts, corporations developed and adopted many internal defensive tactics.[9] Externally, corporate boards were lobbying state legislatures to provide additional protection.[10] According to Professor Jonathan Macey, managers became some of the leading proponents for these statutes because such managers could "obtain politically what they were unable to obtain in the marketplace—meaningful job security regardless of the quality of their performance."[11] While this may be a more cynical view of the motivation behind constituency statutes, it provides another reason for managers to lobby their legislators even harder for greater latitude and protection.

Most states' corporations laws imposed a fiduciary duty on directors to both the shareholders and the corporation but provided no effective guidance in the context of hostile takeovers.[12] "When fundamental corporate issues are at stake, particularly control over the corporation, the 'common benefit of all stockholders' and the 'best

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[5] *Id.*

[6] Thomas Bamonte, *The Meaning of the "Corporate Constituency" Provision of the Illinois Business Corporations Act*, 27 Loy. U. Chi. L.J. 1, 3 (1995).

[7] *Id.* at 3-4.

[8] *See* Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 Loy. L.A. L. Rev. 765 (2009).

[9] Adams & Matheson, *supra* note 2, at 1093.

[10] *See* Bisconti, *supra* note 8, at 780-86.

[11] Jonathan Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 Stetson L. Rev. 23, 33 (1991).

[12] Bamonte, *supra* note 6, at 3-4.

interests of the corporation' may diverge sharply."[13] To address this potential divergence in the face of hostile takeovers, corporate constituency statutes were rushed through state legislatures as part of antitakeover legislation packages.[14]

States Enact Constituency Statutes

The first state to enact a constituency statute was Pennsylvania in 1983.[15] Many others soon followed, and by 1999 twenty-nine states had enacted their own constituency statutes.[16] To-date, forty-one states have some form of a constituency statute.[17] The unifying principle of all constituency statutes is that they "enable corporate directors to consider interests other than those of their shareholders when exercising their corporate decision-making authority."[18] A common constituency statute contains these provisions:

1. The board of directors of a corporation may consider the interests and effects of any action upon non-shareholders.
2. The relevant non-shareholder groups include employees, suppliers, customers, creditors and communities.
3. The directors may consider both long-term and short-term interests of the corporation.
4. The directors may consider local and national economies.
5. The directors may consider any other relevant social factors.[19]

With constituency statutes, corporate leaders were provided a tool, beyond case law and the business judgment rule, which allowed them to consider interests beyond shareholders'. In the states that have enacted constituency statutes, directors are allowed to explicitly consider the interests of the community even without a near-term benefit to shareholders.[20]

> [These] statutes purport to change the duty of care of officers and directors while creating judicial standards for reviewing nonstatutory antitake-

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[13] *Id.* at 3.

[14] *Id.* at 7.

[15] 15 Pa. Cons. Stat. Ann. § 1715 (West 2010); Cheri Budzynski, *Can a Feminist Approach to Corporate Social Responsibility Break Down the Barriers of the Shareholder Primacy Doctrine?*, 38 U. Tol. L. Rev. 435, 443 (2006).

[16] Budzynski, *supra* note 15, at 443.

[17] *Id.*; Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 Ariz. L. Rev. 823, 833 (2003).

[18] Bisconti, *supra* note 8, at 781-82.

[19] *Id.* at 782.

[20] Lisa Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 Wash. & Lee L. Rev. 409, 462 (2002).

> over devices such as poison pills. Whereas many of the early antitakeover devices imposed limitations on entities attempting an unsolicited purchase of another firm without addressing the duties of directors for the target firm, constituency statutes may be expanded to apply outside the context of hostile takeovers to influence everyday board decisions. These improvements suggest that constituency statutes enhance and codify widely accepted legal principles.[21]

Also, the statutes "appear to allow directors to consider [community] interests divorced from shareholder concerns."[22] In essence, directors do not have to prioritize shareholder concerns over other constituencies' concerns. This seemed to be a dramatic shift in the way corporations law operated. However, the shift has been less dramatic than one might expect. It is helpful to see how some states' statutes have operated. The statutes outlined below reveal some of the different approaches that state legislatures took when enacting them. They can be described in four categories: (1) permissive statutes covering all corporate decisions (Pennsylvania);[23] (2) permissive statutes declaring that the corporation itself is superior to shareholders (Illinois);[24] (3) permissive statutes covering only hostile takeover-related decisions (Oregon);[25] and (4) a formally mandatory statute (Connecticut).[26]

As the first to be enacted, Pennsylvania's constituency statute provides that directors, in considering the best interests of the corporation in discharging their duties, *may* consider the effects of any action upon all groups affected by such action, including shareholders, employees, suppliers, customers, creditors of the corporation, and communities in which offices or other establishments of the corporation are located.[27] Furthermore, directors may consider the "short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation."[28] This statute appears to cover all director decisions, not just those in the context of a hostile takeover. In addition, it is important to note the permissive use of the word "may" in the statute's grant

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[21] Adams & Matheson, *supra* note 2, at 1094.
[22] Fairfax, *supra* note 20, at 463.
[23] 15 Pa. Cons. Stat. Ann. § 1715 (West 2010).
[24] 805 Ill. Comp. Stat. § 5/8.85 (2005).
[25] Or. Rev. Stat. Ann. § 60.357 (West 2011).
[26] Conn. Gen. Stat. § 33-756 (2009).
[27] 15 Pa. Cons. Stat. Ann. § 1715 (West 2010).
[28] *Id.*

of discretion. Following Pennsylvania's lead, this permissive, not mandatory language, would become a common theme.

Similarly, the Illinois statute provides that:

> In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.[29]

This form of constituency statute appears to set out that directors owe a primary duty to the corporation, not shareholders. It also explicitly states that the statute covers "the effects of any action" and the "long-term and short-term interests of the corporation." This is significant because traditional jurisprudence describes the long-term interests of the corporation as a focus on shareholder return.[30] Finally, directors are given broad discretion by the use of the word "pertinent" when describing the degree of relevance a factor must have when considered by a director. Thus, as long as directors believe that a factor is pertinent to a corporation, they may consider this factor even if it conflicts with the interests of the shareholders.

When enacting their version, Oregon legislators decided to confine their constituency statute to the context of a hostile takeover. The statute reads:

> When evaluating any offer of another party to make a tender or exchange offer for any equity security of the corporation, or any proposal to merge or consolidate the corporation with another corporation or to purchase or otherwise acquire all or substantially all the properties and assets of the corporation, the directors of the corporation may, in determining what they believe to be in the best interests of the corporation, give due consideration to the social, legal and economic effects on employees, customers and suppliers of the corporation and on the communities and geographical areas in which the corporation and its subsidiaries operate, the economy of the state and nation, the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation, and other relevant factors.[31]

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[29] 805 Ill. Comp. Stat. § 5/8.85 (2005).

[30] *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); *see also* Paramount Commc'ns v. QVC Network, 637 A.2d 34 (Del. 1994).

[31] Or. Rev. Stat. Ann. § 60.357 (West 2011).

This language only applies when directors are weighing whether to repel a hostile takeover attempt. Recently, an attempt was made to extend this provision to all corporate decisions, not just hostile takeovers.[32] However, this amending bill never made it out of committee. Twelve other states have constituency statutes which deal directly with a director's consideration of "other" constituencies in a hostile takeover environment. This is likely a response to the antitakeover sentiment of the late 1980s, as discussed *supra*. Statutes enacted in other states differ in slight ways, but all of them allow directors to consider interests other than shareholders' when determining the best interests of the corporation.[33]

Until 2010, the only state to deviate from the use of permissive language in its constituency statute was Connecticut.[34] This provision was amended in 2010,[35] resulting in a deliberate shift by the legislature from a seemingly mandatory approach to a permissive alternative. Connecticut's statute used to read, in pertinent part:

> [A] director of a corporation . . . *shall* consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers ap-

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[32] H.B. 2829, 75th Or. Legis. Assemb., Reg. Sess. (Or. 2009).

[33] Roberta Karmel, *Implications of the Stakeholder Model*, 61 Geo. Wash. L. Rev. 1157, 1163 (1993). *See* Fla. Stat. § 607.0830(3) (2005); Ga. Code Ann. § 14-2-202(b)(5) (West 2005); Idaho Code Ann. §§ 30-1602, -1702 (West 2005); Ind. Code Ann. § 23-1-35-1(d), (f), (g) (West 2005); Iowa Code Ann. § 491.101B (West 2005); Ky. Rev. Stat. Ann. § 271B.12- 210(4) (West 2004); La. Rev. Stat. Ann. § 12:92(G)(2) (2004); Mass. Gen. Laws Ann. ch. 156B, § 65 (West 2005); Minn. Stat. § 302A.251(5) (2004); Miss. Code Ann. § 79-4-8.30(d) (2005); Mo. Rev. Stat. § 351.347 (2005); Neb. Rev. Stat. § 21- 2035(c) (2005); N.J. Stat. Ann. §§ 14-A:6-1(2), 6-14(4) (West 2005); N.M. Stat. Ann. § 53-11-35(D) (LexisNexis 2005); N.Y. Bus. Corp. Law § 717(b) (Consol. 2005); Ohio Rev. Code Ann. § 1701.59(E) (LexisNexis 2005); R.I. Gen. Laws § 7-5.2-8 (2004); S.D. Codified Laws § 47-33-4 (2005); Wis. Stat. § 180.0827 (2005); Wyo. Stat. Ann. § 17-16-830(e) (2005) (enacted 1989).

[34] Some scholars label Arizona's statute as mandatory. However, there is ambiguity as to whether or not corporate directors in Arizona are required to consider "other interests." *See* Ariz. Rev. Stat. Ann. § 10-1202 (2010).

[35] Conn. Gen. Stat. § 33-756 (2009), *amended by* 2010 Conn. Legis. Serv. P.A. 10-35 (H.B. 5530) (West 2010).

> propriate in determining what he reasonably believes to be in the best interests of the corporation.[36]

Connecticut stood out as the only state that required directors to consider the interests of constituencies beyond shareholders. The use of the word "shall" appeared to be a mandate that all factors that a director "reasonably considers appropriate" were to be considered in the context of takeovers and mergers. Until Connecticut's statute was passed in 1988, a fundamental tenet in American corporations law was that "corporate directors owe their loyalty exclusively to the corporation and its shareholders, not to any other constituency."[37] On its face, this statute seemed to challenge this tenet by forcing directors to consider interests beyond the corporation and its shareholders. However, like the rest of the enacting states, Connecticut did not provide non-shareholders with a right of enforcement.

It is significant that Connecticut's constituency statute, in its previous mandatory form, was not considered in a substantive review by the courts. This may be an indication that the courts are reluctant to veer away from the traditional tenet that directors must focus their concern exclusively on the interests of the corporation and its shareholders. As described below, this reluctance is shared by courts in almost all jurisdictions with constituency statutes.

If there were any questions as to whether the Connecticut legislature sought to fundamentally change its corporations law with a mandatory statute, such questions were put to rest in 2010. Public Act 35 removed "shall" and replaced it with "may," resulting in an alignment with the permissive nature of other states' constituency statutes.[38] Due to this recent amendment, it is impossible to know whether a reviewing court would have required more than inserting the word "shall" to hold such provision as a mandatory requirement. Additionally, if Connecticut had hoped to truly implement change, an enforcement right should have been provided for non-shareholders. One could argue that Connecticut's legislature, in enacting this amendment, was responding to concern or backlash over its mandatory approach. However, it is also plausible that the legislature merely intended to clarify that such statute was never intended to be mandatory and, thus, not a revolutionary change in corporations law.

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[36] *Id.* (emphasis added).

[37] Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681 (1993).

[38] 2010 Conn. Legis. Serv. P.A. 10-35 (H.B. 5530) (West).

There are still nine states that have yet to enact a constituency statute. While commentators have yet to debate why these states have decided to yield on these statutes, one possible argument as to why they chose not to enact one may be because, with the exception of Delaware, they were not significantly impacted by the hostile takeover wave of the 1980s. Another argument may be that states such as Alaska, Arkansas, New Hampshire and West Virginia wanted to observe the impact of constituency statutes in other states. Legislators in these holdout states may have felt that other jurisdictions were overreacting by taking unnecessary steps in the face of hostile takeovers.

Critics of Constituency Statutes

While the passage of these statutes signaled a possible shift in corporations law, many scholars have expressed their concerns, which can be categorized into five groups: (1) the permissive nature of the statutes; (2) the lack of an enforcement right; (3) the divisive impact on corporate decision-making; (4) the limited applicability of some of the statutes; and (5) the nonconformance of Delaware. First, as described above, all of the statutes allow, but do not require, directors to consider interests beyond shareholders' in certain contexts. This discretionary nature may have little impact on directors who already enjoy protection from the business judgment rule.[39] In addition, "[n]one of the statutes indicates how much weight should be given to the various interests."[40] This neither forces directors to balance shareholders' interests with other constituencies' interests, nor does it remove shareholders as the primary concern. As Terry O'Neill describes it, even with the onset of constituency statutes, "corporate directors owe their loyalty exclusively to the corporation and its shareholders, not to any other corporate constituency."[41] It is also worth noting that directors are required to act in the best interests of the corporation and shareholders. Even if the constituency statutes are read with a literal interpretation, they require a *consideration* of the interests of non-shareholders, not *action* in the interests of non-shareholders. If legislators intended to change the behavior of corporate leaders, they could have *required* directors to act in the best interests of all constituencies, rather than merely consider their interests. Still, the radical step lies in

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[39] *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 463 (2006).

[40] *Id.* at 464.

[41] O'Neill, *supra* note 37, at 681.

the legislative judgment that groups other than shareholders are entitled to the directors' concern.

Second, the constituency statutes fail to provide these "other constituencies" an enforceable right. There are no indications that any court is willing to imply a right of action pursuant to these statutes. In fact, some of the statutes explicitly deny such enforcement rights to non-shareholders.[42] "Consequently, stakeholders cannot initiate litigation to require that management consider their interests."[43] Without a legally enforceable right, non-shareholders necessarily take a back seat to shareholders who do maintain statutorily enabled litigation options.

Third, if corporate directors and management are forced to consider interests beyond shareholders', decision-making may become inefficient. Simply put, "having many bosses makes it difficult for management to effectively and fairly manage the firm."[44] According to Timothy Fort, "multiple constituents, if actually powerful, could create corporate gridlock, allowing nothing to get done."[45] Even though managers and directors consider a wide variety of interests when making decisions, constituency statutes may elevate non-shareholder interests to a level on par with those of shareholders, thereby increasing the likelihood that decision-makers will become slower and less efficient in their process. Fort's concern is that, although he feels that corporations can effectively weigh the interests of employees and other internal constituency groups, adding in external constituencies, such as suppliers and community groups may over-complicate corporate decision-making.[46] Indeed, corporations may not have the time or the resources to determine and then evaluate the interests of external groups in a timely and cost-effective manner.

Fourth, as outlined *supra*, many of the constituency statutes specifically apply to hostile takeover scenarios only. This is likely because the intent of the enactors was to equip directors with another method of impeding hostile takeovers.[47] Oregon's statute, for example, gives

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[42] *See* GA. CODE ANN. § 14-2-202(b)(5); NEV. REV. STAT. § 78.138(6); N.Y. BUS. CORP. LAW § 717(b) (Consol. 2012).

[43] Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 IOWA J. CORP. L. 637, 653 (2006).

[44] Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 180 (1997).

[45] *Id.*

[46] *See id.* at 180-81.

[47] O'Neill, *supra* note 37, at 683.

broad discretion to directors "[w]hen evaluating any offer of another party to make a tender or exchange offer for any equity security of the corporation, or any proposal to merge or consolidate the corporation . . . ."[48] Essentially, as some authors have argued, legislators may not have intended to raise non-shareholders to the level of shareholders outside of the hostile takeover context. The reaction to the wave of hostile takeovers was not "indicative of a legal revolution."[49] Others have countered this contention by disregarding the fact that the constituency statutes were enacted in response to hostile takeovers.[50] Instead, these statutes "may go well beyond the narrow confines of the hostile takeover," regardless of the intent of state legislatures.[51]

Finally, despite the prevalence of constituency statutes, Delaware has declined to enact a similar statute over the last three decades. This is significant as Delaware corporate law is the bellwether for other states and its guidance is probably the most important of all of the states. However, as described *infra*, the Delaware judiciary has aligned its common law to primarily conform to constituency statutes, especially in circumstances outside of hostile takeovers.

Traditional Duties–Loyalty and Care–Owed to Shareholders and the Business Judgment Rule

Prior to the enactment of constituency statutes, common law defined the boundaries by which directors and managers were required to act. Now codified in almost all jurisdictions, court-imposed fiduciary duties on directors ensured that directors "did not manage the corporation negligently or for their own benefit. In most states, directors can be held personally liable for breaching their fiduciary duties."[52] The corporation's board of directors is required to manage the affairs of the company with the interests of the shareholders as the primary consideration. Maximizing shareholder wealth has been labeled "shareholder primacy."[53] "The shareholder primacy model is a theory of corporate governance that requires directors to make decisions with the ultimate goal of maximizing shareholder returns."[54] This requires directors and the corporation to elevate shareholder interests above all

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[48] Or. Rev. Stat. Ann. § 60.357 (2010).
[49] Velasco, *supra* note 39, at 464.
[50] O'Neill, *supra* note 37, at 683.
[51] *Id.*
[52] Bisconti, *supra* note 8, at 772-73.
[53] *Id.* at 770.
[54] *Id.* at 783.

other constituencies. Seemingly, constituency statutes would have chipped away at shareholder primacy if these statutes had been given any weight in judiciaries.

The hallmark case of *Dodge v. Ford Motor Co.* set forth the focus on shareholder interests above all else.[55] In that case, the Michigan Supreme Court rejected the authority of the Ford Motor Company to sacrifice profits in the name of social responsibility.[56] Henry Ford and his board of directors exercised their discretion to withhold the distribution of Ford's earnings as a shareholder dividend.[57] Instead, the funds were used to reinvest in the company to benefit its employees.[58] The Michigan Supreme Court balked at Ford's decision and held that the corporation is to be operated "primarily for the profit of the stockholders."[59] The Ford board of directors was wrong to consider other interests beyond shareholder return. Even though the directors had a certain amount of discretion in their decisions, "that discretion was limited to choosing the appropriate means to maximize shareholder wealth."[60]

Despite early cases such as *Dodge v. Ford*, courts have shown more deference to board decisions, with the development of the business judgment rule.[61]

> The business judgment rule operates as a presumption in favor of the board's decisions so long as certain prerequisites are met. In other words, the business judgment rule makes it difficult for shareholders to prevail on a claim against the board for breach of a fiduciary duty because of judicial deference.[62]

This deference underlies the policy that "courts should give recognition to directors' business expertise when exercising their managerial power."[63] Essentially, "a director's or manager's decision is a 'valid exercise of business judgment' if the decision is 'reasonably informed.' "[64] The business judgment rule serves as a backstop for directors contem-

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[55] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

[56] *Id.*

[57] *Id.* at 671.

[58] *Id.*

[59] *Id.* at 684.

[60] Bisconti, *supra* note 8, at 775.

[61] *Id.*

[62] *Id.*

[63] Budzynski, *supra* note 15, at 451.

[64] *Id.* (quoting Brehem v. Eisner, 746 A.2d 244, 259 (Del. 1984)).

plating a variety of interests, so long as such interests do not conflict with or detract from shareholder primacy.

Delaware Sets Out the Rules in the Context of a Hostile Takeover

Traditionally, under Delaware common law, directors were required to focus exclusively on the interests of shareholders in a hostile takeover environment.[65] "When a corporation is an acquisition target, the business judgment rule is modified so that the board's response to a takeover receives heightened scrutiny."[66] Essentially, directors could consider other interests except in times of a hostile takeover. The Delaware courts have subsequently set forth a trilogy of opinions which frame the fiduciary duties of directors of a target company in a hostile takeover.

In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court determined that, when faced with a hostile takeover, directors may consider "[the] inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders . . . , the risk of nonconsummation, and the quality of securities being offered in exchange."[67] According to the court, the burden is on the board to establish that there is a reasonably perceived threat to the corporate enterprise and that the measure adopted is reasonable in relation to the threat posed.[68] For the first time, directors were allowed to consider interests beyond shareholders'. However, this decision was soon reined in by *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*

In *Revlon*, the Delaware Supreme Court noted that "boards may only consider stakeholder constituencies when 'there are rationally related benefits accruing to stockholders.'"[69] In essence, directors could now consider other constituencies besides shareholders, but must do so concurrent with consideration of shareholders.[70] "As the *Revlon* court makes clear, when a corporation has abandoned its long-term strategies and has entered auction mode . . . , the sole fiduciary duty of

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[65] *See* Bisconti, *supra* note 8, at 778.
[66] *Id.*
[67] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).
[68] *Id.* at 954-55.
[69] Budzynski, *supra* note 15, at 453 (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)).
[70] *Id.*

the board is to maximize immediate shareholder value."[71] This made clear that *Unocal* was not intended to authorize redress of a negative impact on a non-shareholder at the expense of shareholders. Furthermore, the analysis for directors changes in hostile takeover contexts, as they are to focus solely on the interests of shareholders.

Finally, in *Paramount Commc'ns, Inc. v. Time, Inc.*, the Delaware Supreme Court held that directors do have the flexibility to consider options that may not be the most beneficial to shareholders in the short-term as long as the chosen course of action supports the long-term interests of both shareholders and the corporation.[72] While not directly considering other constituencies, this case made apparent to directors that, absent a triggering of *Revlon*, they could sacrifice short-term shareholder returns if the sacrifice is in the long-term interests of the corporation and its shareholders.[73] This short-term sacrifice may include the consideration of constituencies such as employees, suppliers, creditors, and community organizations.

Delaware law, as the prevailing law looked to by many jurisdictions around the country, maintains a director's fiduciary duty to shareholders while allowing directors to consider the interests of others as long as there is some reasonable connection to the long-term interests of the corporation and shareholders.[74] In the context of a hostile takeover, directors are to focus exclusively on shareholder interests. Delaware may be striking a balance between the consideration of non-shareholder interests and the need to elevate the fiduciary duty of directors when they are considering a sale of the corporation and its assets. The Delaware legislature has acquiesced to the decisions of the Delaware Chancery Court and the Delaware Supreme Court. One must assume that the legislature has acted in full awareness of the circumstances surrounding constituency statutes and determined that Delaware's common law takes the proper approach in allowing other interests to be considered as long as there is a rational relationship to the long-term interests of shareholders.

This approach protects shareholder primacy while acknowledging the changing corporate landscape. Juxtaposing the business judgment

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[71] Bisconti, *supra* note 8, at 779.

[72] Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1990).

[73] *Id.*

[74] *Paramount Commc'ns, Inc.*, 571 A.2d 1140; Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

rule along with prevailing Delaware case law reveals that, without mandatory language or an enforcement right for non-shareholders, constituency statutes do little to influence the corporations law landscape. Regardless of the enactment of these statutes, directors have been and continue to be provided greater discretion to consider a wide range of interests as long as shareholder returns are not sacrificed in the long-term, especially when operating outside of the context of a hostile takeover.

The Limited Case Law Interpreting Constituency Statutes

In the states that have enacted constituency statutes, very few judicial opinions have evaluated and interpreted these statutes. The opinions concerning constituency statutes appear to conform them to the Delaware common law. These courts have hesitated to deviate from the longstanding principle of shareholder primacy, even though state legislatures have enacted statutes that purport to change the longstanding principle. Instead, "constituency statutes currently function only to the extent that they do not conflict with shareholder primacy."[75]

In *Baron v. Strawbridge*, the plaintiff formed a corporation for the purpose of conducting a hostile takeover.[76] The defendant corporation undertook defensive measures to fend off this takeover attempt.[77] In applying Pennsylvania's constituency statute, the court held that the defendant board acted appropriately in reclassifying its stock in response to the threat of a takeover. The court found that "[i]t was proper for the company to consider the effects the . . . tender offer would have, if successful, on the company's employees, customers and community."[78] Then, in another Pennsylvania decision, *Keyser v. Commonwealth*, "the district court employed the then-current statute to determine the appropriateness of a white knight defense to a change in control. Thus, the public policies favoring constituency statutes were acknowledged and accepted by Pennsylvania courts as they invoked the nation's first adopted constituency statute."[79] Finally, in *Norfolk Southern v. Conrail*, the district court, in determining whether a corporation

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[75] Bisconti, *supra* note 8, at 784.

[76] Baron v. Strawbridge, 646 F. Supp. 690 (E.D. Pa. 1986).

[77] *Id.* at 697-98.

[78] *Id.* at 697.

[79] Adams & Matheson, *supra* note 2, at 1111 (citing Keyser v. Commonwealth Nat'l Fin. Corp., 675 F. Supp. 238, 258 (M.D. Pa. 1987)).

breached its fiduciary duties to shareholders by taking a lower buyout offer to protect employees, relied upon Pennsylvania's constituency statute and held that directors are not required to treat the financial welfare of shareholders as the paramount concern.[80]

In Wisconsin, a federal district court relied upon the constituency statute in finding for a board of directors which refused poison pill rights in fending off a tender offer.[81] The court concluded that "[t]he board has acted in accord with its fiduciary responsibilities in a manner reasonably related to the perceived threat to the corporation, its shareholders, and other constituencies."[82] Accordingly, the Wisconsin court applied fiduciary duties on a corporation's directors based upon responsibilities iterated in the state's constituency statute.[83]

The Maine constituency statute was relied upon by a district court in Maine involving yet another poison pill case.[84] In upholding the board's decision to delay a vote on whether to take the poison pill, the court held that "Maine law suggests that the Directors of a corporation, in considering the best interests of the shareholders and corporation, should also consider the interests of the company's employees, its customers and suppliers, and communities in which offices of the corporation are located."[85] This case has been a beacon for constituency statute proponents who claim that the statute's use "demonstrates the positive effect such legislation has on ensuring stakeholders' interests are considered in change of control situations."[86]

Nevada's constituency statute was dealt a blow in *Hilton Hotels v. ITT Corp.* In this case, "the court discounted the importance of other stakeholder constituencies when it granted a preliminary injunction to the plaintiffs in a hostile takeover bid. Defendants, in an attempt to stop the takeover, refused to conduct their annual meeting and insti-

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[80] Norfolk S. Corp. v. Conrail, Inc., No. Civ.A 96-7167, 1997 WL 33463657 (E.D. Pa. Jan. 09, 1997).

[81] *See* Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1008-09 (E.D. Wis. 1989).

[82] *Id.* at 1016.

[83] Adams & Matheson, *supra* note 2, at 1111 (quoting *Universal Foods*, 708 F. Supp. at 1016).

[84] *See* Georgia-Pac. Corp. v. Great N. Nekoosa Corp., 727 F. Supp. 31, 33 (D. Me. 1989).

[85] *Id.*

[86] *See* Adams & Matheson, *supra* note 2, at 1112.

tuted a plan of defense against the merger."[87] To justify their actions, the board suggested that they were able to make this decision based on Nevada's constituency statute.[88] The court held that the rights of the shareholders could not be outweighed by other stakeholder constituencies listed in Nevada's statute.[89]

While there have been some victories for constituency statute advocates, there have been limited instances where the statutes have been embraced by courts. There has been judicial reluctance to shift away from the standards applied in the courts of Delaware. Even though Delaware law and constituency statutes both permit the consideration of non-shareholder interests, absent a hostile takeover, many constituency statutes go further by not requiring a relation to the benefit of shareholders. However, post-*Revlon*, Delaware still requires an exclusive focus on the interest of shareholders in the context of a takeover or merger. This differs from the underlying principle of constituency statutes—other constituencies may be considered, especially in the context of takeovers and mergers.

ABA and ALI Interpretations

In addition to scholars and case law, the American Bar Association and the American Law Institute have weighed in with their interpretations on how constituency statutes should be applied. Both organizations have promulgated publications that advocate for an application which adheres to traditional standards—other interests may be considered by directors as long as they do not disfavor the interests of shareholders.[90]

Shortly after most states had enacted their constituency statutes, the ABA's Committee on Corporate Laws (the "Committee") convened a meeting to determine whether or not the Revised Model Business Corporations Act should be revised in light of these new statutes.[91] The Committee issued a report that concluded that the Act should not

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[87] Budzynski, *supra* note 15, at 454-55 (discussing Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1344, 1351 (D. Nev. 1997)).

[88] *Id.* at 455.

[89] *Hilton Hotels Corp.*, 978 F. Supp. at 1351.

[90] *See* ABA Comm. on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 Bus. Law 2253 (August, 1990); A.L.I., Principles of Corporate Governance: Analysis And Recommendations § 6.02 (1994).

[91] ABA Comm. on Corporate Laws, *supra* note 90, at 2253.

be revised and that constituency statutes should be construed with existing law.[92]

The Committee acknowledged that constituency statutes had the potential to dramatically shift the landscape of corporations law if courts decided to interpret them so. It was also concerned that this potential shift might occur "without sufficient attention having been given to all of the economic, social, and legal ramifications of such a change in law."[93] In addition, "constituency statutes have typically been adopted as one measure, among others, designed to assist directors in forestalling unwanted takeovers."[94] The Committee sought to characterize these statutes as limited in scope and merely a response to the hostile takeover wave, described *supra*.

While the Committee acknowledged that societal shifts brought the interests of non-shareholders to the forefront, a substantial majority of the Committee members concluded that "other constituencies legislation is an unwise way in which to regulate hostile tender offers because such legislation may, perhaps unwittingly and without sufficient thought and consideration, alter long-standing and tested concepts of the relationships that should exist between corporations and their directors and shareholders."[95] Also, in the Committee's view, the long-standing principles of law should only be changed "after a thoughtful, national debate dealing with the many profound consequences of such a change, not by means of ambiguous statutory enactments."[96] Finally, the Committee declared that "unless the enacting legislature has clearly evidenced a different intent, the statutes that have been adopted should be interpreted in a manner consistent with the existing common law."[97] In the Committee's eyes, these statutes were legislative affirmation of what courts would be expected to hold in the absence of a statute.[98]

The American Law Institute took a similar stance in its Principles of Corporate Governance and Analysis and Recommendations.[99] In its 1994 release, the ALI considered constituency statutes when it said that

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 2254.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 2271
[99] *See* A.L.I., *supra* note 90, at § 6.02.

directors may consider the interests of non-shareholders if doing so does not significantly disfavor the long-term interests of shareholders.[100] While upholding the shareholder primacy model, the ALI acknowledged the permissive nature of constituency statutes and modern corporate law when it promulgated this principle on corporate governance:

> A business corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain. Even if corporate profit and shareholder gain are thereby enhanced, the corporation, in the conduct of its business:
> (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;
> (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and
> (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.[101]

The principles set forth by the ALI expressly recognize other interests beyond shareholders' and allow directors the discretion to consider these interests as long as they comply with the long-term interests and gains of shareholders. Thus, the ABA and ALI continue to construe constituency statutes as permitting the consideration of non-shareholder interests as long as those interests do not conflict with those of shareholders.

Suggestions for Improvement

With few commentators putting significant credibility behind constituency statutes and minimal case law applying them, one is left to wonder whether the intent of state legislatures has been carried forward. If constituency statutes truly were intended to exclusively serve as a complementary shield to help directors fend off hostile takeovers, then the statutes may be left as is. However, if the statutes were intended to serve the purpose of shifting the focus away from pure shareholder primacy, changes may serve to bolster the effectiveness of these statutes. Some scholars have put forth options that legislatures could employ to better serve the wide variety of constituents.

To provide more effectiveness and credibility to constituency statutes, some have advocated for making them mandatory instead of permissive. This would require directors to consider non-shareholder interests by expressly demonstrating legislatures' intent to force this

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[100] *Id.*
[101] *Id.* § 2.01.

requirement. Terry O'Neill has promoted the idea that "directors no longer should be required simply to maximize shareholder wealth. They should, instead, be cast in the role of intermediary, required to recognize and to balance the conflicting interests of all of those who have a stake in the corporation."[102] To achieve this duty, O'Neill calls for, among other actions, updating the constituency statutes to be *mandatory* and not just *permissive.*[103] In addition, O'Neill notes that the statutes should also uniformly apply to all contexts, not just hostile takeovers.[104]

Edward Adams and John Matheson also advocate for a mandatory constituency statute scheme.[105] They believe that this would lead to the best results for a corporation's varied constituents as well as for the corporation itself.[106] This is because the consideration of other interests may yield long-term benefits to all constituencies, including shareholders. While the concept of amending constituency statutes to impose a mandatory requirement has been suggested by these scholars,[107] such a shift, by any state, is highly unlikely given that the only state with a seemingly mandatory statute recently amended it to ensure that such statute is permissive.

Adams and Matheson further contend that constituency statutes should be updated to include a stakeholder enforcement right.[108] "Stakeholders need to be given standing to sue; otherwise, constituency statutes lack the power necessary to guarantee consideration of nonshareholder interests."[109] Finally, these authors would like to see management bearing the burden of proving that it has fulfilled its obligations to non-shareholders.[110] This would be an affirmative duty on management to show, at some level, what steps it took to look after the interests of non-shareholders.[111] Their primary concern with this final requirement is that, without this affirmative duty, directors may "hide

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[102] O'Neill, *supra* note 37, at 684.
[103] *Id.* at 683.
[104] *Id.*
[105] Adams & Matheson, *supra* note 2, at 1121.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *See id.*

behind the shield of constituency statutes when [they] do not properly consider the investment of non-shareholders."[112]

Another author has called for legislatures to revisit constituency statutes and to clarify their intent.[113] Under this view, legislatures have failed to provide adequate guidance for the application of constituency statutes and, as a result, courts have refused to break from the "normative, analytically convenient framework," as described above.[114] To tackle the existing debacle that is constituency statutes, state legislatures could consider the public policy that they would like to promote and then utilize constituency statutes to achieve this goal.[115] If the goal of legislatures is to require directors to consider non-shareholder interests, the statute should make clear that they are intended to require the consideration of other constituencies' interests.[116] Also, the statutes should reference the weight that should be given to non-shareholder interests relative to the interests of shareholders.[117]

Beyond changing the way that constituency statutes are drafted or applied, other scholars have recommended additional improvements to achieve the intent of the statutes. "[M]echanisms should be developed to enable lenders and employees as well as shareholders to monitor directorial activity to insure that the business enterprise remains viable."[118] This approach could include greater interaction and collaboration between directors and all relevant constituencies. Additionally, greater reporting requirements could be implemented to make both directors and constituencies aware of all stakeholders' concerns, interests, and actions. Institutional investors are in the best position to develop and maintain these mechanisms because they wield the requisite influence and their positions overlap with other constituencies' interests.[119] These monitoring systems will "motivate directors to prevent any single constituency from usurping a corporation's capitalization

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[112] *Id.* (citing Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. Rev. 1189, 1234 (1991)).

[113] Bisconti, *supra* note 8, at 794-95.

[114] *Id.* at 793.

[115] *Id.*

[116] *Id.* at 794.

[117] *Id.*

[118] Karmel, *supra* note 33, at 1175.

[119] *Id.*

for its own use in such a manner that other valid constituencies are significantly harmed."[120]

Finally, one author has advocated for using constituency statutes as a building block and adopting additional statutes that require regular stakeholder meetings.[121] In her opinion, "[t]he purpose of these [stakeholder] meetings would be to close the physical and psychological distance between corporate leaders and stakeholders and, in turn, cultivate more regular and earnest consideration of stakeholder interests inside corporate board rooms."[122] These meetings would help to build relationships and increase awareness of stakeholder concerns.[123] The intent is that conflict resolution and community-oriented decision-making can be incorporated early in the corporate process so that litigation does not have to ensue.[124] This option presents obvious hurdles such as the meeting requirement and the earnest consideration of stakeholder interests. However, the spirit of this suggestion goes to the crux of what other scholars are striving for—to improve constituency statutes so that they can become more relevant and effective.

The above authors and scholars have put forth several options for either amending or adding to constituency statutes. These options respond to some of the major criticisms of constituency statutes, as enacted. However, one final option could be to leave the statutes as they are and declare their ineffectiveness. Leaving them to continue under the status quo, however, allows them to remain largely irrelevant as they "have realized neither the hopes they initially inspired nor the fears they initially instilled."[125] The ultimate demise and capitulation of constituency statutes would neither surprise legal scholars and legislators nor change the way modern corporations law is applied. Even if constituency statutes were merely another defense against takeovers, changes would be necessary to ensure their effectiveness at a time when the landscape of American corporate law is evolving. Given the path that these statutes have taken, such change is neither likely nor desired. Instead of trying to change constituency statutes, the lessons

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[120] *Id.*

[121] Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 827-28 (2003).

[122] *Id.* at 828.

[123] *See id.*

[124] *Id.*

[125] *Id.* at 841.

they represent should be applied to current and future movements within corporations law.

Applying the Lessons Going Forward

In recent years, it has become apparent that "[m]anagerial discretion to sacrifice corporate profits is both inevitable and affirmatively desirable," especially in the short-term.[126] "It is inevitable because it cannot be disentangled from the discretion managers need to make profit-enhancing corporate decisions."[127] Furthermore, "[i]t is affirmatively desirable because it allows social and moral sanctions to optimize corporate conduct."[128] Put differently, the events of the late 1990s, the early 2000s, and the Great Recession of 2008-2009 have set the stage for a greater social and moral desire to consider the interests of other constituencies, even if shareholder returns are sacrificed in the near-term. The technology bubble, the Enron debacle, global warming, and the financial collapse have all contributed to the mindset of greater good. The stakes are too high to leave the lessons offered by the experience of the constituency statute lying idle.

Upon declaring constituency statutes ineffective or irrelevant, perhaps legislatures can reflect upon the path paved by these statutes. Legislators should understand and consider the status quo regarding corporations law and the state of case law in their respective jurisdictions. If it is their intent to augment or curtail such case law, intentional steps must be taken to enable change. Modern corporations law is deeply engrained in the fabric of businesses' strategies and tactics and is unlikely to yield to permissively worded statutory amendments, especially in a hostile takeover context. Moreover, knee-jerk reactions to the latest hot-button issues may be politically savvy, but such reactions may not usher in an effective solution to underlying problems.

Legislatures do not have to wait for an opportunity to implement the lessons learned from the capitulation of the constituency statute. Indeed, many states are already looking to B corporations as a method by which to perpetuate part of the original intent behind constituency statutes (to explicitly consider interests beyond shareholders'). Enacted in eleven states to date, benefit corporations, or B corporations,

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[126] Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 868 (2005).

[127] *Id.*

[128] *Id.*

allow corporations to elect to become B corporations and devote much of their corporate agenda to social responsibility.[129] An entity with this status is generally required to have, as part of its purpose, the purpose of creating a general public benefit.[130] Virginia's statute defines a general public benefit as "a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation."[131] These statutes allow corporations to write their social mission into their charters, including the purpose of creating benefits for those beyond shareholders.

Without greater adoption around the country or successful tests in state judiciaries, it is uncertain whether B corporations will make directors' duties significantly more ironclad from shareholder lawsuits in the context of a takeover. However, legislators in adopting states are at least making clear that they want certain corporations, under their own choosing, to be beholden to those beyond shareholders. Even if legislators are not giving greater protections,[132] they are drawing the line for corporations that are exclusively subjected to the interests of their shareholders and those which may consider a variety of societal interests. It may be more likely that a court would recognize that B corporation shareholders knew or should have known that their interests would be considered alongside those of non-shareholders. In essence, B corporation shareholders are on notice that they are investing in an entity which can seek to benefit the greater community rather than simply focus on shareholder returns.

As an alternative to constituency statutes, B corporation statutes run the same risks as constituency statutes because they may provide broader director protections in form but not in substance. However, if developed properly and given enough weight by reviewing courts, B corporations may offer legislators an option to effectuate some of their original intent behind constituency statutes. Unlike the quick enactment of constituency statutes, state legislators interested in B corpora-

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[129] *See State by State Legislative Status*, BENEFIT CORP INFO. CENTER, http://www.benefitcorp.net/state-by-state-legislative-status (last visited September 24, 2012).

[130] *See, e.g.*, N.J. STAT. ANN. § 14A:18-5 (West 2011).

[131] H.B. 2358, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

[132] *But see* CAL. CORP. CODE § 14620 (West 2011) (delineating the constituencies that directors *shall* consider versus those that directors *may* consider while discharging their duties). Such delineation comports with the Model Benefit Corporation Legislation, as developed by B Labs, *available at* http://benefitcorp.org/storage/Model_Legislation.pdf.

tions should heed the warning of the constituency statute impact (or lack thereof) and be extremely purposeful and clear if and when they proceed to adopt B corporations as well as future corporations law advancements.

Conclusion

Constituency statutes have been the subject of extensive debate and scholarship. They were enacted almost three decades ago in the wake of the hostile takeovers of the early 1980s. All contain permissive language which, in turn, merely provides that directors *may* consider interests beyond shareholders' in certain situations. The case law interpreting these statutes has been relatively sparse and this has added to the ambiguity surrounding them. To date, most courts have construed these statutes to conform to the over-arching common law as set forth in Delaware.

To clarify their intent and to improve the impact of these statutes, some scholars have encouraged state legislatures to amend these statutes to make it mandatory for directors to consider non-shareholder interests and to provide non-shareholders enforcement rights. Similar to the reluctance of courts to make waves in this area, legislatures have not shown indications that they are seeking to shift away from the shareholder primacy model. Therefore, until further notice, the status quo prevails and directors should continue to look to *Unocal*, *Revlon*, and *Paramount* for guidance. As state legislatures proceed to adopt B corporation statutes and future corporate law maneuvers, they must recall their experience with constituency statutes and carefully consider the impact of their legislative mandates.