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CONSUMER PRIMACY: A DYNAMIC MODEL OF CORPORATE GOVERNANCE FOR CONSUMER-CENTRIC BUSINESSES

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Abstract

This Article challenges the conventional view that corporate law should principally strive to increase shareholder value, arguing that rather, corporate law should principally strive to ensure consumer satisfaction in consumer-centric businesses. Consumer-centric businesses are defined here as businesses in which consumers occupy a central role in the creation and distribution of corporate value and risks. For example, a consumer of a crowdfunded product does not take shares, but provides capital and product-design feedback during the early and critical stages of the product's development. A consumer using a ridesharing app makes significant contributions to building the platform and provides real-time ratings and feedback regarding their experience, which are then used to incentivize desirable behavior within the platform. A purchaser of a token in an initial coin offering (ICO) purchases a medium of exchange that can be used within a particular network, with the value of the token being determined by the network's success. In each of these examples, consumers have taken on roles that are the functional equivalents of the characteristics that legal theories of the firm have long relied upon to

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justify the law's treatment of shareholders as owners and principals of firms. Based on this observation, I argue that consumers in these and other consumer-centric businesses should be provided with rights and obligations (such as the right to vote, standing to sue, and participation rights) commensurate to their contributions. In this Article, I show how this consumer-oriented model of the firm, which I refer to as the consumer primacy model, is useful as a mechanism to align corporate and societal interests and to inject diversity, long-termism, accountability, and social responsibility into the corporate boardroom, the lack of which has given rise to long-standing critiques of corporate culture in the United States.

I. INTRODUCTION

Shareholders and their investment capital were the fuel that drove the remarkable growth of industrial firms in the twentieth century.[1] In recognition of such essential contributions, as well as the difficulty of protecting shareholders' interests via contract,[2] a corporate law and governance framework developed to protect shareholders and their capital investments. These protections included disclosure and information rights, inspection rights, participation rights, voting rights, fiduciary duty protections, and dividends.[3] This bundle of legal shareholder rights and protections came to be regarded as the foundation of a thriving capital market,[4] and this shareholder-oriented legal framework came to be known as the *shareholder primacy norm* in corporate law.[5]

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[1] *See, e.g.*, Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831, 834 (1993) ("The Industrial Revolution was distinguished by a shift to capital-intensive production . . . .").

[2] *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L.J. 401, 423 (1993). "It is desirable to maintain a system of corporate governance in which fiduciary duties are owed exclusively to shareholders because no suitable alternative means of protecting shareholders' claims exist other than by way of a judicially enforced regime of fiduciary duties. By contrast, the obligations owed to other claimants can be enforced by contract because they are more precisely defined than the obligations to shareholders." *Id.*

[3] *See, e.g.*, Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 L. & CONTEMP. PROBS. 215, 216–18 (1999) (discussing shareholders' rights to vote, sell, or sue).

[4] *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Law and Finance*, 106 J. POL. ECON. 1113, 1129, 1146 (1998) (arguing that dispersed ownership in large public corporations can only arise in legal environments that provide adequate protections to minority shareholders). The authors show that common law systems consistently outperform civil law systems in terms of the depth and liquidity of their capital markets. *Id.* at 1132, 1147–48.

[5] *See* Lynn A. Stout, *New Thinking on "Shareholder Primacy*,*"* 2 ACCT., ECON. & L. 1, 1 (2012) (explaining how shareholder wealth maximization became the "proper goal of corporate governance" in the 1970s); D. Gordon Smith, *The Shareholder Primacy Norm*, 23

The shareholder primacy norm views the maximization of shareholder value as the most efficient means of maximizing total corporate and, ultimately, societal value.[6] As famously asserted by Milton Friedman in 1970, the norm is based on the understanding that it is the *social* responsibility of a business to increase its profits, because increasing its profits also increases overall social welfare.[7] But while profits have been a reliable proxy for societal value in some contexts, there is growing evidence of discord between profit-seeking and public interest.[8] This discord prompts a reexamination of the shareholder primacy norm, which rests on the presumed equivalence between societal and shareholder value.

Several recent examples have highlighted the harmful consequences of a misalignment between profit and social welfare. In November 2020, the opioid manufacturer Purdue Pharma LP (Purdue Pharma) admitted that it had marketed and sold dangerous opioid products, despite having reason to believe these products were

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J. CORP. L. 277, 278 (1998) (discussing the various formulations of the shareholder primacy norm).

[6] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) ("[A]s a consequence of both logic and experience, there is convergence on a consensus that the best means to . . . the pursuit of aggregate social welfare . . . is to make corporate managers strongly accountable to shareholder interests, and, at least in direct terms, only to those interests.").

[7] Milton Friedman, *A Friedman Doctrine--The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/X8GE-JYM7].

[8] *See, e.g.*, Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2015 (2003) (explaining how methods used to increase shareholder wealth harms consumers, employees, suppliers, and others); Thomas Clarke, *Accounting for Enron: Shareholder Value and Stakeholder Interests*, 13 CORP. GOVERNANCE 598, 604 (2005). "[T]he relentless emphasis on the importance of shareholder value in recent times has created the conditions for the disconnection of corporations such as Enron from their essential moral underpinnings, encouraging them to concentrate exclusively on financial performance, and to neglect not just the wider stakeholder interests of customers and employees, but the essential interests of the economies and communities in which they operate." *Id.*; Terence Tse, S*hareholder and Stakeholder Theory: After the Financial Crisis*, 3 QUALITATIVE RSCH. FIN. MKTS. 51, 53–55 (2011) (explaining how the pursuit of shareholder value maximization through increasing corporate size and cash flows led banks, including Lehman Brothers, to overly rely on credit markets and undertake questionable risks, which ultimately led to the 2008–2009 financial crisis); Frederick H. Alexander, *Saving Investors from Themselves: How Stockholder Primacy Harms Everyone*, 40 SEATTLE U. L. REV. 303, 306–08 (2017) (discussing how corporate decision-makers in the "free market" created by shareholder primacy must pursue every negative-sum opportunity with other stakeholders in order to give shareholders the greatest return to the detriment of all parties involved); Jacob M. Rose, *Corporate Directors and Social Responsibility: Ethics Versus Shareholder Value*, 73 J. BUS. ETHICS 319, 319–20 (2007) (finding that directors consistently and knowingly give up corporate social responsibility that affects social welfare in order to increase shareholder value because they believe current corporate law requires them to take shareholder value-maximizing actions).

being diverted to abusers.[9] In 2019 alone, nearly 50,000 people died from opioid-involved overdoses in the United States.[10] As another example, in January 2021, the Boeing Company (Boeing) was charged with fraud conspiracy for failing to be transparent about a defect in the manufacture of its 737 Max airplane that led to 346 passenger deaths.[11] As stated by Acting Assistant Attorney General David P. Burns of the Justice Department's Criminal Division: "Boeing's employees chose the path of profit over candor by concealing material information from the FAA [Federal Aviation Administration] concerning the operation of its 737 Max airplane and engaging in an effort to cover up their deception."[12] The Purdue Pharma and Boeing examples, and numerous others like them, illustrate how putting profits first can lead to socially irresponsible and disastrous results.

But if profit is not a guaranteed path to socially responsible business, then what is? In this Article, I argue that prioritizing consumers' interests is the better path for a growing subset of firms, and I define and refer to this subset of firms as *consumer-centric businesses*. Consumer-centric businesses include all businesses in which consumers are more than mere purchasers and occupy, more so than any other stakeholder, a central role in the creation and distribution of corporate value and risks. Instagram, the photo- and video-sharing social networking platform, now owned by Facebook,[13] is a prime example of a consumer-centric business. The core value of Instagram's business, which was projected to generate $18.16 billion in ad revenue in 2021, is derived from the 50 billion photo and video posts contributed by more than 1.074 billion users on the platform.[14] Instagram launched with only $500,000 of seed funding and had just 13 employees when it became a billion-dollar company.[15]

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[9] Press Release, Dep't Just., Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies (Nov. 24, 2020) (on file with author), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies [https://perma.cc/BE9F-FQM4].

[10] *Opioid Overdose Crisis*, NAT'L INST. DRUG ABUSE (Mar. 11, 2021) (on file with author), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis [https://perma.cc/MA5T-N6Z2].

[11] Press Release, Dep't Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021) (on file with author), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/EE4U-CHK8].

[12] *Id.*

[13] *Facebook to Acquire Instagram*, FACEBOOK (Apr. 9, 2012), https://about.fb.com/news/2012/04/facebook-to-acquire-instagram/ [https://perma.cc/72VV-5WNZ]; Laurie Segall, *Facebook Acquires Instagram for $1 Billion,* CNN MONEY (last updated Apr. 9, 2012, 3:19 PM), https://money.cnn.com/2012/04/09/technology/facebook_acquires_instagram/index.htm [https://perma.cc/4T9C-MP8W].

[14] Data current as of June 28, 2021. *Instagram by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (last updated Aug. 11, 2021), https://www.omnicoreagency.com/instagram-statistics/ [https://perma.cc/N83H-ULAN].

[15] SARAH FRIER, NO FILTER: THE INSIDE STORY OF INSTAGRAM 15, 62 (2020).

In support of a paradigm shift from shareholder primacy to consumer primacy for certain firms, I first begin by identifying the three distinct characteristics that have historically been used to justify shareholders' primacy status under the shareholder primacy norm, and by referring to the group that embodies these characteristics as *primary stakeholders*. First, primary stakeholders provide core inputs that create a significant *stake* in the business.[16] Second, primary stakeholders are *vulnerable* to opportunistic and oppressive behaviors that are otherwise not fully addressed by contracts or existing regulations.[17] Third, primary stakeholders' interests are a *reliable metric* of collective corporate and societal value.[18] Having identified the three primary stakeholder characteristics, I then define consumer-centric businesses as businesses in which consumers, more so than any other stakeholder, hold these primary stakeholder characteristics.

This Article is motivated by the observation that while these primary stakeholder characteristics were emblematic of shareholders in an industrial society, they are increasingly more suitable descriptors of consumers in our postindustrial world. Clinging too rigidly to the shareholder primacy norm in an increasingly consumer-centric world is therefore descriptively inaccurate and, more pressingly, has led to a growing misalignment between corporate and social objectives. This disconnect has also widened the inequalities in our society by privileging capital investment over other inputs that add just as much, if not more, value to businesses and to society.[19]

Notably, consumers' contributions of both tangible and intangible capital are increasingly becoming the key drivers of growth in our postindustrial world.[20] The

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[16] *See infra* Section II.A.1.

[17] *See infra* Section II.A.2.

[18] *See infra* Section II.A.3.

[19] *See* Thomas Clarke, Walter Jarvis & Soheyla Gholamshahi, *The Impact of Corporate Governance on Compounding Inequality: Maximising Shareholder Value and Inflating Executive Pay*, 63 CRITICAL PERSPECTIVES ON ACCT., 2019, at 1, 2 (explaining how the focus on maximizing shareholder value systemically compounds inequality by dedicating corporations to serving a small elite of owners and managers while dispossessing workers from the same prosperity).

[20] This acknowledgement that our increasingly data-driven economy cannot exist but for the data contributed by users and consumers forms the basis of the idea of a "data dividend" that has been proposed by academics and policymakers. *See generally* Dan Vesset, Henry D. Morris & John F. Gantz, *Capturing the $1.6 Trillion Data Dividend*, IDC 1 (2014). Former U.S. presidential candidate Andrew Yang inspired the data dividend project which seeks to help Americans gain ownership and control of their personal data. *Who We Are*, DATA DIVIDEND PROJECT, https://www.datadividendproject.com/aboutus [https://perma.cc/MLX8-VL5N?type=image] (last visited Sept. 6, 2021). *See About the Data Dividend Project*, DATA DIVIDEND PROJECT, https://www.datadividendproject.com/manifesto [https://perma.cc/5CVB-PKQE] (last visited May 14, 2021) (noting that the consumer data brokering industry is a $200 billion industry); *see also* Yakov Feygin, Hanlin Li, Chirag Lala, Brent Hecht, Nicholas Vincent, Luisa Scarcella & Matthew Prewitt, *A Data Dividend that Works:*

misuse of these contributions has led to privacy concerns, manipulation, fraud, and other vulnerabilities that are notoriously difficult to address fully via contract and external regulation.[21] Furthermore, there is a growing recognition that consumer satisfaction is a more reliable metric of the value and harm that corporations confer upon our society.[22] Relating back to Purdue Pharma and Boeing, the arguments made in this Article rest on the assertion that patient well-being and passenger safety are better measures of these businesses' overall value than their price-to-earnings ratios.

These developments suggest that we need a new model of the firm for consumer-centric businesses—one that does not view consumers merely as sources of shareholder value extraction and instead treats consumers as the owners and controllers of the value they create. This model of the firm in which consumers migrate from the periphery to the core of corporate governance is referred to here as the *consumer primacy model*.

The proposed consumer primacy model would first require companies to self-certify as to whether they are a consumer-centric business.[23] The scope of companies that are subject to this self-certification requirement would depend on the implementation strategy adopted.[24] Second, any business that self-certifies as a consumer-centric business would be required to appoint a consumer representative (or an equivalent) to serve on its governing body.[25] This consumer representative would be accountable to consumers, meaning that they would represent consumers' interests and owe fiduciary duties to them.[26] Third, the consumer primacy model would require consumer-centric businesses to routinely report on their consumer-welfare metrics, as determined by the consumer representative in consultation with the governing body.[27]

Steps Toward Building an Equitable Data Economy, BERGGRUEN INST. 5–6, 21 (2021), https://www.berggruen.org/ideas/articles/a-data-dividend-that-works-steps-toward-building-an-equitable-data-economy/ [https://perma.cc/RL64-TXCK] (outlining an immediately implementable data dividends plan); Gavin Newsom, Governor of California, State of the State 2019 Address (Feb. 12, 2019), https://www.capradio.org/articles/2019/02/12/text-and-analysis-state-of-the-state-2019/ [https://perma.cc/6XJP-XGY8] ("California's consumers should also be able to share in the wealth that is created from their data."). The data dividend proposals' focus on providing consumers with financial rights is complementary to this Article's focus on providing consumers with governance rights.

[21] *See, e.g.*, Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 382 (2016) (describing the risks in under-regulation as well as overregulation by comparing data protection legislation between the U.S. and E.U.).

[22] *See* Donald R. Lehmann, *Metrics for Making Marketing Matter*, 68 J. MKTG. 73, 74 (2004) (highlighting the importance of attempting to understand the relationship between customer satisfaction and firm value despite the difficulty of measuring and developing such a value chain).

[23] *See infra* Section IV.A.1.

[24] *S*ee *infra* Section IV.B.

[25] *See infra* Section IV.A.2.

[26] *See infra* Section IV.A.3.

[27] *See infra* Section IV.A.4.

To demonstrate how the proposal would work in practice, we return to the example of Boeing. If Boeing were to certify as a consumer-centric business,[28] Boeing would then be required to appoint a consumer representative to its board. One of the primary responsibilities of this consumer representative would have been to consider the consumer-welfare effects of the company's business decisions, and their presence likely would have served to counterbalance the profit-above-safety attitude that was later revealed to have permeated the organization.[29] Furthermore, consumers would have been able to bring breach of fiduciary duty claims against the consumer representative for the injuries they suffered as a result of the company's disregard for its passengers' safety and lives.

The consumer primacy model for consumer-centric businesses is expected to create a more efficient and just society. The proposed model is more efficient because it transfers some of the ownership and control of the consumer-centric business to the parties whose interests are most aligned with long-term corporate and societal interests—the consumers. The model is also more just because it adheres to the basic principle of mutuality: that businesses should acknowledge and serve the stakeholders who contribute the most to, and suffer the most from, their activities.[30]

The consumer primacy model recognizes the evolution of the consumer from a passive to an active participant in our contemporary society.[31] It seeks to shift businesses' perceptions of the consumer toward viewing the consumer as a source from whom to *invite* input, insight, and guidance, rather than as one from which to *extract* value. The consumer primacy model also recognizes that consumers' own perceptions of their role within business and society, too, must change.[32] By naming and treating consumers as primary stakeholders, the law can be used to instill a greater sense of social responsibility in consumers and, accordingly, in the businesses with which they engage.

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[28] Notably, Boeing's corporate value statement opens with: "At Boeing, we are honored to serve all the people who rely on our products and services every day," suggesting a consumer orientation. *Our Values*, BOEING, http://www.boeing.com/principles/values.page [https://perma.cc/7SJG-XJJL] (last visited May 14, 2021).

[29] *See generally* Press Release, Dep't Just., *supra* note 11.

[30] For a discussion of the theory and practice of mutuality in business, see PUTTING PURPOSE INTO PRACTICE, THE ECONOMICS OF MUTUALITY (Colin Mayer & Bruno Roche eds., 2021).

[31] Minna Lammi & Mika Pantzar, *The Data Economy: How Technological Change Has Altered the Role of the Citizen-Consumer*, 59 TECH. SOCIETY 1, 4–5 (2019) (emphasizing the consumer's new role in modern, digitalized society).

[32] *See, e.g.*, David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 283–85 (2009) (explaining how corporate law fails to provide consumers a mechanism to overcome collective action problems inhibiting socially responsible consumption); Richard Wilkinson & Kate Pickett, *The World We Need*, *in* CO-OPERATIVES IN A POST-GROWTH ERA: CREATING CO-OPERATIVE ECONOMICS 61, 71 (Sonja Novkovic & Tom Webb eds., 2014) ("Consumerism is almost certainly the greatest obstacle to any attempt to make major reductions in carbon emissions.").

The shareholder primacy model that has permeated contemporary corporate law has thus far relied on consumers to operate on a borrow-more-to-buy-more model, which leads to increased shareholder wealth, but at the cost of greater consumer debt and societal waste.[33] While it might have been useful to rely on this growth-focused model in the early stages of industrial society, there is growing evidence to suggest that seeking the illusory "more" is becoming less sustainable.[34] As an alternative, the consumer primacy model offers a sustainable approach to corporate governance by introducing the cooperative values to the existing corporate law framework.[35]

The rest of the Article proceeds as follows. In Part II, I discuss the shareholder primacy model and how it became cemented as the norm in corporate law. I explain why and how treating shareholders as primary stakeholders, and giving them special privileges associated with this primacy status, was an important foundation for our industrial society. I extract from this discussion the primary stakeholder characteristics—i.e., the characteristics of shareholders that entitled them to primacy status in the eyes of corporate law. In Part III, I describe the ways in which consumers increasingly (and shareholders decreasingly) embody the primary stakeholder characteristics in contemporary firms, and I label such firms as consumer-centric businesses. In Part IV, I outline the consumer primacy model for consumer-centric businesses. I describe how a shift to consumer primacy can be achieved and why it is socially desirable, and I address counterarguments. I conclude in Part V by recognizing that adoption of the consumer primacy model for consumer-centric businesses would pave the way for a more dynamic corporate law framework that allocates rights and protections according to the substance, rather than the form, of stakeholders' relationships to one another, the enterprise, and society.

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[33] VICKI ROBIN & JOE DOMINGUEZ, YOUR MONEY OR YOUR LIFE 18 (2018) (referring to consumerism as "a twentieth-century invention of our industrial society, created at a time when encouraging people to buy more goods was seen as necessary for continued economic growth").

[34] *See* JOHN R. EHRENFELD, SUSTAINABILITY BY DESIGN: A SUBVERSIVE STRATEGY FOR TRANSFORMING OUR CONSUMER CULTURE (2009). *See also* KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST CENTURY ECONOMIST 9 (2017) (explaining that one powerful depiction of this "tipping point" takes the form of a doughnut). According to Raworth's model, the inner ring of the doughnut is a social foundation of well-being that no one should fall below, and the outer ring is an ecological ceiling of planetary pressure that we should not go beyond. Beyond the two rings' boundaries lies a "safe and just space for humanity." *Id.*

[35] *See* COOPERATIVES IN A POST-GROWTH ERA: CREATING CO-OPERATIVE ECONOMICS (Sonja Novkovic & Tom Webb eds., 2014) (discussing cooperatives as a feasible alternative to driving a more environmentally sustainable and equitable economic system to the current private interest-focused model).

II. SHAREHOLDER PRIMACY AND OTHER MODELS OF THE FIRM

The doctrine of shareholder value provides that public corporations are owned by shareholders and that the corporation's purpose is to maximize shareholder wealth.[36] The doctrine of shareholder value has evolved into a norm—referred to as the *shareholder primacy norm* in corporate law—which shapes how we think about corporate purpose and corporate governance.[37] This Part begins with an outline of the origins and development of the shareholder primacy norm. It then points to the signs of the norm's erosion and examines the currently available alternatives to the shareholder primacy norm.

A. Shareholder Primacy and Shareholder-Owned Enterprise

1. Shareholder Stakes

In the industrial era of the United States, when investment capital was scarce, the ability to raise capital from numerous and dispersed investors was essential to our nation's survival and growth. As John Coffee explains: "As a debtor nation facing the need to develop highly capital-intensive industries . . . the United States was more dependent upon foreign capital, and it had to strive harder to convince remote foreign investors of the adequacy of the safeguards taken to protect their investments."[38]

Many of the primary safeguards stemmed from the legal system. In fact, the influential work of Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny (which spawned the expansive "law and finance" literature) views legal protections of minority shareholders as a precondition to dispersed ownership of public corporations.[39] Another shareholder-value-enhancing mechanism, incentivized by favorable tax treatment,[40] is performance-based compensation, which has been used to align managerial and shareholder interests. This shareholder-oriented legal framework came to be known as the *shareholder primacy norm* in corporate law.[41]

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[36] LYNN STOUT, THE SHAREHOLDER VALUE MYTH 2 (2012) ("According to the doctrine of shareholder value, public corporations 'belong' to their shareholders, and they exist for one purpose only, to maximize shareholders' wealth.").

[37] *See supra* note 5 and accompanying text.

[38] John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 8 (2001).

[39] *See* La Porta, Lopez-de-Silanes & Shleifer, *supra* note 4 and accompanying text.

[40] *See* Brian J. Hall & Jeffrey B. Liebman, *The Taxation of Executive Compensation*, TAX POL'Y & ECONOMY 1, 11 (2000).

[41] *See supra* note 5 and accompanying text.

One judicially recognized exception to shareholder primacy arises in the case of insolvent firms.[42] When a firm is insolvent (or near insolvent), it is the creditors who are most eager to see that the firm survives so that their outstanding obligations will be, even if only partially, repaid. Therefore, when a firm approaches the "zone of insolvency," its creditors step into the shoes of its shareholders under Delaware law.[43] In these exceptional cases, creditors are seen as enjoying primacy status.

The general rule and its exception both aim to attribute principal status to the party whose interest is best aligned with the interests of the entire entity. It is because shareholders (and in limited cases, creditors) are presumed to have the greatest stake in the corporation's fate that they are given primacy status under corporate law.[44] As such, in cases where a non-shareholder stakeholder has the greatest stake in the corporation, primary status should be transferred from the shareholders to that stakeholder.

2. Shareholder Vulnerabilities

Shareholder primacy rests not only upon efficiency-based arguments but also upon notions of fairness. Some consider shareholders to be the most susceptible to mistreatment and oppression by the managers to whom they cede control, arguing that this susceptibility gives rise to a moral obligation to protect the shareholder.[45] We use the term "equity" to refer to the value of shares issued by an enterprise, as was articulated in an early 1824 case, *Wood v. Dummer.*[46]

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[42] *See, e.g.*, Frederick Tung, *Gap Filling in the Zone of Insolvency*, 1 J. BUS. & TECH. L. 607, 610, 612–13 (2007) (noting that creditors become the primary residual risk bearers in insolvent firms and should be the primary beneficiaries of directors' fiduciary duties in such circumstances).

[43] Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613, at *34 n.55 (Del. Ch. Dec. 30, 1991). Chancellor Allen's famous footnote 55 in the *Credit Lyonnais* case (and concretized in the *Product Resources* decision) first introduced this concept of creditors as residual claimants, which had the legal significance of fiduciary duties being owed to creditors of insolvent companies. *Id.*; *see* Prod. Res. Group, L.L.C. v. NCT Group, Inc., 863 A.2d 772, 790–91 (Del. Ch. 2004) ("When a firm has reached the point of insolvency, it is settled that under Delaware law, the firm's directors are said to owe fiduciary duties to the company's creditors.").

[44] Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 175 ("[S]hareholders retain plenary authority to guide the fate of a corporate enterprise because . . . they have the greatest stake in the outcome of corporate decision-making.").

[45] *See, e.g.*, Jonathan R. Macey, *Corporate Social Responsibility: A Law & Economics Perspective*, 17 CHAP. L. REV. 331, 334 (2014) ("[F]iduciary duties are owed solely to residual claimants because they are the group that faces the most severe set of contracting problems with respect to defining the nature and extent of the obligations owed to them by officers and directors.").

[46] Wood v. Dummer, 30 F. Cas. 435, 439–40 (D. Me. 1824) (No. 17,944) ("The stockholders have no right to any thing but the residuum of the capital stock, after payment

Among shareholders, the minority shareholder is seen as the party that is most deserving of corporate law protections because it relies upon trust rather than explicit contractual protections when dealing with the enterprise.[47] In the event this trust is breached, courts have stepped in to fill any gaps left unaddressed by the contracts by making inferences about the reasonable expectations of minority shareholders.[48] Minority-oppression rules (such as heightened fiduciary duty and statutory provisions for minority squeeze-outs) recognize that minority shareholders, particularly in privately held corporations, deserve special protections due to the ease with which the majority can oppress the minority.[49] In this way, the level of protection offered has been tied to the level of a beneficiary's vulnerability. Thus, as the party most vulnerable to oppression changes from the shareholder to the consumer, it is arguable that the consumer should become the beneficiary of the special protections that had previously attached to vulnerable shareholders.

3. Shareholder Value Metrics

The shareholder primacy norm has also been favored for its ease and utility as a measurement and accountability mechanism. Shareholder value can be reduced to a single number (i.e., stock price),[50] which can be compared across firms and time periods, and thus reliably be used as a metric to measure managers' performance.[51] The market value criterion has been praised for obviating the difficulties of considering individual and heterogeneous stockholder utility functions, while leading to the result that each stockholder would have wanted.[52]

A related justification is that shareholders' interests, unlike other stakeholders' interests, are comparatively homogeneous and are thus easier to synthesize. Even acknowledging that not all shareholders are alike, some scholars have argued that they are more alike than any other stakeholder group, as all presumably want the

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of all the debts of the bank. The funds in their hands, therefore, have an equity attached to them, in favour of the creditors, which it is against conscience to resist.").

[47] Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 912 (2005) ("Because close corporation owners are frequently linked by family or other personal relationships, there is often an initial atmosphere of mutual trust that diminishes the sense that contractual protection is needed.").

[48] *See, e.g.*, Meiselman v. Meiselman, 307 S.E.2d 551, 564 (N.C. 1983); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663–64 (Mass. 1976); Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505 (Mass. 1975).

[49] *See* Robert B. Thompson, *Allocating the Roles for Contracts and Judges in the Closely Held Firm*, 33 W. NEW ENG. L. REV. 369, 377–78, 389, 398 (2011).

[50] *See* Alexander, *supra* note 8 at 307 (noting that directors are beholden to shareholders, and in current markets, "the strongest indicator of [share]holder return remains the current stock price," whether that value is created in the short- or long-term).

[51] ROBERT C. CLARK, CORPORATE LAW 20 (1986) ("[A] single objective goal like profit maximization is more easily monitored than a multiple, vaguely defined goal like the fair and reasonable accommodation of all affected interests . . . .").

[52] EUGENE F. FAMA & MERTON H. MILLER, THEORY OF FINANCE 69 (1972).

highest possible return on their investment.[53] Indeed, the main criticism lodged against alternatives to shareholder primacy, such as the stakeholder model that will be later discussed, has been that requiring directors to pander to a variety of interests will lead to a diffusion of their focus.[54] As consumer satisfaction metrics become a more reliable measure of corporate value and, more importantly, societal value, we need to look to these metrics as potential measures of corporate value.

4. Summary

To summarize, shareholders have enjoyed primacy status within the corporate law framework for a number of reasons. First, shareholders provided the input (investment capital) that was most valued by industrial enterprise, and treating shareholders as primary stakeholders encouraged them to provide these valuable investments. Shareholder interests were also seen as being most aligned with those of the enterprise. Second, shareholders were regarded as the most appropriate beneficiaries of corporate law protections because they were seen as not having the benefit of contractual and external protections that other stakeholders were presumed to have, and thus required the protection of corporate law. Third, shareholder value (measured by stock price) was seen as a readily available, accurate, and easily comparable measure of firm value that could be used to hold managers accountable.

These three characteristics are referred to here as the *primary stakeholder characteristics*. While each has been used to defend shareholders' status as primary stakeholders, none of them is wed to any particular stakeholder being the primary stakeholder and could easily lend itself to a more dynamic view of corporate governance, as further discussed in Part V.

The Three Primary Stakeholder Characteristics	
Stakes	Primary stakeholders provide the input that is most valued by the firm, and primary stakeholders' interests are aligned with those of the firm
Vulnerability	Primary stakeholders are the most susceptible to mistreatment and oppression
Measurability	Primary stakeholders' interests are easily measurable

[53] *See, e.g.*, Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 1007 (2013) ("Shareholders in business corporations around the world today are generally investors whose primary, and typically only, interest in the firm is to obtain a financial return.").

[54] *See, e.g.*, Hansmann & Kraakman, *supra* note 6, at 445 ("The growing view today is that meaningful direct worker voting participation in corporate affairs tends to produce inefficient decisions, paralysis, or weak boards.").

Having established the three primary stakeholder characteristics, this Article next identifies the subset of firms in which consumers, more so than any other stakeholder, satisfy the primary stakeholder characteristics and charts out a path toward consumer primacy for these firms.

B. Shifting Grounds of Shareholder Primacy

The shareholder primacy norm is based on the understanding that maximizing shareholder wealth maximizes the corporation's total value and, ultimately, societal value.[55] However, this conventional wisdom that shareholder interest is aligned with collective interest has recently come under fire.[56]

To begin with, there are concerns about shareholders' increasingly passive role in corporate governance.[57] While those concerns have been countered with accounts of increasing shareholder activism, especially on the part of institutional investors,[58] there have been growing concerns that these institutional investors are exercising their power in ways that value short-term, private benefits over long-term, collective gains.[59] Adding to this concern of short-termism is the proliferation of high-frequency trading, under which the duration of share ownership is reduced to mere milliseconds.[60] As shareholders become more passive, more focused on the short term, and more transient, it can no longer be assumed that maximizing shareholder wealth reliably maximizes the corporation's total value, especially when taking a view toward sustainable corporate value.

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[55] *See* Friedman, *supra* note 7.

[56] *See supra* note 8.

[57] *See, e.g.*, Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 521–22 (1990) ("The managers — the current officers and directors — pick the directors, and the shareholders rubberstamp the managers' choices . . . . Collective actions problems, which arise because each shareholder owns a small fraction of a company's stock, explain why shareholders can't be expected to care."); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1034 (2013) ("[C]orporations have grown in scale and complexity and shareholders have been transformed into passive investors relying on professional managers . . . .").

[58] *See, e.g.*, Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1042 (2007) (discussing the activism of public pension funds, mutual funds, and hedge funds).

[59] STOUT, *supra* note 36, at 94 (describing how activist hedge funds' strategies are designed to raise short-term share prices without creating long-term wealth); *see also* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 711–715 (2010). For an account of activist shareholders, see Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1290–92 (2008).

[60] *See, e.g.*, Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV. (July–Aug. 2012), https://hbr.org/2012/07/what-good-are-shareholders [https://perma.cc/XE2S-M4BT] ("In a more recent development, high-frequency traders whose holding periods can sometimes be measured in milliseconds now account for as much as 70% of daily volume on the NYSE.").

There have also been concerns that shareholders' common ownership (referred to as horizontal shareholding), resulting from institutional investors' significant investment stakes, could have anticompetitive effects.[61] Also relevant to this discussion are the accounts of empty voting, where shareholders holding short positions in a firm may exercise their vote in self-interested ways that are adverse to the overall interests of the firm.[62] Indeed, some shareholders benefit outright when the corporation suffers a loss. For example, financial fraud benefits those investors who buy and hold shares until the fraud is discovered, but has an overall detrimental effect on the corporation and society.[63]

One response to these concerns is that there are sufficient pro-social shareholders to outweigh those with antisocial tendencies. Here, the pro-social group usually refers to long-term value investors. However, the presumed pro-social tendencies of long-term shareholders have also come into question. In "The Uneasy Case for Favoring Long-Term Shareholders," Jesse Fried challenges the presumption that serving long-term shareholders will generate more value over time than serving short-term shareholders.[64] Fried explains that long-term shareholders do not represent the interests of all of the firm's shareholders when the volume of repurchases and equity issuances is high, when managers' ability to exploit information asymmetries is substantial, and when the difficulty of engaging in costly

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[61] *See generally* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership* 73 J. FIN. 1513, 1558 (2018) (concluding that there are "anticompetitive incentives due to common ownership links at the market level"). *See also* José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition*, FIN. MGMT., 2021, at 1, 8 (discussing anticompetitive effects in the context of common ownership); Einer Elhauge, *The Greatest Anticompetitive Threat of Our Time: Fixing the Horizontal Shareholding Problem*, PROMARKET (Jan. 7, 2019), https://promarket.org/2019/01/07/greatest-anticompetitive-threat-horizontal-shareholding/ [https://perma.cc/9H8L-BBQJ] ("The big three index fund families (Black Rock, Vanguard, and State Street) alone own 18 percent of shares and cast an estimated 24 percent of votes in publicly-traded firms, and own 20 percent of shares and cast an estimated 26 percent of votes at S&P 500 firms."). *But see generally* Edward B. Rock & Daniel L. Rubinfeld, *Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance* 1–37 (N.Y.U. Sch. L. & Econ. Rsch. Paper Series, Working Paper No. 17-05, 2017) (critiquing the arguments put forth by Azar and other authors, especially in the airline industry).

[62] *See* Henry T.C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. LAW. 1011, 1015–21 (2006) (discussing the pros, cons, and prevalence of empty voting); Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1253 (2008) ("The most troubling pathology of complexity is the system's inability to provide vote verification and an end-to-end audit trail."); Roberta S. Karmel, *Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the Decoupling of Economic and Voting Rights?*, 55 VILL. L. REV. 93, 98 (2010) (discussing the abuse of the "one share one vote" rule through empty voting).

[63] STOUT, *supra* note 36, at 68.

[64] Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554 (2015) (arguing that long-term shareholders can destroy value equivalent to short-term shareholders).

price manipulation is great.[65] Fried concludes: "Neither short-term nor long-term shareholder interests can be counted on to align with the interests of non-shareholder parties."[66]

Of greater concern is the evidence that even well-intended shareholders often cannot be counted on to realize their good intentions. In *Sacrificing Corporate Profits in the Public Interest*, Einer Elhauge argues that even shareholders who have pro-social tendencies act against their own pro-social inclinations when they lack sufficient information.[67] Lynn Stout, in *Cultivating Conscience: How Good Laws Make Good People*, introduces findings from experimental research that shows that people will act pro-socially only when they are told others will behave pro-socially, when pro-social decisions provide greater benefits, and when they are asked to behave pro-socially.[68] As Stout shows, the opposite holds true in capital markets—shareholder primacy ideology teaches shareholders that investors (and managers, on shareholders' behalf) should maximize share price at whatever cost, that others will behave selfishly, and that selfish investing creates social value.[69]

These recent findings suggest that we have been clinging to a norm based on an increasingly unsupported equivalence between shareholder and societal value. Shareholders continue to be treated as primary stakeholders because of their presumed pro-social tendencies even when their true nature may be inconsistent with these presumptions. This has led to a growing misalignment between corporate purpose and social purpose. It has also widened the inequalities in our society by privileging investor-provided capital input over other types of input.[70] As one data point, the largest shareholders of Amazon and Walmart grew $116 billion richer during the COVID-19 pandemic, even as many consumers were left unemployed and with diminished spending power.[71] These shifts suggest that we must consider alternative views, which are surveyed in the next subpart.

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[65] *Id.* at 1615–20.

[66] *Id.* at 1621; *see also id.* at 1564 ("The fundamental problem with focusing on either short-term or long-term shareholder interests is that neither type of shareholder interest reflects the value flowing to both the firm's current and future shareholders.").

[67] Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 796–802 (2005).

[68] LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 59–68 (2010).

[69] *Id. See also* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

[70] *See* Clarke, *supra* note 8.

[71] *See* Molly Kinder & Laura Stateler, *Amazon and Walmart Have Raked in Billions in Additional Profits During the Pandemic, and Shared Almost None of It with Their Workers*, AVENUE BLOG (Dec. 22, 2020), https://www.brookings.edu/blog/the-avenue/2020/12/22/amazon-and-walmart-have-raked-in-billions-in-additional-profits-during-the-pandemic-and-shared-almost-none-of-it-with-their-workers/ [https://perma.cc/PHA3-7BC4].

C. Alternatives to Shareholder Primacy

The shareholder primacy norm served us remarkably well during most of the twentieth century, as established above in Section II.A. However, there is growing evidence of inefficiencies in the shareholder-owned enterprise and its harmful effects on our society, as discussed above in Section II.B. Notwithstanding these shortcomings, the shareholder primacy norm has endured, and some scholars view its continued dominance as attributable to the absence of any superior alternatives.[72] Here, I discuss the currently available alternatives before turning to the proposed consumer primacy alternative in Parts III and IV.

1. Employee Primacy

Among non-shareholder stakeholders, employees have received significant attention as possible contenders to shareholders for primacy status.[73] Margaret Blair and Mark Roe emphasize the importance of the employee role in corporate governance by finding that (1) human capital is as important as physical capital in creating value; (2) the relationship between employees and companies functions under different rules and norms; and (3) boardroom decisions affect the daily lives and financial security of employees.[74] A similar view was expressed by Clyde Summers in a manuscript contemplating codetermination—a system of corporate governance under which employees, along with shareholders, can vote for representatives on a corporation's board of directors—in the United States.[75] More recently, Matthew Bodie and Grant Hayden have argued for a model allowing shared governance between shareholders and employees,[76] and George Georgiev has

[72] Hansmann & Kraakman, *supra* note 6, at 439 (defending the shareholder-oriented view of corporate governance through the failure of alternatives).

[73] *See generally* Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008) (defending employee primacy in corporate governance through law and economics arguments as well as civic republicanism); Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1751 (1990) ("Employee ownership of enterprise has become a prominent focus of public policy and private action both in the United States and abroad.").

[74] MARGARET M. BLAIR & MARK J. ROE, EMPLOYEES AND CORPORATE GOVERNANCE 1–2 (1999).

[75] Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155, 170 (1982) ("[T]he employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders.").

[76] Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2453–62 (2020).

identified human capital management (HCM)[77] as an anchor concept that could be used by corporations to incorporate more worker considerations into U.S. corporate governance.[78] Using the primary stakeholder characteristics developed in this Article, it can be said that these theories of employee primacy highlight the cases where employees embody two of the three primary stakeholder characteristics—stakes and vulnerabilities.

2. Director Primacy

Stephen Bainbridge argues that director primacy is a more accurate view of corporate governance.[79] Indeed, the General Corporation Law of Delaware, which is widely accepted as the preeminent jurisdiction for business formation within the United States, declares that the business and affairs of every corporation shall be managed by, or under the direction of, the board.[80] Others have suggested that the group actually in power is not the directors but the chief executives.[81]

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[77] Economist and Nobel laureate Gary Becker popularized the term *human capital management* (HCM), which refers to a set of practices that views workers as productive assets that are key to delivering long-term firm value. George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 644–45 (2021).

[78] *Id.* at 639–40.

[79] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 547–50 (2002).

[80] DEL. CODE ANN. tit. 8, § 141 (2021).

[81] *See, e.g.*, Alfred F. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM. 117, 117 (1988) ("Capitalism, in most large public corporations, has been subtly transformed from a system of dominance by the suppliers of capital to a system of dominance by the managers, dubbed 'managerialism.'"); Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345, 353–54 (2007) (documenting the movement of corporate governance towards a CEO primacy model); George W. Dent, Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 HOUS. L. REV. 1213, 1215 (2008) (arguing that the status quo is "CEO primacy—governance by managers largely for their own benefit"); Usha Rodrigues, *A Conflict Primacy Model of the Public Board*, 2013 U. ILL. L. REV. 1051, 1051 (2013) ("CEOs and other executives [rather than boards] came to dominate the real-world control of the corporation."). *But see* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1039–42 (2010) (describing the declining powers of CEOs); William W. Bratton, Jr., *The New Economy Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989) (noting that the managerialist theory of corporate law, which "put corporate management groups at the large corporation's strategic center," recently disappeared).

3. Shared Primacy and Stakeholder Models

Robert Thompson points to the multiplicity of primacy theories as evidence of the limits of the explanatory power of any one primacy theory.[82] Instead, he develops an alternative theory based on shared power among shareholders, directors, and officers.[83]

In a similar spirit, Margaret Blair and Lynn Stout's team production theory draws from the insight that financial capital is just one of many essential contributions that firms accept from stakeholders.[84] Under the team production theory, the directors of a corporation's board are the "mediating hierarchs" who balance the ex-post demands of all the stakeholders who have made essential contributions to the firm.[85] According to Blair and Stout, measures such as eliminating staggered boards and weakening anti-takeover measures make it difficult for the board to serve this role and thus deter non-shareholder stakeholders from making firm-specific contributions.[86]

Blair and Stout's team protection theory can be seen as one strain of the stakeholder model, which regards all stakeholders—not only shareholders but also directors, employees, consumers, suppliers, the state, community members, and future generations—as beneficiaries of the corporation.[87] Constituency statutes, which require directors to serve the interests of multiple stakeholders, are one legislative expression of the stakeholder model,[88] and benefit corporation legislation is another.[89]

According to Edward Freeman, the term *stakeholder* first appeared in an internal memo at the Stanford Research Institute, now SRI International, Inc. (SRI), in 1963 and was intended to generalize the notion that the stockholder was not the only group to whom management need be responsive.[90] Freeman defines the stakeholder very broadly as "any group or individual who can affect, or is affected by, the achievement of a corporation's purpose."[91] Under this definition,

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[82] Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 383 (2016).

[83] *Id.*

[84] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 (1999).

[85] *Id.*

[86] *Id.* at 250, 253.

[87] *See* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 52 (1984) ("[I]f business organizations are to be successful in the current and future environment then executives must take multiple stakeholder groups into account.").

[88] *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16 (1992).

[89] *See* Tiffany M. Burba, *To "B" or Not to "B": Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 VAND. L. REV. EN BANC 147, 158–159 (2017) (comparing benefit corporation legislation to other constituency statutes).

[90] FREEMAN, *supra* note 87, at 31. Relying on the theory, SRI developed systems to measure the satisfaction of these key groups as input into the corporate planning process. *Id.*

[91] *Id.* at vi.

stakeholders include employees, customers, suppliers, stockholders, banks, environmentalists, government, and any other group that can not only help or hurt the corporation but also be helped or be hurt by the corporation.[92]

Such a broad definition of stakeholders, however, has contributed to a deepening divide between shareholders and other stakeholders in the allocation of decision-making power within the firm. Under a broad definition of stakeholder like Freeman's, even adversaries (such as competitors or criminals who commit fraud against the firm) would be considered stakeholders.[93] And while stakeholder models have been more widely embraced in recent years by business and legal communities,[94] including through the growing calls for mandatory adoption of the public benefit corporation form,[95] stakeholder models have also been criticized for lacking empirical support and for attendant difficulties of measurement and implementation.[96]

4. The Absent Consumer

The aforementioned alternatives to shareholder primacy have largely ignored an important corporate constituent: the consumer. One exception is David Yosifon's

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[92] *Id.*

[93] *Id.* at 53 ("As unsavory as it is to admit that such 'illegitimate' groups [such as terrorists] have a stake in our business, from the standpoint of strategic management, it must be done. Strategies must be put in place to deal with terrorists if they can substantially affect the operations of the business.").

[94] *See, e.g.*, Larry Fink, *Annual Letter to CEOs: A Sense of Purpose* BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/M648-CGJV] ("To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."); Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1158 (1993) (evaluating the importance of the stakeholder model); James E. Post, Lee E. Preston & Sybille Sachs, *Managing the Extended Enterprise: The New Stakeholder View*, 45 CAL. MGMT. REV. 6, 6 (2002) (developing "a new 'Stakeholder View' of the firm that stresses the role of stakeholder relationships in the creation of organizational wealth").

[95] *See, e.g.*, Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism 5* (Roosevelt Inst., Working Paper No. 202008, 2020), https://ssrn.com/abstract=3461924 ("To begin changing corporate governance to require respect of all stakeholders, large companies (whether publicly listed, or owned by a private equity firm or a rich family) receiving federal bailout money should be required to become a benefit corporation under state law.").

[96] *See generally* SAMUEL F. MANSELL, CAPITALISM, CORPORATIONS AND THE SOCIAL CONTRACT: A CRITIQUE OF STAKEHOLDER THEORY (2013) (critiquing stakeholder theory's normative foundations as being incompatible with the purpose of business in a market economy); Yves Fassin, *Imperfections and Shortcomings of the Stakeholder Model's Graphical Representation*, 80 J. BUS. ETHICS 879, 879 (2008) (confronting the stakeholder theory's shortcomings with a graphical scheme); Susan Key, *Toward a New Theory of the Firm: A Critique of the Stakeholder "Theory,"* 37 MGMT. DECISION 317, 326 (1999) (criticizing the stakeholder theory for lacking sufficient theoretical content).

work, which examines the consumer interest in corporate law.[97] Yosifon uses insights from law and behavioralism to examine the limits of the shareholder primacy norm.[98] More recently, Ramsi Woodcock brought antitrust principles, which require firms to maximize consumer welfare, to bear on corporate governance.[99] This Article shares the consumer orientation of these prior works but offers a new perspective in that it relies on the rationales that have been used to support shareholder primacy to justify the shift to consumer primacy for consumer-centric businesses.

III. CONSUMERS' RELATIONSHIP TO SHAREHOLDER PRIMACY

Part III first examines the conventional view of the consumer in corporate law discourse and the ways in which these views have kept consumers at the periphery of corporate governance. I then examine how the confluence of technological and cultural shifts has prompted a migration of consumers from the periphery to the core of corporations and society. Last, I show how this shift has created a subset of firms, referred to herein as "consumer-centric businesses," in which consumers are the primary stakeholders, drawing from the primary stakeholder characteristics identified in Part II.

A. Traditional Consumers at the Periphery of the Shareholder Primacy Model

Under the traditional paradigm of shareholder primacy, consumers are seen as one of the inputs to be managed in the managers' pursuit of maximizing shareholder value.[100] This means that business decisions that reduce consumer welfare could be seen as consistent with upholding corporate managerial duties, so long as there is a net benefit to shareholders.

This treatment of consumers is consistent with stereotypes surrounding the consumer, who is often seen as too multitudinous, myopic, uninformed, selfish, and fickle to be given a seat at the corporate governance table.[101] Consumers, as

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[97] Yosifon, *supra* note 32.

[98] *Id.* at 255–56.

[99] Ramsi A. Woodcock, *The Antitrust Case for Consumer Primacy in Corporate Governance*, 10 U.C. IRVINE L. REV. 1395 (2020).

[100] *See, e.g.*, Diane Denis, *Corporate Governance and the Goal of the Firm: In Defense of Shareholder Wealth Maximization,* 51 FIN. REV. 467, 471–72 (2016) (noting that firms compete in markets for customers to find the set of factors of production most advantageous to maximize shareholder wealth).

[101] *See* LIZABETH COHEN, CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 9–11 (1st ed. 2003) (summarizing critiques of mass consumption and consumerism); *see also* DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 220–51 (1976) (depicting consumerism as favoring personal gratification over public household needs); Mark Bevir & Frank Trentmann, *Introduction: Consumption and Citizenship in the New Governance*, *in* GOVERNANCE, CONSUMERS AND CITIZENS 14–

suggested by the dictionary definition of the word *consume* (which includes the meanings "to use up," "spend wastefully," and "burn away"),[102] are generally understood as representing only their private material interests, and are thus seen as unsuitable representatives of the collective interest.[103] Indeed, John Kenneth Galbraith, in his book *The Affluent Society*, points to American private consumption as the main culprit for the neglect of society's needs.[104]

Another common perception of consumers is that they do not need any additional corporate law protections as they can rely on external regulations (e.g., consumer protection and antitrust law), contracts, or the power of their purse (e.g., boycotts) to address any grievances that they may have suffered in their dealings with a business.[105]

As Don Slater has observed, consumers are often depicted in terms of one of two extremes.[106] At one end of the spectrum, they are presented as "cultural dupe[s] or dope[s]" susceptible to fraudulent promises and extraneous pressures.[107] At the other end, they are lauded as "hero[es] of modernity" encompassing the virtues of rationality, robust autonomy, self-definition, and self-assertion.[108] Acknowledging the diversity of consumers' capacities, it is in the cases where consumers fall on the more enlightened side of Slater's spectrum (accompanied by the recognition that a growing number of consumers are moving in that direction)[109] that they will likely play a greater role in corporate governance.

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16 (Mark Bevir & Frank Trentmann eds., 2007) ("Unfortunately a restricted concept of the consumer has become ever more prominent since the late nineteenth century. The consumer appears as an atomistic individual engaged in market exchanges so as to maximize the satisfaction of his or her preferences.").

[102] *Consume*, MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/ consume [https://perma.cc/NZN8-GCH7] (last visited Aug. 26, 2021).

[103] *See supra* note 101 and accompanying text.

[104] JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 257 (1958) ("[I]n an atmosphere of private opulence and public squalor, the private goods have full sway.").

[105] Vikas Mehrotra & Randall Morck, *Governance and Stakeholders*, *in* THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 641 (Benjamin Hermalin & Michael Weisbach eds., 1st ed. 2017) (referring to the ultimate consensus that non-shareholder corporate constituencies, including customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance).

[106] DON SLATER, CONSUMER CULTURE AND MODERNITY 33 (Polity Press ed. 1997).

[107] *Id.*

[108] *Id.*; THE CONSUMPTION READER 7 (David B. Clarke, Marcus A. Doel & Kate M.L. Housiax eds., 1st ed. 2003) (noting that the model of the consumer as "gullible dupe" is just as unrealistic as the neoclassical view of the consumer as "rational utility maximizer").

[109] *See* Lammi & Pantzar, *supra* note 31.

B. Consumers as Primary Stakeholders of Contemporary Firms

In this subpart, I explain how many of the stereotypes and presumptions about the consumer surveyed in subpart A do not comport with reality. A confluence of technological and cultural developments has created a consumer that is more visible, conscious, and proactive.[110] There are a growing number of cases where consumers' interests are in fact well aligned with the best interests of the firm. Some examples include firms in the sharing economy, such as the ridesharing app Uber or the home-sharing app Airbnb. In these businesses, individual consumers' input regarding their experiences is critical to building, establishing, and developing the market.[111] Uber drivers who treat their passengers well and Airbnb hosts who create a pleasant environment for their guests are rewarded with more passengers and guests.[112] This reward cuts both ways, with conscientious riders and guests also being rewarded with credit and priority status.[113] In each of these cases, the consumers' experiences and contributions are measured and tracked in real-time and used as currency on the

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[110] *See, e.g.*, Faisal Khoja, *Adoption of Internet of Things (IoT): A Way of Increasing Consumer Bargaining Power*, 7 INT'L J. SCI. & ENG. RSCH. 790, 790 (2016) ("[I]nstant access to information [through new technology] has allowed customers and consumers [to] have a collectively rich bargaining power."); Nicholas D. Evans, *How Digital Business Disrupts the Five Forces of Industry Competition*, CIO (Aug. 26, 2015, 3:03 PM), https://www.cio.com/article/2976572/digital-disruption-from-the-perspective-of-porters-five-forces-framework.html [https://perma.cc/K4P2-KA6R] ("Customers and consumers have amassed far more bargaining power today due to instant access to information, insights from social media including access to reviews and feedback, low switching costs via digital channels, price sensitivity, access to substitute products and services with greater ease of use and convenience, as well as increased industry competitiveness as a result of the other forces."); Mark Fenwick, Joseph A. McCahery & Erik P.M. Vermeulen, *The End of 'Corporate' Governance: Hello 'Platform' Governance*, 20 (Eur. Corp. Governance Inst., Working Paper No. 430, 2018) (recognizing that new digital technologies offer modern consumers platform operation, solutions to data problems, access and the ability to create new information); Deirdre Shaw, Terry Newholm & Roger Dickinson, *Consumption as Voting: An Exploration of Consumer Empowerment*, 40 EUR. J. MKTG. 1049, 1050 (2006) ("[C]onsumers are often regarded as co-creators of the value that they derive from a product or service.").

[111] Michelle de Haaff, *What We Can All Learn from Uber's Customer Experience*, MEDALLIA BLOG (Apr. 7, 2014) (using Uber as an example of innovation in consumer experience).

[112] *How the Uber Rating System Works*, UBER (Nov. 22, 2018), https://www.uber.com/en-EG/blog/how-the-uber-rating-system-works/ [https://perma.cc/NAC7-SM6W] ("[R]ating a driver or rider does not affect your account, but having a high rating means you are more likely to be prioritized by drivers if you are a rider, and more likely to appeal to riders if you are a driver."); *Why Reviews Matter*, AIRBNB RESOURCE CENTER, (May 13, 2021), https://www.airbnb.com/resources/hosting-homes/a/why-reviews-matter-41 [https://perma.cc/ZPX5-9WK7] (explaining that although a host's rating of a guest does not necessarily impact the guest's use of or experience with the Airbnb platform itself, it helps to inform potential hosts as to whether they want to host the guest or not).

[113] *See supra* note 112 and accompanying text.

platforms.[114] Accordingly, the algorithms behind these apps are designed to privilege the consumer experience above all other factors, even price.[115] Uber's algorithm, for example, punishes drivers that previous passengers have had negative experiences with by ensuring that such drivers do not show up in future searches.[116]

Additionally, there is a growing body of empirical studies suggesting that consumer interest is well aligned with the long-term value of the firm.[117] Indeed, as support for this view, a work by Xiaotao Liu and coauthors demonstrates that customer-oriented firms tend not to take shortcuts to boost stock prices in the immediate term because of the potential negative long-term repercussions.[118] Rosabeth Moss Kanter's 2011 *Harvard Business Review* article, *How Great Companies Think Differently*, finds that companies that prioritize goals other than maximizing shareholder value are the ones that are most successful at maximizing shareholder value over time.[119] Kanter points to the unique contributions that customers and other stakeholders can make, due to their long-term commitments to the enterprise.[120]

Taking the alignment proposition a step further, there may be some cases where consumers' interests are aligned with the best interests of not just one particular firm but the best interest of society overall. Compared to shareholder culture, which represents one in two Americans in the United States (with reports that this

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[114] *Reviews for Stays*, AIRBNB, https://www.airbnb.com/help/article/13/reviews-for-stays [https://perma.cc/7FU5-NX6A] (last visited Aug. 17, 2021) (requiring reviews of hosts and guests to be submitted within 14 days of checking out); Bekah Wheeler, *How Long Do You Have to Rate Your Uber Driver?*, RIDE GURU (Jan. 16, 2020), https://ride.guru/content/newsroom/how-long-do-you-have-to-rate-your-uber-driver [https://perma.cc/WL9L-MWT2] (explaining that drivers must submit their reviews of passengers immediately or be locked out of the app, while passengers must submit reviews of drivers within 24 hours).

[115] *See generally* Jing Li, Simon Hudson & Kevin Kam Fung So, *Exploring the Customer Experience with Airbnb*, 13 INT'L J. CULTURE, TOURISM & HOSP. RSCH. 410, 411, 420–23 (2019); Kevin Kam Fung So, Haemoon Oh & Somang Min, *Motivations and Constraints of Airbnb Consumers: Findings from a Mixed-Methods Approach*, 67 TOURISM MGMT. 224, 225–28 (2018) (noting that only customer enjoyment and experience was significant in influencing consumers' future behavioral intentions).

[116] *How Does Uber Match Drivers with Riders?*, UBER, https://www.uber.com/us/en/marketplace/matching/ [https://perma.cc/873K-X4WQ] (last visited Aug. 13, 2021) ("Uber may also modify pairings of drivers and riders in certain instances to help maintain a safe platform; for example, we prevent matches if one has given the other a one-star rating in the past.").

[117] For the argument that the stock market prices, on the other hand, are not accurate measures of long-term value, see Bratton & Wachter, *supra* note 59, at 661, 700.

[118] Xiaotao Liu, Xiaoxia Liu & Colin D. Reid, *Stakeholder Orientations and Cost Management*, 36 CONTEMP. ACCT. RSCH. 486, 488–489 (2019).

[119] Rosabeth Moss Kanter, *How Great Companies Think Differently*, HARV. BUS. REV. MAG. (Nov. 2011), https://hbr.org/2011/11/how-great-companies-think-differently [https://perma.cc/NFA7-XH78].

[120] *Id.*

percentage of shareholders is declining),[121] consumption is a near-universal experience. The consumer is a critical and growing stakeholder within firms, with consumer spending in the United States reaching an all-time high of $13 trillion in the fourth quarter of 2020.[122] Zygmunt Bauman describes consumption as "a permanent and irremovable condition and aspect of life, bound by neither time nor history; one of the inseparable elements of biological survival which we, humans, share with all other living organisms."[123]

Furthermore, in addition to their tremendous purchasing power, consumers possess certain superior and distinct capacities. David Bowen and Gareth Jones have argued that consumer participation is necessary to improve system efficiency within the service industry.[124] In particular, Bowen and Jones discuss how the diversity and unpredictability of consumer demands are major sources of uncertainty.[125] They argue that inviting consumer knowledge and labor during the production process is an effective way to manage this uncertainty.[126]

There are a number of important examples of how the underrepresented segments of our society have historically used their status as consumers as a source of empowerment when other means of expression were unavailable. Lizabeth Cohen describes how women and African Americans who were denied access to traditional avenues of power after World War II seized upon the consumer role as a way for them to uphold the public interest.[127] Monroe Friedman, an expert on consumer boycotts, writes: "Since the Revolutionary War it can be argued that the boycott has been used more than any other organizational technique to promote and protect the rights of the powerless and disenfranchised segments of society."[128]

Last but not least, as counterevidence to the "ultimate consensus" that consumers are protected by contractual means,[129] it has been reported that consumers often trade off contractual rights for more immediate perks.[130] And while

[121] Jeffrey M. Jones, *U.S. Stock Ownership Down Among All but Older, Higher-Income*, GALLUP (May 24, 2017), https://news.gallup.com/poll/211052/stock-ownership-down-among-older-higher-income.aspx [https://perma.cc/Y8QF-4A6U] (finding that from 2001–2008, an average of 62% of Americans owned stock, whereas from 2009–2017 an average of 54% of Americans owned stock).

[122] *United States Consumer Spending*, TRADING ECON., https://tradingeconomics.com/united-states/consumer-spending [https://perma.cc/P48L-SS7D] (last visited Aug. 31, 2021) (using data from the U.S. Bureau of Economics to analyze consumer spending trends).

[123] ZYGMUNT BAUMAN, CONSUMING LIFE 25 (2007).

[124] David E. Bowen & Gareth R. Jones, *Transaction Cost Analysis of Service Organization-Customer Exchange*, 11 ACAD. MGMT. REV. 428, 429 (1986).

[125] *Id.* at 428.

[126] *Id.* at 438–39.

[127] COHEN, *supra* note 101, at 31–44 (discussing women as citizen consumers and the black power of the purse).

[128] MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 3 (1999).

[129] Mehrotra & Morck, *supra* note 105.

[130] *See* Oren Bar-Gill & Omri Ben-Shahar, *Exit from Contract*, 6 J. LEGAL ANALYSIS 151, 151 (2014).

it is true that there is a separate consumer protection regime, as Monroe Friedman notes: "Since 1980 there has been a dramatic drop in government support for consumer protection programs, and, in light of existing political and economic realities, it seems unlikely that government support will increase markedly in the near future."[131] Indeed, a March 2019 report of the Consumer Federation of America documents a decline in enforcement activity at the Consumer Financial Protection Bureau, which was created to ensure that financial companies treat customers fairly.[132]

The impact that businesses have on consumers is also growing. As noted by Andrew Crane and coauthors, corporations predetermine to a considerable degree the extent of consumers' citizenship,[133] social rights,[134] and civil rights.[135] The mutual reliance between firms and their consumers may be more prevalent in contemporary society, but it is not new. Henry Hansmann and Mariana Pargendler point to the separation between consumption and control in early nineteenth-century business corporations as a fundamental feature of that era's business corporations.[136] In particular, they argue that the various corporate governance mechanisms observed in firms with a high degree of separation of ownership and consumption were developed primarily to protect consumers (who were also shareholders) from monopolistic misconduct.[137]

As the mutual impact of corporations and consumers upon each other grows in significance, the treatment of consumers as primary stakeholders of firms becomes an important prerequisite to encouraging productive interactions between consumers and businesses. The accounts of consumers as holders of superior or exclusive information and ability—coupled with accounts of shareholder passivity, transience,

[131] *See* FRIEDMAN, *supra* note 128, at 2.

[132] CHRISTOPHER L. PETERSON, CONSUMER FED'N OF AM., DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE (Mar. 12, 2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf [https://perma.cc/TTM7-KWQ3].

[133] Andrew Crane, Dirk Matten & Jeremy Moon, *Stakeholders as Citizens? Rethinking Rights, Participation, and Democracy*, 53 J. BUS. ETHICS 107, 113 (2004). ("Corporations predetermine a considerable scope for the exercise of consumers' citizenship rights, such as by denying them access to certain products, or enabling freedom of expression.").

[134] *Id.* ("In the area of social rights, corporations provide an increasing amount of services, which in developed countries have long been linked to the welfare state.").

[135] *Id.* at 113–14 ("Corporations administer civil rights as they shape the freedom to engage in markets by shaping the offer of goods and services as well as influencing consumer preferences through advertising.").

[136] Hansmann & Pargendler, *supra* note 53, at 951 (referring to "the lack of separation between ownership and consumption" as "a critical but underappreciated feature of corporate enterprise in the early Republic").

[137] *Id.* ("The peculiar features of early corporate law and practice were frequently designed to minimize the abuse of that market power. They did not seek to protect the corporation's shareholders as investors, as is conventionally assumed today, but rather to protect them as *consumers*.").

impatience, and disinterest[138]—suggest that we need a new model of the firm in cases where shareholder primacy no longer truly serves societal interests. In Section III.C, I identify the characteristics of firms for which a consumer orientation, rather than shareholder orientation, is more aligned with serving society's interests.

C. Defining Consumer-Centric Business

The migration of consumers from the periphery to the core of contemporary businesses has created a subset of firms in which consumers are primary stakeholders. In these firms, consumers embody the primary stakeholder characteristics identified in Part II which are also recounted below. This Article refers to such firms as *consumer-centric businesses*.

1. Consumer Stakes

The first primary stakeholder characteristic is related to stakes: Which group of stakeholders provides the most critical inputs to the corporation? As discussed in Section II.A.1, the indispensable nature of the shareholders' input in capital-intensive enterprises is often cited as the reason shareholders, over all other stakeholders, receive special legal rights and protections.[139] In a consumer-centric business, however, consumers provide critical financial and nonfinancial inputs.

Take the example of crowdfunded firms. While the purchasers (or backers) of a crowdfunded firm usually do not take equity, they provide critical inputs at the early stages of the product's development and recover their initial investment only in the event of successful delivery.[140] This trend is expected to grow with new crowdfunding limits that have raised the ceiling of consumer financial contributions to $5 million per crowdfunded business.[141] A well-known example of a crowdfunded project is Oculus, a virtual reality headset developer that received much attention for its impressive ability to draw from the crowd.[142] Oculus suffered major setbacks, however, when it failed to tend to its backers following its acquisition by

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[138] *See supra* notes 57 and 59–63 and accompanying text.

[139] *See* Jensen, *supra* note 1, at 44.

[140] Tim Smith, *Crowdfunding*, INVESTOPEDIA (May 15, 2021), https://www.investopedia.com/terms/c/crowdfunding.asp [https://perma.cc/EP3V-28A6] (explaining that crowdfunding allows large groups to finance a new business venture through small individual amounts of capital, but such investors face a high risk of losing their capital because so many new businesses fail).

[141] 17 C.F.R. § 227.100 (2020).

[142] Michael A. Stanko & David H. Henard, *How Crowdfunding Influences Innovation*, 57 MIT SLOAN MGMT. REV. 14, 15 (2016) ("[T]he Oculus Rift, a virtual-reality gaming headset[,] . . . raised $2.4 million via crowdfunding.").

Facebook.[143] This example demonstrates the significance of consumer inputs and stakes as they relate to the ultimate success of the consumer-centric business.

2. Consumers' Vulnerabilities

The second primary stakeholder characteristic is related to vulnerabilities: Which group of stakeholders suffers the greatest risk of otherwise unmitigated harm? The difficulty of protecting shareholder vulnerabilities by contract is one of the central explanations for why shareholders, over all other stakeholders, receive special legal rights and protections.[144] In a consumer-centric business, however, the consumer bears the risk, as was the case in the Boeing and Purdue Pharma examples highlighted at the opening of this Article.

David Yosifon identifies three industries—tobacco, food, and dietary supplements—in which consumers are the most vulnerable stakeholders.[145] Yosifon argues that these industries have adverse environmental, safety, and health impacts that are borne disproportionately by the consumer, which requires prioritizing the vindication of the consumer interest above all other interests.[146]

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[143] *Id.* ("Oculus VR was later acquired by Facebook Inc. for $2 billion."); Laura Entis, *Game Over? Oculus Fans Outraged by Facebook Purchase*, NBC NEWS (Mar. 26, 2014, 2:45 PM), https://www.nbcnews.com/business/business-news/game-over-oculus-fans-outraged-facebook-purchase-wbna54786612 [https://perma.cc/UNW8-H5P8]. Oculus faced "instant and intense backlash from the gaming community, particularly from those who had backed Oculus's Kickstarter project," upon Facebook's acquisition of the company, with many commentators claiming that Facebook's intentions did not align with the perceived intentions of Oculus as "the very antithesis of a tech behemoth like Facebook." *Id. See also* Luke Smith, *The Oculus Rift Buyout Outrage: What Are the Rights of Kickstarter Backers?*, N.Y.U. J. INTELL. PROP. & ENT. L. BLOG (Apr. 4, 2014), https://blog.jipel.law.nyu.edu/2014/04/the-oculus-rift-buyout-outrage-what-are-the-rights-of-kickstarter-backers/ [https://perma.cc/6HVQ-9NFF] (explaining that in response to Facebook's announcement of its acquisition of Oculus, "[m]any who had originally 'invested' in Oculus, some with money, others with their vocal support, felt betrayed . . . [and] felt that they had rights when it came to how the company operated, as they helped *fund* the launch of the project" (emphasis added)).

[144] *See generally* Hansmann & Kraakman, *supra* note 6, at 440–41 (referring to the shared consensus that "ultimate control over the corporation should rest with the shareholder class . . . [while] other corporate constituencies . . . should have their interests protected by contractual and regulatory means rather than through participation in corporate governance . . . and the market value of the publicly traded corporation's shares is the principal measure of the shareholders' interests"); Macey & Miller, *supra* note 2, at 401 (explaining that corporate fiduciary duties are exclusively held by shareholders because they become less valuable as they become more diffuse).

[145] Yosifon, *supra* note 32, at 255.

[146] *Id.* at 271–81.

Continuing the example of crowdfunding from above, in these cases, money is often collected upfront from consumers, with no guarantee of successful delivery.[147] As another example, initial coin offerings (ICOs) have drawn significant investments from consumers, notwithstanding the documented gap between promises made in white papers versus promises delivered in the underlying smart contracts (which are self-enforcing contracts embedded in computer code).[148]

Assuming no foul play, such as fraud, duress, or misrepresentation, why would consumers be willing to part with their money without demanding additional protections in these situations? One reason is that trust or affinity (i.e., an emotional, rather than economic, factor) is driving their contribution.

These consumer tendencies fit nicely within the rationales used by courts to provide minority shareholders special protections under corporate law. Minority shareholders are often seen as motivated by personal relationships and trust, which prevents them from aggressively advocating for protections, thus creating a gap for the law to fill.[149] By the same token, consumers who rely on personal affinity for the product, founder, or cause to determine whether to invest time, money, or ideas may deserve similar treatment. Furthermore, in the case of crowdfunding, the fact that monetary amounts tend to be small engenders collective-action problems, which create an even greater gap for the law to fill.

3. *Consumer Metrics*

The third primary stakeholder characteristic is related to metrics: Which group of stakeholders' interests can be measured by a metric that can be readily determined and uniformly compared? The ease and reliability of share price as a metric of corporate value is one reason that shareholders, over all other stakeholders, receive special privileges in corporate law.[150] In a consumer-centric business, however, consumer satisfaction provides a reliable and accurate measure of a firm's output, and consumers' interests are connected to the long-term value of the firm.

While consumer satisfaction may seem to be a subjective and psychological concept that evades measurement, fortunately, some useful metrics of customer satisfaction have been developed and used by researchers in exploring the relationship between consumers and corporate governance.

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[147] Ethan Mollick, *The Dynamics of Crowdfunding: An Exploratory Study*, 29 J. BUS. VENTURING 1, 11 (2014) ("[T]he money is raised up front, and, in the case of reward-based crowdfunding, without any clear legal obligation from the project initiator to deliver their promised rewards. For the dishonest, this creates an opportunity for fraud.").

[148] *See* Shaanan Cohney, David Hoffman, Jeremy Sklaroff & David Wishnick, *Coin-Operated Capitalism*, 119 COLUM. L. REV. 591, 643–44 (2019).

[149] *See supra* Section II.A.2; *see also* Martin Edwards, *The Big Crowd and the Small Enterprise: Intracorporate Disputes in the Close-But-Crowdfunded Firm*, 122 PENN ST. L. REV. 411, 425 (2018).

[150] Hansmann & Kraakman, *supra* note 6, at 440–41 (referring to the shared consensus that "the market value of the publicly traded corporation's shares is the principal measure of the shareholders' interests").

The American Consumer Satisfaction Index (ACSI) is one such measure.[151] An individual firm's ACSI score represents its consumers' overall evaluation of their total purchase and consumption experience.[152] The ASCI has three strengths: first, it measures consumer satisfaction as experienced by consumers rather than by expert ratings or managers' perceptions; second, it provides a comprehensive picture of consumer satisfaction for the major economic sectors; and third, it provides a uniform set of comparable consumer-based firm performance measures.[153]

A number of empirical studies have used the ACSI to find a positive correlation between customer satisfaction and a firm's value.[154] Recent work by Nick Bontis and coauthors found that customer satisfaction is intertwined with organizational reputation, particularly in the banking industry.[155] Eugene Anderson and coauthors have developed a theoretical framework that shows how customer satisfaction

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[151] AM. CUSTOMER SATISFACTION INDEX, *About ACSI: Unique Benchmarking Capability*, https://www.theacsi.org/about-acsi/unique-customer-satisfaction-benchmarking-capability [https://perma.cc/GHL5-9ZU7] (last visited Sept. 2, 2021) ("For over two decades, the ACSI has used its science-based, proprietary methodology to analyze customer satisfaction for 10 economic sectors and 47 key industries that together represent a broad swath of the national economy."); James Chen, *American Customer Satisfaction Index (ACSI)*, INVESTOPEDIA (Apr. 10, 2021), https://www.investopedia.com/terms/a/american-customer-satisfaction-index.asp [https://perma.cc/BD9A-YQLE] ("The American Customer Satisfaction Index (ACSI) is an economic indicator of U.S. consumer sentiment that is based on a nationwide survey in which U.S. consumers are asked to rate the products and services that they use.").

[152] *See generally* Eugene W. Anderson, Claes Fornell & Sanal K. Mazvancheryl, *Consumer Satisfaction and Shareholder Value*, 68 J. MKTG. 172, 174 (2004) (providing more information about the ACSI).

[153] *Id.*

[154] *See* Rajdeep Grewal, Murali Chandrashekaran & Alka V. Citrin, *Customer Satisfaction Heterogeneity and Shareholder Value*, 47 J. MKTG. RSCH. 612, 617–18 (2010) (using ACSI reports to measure customer satisfaction in relation to service quality and advertising, suggesting impacts of customer satisfaction heterogeneity on shareholder value); Don O'Sullivan & John McCallig, *Does Customer Satisfaction Influence the Relationship Between Earnings and Firm Value?*, 20 MKTG. LETTERS 337, 337 (2009) ("Utilizing an earning-based valuation model and data from the American Customer Satisfaction Index (ACSI) and COMPUSTAT, the study shows that both satisfaction and the interaction between earnings and satisfaction have a significant influence on firm value."); Kapil R. Tuli & Sundar G. Bharadwaj, *Customer Satisfaction and Stock Returns Risk*, 73 J. MKTG. 184, 194 (2009) (using the ACSI database to measure customer satisfaction scores and finding that "customer satisfaction contributes to the creation of shareholder wealth by lowering the overall and downside market and idiosyncratic risk"); *see* Xueming Luo, Jan Wieseke & Christian Homburg, *Incentivizing CEOs to Build Customer- and Employee-Firm Relations for Higher Customer Satisfaction and Firm Value*, 40 J. ACAD. MKTG. SCI. 745, 750–52 (2012) (using ACSI to measure customer satisfaction in relation to CEO compensation).

[155] Nick Bontis, Lorne D. Booker & Alexander Serenko, *The Mediating Effect of Organizational Reputation on Customer Loyalty and Service Recommendation in the Banking Industry*, 45 MGMT. DECISION 1426, 1426–28, 1440 (2007).

affects future customer behavior and, in turn, future cash flows.[156] Their paper also provides a comprehensive survey of the growing body of research linking customer satisfaction to measures of financial performance.[157]

The empirical literature establishing a correlation between consumer satisfaction and a firm's value suggests that a model that looks to consumer satisfaction as a measure of firm value is worthy of serious consideration as an alternative for consumer-centric businesses.

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In summary, consumers of consumer-centric businesses embody the characteristics that have traditionally been used to justify the law's treatment of shareholders as primary stakeholders. Consumers of consumer-centric businesses increasingly (as shareholders decreasingly) provide critical inputs and are the victims of market failures for which corporate law provides the most effective shield. Furthermore, consumer satisfaction is a useful measure of overall corporate value for consumer-centric businesses. The thesis of the Article is that social welfare is most efficiently served if corporate law serves the interests of the *consumers*, rather than shareholders or other stakeholders, in these consumer-centric businesses.

IV. CONSUMER PRIMACY FOR CONSUMER-CENTRIC BUSINESSES

Part III identified how consumers of a growing number of contemporary firms increasingly embody the characteristics associated with primary stakeholder status, and labeled these firms as consumer-centric businesses. As established in Part I, the failure to tend to consumer interests in consumer-centric businesses has led to some of the most serious corporate disasters and scandals of recent years. Synthesizing Parts II and III, this Part IV argues that corporate law should strive to serve the consumer interest in consumer-centric businesses. This shift is expected to better serve the interests of the collective enterprise and of society. Such a shift is achieved by inviting consumers to participate in key corporate governance mechanisms by giving them the right to representation, the protection of fiduciary duties, and the right to receive tailored disclosures. This reorientation of corporate law and governance mechanisms toward the consumer is referred to here as the *consumer primacy model* of the firm.

I first describe the primary components of the consumer primacy model and outline the options for implementation. I then discuss the expected benefits and address potential objections and counterarguments.

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[156] Anderson et al., *supra* note 152, at 178 (demonstrating a positive association between customer satisfaction and long-term financial performance).

[157] *Id.*

A. Consumer Primacy for Consumer-Centric Businesses

1. Certification as Consumer-Centric Business

The first step of the consumer primacy model is self-certification. Each company that is subject to consumer primacy certification (the scope of subject firms will be addressed at the end of this subsection) will be required to self-certify, annually, as to whether it is a consumer-centric business.

Self-certification has been used in a number of other corporate contexts. Recently, as businesses reopen in the wake of the COVID-19 pandemic, regulators are encouraging businesses to self-certify as to their compliance with best and safe operating practices.[158] Benefit corporations that seek B Corp certification must first complete an impact assessment, which is then reviewed by B Lab, a nonprofit that administers the B Corp certification process.[159]

Self-certification reduces the likelihood of error, lowers transaction costs, and gives companies control of their own governance, which will likely lead to more buy-in and less resistance to compliance with subsequent steps.[160] Businesses have the best information about themselves, including where core inputs come from, where the pain points are, and how they define and measure their successes and failures. Another benefit of self-certification is that the process educates companies about best practices and sensitizes them to issues that they are certifying on.[161]

While there may be some concerns that self-certification may lead to lower compliance, these concerns can be addressed by requiring a responsible corporate director or officer to make the certification and by creating incentives for compliance. These incentives could take the form of financial, legal, or reputational benefits. Self-certification is also a way for businesses to show consumers that they care about the consumer impact of their business decisions. Convincing companies that careful

[158] For example, Illinois announced the launch of "Back to Business," a free, voluntary service connecting small businesses of 250 or fewer employees with health and workplace safety consultants, and offering self-certification to indicate to employees and consumers alike the businesses' practices. *About Back to Business Illinois*, ILLINOIS.GOV, https://www2.illinois.gov/sites/WorkSafe/AboutUs/Pages/About-Back-to-Business.aspx [https://perma.cc/9LFS-7KXK] (last visited Sept. 6, 2021).

[159] *Certification*, BCORPORATION.COM, https://Bcorporation.net/certification [https://perma.cc/444F-QGDC] (last visited Aug. 26, 2021).

[160] Evangelia Fragouli, *The Interaction of Employee Trust & Ethical Decision Making*, 11 BUS. & MGMT. REV. 161, 164 (2020) (explaining that self-certification allows business leaders to build trust with their employees and influences leaders to make more ethical decisions in order to keep their employees' trust, while also improving access to information between leaders and employees).

[161] Dong-Young Kim & Young-Ha Hwang, *Self-Certification Framework for Technological Innovation: A Case Study*, 31 INT'L J. QUALITY & RELIABILITY MGMT. 751, 758–59 (2014) (noting that appropriate control by top management in developing an internal-driven motivation and implementing "a voluntary certification program can provide opportunities for stimulating mutual learning").

consideration of the consumer-centric nature of their business is beneficial in the long term is critical to the success of this proposal.

Another way to reduce error and noncompliance in the certification process is through simplicity and clarity—by not making it too difficult or expensive to certify and comply. And while the certification is done at the individual company level, it would be helpful to provide a common repository of resources and guidance, including, in some cases, an intermediating entity[162] such as the B Lab for benefit corporations, as later discussed. The entity assigned to provide this guidance would depend upon the method of implementation, which is discussed further in Section IV.B.[163]

The certification process envisioned in this Article takes the form of an annual survey, which includes a series of questions about the company's relationship with its consumers in terms of *stakes*, *vulnerabilities*, and *metrics*.

As to consumer stakes, the survey requires companies to ask: How important are consumer inputs in achieving the corporation's objectives? Inputs include both tangible (money, land, material resources) and intangible (data, time, reputation) resources. A company that certifies itself as a consumer-centric business will find consumers to be its most critical input provider. A company that derives a majority of its value from buying, selling, receiving, or sharing consumer information would clearly satisfy this prong of the consumer-centric business definition.

As to consumer vulnerabilities, the survey requires companies to consider: What are the risk factors of consumers, and how serious are they compared to the risk factors impacting other stakeholders? For a company that is a consumer-centric business, the harms suffered by consumers would be the most serious. These risks include not only financial risks but also nonfinancial risks such as safety, privacy, surveillance, and implicit bias.

As to consumer metrics, the survey requires companies to consider: How does the firm track and measure its success? For a company that is a consumer-centric business, the metrics used to evaluate the success of the entire enterprise will be connected to consumers. Since there will likely be multiple metrics, respondents are encouraged to consider scenarios where those metrics come into tension with one another, to determine their relative priorities.

Companies whose consumers occupy the greatest space across all three dimensions will be considered "consumer-centric" for purposes of the consumer primacy proposal. Companies that do not fall under this designation may still wish to adopt some of the suggestions made in this Article. At this first step, the goal is for the most consumer-centric firms (i.e., those that derive the most value from and

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[162] Jonathan M. Barnett, *The Certification Paradox*, *in* CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW, VOL. 2: ADMINISTRATIVE LAW, TRADE, PRIVACY, TORT, COPYRIGHT AND TRADEMARK 252–53 (Jorge L. Contreras, ed. 2019) (explaining that "a repeat-play intermediary supplies its reputational capital and evaluation expertise to sellers who cannot make credible commitments to, or buyers who cannot make independent evaluations of, product quality at a comparable cost").

[163] *See infra* Section IV.B.

inflict the most harm on consumers) to identify as such and implement the suggested changes to improve their consumer orientation.

Two examples that offer guidance for the consumer-centric business certification process are the B Corp Impact Assessment (BIA) and the stakeholder audit. The BIA is powered by the B Lab, a nonprofit organization that sends companies a questionnaire tailored to the company's size, sector, and geography and includes questions about governance, workers, community, and environment.[164] The self-assessment is followed by a review and verification by the B Lab. Approximately one in three of the companies that complete the assessment is ultimately successful in being certified as a "Certified B Corporation."[165] Companies are required to resubmit an assessment every three years, and the certification fees range from $500 to $50,000 per year based on company revenues. While this certification is not required to do business as a benefit corporation, the certification provides companies with access to the reputation and community that attach to the certification.[166] Likewise, self-certification as a consumer-centric business could be an effective signal to both consumers and peers of a company's commitment to its consumers and cooperative principles.

The second example, the stakeholder audit, is an entirely autonomous process and does not involve any third-party review.[167] The audit is voluntarily performed by the company and can be adapted to the needs of the company.[168] The purpose of the stakeholder audit is to construct a social analog for the balance sheet and income statement by requiring companies to explicitly state their corporate mission, identify the stakeholder issues and concerns, assess corporate strategies for stakeholders, and adjust priorities among stakeholder interests.[169] From this analysis, the business can construct a grid that ranks the importance of each class of stakeholder for achieving success in each business target.

What these examples show is that self-assessment and self-certification take many forms, with the common thread being that they require both internal and external motivations. The proposed consumer primacy model can be understood as one type of the stakeholder audit that could be further enhanced by an intermediating entity, looking to the B Lab as a model.

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[164] *About Us*, B IMPACT ASSESSMENT, https://bimpactassessment.net/about-b-impact [https://perma.cc/NPA9-KFE5] (last visited Aug. 15, 2021) (providing further information through clickable links within the source).

[165] *Certification*, *supra* note 159.

[166] For differences, see *Benefit Corporations & Certified B Corps*, BCORPORATION.COM, https://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps [https://perma.cc/KHK7-775Y] (last visited Aug. 26, 2021).

[167] *See* JOHN HARGREAVES & JAN DAUMAN, BUSINESS SURVIVAL AND SOCIAL CHANGE 169–84 (1975).

[168] *Id.*

[169] *Id.*

2. Consumer Representation

Once a business self-certifies as a consumer-centric business, it will be required to appoint at least one consumer representative (or an equivalent) to serve on its governing body. Alternatively, companies could elect to create a responsible board committee or officer that is dedicated to the consumer interest (the relevant director, officer, or committee is referred to here as the "consumer representative"). These consumer representatives would be accountable to the consumers, meaning they would represent the consumers' interests and owe fiduciary duties to the consumers.[170]

In addition, the consumer representative would need to be consulted when the governing body meets to consider decisions and fundamental transactions that might adversely impact consumer interests. While there may be concerns that attaching greater responsibility to the consumer representative could lead to an unwillingness to serve,[171] evidence of the impact of potential liability on board service is inconclusive.[172]

The idea of a consumer interest director should be familiar to readers of Ralph Nader, Mark Green, and Joel Seligman's 1976 book, *Taming the Giant Corporation*.[173] The authors' vision contemplated each individual director having a responsibility for a particular concern, including consumer protection.[174] Robert Dahl is also credited for the idea of "interest group management," which envisages a board of directors that might consist of a mix of employee-elected representatives, consumer-elected representatives, and delegates of federal, state, and local governments.[175] Another variation, with which the proposal advanced here most closely aligns, was proposed by Christopher Stone in 1975 (and reframed by Alfred Conard in 1977), where he suggests that a "special interest" director be added for any area in which the company demonstrates a delinquency.[176]

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[170] *See infra* Section IV.A.3.

[171] *See* Bernard S. Sharfman, *The Enduring Legacy of Smith v. Van Gorkom*, 33 DEL. J. CORP. L. 287, 301–02 (2008) (noting how the fear of potentially being held personally liable for their corporate decision-making led to some directors resigning from their board positions and others not even considering board service).

[172] *See* Charles J. Hartmann & Pamela Gayle Rogers, *The Influence of* Smith v. Van Gorkom *on Director's and Officer's Liability*, 58 J. RISK & INSURANCE 525, 529–31 (1991) (noting that the "most disturbing predicted consequence" of the Van Gorkom decision—that the fear of judicial scrutiny and liability would deter competent individuals from serving on boards—seems to be overstated).

[173] RALPH F. NADER, MARK J. GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 125 (1976).

[174] *Id.*

[175] Robert Dahl, *Power to the Workers?*, N.Y. REV. BOOKS 20 (Nov. 19, 1970), https://www.nybooks.com/articles/1970/11/19/power-to-the-workers/ [https://perma.cc/M4RW-J6UG].

[176] CHRISTOPHER STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 152–83 (1975); Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 941 (1977) (citing Stone).

Successful examples of consumer participation in the formation of company policies offer a helpful guide as to how consumer representation could work in practice. In Europe, when the public had concerns about the safety of genetically modified foods, supermarkets removed the products from their shelves not because of government regulation, but because of their customers' demands.[177] The Cooperative Wholesale Society (CWS), a federation of consumer cooperatives, solicited consumer opinion on the issue, which was then used to inform company policy.[178]

Another example that could serve as a model for consumer primacy is the mutual form of governance. For instance, Northwestern Mutual's centerpiece of governance is its Policyowners' Examining Committee (POEC), which was formed in 1909 with the specific goal of providing customers (policyowners) greater representation and requiring the board to be accountable to these policyowners.[179] Former president and CEO of Northwestern Mutual Edward Zore provides the following account of the POEC's scope of work:

> Each year, the POEC makes an independent and completely unrestricted evaluation of the company's business operations, management, and strategic plans. The process includes a personal review of the findings with the CEO and, in separate meetings, with the board of trustees. Ultimately, the committee's report, in the members' own words, is published in the company's annual report . . . . The POEC examination process involves several rounds. Broadly speaking, members first receive extensive information in advance of visits to the company's Milwaukee headquarters. Candidates make two visits, totaling about five business days. The first visit covers broader topics. In the second visit, the POEC generally selects a few areas to examine more intensively. The POEC is given free rein to examine all company strategies, policies, and relevant documents. The members encourage people to share how their jobs support the company's overall game plan. They confer with as many as 50 different people during the process—policyowners, trustees, headquarters employees, and members of the company's field sales force.[180]

What is impressive about Northwestern Mutual's participatory governance model is its long history, as well as the various improvements that were made in the company structure, operations, and strategy as a direct result of its consumers' inputs.[181] For example, Northwestern Mutual held its first annual planning rally in 1967, which included all top company executives, in response to a 1966 POEC

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[177] Crane et al.,, *supra* note 133, at 114.

[178] *Id.* (citing CWS, RESPONSIBLE RETAILING (1995)).

[179] Edward J. Zore, *A Role for the Customer in Governance*, 27 STAKEHOLDER REPRESENTATION 35–37 (2003).

[180] *Id.*

[181] *Id.* at 36.

request for long-range planning.[182] In addition, the company developed and implemented an institutional "e-vision" to concretize the company's leadership role in technology within its industry in response to a 1999 POEC recommendation.[183]

While these efforts are most commonly observed in cooperatives or mutuals, they are not limited to these business forms. Robert Stringer describes the efforts of the EarthLink board to collect direct and unedited customer comments as to their unmet and unsatisfied needs, as well as similar efforts made by Citigroup and PepsiCo directors to directly engage with their customers.[184]

As more channels for communications with consumers are created and implemented, the scope of consumer participation may also be expanded to include voting on other matters relating to consumer interest. In the same way that even "nonvoting" shares receive some basic voting rights when the matter being voted on relates to their fundamental interests, consumers also have fundamental interests that could be protected via voting rights.

Setting aside for a moment the challenges of implementation, which go beyond the scope of this paper, what might that nonwaivable core of fundamental consumer interests include in the context of consumer-centric businesses? And how can these interests be protected using the mechanisms of corporate law and governance? A good place to begin might be matters related to transparency and control over the gathering and sharing of consumers' personal data. The ownership of and control over users' personal data have become key concerns for consumers, corporations, and regulators alike as the pervasive nature of corporations' data collection and marketing practices raises questions about consumers' privacy and agency.[185] These matters would, under the current corporate law regime, be a matter within the board's business judgment. Legally mandating consumer approvals of matters relating to consumer data may be one pathway, alongside legislation,[186] to ensure that companies abide by fair information-gathering practices.

3. *Fiduciary Duties to Consumers*

Much of corporate law has been focused on the question of how to manage agency costs. In addition to voting, fiduciary duties have been developed as an

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[182] *Id.*

[183] *Id.*

[184] Robert A. Stringer, *Hearing the Voice of the Customer in the Boardroom*, 2006 CORP. BD. 18, 19–20 (2006).

[185] *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (describing the dangers of "surveillance capitalism" and the ways in which it threatens humanity).

[186] Notably, California, Illinois, and a number of other states have implemented legislation relating to the protection of consumer data collected by large corporations. California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.100; Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14 (2008). In the European Union, the General Data Protection Regulation is recognized as a leading piece of regulation in the realm of consumer data protection. Regulation 2016/679, O.J. (L 119) 1.

important agency cost mitigation mechanism. As consumers step into the role of primary stakeholder, what would a corresponding transfer of fiduciary duty protections to consumers look like?

This reorientation of the existing fiduciary duty model toward a new primary stakeholder must begin by revisiting the principal-agent framework on which shareholder primacy rests. To redirect fiduciary duties to consumers under the prevailing framework (notwithstanding its limitations[187]), one would need to establish that the consumer is the principal to whom the consumer representative owes its duties. This would be distinct from the agency relationship that the company directors have with shareholders generally.

For the consumer primacy model to stand on these grounds, it must first be established that consumers have manifested assent for the consumer representative to act on the consumers' behalf and subject to their control, and for the consumer representative to also manifest its assent to so act.[188] Some of these bonds will be formed by contract, including informal and internal arrangements that emerge around those contracts, and others by corporate law and regulations. By design, the consumer representative introduced in the preceding Section IV.A.2. could be seen as being subject to the control of consumers in the sense that they are selected to serve for the benefit of the consumer interest.

It should be noted that this reorientation is consistent with the norms espoused in the marketing field.[189] David Clarke and co-editors view the development of consumer research within the field of marketing as "an attempt to overcome the restrictive assumptions of the neoclassical account of the consumer"[190] and note that the impetus for the research was the call from business itself for a "more pragmatic approach to understanding consumer behavior."[191] In this strain of the literature, the *consumer* is viewed as the principal, with other corporate stakeholders (including shareholders) existing to serve the consumer. Shareholder profits, in turn, are

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[187] It should be acknowledged that there are some problems with shareholder primacy's fit with the principal-agent framework (as highlighted by Lynn Stout in *The Shareholder Value Myth*) which apply to the consumer primacy model as well. STOUT, *supra* note 36, at 93–95.

[188] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

[189] *See* Curt Fowler, *The ROI of Customer Excellence – Part 2*, BLOG POST: VALUES DRIVEN RESULTS, https://valuesdrivenresults.com/roi-customer-excellence-part-2/ [https://perma.cc/MGJ3-N6P3] (last visited Aug. 28, 2021) ("A company's primary responsibility is to serve its customers, to provide the goods or services which the company exists to produce. Profit is not the primary goal but rather an essential condition for the company's continued existence." (quoting Peter Drucker)). For a full review, see Russell W. Belk, *Studies in the New Consumer Behavior, in* ACKNOWLEDGING CONSUMPTION: A REVIEW OF NEW STUDIES (Daniel Miller ed., 1995) (examining consumer behavior research).

[190] THE CONSUMPTION READER, *supra* note 108, at 5.

[191] *Id.* at 8. One notable exception is economist Adam Smith, who understood that: "Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer." ADAM SMITH, INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 625 (Modern Library 1993) (1776).

regarded as a necessary condition for the firm's service of its consumers. Peter Drucker is widely cited as teaching that "the purpose of business is to create a customer."[192] John Mackey, cofounder of Whole Foods Market and the Conscious Capitalism movement, has also embodied consumer primacy thinking in his management philosophy by explaining (in a debate with the noted shareholder primacist Milton Friedman):

> Making high profits is the means to the end of fulfilling Whole Foods' core business mission. We want to improve the health and well-being of everyone on the planet through higher-quality foods and better nutrition, and we can't fulfill this mission unless we are highly profitable.[193]

Also relevant to this reconceptualization is the concept of trust, which is closely aligned with the second prong of vulnerability in the primary stakeholder analysis. The second prong looked at the ways in which consumers are the primary victims of the market failures that corporate law protections have been specifically designed to address. As in a close corporation, where minority shareholders are provided with heightened protections (including heightened fiduciary duties and an appraisal remedy) because of their susceptibility to misconduct by the majority shareholders, the same logic could be used to extend fiduciary duties to consumers of consumer-centric businesses.[194]

Returning to the earlier example of initial coin offerings (ICOs), there is an alarming gap between promises made in the marketing stage and results actually delivered to purchasers.[195] The issuers draw significant investments from nonaccredited investors, they operate within an underregulated area of the market, and the offerings are often built around a cult of personality. Thus, the conditions are ripe for corporate law's protectionist reach to extend to consumers in these cases.

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[192] *Peter Drucker on Marketing*, FORBES (July 3, 2006, 6:00 AM), https://www.forbes.com/2006/06/30/jack-trout-on-marketing-cx_jt_0703drucker.html?sh=77962690555c [https://perma.cc/362M-6NAR]; *see also* Edwards, *supra* note 149 (arguing that corporations should serve the customer).

[193] JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS xii (2013); David Shaywitz, *Five Take-Aways from Whole Foods CEO John Mackey's Surprising New Book*, FORBES (Feb. 16, 2013, 11:30 PM), https://www.forbes.com/sites/davidshaywitz/2013/02/16/five-take-aways-from-whole-foods-ceo-john-mackeys-surprising-new-book/?sh=32a729e6576e [https://perma.cc/EA5E-D4T7].

[194] *See* Donahue v. Rodd Electrotype Co. of New Eng., 328 N.E.2d 595, 599–600 (Mass. 1975) (requiring a heightened fiduciary duty of directors and majority shareholders toward minority shareholders of close corporations).

[195] *See* Cohney et al., *supra* note 148, at 597–613 (finding the mismatch between promises made to investors and the actual corresponding ICO code for the top 50 ICOs of 2017 "troubling," because investors relying on contractual promises, "even if legally binding, might lack an easy and practical form of legal remedy" due to investors' "very uncertain ability to sue and recover founders' assets").

Having established the theoretical bases for imposing fiduciary duties, we now turn to their operation. The recent Cambridge Analytica scandal at Facebook provides a relevant context for an illustrative example. In March 2018, over 50 million Facebook users learned that their personal data had been misused by the analytics firm Cambridge Analytica.[196] It was reported that Cambridge Analytica had taken users' private information to develop political propaganda campaigns.[197] Facebook is currently facing multiple class-action suits, including suits filed by shareholders claiming that the directors and officers of the firm breached their fiduciary duties by failing to disclose the scandal in their previous SEC filings.[198] If Facebook had self-certified as a consumer-centric business, the users (and not only the shareholders) of Facebook would also be able to seek damages and equitable relief for breaches of the fiduciary duties caused by the company's breach of users' trust. In this way, consumer primacy allows those most directly harmed by the corporate activity—the users—to seek to recover damages they suffered as a result of the breach of their trust.

This proposal to shift the benefit of fiduciary protections to consumers is consistent with existing modifications to the scope and beneficiaries of fiduciary duties. Notably, in banking, directors are subject to enhanced duties toward bank depositors (in addition to bank shareholders) on the grounds that banks are charged with serving the public interest.[199]

Furthermore, the idea of broadening the groups to whom managers are held accountable has been embraced by both business and policy leaders.[200] The most recent edition of the Business Roundtable's "Principles of Corporate Governance" invites boards to consider all of the company's constituencies—which include employees, customers, suppliers, and the community in which the company does

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[196] Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/6X3J-A3MS].

[197] *Id.*

[198] *In re* Facebook, Inc. S'holder Derivative Priv. Litig., 367 F. Supp. 3d 1108, 1115–17 (N.D. Cal. 2019).

[199] *See* Briggs. v. Spaulding, 141 U.S. 132, 170 (1891); Litwin v. Allen, 25 N.Y.S.2d 667, 677–78 (N.Y. Spec. Term 1940). The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 introduced a gross negligence standard for directors of federally insured and chartered depositories. *See* 12 U.S.C. § 1821(k) (2013).

[200] *See* Melissa Sawyer & Marc Trevino, *Review and Analysis of 2017 U.S. Shareholder Activism*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Apr. 10, 2018), https://corpgov.law.harvard.edu/2018/04/10/review-and-analysis-of-2017-u-s-shareholder-activism/ [https://perma.cc/7ZBN-P4VD] (discussing corporations' shift toward social responsibility); Geoff Colvin, *Revisiting the Business Roundtable's 'Stakeholder Capitalism,' One Year Later*, FORTUNE (Aug. 19, 2020, 4:00 AM), https://fortune.com/2020/08/19/business-roundtable-statement-principles-stakeholder-capitalism-corporate-governance/ [https://perma.cc/263N-9SS5] (quoting Joe Biden as stating in July 2020 that "it's way past time we put an end to the era of shareholder capitalism").

business—when making decisions.[201] The principles explicitly state that corporations "have obligations to stakeholders other than their shareholders" and that the interests of these stakeholders are to be considered in the context of achieving long-term value.[202] This is noticeably different from the earlier 2012 edition of the same principles, which stated that "obligations [to other constituents] are best viewed as part of the paramount duty to optimize long-term *shareholder* value."[203] Extending corporate fiduciary duties to consumers can be used to operationalize these growing calls for change.

The proposal here is related to, but to be distinguished from, Jack Balkin's information fiduciaries.[204] Information fiduciaries refer to the idea that digital companies should be treated as fiduciaries because people are deeply dependent on and vulnerable to them. Balkin argues that law should impose on these companies special duties of care, confidentiality, and loyalty that run to their end users.[205] Elements of Balkin's proposal are found in a new bill that requires online service providers to act as fiduciaries for their users.[206]

While the consumer primacy proposal and Balkin's proposal both seek to use fiduciary duties to widen the scope of protections to consumers, the latter applies only to data companies and is justified primarily on moral grounds, citing a special relationship of trust and confidence. By contrast, consumer primacy applies to all companies and is supported by agency as well as fiduciary principles. In another respect, Balkin's proposal goes further by considering the entire entity (rather than a dedicated representative, as the consumer primacy proposal does) as owing a fiduciary duty to its users.[207]

In spite of their differences, there are also notable synergies between the two concepts. Consumer primacy provides a way to reconcile the information fiduciary

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[201] BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 4 (2016), https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf [https://perma.cc/78T7-TVMQ]. *But see* Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose,* 46 J. CORP. L. 285, 286 (2021) (explaining that the law of corporate purpose remains oriented toward the maximization of shareholder value); Melissa C. Bender, Isabel K.R. Dische, Keith F. Higgins, Joshua A. Lichtenstein & Michael R. Littenberg, *Business Roundtable Broadens Scope of a Corporation's Purpose to Include Other Stakeholders*, ROPES & GRAY (Aug. 26, 2019) (noting that the Statement did not alter or change a director's fiduciary duties).

[202] BUSINESS ROUNDTABLE, *supra* note 201, at 25.

[203] BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 30 (2012), https://www.businessroundtable.org/archive/resources/business-roundtable-principles-of-corporate-governance-2012 [https://perma.cc/C8UW-99B6] (emphasis added).

[204] JACK M. BALKIN, FIXING SOCIAL MEDIA'S GRAND BARGAIN 11–15 (2018).

[205] *Id.* at 12.

[206] Data Care Act of 2018, S. 3744, 115th Cong. (2018); *see also* Press Release, Office of Senator Brian Schatz, Schatz Leads Group of 15 Senators in Introducing New Bill to Help Protect People's Personal Data Online (Dec. 12, 2018) (on file with author) (describing the proposed legislation, referred to as the "Data Fiduciary Act" by Senator Cory Booker, as "establishing a fiduciary duty for online providers").

[207] BALKIN, *supra* note 204.

concept with corporate law by providing the theoretical and normative bases to loosen the firm grasp that shareholder primacy has on corporate law. Those who have taken a skeptical view of Balkin's information fiduciaries proposal point to the concept's incoherence with corporate law, which makes clear that shareholders come first.[208] Consumer primacy provides a safe harbor for managers to give preference to consumer interests under specified conditions (i.e., the conditions that make a business a "consumer-centric business"). These debates show how any "grand bargain" for regulating digital companies must be coordinated with corporate law and governance.

4. Disclosures

The consumer primacy model requires consumer-centric businesses to report their performance on consumer metrics. This suggested intervention is related to the third prong of the consumer-centric business definition. It stems from the recognition that consumer metrics may be just as reliable and accurate, if not more so, than the traditional measure of firm value, a firm's share price.[209]

For many firms, the previously discussed American Consumer Satisfaction Index (ACSI) could provide a reliable measure of consumer satisfaction.[210] Other industry-specific measures of customer satisfaction, such as measures of patient well-being in the health care industry, could also be considered. The choice and review of metrics and methods of disclosure will fall under the responsibility of the consumer representative. The noncontroversial cases are the ones where consumer interest and shareholder value are aligned. Take, for example, the airline industry. Passenger safety and satisfaction are two of the most important measures of an airline's performance and have been shown to be useful precursory indicators of a firm's market value. A 2007 study found that the number of customer complaints to the Department of Transportation (DOT) had an impact on the stock market performance of that airline.[211] The study estimated that Southwest Airlines could be expected to suffer a loss of $262 million in its market value for each 1% increase in DOT complaints.[212] Assuming Southwest satisfies the two other prongs of the consumer-centric business definition, and self-certifies as a consumer-centric

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[208] Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 504 (2019) ("A fiduciary with sharply opposed loyalties teeters on the edge of contradiction.").

[209] *See supra* Section III.C.3.

[210] The ACSI is a national cross-industry measure of customer satisfaction that measures the satisfaction of U.S. household consumers with the quality of products and services offered by firms with significant share in U.S. markets. *See generally* AMERICAN CONSUMER SATISFACTION INDEX, https://www.theacsi.org/ [https://perma.cc/AP6A-KKV5] (last visited Sept. 3, 2021).

[211] Xueming Luo, *Consumer Negative Voice and Firm-Idiosyncratic Stock Returns*, 71 J. MKTG. 75, 82 (2007) (finding that when dissatisfied customers complain against an airline to Department of Transportation, the stock price of that airline declines dramatically).

[212] *Id.*

business, DOT complaints would be one of the measures that the airline would be expected to disclose to its stakeholders.

The more difficult cases are the ones where consumer and shareholder value are in tension with one another. These are the cases, however, where consumer primacy matters most. These are the contexts where the temptation to prioritize shareholder profits over consumer satisfaction are strongest as we saw from the Boeing and Purdue Pharma examples that opened this Article. In managing these temptations, consumer-centric businesses—through the consumer representative—will be required to consider the trade-offs they have made between consumer and shareholder interest.

B. Implementation

In the United States, internal corporate affairs are governed by state corporate law, contracts, federal securities laws and stock exchange rules. In this subpart of the paper, I discuss the available methods for implementing consumer primacy, describing the strengths and weaknesses of, and the potential synergies and conflicts among, each.

1. Private Ordering

The pathway to consumer primacy that requires the least external intervention would be for companies to adopt it voluntarily.[213] In fact, a number of innovative companies have already done so, such as LunaDNA, a San Diego-based company that collects personal genetic information from users and provides that information to medical researchers.[214] LunaDNA is the first community-owned health and DNA data platform to offer membership shares to members for contributing personal health information.[215] This approach stands in stark contrast to the dominant model in this industry, which takes both money and data from users, usually in exchange for a health report or other diagnostic.[216]

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[213] Steven L. Schwarcz, *Private Ordering*, 97 NW. U.L. REV. 319, 321 (2002) (private ordering delegates regulatory authority to private actors, in the commercial context, to reduce the cost of regulation).

[214] LUNA PBC, https://www.lunadna.com/lunapbc/ [https://perma.cc/GGC5-GA5R] (last visited Sept. 3, 2021).

[215] *LunaDNA Is Approved by the SEC to Offer Ownership Shares to Individuals for Sharing Data*, LUNADNA (APR. 19, 2019), https://www.lunadna.com/ownership-shares-for-sharing-data-2/ [https://perma.cc/9333-JZY9].

[216] For example, 23andMe and AncestryDNA are two companies that require users to submit a payment in addition to their genetic information in exchange for an analysis of their genetic input. *How It Works*, 23ANDME, https://www.23andme.com/howitworks/?gnav=gv1 [https://perma.cc/J9NE-LC2J] (last visited Sept. 3, 2021); *How Does AncestryDNA Work?*, ANCESTRY, https://www.ancestry.com/dna/lp/how-does-ancestrydna-work [https://perma.cc/T5PV-PNT3] (last visited Sept. 3, 2021).

One complication of private ordering is the obvious conflict with shareholder primacy. Pursuing consumer interests at the expense of shareholder value was considered to be a breach of fiduciary duties in a notable Delaware case, *eBay Domestic Holdings, Inc. v. Newmark*.[217] In that case, Craigslist's majority shareholders were found to be in breach of their fiduciary duty when they executed plans to cut ties with eBay (Craigslist's then minority shareholder) so that they could continue their user-friendly business model without pressure from eBay to aggressively pursue monetization.[218] The Delaware Court of Chancery held: "Directors of a for-profit Delaware corporation cannot deploy a [policy] to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law."[219]

Clear judicial or legislative guidance that a consumer primacy approach is legally permissible (even for an investor-owned enterprise) if the business meets the definition of consumer-centric business, will thus be an important prerequisite to the successful implementation of the consumer primacy proposal.

Just as important as these external permissions, if not more, are internal motivations. In order for the consumer primacy model to succeed, consumer-centric businesses and their directors and executives must be dedicated to prioritizing consumer interests above all other interests, including profit maximization in the short term. One force that might help to propel institutions toward consumer primacy is the global consensus building around more sustainable and accountable corporate governance structures.[220] The United Nations' Sustainable Development Goals (SDGs) have been a beacon guiding this movement.[221] Among the seventeen goals, goal twelve focuses on strategies to ensure sustainable consumption and production patterns.[222] The goal states: "Sustainable consumption and production is about doing more and better with less."[223] As noted in this Article's Introduction and throughout, consumer primacy is not about just more consumption, but more sustainable consumption that is aligned with the long-term interests of the business and society.

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[217] 16 A.3d 1, 48 (Del. Ch. 2010).

[218] *Id.* at 8–9.

[219] *Id.* at 35.

[220] Jacob D. Rendtorff, *Sustainable Development Goals and Progressive Business Models for Economic Transformation*, 34 LOC. ECON. 510, 521 (2019).

[221] *See United Nations Sustainable Development Programme*, SUSTAINABLE DEV. GOALS (last visited Apr. 23, 2021), https://www.undp.org/content/undp/en/home/sustainable-development-goals.html#:~:text=The%20Sustainable%20Development%20Goals%20(SDGs,peace%20and%20prosperity%20by%202030 [https://perma.cc/K9DW-NS2H] (outlining 17 distinct goals to strive towards as adopted by U.N. Member States).

[222] *See Goal 12: Ensure Sustainable Consumption and Production Patterns*, U.N. SUSTAINABLE DEV. GOALS, https://www.un.org/sustainabledevelopment/sustainable-consumption-production/ [https://perma.cc/X58U-9GEK] (last visited Aug. 26, 2021).

[223] *Id.*; *see Sustainable Consumption and Production Policies*, U.N. ENV'T PROGRAMME, https://www.unep.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies [https://perma.cc/H6WL-JLW4] (last visited Sept. 10, 2021).

It is aligned with the SDGs, which define sustainable consumption and production (SCP) as:

> [T]he use of services and related products, which respond to basic needs and bring a better quality of life while minimizing the use of natural resources and toxic materials as well as the emissions of waste and pollutants over the life cycle of the service or product so as not to jeopardize the needs of future generations.[224]

One way consumer primacy points toward SCP is by giving consumers a sense of empowerment as well as responsibility for the consequences of their actions.

Other paradigms that are aligned with consumer primacy include the platform cooperativism movement. The platform cooperativism movement, led by Trebor Scholz, suggests the cooperative form as the democratic ideal for the sharing economy.[225] Platform cooperativism rests on three pillars: change of ownership, solidarity, and intertwining of economic and social goals.[226] The movement draws on consumers' willingness to share while addressing the risks of "crowd fleecing" (a term used to describe institutions' financialization of personal assets),[227] which is an important aim of consumer primacy as well.

2. Federal Legislation

Consumer primacy could also be introduced through federal legislation. One model is the Accountable Capitalism Act, a bill introduced by Senator Elizabeth Warren in August 2018, which requires directors of large public companies to have a duty to consider the interests of shareholders, employees, customers, the community, the environment, and the long term.[228]

While the proposed Accountable Capitalism Act is framed as a stakeholder governance model, it is primarily focused on empowering employees. Notably, subsection 6(b)(1) of the proposed act requires that "[n]ot less than 2/5 of the directors of a United States corporation [defined as corporations with over $1 billion in tax receipts[229]] shall be elected by the covered employees . . . ."[230] Furthermore, the proposed act applies only to large corporations (as measured by tax receipts).[231]

Despite some obvious differences in scope, the Accountable Capitalism Act offers a helpful model and potential synergies for the consumer primacy model

[224] U.N. ENV'T PROGRAMME, *supra* note 223.
[225] *See* TREBOR SCHOLZ, PLATFORM COOPERATIVISM: CHALLENGING THE CORPORATE SHARING ECONOMY 14–17 (Stefanie Ehmsen & Albert Scharenberg eds., 2016).
[226] *See id.* at 14.
[227] *Id.* at 3–4.
[228] *See* Accountable Capitalism Act, S. 3348, 115th Cong. (2018) (reintroduced in 2020 as the Accountable Capitalism Act, S. 3215, 116th Cong. (2021) [hereinafter S. 3215]).
[229] S. 3348 115th Cong. § 2(2)(A)(3).
[230] S. 3215 116th Cong. § 6(b).
[231] S. 3348 § 2(2).

proposed here. The Accountable Capitalism Act envisions a dedicated unit (a newly established "Office of the United States Corporations") to monitor compliance and refer violations to the appropriate federal agency for enforcement.[232] The Office of the United States Corporations would also have the ability to rescind and revoke corporate charters if appropriate.[233] This office would also be well suited to the task of monitoring compliance with the proposed consumer primacy reforms.

Elsewhere in the world, former British prime minister Theresa May has proposed mandating employee and customer participation in corporate governance.[234] Germany's codetermination model also offers a guide for non-shareholder stakeholder (in that case, employee) representation on corporate boards.[235]

Federal securities regulation reforms would also be useful in implementing consumer primacy reforms, especially for public corporations. Ann Lipton argues for the disclosure of more information—in a similar vein to the consumer metric disclosures required of consumer-centric business—to protect not only investors but other stakeholders.[236] David Yosifon contemplates the various ways in which federal securities laws could be reformed to tend to consumer interest, including by allowing consumers to vote on shareholder proposals on social issues or by permitting consumers to author proposals and submit them to shareholders or to the entire firm.[237] While these suggestions are beyond the scope of the proposal advanced here, they are very well aligned with the consumer primacy model and its goal of strengthening the consumer's voice in consumer-centric businesses.

The key difficulty of the federal approach lies in the political challenges of implementation. Even with all the praise the Accountable Capitalism Act has

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[232] S. 3215 § 3(a).

[233] *See id.* § 3(c)(4)(B).

[234] *See* Claire Evans, *United Kingdom: Government Launches Consultation on Worker Representatives on Company Boards*, EUROFOUND 1 (2017).

[235] *See* DGB, *German Codetermination ("Mitbestimmung")*, https://en.dgb.de/fields-of-work/german-codetermination [https://perma.cc/5FXV-A2SL] (last visited Aug. 22, 2021); Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law*, 23 COLUM. J. EUR. L. 135, 135–36 (2016).

[236] *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 572 (2020).

[237] Yosifon, *supra* note 32, at 311–12.

received,[238] it has engendered no meaningful progress to date.[239] Federal regulation of corporations has typically been wrested out of large-scale crises. It was only after the Enron Corporation, Tyco International, and WorldCom accounting scandals that Congress passed the Sarbanes-Oxley (SOX) Act of 2002 to protect investors from fraudulent financial reporting by corporations.[240] And it was only after the 2007–2008 global financial crisis that the Dodd-Frank Wall Street Reform and Consumer Protection Act, including consumer protection reforms such as the creation of a new Consumer Financial Protection Bureau, was enacted.[241] Similarly, now may be a ripe moment for reform as the COVID-19 pandemic reveals the inadequacies of the current system.[242] The pandemic magnified the long-standing structural inequalities in our society, yet also highlighted the ingenuity and capabilities of companies to

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[238] *See, e.g.*, Lenore Palladino & Kristina Karlsson, *Towards 'Accountable Capitalism': Remaking Corporate Law Through Stakeholder Governance*, ROOSEVELT INST. 1, 5 (2018) (arguing that stakeholder governance as imagined under the Accountable Capitalism Act would help to solve economic inequality and grant bargaining power to stakeholders over the allocation of corporate profits); *see also* Bill Tomlinson, M. Six Silberman, Andrew W. Torrance, Yaqi Xie, Rebecca W. Black, Kurt Squire, Paramdeep S. Atwal, Ameya N. Mandalik & Sahil Railkar, *Accountability with a Capital "Ism": A Computational Simulation of the Accountable Capitalism Act vs. Delaware Corporate Law*, 17 OHIO ST. TECH. L.J. 75, 120–21 (2021) (finding that the Accountable Capitalism Act would lead to more balanced corporate behavior than current Delaware corporate law).

[239] As of the writing of this Article, the bill had been re-introduced in a previous session of Congress in 2020 but did not receive a vote. Senator Elizabeth Warren has since re-introduced the bill with no additional movement. *S. 3215 (116th): Accountable Capitalism Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/116/s3215 [https://perma.cc/U6H8-YJRR] (last visited Aug. 21, 2021).

[240] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 777 (2002) (implemented by 17 C.F.R. § 240.13a-15); *see generally* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005).

[241] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see generally* Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Succeed in Preventing Future Crises?*, 64 SMU L. REV. 1243, 1244–47 (2011).

[242] *See* INEQUALITY AND COVID-19, INST. POLICY STUDS., https://inequality.org/facts/inequality-and-covid-19/ [https://perma.cc/6ZYX-GJHL] (last visited Sept. 1, 2021) (indicating that the combined wealth of all U.S. billionaires increased $1.763 trillion (59.8%) between the period March 18, 2020 and August 17, 2021). Black and Indigenous Americans experienced significantly higher mortality rates compared to other race and ethnic groups during the COVID-19 pandemic, and gender-inequality in the workforce was exacerbated during the COVID-19 pandemic because women were more likely to be in occupations hard-hit by pandemic layoffs. *Id.* "Despite making up only 16 percent of the global population, people in high-income nations have gotten 47 percent of all vaccine doses." *Id.*

develop a vaccine in record time.[243] This crisis, as devastating as it was and continues to be, has given the public and policymakers an opportunity to reimagine and implement a better future for all, toward which consumer primacy, I argue, takes us one step closer.

3. State Statutes

U.S. corporate law largely comprises state laws, and thus, amending state corporate codes to mandate consumer primacy could offer a clear pathway thereto. Among the fifty states, California is a promising potential first mover. Notably, California has been one of the leaders in consumer privacy legislation,[244] as well as board diversity mandates.[245] California is known to have some of the strongest consumer protection laws in the United States, with an active network of consumer groups, including the Utility Consumers' Action Network, Consumer Federation of California, and Privacy Rights Clearinghouse.[246]

As I've discussed in another article, a few large states (notably, California and New York) have a corporate long-arm provision in their corporate statutes that gives them the power to influence the internal affairs of domestic and foreign corporations if those corporations have a material impact on residents within the state.[247] "Material impact" in this context would be determined by reference to the number or percentage of resident consumers that the organization deals with annually, with any organization that exceeds a predetermined threshold being subject to the consumer primacy provisions.

The downside of a state-led approach is that its protection can only reach the individual state's residents. In addition, the buy-in of multiple states would be required before large-scale change could occur. But as we saw with the California Consumer Privacy Act (CCPA) and the California Privacy Rights Act (CPRA), a single state can create a contagion affect. California provided a blueprint for other states to thereafter introduce "copycat" legislation, with Virginia following suit by

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[243] *See* Sandy Cohen, *The Fastest Vaccine in History*, UCLA HEALTH (Dec. 10, 2020), https://connect.uclahealth.org/2020/12/10/the-fastest-vaccine-in-history/ [https://perma.cc/D5AR-VW7V].

[244] California Consumer Privacy Act, Assemb. B. 375, 2017–2018 Leg. Sess. (Cal. 2018) (codified as CAL. CIV. CODE §§ 1798.100–1789.198).

[245] S.B. 826, 2017–2018 Leg. Sess. (Cal. 2018); Assemb. B. 979, 2019–2020 Leg. Sess. (Cal. 2020).

[246] *See* Antonio F. Dias, Courtney Lyons Snyder, Brian Hershman & Keith M. Kollmeyer, *California Passes Legislation to Create Mini-CFPB*, JONES DAY COMMENT. (Oct. 2020), https://www.jonesday.com/en/insights/2020/10/california-passes-legislation-to-create-minicfpb. [https://perma.cc/V47Y-GARL] (noting that California's Department of Financial Protection and Innovation (DFPI), established through the California Consumer Financial Protection Law (CCFPL), is considered by many a "mini-CFPB" (Consumer Financial Protection Bureau)); *State and Local Consumer Agencies in California*, USA.GOV, https://www.usa.gov/state-consumer/california [https://perma.cc/W674-LL5W] (last visited Aug. 26, 2021) (listing the available consumer agencies in California).

[247] Summer Kim, *Corporate Long Arms*, 50 ARIZ. ST. L.J. 1067, 1086–87 (2018).

signing the Virginia Consumer Data Protection Act into law soon thereafter[248] and many others expected to follow.[249]

In addition to state corporate law, state organizational law could provide yet another avenue for reform. While consumer cooperatives offer a useful guide for cooperative principles, their reach is limited to those who opt into these business forms. The reality is that many consumer-centric businesses are not organized as cooperatives.[250] Some reasons include managerial capture, collective-action problems among consumers, and a preference among legal and financial advisers for the Delaware corporate form.

The good news is that the popularity of the cooperative form has continued to grow. According to a 2014 report for the United Nations, there were 2.6 million cooperatives with over 1 billion members worldwide.[251] Although cooperatives are gaining popularity, according to research conducted by Greg Brodsky, only about 10% of people can actually define the term.[252] The consumer primacy proposal is a way to insert clearly defined consumer protection mechanisms inspired by cooperative principles into investor-owned and other enterprises.

Another natural area of overlap between the consumer primacy proposal and organizational law is the benefit corporation statutes. As with cooperatives, however, the benefit corporation model's reach is again limited to those who opt into that

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[248] Virginia Consumer Data Protection Act, S.B. 1392, 2021 Leg. Sess. §§ 59.1-571–59.1.581 (Va. 2021).

[249] Laura E. Jehl, Mark E. Schreiber & Kari Prochaska, *Washington State Takes the Lead in CCPA Copycat Legislation Race, Trends Emerge*, MCDERMOTT WILL & EMERY (Mar. 2, 2020), https://www.mondaq.com/unitedstates/data-protection/903324/washington-state-takes-the-lead-in-ccpa-copycat-legislation-race-trends-emerge [https://perma.cc/24NH-556K] (noting that "copycat" legislation of California's Consumer Privacy Act has been introduced across the United States at a "dizzying pace").

[250] *See* Greg Brodsky & Jessica Mason, *The 3 Reasons We Don't See More Cooperatively Owned Businesses*, MEDIUM BLOG (July 28, 2020), https://medium.com/start-coop/the-3-reasons-we-dont-see-more-cooperatively-owned-businesses-e0172217e7ed [https://perma.cc/2VPR-J7TB]; Alex Pentland & Thomas Hardjono, *Data Cooperatives*, *in* BUILDING THE NEW ECONOMY (Alex Pentland, Alexander Lipton & Thomas Hugo eds., 2020), https://wip.mitpress.mit.edu/pub/pnxgvubq/release/2 [https://perma.cc/2RHW-8JVW] (noting that data, a powerful new resource, remains concentrated in the hands of few); Ada Lovelace Inst. & U.K. A.I. Council, *Data Cooperatives*, *in* EXPLORING LEGAL MECHANISMS FOR DATA STEWARDSHIP (2021), https://www.adalovelaceinstitute.org/feature/data-cooperatives/ [https://perma.cc/K56T-X4S2] (noting that there isn't a significant uptake or use of the few data cooperatives currently in operation, likely due to the complexity of properly maintaining and using such data).

[251] DAVE GRACE & ASSOCIATES, MEASURING THE SIZE AND SCOPE OF THE COOPERATIVE ECONOMY: RESULTS OF THE 2014 GLOBAL CENSUS ON CO-OPERATIVES 1 (2014), https://www.un.org/esa/socdev/documents/2014/coopsegm/grace.pdf [https://perma.cc/LG2E-NHVB].

[252] Devin Thorpe, *People Love Co-Ops but Don't Really Know What They Are*, FORBES (Aug. 16, 2019, 9:00 AM), https://www.forbes.com/sites/devinthorpe/2019/08/16/people-love-co-ops-but-dont-really-know-what-they-are/?sh=20a657725648 [https://perma.cc/P4QK-S257].

business form. It is only a partial solution, as the companies which are prone to trade off consumer welfare for greater shareholder profits will likely not be organized as public benefit corporations. So long as the thumb on the corporate law scale weighs down on the Delaware investor-owned enterprise, internal and external interventions will be necessary to rebalance the scale and realize the proposals set forth in this Article.

4. Implementation Priorities

Among the options discussed, federal legislation with few carve-outs would be the most effective in terms of its uniformity and breadth. A second-best option would be state regulation, coupled with the contagion effect that could be triggered by a strong first mover. The most organic option would be private ordering, but this would require both internal and external coordination.

Each of the implementation strategies should be explored together to realize consumer primacy for consumer-centric business. The hope is that the combination of international, federal, and state regulation will bring greater awareness of consumer primacy as a superior form of doing business for consumer-centric businesses. This awareness could then culminate in the creation of a new business form, perhaps a variant of the benefit corporation, that caters to consumer interest, which could come to be known as a "Consumer Benefit Corporation."

For any of these solutions to work (or be birthed in the first place), there needs to be a shift in consciousness among consumers themselves. A 2020 study by IBM noted a shift among consumers from value-driven (those who are primarily concerned with price and convenience) to purpose-driven (those who select brands based on alignment with their personal values).[253] Over 70% of the respondents they surveyed said they looked for specific value attributes when making a purchase and choosing a brand.[254] The current generation of consumers have the will and aptitude to demand changes in the businesses they engage with;[255] consumer primacy gives them one platform to do so.

One recent example of consumers using the power of their purse to achieve social objectives can be found in the legal profession.[256] The legal profession is one

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[253] KARL HALLER, JIM LEE & JANE CHEUNG, IBM, MEET THE 2020 CONSUMERS DRIVING CHANGE 2, 11 (2020), https://www.ibm.com/downloads/cas/EXK4XKX8 [https://perma.cc/ZQU9-GJV9].

[254] *See id.* at 1, 5.

[255] VALASSIS, 2021 CONSUMER INTEL REPORT 27, https://valassis.com/consumer-intel-report/?utm_campaign=CIR_2021_pr&utm_medium=press-release&utm_source=news [https://perma.cc/5MX5-TGHQ] (last visited Aug. 26, 2021) ("Seventy-two percent of millennial parents are more likely to be loyal to a brand or store that shares its efforts to be environmentally responsible, or has sustainable/ethical business practices. Sixty-three precent of millennials are willing to pay more for sustainable products.").

[256] *See generally* Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, 42 LITIG. NEWS (2017).

of the least diverse professions.[257] While shareholders (i.e., equity partners) have not been reliable agents of change, their clients have been making a concerted effort to increase diversity by demanding it from the firms they engage.[258] Some of the initiatives include requirements that one-third of a law firm's team be composed of women and ethnic minorities or that law firms create and implement clear and measurable leadership opportunities for women and minorities.[259]

A notable example is Hewlett Packard, which has a policy for withholding a percentage of all amounts invoiced by law firms that do not meet or exceed their minimal diverse staffing requirements.[260] Similarly, but employing a carrot rather than a stick, Microsoft has a detailed diversity checklist and pays a 2% bonus (based on the previous year's fees) to firms that satisfy or exceed such criteria.[261] Facebook has a policy regarding the selection of law firm representation that requires at least 33% of the lawyers retained by the firm to be female or a member of an ethnic minority group.[262]

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[257] Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1080 (2011) (explaining that the legal profession lags behind other occupations in achieving diversity and equality); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1041 n.1 (2011) ("[O]nly two professions, the natural sciences and dentistry, have less diversity than law . . . ."); ABA House Delegates Resol. 113 (2016) (urging companies and law firms to improve diversity within the legal field); 2020 ABA MODEL DIVERSITY SURVEY, ABA COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION 3 (2021) ("The legal profession has long struggled with ensuring that lawyers in law firms who are of diverse backgrounds have the same opportunities, including economic, afforded them to the same extent as their counterparts.").

[258] Sarah Garvey, *Corporate Clients Lead Charge for Diversity and Inclusion in Law Firms*, LAW CROSSING, https://www.lawcrossing.com/employers/article/900047982/General-Counsels-Join-Law-Firm-Diversity-Movement-Corporate-Clients-Use-Incentives-and-Punishments-to-Inspire-Diversity-and-Inclusion/ [https://perma.cc/MNH8-D9WL] (last visited Aug. 31, 2021) ("In 2016, 24 general counsels, including the GC's of powerhouses PepsiCo, McDonald's, eBay, CVS, Bristol-Myers Squibb, American Express, and MassMutual, signed a letter addressed to the chief legal officers of Fortune 1000 companies to encourage support for American Bar Resolution 113 to Help Promote Diversity in the Legal Profession.").

[259] Wald, *supra* note 257, at 1080.

[260] Debra Cassens Weiss, *HP General Counsel Tells Law Firms to Meet Diversity Mandate or Forfeit Up to 10 Percent of Fees*, ABA (May 25, 2017), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2017/spring2017-0517-hp-general-counsel-diversity-mandate/ [https://perma.cc/JXV7-5R56].

[261] Dev Stahlkopf, *Microsoft's Law Firm Diversity Program 2020 Awards and the Next Evolution of the Program*, MICROSOFT BLOG (Sept. 30, 2020), https://blogs.microsoft.com/on-the-issues/2020/09/30/microsoft-law-firm-diversity-program-2020-awards/ [https://perma.cc/NT82-TT2M].

[262] Faith A. Alejandro & Terrence L. Graves, *Diversity and Inclusion: Not Just an Ideal, but a Client Demand*, SANDS ANDERSON (Apr. 13, 2017), https://www.sandsanderson.com/

C. Expected Benefits

Shifting to a consumer primacy model for consumer-centric businesses is expected to lead to a more efficient and just outcome for these businesses. The consumer primacy model incentivizes consumers to engage in the enterprise by offering them more control and participation rights, as well as protections for the risks that they bear. It is the alignment of the consumers' interests with societal value that ensures that consumer satisfaction is a reliable metric against which managerial performance can be measured. The consumer primacy model also inspires consumers to become more conscious and responsible participants in business and society.

1. Empowering Consumers

Consumer primacy seeks to provide consumers of consumer-centric business with legal rights and protections that are more commensurate with their economic contributions. This aspect of consumer primacy is most closely related to the first prong of the primary stakeholder characteristic. As established in Section III.C.1., in consumer-centric firms, consumers (more so than any other stakeholder, including shareholders) are the stakeholders that provide the input that is most valued by the firm, and that have the greatest stake in the firm's success or failure.

Granting consumers more rights gives them stronger incentives to further invest in the inputs that generate core value for consumer-centric businesses. These rights are designed to incentivize their investments (e.g., time, information) in much the same way shareholder primacy sought to incentivize capital investments during a time when capital was scarce and vital to industry. The shift to consumer primacy is expected to better serve the goals of corporate and organization law, which, as established in Part II, are to identify the primary stakeholder whose interests are most aligned with collective social interest and to give them ownership and control rights that maximize not only their own but also society's well-being.

2. Protecting Consumers

In addition to empowering consumers, consumer primacy also seeks to protect consumers using fiduciary duties, as discussed in Section IV.A.3. This aspect of consumer primacy is most closely related to the second prong of the primary stakeholder analysis, which is related to a stakeholder's vulnerability to harm. As established in Section III.C.2., in consumer-centric businesses, consumers are the stakeholders (more so than any other stakeholder, including shareholders) that bear undiversified and unprotected risks due to the nature of their relationship to the firm. Many of the explanations commonly used to justify shareholders' status as

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news/2017/04/13/diversity-and-inclusion-not-just-anideal-but-a-client-demand/ [https://perma.cc/XLD5-DDSU] ("Increasingly, clients are creating both incentives and penalties for their vendors and suppliers to align with their diversity goals.").

beneficiaries of corporate law protections are apt explanations of the consumers' status in consumer-centric businesses, yet the applicable legal framework presumes and treats shareholders as the sole and exclusive beneficiaries of these protections. Consumer primacy seeks to address this misalignment by transferring certain corporate law protections from shareholders to consumers in consumer-centric businesses.

3. *Aligning Corporate and Societal Value*

Consumer primacy, like shareholder primacy, draws from the principal-agent model of the firm, which is mired in agency costs. One way to mitigate agency costs is by clear identification of the primary stakeholder whose interests are to be served by the enterprise. In a consumer-centric business, as established in Section III.C.3., consumer satisfaction or other consumer metrics provide high-quality, reliable information about firm value. Requiring consumer-centric businesses to report on consumer metrics (as discussed in greater detail in Section IV.A.4.) is expected to reduce agency costs in consumer-centric firms by offering an observable and dependable metric to assess managerial behavior and firm performance.

The proposed interventions seek to shift the corporation's perception of the consumer from object to subject—not as one from whom to extract shareholder value but as one who provides input, insight, and guidance. Giving consumers a seat at the table will change consumers' own perceptions of their role within society and their part in its sustenance.

4. *Diversity and Inclusion*

Increased consumer participation in corporate governance is also expected to inject diversity into the boardroom, the lack of which has been at the center of recent debates about U.S. corporate culture.[263] For example, electrical networks, frequently organized as consumer cooperatives, were one of the first groups to elect women to their boards.[264] A December 2015 report by the International Cooperative and Mutual Insurance Federation (ICMIF), which is recognized as a global representative leader for cooperative and mutual insurance organizations, shows that women held 21% of board seats on cooperatives, and almost half (48%) of

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[263] *See, e.g.*, Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 16–17 (2011); Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 759–60, 777 (2011).

[264] Debra C. Jeter, Randall S. Thomas & Harwell Wells, *Democracy and Dysfunction: Rural Electrical Cooperatives and the Surprising Persistence of the Separation of Ownership and Control*, 70 ALA. L. REV. 361, 389 (2018) ("The REA's Model Act allowed, and REA publicity encouraged, husbands and wives to hold a joint membership in the cooperative, sharing a vote.") The express purpose of the act was to facilitate the election of women to the board of trustees. *Id.*

cooperatives had three or more women on their boards in that year.[265] In contrast, among the S&P 1500 in 2016, women held only 17.8% of corporate board seats and 19% in 2017.[266] The data indicate that consumer participation in corporate governance opens up a wider and more diverse pool of candidates from which consumer-centric business can recruit directors, and thus consumer primacy could create a direct pathway to more diverse boards.

D. Potential Objections

This subpart addresses some of the potential objections to the consumer primacy proposal. Many of these objections, as I describe in more detail below, are universal challenges that are not unique to consumer primacy, and in many ways, consumer primacy fares better than other alternatives in addressing these challenges.

1. Managerial Misconduct

There is a general concern that straying from shareholder value will lead to managerial misconduct. In Elaine Sternberg's critique of the stakeholder theory, her main issue with the stakeholder model is that the theory is incompatible with business because it leads to a diffusion of managerial focus.[267] Sternberg cautions that this diffusion will ultimately undermine ownership, representation, and wealth.[268] In Sternberg's view, the large number of relevant stakeholders makes catering to all of them chaotic and ineffective, and the difficulty of comparative analysis makes the board accountable to no one.[269] Furthermore, when the number of stakeholders is unmanageable, leadership ignores groups that have no bargaining power or influence, which worsens the inequality issues that the stakeholder model seeks to address.[270]

The comparative strength of the consumer primacy model over the stakeholder model is that there is a primary stakeholder—the consumer—to whom the consumer

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[265] *ICMIF Members' Governance 2016*, INTERNATIONAL COOP. MUT. INS. FED'N (Sept. 2016), https://www.icmif.org/wp-content/uploads/2020/07/ICMIF-Members-Governance-2016-31.pdf [https://perma.cc/4VKH-XUZZ].

[266] Jon Lukomnik, *Board Refreshment Trends at S&P 1500 Firms*, HARV. L. SCH'L F. ON CORP. GOVERNANCE (Feb. 9, 2017) (on file with author); KOSMAS PAPADOPOULOS, ROBERT KALB, ANGELICA VALDERRAMA & THOMAS BALOG, U.S. BOARD STUDY: BOARD DIVERSITY REVIEW, INSTITUTIONAL SHAREHOLDER SERVICES 6 (Apr. 11, 2018).

[267] Elaine Sternberg, *The Defects of Stakeholder Theory*, 5 CORP. GOVERNANCE 3, 4–5 (1997) [hereinafter, Sternberg, *The Defects of Stakeholder Theory*].

[268] *Id.* at 9.

[269] *Id.* at 4–5; *see also* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 UNIV. PA. L. REV. 2063, 2065 (2001) ("[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own.").

[270] *See* Sternberg, *supra* note 267, at 5.

representative will be held accountable, thereby avoiding the diffusion problem. Furthermore, the definition of consumer-centric business rests on the availability of a specific metric by which consumer interest can be measured, which is the third prong of the definition of a consumer-centric business. This overcomes the concerns raised by Sternberg and others that straying from shareholder primacy will lead to unfettered board discretion.[271]

Yet, one of the challenges of relying on consumer satisfaction as a metric of firm performance is that satisfaction may seem to be an inherently subjective matter. As discussed in Jerry Muller's book *The Tyranny of Metrics*,[272] an excessive fixation on metrics without understanding why the metrics are being used threatens the quality of organizations and the people they serve.[273] Furthermore, reviews or star ratings on consumer products may be bought, forged, or otherwise influenced. Fortunately, there are a number of metrics available to measure consumer satisfaction, welfare, and utility that are gathered by independent parties and are tailored to the subject enterprise.[274] An independent index, such as the aforementioned ACSI, which is designed, conducted, and analyzed by the National Quality Research Center (NQRC) at the University of Michigan, overcomes these challenges.[275]

2. Administrability

There will likely be a host of concerns surrounding the administrability of the consumer primacy proposal. For one, heterogeneity within the consumer group poses a challenge to identifying the representative consumer whose interest the consumer representative is charged with serving. In considering the possibility of customers' membership on the board of directors, Oliver Williamson flags the practical challenges of implementation by asking: Who are the representative consumers, and how do they communicate with their constituency?[276] As noted by Grant Hayden and Matthew T. Bodie, it is difficult to devise an accurate way to identify specific members of the consumer constituency.[277]

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[271] *See, e.g.*, CLARK, *supra* note 51; Roe, *supra* note 269.

[272] JERRY Z. MULLER, THE TYRANNY OF METRICS (2018).

[273] *Id. See also* Jerry Z. Muller, *The Tyranny of Metrics: The Quest to Quantify Everything Undermines Higher Education*, 64 CHRON. HIGHER EDUC. 20 (2018).

[274] *See supra* notes 151–157 and accompanying text on American Consumer Satisfaction Index.

[275] NAT'L QUALITY RSCH. CTR., AMERICAN CUSTOMER SATISFACTION INDEX: METHODOLOGY REPORT, 1–2 (2008).

[276] Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1213 (1984). Williamson cautions: "Token representation may create only unwarranted confidence." *Id.* He concludes that "[w]ith the possible exception of large customers with special information needs . . . a general case for inclusion of consumers on the board of directors is not compelling." *Id.* at 1214.

[277] Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2120 (2010).

Identification becomes especially challenging in two-sided markets. Using the example of a social media platform, consumers include both the ad buyers and the social media account holders whom these ad buyers are targeting. In such cases, the representative consumer would first need to be identified based on the stakes-vulnerability-metric analysis outlined in Section III.C, an identification which would need to occur at the first step of the self-certification process.

As complicated as they appear, these challenges are not unique to consumers. There is a growing recognition that shareholders too are not a homogenous group.[278] Elaine Sternberg acknowledges that shareholders are imperfect beneficiaries themselves but defends them nonetheless as the best among the available options.[279] What Sternberg finds to be key to creating accountability are mutually beneficial long-term relationships.[280] What I show here is that as shareholders have become increasingly passive, impatient, indifferent, and/or self-interested, consumers are increasingly assuming the mantle of leadership and are moving toward the core of mutually beneficial relationships that generate long-term value within consumer-centric businesses.

3. Capacity

There is also the issue of whether consumers are capable of performing the tasks that the consumer primacy model assigns to them. The consumer primacy proposal contemplates consumers participating indirectly via a representative in some, but not necessarily all, matters of corporate governance and only in some, but not all, firms. In this regard, excluding consumers from corporate governance on the basis that they lack capacity is overbroad, especially considering that even a small percentage of savvy consumers can harness the power to influence businesses.[281]

Another concern, related to capacity, is that consumers may not have sufficient information or access to independent advice and counsel. Consumers have been described as quasi-rational, meaning their rational choices are constrained by

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[278] *Id.* at 2119.

[279] *See* ELAINE STERNBERG, JUST BUSINESS: BUSINESS ETHICS IN ACTION 6, 42–53 (2d ed. 2000) [hereinafter STERNBERG, JUST BUSINESS] (arguing that pursuing profit maximization is better for the firm's long-term interests compared to pursuing the goals of stakeholders generally or of customers, employees or managers); Sternberg, *The Defects of Stakeholder Theory*, *supra* note 267 (discussing various flaws of the stakeholder primacy model and arguing against its use).

[280] *See* ELAINE STERNBERG, CORPORATE GOVERNANCE: ACCOUNTABILITY IN THE MARKETPLACE 138–39 (stating that firms can provide equity to foster long-term mutually beneficial relations with its stakeholders); STERNBERG, JUST BUSINESS, *supra* note 279, at 53–57 (explaining the importance of long-term consequences and how stakeholder theory encourages short-termism by stakeholder groups).

[281] *See, e.g.*, George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1309 n.78 (1981) (explaining how repair agreement terms favored by certain consumers may influence a business' product designs).

uncertainty.[282] Again, the suggestion made here is that consumer interests be reflected in some, but not all, matters of corporate governance, and in particular only in the matters in which a consumer representative has information and experience, some of which can be cultivated by the firm itself, as demonstrated by the example of Northwestern Mutual.[283]

4. *Redundancies*

Another cluster of objections centers around redundancies. One concern raised here is whether the consumer protection framework (e.g., the Consumer Financial Protection Bureau [CFPB] or the Federal Trade Commission [FTC]) is already doing the work of consumer primacy. The CFPB, however, is primarily focused on the financial sector and homeowner protections.[284] Similarly, the FTC's Bureau of Consumer Protection is charged with protecting consumer interests but focuses on unfair, deceptive, and fraudulent business practices.[285] There are state consumer protection offices, but they too are focused on protecting victims of fraud, deception, unfair business practices, and untrue or misleading advertising, pursuant to the Uniform Deceptive Trade Practice Act.[286] Nonprofit organizations like the Better Business Bureau are focused on advancing market trust, which is an important prerequisite to, but not a substitute for, consumer primacy.[287]

For the same reason that the SEC and federal and state investor protection regulations do not negate the need for, but instead coexist with, corporate protections

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[282] *See, e.g.*, Richard L. Hasen, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 392 (1990) ("[Consumers] strive toward rational ends, but are influenced by cognitive constraints on their decision making under risk or uncertainty.").

[283] *See* Zore, *supra* note 179 and accompanying text.

[284] *Consumer Financial Protection Bureau Homepage*, CONSUMERFINANCE.GOV, https://www.consumerfinance.gov/ [https://perma.cc/W6YA-6XN3] (last visited Aug. 26, 2021) ("The Consumer Financial Protection Bureau is a U.S. government agency that makes sure banks, lenders, and other financial companies treat you fairly.").

[285] *Bureau of Consumer Protection*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection [https://perma.cc/5WFU-3L4V] (last visited Aug. 26, 2021) ("The FTC's Bureau of Consumer Protection stops unfair, deceptive and fraudulent business practices by collecting reports from consumers and conducting investigations, suing companies and people that break the law, developing rules to maintain a fair marketplace, and educating consumers and businesses about their rights and responsibilities.").

[286] Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 485 (1967) (describing the Act as a "significant means of combatting consumer fraud").

[287] *BBB Homepage*, BETTER BUS. BUREAU, https://www.bbb.org/ [https://perma.cc/QE7Q-5JLR] (last visited Aug 26, 2021) ("BBB's Vision: An ethical marketplace where buyers and sellers trust each other.").

of shareholders,[288] the availability of consumer protection agencies and regulations should not be a reason for corporate law to disregard consumer interests.

A second argument about redundancy might stem from the observation that boards already account for consumer interests in their decision-making process. The current framework, however, is clearly inadequate. Robert Stringer's work identifies the gap that currently exists between perception and reality in the board's understanding of the consumer.[289] He cites a survey of 223 senior executives conducted by Mercer Delta and the Economist Intelligence Unit, which revealed that 52% of executives viewed satisfying customer expectations as one of the top four business risks they faced.[290] In reality, however, an overwhelming majority spent very little time in board meetings discussing consumers, and most director respondents indicated that they had little to no direct or even indirect contact with the business' consumers.[291]

Some may argue that the consumer primacy proposal will not have much impact so long as the business judgment rule is available as a presumptive shield for directors. Overlaying directors' fiduciary duties, the business judgment rule is a judicially created presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[292] Under this standard, directors' decisions concerning consumers would be protected by the business judgment rule so long as there is a rational business purpose.[293] The challenge with the business judgment rule is that while it is intended to motivate entrepreneurialism among directors, it can also act as a cover for bad acts. Furthermore, if duties are limited or eliminated by contract, consumers have little protection to rely on. However, again, these criticisms apply to all fiduciary duties, and this occasion to rewrite and reframe corporate fiduciary duties gives us an opportunity to reconsider their trade-offs.

5. *Competing Interests*

Another potential critique of the consumer primacy model is its distributional consequences. This concern can be addressed by more precisely defining the scope of consumer-centric business to include only businesses for which there is an alignment between consumer and societal interest. Furthermore, recent empirical work in the accounting discipline has demonstrated a positive link between consumer satisfaction and firm value, suggesting that promotion of consumer interests is not always in tension with maximization of firm value.[294]

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[288] *See, e.g.*, ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK, 127–48 (2019).

[289] Stringer, *supra* note 184, at 18–20.

[290] *Id.* at 18.

[291] *Id.*

[292] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[293] *See id.*

[294] *See supra* notes 154–157 and accompanying text.

Lastly, there may be concerns that consumer primacy interferes with the contractual bargain reached among stakeholders. The contractarian views corporate governance as "a complex set of constraints that shape the *ex post* bargaining over the quasi-rents generated by a firm."[295] One could argue that the consumer primacy intervention meddles with these contracts. Under this contractarian account, consumers have agreed to make their contributions and have accepted risks without requiring equity ownership and associated control rights in exchange therefor. Accordingly, if this is the bargain that has been reached by parties, should not this bargain be respected? But if these bargains were reached on the basis of consumers' naiveté, loyalty, affinity, or hype, we would need to be mindful of the informed consent and fairness considerations that are essential to contracts. As David Yosifon explains, even under the contractarian view of firms, "contracting regimes include pervasive state involvement that can only be justified by a social purpose."[296]

V. CONCLUSION: DYNAMIC CORPORATE GOVERNANCE

In this Article, I have argued that the transition from the industrial to the postindustrial age requires a corresponding transition from a shareholder primacy view to a consumer primacy view in the governance of some firms. These firms, which I refer to as "consumer-centric businesses," are businesses that have a special relationship with their consumers, as determined by consumers' relationships to stakes, vulnerabilities, and metrics.

For these firms, existing theories and models of the firm must be updated to regard consumers as one of the principals in the principal-agent model of the firm and as one of the key stakeholders in the stakeholder model of firms. In support of this shift, I characterize recent corporate scandals as failures that could have been averted through a consumer-oriented approach to corporate governance. I also show how consumers' integration into corporate governance can be a vehicle to inject diversity, long-termism, accountability, and social responsibility into the boardroom, the lack of which has given rise to long-standing critiques of corporate culture in the United States.

The consumer primacy model proposed in this paper is just one among many possible models of governance for contemporary firms. A consumer-oriented strategy is not suitable for every organization for the same reasons that I argue that a shareholder-oriented strategy is not suitable for every organization. The consumer-oriented proposal outlined in this Article is intended as an exposition of one possible dynamic approach to corporate governance, in which the model of the firm is adapted to the particularities of each firm (and even for the same firm, across different periods). A flexible corporate law framework that looks beyond the choice

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[295] Luigi Zingales, *Corporate Governance*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS 249, 250 (Steven N. Durlauf & L. E. Blume eds., 2nd ed. 2008).

[296] Yosifon, *supra* note 32, at 257 (citing William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 438–39 (1989)).

of legal form to the substance of a firm's relationship with its stakeholders could offer a new pathway to realizing the renewed commitments made by business leaders toward long-term, collective, and sustainable prosperity.[297]

[297] *See Statement on the Purpose of a Corporation*, BUSINESSROUNDTABLE.ORG, https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/9MNK-QZ43] (last visited Aug. 26, 2021). For the relationship between sustainability and prosperity, *see* William E. Rees, *Are Prosperity and Sustainability Compatible?*, *in* CO-OPERATIVES IN A POST-GROWTH ERA: CREATING CO-OPERATIVE ECONOMICS 83–84 (Sonja Novkovic & Tom Webb eds., 2014).