Just Say Yes? The Fiduciary Duty Implications of Directorial Acquiescence

Lisa Fairfax
University of Pennsylvania Carey Law School

Just Say Yes? The Fiduciary Duty Implications of Directorial Acquiescence

*Lisa M. Fairfax**

ABSTRACT: The rise in shareholder activism is one of the most significant recent phenomena in corporate governance. Shareholders have successfully managed to enhance their power within the corporation, and much of that success has resulted from corporate managers and directors voluntarily acceding to shareholder demands. Directors' voluntary acquiescence to shareholder demands is quite simply remarkable. Remarkable because most of the changes reflect policies and practices that directors have vehemently opposed for decades, and because when opposing such changes directors stridently insisted that the changes were not in the corporation's best interest. In light of that insistence, and numerous statements from directors that they have conceded to shareholder demands as a result of fear, coercion and even blackmail, this Article focuses on whether a director's decision to acquiesce to shareholder demands could be viewed as a fiduciary duty breach. Considerable ink has been spilled, over whether a director's efforts to thwart shareholder demands represents a breach of fiduciary duty. However, the question of whether directors' decision to acquiesce to shareholder demands has any fiduciary implications has been unexplored.

This Article fills this important gap and in so doing advances two critical arguments. First, this Article argues that to the extent directors have conceded to shareholder demands despite believing that they are not in the corporation's best interests or based on fear of losing their board seat, such concessions clearly raise the specter of fiduciary duty concerns. Notably, this Article advances this argument as a scholar who is a strong advocate of increased shareholder power. In advancing this argument, this Article tackles the many reasons critics may resist characterizing director acquiescence as a breach, including the potential that directors have changed their mind, have engaged in a legitimate cost-benefit analysis, or have an obligation to comply with shareholder preferences. Second, this Article argues that there are significant

* Alexander Hamilton Professor of Business Law, George Washington University Law School. Special thanks to Dorothy Brown and the faculty of the Emory University School of Law, Cathy Hwang, Jeff Schwarz and the students and faculty at the University of Utah College of Law Economics and Business Colloquium, and the faculty at the University of Iowa College of Law for their insights and comments on earlier versions of this draft. All errors, of course, are mine.

negative repercussions that flow from our collective failure to highlight and examine the fiduciary implications of acquiesce in the context of shareholder activism. These include negative repercussions for our normative understanding of the appropriate contours of directors' duties, particularly those duties to the entire corporate enterprise. These also include the need to pay close attention to understanding the appropriate balance between much needed director accountability that could stem from enhanced shareholder power, on the one hand, and on the other hand, the potential for shareholder overreach that could harm the corporation and its stakeholders—both shareholder and non-shareholder. This Article further insists that negative repercussions stem from the very real possibility that very few actors will have the incentive to explore the fiduciary duty issues that animate this Article. Indeed, those upon whom we generally rely to explore and challenge breaches of directors' fiduciary duties—namely shareholders—are least likely to do so in the context of directorial acquiescence to shareholder demands. Hence, this Article's exploration is critical because it may be one of the only forums in which this important issue is examined.

I. INTRODUCTION

In 1997, shareholders of the Eastman Kodak Company ("Kodak") introduced a proposal seeking to "declassify" the Kodak board.[1] At the time, the Kodak board was classified, which meant it was divided into three classes with directors serving staggered three-year terms.[2] Declassification would mean that all Kodak directors would serve annual terms, and thus come up for election every year.[3] Shareholders argued that Kodak's classified board was not in the best interests of Kodak and its shareholders, primarily because it limited board and managerial accountability.[4] The Kodak board recommended against declassification, not only advancing several reasons why a classified board was preferable to declassification, but also advancing the Board's belief that declassification was not in Kodak's best interests.[5] While a majority of

1. Eastman Kodak Co., Notice of 1997 Annual Meeting and Proxy Statement (Form DEF 14A) (Mar. 27, 1997), https://www.sec.gov/Archives/edgar/data/31235/0000031235-97-000006.txt [https://perma.cc/3PMW-FW4M].

2. *Id.*

3. *Id.*

4. *See id.*

5. *See id.*

Kodak shareholders approved the declassification proposal, such proposals are only advisory in nature and the Board refused to adhere to shareholders' advice related to declassification and thus refused to eliminate the classified board.[6] Between 1997 and 2003, Kodak shareholders proposed declassification at least three more times.[7] Each time a majority of shareholders approved the proposal, and each time the Kodak board reiterated its view that declassification was not in the corporation's best interests and thus refused to implement declassification.

In 2005, after intense pressure from shareholders, the Kodak board reversed its stance, recommending that shareholders approve a provision eliminating Kodak's classified board.[8] In its recommendation, the Kodak board stated: "Over the years, our Board has carefully considered the advantages and disadvantages of a classified board, and has repeatedly concluded that a classified board is in the best interests of the Company and its shareholders."[9] The Board further stated: "The Board continues to believe that the election of directors to staggered terms promotes strong corporate governance by providing Board stability . . . ."[10] Nonetheless, the Board announced: "The Board acknowledges, however, the growing sentiment among shareholders in favor of annual elections. More and more investors view classified boards as anachronisms that reduce board accountability to shareholders. The Board recognizes that annual elections are in line with emerging best practices in the area of corporate governance."[11] As a result, the Board proposed declassification.

This Article ponders the following question: Is it possible that actions of boards such as Kodak raise fiduciary concerns? In the last decade, shareholders have actively lobbied corporations to adopt corporate governance mechanisms aimed at enhancing their influence over director elections and corporate affairs.[12] This same period also has witnessed a

6. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 854–55 (2005) (noting that between 1997 and 2003, resolutions to repeal staggered boards passed with majority support four times at Kodak).

7. *See id.*

8. *See* Eastman Kodak Co., *Kodak to Propose Annual Election of Board of Directors*, WHATTHEYTHINK (Mar. 16, 2005), https://whattheythink.com/news/23016-kodak-propose-annual-election-board-directors [https://perma.cc/GNH5-NKD8].

9. Eastman Kodak Co., Notice of 2005 Annual Meeting and Proxy Statement (Form DEF 14A) 17 (Apr. 19, 2005), https://www.sec.gov/Archives/edgar/data/0000031235/0001206774050000627/ed910256.htm [https://perma.cc/2DG9-UA4F].

10. *Id.*

11. *Id.*

12. Shareholders have submitted a record number of shareholder proposals—proposals requesting corporations to adopt a wide range of policies and procedures. Over the last decade, there have been several years where the total number of shareholder proposals filed reached record highs. Even as the overall number of proposals have declined in the last two or three years, shareholder support for such proposals has increased. *See* GIBSON, DUNN & CRUTCHER LLP, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2018 PROXY SEASON 1 (2018), https://

significant rise in director election contests and other activist campaigns.[13] Shareholders' increased activism also has ushered in a new era of shareholder engagement whereby shareholders are increasingly seeking to interact with the corporation outside of the annual meeting and other more traditional communication platforms.[14]

This recent wave of shareholder activism is notable not only because shareholders have successfully managed to enhance their power within the corporation, but also because much of that success has resulted from corporate managers and directors *voluntarily acceding* to shareholder demands. Kodak is a prime example of this voluntary acquiescence. To be sure, increased shareholder activism has led to new federal laws mandating that corporations alter their governance structures in ways aimed at increasing shareholders' power and influence.[15] However, in the wake of intense

---

www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf [https://perma.cc/JS5J-M7FZ]. The years 2008 and 2009 experienced a record high volume of shareholder proposals; 2012 and 2013 also show an increased volume of shareholder proposals. *See* Matteo Tonello, *Proxy Voting Analytics (2008–2012)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 24, 2013), http://corpgov.law.harvard.edu/2013/02/24/proxy-voting-analytics-2008-2012 [https://perma.cc/HS7A-ULH7]; Matteo Tonello, *Proxy Voting Analytics (2009–2013)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 26, 2013), http://corpgov.law.harvard.edu/2013/09/26/proxy-voting-analytics-2009-2013 [https://perma.cc/KAG3-JYTM]; *see also* ERNST & YOUNG LLP, LET'S TALK: GOVERNANCE: 2014 PROXY SEASON REVIEW 6 (2014), http://www.shareholderforum.com/ACCESS/Library/20140730_Ernst&Young.pdf [https://perma.cc/VV7Q-W7TH] ("In recent years, the number of shareholder proposal submissions [have] been at an all-time high . . . ."). The years 2017 and 2018 experienced some decline, but also experienced an increase in shareholder support for proposals. *See* GIBSON, DUNN & CRUTCHER LLP, *supra*, at 1.

13. *See* Josh Black, *Foreword* to ACTIVIST INSIGHT, ACTIVIST INVESTING: AN ANNUAL REVIEW OF TRENDS IN SHAREHOLDER ACTIVISM 3 (2015), http://www.shareholderforum.com/access/Library/20150130_ActivistInsight-SRZ.pdf [https://perma.cc/KJM5-259T] (discussing a record number of activist campaigns in 2014); Warren S. de Wied, *Proxy Contests*, PRAC. L.J., Nov. 2010, at 32, 33. ("Over the past ten years there has been an 87% increase in frequency of proxy contests."); Martin Lipton, *Some Thoughts for Boards of Directors in 2015*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 2, 2014), http://corpgov.law.harvard.edu/2014/12/02/some-thoughts-for-boards-of-directors-in-2015 [https://perma.cc/NPH7-AN99] ("The number of activist attacks has surged from 27 in 2000 to nearly 250 year-to-date in 2014, in addition to numerous undisclosed behind-the-scenes situations."); *see also* Anthony Garcia, *In Proxy Voting, Public Disclosures Often Lead to Private Agreements*, FACTSET (Jan. 5, 2015), https://insight.factset.com/in-proxy-voting-public-disclosures-often-lead-to-private-agreements [https://perma.cc/W3Y7-UZDA] (analyzing FactSet data that shows general rise in proxy fights and a "high watermark" in 2009).

14. Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 831 [hereinafter Fairfax, *Mandating Board-Shareholder Engagement*]; Matteo Tonello, *Global Trends in Board-Shareholder Engagement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 25, 2013), https://corpgov.law.harvard.edu/2013/10/25/global-trends-in-board-shareholder-engagement [https://perma.cc/F9AT-NX43].

15. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010) (mandating say-on-pay votes); *id.* § 957 (extending broker voting prohibition to certain compensation matters). *See generally* Facilitating Shareholder Director Nominations, 76 Fed. Reg. 58,100 (Sept. 20, 2011) (to be codified at 17 C.F.R. pt. 200,

shareholder activism, corporate directors have voluntarily implemented sweeping changes to corporate governance procedures highlighted by the adoption of majority voting for director elections, proxy access—shareholder access to the corporation's proxy statement for nomination of directors, the declassification of boards, and the elimination of supermajority rules for fundamental transactions.[16] Directors also have acceded to shareholder demands to alter the manner in which they govern, including changing their compensation policies and practices,[17] as well as adopting and implementing certain strategic goals preferred by activist shareholders.[18] While there is considerable debate about the benefits of shareholder activism,[19] it is clear that shareholder activism often causes directors to alter their behavior in response (or to appear responsive) to shareholder concerns.

Directors' voluntary acquiescence to shareholder demands is remarkable for several reasons. First, like the Kodak example, director acquiescence is notable because corporate directors have voluntarily agreed to measures that, until very recently, they vehemently opposed.[20] Second, as with Kodak, director acquiescence is notable because in many cases, directors' opposition to shareholder demands has spanned years, if not decades.[21] Third, again like with Kodak, director acquiescence is notable because in prior years, directors

---

232, 240, 249) (mandating proxy access and allowing shareholders to propose proxy access bylaws); Order Approving Proposed Rule Change to Eliminate Broker Discretionary Voting for the Election of Directors, 74 Fed. Reg. 33,293 (July 10, 2009) (amending NYSE Rule 452 to eliminate uninstructed broker voting in uncontested director elections).

16. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW 5 (2014) [hereinafter SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW], http://www.sullcrom.com/siteFiles/Publications/SC_Publication_2014_Proxy_Season_Review.pdf [https://perma.cc/G5TD-P95B] (referring to proposals related to majority voting, declassification, and the elimination of supermajority rules as the three most successful over the past decade); *see also* SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW 6–10 (2017) [hereinafter SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW], https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2017_Proxy_Season_Review.pdf [https://perma.cc/6ERJ-F7N2] (describing the success of the proxy access proposal).

17. *See* TOWERS WATSON, U.S. EXECUTIVE PAY ADVISORY VOTES: 2014 RESULTS FOR THE RUSSELL 3000, at 15 (2015) (discussing changes to compensation practices made in the wake of say on pay).

18. *See* Lipton, *supra* note 13 (discussing new goals and strategies adopted in connection with proxy fights and activist campaigns).

19. *See* LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 36–43 (2011) [hereinafter FAIRFAX, SHAREHOLDER DEMOCRACY] (discussing the shareholder empowerment debate). *See also generally* Bebchuk, *supra* note 6 (highlighting the pros and cons of increasing the power of shareholders); Stephen M. Bainbridge, Response, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006) (commenting on the value of empowering shareholders); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010) (describing a time when the increase of a shareholder's power generated negative results).

20. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 127–39 (explaining historical resistance to proxy access).

21. *See id.*

had steadfastly refused to acquiesce to shareholder demands despite overwhelming shareholder support for certain changes.[22] In this regard, the current wave of director acquiescence reflects a seismic shift in directors' stance and apparent preferences.

This Article focuses on whether a director's decision to accede to shareholder demands could be viewed as a fiduciary duty breach. Considerable ink has been spilled, and legal challenges made, over whether a director's efforts to thwart shareholder activism represents a breach of fiduciary duty.[23] However, the question of whether directors' decision to acquiesce to shareholder demands has any fiduciary implications has been unexplored. This Article maintains that this lack of exploration is a mistake.

This Article corrects this mistake and in so doing advances two critical arguments. First, this Article argues that there clearly are some circumstances pursuant to which directors' acquiescence to shareholder demands can and should be considered as fiduciary duty breaches.[24] In advancing this argument, this Article acknowledges that directors' decisions to acquiesce may be viewed as welcome and appropriate to some. Indeed, elsewhere I have been a strong supporter of shareholder activism and the governance changes it has spurred.[25] I also have recognized that shareholder activism can play a critical role in ensuring greater board and managerial accountability.[26] It is in this context, however, that I advance the thesis cautioning even supporters of shareholder activism to be mindful that some of the director acquiescence spurred by shareholder activism may be fiduciary duty breaches.

Second, and equally as important, this Article argues that there are significant negative repercussions that flow from our collective failure to highlight and examine the fiduciary implications of acquiescence in the

22. *See* Bebchuk, *supra* note 6, at 852–56 (detailing historical resistance to declassification despite overwhelming shareholder support).

23. Shareholders have brought a host of lawsuits challenging directors' actions they believe to be aimed at thwarting or impeding activist campaigns. *See, e.g.*, Third Point LLC v. Ruprecht, No. 9469-VCP, 2014 WL 1922029, at *1 (Del. Ch. May 2, 2014) (challenging board use of a rights plan, or "poison pill," in proxy contest); Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 247 (Del. Ch. 2013) (challenging board use of contractual discretion); Selectica, Inc. v. Versata Enters., Inc., No. 4241-VCN, 2010 WL 703062, at *11 (Del. Ch. Feb. 26, 2010) (challenging board adoption of a poison pill); Gantler v. Stephens, 965 A.2d 695, 699 (Del. 2009) (challenging director action to reject opportunity to sell the company).

24. *See infra* Part III.

25. *See* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1315 (2019) [hereinafter Fairfax, *From Apathy to Activism*]; Fairfax, *Mandating Board-Shareholder Engagement, supra* note 14, at 825–30; Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 91–94 (2008) [hereinafter Fairfax, *Making the Corporation Safe*].

26. *See* Fairfax, *From Apathy to Activism, supra* note 25, at 1330–31; Fairfax, *Mandating Board-Shareholder Engagement, supra* note 14, at 830–32; Fairfax, *Making the Corporation Safe, supra* note 25, at 93.

context of shareholder activism.[27] These include negative repercussions for our normative understanding of the appropriate contours of directors' duties.[28] These also include the need to pay close attention to understanding the appropriate balance between much needed director accountability that could stem from enhanced shareholder power,[29] on the one hand, and on the other hand, the potential for shareholder overreach that could harm the corporation and its stakeholders—both shareholder and non-shareholder.[30] This Article further insists that negative repercussions stem from the very real possibility that very few actors will have the incentive to explore the fiduciary duty issues that animate this Article.[31] Indeed, those upon whom we generally rely to explore and challenge whether there have been breaches of directors' fiduciary duties—namely shareholders—are least likely to do so in the context of directorial acquiescence to shareholder demands. Hence, this Article's exploration is critical because it may be one of the only forums in which this important issue is examined.

On the one hand, the possibility of director fiduciary duty breaches in the context of director acquiescence to shareholder demands appears obvious. Indeed, it is axiomatic "that . . . directors have a fiduciary duty to act in the best interests of the corporation[]."[32] Yet much of the criticism of shareholder activism and empowerment suggests that directors have been pressured to take actions despite their belief that such actions are not in the corporation's best interests.[33] Hence, some critics contend that directors bow

27. *See infra* Part IV.

28. *See infra* Section IV.G.

29. *See infra* Section IV.G.

30. *See infra* Part IV.

31. *See infra* Part IV.

32. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985); *see* MODEL BUS. CORP. ACT § 8.30(a)–(b) (AM. BAR ASS'N 2002); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009); Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984) (noting that boards' exercise of corporate power begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

33. *See* Lipton, *supra* note 13; *see also* Steven A. Rosenblum, *The Shareholder Communications Proxy Rules and Their Practical Effect on Shareholder Activism and Proxy Contests*, *in* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 10-1, 10-4 (Amy L. Goodman, John F. Olson & Lisa A. Fontenot eds., 5th ed. 2013) (noting that "companies [frequently] are bowing to the wishes of . . . activists, or . . . reaching compromise[s]"); Bainbridge, *supra* note 19, at 1756 (noting that because "'managers are risk-averse' . . . managers may . . . give in to blackmail even when . . . proposal[s] ha[ve] little chance of passage"); Bebchuk, *supra* note 6, at 885 (recognizing but rejecting blackmail argument); Ed. Bd., *When Shareholder Activism Goes Too Far*, BLOOMBERG OP. (Apr. 10, 2014, 4:43 PM), http://www.bloombergview.com/articles/2014-04-10/when-shareholder-activism-goes-too-far [https://perma.cc/4EPG-ZV2U] (noting that some "hyperactivists" have "coerce[d] companies into" engaging in actions focused on short term "instant gratification" and that these actions reflect "companies . . . taking the easy path" of giving in rather than explaining their investment strategies to shareholders).

to the demands of shareholders with special interests, even when those interests do not align with the interests of the broader shareholder class.[34] Others imply that directors focus on shareholders with short-term interests, or otherwise focus on short-term goals, despite directors' desire to focus on the corporation's long-term health and sustainability.[35] Those criticisms imply that some directors acquiesce to shareholder demands not because they agree with them, but rather because they feel pressured, coerced, or even blackmailed.[36] Importantly, when opposing the very measures that they have now agreed to implement, directors' primary contention was that such measures were not in the corporation's best interests.[37] Directors' about-face with respect to those measures therefore raises concerns that there may be directors who continue to hold such views, but accede to shareholder demands for other reasons. Indeed, re-reading the Kodak board's statement in support of declassification certainly suggests that factors other than a belief in the appropriateness of their reversed stance may have colored their decision to acquiesce.[38] In light of directors' obligations to act in the corporation's best interests, the notion that directors may be acquiescing to shareholder demands even when they do not believe that those demands are in the corporation's best interests raises fiduciary duty concerns.

Equally axiomatic is that directors owe a fiduciary duty to refrain from actions aimed at furthering their own self-interests or perpetuating themselves in office.[39] Yet there is considerable anecdotal and empirical evidence suggesting that the reason why some directors acquiesce to shareholder demands, despite their best judgment, is to avoid receiving less than a majority of the shareholder vote, avoid being the subject of a high dissent vote, or avoid being the target of increasingly successful proxy fights where dissident

34. *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 575–77 (2006); Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REGUL. 174, 231–32 (2001) [hereinafter Romano, *Less is More*].

35. *See* Bratton & Wachter, *supra* note 19, at 674 n.77; Lipton, *supra* note 13; Lynn Stout, *Shareholders Should Not Always Come First*, FIN. TIMES (Mar. 27, 2005), https://www.ft.com/content/d1d3671a-9eeb-11d9-82f0-00000e2511c8 [perma.cc/3WWQ-LBQF].

36. *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922 (2013) (noting that "[m]ajority voting . . . has swept the field with boards caving in to shareholder demands"); *see also* JAMES MACGREGOR, SHAREHOLDER ACTIVISM ISN'T ALWAYS A GOOD THING: THREE INFLUENTIAL OPINIONS 1 (claiming that shareholders have been allowed to jeopardize corporations); SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 5–6 (suggesting that some corporate changes may be the result of coercion).

37. *See, e.g.*, Eastman Kodak Co., *supra* note 1 (recommending shareholders vote against a proposal to declassify the board of directors).

38. *See* Eastman Kodak Co., *supra* note 9, at 17 (indicating that "[t]he Board continues to believe that the election of directors to staggered terms promotes strong corporate governance").

39. *See* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 953–55 (Del. 1985); Polk v. Good, 507 A.2d 531, 536–37 (Del. 1986); Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964).

shareholders manage to unseat incumbent directors.[40] To be sure, the law recognizes that directors may undertake actions aimed at simultaneously maintaining their board seats and furthering legitimate corporate interests without breaching their fiduciary responsibilities.[41] But the law also recognizes that those actions not only implicate fiduciary duties, but also may warrant enhanced judicial scrutiny.[42] Viewed in this context, the current trend of board acquiescence merits our attention.

Of course, there may be skeptics of the proposition that directorial acquiescence to shareholder demands can or should be characterized as a fiduciary duty breach. Some may argue that it is not at all clear that directors actually believe (or would admit to believing) that their actions in response to shareholder demands are not in the best interests of the corporation, or are otherwise done only to maintain their position. Others may argue that it is not clear that director actions that align with the will of a majority of shareholders can be considered a breach of directors' duties. Indeed, shareholder activism arose as a response to the perception that directors had failed to appropriately consider shareholder concerns and that failure may have led to breaches of directors' duties.[43] From this perspective, directorial acquiescence is precisely what shareholders are seeking. This Article explores and ultimately rejects these and other arguments against treating directorial acquiescence as a fiduciary breach, at least to the extent that such arguments would categorically reject any theory of potential breach in this context.

Part I of this Article examines the current wave of shareholder activism and board responses. Part II highlights the fiduciary duty implications of director acquiescence and advances the argument in favor of viewing some forms of director acquiescence as a fiduciary duty breach. Part II also grapples with the arguments against characterizing director acquiescence to shareholder demands as a fiduciary duty concern or potential breach. Part III discusses the ramifications of understanding director acquiesce as a potential fiduciary duty breach, as well as the need to highlight rather than ignore such breaches.

40. *See generally* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16 (analyzing negative recommendations against directors); Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649 (2009) (analyzing the various ways that proxy advisors make recommendations to institutional investors); Leo E. Strine, Jr., *Making it Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235 (2014) (highlighting the advantages of benefit corporations in forwarding stakeholder interests); Lipton, *supra* note 13 (identifying the prevailing issues which board members should consider in strategizing to achieve company objectives).

41. *See* Gantler v. Stephens, 965 A.2d 695, 711–13 (Del. 2009); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661–63 (Del. Ch. 1988) (noting that even director actions for the primary or sole purpose of thwarting the shareholder vote are not per se void).

42. *See Unocal*, 493 A.2d at 954–55.

43. *See* Bebchuk, *supra* note 6, at 836–43; Bratton & Wachter, *supra* note 19, at 655–56.

While many of directors' decisions to acquiesce to shareholder demands should be viewed as welcome and appropriate, understanding the fiduciary duty implications of director acquiescence is critical to the normative development of our fiduciary duty law in this arena. Shareholder empowerment challenges us to determine the appropriate balance between shareholder power and director discretion. Assessing the import of acquiescence is an important part of understanding that balance. This means that we need to first acknowledge its fiduciary implications.

II. SHAREHOLDER ACTIVISM AND THE AGE OF ACQUIESCENCE

The term shareholder activism refers to a wide variety of shareholder activity, ranging from filing shareholder proposals to waging proxy contests.[44] Changes that result from such activism fall along two spectrums: procedural changes and operational or strategic changes. For ease of illustration, this Article focuses on some of the key governance changes that have emerged as a result of directors' acquiescence to activists' demands.

A. CORPORATE GOVERNANCE CHANGES

In the last decade, we have witnessed a virtual wave of directors acceding to shareholder demands to alter their corporate governance policies and procedures. As a result, corporate governance procedures at public companies have changed dramatically within a relatively short span of time. This section explores those changes.

1. Board Declassification

One critical change has been board declassification.[45] Board declassification refers to the elimination of classified or staggered boards —that is, boards in which only a percentage of directors are elected each year—replaced by boards that are elected annually.[46] In 2004, only 55 percent of S&P 500 companies had declassified boards.[47] In 2014, 93 percent of S&P 500 companies and 96 percent of S&P 100 companies have declassified boards.[48]

---

44. *See generally* David A. Katz & Laura A. McIntosh, *The Mainstreaming of Shareholder Activism in 2013*, N.Y. L.J., Sept. 26, 2013, at 1, http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22861.13.pdf [https://perma.cc/VTU3-EPNV] (describing the increase in shareholder activism, including "corporate governance-related activism" and "strategy-related or economically-motivated activism").

45. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 5 (referring to declassification as one of the most successful shareholder proposals in 2014).

46. *See* Fairfax, *Making the Corporation Safe*, *supra* note 25, at 70.

47. SPENCER STUART, 2014 SPENCER STUART BOARD INDEX 15 (2014), https://www.spencerstuart.com/~/media/PDF%20Files/Research%20and%20Insight%20PDFs/SSBI2014web14Nov2014.pdf [https://perma.cc/MRR4-7Z5N].

48. *Id.*

2. Majority Voting

Another crucial change has been that associated with majority voting in director elections.[49] In 2005, shareholders began advocating in earnest for majority voting to replace the then default rule of plurality voting in director elections.[50] Plurality voting refers to a system whereby directors are elected so long as they receive a plurality, or the most, of the votes cast, without regard to withheld votes or votes cast against.[51] Under a plurality regime, in an uncontested election it would be possible for a director to be elected even if the overwhelming majority of shareholders withheld their vote against her because the plurality regime ensures that such director is elected so long as she receives one vote in her favor.[52] By contrast, majority voting ties director election results to obtaining a majority of the shareholder vote.[53] Directors' response to the majority voting campaign resulted in a virtual sea change in the director election standard. In 2004, one study revealed that approximately one hundred companies had majority vote regimes,[54] while another survey found that fewer than thirty S&P 500 companies had majority

---

49. Another change to public company elections was the elimination of broker uninstructed voting in uncontested elections. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 92–93; Ali C. Akyol, Konrad Raff & Patrick Verwijmeren, *The Elimination of Broker Voting in Director Elections*, 21 FIN. RSCH. LETTERS 34, 34 (2017) (finding no impact of director elections on wealth effects as a result of the changed rule). Although a change supported and encouraged by shareholders, it came about as a result of changes to federal law and not directorial acquiescence. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 92–93. This Section will focus on majority voting and its impact on director behavior. However, it is clear not only that the combination of changes to the electoral process has altered director behavior, but also that such changes impact directors' response to majority voting. Hence, any discussion of such voting cannot be viewed in isolation.

50. *See* Fairfax, *Making the Corporation Safe*, *supra* note 25, at 66.

51. *Id.* at 63–64.

52. *See id.*

53. There are essentially two forms of majority voting regimes. *See id.* at 64–65. In a "true majority voting" regime, director nominees must receive a majority of the shareholder vote to be elected. *See id.* Under a "plurality plus" regime, plurality voting remains the default but when a director fails to receive a majority of the vote, she must tender her resignation and the board has some period of time (frequently up to 90 days) to determine if it will accept the resignation. *See id.* at 65. Perceiving plurality voting as undermining director accountability and shareholders' ability to impact election outcomes, in 2005 shareholders mobilized in support of majority voting by filing a record number of shareholder proposals on the issue. *See id.* at 66; *see also* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 61–70.

54. *See* CLAUDIA H. ALLEN, STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS 10 n.9 (2007), https://papers.ssrn.com/sol3/papers.cfmabstract_id=2475122 [https://perma.cc/T8L9-8L6A] (revealing more than 100 corporations had majority voting regimes before the majority vote campaign began).

voting regimes.[55] Today more than 93 percent of S&P 500 companies had some form of majority vote regime.[56]

3. Supermajority Voting

Corporate directors also have acquiesced to shareholder demands to eliminate supermajority voting. "Supermajority voting refers to [governance] rules . . . requir[ing] that certain fundamental transactions," such as amendments to bylaws and the charter or approval of mergers and acquisitions, must "receive more than a simple majority shareholder vote in order to be approved."[57] The required supermajority vote can range from 55 percent to 80 percent of the shareholder vote.[58] In previous years, many large corporations had adopted supermajority thresholds for their fundamental transactions, especially for charter and bylaw changes.[59] However, in recent years, significant percentages of corporate directors have voluntarily eliminated the practice of requiring supermajority voting. Thus, in 2019, only 38.8 percent of S&P 500 companies required supermajority voting for altering the charter, while only 24.1 percent of such companies required a supermajority vote for changing the bylaws.[60]

---

55. *See* Brooke A. Masters, *Shareholders Flex Muscles Proxy Measures Pushing Corporate Accountability Gain Support*, WASH. POST (June 17, 2006), https://www.washingtonpost.com/archive/business/2006/06/17/shareholders-flex-muscles-span-classbankheadproxy-measures-pushing-corporate-accountability-gain-supportspan/e9c11d2e-7258-4f6b-aab9-29668a7b1d02 [https://perma.cc/VP7T-J4L6].

56. *See Zombie Directors and Board Accountability*, ROBBINS GELLER RUDMAN & DOWD LLP (July 16, 2014), http://www.rgrdlaw.com/news-item-Zombie-Directors-Board-Accountability-071614.html [https://perma.cc/2DBE-HSKN]; *see also* Marc S. Gerber, *US Corporate Governance: Boards of Directors Face Increased Scrutiny*, SKADDEN (Jan. 16, 2014), http://www.skadden.com/insights/us-corporate-governance-boards-directors-face-increased-scrutiny [https://perma.cc/6QGM-EFWA] (finding that as of January 2014, almost 90 percent of S&P companies had adopted a majority voting regime).

57. Fairfax, *From Apathy to Activism*, *supra* note 25, at 1317.

58. *See* Kosmas Papadopoulos, *An Overview of Vote Requirements at U.S. Meetings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2019), https://corpgov.law.harvard.edu/2019/07/06/an-overview-of-vote-requirements-at-u-s-meetings [https://perma.cc/4SKD-GRTP].

59. *See* SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 16, at 11; *see also* Stephen Taub, *Super-Majority Vote Rules Come Under Fire*, COMPLIANCE WK. (May 8, 2006, 7:00 PM), https://www.complianceweek.com/super-majority-vote-rules-come-under-fire/6596.article [https://perma.cc/B673-A7MN] (discussing the governance problems created by super-majority voting requirements); Papadopoulos, *supra* note 58 (explaining how super-majority requirements can create troublesome results).

60. *See* SULLIVAN & CROMWELL LLP, 2019 PROXY SEASON REVIEW: PART 1, at 26 (2019) [hereinafter SULLIVAN & CROMWELL LLP, 2019 PROXY SEASON REVIEW], https://www.sullcrom.com/files/upload/SC-Publication-2019-Proxy-Season-Review-Part-1-Rule-14a-8-Shareholder-Proposals.pdf [https://perma.cc/4AXD-XXPW].

4. Proxy Access

Corporate directors also have voluntarily adopted proxy access. Proxy access refers to the ability of shareholders to place director nominees of their choosing, particularly nominees who may be different from management's choice, on the corporation's proxy statement.[61] Prior to 2015, only 15 companies in the entire United States—significantly less than one percent —had some form of proxy access.[62] Today, 87 percent of S&P 100 companies, and 73 percent of S&P 500 companies had adopted some form of proxy access.[63] Between 2015 and 2018, 90 percent of companies that have received a shareholder proposal to adopt a proxy access rule have done so.[64]

B. *Acquiescence in Context*

The significant level of director acquiescence is remarkable. On the one hand, directors are not required to make the changes demanded of them by shareholders. This fact alone may suffice to highlight the significance of director acquiescence. However, the real significance of such acquiescence lies in the fact that directors had heretofore vehemently resisted shareholder demands to make the very changes that they have now acceded to in unprecedented and record numbers.

1. No Mandate

Directors' decision to adopt these corporate governance changes may be viewed as remarkable simply because directors are under no legal obligation to do so. When shareholders request that directors alter their governance structures, such requests generally are made in the context of non-binding shareholder proposals.[65] Shareholder proposals are recommendations made by shareholders that appear on the corporation's proxy statement to be voted on by other shareholders.[66] These recommendations are nonbinding in nature.[67] Hence, boards are not obligated to adopt them.

---

61. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 127.

62. SIDLEY AUSTIN LLP, SIDLEY CORPORATE GOVERNANCE REPORT: PROXY ACCESS—NOW A MAINSTREAM GOVERNANCE PRACTICE 4 (2018), https://www.sidley.com/-/media/update-pdfs/2018/02/20180201-corporate-governance-report.pdf [https://perma.cc/7HDC-UXUN]; Holly J. Gregory, Rebecca Grapsas & Claire Holland, *The Latest on Proxy Access*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 1, 2019), https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access [https://perma.cc/V2XS-MQSN].

63. *See* SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 16 (2018) [hereinafter SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW], https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf [https://perma.cc/V9TB-B78T]; SULLIVAN & CROMWELL LLP, 2019 PROXY SEASON REVIEW, *supra* note 60, at 27.

64. *See* SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW, *supra* note 63, at 17.

65. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 60.

66. *See id.*

67. *See id.*

This is true even when a majority of shareholders support the shareholder proposals at issue.[68] The fact that shareholders have requested the various governance changes through the shareholder proposal process underscores the fact that directors are under no obligation to enact shareholder requests. Efforts at the federal level to mandate governance mechanisms favored by shareholders have failed. For example, the federal effort to require majority voting for all public companies failed.[69] Moreover, the D.C. Circuit struck down the Securities and Exchange Commission ("SEC") rule mandating proxy access for all public companies.[70] The failure of these federal efforts further underscores the fact that directors have no legal obligation to accede to shareholder demands.

2. The Director Turnaround

Director acquiescence is also remarkable because directors have adopted these changes in an abrupt departure from their prior stance. When shareholders recommend changes through the shareholder proposal process, directors have the ability to make a recommendation regarding whether other shareholders should vote for or against such changes.[71] As the Kodak example suggests, directors almost always recommend a vote against the changes requested by shareholder proposals.[72] Directors advance very cogent arguments regarding such a recommendation, most of which center around directors' professed belief that such changes are not in the corporation's best interests.[73] Notwithstanding directors' negative recommendations, and notwithstanding directors' well-crafted arguments denouncing the changes requested by shareholders, in recent years directors have acquiesced to such changes, often only a few short weeks after proclaiming their opposition to such changes.[74] Directors' acquiescence is therefore remarkable because it often comes on the heels of directors' professed belief in the lack of propriety of the changes being requested.

3. The Director Turnaround in Historical Context

Perhaps most remarkable is that directors have acquiesced to shareholders' requested changes, despite long-standing opposition to many of the changes, and despite circumstances in which shareholder support for these changes has been significant. One visible example of this phenomenon relates to classified boards. Indeed, Kodak's historical stance with respect to

---

68. *See id.*

69. *Id.*

70. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011); Fairfax, *From Apathy to Activism*, *supra* note 25, at 1317–18.

71. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 63.

72. *See id.*

73. *See id.*

74. *See id.*

declassification was by no means unique. Historically, many directors argued that classified boards were in the best interests of the corporation because they promote corporate stability and continuity, as well as an enhanced focus on long-term strategy.[75] Shareholders contended that the classified board structure represented an entrenchment device that makes it more difficult for shareholders to elect a board majority that they prefer.[76] Shareholders also insisted that declassified boards increase board and managerial accountability.[77] Thus, shareholders vigorously advocated for board declassification for decades.[78] Moreover, "[t]he average shareholder support for board declassification has" been well over "[50] percent for . . . [several] decade[s]."[79] In fact, for many years, the average shareholder support for board declassification was as high as 70–80 percent.[80] Hence, shareholders have consistently and overwhelmingly requested that directors declassify the board. Historically, however, directors turned down the request even though an overwhelming majority of shareholders frequently supported the request,[81] even when a sizeable majority of shareholders have made the request for several years in a row.[82] Indeed, directors' refusal to accede to shareholder demands for board declassification was used as the poster-child for shareholder disempowerment and director entrenchment.[83] Against this backdrop, directors' current acquiescence to board declassification is especially remarkable.

Similarly, directors historically and consistently resisted shareholder calls to eliminate supermajority voting thresholds. Shareholders have pushed directors to eliminate supermajority voting based on the rationale that such voting thresholds undermine shareholders' ability to approve critical corporate changes.[84] Shareholder support for altering supermajority votes has averaged between 60–70 percent of the shareholder support for many years.[85] Shareholders approved proposals related to supermajority voting at "almost

75. *See* Bebchuk, *supra* note 6, at 854.

76. *See id.* at 853–54.

77. *See id.*

78. *See* Fairfax, *From Apathy to Activism*, *supra* note 25, at 1316–17; SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW, *supra* note 63, at 21–22.

79. Fairfax, *From Apathy to Activism*, *supra* note 25, at 1316; *see* SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW, *supra* note 63, at 21–22.

80. Fairfax, *From Apathy to Activism*, *supra* note 25, at 1316; *see* SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW, *supra* note 63, at 21.

81. *See* Bebchuk, *supra* note 6, at 854–55.

82. *See id.*

83. *See id.* at 855–56.

84. *See* Papadopoulos, *supra* note 58.

85. *See* SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW, *supra* note 63, at 21. Super majority voting proposals averaged shareholder support of 73 percent in 2018, 74 percent in 2017, and 60 percent in 2016. SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 16, at 11.

every company" in which shareholders have an opportunity to vote on the issue.[86] Previously, boards did not respond to such votes, insisting that supermajority voting was in the corporation's best interests because such voting structures increased corporate stability while protecting minority shareholders.[87] Like declassification, boards' sudden decisions to voluntarily eliminate supermajority thresholds is noteworthy in light of this historical and consistent resistance.

The effort to implement majority voting followed a similar pattern. Directors insisted that plurality voting was in the corporation's best interests because it served to ensure appropriate election outcomes and served as a failsafe against failed elections that could occur if no director received a majority vote.[88] By contrast, shareholders contended that a majority voting regime was vastly superior to plurality voting because majority voting ensured that shareholders' vote would actually impact election outcome, and thus would actually serve as a meaningful form of director accountability.[89] Shareholders began agitating for majority voting in earnest in 2005.[90] Shareholders' advocacy around majority voting caught the attention of federal legislators, and in 2009, Congress proposed a financial reform bill that included a provision that would mandate majority voting for all public companies.[91] However, the significant opposition from corporate officers and directors caused legislators to remove the majority voting provision from the final bill.[92] Nevertheless, in a few short years, large numbers of corporate directors began acquiescing to shareholder calls to adopt majority voting.

Perhaps the most significant turnaround, however, is the one related to proxy access. Shareholders have pushed for proxy access for decades, often referring to it as the "holy grail" of shareholder rights.[93] Shareholders have contended that enabling shareholders to nominate candidates of their choice to the corporation's proxy statement ensures that director elections are not simply a rubber stamp of managerial choices.[94] In shareholders' view, proxy access strengthens shareholders' nomination and election rights while enhancing their ability to hold directors accountable.[95] Directors have repeatedly and vehemently resisted proxy access, insisting that proxy access was not in the best interests of the corporation because it would increase the costs and contentiousness of every corporate election, enhance the power of

---

86. SULLIVAN & CROMWELL LLP, 2019 PROXY SEASON REVIEW, *supra* note 60, at 26.
87. *See* Papadopoulos, *supra* note 58.
88. *See* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 85.
89. *See id.*
90. *See id.* at 89.
91. *See id.* at 92.
92. *See id.*
93. *See id.* at 130.
94. *See id.*
95. *See id.*

special interests shareholders, and undermine corporate performance.[96] Historically, federal law prohibited shareholders from using the shareholder proposal process to implement proxy access.[97] Shareholders' vigorous demands for proxy access prompted the SEC to propose a proxy access rule on five separate occasions.[98] Each time, the SEC's efforts met with intense opposition from corporate directors and the business community.[99] In four of those instances, the opposition caused the SEC to abandon its efforts.[100] The fifth time, in 2010, the SEC managed to pass a proxy access rule, despite the strenuous objection from corporate officers and directors.[101] The rule had two components: One was a rule that mandated proxy access for all public companies and the other was a rule that allowed shareholders to submit proxy access proposals to the corporation's proxy statement for the first time in history.[102] Very soon after the SEC's actions, the Business Roundtable (the nation's leading association of top business executives and directors) brought suit against the SEC to overturn the portion of the SEC rule mandating proxy access.[103] The lawsuit was successful, ensuring the elimination of mandated proxy access.[104] Part of the court's rationale for overturning the proxy access mandate was that boards needed the flexibility to determine if proxy access was in the corporation's best interests.[105] Despite their success in court, directors have now voluntarily agreed to implement proxy access in droves. In light of their historical and strenuous objection to proxy access, directors' acquiescence with respect to proxy access is particularly remarkable.

* * *

As the foregoing Section highlights, directors' willingness to voluntarily adopt the many different governance changes advocated by shareholders is remarkable. These changes do not reflect new procedures and policies. Instead, they relate to long-standing requests by shareholders. More importantly, they reflect requests related to mechanisms that corporate

---

96. *See id.* at 130–31.

97. *See id.* at 128.

98. *See id.* at 131.

99. *See id.*

100. *See id.*

101. *See generally* 17 C.F.R. § 240.14a-8 (2020) ("address[ing] when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders").

102. *See id.*; *see also* Fairfax, *From Apathy to Activism*, *supra* note 25, at 1317–18 (explaining the two components of the SEC's proxy access rules).

103. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011); Fairfax, *From Apathy to Activism*, *supra* note 25, at 1318.

104. *See* Fairfax, *From Apathy to Activism*, *supra* note 25, at 1318.

105. *See Bus. Roundtable*, 647 F.3d at 1146, 1150.

directors have repeatedly rejected based on the claim that such mechanisms were not in the corporation's best interests.

Viewed from this perspective, directors' acquiescence begs an important question: Why have directors agreed to implement changes that they have heretofore refused? There are several potential narratives around the answer to this question ranges. On one side is the possibility that directors have finally been convinced of the wisdom of the many procedures advocated by shareholders. On the other side is the contention that directors have been pressured, threatened, and even blackmailed into making changes that they do not believe are in the corporation's best interests.[106] If the former is accurate, then directors' acquiescence is a positive sign and raises no fiduciary duty concerns. If the latter is accurate, it raises the possibility that directors have been engaging in breaches of their fiduciary duties.

III. Directorial Acquiescence Through the Lens of Fiduciary Duty

At the most fundamental level, it is undeniable that directors' decision to acquiesce has fiduciary duty implications. This is because directors' fiduciary duty governs all the decisions directors make on behalf of the corporation.[107] Hence, it should be clear that whether directors decide to resist or comply with shareholder demands, their decision must be guided by their fiduciary duty.

There is also no question that directors' decision to resist shareholders' efforts could trigger a breach of directors' duties. Certainly, shareholders have brought actions in many contexts challenging directors' decisions when they thwart shareholder efforts.[108] While there may be dispute about the outcome, no one appears to question that under the appropriate circumstances, directors could be liable for breaching their duty when they fail to comply with shareholders' demands or otherwise take affirmative steps to prevent shareholders from achieving their goals.[109]

What appears to be the subject of some question, however, is whether directors' decision to *comply* with shareholder demands could ever be appropriately viewed as a fiduciary duty breach. This Part answers that question in the affirmative, and then considers and refutes the arguments of those who would resist such a characterization.

A. Acquiescence as Breach?

Directors have a duty of care and a duty of loyalty. This Article asserts that director acquiescence may run afoul of both duties.

106. *See supra* note 33 and accompanying text.

107. *See supra* note 32 and accompanying text.

108. *See* Rock, *supra* note 36, at 1939.

109. *See id.*

1. Duty of Care

The duty of care has been characterized as the duty to act in a manner that directors reasonably believe to be in the best interests of the corporation and its shareholders.[110] Many critics of shareholder activism, including some directors and their advocates, have suggested that increased shareholder power has caused directors to accede to shareholder demands, even when directors do not believe that those demands are in the best interests of the corporation.[111] For example, some contend that directors have acceded to the demands of shareholders with special interests even when those interests are not consistent with those of the corporation or of the broader shareholder class.[112] Others have suggested that directors have been compelled to focus on shareholders with short-term interests, or otherwise have been forced to focus on short-term goals, even when directors believe it would be more consistent with the corporation's best interests to focus on the corporation's long-term health and sustainability.[113] If these suggestions are accurate, they reflect an acknowledgment that directors may be breaching their fiduciary duty of care.

Importantly, duty of care violations rest on a director's *belief* in the propriety of her decision, rather than the outcome of any decision made by the director. Duty of care breaches are analyzed under the business judgment rule, which focuses on directors' reasonable belief and gives directors wide latitude to make decisions so long as directors have a reasonable belief in the appropriateness of those decisions.[114] Relying on the business judgment rule, courts have repeatedly refused to find a duty of care breach based on the outcome or impact of a director's decision.[115] Instead, the crux of a duty of

---

110. *See* MODEL BUS. CORP. ACT § 8.30(a)–(b) (AM. BAR ASS'N 2002); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009); Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985).

111. *See* Rosenblum, *supra* note 33, at 10-4 (noting that companies frequently are "bowing to the wishes" of activists); Ed. Bd., *supra* note 33 (noting that some shareholders have coerced companies into engaging in actions focused on short term "instant gratification").

112. *See* Anabtawi, *supra* note 34, at 575–77; Romano, *Less is More*, *supra* note 34, at 231–32.

113. *See* Bratton & Wachter, *supra* note 19, at 674 n.77; Stout, *supra* note 35; Lipton, *supra* note 13.

114. *See Aronson*, 473 A.2d at 811–12.

115. *See* Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1065–66 (2006) (noting that outside director liability is almost non-existent because there had only been one case since 1980 that had held an outside director liable); Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 982 (1994) (confirming study by Joseph W. Bishop); Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591, 591 nn.1–2 (1983) (finding only seven cases in which directors have been held liable for "fraud or self-dealing"); Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the*

care breach lies in the extent to which a director has a reasonable belief that her actions would benefit the corporation.[116] So long as such a belief exists, the business judgment rule mandates that courts do not find a duty of care breach, and instead ensures that courts sanction the director's decision even if others—including courts and other actors—disagree with the decision. By contrast, if directors make decisions without a reasonable belief in their propriety, then their decisions are not protected by the business judgment rule and hence reflect violations of the duty of care.[117] This focus on directors' subjective mind-frame is designed to protect directors from inappropriate second-guessing by courts and other parties.[118] The focus is also an acknowledgement that business decisions are highly subjective and that often there is no one size fits all decision that is appropriate for every corporation in every context.[119] Moreover, it is an acknowledgement that directors do not have to follow the practices of other directors and corporations in order to comply with their duty of care.[120] Indeed, courts have made clear that there is a difference between corporate best practices—i.e., the practices followed by most corporations and considered good governance—and the measurement of whether a director has breached her duty.[121] In the courts' view, best practices cannot be used to measure whether a director has breached her duty.[122] Instead, the core inquiry centers on whether directors have a good faith belief in the appropriateness of their actions. Such belief insulates board decision-making, while the failure to have such a belief could amount to a violation of the director's duty of care.

The duty of care's focus on directors' subjective belief makes it clear that director acquiescence to shareholder demands could constitute a breach of that duty. Compliance with the duty of care demands that directors take actions that they reasonably believe to be in the corporation's best interests. If it is true that directors have acceded to shareholder demands even when they do not actually believe that the policies associated with those demands are in the best interests of the corporation, then it is entirely possible that directors have breached their duty of care.

Importantly, this breach occurs irrespective of our evaluation of the outcome of the decision. The duty of care doctrine informs us that directors

---

Indemnification of Corporate Directors and Officers, 77 YALE L.J. 1078, 1099 (1968) (finding only four cases).

116. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 787–89 (Del. 1981).

117. *See id.*

118. *See Aronson*, 473 A.2d at 812; Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985).

119. *See Aronson*, 473 A.2d at 812; *Unocal*, 493 A.2d at 954.

120. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 56–57 (Del. 2006); Shlensky v. Wrigley, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968).

121. *See In re Walt Disney*, 906 A.2d at 56–57.

122. *See id.*

may have breached their duty even if we agree with their ultimate decision. The duty of care doctrine also informs us that directors may have breached their duty even if directors have followed the crowd or the wave of other directors and corporations also implementing governance changes.[123] Moreover, the duty of care doctrine informs us that directors may have breached their duty even if they have adopted policies that are considered best practices.[124] In other words, it does not matter that shareholders and stakeholders alike may be satisfied with the ultimate decision made by directors—i.e., the implementation of majority voting or proxy access. It also does not matter that the decision may be one adopted by other corporations or otherwise deemed to be a corporate best practice.[125] This is because compliance with the duty of care does not focus on outcome and does not turn on the wishes or dictates of other corporate actors. Instead, in order for a director's decision to be protected, and thus not run afoul of the duty of care, it must be made with a reasonable belief by the director that the decision is in the corporation's best interests. From this perspective, even if you agree with the directors' decisions or otherwise believe the decisions to be consistent with best practice, it remains possible that directors' acquiescence to shareholder demands is a breach so long as directors' acquiescence does not result from a belief that the actions being taken were in the corporation's best interests.

Viewed through this lens, it is clear that board action in this area raises fiduciary considerations. Any action by directors must be guided by their fiduciary duty, and thus acquiescence certainly begs the question of how we should understand those actions in light of their fiduciary obligations. Boards have been adamant for several years that declassification was not in the corporation's best interests. Then too, even as some boards recommend declassification, they continued to profess a belief that classified boards "promote[] strong corporate governance."[126] In this regard, it was not at all clear that board decisions to embrace declassification was based on a belief that such declassification was in the corporation's best interest, thus raising fiduciary concerns.

2. Duty of Loyalty

The duty of loyalty focuses on directors' actions in the context of conflicts of interests, and requires that directors' actions are not aimed at promoting their own self-interests over the interests of the corporation and its

---

123. *See Shlensky*, 237 N.E. at 781; *see also In re Walt Disney*, 906 A.2d at 57–60 (noting that directors' actions were "far less" than best practices and left "much to be desired" in terms of best practices, but nonetheless did not constitute a breach of due care).

124. *See In re Walt Disney*, 906 A.2d at 64.

125. *See id.*

126. *See* Eastman Kodak Co., *supra* note 9, at 16; *see supra* text accompanying note 9.

shareholders.[127] The duty of loyalty has been interpreted to include the duty to refrain from actions aimed primarily or exclusively at entrenchment or maintaining a board seat.[128] The Delaware Court of Chancery has held that the duty of loyalty could be unintentionally breached when directors take an action in good faith, but with the purpose of entrenchment.[129]

Critics of shareholder activism have suggested that directors have made concessions to shareholders because those directors fear losing their board seats.[130] Evidence appears to confirm that directors have adopted shareholder proposals in order to ensure that they receive a majority of the vote or that they will not receive a high percentage of dissenting votes.[131] Evidence also indicates that directors agree to shareholder demands in order to avoid being the target of proxy contests.[132] To the extent that entrenchment represents an action taken for the purpose of maintaining one's board seat, this type of acquiescence may be viewed as a form of entrenchment that could trigger duty of loyalty concerns. This is particularly true if entrenchment can occur unintentionally and even when directors may believe that they are acting in good faith.

The foregoing discussion related to entrenchment similarly suggests that board action in this context may raise fiduciary considerations. Again, fiduciary duty must guide all director decisions, including, if not especially, if those decisions involve a potential conflict of interests and thus may implicate the duty of loyalty. To be sure, there is no specific evidence that any particular board member has acted in order to preserve their board seats. Nonetheless, critics of shareholder power contend that one explanation for the abrupt turnaround in director response to shareholder demands has been their concern for protecting their board seat.[133] In this regard, if board members make decision based on concern for their board seat, that concern could prove problematic from a fiduciary perspective. Importantly, because director actions must be guided by fiduciary duty, the fiduciary concerns exist even if we conclude that no fiduciary breach occurred.

---

127. *See* Marciano v. Nakash, 535 A.2d 400, 404–05 (Del. 1987).

128. *See* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985) (explaining that directors cannot "act[] out of a sole or primary purpose to entrench themselves in office"); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

129. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 663 (Del. Ch. 1988); Lerman v. Diagnostic Data, Inc., 421 A.2d 906, 914 (Del. Ch. 1980); AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 114 (Del. Ch. 1986).

130. *See* Rosenblum, *supra* note 33, at 10-53 to 10-54 (noting that companies are willing to make concessions in order to avoid a shareholder proposal or proxy fight).

131. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 6; Choi et al., s*upra* note 40, at 664; Strine, *supra* note 40, at 250–51; Lipton, *supra* note 13.

132. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 6; Choi et al., s*upra* note 40, at 657, 660–61; Strine, *supra* note 40, at 239–41; Lipton, *supra* note 13.

133. *See supra* text accompanying note 40.

3. Duty of Good Faith

The doctrine of good faith is murky at best. It nevertheless may have application to director acquiescence to shareholder demands. On the one hand, courts have been clear that good faith is not a separate duty, but rather a subset of the duty of loyalty.[134] On the other hand, the obligation of good faith appears to focus on a director's motive or mental state.[135] As one commentator noted, "good faith is becoming solidified as a concept turning largely on director motivations or the mental state of directors."[136] To the extent good faith requires that directors take actions that they subjectively believe to be in the corporation's best interests, then acquiescence also raises the possibility that directors may breach that duty, albeit indirectly.

The connection between good faith and entrenchment has been pointed out by others. Professor Mark Lowenstein has argued that some entrenchment cases should be understood as implicating the duty of good faith. For example, Lowenstein argues that the seminal entrenchment case of *Schnell v. Chris-Craft Industries*[137] should be understood as one that implicates a violation of the duty of good faith.[138] In *Schnell*, directors changed the annual meeting date in order to reduce the time that dissident shareholders would have to solicit shareholders in a proxy contest.[139] The Delaware Supreme Court found that the directors' conduct violated their fiduciary duty because their actions were motivated by the desire to maintain themselves in office rather than the best interests of the corporation.[140] Professor Lowenstein argues that because the breach turned on the directors' motivations, the case is better understood as a breach of the duty of good faith.[141] As Lowenstein asserts, acting in the

---

134. *See* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (noting "that a failure to act in good faith is not conduct that results, *ipso facto*, in the direct imposition of fiduciary liability," but rather, "'is a subsidiary element' . . . 'of the fundamental duty of loyalty'" (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

135. *See* Mark J. Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433, 442–43 (2009) (noting that the concepts of "'subjective intent' [and] 'conscious disregard' forces one to examine the director's motivation"); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006) (defining bad faith as "conduct motivated by subjective bad intent" and "a conscious disregard for one's responsibilities"); *see also Stone*, 911 A.2d at 370 (noting that a finding of a breach of good faith requires that directors "demonstrat[e] a conscious disregard for their responsibilities"); Citron v. Fairchild Camera & Instrument Corp., No. 6085, 1988 WL 53322, at *15 (Del. Ch. May 19, 1988) (noting "that [the] question [of good faith] calls for an *ad hoc* determination of the board's motives").

136. *See* Loewenstein, *supra* note 135, at 462.

137. *See generally* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971) (finding that the management sought to use the corporate machinery and the Delaware law to maintain its position in office, thus obstructing the rights of stockholders).

138. *See* Loewenstein, *supra* note 135, at 448.

139. *See Schnell*, 285 A.2d at 438–39.

140. *See id.* at 439.

141. *See* Loewenstein, *supra* note 135, at 448 (noting that the doctrine of good faith "fits rather nicely" because it focuses on director motivation).

best interests of the corporation would require directors "to put aside all personal interests," while actions aimed at perpetuating themselves in office would suggest that personal interests informed the decision and hence the actions should be condemned as a violation of the duty of good faith.[142] If we adopt this understanding of good faith, it supports the possibility that some forms of acquiescence—where motivated by the desire to remain in office —could translate into a breach of the duty of good faith. In other words, if directors' actions were motivated by a desire to stay in office rather than what they believed to be in the corporation's best interest, their actions could be viewed as problematic from a fiduciary perspective.

* * *

If we take the rhetoric surrounding director acquiescence to shareholder activism at face value, it suggests that there may be some circumstances under which directors' acquiescence can be characterized as breaches of their fiduciary duty. This encompasses circumstances in which directors are complying with shareholder demands, even when they do not consider those demands to be in the corporation's best interests.[143] It also encompasses situations when directors' acquiescence is motivated by a desire to remain on the board.[144] Viewed through this lens, the case for breach appears relatively straight-forward.

B. The Case Against Breach

One can imagine several objections to the contention that directors' actions of acquiescing to shareholder demands represent or could represent a breach of their fiduciary duties. This Section evaluates some of those objections.

1. Acquiescence as Change of Heart?

Some may contend that it is inappropriate to characterize director acquiescence as a fiduciary duty breach because of the likelihood that directors have legitimately changed their minds about the propriety of the governance changes that they have agreed to implement. To be sure, one of the core purposes of shareholder activism and engagement is to encourage directors to understand the benefits of the many corporate governance proposals that they have previously rejected.[145] In this regard, director

142. *See id.*

143. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 5 (noting that boards fiduciary duty does not require that they abandon or water down antitakeover protections).

144. *See infra* Section III.B.5.

145. *See generally supra* Section II.A (discussing four general changes to corporate governance).

acquiescence can be viewed as a successful byproduct of increased shareholder activism. From this perspective, it would be inappropriate to characterize director acquiescence as a fiduciary duty breach because such acquiescence does not reflect a disbelief in the propriety of shareholder demands, but instead reflects a legitimate shift in director sentiments pursuant to which directors have now become convinced that the changes sought by shareholders are in fact beneficial to the corporation.

On the one hand, there is significant evidence to support this change of heart narrative. In fact, elsewhere I have written about the shift in corporate norms pursuant to which directors now appear to have embraced the belief that many of the governance features they previously rejected are both appropriate and integral features of a well-functioning corporation.[146] Perhaps most significantly, there is a significant amount of director rhetoric reinforcing this changed belief narrative because when directors acquiesce, they do so by lauding the benefits of their recently enacted governance changes to the corporation and its shareholders.[147] Indeed, federal disclosure documents are replete with statements in which directors stridently proclaim that particular governance features—many of which they have previously rejected, such as majority voting or proxy access—are "in the best interests of the corporation and its stockholders."[148]

On the other hand, the notion that all directors have suddenly had a change of heart appears over-inclusive. Indeed, this notion does not account for the fact that there is also evidence indicating that at least some directors feel pressured or otherwise adopt changes that they do not believe are in the corporation's best interests.[149] Thus, some have insisted that because directors and officers are risk averse, they may be susceptible to blackmail by shareholders who increasingly have greater power and influence in the corporation.[150] Others contend that directors may be "taking the easy path" of giving into shareholder demands rather than having to explain their strategies and beliefs to shareholders.[151] Still, others insist that corporate directors have been pressured into adopting policies and practices that focus on the short-term in an effort to appease activist shareholders and protect their board seats.[152] Thus, while the change of heart narrative may negate any contention that all instances of acquiescence should be construed as fiduciary duty breaches, it

146. *See* Fairfax, *From Apathy to Activism*, *supra* note 25, at 1327–28.

147. *See id.* at 1329–33.

148. *See id.*

149. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 6 (suggesting directors may feel coerced into making corporate changes).

150. *See* Bainbridge, *supra* note 19, at 1755–56.

151. *See* Ed. Bd., *supra* note 33.

152. *See* Stout, *supra* note 35; *see also* Anabtawi, *supra* note 34, at 577 (discussing corporate managers efforts to satisfy increasingly demanding shareholders); Romano, *Less is More*, *supra* note 34, at 231–32 (discussing individual shareholder activism).

likely cannot be used to completely negate the possibility of fiduciary duty breaches by some directors.

In fact, both critics and proponents of shareholder activism appear skeptical of the change of heart narrative and instead have essentially acknowledged the potential for such breaches. Professor Lucian Bebchuk, an ardent supporter of shareholder activism and empowerment, has recognized that shareholder activism is likely to have an indirect impact on director behavior, causing directors to take actions in order to avoid the risk of losing their board seats.[153] While he argues that such actions should be deemed appropriate because they reflect the will of a majority of shareholders,[154] his claims leave open the possibility that directors may be influenced to act even when they do not believe their actions are in the best interests of the corporation.[155] Professor Stephen Bainbridge, a strong supporter of director primacy and critic of shareholder empowerment, similarly notes that directors and managers are risk averse, and thus there is every reason to suspect that shareholders could pressure directors to engage in actions that are not beneficial to the corporation.[156]

Leo Strine, the former Chief Justice of the Delaware Supreme Court, has acknowledged that the most plausible explanation for directors' acquiescence to shareholder demands is one that recognizes that directors are feeling pressured to accede to those demands, even when they do not believe that they are in the corporation's best interests.[157]

> [T]he notion that independent directors are prepared to stand on principle, rather than compromise it—even if that means a loss of office—has not been borne out by experience. Within less than a decade, independent directors have either done a 180° in principle on the utility of a classified board or have decided that they would rather abandon a staggered board than face withhold campaigns or proxy contests for opposing stockholder demands to get rid of that board structure. Likewise, when faced with withhold campaigns or proxy contests or activist campaigns, the typical board reaction is to compromise.[158]

As Strine suggests, it strains credulity that all of the directors who acquiesced to shareholder demands simply changed their minds. Take board declassification: Empirical evidence reveals that corporate directors strenuously

153. *See* Bebchuk, *supra* note 6, at 878 (noting that directors and managers "prefer not to lose votes").

154. *See id.* at 885.

155. *See* Bainbridge, *supra* note 19, at 1756; *see also* FAIRFAX, SHAREHOLDER DEMOCRACY, *supra* note 19, at 102.

156. *See* Bainbridge, *supra* note 19, at 1756.

157. *See* Strine, *supra* note 40, at 240.

158. *Id.* at 239–40 (citations omitted).

and repeatedly resisted shareholder efforts to declassify the board.[159] Such directors refused to implement declassification even when a sizeable majority of shareholders approved proposals for declassification, and even when those proposals passed for several consecutive years in a row.[160] In resisting implementation of such proposals, directors advanced a host of reasons why they believed declassification was not in the corporation's best interests.[161] Directors have now done an about-face. Hence, the same corporations that vehemently opposed declassification have now acquiesced. It is difficult to imagine that this acquiescence stems solely from a directorial change of heart, especially when such directors and their advocates continue to bemoan the loss of classified boards and other changes they have made in the wake of shareholder demands.[162]

Viewed in this light, the only logical conclusion is that some directors have not had a change of heart. Instead, not only are some directors taking actions that they do not believe are in the corporation's best interests, but also some directors are doing so out of a fear of losing their board seats. This raises the possibility that there are some instances of director acquiescence that could be characterized as breaches of the fiduciary duty of care, breaches of the duty of loyalty, or both.

2. Rhetoric or Reality?

To the extent that some directors and their advocates have made public and private statements indicating that directors have acquiesced to shareholders or otherwise have taken actions based on shareholder pressure that they do not believe to be in the corporation's best interest, how should we construe those statements? Some may insist that those statements should be viewed as mere rhetoric and thus not a reflection of directors' true beliefs. Consistent with this insistence, one can refute any fiduciary duty concerns simply by arguing that we should not rely on directors' statements as evidence that they do not believe in the propriety of their actions.

Characterizing directors' statements as "mere rhetoric" likely appeals to both proponents and critics of shareholder activism. Proponents of shareholder activism would likely contend that any notion that directors are being compelled to engage in actions incompatible with their beliefs is mere

159. *See* Bebchuk, *supra* note 6, at 854–55.

160. *See id.*

161. *See, e.g.*, INSTITUTIONAL S'HOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINE UPDATES: 2015 BENCHMARK POLICY RECOMMENDATIONS 3–4 (2014) [hereinafter ISS PROXY REPORT], https://www.issgovernance.com/file/policy/2015USPolicyUpdates.pdf [https://perma.cc/V8CN-UKJP]; *see also* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 5–6 (noting that many companies that resist changes to their governance structure believe that provisions such as classified boards and supermajority requirements benefit corporations by encouraging continuity and stability).

162. *See* Lipton, *supra* note 13.

opportunistic rhetoric aimed at discrediting the shareholder empowerment effort. While critics of shareholder activism certainly imply that directors do not believe in the appropriateness of the actions they have taken in response to shareholder demands, such critics fall short of condemning directors or otherwise describing directors' actions as problematic.[163] Such reluctance is no doubt premised on the supposition that directors are acting in good faith as they seek to appropriately respond to the significant pressure they face from shareholder activists and their supporters.[164] Such reluctance underscores the fact that critics of shareholder activism would be loath to characterize directors' statements as reflections of fiduciary duty breaches. Thus, it is likely that both critics and proponents of shareholder activism would embrace the notion that directors' statements are inconsequential rhetoric and thus resist the implication that those statements should be viewed as evidence of a fiduciary duty breach.

However, this Article insists that the rhetoric should be viewed as a reflection of at least some directors' reality. In so doing, this Article contends that directors and their advocates cannot have it both ways. It cannot be the case that we are expected to credit public statements made by directors and their advocates when those statements profess directors' beliefs that particular actions are in the corporation's best interests, but we are expected to discredit public statements when they proclaim that directors do not believe that particular actions are in the corporation's best interests. Instead, to the extent we are expected to believe that directors' statements have merit, then we must credit all of their statements, including those indicating that some directors are taking actions that they do not believe to be in the corporation's best interests. While viewing the rhetoric as a reflection of some directors' reality may make both sides of the debate related to shareholder empowerment uncomfortable, it does not make it "mere rhetoric," nor does it undermine the potential fiduciary duty ramifications.

3. Fiduciary Duty as Shareholder Will

Some may question this Article's thesis based on the contention that directors cannot breach their fiduciary duty, so long as directors act in a manner that is consistent with the will of the shareholders. Certainly shareholder activists and their supporters strongly contend that directorial acquiescence is consistent with the directors' duty because directors have an obligation to consider the interests of shareholders, particularly the interests of the majority of shareholders.[165] Professor Bebchuk suggests that directors' actions are consistent with their fiduciary responsibilities when they are

---

163. *See* Strine, *supra* note 40, at 239–40.

164. *See id.*

165. *See* Bebchuk, *supra* note 6, at 855–56.

consistent with shareholder preferences.[166] There also is at least some judicial support for the proposition that directors should be viewed as the agents of shareholders.[167] There also exists support for the contention that directors comply with their fiduciary duty when they act in accordance with shareholder preferences.[168] The fact that we shield potentially problematic director action from breach of duty claims when those actions are approved by a majority or supermajority of shareholders further buttresses the notion that directors cannot be deemed to have breached their fiduciary duty when they comply with shareholder preferences.[169] Viewed in this light, because they reflect the will of shareholders, it would essentially be impossible for directors' actions to be characterized as a fiduciary duty breach.

To be sure, even if this notion of director duty is accurate, it is over-inclusive as applied to the current wave of director acquiescence for at least two reasons. First, it is not entirely clear if director actions actually reflect shareholder preferences. The presence and potential influence of proxy advisory firms, such as Institutional Shareholder Services ("ISS"), clouds the issue about shareholder preferences. Among other things, proxy advisory firms make recommendations about how shareholders should vote on certain matters.[170] The available evidence reveals that such firms influence directors' actions, and hence directors' decisions to acquiesce.[171] This evidence is controversial because questions have been raised about the extent to which the recommendations from such firms reflect shareholder preferences.[172] To be sure, such firms have indicated that they reach out to shareholders prior to making voting recommendations, and thus that their recommendations reflect shareholder preferences.[173] However, there is considerable concern

166. *See id.* at 837.

167. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 663 (Del. Ch. 1988) ("The theory of our corporation law confers power upon directors as the agents of the shareholders . . . .").

168. *See* Rock, *supra* note 36, at 1910 ("[M]anagers and directors today largely 'think like shareholders.'").

169. *See* Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009); ARTHUR FLEISCHER, JR. & ALEXANDER R. SUSSMAN, DIRECTORS' FIDUCIARY DUTIES IN TAKEOVERS AND MERGERS 16 (2004) (noting shareholder approval of a proposed merger or other transaction operates to "shield the board from most breach of fiduciary duty claims").

170. *See generally* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16 (describing services performed by proxy advisory firms).

171. *See id.* at 21–26 (describing director response to negative recommendations from ISS and other proxy advisory firms, and describing directors outreach efforts to proxy advisory firms); *see also* Choi et al., *supra* note 40, at 657 (noting that ISS has influenced directors' decisions in certain proxy contests).

172. *See* Choi et al., *supra* note 40, at 657.

173. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 28 (noting shareholder outreach efforts upon which recommendations were based); Choi et al., *supra* note 40, at 696–97 (finding that "advisor recommendations—at least with respect to uncontested director elections—appear to be based on the factors that should matter to investors," but raising concerns about the heterogeneity of proxy advisors and the factors they

about the extent to which this indication is accurate.[174] The concern about whether and to what extent proxy advisory firm recommendations reflect shareholder preferences certainly calls into question the notion that director acquiescence is appropriate because it raises doubts about whether that acquiescence is a valid reflection of shareholder preferences.

Second, it is not true that all of the actions to which directors acquiesce reflect the preferences of a majority of shareholders. Indeed, some directors act in anticipation of a shareholder vote,[175] and hence do not necessarily know that those actions would be demanded by a majority of the shareholder base. Other actions are taken in response to agitation involving less than a majority of shareholders.[176] Still other actions are taken as a result of behind the scenes negotiation with shareholders who hold less than a majority of the shares.[177] Indeed, critics' concern regarding special interests shareholders reflects the concern that shareholders with only a minority interest in the corporation will nevertheless influence directors' conduct.[178] This concern indicates that directors may acquiesce even when it is not clear that such acquiescence reflects the will of the majority of shareholders. Hence, even if one were to concede that directors do not breach their fiduciary duty when they comply with the demands of a majority of the shareholders, this concession would not shield every act of directorial acquiescence because not every act can be characterized as a reflection of majority shareholder preferences.

More fundamentally, however, the notion that directors' acquiescence cannot be viewed as a fiduciary duty breach so long as they conform to the preferences of a majority of shareholders is neither descriptively accurate nor normatively preferable. From a descriptive point of view, such a conception of fiduciary duty is simply not an accurate reflection of current fiduciary duty law. Of course, directors have a duty to the corporation and its shareholders. However, case law is clear that such a duty does not require directors to accede to the demands of shareholders. Instead, directors can take actions to protect the corporate enterprise against shareholders, including a majority of

---

consider, and noting that those concerns could mean that investors are following recommendations that include factors that they would not consider relevant).

174. *See* Tamara C. Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control*, 14 STAN. J.L. BUS. & FIN. 384, 427–29 (2009); Choi et al., *supra* note 40, at 650–60.

175. *See supra* notes 59–60.

176. *See supra* notes 64–68. Importantly, the recognition that directors may take action in response to signals from less than a majority of shareholders means that directors may take actions that are not beneficial to all shareholders because shareholders have diverse interests. *See* Anabtawi, *supra* note 34, at 564; K.A.D. Camara, *Classifying Institutional Investors*, 30 J. CORP. L. 219, 229–42 (2005); Stout, *supra* note 35. In this regard, even if it is appropriate for directors to "think like shareholders," when directors act in response to demands from less than a majority of shareholders, one must consider how directors should ascertain which shareholders thoughts are most appropriate to reflect.

177. *See* SULLIVAN & CROMWELL LLP, 2014 PROXY SEASON REVIEW, *supra* note 16, at 9.

178. *See supra* text accompanying notes 34, 96.

shareholders.[179] Indeed, courts have indicated that a director's duties may require her to act against the interests of shareholders.[180] Then too, directors can consider and even further the interests of other constituents over those of a majority of shareholders.[181] Perhaps most importantly, courts have consistently maintained that the mere fact that a majority of shareholders may condone a director's action is insufficient to demonstrate that a director's actions complied with her fiduciary duty.[182] In other words, it is simply not the law that directors comply with their fiduciary duty by complying with majority shareholder preferences. From this perspective, the concept that directors cannot breach their fiduciary duty so long as they comply with shareholder preferences is simply not consistent with current case law.

Importantly, this case law has not changed even in the context of shareholder activism. Indeed, commentators have recognized that the law does not equate compliance with fiduciary duty with compliance with shareholder preferences. In a memo to its director clients related to directors' duties amidst increased shareholder activism, lawyers at Skadden insist "directors need not and should not merely passively adopt an activist's agenda based only on perceived shareholder sentiment at the time."[183] Or to put it more bluntly, directors' fiduciary duty demands that directors not "simply respond in a Pavlovian manner to perceived shareholder sentiment at a moment in time."[184] In 2010, the Delaware Supreme Court held that the board has the discretion to refuse to remove a director from his position, even when a majority of shareholders favored such removal.[185] In that case, the court stated that directors can make an "informed business judgment that the best interests of the corporation require" them to override the determination of a majority of the shareholders.[186] The court contended that directors' judgment would be respected, so long as it was motivated by a sincere belief

179. *See* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985).

180. *See* Unisuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317, at *8 (Del Ch. Dec. 20, 2005); *see also* Paula J. Dalley, *Shareholder (and Director) Fiduciary Duties and Shareholder Activism*, 8 HOUS. BUS. & TAX L.J. 301, 312–13 (2008) ("If the shareholders were the board's principal, then the board would be obligated to obey the shareholders' wishes without considering other interests and without exercising independent judgment. This is a result that many people would prefer, but it is clearly not the law." (footnote omitted)).

181. *See Unocal*, 493 A.2d at 955 (noting that one of the threats boards can consider when thwarting the actions of shareholders is the impact of those actions on constituents other than shareholders).

182. *See* Gantler v. Stephens, 965 A.2d 695, 713 (Del. 2009).

183. Stephen F. Arcano & Richard J. Grossman, *Navigating Today's Shareholder Activism Landscape: What Companies Should Consider*, SKADDEN (June 25, 2014), https://www.skadden.com/insights/publications/2014/06/navigating-todays-shareholder-activism-landscape-w [https://perma.cc/47GF-JF6C].

184. *Id.*

185. *See* City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc., 1 A.3d 281, 290–91 (Del. 2010).

186. *Id.* at 291.

that ignoring majority shareholder preferences was in the corporation's best interests.[187] Hence, even in the wake of increased shareholder activism and influence, courts have steadfastly refused to condone the notion that compliance with fiduciary duty is tantamount to compliance with shareholder preferences.

Along these same lines, the overwhelming majority of courts have refused to embrace any theory implying that directors breach their duty when they refuse to implement pay packages supported by a majority of shareholders. Indeed, a host of shareholder suits were filed alleging that when directors fail to respond to a vote by a majority of shareholders rejecting an executive pay package, their failure should be viewed as a breach of their fiduciary duty.[188] Almost every court has steadfastly refused to adopt such reasoning and hence has insisted that directors have the discretion to ignore shareholders' majority votes.[189] These recent cases do not deviate from the long-standing principle that directors' fiduciary duty does not require them to concede to shareholder demands. These recent cases therefore make it problematic to suggest that conceding to such demands is sufficient, on its own, to satisfy directors' fiduciary duty.

Moreover, the normative implications of this characterization of directors' duty are problematic. First, they suggest that directors must concede to the demands of the majority of shareholders without regard to considerations of minority shareholders. Second, they suggest that so long as directors comply with shareholder demands, their duty does not require them to engage in independent decision-making.[190] As a corollary, they further suggest that directors should not be held responsible for their actions because they do not have any discretion. This suggestion is highly problematic given

187. *See id.*

188. *See* cases cited *infra* note 189.

189. *See* Teamsters Loc. 237 Additional Sec. Benefit Fund v. McCarthy, No. 2011-CV-197841, 2011 WL 4836230, at *10–12 (Ga. Super. Sept. 16, 2011); Charter Twp. of Clinton Police & Fire Ret. Sys. v. Martin, 162 Cal. Rptr. 3d 300, 313–14 (Ct. App. 2013); Gordon v. Goodyear, No. 12 C 369, 2012 WL 2885695, at *10 (N.D. Ill. July 13, 2012); Iron Workers Loc. No. 25 Pension Fund *ex rel.* Monolithic Power Sys., Inc. v. Bogart, No. 11-4604 PSG, 2012 WL 2160436, at *4 (N.D. Cal. June 13, 2012); Laborers' Loc. v. Intersil, 868 F. Supp. 2d 838, 846–49 (N.D. Cal. 2012); Plumbers Loc. No. 137 Pension Fund v. Davis, Civ. No. 03:11-633-AC, 2012 WL 104776, at *8 (D. Or. Jan. 11, 2012). *But see* NECA-IBEW Pension Fund *ex rel.* Cincinnati Bell, Inc. v. Cox, No. 1:11-cv-451, 2011 WL 4383368, at *3–4, *3 n.4 (S.D. Ohio Sept. 20, 2011) (noting plaintiff's claim that a negative say-on-pay vote was "'direct and probative evidence' that the . . . [company's] compensation [package] was not in the best interests of . . . shareholders").

190. *See* Dalley, *supra* note 180, at 312–13; Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 42–45 (2004) (insisting that boards have a duty to independently assess proposals even when they receive approval from a majority of the shareholders). *See generally* Bainbridge, *supra* note 19 (emphasizing the importance of boards' independent judgment and discretion).

the importance we place on directors and their independence.[191] Third, they suggest that directors' fiduciary duty obligations do not enable them to consider the interests of other stakeholders, or even the long-term health of the corporation. Instead, it suggests that directors' duty requires them to focus only on shareholders, even when those shareholders are only concerned with short-term goals. This is a problematic understanding of directors' duties. Indeed, many commentators, including SEC officials and other federal regulators, have expressed significant concern that some of the policies and preferences requested by shareholders harm the long-term interests of the corporation and its shareholders.[192] A concept of fiduciary duty that equates director duty with shareholder preferences would suggest that this concern has no real merit. Then too, recently, influential shareholders and business groups have stressed the importance of corporate purpose beyond shareholders and profit-making considerations.[193] Those groups insist that a well-functioning corporation is one that focuses on the needs of all of its stakeholders, thereby negating the assumption that a laser focus on shareholders reflects a normatively appropriate characterization of directors' duties.[194] In this regard, the conceptualization of directors' fiduciary duty as a reflection solely of shareholder preferences is problematic at best. Hence, such a conceptualization should not be used to negate this Article's thesis that directors breach their duty when they acquiesce to shareholder preferences, despite their belief that such acquiescence is not in the corporation's best interests.

4. Cost-Benefit Analysis as a Duty

Another reason why some may contend that it is inappropriate to construe director acquiescence as a fiduciary duty breach is because such a construction fails to appreciate directors' ability to engage in a cost-benefit analysis when carrying out their fiduciary duties. As this reasoning suggests, it is consistent with the board's fiduciary duty to make an informed determination that the costs of engaging in certain actions, even when those actions are objectionable, are outweighed by the benefits. With respect to acceding to shareholder demands, those benefits could be forestalling costly

191. *See generally* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127 (2010) [hereinafter Fairfax, *The Uneasy Case for the Inside Director*] (critiquing the value of independent directors).

192. *See* Stout, *supra* note 35.

193. *See* Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter [https://perma.cc/7MGG-NVAA] (signaling, by the world's largest shareholder, that corporations should focus on purpose, social obligations, and the needs of all corporate stakeholders); *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019) [hereinafter BUS. ROUNDTABLE], https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/G478-2UKG] (outlining standards for corporate responsibility).

194. *See* Fink, *supra* note 193; BUS. ROUNDTABLE, *supra* note 193.

litigation, avoiding costly, distracting, or resource intensive proxy fights, and preventing or containing negative publicity. Those benefits could also be guarding against the threat of shareholders who would cause injury to the corporation.[195] Directors could acquiesce to shareholder demands based on a legitimate belief that these benefits outweigh any cost concerns that they may have. Viewed in this light, directors' actions should not be viewed as improper.

In other contexts, courts not only have recognized directors' ability to engage in cost-benefit analysis when deciding to acquiesce to shareholder demands, but also have confirmed that such a cost-benefit assessment is consistent with directors' fiduciary obligations. For example, courts have maintained that it is consistent with directors' fiduciary duty to pay greenmail to shareholders.[196] Greenmail represents a board's decision to purchase shares from shareholders at a premium in order to prevent a hostile takeover or other aggressive actions, including actions that challenge a director's board seat.[197] Courts contend that directors can make the decision that the costs of such payments are outweighed by the benefits associated with protecting the corporation from the threat posed by certain shareholders.[198] Courts have insisted that such payments are appropriate, even when such payments may also be motivated by a desire to stay in office.[199] This suggests that directors have the flexibility to engage in cost-benefit analysis without running afoul of their fiduciary duty, even when one of the costs relates to the loss of a board seat.

Nevertheless, the notion that directors' ability to engage in a cost-benefit analysis precludes a finding that acquiescence could be a fiduciary duty breach is over-broad. This Article does not contend that directors cannot engage in an appropriate cost-benefit analysis consistent with their fiduciary duties. Of course, directors can assess the risks and rewards of adopting a given policy or procedure. This is true even if such an assessment is intertwined with directors' desire to stay in office.[200] Affording directors the flexibility to engage in a cost-benefit analysis does not enable them to do so without restriction, however. In other words, we still must determine which forms of cost-benefit assessments represent appropriate balances, and which cross the line because directors have not legitimately engaged in any

195. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 658 (Del. Ch. 1988).

196. *See* Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964).

197. *See id.*

198. *See id.* at 555 (suggesting that directors can balance the costs of paying a premium for certain stock against the concern that the shareholder would alter policies deemed vital to the corporation's future); *see also* Roberta S. Karmel, *Greenmail, the Control Premium and Shareholder Duty*, 48 WASH. & LEE L. REV. 937, 949–53 (1991) (discussing Delaware case law regarding the legality of greenmail).

199. *See* Polk v. Good, 507 A.2d 531, 536–37 (Del. 1986).

200. *See supra* notes 133–44 and accompanying text.

balancing, or because directors have allowed the benefit of retaining their seat to unduly tip the scales.[201] From this perspective, this Article contends that while legitimate forms of cost-benefit analysis may sanction director conduct in the context of acquiescence, such analysis does not negate the fact that acquiescence may implicate fiduciary duty concerns. Moreover, the fact that directors may engage in such analysis does not foreclose the possibility that the analysis may be inappropriate and thus may result in a fiduciary duty breach.

5. Entrenchment and Line Drawing

Some may reject this Article's attempt to characterize director's actions as a fiduciary duty breach based on entrenchment because such an attempt proves too much. Indeed, not only is it likely that many director actions are aimed at protecting board seats, but also this likelihood increases with respect to shareholder activism because such activism is often aimed either implicitly or explicitly at removing directors from their board seats. Importantly, the effort to increase shareholders' rights over the director election process is based on the premise that directors care about preserving their board seats and will be responsive to shareholders when they have the ability to threaten those seats.[202] Thus, to argue that directors breach their duty solely by virtue of the fact that they have taken actions for the purpose of protecting their board positions would condemn all of their actions in response to shareholder activism as fiduciary duty breaches. Such a condemnation would be inappropriate and illogical. Moreover, courts have explicitly stated that directors do not violate their fiduciary duty when they take actions that have an entrenchment purpose and effect, but are nevertheless consistent with advancing the best interests of the corporation.[203] This suggests that categorizing director acquiescence as improper entrenchment is inappropriate.[204]

While acknowledging that such categorization has the potential to be overbroad, this Article disagrees that it is inappropriate, at least in certain circumstances. Indeed, pinpointing the over-broad potential of the entrenchment label does not negate the fact that some instances of director acquiescence should be classified as inappropriate entrenchment. First, this Article insists that the very fact that all actions in this context could have an entrenchment purpose and effect should make us more, rather than less,

201. *See* Karmel, *supra* note 198, at 949–50 (noting restrictions on green mail payments based on the determination that directors were motivated by "a desire to perpetuate themselves in office").

202. *See* Bebchuk, *supra* note 6, at 878.

203. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 658–59 (Del. Ch. 1988).

204. *See* Gantler v. Stephens, 965 A.2d 695, 707 (Del. 2009) (noting that "to argue that directors have an entrenchment motive solely because they could lose their positions . . . is, to an extent, tautological"); Pogostin v. Rice, 480 A.2d 619, 627 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

concerned about potential fiduciary duty breaches. In fact, in other contexts where entrenchment could color all of directors' behaviors, courts have emphasized the need to increase the scrutiny of directors' actions. Thus, in the takeover context, the Delaware Supreme Court has stated: "Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty . . . ."[205] That court further emphasized that "[c]ourt[s] ha[ve] long recognized that" when there is a threat to a board member's seat, "directors are of necessity confronted with a conflict of interest, and an objective decision is difficult."[206] In other words, when board members are confronted with situations in which they have concerns about removals from office, the fiduciary duty inquiry is enhanced, not eliminated. To be sure, this does not transform every decision into a breach of duty. Instead, when assessing a potential fiduciary duty breach in situations where every action by directors could also be viewed as an effort to maintain their board seats, "the inquiry must be quite nuanced."[207] Courts have made clear that while not every action should be construed as a form of improper entrenchment, some do rise to the level of a breach of duty.[208] The dividing line occurs when, in addition to seeking to maintain their seats, it can be proven that directors took no steps to determine if the actions were in the best interests of the corporation, or otherwise took actions despite believing that they were antithetical to the corporation's best interests.[209] From this perspective, it is not problematic to characterize directors' conduct as a potential fiduciary duty breach based on entrenchment concerns. Instead, recognizing that most, if not all, actions responsive to shareholder activism could implicate entrenchment should cause us to apply more exacting scrutiny to those actions. While that scrutiny must be more nuanced, and by its nature must involve much more difficult line-drawing, it does not negate the potential for breach.

This Article does not contend that directors who change their mind about issues that align with shareholder preferences automatically breach their duty. However, this Article does contend that their actions raise fiduciary questions that deserve to be probed. While this Article acknowledges that such a probe will be far from easy, such a probe is important for the directors

205. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985).

206. *Id.* at 954–55 (quoting Bennett v. Propp, 187 A.2d 405, 409 (Del. 1962)).

207. Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261, 297 (2001).

208. *See, e.g.*, Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971).

209. *See Gantler*, 965 A.2d at 707–08; *Pogostin*, 480 A.2d at 627 (explaining that entrenchment cannot be proven simply because the board may be motivated by the purpose of retaining control because that would condemn all board actions involving a takeover; instead, shareholders must also demonstrate that the board failed to determine that the actions were in the best interests of the shareholders).

making the decision and is aimed at ensuring that they have an understanding of their duties when making the decision. It is also important for those evaluating such decision.

C. CONCLUDING THOUGHTS

If we allow for the possibility that at least some directors may be taking actions that they do not believe are in the best interests of the corporation, and that at least some directors may be engaging in those actions solely or primarily to ensure that they remain on the board without regard to their benefit to the corporation, then we must acknowledge that some directors are breaching their fiduciary duty. Pinpointing when breaches occur may involve difficult line drawing, but it does not undermine this possibility.

IV. MUCH ADO . . . ?

Even if you agree with this Article's thesis that some actions in the context of acquiescence to shareholder demands may amount to a breach of fiduciary duty, you may nevertheless question the need to focus on such breaches. This Part grapples with that question, and ultimately highlights why such a focus is crucial, particularly given the fiduciary duty implications associated with ignoring these kinds of breaches.

A. FUEL TO THE FIRE

1. The Concern

Proponents of shareholder activism may be concerned with this Article's thesis, based on its potential to undermine the push for increased shareholder power. Such proponents may be concerned that even suggesting that directors' response to shareholder activism could amount to a fiduciary duty breach will encourage opponents of shareholder activism to use this potential for breach as an argument for curtailing shareholder efforts.

This concern is a legitimate one. It is clear that commentators and regulators are concerned by the possibility that shareholder activists may be pressuring directors to engage in actions that are antithetical to the corporation's best interests.[210] For example, current regulation aimed at limiting shareholders' use of the shareholder proposal process stems at least in part from the view that shareholders have used the process to compel directors to take actions not in the corporation's best interests.[211] There has

210. *See* Strine, *supra* note 40, at 240.

211. *See* Daniel F.C. Crowley, Daniel F. Ritter, Karishma Shah Page, Dean A. Brazier & Daniel S. Cohen, *SEC Proposes Rules to Curb Shareholder Proposals, Limit Proxy Voting*, K&L GATES (Nov. 8, 2019), http://www.klgates.com/sec-proposes-rules-to-curb-shareholder-proposals-limit-proxy-voting-11-08-2019 [https://perma.cc/8P8F-R49U]; Katanga Johnson & Jessica DiNapoli, *U.S. SEC Proposes Rules that Could Limit Shareholder Voices*, REUTERS (Nov. 5, 2019, 9:10 AM), https://

been an increase in the number of corporations either making the decision to remain private or go private, or otherwise granting shareholders more limited rights when they go public.[212] It is possible that these actions are being made, at least in part, not only to avoid shareholder activists, but also to avoid situations in which directors are being forced to make decisions that are not in the corporation's best interests as a result of activists' demands. The regulatory response to these scenarios often includes efforts to curtail shareholder power.[213] In this regard, there is a very real possibility that highlighting the fact that directors may be engaging in fiduciary duty breaches when acquiescing to shareholder demands could fuel the effort of curtailing shareholders.

2. The Rebuttal

This Article acknowledges this possibility, but also acknowledges that the train has already left the station on this issue. Thus, even as they avoid labeling directors' actions as breaches, critics of shareholder activism are adeptly using these potential breaches to limit shareholders' power and ability to impact the corporation.[214] This means that shareholder empowerment critics already rely on the possibility that directors do not believe in the propriety of their actions or otherwise are only adopting certain actions based on concern for their board seats as a rationale for limiting the reach of shareholder power.[215] Hence, it is not clear that refusing to label these behaviors as fiduciary duty breaches will prevent the push back from occurring.

Then too, it is entirely possible that by applying such a label, we shift the focus from shareholders' behavior to directors' behavior in at least three ways. First, in reminding directors that their actions have fiduciary duty implications, we may remind them to be more thoughtful in the rhetoric they employ and more careful in the decisions they make. Second, focusing on directors and their fiduciary obligations may remind us that the solution to problematic instances of acquiescence may be with altering director conduct

www.reuters.com/article/us-usa-sec-proxyadvisers/u-s-sec-proposes-rules-that-could-limit-shareholder-voices-idUSKBN1XF1YN.

212. *See* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 454–60 (2017); Ed. Bd., *Where Have All the Public Companies Gone?*, BLOOMBERG OP. (Apr. 9, 2018, 6:00 AM), https://www.bloomberg.com/opinion/articles/2018-04-09/where-have-all-the-u-s-public-companies-gone [https://perma.cc/3CQT-G3HS]; Jason M. Thomas, *Where Have All the Public Companies Gone?*, WALL ST. J.: OP. (Nov. 16, 2017, 7:10 PM), https://www.wsj.com/articles/where-have-all-the-public-companies-gone-1510869125 [https://perma.cc/D4K4-VLWS] (noting that new public companies have decreased to less than half their rate since the 1980s and 1990s); Shauna Steele, *What is Behind the Decline in Public Companies?*, EY (May 4, 2017), https://www.ey.com/en_us/public-policy/what-is-behind-the-decline-in-public-companies [https://perma.cc/TTQ4-7HD6].

213. *See supra* text accompanying note 211.

214. *See supra* text accompanying notes 33, 35.

215. *See supra* text accompanying notes 33, 35.

as opposed (or at the very least in addition to) altering shareholder conduct. This is particularly true if there is a recognition that directors bear responsibility for ensuring that they do not engage in breaches of their fiduciary duty. Third, it may ensure that directors take ownership of their decisions rather than standing behind shareholders. Importantly, one way to resist efforts at curtailing shareholder power around certain fundamental issues such as proxy access or declassification is for directors to take a stand for those issues around which they believe, rather than fostering any implication that they are only doing what shareholders demand.

B. Directors' Good Faith

1. The Concern

Some may contend that labeling directors' actions as potential fiduciary duty breaches is problematic because it inappropriately paints directors as "bad" people. Instead, it is likely that directors are acting in good faith and are seeking to respond to shareholder demands and pressures in an appropriate manner.[216]

2. The Rebuttal

This Article does not assert that directors are necessarily acting in bad faith. Nor does it dispute the contention that directors are seeking to respond in good faith to novel and very difficult demands from shareholders. Instead, this Article seeks to assist directors by encouraging us to shed light on how directors should best resolve those difficulties.

C. Volume Concerns

1. The Concern

It is possible that pinpointing director acquiescence as a fiduciary duty breach may not be a significant concern because the potential volume of breaches is relatively low. This is particularly true for those who believe that the notion of such breaches is largely rhetorical and not a reflection of reality. This is also true for those who believe that directors' acquiescence primarily results from a change of heart or a reasonable cost-benefit analysis entirely consistent with their fiduciary responsibilities.

2. The Rebuttal

Alas, it is not clear that we should seek comfort in these possibilities. Instead, it is possible that the volume of potential breaches in this area is growing and could become more widespread. This is because directors' acquiescence increasingly characterizes director behavior in response to

216. *See supra* text accompanying notes 146–48.

shareholder activism along a wide spectrum of behaviors.[217] Moreover, directors' acquiescence is likely to go unchallenged and unexplored because the shareholders with standing and motivation to sue are likely to be the very shareholders who are compelling directors to action. Because we do not really know how many breaches are occurring, it may be problematic to rely on the volume rationale to avoid discussion about potential breaches.

D. Line Drawing Reconsidered

1. The Concern

Some may assert that there may be very little reason to highlight the possibility that breaches in this context may be occurring if we acknowledge that pinpointing those breaches may be a task too difficult to undertake. The difficulty of precisely pinpointing breaches in the context of acquiescence cannot be overstated.[218] The difficulty stems from several issues. First, this Article has argued that a breach may occur based on a director's subjective belief about the propriety of her actions. This creates an uphill battle with seeking to prove the subjective intent or mindset of such directors. Second, this Article has argued that proving a breach of duty will be nuanced and involve line drawing related to cost-benefit analysis or aimed at determining the circumstances in which a director's desire to remain in office improperly influences her decision to acquiesce. It is hard to overstate how difficult such a line drawing process will be. The problems of line drawing are only enhanced by the deferential treatment afforded directors' actions. The high hurdle shareholders must clear in order to overcome the presumption of the business judgment rule,[219] or otherwise demonstrate that directors' actions merit an enhanced review,[220] are likely to make it exceedingly difficult for shareholders to actually prove breaches related to directors' acquiescence, or otherwise hold directors liable for those breaches. The likelihood of significant difficulties associated with pinpointing and successfully proving director breaches based on acquiescence may mean that acknowledging the potential for such breaches is of limited utility.

2. The Rebuttal

Nonetheless, it is not clear that the inability to appropriately define the contours of a breach should cause us to ignore it completely. The line drawing problem is certainly not new.[221] Yet in other contexts, such as takeovers or proxy fights, it has not precluded courts and commentators from recognizing

217. *See supra* Section II.A.

218. *See* David C. McBride & Danielle Gibbs, *Interference with Voting Rights: The Metaphysics of* Blasius Industries v. Atlas Corp., 26 DEL. J. CORP. L. 927, 928 (2001).

219. *See* Black et al., *supra* note 115, at 1091.

220. *See id.* at 1090–91.

221. *See id.*

the potential for breaches, or otherwise seeking to hold directors liable for such breaches. Importantly, even when courts struggle to draw lines or otherwise fail to conclude that directors have violated their fiduciary duty, there has been an acknowledgement of the benefits stemming from judicial intervention. Most importantly, such intervention enables judges to clarify and refine directors' legal duties.[222] Such intervention also provides important deterrence for directors.[223] Similarly, acknowledging the potential for breach in this area would enable the clarification and refinement of directors' duties as they relate to shareholder demands.

Importantly, there is a long-standing history of judges and scholars insisting that the value of fiduciary law stems not from its potential to impose liability, but in its "sermonizing" power.[224] Indeed, many have criticized the doctrines associated with fiduciary duty because of the wide latitude those doctrines afford directors along with the difficulty of holding directors accountable for breaches of that duty.[225] In response, judges and commentators have insisted that the value of fiduciary law lies in its norm creating rhetoric.[226] That is, even when no liability attaches to director conduct, opinions give judges the opportunity to signal appropriate norms to directors.[227] These signals influence director behavior.[228] If this is an accurate understanding of the value of fiduciary duty law, then our failure to acknowledge the potential for breaches in this area means that we are missing out on an important sermonizing opportunity. Indeed, it is likely that increased shareholder power in some form will be the norm for public corporations.[229] It is therefore of critical importance that directors receive

222. *See* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1797 (2001); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1820–23 (2001); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1269–70 (1999); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016–17 (1997).

223. *See* Eisenberg, *supra* note 222, at 1269–70 (noting that legal rules clarify and "facilitate the effectiveness of informal sanctions by" sending a message about the proper standard of conduct for directors, which increases the likelihood that reputational penalties will be imposed); Rock, *supra* note 222, at 1016–17 (noting that judicial opinions constrain director behavior); Skeel, *supra* note 222, at 1829 (arguing that judicial opinions work to constrain director behavior).

224. *See* Rock, *supra* note 222, at 1016 ("Delaware courts generate in the first instance the legal standards of conduct . . . through what can best be thought of as 'corporate law sermons.'").

225. *See supra* Section III.A.

226. *See* Eisenberg, *supra* note 222, at 1270; Rock, *supra* note 222, at 1016–17; Skeel, *supra* note 222, at 1832–33.

227. *See* Eisenberg, *supra* note 222, at 1269–70; Rock, *supra* note 222, at 1016–17; Skeel, *supra* note 222, at 1833.

228. *See* Eisenberg, *supra* note 222, at 1269–70; Rock, *supra* note 222, at 1016–17; Skeel, *supra* note 222, at 1833.

229. *See* Fairfax, *From Apathy to Activism*, *supra* note 25, at 1322–38.

some signals about the parameters of their obligations in this new normative environment.

From this perspective, ignoring these potential breaches could have repercussions for the appropriate evolution of directors' fiduciary duties. Indeed, acquiescence may be creating critical misconceptions regarding how directors appropriately comply with their duties in the face of significant shareholder preferences and pressure. Without acknowledging the potential for breach, we run the risk of affirming those misconceptions. Such affirmation may prove problematic for those who believe that discretion regarding most corporate decisions should reside with directors, as well as with those interested in enabling the corporation and its directors to focus on other constituents and interests that may not align with shareholder preferences.

E. The Necessary Evil

1. The Concern

One may argue that the slim possibility of finding and proving these breaches may be outweighed by the accountability that shareholder activism seeks to provide. Shareholder activism and the various changes wrought by that activism is designed to ensure that directors feel greater responsibility towards shareholders, thereby increasing the likelihood that directors consider shareholder concerns in their compensation decisions.[230] Some may assert that the potential benefits to be gained outweigh the cost of seeking to ascertain when and if directors breach their duties through acquiescence. Thus, even if you believe that director acquiescence is problematic, it can be argued that these breaches may simply be an inevitable byproduct of curbing director discretion. In this regard, the breaches can be viewed as a necessary evil.

Importantly, one would expect that I would embrace this necessary evil argument. Indeed, elsewhere I have been supportive of shareholder efforts to increase their power, particularly as a means to provide accountability for directors and officers.[231] This is particularly true with respect to the governance changes wrought by acquiescence, such as the adoption of proxy access.[232]

---

230. *See* Jeffrey N. Gordon, *"Say on Pay": Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-In*, 46 HARV. J. ON LEGIS. 323, 337–40 (2009); Elisse B. Walter, Commissioner, SEC, Remarks Before the Practicing Law Institute: Restoring Investor Trust Through Corporate Governance (Feb. 18, 2009), http://www.sec.gov/news/speech/2009/spch021809ebw.htm [https://perma.cc/GQ8D-3ENW] (noting that "Say-On-Pay" promotes increased board accountability).

231. *See generally* Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259 (2009) (discussing shareholder efforts to increase power and ramifications on corporate and managerial accountability).

232. *See generally id.* (discussing the adoption of proxy access and alternative ways for shareholders to increase power).

2. The Rebuttal

Despite my support, this Article asserts that there is a danger with ignoring these potential breaches merely because one (including the author) agrees with the ultimate outcomes. First, even as my scholarship applauds the efforts of shareholders, it also cautions that shareholders must have limits.[233] Our system of corporate governance performs best when there is an appropriate balance between director power and shareholder power.[234] Proponents of shareholder activism have argued that the pendulum had swung too far in the direction of director power, undermining the accountability that was supposed to stem from shareholder involvement.[235] In this regard, increased shareholder power can be viewed as a necessary readjustment. However, if directors simply cater to the whims of shareholders, there is a danger that the pendulum will swing too far in the other direction with problematic results. Thus, it may be important to acknowledge the potential breaches as a way to acknowledge the important role that directors must play in protecting from shareholders who over-reach. Second, my scholarship also emphasizes the importance of director independence and the critical role we ask directors to play as objective decision makers.[236] Fiduciary duty law is replete with references to the importance of director independence to our system of corporate governance.[237] This independence is baked into our governance system—it is the rationale we provide for giving wide discretion to directors to make decisions, even when we would disagree with those decisions and even when those decisions call for them to evaluate the behavior of their fellow directors.[238] We cannot laud and rely upon directors as independent thinkers and then ignore instances of acquiescence because they involve difficult circumstances or involve significant pressure. Instead, it is precisely in these moments of the greatest challenge where directors' duty to be independent must be emphasized and prioritized. Third, this author is mindful of the fact that not everything shareholders demand is appropriate and that not all shareholders' interests align with the interests of the corporate enterprise. Thus, agreement with the platform on any particular shareholder does not blind me to the importance of ensuring that there are checks on power, including shareholder power.

---

233. *See, e.g.*, Fairfax, *Making the Corporation Safe*, *supra* note 25, at 97–105.

234. *See generally id.* (discussing the balance between director power and shareholder power).

235. *See* Bebchuk, *supra* note 6, at 892.

236. *See* Fairfax, *The Uneasy Case for the Inside Director*, *supra* note 191, at 127, 135; Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 452–58 (2008).

237. *See* Fairfax, *The Uneasy Case for the Inside Director*, *supra* note 191, at 135–45.

238. *See* Aronson v. Lewis, 473 A.2d 805, 807–08 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Zapata Corp. v. Maldonado, 430 A.2d 779, 785 (Del. 1981); Fairfax, *The Uneasy Case for the Inside Director*, *supra* note 191, at 135–45; Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 832–34 (2004). *See generally* Rodrigues, *supra* note 236 (questioning current rules' reliance on director independence).

F. THE MARKET OF SELF-HELP

1. The Concern

To the extent that breaches result from directors being compelled to take actions with which they do not agree, it may be that the market will eventually respond, thereby minimizing or eliminating such breaches. Indeed, we may already be witnessing the market response not only through client memos and directives seeking to reiterate that directors' duty does not demand compliance, but also through the form of novel techniques being employed to counteract shareholder influence.[239] This includes the adoption of certain unilateral bylaws.[240] It also includes the decision by some companies to avoid the public markets or avoid shareholder voting in the public markets by issuing shares without the vote. While these responses spark considerable controversy and concern,[241] the fact that corporations have sought to craft

239. Corporations also have certainly sought to limit shareholder actions in several ways. This includes the adoption of certain advance notice bylaws as well as bylaws aimed at disqualifying shareholder nominees who receive third party compensation. *See* Barry H. Genkin, *Ten Bylaw Amendments that May Lessen Your Company's Vulnerability to a Shareholder Activist and Prevent it from Being a Sitting Duck this Proxy Season*, BLANK ROME LLP (Dec. 2008), http://www.blankrome.com/index.cfm?contentID=37&itemID=1856 [https://perma.cc/6E7U-B9SB]. *See generally* ISS PROXY REPORT, *supra* note 161 (discussing bylaw provisions and ISS policy). This also includes adopting forum selection bylaws and fee shifting rules. There is a list of three dozen companies that have adopted some form of fee shifting bylaws. Kevin LaCroix, *Battle Builds in Delaware Over Fee-Shifting Bylaws*, D&O DIARY (Dec. 1, 2014), http://www.dandodiary.com/2014/12/articles/director-and-officer-liability/battle-builds-in-delaware-over-fee-shifting-bylaws [https://perma.cc/MT9K-LUXM]; *see* North v. McNamara, 47 F. Supp. 3d 635, 645–46 (S.D. Ohio 2014); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 556 (Del. 2014). Such actions do spark considerable controversy. *See* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 3 (2015); J. Robert Brown, Jr., *Shifting Back the Focus: Fee Shifting Bylaws and a Need to Return to Legislative Intent* 13, 14–16 (Univ. Denver Sturm Coll. L., Working Paper No. 14-65, 2015), https://papers.ssrn.com/sol3/papers.cfmabstract_id=2547094 [https://perma.cc/C2Z5-DKZU]; *see also* Steven Davidoff Solomon, *A Ruling's Chilling Effect on Corporate Litigation*, N.Y. TIMES (May 23, 2014, 5:01 PM), http://dealbook.nytimes.com/2014/05/23/a-rulings-chilling-effect-on-corporate-litigation [http://perma.cc/72VW-GG32] (citing webinar by prominent plaintiff's firm Grant & Eisenhofer P.A.). While not exactly a new tactic, companies have used repurchases to make activists "go away." These repurchases have their roots in greenmail of the 1980s which arose in the context of hostile takeovers involving repurchases at a premium. *See* Liz Hoffman & David Benoit, *Activist Funds Dust off 'Greenmail' Playbook*, WALL ST. J. (June 11, 2014, 7:03 PM), https://www.wsj.com/articles/activist-funds-dust-off-greenmail-playbook-1402527339 [https://perma.cc/3K3L-QPYV] (reporting that in the past year, at least 10 companies engaged in repurchases, more than in the previous six years combined).

240. This includes the adoption of certain advance notice bylaws as well as bylaws aimed at disqualifying shareholder nominees who receive third party compensation. This practice has drawn criticism from shareholders and ISS. *See* Genkin, *supra* note 239. *See generally* ISS PROXY REPORT, *supra* note 161 (recommending a case-by-case vote on fee shifting, forum selection and other litigation bylaws, but a vote against directors, the committee, or the entire board if those bylaws are unilateral).

241. *See supra* notes 146–54 and accompanying text.

defensive mechanisms suggests that directors may be equipped to engage in self-help, and hence ensure that they are not inappropriately pressured.

2. The Rebuttal

However, these market responses do not grapple with the fiduciary duty concerns animating this Article. Indeed, they neither highlight nor contend with the ramifications of the intersection of director acquiescence and fiduciary duty. In this regard, they are unresponsive to the possibility that we may be fostering a misguided conception of directors' obligations.

G. *THE DUTY TO FIDUCIARY DUTY*

As these other Sections indicate, while there may be reason to ignore and minimize the impact of these potential breaches, this Article argues that such actions would be a mistake. If we take fiduciary duty law seriously, then we must be willing to interrogate potential breaches of that law even in the context of difficult or uncomfortable situations. And even in the context of situations pursuant to which we may be satisfied with the ultimate resolution of director behavior.

This Article acknowledges that line drawing will be difficult. It also acknowledges that there is likely to be significant disagreement about the appropriate lines to draw. The Article nevertheless insists that we have an obligation to consider those lines, and moreover to consider the fiduciary duty implications of acquiescence.

First and foremost, these include negative repercussions for our normative understanding of the appropriate contours of directors' duties. Indeed, it is important that directors have an appropriate understanding of their fiduciary duty so that they can implement that understanding when carrying out their responsibilities. If we do not address these issues in the situations that are highlighted, we miss an important opportunity, thereby ensuring that these issues remained unaddressed in the context of the multitude of instances of which we are not aware. Directors make decisions all the time of which we are not aware and around which they do not receive advice or feedback. When they make those decisions, the only way we can ensure that they do so with the appropriate understanding of their fiduciary responsibilities is by underscoring directors' fiduciary duties in those moments where the questions do arise. Hence, we must take this opportunity to pinpoint directors' duties, and otherwise to correct mistaken assumptions directors may have about their obligations to follow the dictates of shareholders, including majority or controlling shareholders.

Second, from a fiduciary duty standpoint, it is also important to pay close attention to understanding the appropriate balance between much needed director accountability that could stem from enhanced shareholder power, on the one hand, and on the other hand, the potential for shareholder overreach that could harm the corporation and its stakeholders—both shareholder and non-shareholder. While there may be benefits to increased shareholder power, there also may be harms. Taking this opportunity to address how best to strike the balance between director duty and shareholder power is therefore critically important, especially as a signal for directors seeking to strike that balance not only in high pressure circumstances, but also in more routine or less high-profile circumstances.

Third, the current articulation and application of fiduciary duty law makes it crucial that we continue to be able to depend upon directors as independent decision-makers. As noted elsewhere in this Article, fiduciary duty law heavily relies on directors to be objective, and in fact defers to directors *because* there is a presumption that directors can and will be objective.[242] Catering to shareholders is not consistent with objectivity. Hence, focusing on directors' duties in this context is critical to ensuring that we appropriately can rely on director independence.

Fourth, such a focus is important as a reminder that directors owe their duty to the corporate enterprise as whole. Case law makes clear that directors owe a duty to the corporation.[243] This not only includes all of the stakeholders in the corporation from creditors to employees, but also negates the presumption that directors must focus solely on shareholders and their profit-making concerns.[244] Director behavior in the context of shareholder activism challenges us to make these concepts clear.[245] Then too, there is currently a renewed interest in corporate purpose. Such interest has been sparked by pronouncements from some of the most influential actors in the corporate arena proclaiming that the corporation—and by extension its directors and officers—have a duty to the corporation as enterprise, which duty includes appropriate regard for all of the corporation's stakeholders, from employees to the broader community.[246] These pronouncements, and the principles animating them, cannot coexist with actions that reduce fiduciary duty to an obligation to accede to shareholder demands.

Finally, this Article insists that we must focus on the issue precisely because very few actors will have the incentive to explore the fiduciary duty issues that animate this Article. Indeed, those upon whom we generally rely to explore and challenge directors' fiduciary duties—namely shareholders —are least likely to do so in the context of directorial acquiescence to shareholder demands. Hence, this Article's exploration is critical because it may be one of the only forums in which this important issue is examined.

242. *See supra* text accompanying notes 205, 235.

243. *See supra* note 32 and accompanying text.

244. *See supra* text accompanying notes 179–87.

245. *See generally* Fairfax, *Making the Corporation Safe*, *supra* note 25 (discussing why increased shareholder democracy can align with the interests of stakeholders, despite the skepticism and concerns that surround the issue of shareholder democracy).

246. *See supra* notes 164–67.

V. CONCLUSION

Director acquiescence is on the rise. Corporate governance analysts agree that over the last decade, shareholder activism has increased dramatically. Such analysts have highlighted and analyzed the fact that shareholder activism has ushered in a new era of increased shareholder power and engagement. However, those analysts have not sufficiently focused on the fact that the intense shareholder activism has ushered in a new era in which directors have routinely acquiesced to shareholder demands to alter corporate governance structures and policies. This acquiescence is remarkable because directors are now voluntarily agreeing to enact structures and policies that they had heretofore vehemently resisted for decades.

Many view this acquiescence in a favorable light because it suggests that directors have embraced the benefits of these structures and policies. However, in the background of this acquiescence we frequently hear that directors are being pressured to comply with shareholder demands. Most view this narrative around shareholder pressure as a call to dismantle shareholder activism or otherwise reduce the influence of shareholder activists and their supporters.

This Article sounds a different alarm, insisting that we should view this concern as a call to refocus on directors' fiduciary duties by acknowledging that directors may be breaching their duty and examining the most appropriate response to those breaches. Indeed, directors have an obligation to act in the best interests of the corporation, even if such actions may jeopardize their board positions or otherwise place them in the crosshairs of shareholder activists and their campaigns. The possibility that directors are caving into shareholder demands therefore has very important fiduciary duty implications.