THE PULL OF DELAWARE: HOW JUDGES HAVE UNDERMINED NEVADA'S EFFORTS TO DEVELOP ITS OWN CORPORATE LAW

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INTRODUCTION

One of the key features of American corporate law is that states are free to chart their own courses.[1] This freedom has led to fierce competition for corporate charters and the tax revenues they generate,[2] a competition Delaware clearly has won.[3] Home to more than one million active firms,[4] Delaware has more corporate entities than people[5] and is home to nearly half of U.S. public companies,[6] including 66 percent of the Fortune 500 companies.[7] In 2015, Delaware firms accounted for nearly 99percent of U.S. Initial Public Offerings.[8] By virtue of this dominance, Delaware corporate law commands unrivaled respect, and many states routinely look to Delaware when crafting their own corporate laws.[9] However, some states have attempted to differentiate their corporate law

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[1] Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 5 (1993).

[2] *See* ROMANO, *supra* note 1; William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 664 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 255 (1977). *But see* Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439, 468 (2001) (arguing, based on the shareholder primacy ideology, that corporate law is mostly uniform across developed market jurisdictions, suggesting there is no longer competition between states).

[3] *See* ROMANO, *supra* note 1, at 38.

[4] *See* JEFFREY W. BULLOCK, DEL. DIVISION CORPS., 2015 ANNUAL REPORT 1, https://corp.delaware.gov/Corporations_2015 Annual Report.pdf [https://perma.cc/B3YG-3YAY].

[5] Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html [https://perma.cc/73Z9-DE4C].

[6] *Id.*

[7] BULLOCK, *supra* note 4, at 1.

[8] *Id.*

[9] *See, e.g.*, Arnaud v. Stockgrowers State Bank of Ashland, 992 P.2d 216, 218 (Kan. 1999) (citation omitted) (explaining Kansas courts look to Delaware in matters of corporate law); Oliveira v. Sugarman, 152 A.3d 728, 736 n.4 (Md. 2017) (explaining Maryland courts look to Delaware in matters of corporate law); Casey v. Brennan, 780 A.2d 553, 567 (N.J. Super. Ct. App. Div. 2001) (explaining New Jersey courts look to Delaware in matters of corporate law); Rock Ivy Holding, LLC v. RC Props., LLC, 464 S.W.3d 623, 635 (Tenn. Ct. App. 2014) (explaining Tennessee courts look to Delaware in matters of corporate law); *In re* F5 Networks, Inc., 207 P.3d 433, 439 (Wash. 2009) (explaining Washington courts look to Delaware in matters of corporate law); Notz v. Everett Smith Grp., Ltd., 764 N.W.2d 904, 915 (Wis. 2009) (explaining Wisconsin courts look to Delaware in matters of corporate law); *see also* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443–44 (1992) ("Other states . . . have followed Delaware in adopting various legal rules. Delaware has played a major role in the spread of innovations concerning a range of corporate law issues . . . .").

from Delaware's, hoping to capture some of the market for corporate charters by offering alternative and, in their view, better laws.[10]

One area in which states have sought to deviate from Delaware's approach is in defining the corporation's central purpose and the constituencies corporate directors may consider when setting corporate policy.[11] In Delaware, the courts have crafted a rule that puts shareholder interests first.[12] Often referred to as the shareholder primacy or shareholder wealth maximization[13] standard, the general principle is that corporate managers and directors must put the interests of shareholders above all others.[14] To the extent that directors may consider other constituencies, they may consider them only as a means to the end of increasing shareholder welfare.[15] Other states have been more permissive, opting to allow managers and directors to consider the interests of non-shareholder constituencies—like employees, creditors, and local communities—as well.[16]

This article focuses on Nevada and its effort to permit corporate directors to consider other constituencies in fulfilling their fiduciary duties. While the Nevada Legislature has repeatedly enacted legislation to accomplish this goal, the state and federal courts continue to look to Delaware law and have improperly imported Delaware's shareholder primacy rules into Nevada corporate law.[17] This creates a number of problems. First, the idea that a single trial judge or four justices of the Nevada Supreme Court can ignore Nevada's corporate law, and instead rely on Delaware's vision of good corporate governance, violates basic premises of democracy.[18] Second, reliance on Delaware law upsets parties' expectations about what the law actually is in Nevada—making it difficult for firms to build meaningful plans for future investment.[19] Finally, it defeats the promise of a federal system in which states may experiment and innovate with different laws.[20]

This article proceeds as follows: Part I briefly explains the business judgment rule and the higher standards of review by which Delaware courts enforce shareholder primacy in the takeover context. This Part highlights how Nevada law differs from Delaware's and how courts in Nevada have applied the wrong standards in deciding corporate disputes. Part II explains how many states have rejected these standards; it illustrates that states can and do diverge from Delaware's shareholder primacy norm. Part III tells Nevada's story: how Nevada's

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[10] *See* discussion *infra* Part III.
[11] *See* discussion *infra* Part III.
[12] *See* discussion *infra* Part I.
[13] Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951–52 (2018).
[14] *See* discussion *infra* Part I.
[15] *See* discussion *infra* Part I.
[16] *See* discussion *infra* Parts II, III.
[17] *See* discussion *infra* Part III.
[18] *See* discussion *infra* Section IV.A.
[19] *See* discussion *infra* Section IV.B.
[20] *See* discussion *infra* Section IV.C.

legislature has sought to reject Delaware's shareholder primacy standard and how the Nevada courts continue to rely on Delaware law. Part III also presents some recent amendments to Nevada's corporate law, intended, once and for all, to make clear that courts should look to the plain language of Nevada's statutes, not to Delaware law. Part IV discusses the implications of courts ignoring state law. Part V makes some tentative suggestions on how to constrain judges and induce them to follow the law in Nevada. Finally, this article concludes with a call to action, urging Nevada's state and federal judges to take a closer look at Nevada corporate law and to rethink their rote reliance on Delaware corporate law.

I. DELAWARE'S STANDARDS OF REVIEW FOR CORPORATE DECISION-MAKING

Under Delaware corporate law, "directors owe [] fiduciary duties of loyalty and care to the corporation" and its stockholders.[21] The duty of care, simply stated, requires directors to exercise the care that a reasonable person "would exercise under similar circumstances."[22] The duty of loyalty requires directors to put the interests of the corporation and its stockholders above their own.[23] These fiduciary duties, which are considered the primary tool for enforcing shareholder primacy, are not creatures of statute but of common law, "finding their roots and subsequent development in the . . . courts."[24]

One difficulty in pursuing fiduciary duty claims is that directors control the corporations they oversee, including the decision to sue when the corporation has been damaged.[25] Directors who breach their fiduciary duties to their corporations are unsurprisingly loath to sue themselves, and it often falls to shareholders to step into their shoes and file derivative actions on behalf of the corporations they own.[26] When shareholders bring a derivative suit for breach of the duties of loyalty or care, Delaware courts distinguish "between the standard

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[21] Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989);Polk v. Good, 507 A.2d 531, 536 (Del. 1986).

[22] 1 DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE 109 (5th ed.1998).

[23] *Id.* at 263.

[24] Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 295 (2014).

[25] *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (West 2019) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); NEV. REV. STAT. § 78.120 (2019) ("Subject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation."); *see also* Aronson v. Lewis, 473 A.2d 805, 811, 813 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.").

[26] *See* 18 C.J.S. *Corporations* § 482, Westlaw (database updated Sept. 2019).

of conduct and the standard of review."[27] The standard of conduct describes the behavior that the law normatively expects of directors.[28] The standard of review describes the test that courts use to evaluate director liability.[29] In most areas of the law, the two standards are the same;[30] in Delaware corporate law, they are not.[31] This Part summarizes some key standards of review that Delaware courts use to evaluate director liability when shareholders sue for breach of the duty of care or loyalty, a necessary backdrop for highlighting how Nevada law differs from Delaware law and how courts in Nevada have applied the wrong standards.

A. The Business Judgment Rule and Its Limits

The business judgment rule, under which courts afford great deference to director decision-making, "is the default standard of review" for corporate decisions in Delaware corporate law.[32] In its most widely quoted formulation, the business judgment rule is "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."[33] To set aside this presumption, plaintiffs must show gross negligence or corporate waste.[34] Otherwise, the rule protects directors from personal liability.[35] Put simply, the business judgment rule is a powerful rule of judicial restraint by which courts will not inquire into a board's business decisions—even ones that

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[27] Chen v. Howard-Anderson, 87 A.3d 648, 666 (Del. Ch. 2014); *see also* William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 867 (2001) [hereinafter Allen et al., *Function over Form*].
[28] Allen et al., *Function over Form*, *supra* note 27, at 867.
[29] *Id.* at 868.
[30] For example, the standard of conduct that tort law expects of individuals is to act reasonably; the standard of review in a tort suit against an individual is whether the individual acted reasonably. Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437 (1993).
[31] *See Chen*, 87 A.3d at 667. For a discussion of the policy reasons for the divergence between the standard of conduct and the standard of review, see William T. Allen et. al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 454 (2002).
[32] Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011); *see also* Anthony J. Dennis, *Assessing the Fallout:* Paramount Communications, Inc. v. Time, Inc. *and Delaware's* Unocal *Standard of Review*, 17 J. CORP. L. 347, 350 (1992).
[33] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citations omitted).
[34] *See id.*; Dennis, *supra* note 32, at 351. In Delaware corporate law, "gross negligence means reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *In re* Lear Corp. S'holder Litig., 967 A.2d 640, 652 n.45 (Del. Ch. 2008) (citations omitted). Nevada's threshold to overcome the business judgment rule is even higher than Delaware's, requiring "intentional misconduct, fraud or a knowing violation of law" on the part of directors. NEV. REV. STAT. § 78.138(7)(b)(2) (2019). *But see* FDIC v. Johnson, 35 F. Supp. 3d 1286, 1292 (D. Nev. 2014).
[35] McMullin v. Beran, 765 A.2d 910, 917 (Del. 2000).

are unreasonable—absent a showing that the board was grossly negligent or wasteful.[36]

Of course, like any legal doctrine, the business judgment rule has its limits. Delaware courts have conditioned application of the business judgment rule on undivided loyalty.[37] Thus, where shareholders can show that a business decision involved self-dealing or bad faith, Delaware law requires directors to prove that the transaction was entirely fair to the corporation.[38] In other words, rather than finding refuge in the business judgment rule, the directors must prove that the deal was "as favorable [to the corporation] as could have [otherwise] been achieved in an arms-length [transaction] subject to market competition."[39] Directors who fail to carry this heavy burden face personal liability.[40]

B. Delaware's Enhanced Standards for Takeovers

While the business judgment rule remains the bedrock standard of review under Delaware corporate law,[41] Delaware courts have developed more stringent standards for director decision-making during hostile takeovers.[42] The 1980s witnessed a veritable flood of hostile takeovers that led to one of the

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[36] Allen et al., *Function over Form*, *supra* note 27, at 868. Several policy rationales support the business judgment rule. One well-known justification recognizes that courts—composed of legal professionals—are ill-equipped institutions to second-guess business decisions made by independent directors. *See* Kumpf v. Steinhaus, 779 F.2d 1323, 1325 (7th Cir. 1985). A second justification recognizes that risk-taking is an essential feature of any business venture. By insulating directors from personal liability for decisions that turn out poorly, the business judgment rule encourages the kind of informed beneficial risk-taking that leads to innovation. *See* Leo E. Strine, Jr., *Regular (Judicial) Order as Equity: The Enduring Value of the Distinct Judicial Role*, 87 TEMP. L. REV. 99, 106–07 (2014).

[37] Avande, Inc. v. Evans, No. 2018-0203-AGB, 2019 WL 3800168, at *8 (Del. Ch. Aug. 13, 2019) (citations omitted); *cf.* Bayer v. Beran, 49 N.Y.S.2d 2, 6 (Sup. Ct. 1944) ("The 'business judgment rule' . . . yields to the rule of undivided loyalty. This great rule of law is designed 'to avoid the possibility of fraud and to avoid the temptation of self-interest.' ").

[38] *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (holding that transactions taken in bad faith violate the duty of loyalty); *see also* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (analyzing a showing of inequitable corporate decision-making). *But see* DEL. CODE ANN. tit. 8, § 144 (West 2010) (providing two routes—ratification by a disinterested board majority and ratification by informed stockholders—by which a self-dealing transaction can avoid entire fairness).

[39] Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 643 (2010).

[40] *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 349, 361 (Del. 1993); *see also* DEL. CODE ANN. tit. 8, § 102(b)(7)(i) (West 2019) (providing that corporate charters cannot include provisions limiting director liability for breaches of the duty of loyalty); DEL. CODE ANN. tit. 8, § 145(a) (West 2011) (providing that corporations cannot indemnify directors for acting in bad faith).

[41] *See, e.g.*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 122, 125 (Del. Ch. 2009).

[42] *See* Richard C. Brown, *The Role of the Courts in Hostile Takeovers*, 93 DICK. L. REV. 195, 225 (1989).

most remarkable industrial restructurings in the history of corporate America.[43] Lax antitrust policy, paired with the rise in institutional and junk-bond financing,[44] opened the market for corporate control to a new class of entrepreneurs: the corporate raider.[45] By the end of the decade, over a trillion dollars in assets had changed hands,[46] and nearly 30 percent of Fortune 500 companies had been acquired.[47] Unsurprisingly, the dramatic uptick in takeovers sent shockwaves through boardrooms; directors feared losing the control over the companies they ran.[48] This, in turn, inspired corporate lawyers to develop novel takeover defenses designed to stymie unwanted acquisition, the most notable being the "poison pill."[49] When shareholders later sued directors for using these defenses, Delaware courts had to determine whether such actions breached the directors' fiduciary duties.[50]

Delaware courts recognized that directors of target companies face a natural tension when confronting a hostile takeover.[51] While shareholders see the immediate benefit of having their stock bought at a premium,[52] directors are regularly replaced.[53] Corporate directors might resist a takeover not because it is in the best interest of the stockholders or the corporation but because it might cost them their positions.[54] In other words, they have an implicit conflict of in-

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[43] *See* Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSP. 121, 121–24 (2001).

[44] *See* ROBERT M. COLLINS, TRANSFORMING AMERICA: POLITICS AND CULTURE IN THE REAGAN YEARS 111–12 (2007).

[45] William B. Chandler III, *Hostile M&A and the Poison Pill in Japan: A Judicial Perspective*, 2004 COLUM. BUS. L. REV. 45, 47.

[46] COLLINS, *supra* note 44, at 112.

[47] Andrei Shleifer & Robert W. Vishny, *Takeovers in the '60s and the '80s: Evidence and Implications*, 12 STRATEGIC MGMT. J. 51, 53 (1991); *see also* COLLINS, *supra* note 44, at 112 (discussing the 1980's takeover boom); Allan Kanner, *Protecting Workers from Unlawful Interference with Their Jobs*, 10 HOFSTRA LAB. L.J. 171, 175–76 (1992) (same).

[48] *See* COLLINS, *supra* note 44, at 112 (discussing the 1980's takeover boom).

[49] "A poison pill is a defensive mechanism . . . [that permits] all existing shareholders, except for the would-be acquiror, [to] get the right to purchase debt or stock of the target at a discount." Robert J. Klein, Note, *The Case for Heightened Scrutiny in Defense of the Shareholders' Franchise Right*, 44 STAN. L. REV. 129, 129–30 n.6 (1991).

[50] *See* Ronald J. Gilson, Unocal *Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 494–95 (2001).

[51] *See infra* notes 65–68 and accompanying text; *cf.* Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23, 45 (1982); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169 (1981); Ronald J. Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51, 64 (1982).

[52] *See* Sara B. Moeller et al., *Firm Size and the Gains from Acquisitions*, 73 J. FIN. ECON. 201, 220 (2004) (explaining that the average premiums paid to shareholders for public acquisitions are 68 percent for large firms and 62 percent for small firms).

[53] *See* ROMANO, *supra* note 1, at 52.

[54] *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010).

terest. Against this backdrop, the Delaware Supreme Court issued two seminal decisions, *Unocal Corp. v. Mesa Petroleum Co*.[55] and *Revlon, Inc. v. MacAndrews & Forbes Holdings*,[56] which together set forth standards of review for directors facing a takeover.

1. Unocal Corp. v. Mesa Petroleum Co.

Unocal involved an unsolicited two-tiered offer[57] by famed corporate raider T. Boone Pickens to acquire Unocal Corporation in 1985.[58] The Unocal board rejected Pickens's offer as "grossly inadequate," choosing instead to engage in a discriminatory self-tender.[59] The goal of the self-tender was to fend off Pickens's bid by giving shareholders a higher-priced alternative for their shares.[60] Pickens sued to enjoin the self-tender, arguing that the Unocal directors violated their fiduciary duties to shareholders by implementing the defensive tactic.[61]

Though the Delaware Supreme Court ultimately found in favor of the Unocal board,[62] the court acknowledged that takeovers involve an "omnipresent specter" of director self-interest.[63] The court sought to mitigate this conflict by crafting, and then applying, an innovative new standard of review.[64] Under the terms of the now famous *Unocal* "enhanced" standard, directors are required to show that their defensive measures to thwart acquisition: (1) were in response to a legitimate corporate threat, and (2) were proportional to that threat.[65] To meet its burden under the first prong, a target board must in good faith "articu-

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[55] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

[56] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986).

[57] "A two-tiered tender offer is one in which the [raider]" makes a bid for the target corporation by first offering to buy only enough shares to get a majority holding of the target. E. Anthony Lauerman, Comment, *Takeovers—Delaware Court Opens the Door for ESOPs as Defensive Mechanisms to Unsolicited Takeovers*: Shamrock Holdings, Inc. v. Polaroid Corp., 16 J. CORP. L. 143, 154 n.100 (1990). Once the raider has control of the target, the remaining shareholders are "squeeze[d]-out" in the back end of the merger by being forced to accept a lower price for their stock. *Id.* at 156 n. 120. This tender offer method has the effect of reducing holdout costs for the raider because shareholders fear being forced to sell in "the back end of the transaction." *Id.* at 154 n.100.

[58] *Unocal*, 493 A.2d at 949.

[59] *Id.* at 950. A self-tender is a "variant form of [a] stock repurchase," under which a target corporation "commences an offer to purchase . . . its own stock," as the name suggests. R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, 1 DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 6.44 (3d ed. Supp. 2019). The self-tender has a number of effects that tend to thwart a hostile takeover, including making the hostile bid more expensive and burdening the target corporation with substantial debt. *Id.*

[60] *Unocal*, 493 A.2d at 950.

[61] *Id.* at 949, 953.

[62] *Id.* at 958.

[63] *Id.* at 954.

[64] *See id.* at 954–55.

[65] *See id.* at 955.

late some legitimate threat" to corporate interests.[66] The key inquiry under the second prong is whether the board's defensive measures were animated primarily by a desire to eliminate the corporate threat, rather than by a desire to preserve director control.[67] If a board can meet this two-part burden, its actions are "entitled to the protections of the business judgment rule,"[68] and the burden shifts back to the shareholder to show gross negligence or corporate waste.[69]

2. Revlon, Inc. v. MacAndrews & Forbes Holdings

The second case, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[70] also arose from a common takeover situation: an initial hostile tender offer, followed by a friendly bid from a white knight[71] solicited by the target corporation, and numerous subsequent rounds of bidding.[72] The takeover battle began in June 1985 when Pantry Pride made a hostile offer to buy Revlon with the ultimate goal of breaking the company up and selling off its assets—a buyout known as a bust-up takeover.[73] The Revlon board initially rebuffed Pantry Pride's offer.[74] But when Pantry Pride increased its bid price to $56.25, the Revlon board, intending to block Pantry Pride's acquisition, accepted a buyout proposed by Forstmann Little & Co. for $57.25 per share[75] Undeterred, Pantry Pride raised its bid price to $58.00 and sued to enjoin Revlon's transaction with Forstmann.[76]

The Delaware Supreme Court held that the Revlon board breached its fiduciary duties to shareholders by not attaining the highest price possible in the sale of the corporation.[77] The court then proceeded to introduce a new standard of review which "significantly altered the board's responsibilities under the *Unocal* standards."[78] Put simply, *Revlon* provides that once a board initiates an active bidding process, or a change in corporate control becomes inevitable, the

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66 Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 92 (Del. Ch. 2011).
67 *See id.*
68 Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989); *see also* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989); *Unocal*, 493 A.2d at 958.
69 Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985).
70 "The nominal plaintiff, MacAndrews & Forbes Holdings, Inc., [wa]s the controlling stockholder of Pantry Pride." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 n.1 (Del. 1986).
71 "In corporation law . . . a 'white knight' is a friendly alternative partner who rescues the target company from the purported clutches of a hostile bidder." Gilbert v. El Paso Co., 575 A.2d 1131, 1136 n.12 (Del. 1990) (citation omitted).
72 Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 982 (1992).
73 *Revlon*, 506 A.2d at 176–77, 180–81.
74 *See id.* at 177.
75 *Id.* at 177–79.
76 *Id.* at 179.
77 *Id.* at 182.
78 *Id.*

board's actions are "judged against the sole objective of securing the best immediate value" for shareholders.[79] As a practical matter, this means directors can no longer consider the long-term interests of the corporation or other constituencies.[80] For example, a board "cannot prefer one deal over another because [it] believe[s] that a buyer [who offers a lower price has a] business plan that is better for [non-stockholder] constituencies, such as the employees."[81] When *Revlon*'s enhanced standard is invoked, directors are reduced to nothing more than faithful auctioneers.

But *Revlon* effected a more far-reaching change outside the realm of takeovers by shedding light on a fundamental question in corporate law: what is the core purpose of the for-profit corporation? Do corporations exist solely to maximize shareholder wealth? If so, over what time horizon? Or may corporations take other interests essential to the corporation's long-term success into account? The answer after *Revlon*, at least in Delaware, appears to be that corporations exist to maximize shareholder wealth, and directors must further that end, at least in takeover situations.[82]

A recent empirical study by Professor Robert Rhee on the status of shareholder primacy in American corporate law found that, before 1985, Delaware "courts were virtually silent on the concept of shareholder primacy."[83] But after *Revlon* "courts began to opine on shareholder primacy [outside the takeover context] and the trend has been unabated since . . . ."[84] Rhee concludes that "[c]ourts have legitimized and imposed the obligation to maximize shareholder profit across the entire spectrum of managerial decision making."[85] While corporate scholars have long debated, and continue to debate, the normative merit of shareholder primacy,[86] Professor Rhee's study is consistent with the leading academic view that shareholder primacy is the norm in Delaware.[87] For in-

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[79] Leo E. Strine, Jr., Commentary, *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1176 (2002).

[80] *See Revlon*, 506 A.2d at 182.

[81] Strine, *supra* note 79, at 1176.

[82] *See Revlon*, 506 A.2d at 185.

[83] Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1986 (2018).

[84] *Id.* at 1988–89.

[85] *Id.* at 2016.

[86] *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32.

[87] *See, e.g.*, Stephen M. Bainbridge, Response Symposium, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 798 (2002) ("[M]ost corporate law scholars embrace some variant of shareholder primacy."); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 640 (2006) (noting that current scholars have "overwhelmingly embraced" shareholder primacy); Henry Hansmann, *supra* note 2, at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 451 (2013) (calling shareholder primacy "dominant in

stance, former Chancellor William Allen has noted on several occasions that *Revlon* stands for the larger notion in Delaware corporate law that directors are required to maximize the value for shareholders.[88] In his academic writing, the Chief Justice of the Delaware Supreme Court, Leo Strine, has also embraced a reading of *Revlon* consistent with the shareholder primacy model: "The understanding in Delaware is that *Revlon* could not have been more clear that directors of a for-profit corporation must *at all times* pursue the best interests of the corporation's stockholders, and that [it] highlighted the instrumental nature of other constituencies and interests."[89]

II. STATES RESPOND TO *UNOCAL* AND *REVLON*

While some states have adopted both the *Unocal*[90] and *Revlon*[91] standards, many have not.[92] Beginning in the mid-1980s, top management at firms in troubled industries—the firms most susceptible to takeover—lobbied state legislatures for the right to consider more than just shareholder profits.[93] Though

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corporate law theory"); David Min, *Corporate Political Activity and Non-Shareholder Agency Costs*, 33 YALE J. ON REG. 423, 454 (2016) (calling shareholder primacy the "'default rule' of corporate . . . ordering . . . .").

88 *See* D. Gordon Smith, *Chancellor Allen and the Fundamental Question*, 21 SEATTLE U. L. REV. 577, 594 (1998).

89 Leo E. Strine, Jr., Essay, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 771 (2015) (emphasis added); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 n.105 (Del. Ch. 2010) (citing to *Revlon* for the proposition that directors can consider nonshareholder interests only to the extent that they ultimately promote stockholder value); Strine et al., *supra* note 39, at 671 ("[T]he Delaware Supreme Court's decision in *Revlon* is a stark illustration of the duty of loyalty's requirement that directors must prefer the interests of stockholders over other interests.").

90 *See, e.g.*, Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1458–59 (11th Cir. 1989) (applying *Unocal* under Florida law); NCR Corp. v. Am. Tel. & Tel. Co., 761 F. Supp. 475, 499 (S.D. Ohio 1991) (applying *Unocal* under Maryland law); Int'l Banknote Co. v. Muller, 713 F. Supp. 612, 626 (S.D.N.Y. 1989) (applying *Unocal* under New York law); Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1009 (E.D. Wis. 1989) (applying *Unocal* under Wisconsin law); Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488, 509–10 (N.D. Ill. 1988) (applying *Unocal* under Illinois law); Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535, 1543 n.6 (E.D. Mich. 1986) (applying *Unocal* under Michigan law); Burcham v. Unison Bancorp, Inc., 77 P.3d 130, 149 (Kan. 2003) (applying *Unocal* under Kansas law); Crandon Capital Partners v. Shelk, 181 P.3d 773, 783 (Or. Ct. App. 2008) (applying *Unocal* under Oregon law).

91 *See, e.g.*, O'Neill v. Church's Fried Chicken, Inc., 910 F.2d 263, 267 (5th Cir. 1990) (applying *Revlon* under Texas law); Edelman v. Fruehauf Corp., 798 F.2d 882, 886–87 (6th Cir. 1986) (applying *Revlon* under Michigan law); S. Union Co. v. Sw. Gas Corp., 180 F. Supp. 2d 1021, 1036 (D. Ariz. 2002) (applying *Revlon* under Arizona law); Gelco Corp. v. Coniston Partners, 652 F. Supp. 829, 845, 847 (D. Minn. 1986) (applying *Revlon* under Minnesota law).

92 *See, e.g.*, Dixon v. ATI Ladish LLC, 667 F.3d 891, 895–96 (7th Cir. 2012).

93 *See* Mark J. Roe, *From Antitrust to Corporation Governance? The Corporation and the Law: 1959–1994*, *in* THE AMERICAN CORPORATION TODAY 102, 114 (Carl Kaysen ed. 1996).

academics generally saw takeovers as creating efficiency gains,[94] the average person was unsympathetic.[95] "One poll showed 58 percent of [participants] as thinking hostile takeovers did more harm than good . . . ."[96] Voters viewed corporate raiders as greedy and saw bust-up takeovers as throwing employees and managers out of work.[97] Research has since suggested that takeovers have a relatively benign effect on employment,[98] but public hostility at the time was not wholly without merit. Following T. Boone Pickens's raid of Philips Petroleum in 1984, Philips eliminated nearly 3,000 jobs at its headquarters in Bartlesville, Oklahoma—roughly 10 percent of the town's population.[99] Whether or not accurate, the perception that takeovers were harmful spurred state legislators across the country to enact anti-takeover laws designed to protect local firms and to reject the enhanced standards to which Delaware law subjects directors.[100]

State anti-takeover laws vary in form, but nearly all of them increase director flexibility and bargaining power in the takeover context.[101] Some statutes explicitly precluded courts from reviewing director conduct with any greater scrutiny than the business judgment rule. For example, Maryland's statute specifies that actions taken by directors "relating to or affecting an acquisition . . . of [a Maryland] corporation . . . may not be subject to . . . greater scrutiny than is applied to any other act of a director."[102] Indiana's anti-takeover statute goes further by explicitly rejecting Delaware's enhanced standards:

> [J]udicial decisions in Delaware . . . , which might otherwise be looked to for guidance in interpreting Indiana corporate law, including decisions . . . that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control of the corporation, are inconsistent with the proper application of the business judgment rule under this article.[103]

Other state anti-takeover statutes reject Delaware's enhanced standards more subtly. For instance, several states have adopted constituency statutes that

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[94] *See, e.g.*, ROMANO, *supra* note 1, at 81; Bebchuk, *supra* note 51, at 24; Easterbrook & Fischel, *supra* note 51, at 1161; Holmstrom & Kaplan, *supra* note 43, at 127.

[95] Roe, *supra* note 93, at 114–15.

[96] *Id.* at 114.

[97] *Id.* at 115.

[98] *See* Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 46 n.4 (1991).

[99] *See* Bainbridge, *supra* note 72, at 1004.

[100] *See* ROMANO, *supra* note 1, at 54–55. These statutes are referred to by corporate scholars as the "second generation" of anti-takeover legislation. *Id.* at 55. The first-generation anti-takeover statutes, enacted prior to *Revlon* and *Unocal*, generally permitted state agencies to directly regulate hostile takeovers; however, they were found to be an unconstitutional violation of the dormant commerce clause in 1982. *Id.* at 54–55; *see also* Edgar v. MITE Corp., 457 U.S. 624, 626, 646 (1982) (striking down the first-generation Illinois anti-takeover law).

[101] Jonathan R. Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 468–69.

[102] MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(h) (West 2019).

[103] IND. CODE § 23-1-35-1(f) (2019).

authorize, and sometimes even require,[104] directors to consider non-shareholder interests when making corporate decisions.[105] These powerful[106] anti-takeover statutes expand the protection of the business judgment rule[107] by permitting directors to consider not only how their decisions affect shareholders, but also how they affect other corporate constituencies like employees, customers, and the local economy.[108] Constituency statutes implicitly reject *Revlon*'s rule that directors have an unqualified duty to maximize shareholder value, whether in the takeover context or more broadly.[109]

Take Wisconsin's constituency statute, which allows a corporate board to take such non-shareholder interests as employees, suppliers, customers, and the community as a whole into account.[110] In *Dixon v. Ladish Co.*,[111] the United States District Court for the Eastern District of Wisconsin applied the business judgment rule in a merger situation despite the plaintiff's arguments that *Unocal* and *Revlon* applied.[112] The court stated:

> The Wisconsin Legislature enacted § 180.0827 after *Revlon*, and it specifically authorizes corporate directors to consider more than just shareholders in executing their duties. Such a provision is in direct conflict with a rule that would require directors to focus solely on maximizing value for the benefit of shareholders. Thus, *Revlon* cannot be the rule in Wisconsin. Therefore, in total, the court finds that neither *Unocal* nor *Revlon* are applicable in the case at hand and the business judgment rule applies . . . .[113]

Courts in other jurisdictions have also found that state constituency statutes signal a clear departure from the shareholder primacy norm. For instance, in *Seidman v. Central Bancorp*,[114] Massachusetts Superior Court applied the business judgment rule to a board's use of defensive tactics to ward off acquisition, expressly rejecting the plaintiff's argument that Delaware's heightened standards should apply.[115] Quoting from Justice Cardozo, the court explained that

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[104] *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-2702 (2019).

[105] STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 319 (3d ed. 2012) (noting that "[o]ver 30 states have adopted nonshareholder constituency statutes").

[106] *See* FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE 146 (Todd Manza ed., 2018) (explaining that a study by Christopher Geczy "found that constituency statutes truly expand[] the authority of directors" in takeover situations).

[107] *Id.* at 145–46 (finding that courts have interpreted constituency statutes as mandating application of the business judgment rule in cases that would "otherwise be subject to enhanced scrutiny").

[108] BAINBRIDGE, *supra* note 105, at 319.

[109] *See id.* at 320–21.

[110] WIS. STAT. § 180.0827 (2019).

[111] Dixon v. ATI Ladish LLC, 667 F.3d 891 (7th Cir. 2012).

[112] *Id.* at 751, 753.

[113] *Id.* at 753.

[114] Memorandum and Order on Motions for Summary Judgment at *9–10, Seidman v. Cent. Bancorp, Inc., 16 Mass. L. Rptr. 383 (2003) (Nos. 030547BLS, 030554BLS, 032287BLS), 2003 WL 21528509.

[115] *Id.* at *9.

while the plaintiff may prefer a nuanced interpretation of the state's anti-takeover legislation so as to make it consistent with Delaware case law (specifically *Unocal*), judges must be particularly cautious about invading the province of state legislatures.[116]

III. NEVADA'S STORY

In 1991, Nevada sought to join the ranks of states that had rejected *Unocal* and *Revlon*[117] by adopting Nevada Revised Statute (NRS) 78.138.[118] Nearly identical to the Massachusetts statute discussed above, NRS 78.138 permitted directors and officers of Nevada corporations to consider the interests of employees, customers, society as a whole, and the long-term interests of the corporation.[119] Perhaps most important, Nevada's constituency statute also plainly applied in the takeover context, noting that directors may consider whether "these interests [are] best served by the continued independence of the corporation."[120] The stated purpose of the statue was to modernize Nevada corporate law with regard to takeovers and to "encourage[] those wishing to acquire [Nevada] corporations to negotiate with the board of directors . . . before attempting to do so."[121] But despite these efforts to deviate from Delaware law, Nevada courts were reluctant to do so.

In *Hilton Hotels Corp. v. ITT Corp.*,[122] the United States District Court for the District of Nevada relied extensively on Delaware case law to enjoin ITT's use of defensive tactics in a takeover battle.[123] In 1997, Hilton Hotels Corp. announced a $6.5 billion[124] tender offer for the stock of Nevada-based ITT Corp.[125] ITT sought to block Hilton's acquisition by staggering the board[126] so that only one-third of ITT's board would be up for election at any annual

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[116] *See id.* at *9–10.

[117] *See* RESEARCH DIV., NEV. LEGIS. COUNSEL BUREAU, SUMMARY OF LEGIS. AB 655, 66th Sess., at 2–3 (1991) [hereinafter SUMMARY OF LEGISLATION], *available at* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1991/AB655,1991pt1.pdf [https://perma.cc/2YLG-RXZH] (explaining that the bill seeks "to encourage corporate entities to [incorporate] in [the] [s]tate.").

[118] *See* NEV. REV. STAT. § 78.138(3) (1991) (current version at NEV. REV. STAT. § 78.138(4) (2019)).

[119] *See id.*

[120] *Id.*

[121] SUMMARY OF LEGISLATION, *supra* note 117, at 2.

[122] Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342 (D. Nev. 1997).

[123] *See id.* at 1346–49.

[124] Edwin McDowell, *Hilton Makes $6.5 Billion Bid for ITT*, N.Y. TIMES (Jan 28, 1997), http://www.nytimes.com/1997/01/28/business/hilton-makes-6.5-billion-bid-for-itt.html [https://perma.cc/7MPD-DHDS].

[125] *See Hilton Hotels*, 978 F. Supp. at 1344–45.

[126] *Id.* at 1344; *cf.* Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1352–53 (2013) ("Other than dual-class stock, which is rarely used, a staggered board is the most powerful takeover defense available.").

shareholder meeting,[127] thereby preventing Hilton from quickly gaining control of ITT's board of directors.[128] ITT moved to implement its plan without shareholder approval.[129] Hilton sued to enjoin ITT from doing so, arguing ITT's plan breached its directors' fiduciary duties.[130]

Despite NRS 78.138, which explicitly applied to hostile acquisitions, the *Hilton* court began its analysis by noting that there was no on-point Nevada statutory or case law dealing with hostile takeovers or the ability of target boards to implement defensive measures.[131] The court then turned to Delaware case law.[132] The ITT board "argue[d] that Nevada does not follow Delaware case law [because NRS] [Section] 78.138 provides that a board, exercising its powers in good faith and with a[] view to the interests of the corporation can resist potential changes in control of a corporation based on the effect on constituencies other than the shareholders."[133] But the court interpreted Nevada's constituency statute as consistent with the Delaware's heightened standards: "Delaware case law merely clarifies the basic duties established by the Nevada statutes," the court noted.[134] "This Court will not eliminate the principles articulated in *Unocal* . . . and *Revlon* . . . without any indication from the Nevada Legislature . . . that that is the legislative intent."[135] The court permanently enjoined ITT's defensive measures.[136]

A. The Nevada Legislature Responds

In response to *Hilton Hotels Corp.*, the Nevada Legislature amended the state's corporate law in 1999 to make explicit that Nevada does not follow Delaware case law.[137] The legislative intent behind the amendments was to abrogate the *Hilton* court's use of Delaware's enhanced standards and "preserve[] the application of the business judgment rule even in takeover situations" for Nevada corporate boards.[138] The Nevada Legislature created NRS 78.139, dealing specifically with takeovers.[139] Much like the Maryland and Indiana anti-

127 *See Hilton Hotels*, 978 F. Supp. at 1344.
128 *See id.* at 1345.
129 *Id.* at 1344.
130 *Id.* at 1345.
131 *See id.* at 1346.
132 *Id.*
133 *Id.* at 1346–47.
134 *Id.* at 1347.
135 *Id.*
136 *Id.* at 1352.
137 *See* NEV. REV. STAT. § 78.139 (1999) (current version at NEV. REV. STAT. § 78.139 (2019)).
138 Memorandum from John P. Fowler, Chair, Bus. Law Section, State Bar of Nev., to Senate Judiciary Committee 3–5 (Feb. 3, 1999), https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1999/SB061,1999pt1.pdf [https://perma.cc/T67J-R9RG].
139 *See* § 78.139.

takeover laws discussed above[140], NRS 78.139 precluded courts from reviewing director conduct with any greater scrutiny than the business judgment rule, even in takeover situations.[141] The amendments also refined Nevada's constituency statute by reinforcing the notion that corporate boards could appropriately resist takeover by considering non-shareholder interests and that neither *Revlon* nor *Unocal* apply in such cases.[142]

Perhaps most significant, the 1999 amendments added a key provision into the constituency statute: "[d]irectors and officers are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor."[143] This provision blatantly rejects the *Revlon* contention that corporations exist primarily to generate stockholder wealth and that the interests of other constituencies are subordinate to that concern—shareholder primacy.[144] Taken to its logical end, this provision gives directors discretion to sacrifice the economic well-being of the corporation's stockholders so long as it advances some non-shareholder interest they deem more important. This provision should have profoundly changed how courts understood and applied Nevada corporate governance laws; it did not.

B. *The Irresistible Pull of Delaware Law*

In 2006, the Nevada Supreme Court was called on to consider Nevada's fiduciary obligations outside the takeover context in *Shoen v. SAC Holding Corp*.[145] Plaintiffs alleged that the directors of AMERCO, whose primary subsidiary is U-Haul International,[146] had engaged in self-dealing by selling assets to and engaging in transactions with companies owned by an AMERCO director.[147] The question before the court was whether plaintiffs had to make a demand on the board to initiate a suit against the directors, even when it was clear that the board would reject the demand, before proceeding with a derivative action—a classic demand-futility case.[148] This case involved an alleged conflict of interest and the appropriate test for determining demand futility.[149] The court relied extensively on Delaware law[150] to explain that corporate directors have a fiduciary duty to consider the "corporation and its shareholders[']" interests

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[140] *See supra* notes 102–03 and accompanying text.
[141] *See id.* § 78.139(2) (current version at NEV. REV. STAT. § 78.139(1) (2019)).
[142] *See id* § 78.139(5) (current version at NEV. REV. STAT. § 78.139(4) (2019)).
[143] NEV. REV. STAT. § 78.138(5) (1999) (current version at NEV. REV. STAT. § 78.138(5) (2019)).
[144] *See supra* text accompanying notes 82–89.
[145] *See* Shoen v. SAC Holding Corp., 137 P.3d 1171, 1174 (Nev. 2006).
[146] *Id.*
[147] *See id.* at 1175–76.
[148] *See id.* at 1175, 1181.
[149] *Id.* at 1175, 1181.
[150] The *Shoen* court cited to *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) and *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). *See id.* at 1178, 1180–81.

above all others.[151] This formulation of director fiduciary duties is blatantly inconsistent with the language of the 1999 amended constituency statute that stated no corporate interest dominates.[152]

Over the past decade, nearly a dozen Nevada federal and state cases have relied on *Shoen*'s language to explain that shareholders' best interests must be considered over the interests of anyone else under Nevada corporate law.[153] For instance, in a 2011 opinion,[154] the Nevada Supreme Court found that directors of a Nevada corporation breached their fiduciary duties by making unreasonable purchases with corporate money.[155] In so finding, the court commented in dicta that directors violate their fiduciary duty of loyalty by not considering the interest of shareholders as paramount.[156] More recently, in *McDonald v. Palacios*[157] the United States District Court for the District of Nevada explained that directors of a Nevada corporation breach their fiduciary duties by not considering shareholder interests first.[158]

Shoen's shareholder primacy rhetoric has not determined the outcome in any of these cases, in the sense that the holdings did not rest on the board's failure to maximize shareholder wealth, but *Shoen*'s impact should not be underestimated. Legal rhetoric that stems from decisions like *Shoen* can extend

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[151] *Id.* at 1178. Some scholars have argued the phrasing "corporation and its shareholders" embraces nonshareholder constituencies, in which case the court arguably followed Nevada law. *See, e.g.*, Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 325 (2011); Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1097–98 (2012); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 526 (2011). *But see* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 209 (2013) (discussing and rejecting the view that "the corporation and its shareholders" phrasing embraces nonshareholder constituencies). However, in *Pompei v. Clarkson*, the Nevada Supreme Court rejected the plaintiff's claim that directors owe corporate creditors fiduciary duties, citing the *Shoen* case and explaining, "we have held that 'the [fiduciary] duty of loyalty requires . . . directors to maintain, in good faith, *the corporation's and its shareholders' best interests over anyone else's interests*.' " Pompei v. Clarkson, No. 66459, 2016 WL 3486375, at *1–2 (Nev. June 23, 2016) (alteration in original) (citation omitted).

[152] *See supra* text accompanying notes 143–44.

[153] *See* McDonald v. Palacios, No. 2:09-cv-01470-MMD-PAL, 2016 WL 5346067, at *19 (D. Nev. Sept. 23, 2016); FDIC v. Jacobs, No. 3:13-cv-00084-RCJ-VPC, 2014 WL 5822873, at *4 (D. Nev. Nov. 10, 2014); FDIC v. Delaney, No. 2:13-CV-924-JCM-VCF, 2014 WL 3002005, at *3 (D. Nev. July 2, 2014); HPEV, Inc. v. Spirit Bear Ltd., No. 2:13-cv-01548-GMN-GWF, 2013 WL 5961120, at *2 (D. Nev. Nov. 5, 2013); Brinkerhoff v. Foote, No. 68851, 387 P.3d 880, at *4 (Nev. Dec. 22, 2016) (unpublished table decision); *Pompei*, 2016 WL 3486375, at *2; Hodgman v. Las Vegas Motorcoach Partners, LLC, No. 57379, 2013 WL 1120835, at *1 (Nev. Mar. 15, 2013); *In re* AMERCO Derivative Litig., 252 P.3d 681, 700–01 (Nev. 2011); Nutraceutical Dev. Corp. v. Summers, No. 53565, 373 P.3d 946, at *4 (Nev. 2011) (unpublished table decision); Bevilaque v. Dramise, No. A-11-640026, 2014 Nev. Dist. LEXIS 3743, at *25 (Nev. Dist. Ct. Mar. 27, 2014).

[154] *Nutraceutical Dev. Corp.*, 373 P.3d 946.

[155] *See id.* at *5.

[156] *See id.* at *4.

[157] *McDonald*, 2016 WL 5346067.

[158] *See id.*, at *19.

far beyond the case's actual holding by affecting corporate norms, management lore, and law school pedagogy.[159] Take the famed *Dodge v. Ford*[160] case, for example, a case "familiar to virtually every student who has taken . . . corporate law."[161] The Michigan Supreme Court, in dicta, articulated the now-famous slogan that "[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."[162] However, as Professor Lynn Stout has emphasized, "[t]he actual holding of the case—that Henry Ford had breached his fiduciary duty to the Dodge brothers and that the company should pay a special dividend—was justified on entirely different and far narrower legal grounds."[163] That is, that Ford, a majority shareholder, breached his duty of good faith to his minority shareholders.[164] Despite this, the case has been cited for nearly a century for the idea that directors must seek to maximize shareholder wealth above all other concerns.[165]

C. *The Nevada Legislature Responds, Again*

In response to the string of judicial decisions misinterpreting and misapplying Nevada corporate law, the Nevada Legislature passed Senate Bill (SB) 203 in June 2017.[166] SB 203 is the Legislature's third attempt to distinguish Nevada and Delaware corporate law.[167] The bill aims to clarify that "Nevada corporations should be governed by Nevada law" because "[i]t is important that . . . businesses that have chosen to incorporate in Nevada be able to rely on Nevada law."[168] This goal is most significantly embodied in SB 203's addition of an express statement of legislative intent:

> The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction . . . [and] the failure or refusal of a director or officer to consider, or to conform the

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[159] Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. Corp. L. 675, 700 (2006); J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 493 (2013); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

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

[161] Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 164 (2008).

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

[163] Stout, *supra* note 161, at 167.

[164] *Id.* at 167; *see also Dodge*, 170 N.W. at 685.

[165] *See* Stout, *supra* note 161, at 164.

[166] S.B. 203, 2017 Leg., 79th Sess. (Nev. 2017).

[167] *See id.*

[168] *Minutes of the Senate Committee on Judiciary: Hearing on S.B. 203*, 2017 Leg., 79th Reg. Sess. 36 (Nev. 2017) (statement of Lorne Malkiewich, Counsel, U-Haul Int'l, Inc.).

> exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.[169]

In addition to the strong preamble, SB 203 gives directors and officers even greater latitude in their decision-making.[170] The bill reinforces that directors "are not required to consider, *as a dominant factor*, the effect of a proposed corporate action upon any particular group or *constituency*."[171] Thus, it repudiates Delaware's shareholder primacy requirement as well as the language from *Shoen* that directors are to consider shareholder interests as paramount.[172] Finally, S.B. 203 expressly applies NRS 78.138 to all matters, including "any change or potential change in control of the corporation."[173] SB 203 also evidences and reaffirms the Nevada Legislature's rejection of Delaware's standards of enhanced scrutiny.[174] However, given the history described above,[175] it is not clear that even SB 203's direct statement will suffice to pull the Nevada state and federal courts away from the strong gravitational pull that Delaware exerts.

IV. NEVADA COURTS' CONTINUED RELIANCE ON DELAWARE LAW IS DEEPLY PROBLEMATIC

The Nevada courts' refusal to abide by Nevada law is troubling for a variety of reasons. First, it undermines democratic norms and the balance of power among the different branches of government. Second, it upsets parties' expectations about what the law actually is. Finally, it defeats the promise of a federal system in which states may experiment with different laws.

A. Reliance on Delaware Law Undermines Democratic Norms

The American vision of representative democracy, both state and federal, is that free citizens have the right to vote for legislators who set the general rules for society.[176] The legislative branch has been described as the "the heart and soul of our democracy, the arena where politicians and citizens most directly

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[169] Nev. S.B. 203.
[170] *See id.*
[171] *Id.*
[172] *See* discussions *supra* Parts I, III.B.
[173] Nev. S.B. 203.
[174] *See* discussion *supra* Part I.
[175] *See* discussion *supra* Part III.
[176] *See* Shaw v. Reno, 509 U.S. 630, 648 (1993); Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988) ("This is a basic premise of our representative democracy; legislatures, not courts, amend and repeal statutes."); *see also* Evans v. Lynn, 537 F.2d 571, 609 (2d Cir. 1975) ("[O]ur system of representative democracy makes the legislature the primary as well as the initial forum for resolving conflicting social and economic interests . . . .").

interact over pressing concerns."[177] Representative self-government cannot and should not be constrained or removed at the whim of the judiciary.[178] Yet that is what in effect happens when Nevada state and federal courts invalidate corporate governance statutes by applying Delaware law.

The object of a multi-member legislative body is to provide a setting for debate and deliberation;[179] legislators represent individuals with diverse social and political views and must bargain "to produce the majority coalition necessary to pass a . . . law."[180] Given that a statute reflects only what competing groups agree upon, the status quo generally prevails unless the public supports legislation.[181] As the Supreme Court has stated in the federal context, "[a] statute enacted by Congress expresses the will of the people of the United States in the most solemn form."[182] The same holds true for the states.[183] Because courts are not designed to be representative bodies, judge-made law may be entirely different from the law that would result from a democratic process.[184] And to have broad issues of public policy decided by judges, rather than by a majority of Nevada's bicameral Legislature, "is clearly to have less democracy."[185] In short, Nevada's corporate governance statutes reflect value judgments made by the people's representatives—expressions of the state's aspirations. Democracy is best served when judges abide by the results of the democratic political process and refrain from substituting their own views.[186]

Relatedly, courts' application of Delaware law upsets the allocation of power among the different branches of the government. Just as the Constitution vests "[a]ll legislative Powers" in Congress,[187] the Nevada Constitution vests the authority to make law with its Legislature.[188] By contrast, "[a]ccording to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature" charged with interpreting the law, not making it.[189] Of course, in the process of deciding cases, courts will

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177 THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY xiv (Julian E. Zelizer ed., 2004).

178 *Cf.* LOUIS FISHER, ON APPRECIATING CONGRESS: THE PEOPLE'S BRANCH 14–15 (2010) (providing a discussion of the problems that arise when the legislature is undermined by the other branches of government).

179 Cont'l Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1450 (D.C. Cir. 1988).

180 CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 60 (rev. ed. 1997).

181 *Id.*

182 United States v. Lee Yen Tai, 185 U.S. 213, 222 (1902).

183 *See id.*

184 WOLFE, *supra* note 180, at 60.

185 *See* Lino A. Graglia, Essay, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1026 (1992).

186 *Id.*

187 U.S. CONST. art. I, § 1.

188 NEV. CONST. art. IV, § 1.

189 Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989); *see also* Benjamin N. Cardozo, *The Nature of the Judicial Process Lecture I*, *in*

inevitably perform some interstitial lawmaking: judges must fill gaps in statutory language, apply statutes to new situations, and resolve genuine substantive disputes about the law.[190] But even in those cases, judges derive the law, at least initially, from the democratically prescribed text. Delaware law is not, nor has it ever been, the governing law of Nevada. For well over two decades, the Nevada Legislature has vigorously sought to distinguish Nevada's corporate law from Delaware's.[191] Accordingly, when Nevada state and federal courts apply Delaware law to Nevada companies, they usurp legislative authority; they are not interpreting the law, but effectively choosing their own.

Judicial intrusion into the legislative sphere is also problematic because it creates "perverse incentives" for parties to look to the courts instead of the legislature to fashion the law.[192] This further undermines the democratic system.[193] Beyond that, judges making political judgments may undermine the trust of the citizenry on whose confidence the judiciary's legitimacy depends. As the Supreme Court once warned, judicial "legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[194]

B. *Reliance on Delaware Law Upsets the Parties' Expectations*

Nevada courts should apply Nevada law because those subject to the law must know what it proscribes. Firms look for legal certainty and predictability when making investment decisions. A clear legal framework permits companies to plan effectively. As Richard Fischer, the former President of the Federal Reserve Bank of Dallas, explained, "[o]perating a business under conditions of excessive uncertainty is like playing a game when you don't know the rules."[195] Nevada state and federal courts that dispense with existing corporate legislation

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1 JOURNAL OF LAW BOOKS 329, 331 (Robert C. Berring ed., 2011) ("The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) ("In our system of government the framers of statutes . . . are the superiors of the judges. The framers communicate orders to the judges through legislative texts . . . . If the orders are clear, the judges must obey them.").

[190] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 333–34 n.2 (1981) (Blackmun, J., dissenting).

[191] *See* discussion *supra* Part III.

[192] Diarmuid F. O'Scannlain, Lecture, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 34 (2015).

[193] *Id.*

[194] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992); *see also* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN L. REV. 739, 749 (1982) ("From the internal perspective, [judicial] legitimacy largely turns on objectivity rather than correctness . . . .").

[195] Peter Coy, *Trump's Uncertainty Principle*, BLOOMBERG BUSINESSWEEK (Jan. 26, 2017), https://www.bloomberg.com/news/articles/2017-01-26/trump-s-uncertainty-principle [https://perma.cc/LTX3-K7QQ].

in favor of Delaware case law do just the opposite; each decision alters the existing law and leaves Nevada corporations unsure of their legal entitlements and responsibilities. This makes it difficult, if not impossible, to make meaningful plans for future investment. It is also unjust because courts are effectively punishing Nevada corporations for breaking rules that they did not know applied to them.

C. Reliance on Delaware Law Undercuts the Federal System of Government

Even if one were to accept that Delaware courts had developed the best possible law of fiduciary responsibility, it would be inappropriate for Nevada courts to apply Delaware law. Nearly a century ago, Justice Louis Brandeis praised state governments as "laboratories of democracy,"[196] famously noting that the states' independence and size allowed lawmakers to "try novel social and economic experiments without risk to the rest of the country."[197]

From time to time, Congress has considered nationalizing corporate law, as it has much of securities law.[198] However, it has refrained from doing so each time, presumably preferring to let the states set their separate courses.[199] A national law would almost certainly be more efficient because corporate leaders and lawyers would know the law regardless of where their business is incorporated.[200] Planning would be much easier, and there would be far more certainty, especially in small states with few corporate cases. However, there is value in letting states forge their own paths. When judges improperly import Delaware law into Nevada, they undermine Nevada's ability to reach conclusions different from those handed down across the country and experiment with different approaches to fiduciary duty and corporate litigation. If courts continue to look to Delaware case law instead of Nevada statutes, they will undermine the virtues of federalism that Justice Brandeis extolled as one of the great strengths of American democracy.

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196 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2697 (2015) (citations omitted); Landell v. Sorrell, 406 F.3d 159, 178 (2d Cir. 2005) ("States may be laboratories of democracy, and they should have leeway to experiment . . . .").

197 *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

198 *See* Cary, *supra* note 2, at 663–68 (arguing Congress should nationalize corporate law); *see also* Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects*, 31 HOFSTRA L. REV. 681, 689 (2003) ("Right now, American law opts for state competition in corporate law but a mainly national, unified approach to securities law.").

199 *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) (citations omitted) ("[W]e are reluctant to federalize the substantial portion of the law of corporations . . . particularly where established state policies of corporate regulation would be overridden. As the Court stated in *Cort v. Ash*[]: 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' ").

200 *See* Cary, *supra* note 2, at 705.

V. TENTATIVE SOLUTIONS

The Nevada Legislature has three times attempted to distinguish Nevada corporate law from Delaware's by permitting directors of Nevada corporations to consider constituencies other than shareholders when making decisions on behalf of their corporations.[201] Nonetheless, Nevada state and federal courts continue to cite Delaware law and insist that shareholder concerns must take primacy.[202] This Part briefly explores three potential solutions to the problem: wait and see, educate Nevada's judges, and remove judges who resort to Delaware law to decide cases governed by Nevada law.

A. *Wait and See*

Nevada most recently amended its corporate statutes in 2017, and perhaps the third time will truly be the charm.[203] Accepting for the sake of argument that prior efforts to deviate from Delaware corporate law were ambiguous—giving the courts some wiggle room—a contention that seems hard to support, this latest effort leaves absolutely no room for doubt. Thus, the first solution is simply to wait until the next case is tried to see how courts respond. Nevada's clear and compelling statement of legislative reasoning and statutory intent may finally cause judges to forsake Delaware corporate law. However, if past is prologue, it is hard to be optimistic.

B. *Educate Judges on Nevada Corporate Law*

A second, more proactive solution is to educate Nevada's state and federal judges on the history and substance of Nevada corporate law. Unlike Delaware, which has specialized courts that deal in corporate issues, Nevada's judges are generalists.[204] The average Nevada judge may simply not see enough cases to become an expert in corporate law. Judicial education can be accomplished through articles like this, or through corporate orientation courses for newly elected judges and continuing education courses for serving judges.[205] For example, the State Bar of Nevada could hold annual seminars and computer-based trainings that delve specifically into Nevada corporate law. Another op-

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201 *See* discussion *supra* Part III.
202 *See* discussion *supra* Section III.C.
203 *See* discussion *supra* Section III.C.
204 *See About the Nevada Judiciary*, NEV. CTS., https://nvcourts.gov/Supreme/Court_Information/About_the_Nevada_Judiciary/ [https://perma.cc/2FG4-KY2C] (last visited Dec. 20, 2019) ("[Nevada] District Courts have general jurisdiction over all legal disputes."); *see also Court of Chancery*, DEL. CTS., https://courts.delaware.gov/chancery/ [https://perma.cc/E755-Y2ZF] (last visited Oct. 25, 2019). ("The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of [corporate] disputes . . . . Its unique competence in and exposure to issues of business law are unmatched.").
205 *See* Livingston Armytage, *Educating Judges—Where to from Here?*, 2015 J. DISP. RESOL. 167, 168–70.

tion is for the state to craft an institute or expert body in business law to help judges across the state better understand the complexities involved in these sorts of cases.

C. Remove Judges

A more drastic and unlikely solution is to remove judges who do not adhere to Nevada's corporate law, whether through elections or impeachment. On the federal level, the life tenure granted to Article III judges clearly insulates them from elections.[206] But state judges are elected to six-year terms in Nevada, and judges who wish to remain on the bench after their first terms must be reelected.[207] Nevada voters can certainly work to defeat state judges facing election. Take California's 1986 judicial elections for instance, when voters removed from office three state supreme court justices who had been perceived as anti-death penalty.[208] More recently, in 2010, voters in Iowa successfully removed three justices of the Iowa Supreme Court in a retention election following a unanimous opinion upholding same-sex marriage.[209]

The impeachment power could also theoretically be used to reign in the judiciary.[210] Indeed, legislative calls to impeach judges for delivering unpopular decisions arise from time to time. Following *Brown v. Board of Education*, "Impeach Earl Warren" billboards and bumper-stickers littered the South.[211] In 1997, Representative Tom DeLay, the House Majority Whip, pushed to impeach federal judges who upheld affirmative action.[212] And in 2018, Pennsylvania state legislators filed a resolution to impeach four of the state's supreme court justices over a disagreement on the constitutionality of the state's congressional map.[213]

Despite these examples, removing judges for decisions they make on the bench is both unwise and likely ineffective. First, judicial independence is meant to ensure that "powerful people . . . cannot manipulate [the legal system]

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206 *See* U.S. CONST. art. III, § 1.

207 NEV. CONST. art. VI, §§ 3–5.

208 Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2007, 2035 (1988).

209 Melissa S. May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59, 61–63 (2013).

210 *See* U.S. CONST. art. II, § 4; NEV. CONST. art. VII, § 3.

211 *See* Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 503 n.40 (1983).

212 Katharine Q. Seelye, *House G.O.P. Begins Listing a Few Judges to Impeach*, N.Y. TIMES (Mar. 14, 1997), https://www.nytimes.com/1997/03/14/us/house-gop-begins-listing-a-few-judges-to-impeach.html [https://perma.cc/6J7U-H3FK].

213 Mark Scolforo, *GOP Lawmakers Seek to Impeach Judges Over Congressional Map*, AP NEWS (Mar. 20, 2018), https://apnews.com/427f9883f733484ab2c7f0c45b614b44 [https://perma.cc/UP3Z-ZJ3T].

to their advantage."[214] Efforts to impeach judges who make unpopular decisions would undermine this independence. Second, removing judges from the bench is exceedingly rare. Low voter turnout is the norm in state judicial elections, and contests are uncommon.[215] Moreover, the few cases where judges have been ousted via election have come in the wake of highly politicized and controversial opinions; decisions regarding the proper standards for directors are unlikely to incite such a reaction.[216] The norm against judicial impeachment runs deep as well.[217] In the nation's two-hundred-and-forty-year history, the House of Representatives has impeached just fifteen federal judges, only eight of which the Senate convicted.[218] More important, no federal judge has ever been removed from office because Congress disagreed with a decision.[219] Similarly, just two state judges have been impeached in the past twenty-five years, neither of them in Nevada.[220] Thus, removing judges, whether through impeachment or the ballot box, is not a viable option for constraining judges in the corporate law context.

CONCLUSION

Despite three efforts to distinguish Nevada law from Delaware law and permit directors to consider constituencies other than shareholders, both state and federal courts in Nevada continue to look to Delaware law and articulate the shareholder primacy standard. This phenomenon is profoundly troubling because it undermines democracy, weakens the rule of law, and upsets the federal system where states may forge their own paths. If the Nevada courts continue to ignore Nevada law, state lawmakers can and should take steps to educate judges about Nevada corporate law and make clear that Nevada courts should not follow Delaware law, at least when it comes to the fiduciary duties of directors and shareholder primacy.

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214 John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 366 (1999).

215 *See* Alex B. Long, *"Stop Me Before I Vote for This Judge Again": Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 14, 38 (2003).

216 *See id.* at 6, 33.

217 Alan Murphy & Thomas E. Mann, *Reining in a Runaway Federal Judiciary?*, BROOKINGS (May 4, 2005), https://www.brookings.edu/opinions/reining-in-a-runaway-federal-judiciary/ [https://perma.cc/XH5K-P6GK].

218 *Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges [https://perma.cc/VC4W-NW6A] (last visited Dec. 13, 2019).

219 *See* Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 670 (2001).

220 Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUST. (Mar. 23, 2018), https://www.brennancenter.org/blog/impeachment-and-removal-judges-explainer [https://perma.cc/KHC6-LXKV].

20 NEV. L.J. 401

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