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THE OREGON TRAIL: A NEW PATH TO ENVIRONMENTALLY RESPONSIBLE CORPORATE GOVERNANCE?

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INTRODUCTION

In today's world, it is difficult to avoid the popular movement of going "green." To some, it seems as if every other commercial on television involves a new green product and just about every other company is making an effort to go green.[1] In the last few years, environmentally and socially responsible products have gained widespread popularity, fostered the growth of new companies, and become significant profit centers for large corporations.[2] While debates may rage about the wisdom and efficacy of specific environmental or social policies, most agree that being environmentally and socially responsible is normatively better.[3]

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1. *See* Stuart Elliott, *Eco-Ads: The Aim Is to Say How They Save the World*, N.Y. TIMES, May 17, 2006, at A11.

2. *See* Kelly Faircloth, *Report: Consumers Still Shopping Green*, INC.: THE DAILY RESOURCE FOR ENTREPRENEURS, Feb. 20, 2009, http://www.inc.com/news/articles/2009/02/green.html; Nathanial Gronewold, *Appeal of 'Green Products' Growing Despite Recession—Survey*, GREENWIRE, Jan. 21, 2009, http://www.enn.com/lifestyle/article/39140; Joel Makower, *In Recession, Business Keeps Going Green*, BUS. WK. ONLINE, Feb. 2, 2009, http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db2009022_982216.htm; Peter L. Mosca, *Green Design Elements as Profit Centers*, REALTY TIMES, June 16, 2008, http://realtytimes.com/rtpages/20080616_greendesign.htm; Chris Reidy, *Survey: Consumers Continue to Buy Green Products*, BOSTON GLOBE, Feb. 18, 2009, *available at* http://www.boston.com/business/ticker/2009/02/consumers_conti.html; Kevin Voigt, *Business Sees Green in Going Green*, CNN.com, Dec. 21, 2006, http://www.cnn.com/2006/BUSINESS/12/14/environment; Greg Zimmerman, *The Rise and Significance of Eco-Labels and Green Product Certifications*, FacilitiesNet.com, July 2005, http://www.facilitiesnet.com/green/article/Certified-Green--3087.

3. That is, few would likely argue that one should intentionally destroy the environment, but debate may arise about whether a particular policy is warranted or wise. See David Hahn-Baker, "*We Have Met The Enemy . . .*" *A Book Review of Sustainable America: America's Environment, Economy, and Society in the 21st Century*, 7 BUFF. ENVTL. L. J. 259, 264 (2000), for more information about the moral responsibility of "sustainability," from where that morality is derived, and the notion that current unsustainable practices could be based on our moral failings. *See also* Glenn Israel, *Taming the Green Marketing Monster: National Standards for*

In order to meet consumer demand, many companies[4] have found themselves not only creating green products, but also changing their corporate lifestyle so that they, too, become environmentally and socially responsible.[5] In fact, the desire to become green has resulted in the development of publications, rankings, and standards that disseminate information to interested consumers regarding the most green products and companies.[6] Consumers may use this information to discern among the many green products and green companies to determine which gets their hard-earned dollar. Moreover, many consumers take this green initiative to the proverbial next level and seek environmentally and socially responsible companies to invest savings, retirement, and investment dollars.[7]

It is easy to see why many companies feel the need to become, at least in the eyes of the consumer, environmentally and socially responsible. There are several ways to accomplish this goal. Most easily, businesses may create products or otherwise conduct business in such a way that is considered environmentally and socially responsible. But what if this is not enough? Many believe that a shift in norms must occur in order to really address the situation and give corporations the freedom to consider the environmental and social effects of their decisions.[8] The current perception is that a corporation's internal law protects shareholders and thus imposes a duty on the managers to maximize the wealth of the shareholders.[9] Therefore, the decision rule becomes one that is focused on generating profit or shareholder wealth and any focus on nonshareholder constituencies such as employees, the community, or

Environmental Marketing Claims, 20 B.C. ENVTL. AFF. L. REV. 303, 303–04 (stating that green marketing is a response to the consumer seeking green products); Paul H. Luehr, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL'Y 311, 312–13 (1992) (suggesting that consumers are seeking environmentally safer products).

4. The term "companies" is used loosely and colloquially to accommodate both public and private corporations, partnerships, and limited liability companies.

5. Marc Gunther, *Global Warming Could Melt Your Portfolio*, CNNMONEY.COM, Mar. 21, 2006, http://money.cnn.com/2006/03/21/news/international/pluggedin_fortune/index.htm.

6. *See, e.g.*, Dow Jones Sustainability Indexes, http://www.sustainability-index.com/ (last visited Jan. 11, 2010); FTSE4Good Index Series, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited Jan. 11, 2010). The presence of sustainability rankings has stimulated a desire for inclusion among companies. Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 291, 313 (2007).

7. *See* Trillium Asset Management, About Us, http://trilliuminvest.com/about/ (last visited Jan. 11, 2010); Green Century Funds, History, http://www.greencentury.com/about/history/ (last visited Jan. 11, 2010); Rebecca Clarren, *Green Investing 101*, SALON, Nov. 26, 2007, http://www.salon.com/mwt/good_life/2007/11/26/green_investing.

8. *See, e.g.*, Kent Greenfield, *Saving the World with Corporate Law?*, 57 EMORY L.J. 947, 960 (2008).

9. *Id.*

the environment is ancillary at best. Professor Kent Greenfield recently pondered whether the shifting of norms or the changing of the decision rule or internal corporate law will lead corporations to internalize nonshareholder interests.[10] I would argue that the latter will accomplish the former, and a new Oregon law ("Oregon Law") would certainly be successful in this regard.[11] The provision in the new Oregon Law, if enacted by corporations, is not permissive[12]—unlike the various nonshareholder constituency statutes that came before it.[13] Should a corporation elect, vis-à-vis their articles of incorporation, to make environmentally and socially responsible behavior the controlling norm, they would be forced to consider these nonshareholder interests.[14]

The question then becomes whether this is a necessary constraint on corporate decision makers. As elaborated in a recent article by Professor Judd Sneirson,[15] whether a corporation has a duty to maximize profits, especially in light of the business judgment rule, is questionable.[16] Moreover, Professor Sneirson suggests that, even if a corporation does have a duty to maximize profits, there very well may be a direct correlation between profits and conduct that is environmentally and socially responsible.[17] Despite this, Professor Sneirson, similar to the Oregon legislature, believes that a corporation should do more than just *act* in an environmentally and socially responsible way—incorporators should make environmentally and socially responsible behavior the internal law or decision rule of the corporation.[18] This paper argues that such an election is unnecessary and could yield negative consequences.

First, corporations (including Oregon corporations) do not necessarily have an enforceable duty to maximize shareholder wealth.[19] This means that in reality, changing the decision rule addresses a red herring. Even if such a wealth-maximizing duty does exist, corporations that make environmentally and socially responsible decisions despite their effect on profits are given significant leeway to do so from the business judgment rule.[20] Another major

10. *Id.*

11. *See* Act of June 1, 2007, 2007 Or. Laws 254 (creating new provisions for corporations).

12. *Id.*

13. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 9.02 at 14 (2002).

14. Act of June 1, 2007, 2007 Or. Laws 254.

15. Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009).

16. *Id.* at 1005. See *infra* Part II, for a more detailed discussion of profit maximization and the business judgment rule.

17. *Id.* at 1010. *See infra* Part III.B, for a more detailed discussion of profit sustainability and socially responsible behavior.

18. Sneirson, *supra* note 15, at 1017.

19. *Id.* at 995–96.

20. *See infra* Part II (discussing the business judgment rule).

issue may come from the arduous task in reaching a singular, legal definition of environmentally and socially responsible behavior. Decision makers who follow this new decision rule may find themselves in some surprising litigation.

Part I of this Article discusses whether the shareholder primacy norm controls corporate decision-making, or whether the norm is enforced. Assuming that the shareholder primacy norm is the guiding decision rule, Part II discusses how the business judgment rule insulates decision makers from liability when they ignore the norm. Part III then looks at the Oregon Law, and the law's viability as a solution to changing the (norm) decision rule of shareholder primacy to include environmentally and socially responsible conduct. Finally, Part IV concludes that changing the decision rule could lead to potential pitfalls such as shareholder lawsuits.

I. SHAREHOLDER PRIMACY NORM

As explained in this section, the rationale for passing the Law was to free decision makers to make environmentally and socially responsible decisions by changing the decision rule (i.e. the shareholder primacy norm).[21] As it turns out, the shareholder primacy norm, while a "foundation stone in the corporate governance system . . . is both unenforced and unenforceable."[22] Therefore, a change in the decision rule is, perhaps, unnecessary.

A. Norm Development

Economic scholars have often suggested that the business of business is to make profit.[23] The shareholder primacy norm derives from a board of directors' duty of care to the shareholders.[24] This standard of corporate governance can be traced back to the somewhat contested decision of *Dodge v. Ford Motor Co*.[25] The Dodge brothers, with a group of minority shareholders, sued Henry Ford, the president and owner of 58% of capital stock in Ford Motor Company.[26] The Company was prospering—it had profits, assets, and a surplus of almost $112 million, and about $54 million cash on hand.[27] Henry Ford's testimony indicated that shareholders should be satisfied with the large

21. *See infra* Part III.A.

22. D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1002 (2008).

23. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, § 6, at 33.

24. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998).

25. 170 N.W. 668, 684 (1919).

26. *Id.* at 669, 671.

27. *Id.* at 683.

dividends and gains previously dispensed to them by Ford Motor Company.[28] Ford stated that "Ford Motor Company has made too much money, has had too large [of] profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of company, ought to be undertaken."[29] Consistent with this outlook, Ford Motor Company failed to declare any special dividend during the business year.[30] The Michigan court held that corporate directors have discretion to decide whether to pay dividends, but that power is abused when there is a large accumulation of surplus cash that is not needed for corporate business.[31] The court reasoned that the corporation's purpose was to make profits for the shareholder: "It is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others."[32] Thus, the court focused on Ford's purpose and stated:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[33]

Dodge spawned the famous debate between Professors Adolf Berle and Merrick Dodd.[34] In that debate, Professor Berle argues that:

> [A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.[35]

Therefore, this shareholder primacy norm has developed from a duty to make decisions in the best interests of the shareholders.[36] The interpretation of this

28. *Id.*

29. *Id.* at 683–84.

30. *Dodge*, 170 N.W. at 683.

31. *Id.* at 682.

32. *Id.* at 684.

33. *Id.*

34. *See* Adolf Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Powers in Trust*]; Adolf Berle, *For Whom Corporate Managers are Trustees*, 45 HARV. L. REV. 1365 (1932); Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Merrick Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935).

35. Berle, *Powers in Trust*, *supra* note 34, at 1049.

36. Smith, *supra* note 24, at 278.

duty, in following with *Dodge*,[37] is that shareholder primacy means shareholder wealth maximization.[38]

B. Norm in Practice

According to some, "the shareholder wealth maximization norm . . . has been fully internalized by American managers."[39] Yet many sources offer support for the notion that there is no corporate requirement to maximize shareholder profits. Even Professor Stephen Bainbridge acknowledged that "there are surprisingly few authoritative precedents on point."[40] As a general illustration, the American Law Institute's (ALI) *Principles of Corporate Governance* provides a source of doctrinal authority.[41] It states that the corporation "should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[42] ALI's use of "enhance" serves as a critical contrast to "maximize," as used by the court in *Dodge*. Moreover, the ALI's *Principles of Corporate Governance* provides that the corporation "may devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes" even if

37. Of course, others hold a countervailing viewpoint that *Dodge* only provides dicta regarding a wealth maximization norm. *See generally* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 167 (2008); Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New* Lex Mercatoria, 83 DENV. U. L. REV. 101, 135–36 (2005); Sneirson, *supra* note 12, at 1002.

38. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (1962) ("Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible."); *see also* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993) (arguing that shareholder wealth maximization is the norm which guides corporate decision makers); Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 177 (2008); JEFFREY D. BAUMAN, ALAN R. PALMITER, & FRANK PARTNOY, CORPORATIONS LAW AND POLICY: MATERIAL AND PROBLEMS 87 (6th ed. 2007); ROBERT CHARLES CLARK, CORPORATE LAW 678 (1986) ("Although corporation statutes do not answer this question explicitly, lawyers, judges, and economists usually assume that the more ultimate purpose of a business corporation is to make profits for its shareholders."); Robert Roman, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 186 n.30 (2001); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 975 (1992).

39. Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996).

40. STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS 410 (2002).

41. A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: THE OBJECTIVE AND CONDUCT OF THE CORPORATION § 2.01 (1992).

42. *Id.*

corporate profit is not enhanced.[43] ALI's provision illustrates that a corporation does not have a sole duty to maximize profits and can engage in socially responsible conduct. As a result, we see that "even though the shareholder primacy norm is closely associated with debates about the social responsibility of . . . corporations, its impact on the ordinary business decisions of such corporations is limited."[44]

Furthermore, in Delaware, as concluded in *Revlon v. MacAndrews & Forbes Holdings, Inc.*,[45] a corporation's duty to maximize shareholder wealth is limited in scope to situations involving buyout negotiations.[46] The court in *Paramount Communications, Inc. v. Time Inc.*,[47] also stated that "absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover."[48] Decided within a year of *Revlon*, the court in *Unocal Corp. v. Mesa Petroleum*,[49] required consideration of the effect of a takeover before deciding on a bid.[50] Such an analysis, as espoused by *Unocal*, includes balancing the concerns, which may include "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."[51] Therefore, while "proponents of corporate social responsibility have seized upon the shareholder primacy norm in the belief that it is an important determinant of corporate decision making . . . [t]he evidence, however, does not support that belief."[52] In fact, "as a practical matter, courts will not interfere with corporate social responsibility because there is almost always a plausible argument that actions considerate of a corporation's employees, customers, or creditors, or the environment, are in the long-term interests of the corporation's stockholders."[53]

43. *Id.* § 2.01(b)(3). This provision of ALI's *Principles of Governance* recognizes that a corporation is a social as well as an economic institution, and there must be balance between a corporation's economic objective and their social needs. *See id.* at § 2.01 cmt. e.

44. Smith, *supra* note 24, at 280.

45. 506 A.2d 173 (Del. 1986).

46. *Id.* at 184–85.

47. 571 A.2d 1140 (Del. 1989).

48. *Id.* at 1150.

49. 493 A.2d 946 (Del. 1985).

50. *Id.* at 955.

51. *Id.*

52. Smith, *supra* note 24, at 323.

53. Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 35 (2005).

C. *Oregon's Law on a Corporation's Duty to Maximize Profits*

Oregon's case law also lacks any type of direct standard requiring a corporation to operate for the primary purpose of maximizing profits for the shareholders.[54] Likewise, Oregon's state code follows the ALI's language and provides that a corporation may "[m]ake payment or donations or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation."[55] It is not surprising that the Oregon courts apply the ALI's view because Organ lacks a law directly incorporating the shareholder primacy norm and Oregon courts have found the ALI's *Principles of Corporate Governance* particularly important in considering other questions of corporate law.[56] The ALI states that a corporation's objective should be to enhance profit and shareholder gain, but with a restrained view that a corporation does have the power to "devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes."[57] Thus, if a corporation implements environmentally and socially responsible policies, its actions would be quite reasonable given Oregon authority.

Instead of placing an emphasis on a legal standard for a corporation to maximize profits, Oregon case law focuses on shareholder interests and the obligation the corporation and its directors owe to shareholders. For example, in *Locati v. Johnson*, the court lays out the general rule that a corporation's directors owe a fiduciary duty to the shareholders.[58] The court defined a fiduciary duty as one that seeks "the interest of the beneficiary rather than the personal interest of the fiduciary . . . which might suggest that failing to seek the interest of the minority is sufficient to show a breach of duty."[59] Therefore, although Oregon law clearly indicates shareholder primacy through its law on fiduciary duties, it goes no further than Professor Berle's direction that the

54. *See Hearing on H.B. 2826 Before the H. Comm. on the Judiciary*, 74th Leg. Assem. 1 (Or. 2007) (testimony of James M. Kennedy, Private Attorney) [hereinafter Kennedy] (providing only persuasive authority regarding a legal standard to maximize profits).

55. OR. REV. STAT. ANN. § 60.077(2)(p) (West 2008). See *infra* Part IV at note 126 for further discussion.

56. *See supra* Part II.B. *Cf.* Klincki v. Lundren, 695 P.2d 906, 919 (Or. 1985) (adopting a tentative draft of *ALI's Principles of Corporate Governance* in a corporate opportunity case); Chiles v. Robertson, 767 P.2d 903, 912 (Or. Ct. App. 1989) (using *Principles* in determining directors fiduciary duties); Noakes v. Schoenborn, 841 P.2d 682, 685–86 (Or. Ct. App. 1992) (using *Principles* in considering the question of whether a party can bring a derivative action).

57. A.L.I., *supra* note 41 and accompanying text.

58. Locati v. Johnson, 980 P.2d 173, 175 (Or. Ct. App. 1999).

59. *Id.* at 175–76 (citing Chiles v. Robertson, 767 P.2d 903, 912 (Or. Ct. App. 1989)). This rule suggests that minority stockholders' interests in socially and environmentally responsible decisions could outweigh interests in shareholder wealth maximization. Thus, a corporation could face lawsuits for a breach of a fiduciary duty if it does not seek socially and environmentally sound decisions despite its attempts to maximize profits for the corporation and shareholders.

corporation's decision makers owe a duty to the shareholders, generally.[60] And, even if such a duty were interpreted as it generally is, the "universal application of the business judgment rule [including its application in Oregon] makes the shareholder primacy norm virtually unenforceable."[61]

II. THE BUSINESS JUDGMENT RULE

The Oregon Law's purpose is to give corporations the ability to change their internal governance by changing the decision rule.[62] The decision rule (shareholder primacy norm), is derived from the duty of care—a standard of conduct that the decision makers should adhere to when making corporate decisions.[63] This duty of care dictates that the decision makers should act in the best interests of the shareholders. Thus, the question becomes, what effect does this shareholder primacy norm have on corporate decision makers when making decisions? The answer: "[I]t does not matter."[64] Decision makers, when making operational decisions, "are insulated from liability by the business judgment rule."[65] The business judgment rule is the standard of review by which decision makers will be judged, and absent some conflict of interest or fraud, "their decisions will not be second-guessed in the courts."[66] With respect to whether decision makers should strictly adhere to shareholder primacy, the generally accepted principle is that "decision makers may, but do not have to, consider non-shareholder constituencies when making their business decisions."[67] The obvious corollary to this rule is that decision makers are free to deviate from the shareholder primacy norm and consider nonshareholder constituencies when making their business decisions. They are free to do so because of the protection provided by the business judgment rule.

The business judgment rule creates a presumption that decision makers are acting in the corporation's best interest. This presumption can only be rebutted by showing some abuse of discretion.[68] For example in the hallmark case of

60. *See supra* note 34 and accompanying text.

61. A.L.I., *supra* note 41, at 286.

62. *See* Kennedy, *supra* note 54.

63. *See generally*, BAINBRIDGE, *supra* note 13, § 9.2 (discussing shareholder wealth maximization).

64. *Id.* at 414.

65. *Id.*

66. Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking*, 3 CORP. GOVERNANCE L. REV. 438, 465 (2007).

67. *Id.* at 462.

68. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (overruled on other grounds) (describing the business judgment rule as giving deference, absent an abuse of discretion, to the business decisions because such decisions constitute "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest

Shlenksy v. Wrigley, Philip K. Wrigley, the majority shareholder of the Chicago Cubs, also operated Wrigley Field, the Cubs' home field.[69] Wrigley refused to install field lights for night baseball games despite the fact that every major league team scheduled most games at night.[70] A minority stockholder brought a suit against the directors, claiming that they were losing money by not participating in night games and, therefore, that the directors acted for reasons unrelated to the financial interest and welfare of the Cubs.[71] Wrigley may have had valid reasons in its decisions, but the court held it was not within the court's province to determine the correctness of those decisions absent elements of fraud or illegality.[72] Therefore, although shareholder wealth maximization may have led the courts to order Wrigley to participate in night games, the court refused to second-guess because of the high deference given to corporate decision makers by the business judgment rule.[73]

In *Smith v. Van Gorkom*,[74] however, the court showed almost no regard for a corporation's business judgment. In *Smith*, Van Gorkom, the CEO, and other directors of Trans Union solicited a merger offer, and, in doing so, acted on his own and capriciously arrived at a $55 per share price.[75] The court found that the directors did not exercise good faith and informed judgment when they accepted the offer of $55 per share because they took no action to substantiate the offer nor tried to acquire more information about the acquisition.[76] Thus, the court did not recognize any "good faith informed judgment" by the directors. Building on *Wrigley*, courts have and will likely continue to give deference to the operational decisions of the corporation's decision makers so long as they are reasonably informed and made in good faith.

belief that the action taken was in the best interests of the company"); *In re* Tower Air, Inc., 416 F.3d 229, 238 (3d Cir. 2005) ("Overcoming the presumptions of the business judgment rule on the merits is a task."); Halpert Enters., Inc. v. Harrison, No. 07–1144-cv, 2008 WL 4585466, at *2 (2d Cir. Oct. 15, 2008); Priddy v. Edelman, 883 F.2d 438, 443 (6th Cir. 1989); MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 626 (8th Cir. 2003).

69. 237 N.E.2d 776, 777 (Ill. App. Ct. 1968).

70. *Id.*

71. *Id.* at 777–80. Almost all major league baseball games were played at night. *Id.* The court offered a possible reason for Wrigley's decision, stating:

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

Id.

72. *Id.*

73. *Id.* at 781.

74. 488 A.2d 858 (Del. 1985) (overruled on other grounds).

75. *Id.* at 866–68.

76. *Id.* at 876–78.

A clearer definition of the business judgment rule was outlined in *Aronson v. Lewis*.[77] In that case, the Delaware Supreme Court defined the business judgment rule as:

> [A] 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. Absent an abuse of discretion, that judgment will be respected by the courts.[78]

Quite plainly, in Delaware, the business judgment rule gives great deference to corporate decision makers who, in their own determination, act in the corporation's best interests.[79] Even if those decisions take into account the corporation's impact on communities, employees, customers, and other nonshareholder constituents.[80] Delaware courts have made it their purpose not to interfere with directors' decisions on questions of policy and business management,[81] and as long as the directors appear to have acted in good faith, the courts will not interfere with directors' discretion.[82] Not surprisingly, the Oregon courts have applied a similar rule when faced with opportunities to second-guess decision makers.

A. Oregon's Business Judgment Rule

Similar to the general business judgment rule, Oregon's rule acts as a shield from unprofitable or unpopular decisions made in the course of business so long as the directors acted in good faith, with due care, and within their authority.[83] The Oregon statute regarding director duty of care provides:

77. 473 A.2d 805 (Del. 1984).

78. *Id.* at 812 (internal citations omitted); *see also* Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000). The court found that the "directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Id.*

79. *Lewis*, 473 A.2d at 805.

80. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (holding that directors are able to consider various factors when making decisions including impact on non-shareholder constituents, employees, suppliers, customers, and the community).

81. Mercantile Trading Co. v. Rosenbaum Grain Corp., 154 A. 457, 461 (Del. Ch. 1931).

82. *See* Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973); Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977).

83. *See* Zidell v. Zidell, Inc., 560 P.2d 1086 (Or. 1977). This is similar to the way that other jurisdictions handle the business judgment rule. *See* OR. REV. STAT. ANN. § 60.357(2)–(4) (West 2003). The standard for corporate directors in the Oregon statute provides:

(2) In discharging the duties of a director, a director is entitled to rely on information, opinions, reports or statement including financial statements and other financial date, if prepared or presented by:

> A director shall discharge the duties of a director, including the duties as a member of a committee, in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believes to be in the best interests of the corporation.[84]

This duty of care follows Delaware and the ALI's standard and supports the notion that, so long as the decision makers are carrying out their duties in good faith manner, they will be insulated from liability and the courts will abstain from reviewing their decisions.

This is evidenced by *Zidell v. Zidell*, where the Oregon Supreme Court analyzed the duties of corporate directors and the proper role of courts in overseeing corporate policies.[85] The court held that for the judiciary to interfere in a corporate decision, there must be evidence that the decision amounted to fraud, bad faith, or an abuse of discretion on the part of corporate officials authorized to make the decision.[86] The court stated that it was "not the province of the court to act as general manager of a private corporation or to assume the regulation of its internal affairs."[87] In other words, *Zidell* sets a high burden of proof that must be shown to penetrate the deference allowed by Oregon courts.[88]

(a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(c) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.

Id.

84. OR. REV. STAT. ANN. § 60.357(1) (West 2003).

85. *Ziddell*, 560 P.2d at 1089.

86. *Id.*

87. *Id.* (citing Gay v. Gay's Super Markets, 343 A.2d 577 (Me. 1975)).

88. *See id.* at 419 ("If there are plausible business reasons supportive of the decision of the board of directors, and such reasons can be given credence, a Court will not interfere with a corporate board's right to make that decision.") (internal quotations omitted); *see also* Naito v. Naito, 35 P.3d 1068, 1083 (Or. Ct. App. 2001) (explaining that the corporation's management and directors are usually in the best position to determine the factors that go into deciding a corporation's needs).

A more recent case, *Crandon Capital Partners v. Shelk*,[89] defined the business judgment rule as a "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."[90] The court further explained, "A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose."[91] *Crandon* effectively established the business judgment rule in Oregon as the same rule Delaware courts use in interpreting and deferring to a corporation's business judgment.[92] Therefore, although supporters of the Oregon Law argued that Oregon lacked such a standard, Oregon seems to have a rather well-defined business judgment rule that protects decision makers who implement environmentally and socially responsible policies.[93]

III. OREGON'S LAW

Corporate law is, effectively, the set of rules that controls the decision making structure of the corporation.[94] Proponents of corporate social responsibility argue that corporate law in the United States is "used almost exclusively to protect shareholders (or the firm itself)."[95] Therefore, other nonshareholder constituents or "stakeholders" such as employees, communities, etc., must rely upon "external" regulations such as environmental regulations, disclosure requirements, or consumer protection laws.[96] Through the passing of a recent law, Oregon took the first step at changing a corporation's internal law or decision rule to consider the interests of nonshareholder constituencies.

Oregon corporations can now make "green" more than just a mission statement. A new law amending Oregon's corporation code[97] provides that a corporation's articles of incorporation may set forth "[a] provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible."[98] The provision, if

89. 181 P.3d 773 (Or. Ct. App. 2008).

90. *Id.* at 782 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (1984)) (internal quotations omitted).

91. *Id.* (quoting Unocal Corp. v. Mesa Petroleum, 493 A.2d 946, 954 (Del. 1985)) (internal quotations omitted).

92. *See supra* note 56.

93. *See* Sneirson, *supra* note 15, at 1019.

94. Smith, *supra* note 22, at 989.

95. Greenfield, *supra* note 8, at 951.

96. *Id.*

97. OR. REV. STAT. § 60.047(2)(e) (West 2008). The law was passed in June 2007 and took effect on January 1, 2008.

98. *Id.*

adopted, requires all corporate decisions to be environmentally and socially responsible.[99] The Law was enacted to protect corporate decision makers, who desire to make environmentally and socially responsible decisions, because the assumption was that such decisions could make the corporation vulnerable as they are considered deviations from the supposed norm.[100] To that end, and to the extent the purpose was to allow corporations to affirmatively declare their decision rule as one different from shareholder primacy, the Law is successful.

The initial problem, however, is that the Law fails to define "environmentally and socially responsible."[101] This problem is exacerbated by a noted paucity of sources for a corporation to follow in determining what it means to be socially and environmentally responsible.[102] Nonetheless, decision makers will be forced to interpret for themselves what it means to engage in environmentally and socially responsible conduct. What happens when this interpretation is not shared by the shareholders of the corporation? Ultimately, the courts will decide, and the failure to carefully define and articulate what the corporation means by socially and environmentally responsible behavior creates an uncertainty that places the company at risk.[103] If a corporation assumes this risk and adopts the new provision, it is potentially opening the door to shareholder suits.[104]

A. Purpose and Rationale of the Oregon Law

The Oregon law's apparent purpose, to allow for decision makers to account for nonshareholder interests, incorporates the ALI's *Principles of*

99. *Id.*; *see also infra* Part IV.

100. *See* Andy Giegerich, *Some Biz Lawyers Worry Over Sustainability Effort*, PORTLAND BUS. J., Apr. 18, 2008, http://www.bizjournals.com/portland/stories/2008/04/21/focus7.html?ana=from_rss. "The Purpose was to avoid any risk that might be left for the board of directors that chooses to operate in a way that recognizes environmental and sustainable goals . . . [i]t creates a safe harbor for them. Yet anyone who doesn't want to doesn't have to under existing law." *Id.*

101. *See generally* OR. REV. STAT. § 60.047 (West 2008).

102. *See* JEFFREY HOLLENDER & STEPHEN FENICHELL, WHAT MATTERS MOST 29 (2004) (stating that there is not one single definition of corporate social responsibility); ADRIAN HENRIQUES, CORPORATE TRUTH 27 (2007); JOHN J. KIRTON & M.J. TREBILCOCK, HARD CHOICES, SOFT LAW 191 (2007); WILLIAM C. FREDERICK, CORPORATION, BE GOOD! 44 (2006); JOHN C. DERNBACH, ENVIRONEMENTAL LAW INSTITUTE, STUMBLING TOWARD SUSTAINABILITY 550 (2002).

103. Practitioners have already expressed concern over the new law in Oregon. *See* Perkins Coie, *Recent Oregon Legislation Addresses Corporate Social Responsibility*, PERKINSCOIE.COM, Jan. 1, 2008, http://www.perkinscoie.com/news/pubs_detail.aspx?publication=1553&op=updates (arguing that social responsibility provisions should be specific, not general, and that social responsibility legislation may encourage shareholder activists); *see also infra* Part IV.

104. Coie, *supra* note 103.

Corporate Governance standard involving a corporation's objective and conduct.[105] The relevant portion of the ALI principles provides that:

> Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of the business: (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law; (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and (3) May devote a reasonable amount of resources to *public welfare, humanitarian, educational, and philanthropic purposes*.[106]

The incorporation of ALI's essential principles into Oregon Law aims to protect corporate decisions considered to be environmentally and socially responsible.[107] As noted above, the rationale for such a provision is attributed to the supposed deficiency of Oregon case law in defining the business judgment rule, which protects decision makers who deviate from the shareholder primacy norm, and thus, accommodates environmentally and socially responsible decision-making.[108] During debate on the bill, proponents argued that an absence of a strong business judgment rule made socially and environmentally responsible corporate decisions vulnerable to an assumed duty owed by corporations to maximize shareholder value.[109] In other words, proponents argued that courts might determine that socially and environmentally responsible decisions run afoul of a corporation's duty to maximize profit, which chills a corporation from engaging in socially and environmentally responsible policies.[110] Not only is this a false premise, as argued in this Article, but it turns out that profitability and environmental and social responsibility are not necessarily perpendicular.

B. Profitability and Sustainability

The main justification for the Oregon law is a fear that corporations making decisions to act in an environmentally and socially responsible way could be subject to lawsuits because those decisions do not necessarily equate to actual profits.[111] By electing to be an environmentally and socially responsible corporation, the decision makers presumably feel more at liberty to make decisions that will further this objective as opposed to those decisions that will only produce the maximum profit. As Professor Sneirson noted, the

105. Kennedy, *supra* note 54, at 1.
106. A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS 53 (1994) (emphasis added).
107. *See* Kennedy, *supra* note 54, at 1.
108. *Id.* at 2.
109. *Id.*
110. *Id.*
111. *Id*.

notion that environmentally and socially responsible business is unprofitable may be more perception than reality.[112]

The discussion of environmentally and socially responsible corporate behavior is more commonly covered under the umbrella of "sustainability."[113] Sustainability, more commonly discussed among humanitarians and moralists, has recently, and quite abruptly, become a part of the vocabulary of many of the world's most successful corporations.[114] In fact, many corporations and their directors are "recognizing that economic and social returns are now coming together to satisfy shareholders and stakeholders alike."[115]

This notion is further substantiated under what has become known as the "double bottom line."[116] Double bottom line is the concept that "profits" have both a financial and social component.[117] Moreover, the maximization of shareholder wealth can be accomplished not only by monetary revenue, but also by creating positive externalities and reducing negative externalities of the corporation's production.[118] This notion is very much consistent with the holding in *Paramount*, that directors can consider the impact on nonshareholder constituents including employees, suppliers, customers, creditors, and the community generally.[119]

As noted by commentator Pete Engardio, there has been a significant investment in the sustainability agenda.[120] Not only in the form of investment into companies meeting the criteria for being "sustainable," but also into research to satisfy rising investor demand.[121] In addition to creating "sustainable" products, corporations are finding investor demand and are now including reports on their "sustainable" efforts in their annual reports to shareholders.[122] Therefore, corporations are certainly seeing a payoff for going

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112. Sneirson, *supra* note 15, at 991.

113. The lack of material defining "environmentally and socially responsible" could be problematic. *See supra* Part II.

114. Pete Engardio, *Beyond the Green Corporation*, BUS. WK., Jan. 29, 2007, at 50, 52.

115. Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects A Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 628 (2008). Moreover, "They are ensuring that these groups no longer have to be at odds with each other." *Id.*

116. *Id.* at 633.

117. *Id.* The double bottom line is achieved by "harnessing innovation, people, and resources to develop an enterprise that is self-sustaining, makes money, and solves a social problem." *Id.*

118. *Id.* at 635.

119. Paramount Commc'n. Inc. v. Time, Inc., 571 A.2d at 1140, 1153 (Del. 1989).

120. Engardio, *supra* note 114, at 56–57.

121. *Id.*

122. *See* Kerr, *supra* note 115, at 644 (citing William Rosenzweig, *Double Bottom Line Project Report: Assessing Social Impact In Double Bottom Line Ventures* (2004) (Center for Responsible Business Working Paper Series, Paper 13, 2004), *available at* http://repositories.cdlib.org/crb/wps/13.

green. And, as Unilever CEO Patrick Cescau puts it, "[It's] about . . . growth and innovation. In the future, it will be the only way to do business."[123] Thus, the idea that shareholder primacy and environmental and social responsibility are at odds and corporations are not free to internalize nonshareholder interests is false. Moreover, changing the internal law of the corporation to mandate environmental and social responsibility may be the corporate governance equivalent of cutting off one's nose to spite one's face. Decision makers will be constrained by this decision rule and deviations will be met with potential lawsuits from inside and outsides the corporation.

IV. LITIGATION

Adopting the provision provided by the Oregon Law that the corporation will act in an environmentally and socially responsible manner will have the positive effect of changing the law of the corporation; decision makers will be bound to act within this framework. The effect of this is two-fold: first, the potential revival of the *ultra vires* law suit; and second, possibly giving standing to nonshareholder to enjoin the corporation from acting in a way that is not considered environmentally and socially responsible.

A. Ultra Vires

Generally, the law of a corporation is derived from three separate sources: (1) The requirements set out in the corporation's charters and bylaws; (2) the statutory law of the state in which the corporation is incorporated; and (3) case law.[124] Traditionally, the doctrine of *ultra vires* "limited the authority of corporations to the purposes and activities named in the corporate charter."[125] Purposes for this limitation range in theories of a contractual relationship between shareholder and corporation[126] to an interest in limiting the effects of

123. *Id.* at 632.

124. Stout, *supra* note 37, at 168; *see also* 7A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, Ch. 40 Ultra Vires §§ 3399–3579 (1997).

125. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1283 (2001) (citing JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 60 (1972) ("[T]he general powers of a corporate body must be restricted by the nature and object of its institution.")). Professor Greenfield goes on to state, "According to an early nineteenth-century treatise, a corporation is confined to the sphere of action limited by the terms and intention of the charter." *Id.* at 1380 n.68 (internal quotations omitted).

126. *Id.* at 1304. It can be argued that the *ultra vires* doctrine exists as to enforce a contractual agreement between shareholders and directors regarding the purpose of the corporation. This ultimately protects the shareholders from those in charge of the corporation changing the business beyond the initial agreement. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW § 1.1.3 (2000).

large corporations on society.[127] Purposes of the limitation notwithstanding, *ultra vires* generally meant to limit the corporation to only those powers enumerated by the charter and bylaws and not to limit the corporation from "illegal acts."[128]

Once prominent in the late nineteenth and early twentieth centuries, the *ultra vires*[129] doctrine has long since been declared dead.[130] Before the modern era of corporate law, corporations were usually only created by an act of the legislature for a specific purpose, such as constructing a railroad.[131] This charter which gives a corporation the power to act for a specific purpose also limited its ability to engage in activities that did not further that purpose.[132] If the corporation went beyond its enumerated purpose, shareholders had the right to enjoin the corporation's *ultra vires* acts that were beyond its enumerated powers.[133] Limiting corporations to specific purposes acted as a check that held corporations accountable, which ultimately limited their economic influence in society.[134] Modern corporate law, however, has evolved in such a way that these shareholder checks on corporate acts are effectively no longer available. Courts and legislatures started expanding the limitation of corporate existence, which dissolved much of the limitation on corporate

127. Harry Rajak, *Judicial Control: Corporations and The Decline of Ultra Vires*, 26 CAMBRIAN L. REV. 9, 18 (1995); Liggett Co. v. Lee, 288 U.S. 517, 548–49 (1932) (Brandeis, J., dissenting).

128. 7A FLETCHER ET AL., *supra* note 124, § 3400; *see also* State Savings & Loan Ass'n v. Bryant, 81 P.2d 116, 129 (Or. 1938) (distinguishing the act of the corporation that was illegal as opposed to *ultra vires*); *but see* Greenfield, *supra* note 125, at 1314 (arguing the opposite view).

129. The term is commonly defined as follows: "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." BLACK'S LAW DICTIONARY 1559 (8th ed. 2004).

130. Linda Sugin, *Resisting the Corporation of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 900 (2007); *see* Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 67, 94 (2007) ("[A]bolition of the ultra vires doctrine probably comes closest to being complete . . . .").

131. *See* Ashbury Ry. Carriage & Iron Co. v. Riche, (1875) 7 L.R.E. & I. App. 653; *see also* Michael A. Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 81–83 (1984); Greenfield, *supra* note 125, at 1280 (describing how law schools teach that the doctrine is "dead or at least deathly ill").

132. GEVURTZ, *supra* note 126, at 21–22.

133. Greenfield, *supra* note 125, at 1282. The doctrine of *ultra vires* acted as a device for corporations to avoid contracts or it could result in a corporation losing contracts. This aspect of the doctrine, however, is not relevant to the discussion of this article.

134. Liggett v. Lee, 288 U.S. 517, 548–49 (Brandeis, J., dissenting); *see also* Greenfield, *supra* note 125, 1302–03.

activities.[135] One example occurred when legislatures started allowing corporations to provide a list of their business purposes, which ultimately led corporations to provide exaggerated lists for all types of purposes.[136] Finally, the legislatures established that corporations could provide their purposes to be for all lawful business in order to avoid the fruitlessness of creating an extensive list of purposes.[137]

In Delaware, section 101(b) of the Delaware Corporation Code states, "A corporation may be incorporated . . . to conduct or promote any lawful business or purposes . . . ."[138] Specific to this article, Oregon adopted the language of the Model Business Corporation Act.[139] In fact, almost all states permit or require incorporators to define the purposes of formation in a corporation and generally such purposes are for "any lawful purposes."[140] Therefore, as corporate law has changed so has the doctrine of *ultra vires*, and presumably all that remains outside the scope of a corporation's power or purpose is unlawful business actions or activities that are not directed toward any business goal.[141]

Current Oregon corporation law provides that "Every corporation incorporated . . . has the purpose of engaging in any lawful business *unless a more limited purpose is set forth in the articles of incorporation*."[142] Such a limited purpose could include the direction that corporations "conduct the business of the corporation in a manner that is environmentally and socially responsible . . . ."[143] By placing this limitation in the articles of incorporation, the incorporators could be resurrecting the once-dead *ultra vires* lawsuit.

B. Shareholder Litigation

Changing the internal law of the corporation could potentially have some negative ramifications. The law transitions from the very vague "for all lawful

135. GEVURTZ, *supra* note 126, at 22; Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 214 (1985); Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 251 (1976).

136. GEVURTZ, *supra* note 126, at 23.

137. *Id.*

138. DEL. CODE ANN. tit. 8, § 101(b) (West 2001).

139. OR. REV. STAT. ANN. § 60.074(1) (West 2003); MODEL BUS. CORP. ACT § 3.01 (2002) ("Every corporation incorporated under this chapter has the purpose of engaging in *any lawful business* unless a more limited purpose is set forth in the articles of incorporation.") (emphasis added).

140. *See* Stout, *supra* note 37, at 169; Greenfield, *supra* note 125, at 1317 ("Articles of incorporation of specific companies tend to track the language of the applicable statutes and thus bolster the notion that the corporations themselves consider their authority as being limited to lawful purposes . . . .").

141. *See* GEVURTZ, *supra* note 126, at 23.

142. OR. REV. STAT. ANN. § 60.074 (West 2003) (emphasis added).

143. *Id.* § 60.047(2)(e).

purposes" or unenforceable shareholder primacy norm to the very specific requirement that the decision makers operate the business in an environmentally and socially responsible manner. The rise of general incorporation laws has eroded the *ultra vires* doctrine. The Oregon Law, however, effectively reverses the "all lawful purposes" provision found in corporate charters. By electing the provision provided by the Oregon Law, a corporation is binding itself to conduct business in a specific way. If a corporation fails to act in a socially and environmentally responsible way, a shareholder could bring a suit seeking to enjoin the corporation from its *ultra vires* acts—acts that are not socially or environmentally responsible. The protection once provided by the business judgment rule is now gone. Decision makers are, under the current perceived norm and the protection of the business judgment rule, free to make decisions they deem to be in the best interest of the shareholders. By electing the provision provided by the Oregon Law, they are binding themselves to a specific decision rule: A decision rule that specifically constrains the decision makers from making any decision that is not considered environmentally and socially responsible.

This is troublesome because there is no singular definition of environmentally and socially responsible. The inherently subjective standard leaves a determination of what is "responsible," "environmental," or even "social" to each individual. The corporation is leaving the determination to shareholders who may disagree with the corporation in their definition or in their application of environmentally and socially responsible behavior. Furthermore, when disagreement does arise between shareholders and decision makers with respect to what is environmentally and socially responsible, the corporation must avail itself to the interpretation of the courts. Perhaps, this is a very dangerous position compared to whatever benefits that may be perceived from electing such a provision.

C. Nonshareholder Litigation

Generally, nonshareholder constituency statutes are permissive insomuch as they allow corporate decision makers to consider nonshareholder interests, but do not require them to do so.[144] Given that the statutes do not require decision makers to consider nonshareholder interests, it is unlikely that nonshareholders would have standing to enforce them.[145] Incorporating the requirement for environmental and social responsibility into the articles of incorporation changes the permissive nature of the statutes. Adopting the environmentally and socially responsible provision would bind the corporate

144. Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 987 (1992).

145. Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1233–34 (1991).

decision makers to act in such a manner, exclusively and without consideration to shareholder or other interests. This potentially gives nonshareholders, environmental activist groups, human rights groups, etc., the opportunity to enjoin the corporation form acting in a way that they consider to be in violation of the law of the corporation. The definition of "environmentally and socially responsible" becomes more unruly with the addition of nonshareholders to the game. Under current law, Oregon corporations are free to consider nonshareholder interests in making decisions, but are not constrained in doing so.[146] The mandatory nature of the language provided in the Oregon Law could potentially leave corporations conflicted as to who their master is and vulnerable to lawsuits from shareholders and nonshareholders alike.

CONCLUSION

Professor Greenfield argues that "corporate law should not presume, without strong arguments, to prohibit corporate decision makers from taking into account the very societal interests that the corporation is ultimately meant to serve in the first place."[147] Corporations "will not, through their own generosity, internalize the external costs of their decisions or keep an eye on the social harms they produce."[148] The solution would then be to change the internal law of the corporation and shift the present decision rule to one that mandates the consideration of nonshareholder interests. To this end, the Oregon Law is successful. The language of the Oregon Law, however, presents other unique problems.

Corporate decision makers are, pursuant to their duty of care, required to act in the best interests of the shareholders and the corporation, generally. Although many have interpreted this duty as a duty to maximize shareholder wealth, no such duty has been enforced by the courts. In fact, the case most widely cited in this regard, *Dodge v Ford*, only speaks to this duty in dicta.[149] To the extent that decision makers are required to follow this decision rule, they are insulated by the business judgment rule. Therefore, the Oregon Law does nothing more than fight back the great boogeyman of corporate law. And, in doing so, it makes the corporation more vulnerable than it was before.

The corporation's mandate, through its articles of incorporation, that it will act in an "environmentally and socially responsible manner," creates unnecessary risk. While it is true that it will change the internal law of the corporation and shift the norm to one that requires the corporation to consider nonshareholder constituencies, it is opening the door to a potential flood of litigation over what it means to be "environmentally and socially responsible."

146. See *supra* Part III.
147. Greensfield, *supra* note 8, at 965.
148. *Id.* at 963.
149. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919).

The primary issue here is the Oregon legislature's failure to define "environmentally and socially responsible." Through this omission, the legislature creates a scenario whereby the corporation, the shareholders, and the courts will each be allowed to interpret and define what it means to be environmentally and socially responsible. Without adopting the provision that the corporation will act in an environmentally and socially responsible manner, the decision makers are free to consider such interests, so why adopt the provision and take the unnecessary risk?