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**Corporate Power is Corporate Purpose I:
Evidence From My Hometown**

By

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One of the most tired debates in American corporate law has been about the ends of corporate governance. Must, within the limits of their legal discretion, boards of directors act for the best interests of stockholders? Or may they exercise their discretion to advance, as an end in itself, the best interests of other corporate constituencies, such as the corporation's employees, home communities, and consumers? The reason this debate is a bit tired is because it is not about whether corporate statutes should be amended to give equal credence to other constituencies than stockholders, it is about arguing that corporate laws that give only rights to stockholders somehow implicitly empower directors to regard other constituencies as equal ends in governance. In other words, the debate involves large doses of wish fulfillment, with advocates for other constituencies arguing that the law already is what they in fact think it ought to be. Nice as a good fantasy life can be, when one emerges from the bliss, reality remains the same, and in this case, it is even worse because time that could be spent pushing for actual reforms to give real legal and

therefore market power to other constituencies is spent instead on arguing that the world is other than it plainly is.

Particularly problematic about this debate is its ongoing role in helping corporations avoid responsibility to the full range of societal interests they affect. By continuing to suggest that corporate boards themselves are empowered to treat the best interests of other corporate constituencies as ends in themselves, no less important than stockholders, scholars and commentators obscure the need for legal protections for other constituencies and other legal reforms that empower these constituencies and give them the means to more effectively protect themselves. Pretending that corporate boards—an odd recourse for ordinary people anyway—are to be looked at as a source of protection and solace for workers, the environment, and consumers dilutes the focus that is actually needed, which is on the protections from externalities that other constituencies deserve. Likewise, by pretending that if

corporate boards would just “do the right thing,” non-shareholder constituencies would be better off, advocates let another key source of societal power off the hook: the money manager agents who control the capital of and wield the voting power of ordinary Americans’ retirement and college savings. This article seeks to ground the debate in what should be obvious: shareholders are the only corporate constituency with power under our prevailing system of corporate governance in two sections. First, this article reviews relevant parts of American corporate law dealing with corporate power to reinforce the tangle those who argue that corporate boards can just “do the right thing” get themselves into when trying to explain away settled corporate law doctrine. Second, this article uses the recent history of E. I. du Pont de Nemours and Company to illustrate what happens in the real world, when corporate boards are faced with the realities that shareholder interests may conflict with the interests of other constituencies.

I.

To buttress the argument that they are correct about the ends of corporate law, scholars and commentators often argue that judges and other scholars have gotten it wrong.¹ For example, the iconic case of *Dodge v. Ford* (170 N.W. 668 (Mich. 1919)) did not mean what it said, and those who took it at its word were just not linguistically skilled (Johnson, 2013; Millon, 2013; Henderson, 2010; Henderson, 2009; Stout, 2008). For example, that the landmark decision in *Revlon* (506 A.2d 173 (Del. 1986)), making clear that any decision of a board had to be justified by reference to the end of the best interests of stockholders, was an exception to the rule, rather than making clear what the general rule was always meant to be (Manesh, 2014; Johnson, 2013; Stout, 2012). For example, by arguing that the business

¹ For those readers unfamiliar with American corporate law, Stephen Bainbridge's treatise on corporate law is an excellent general guide. Bainbridge, Stephen M. (2009), *Corporate Law*, 2d ed., Foundation Press. Sections that may be particularly helpful include his discussion on the sources of corporate law and Delaware's important role in § 1.2, and §§ 6-7, which provide an overview of the law of fiduciary duty, covering the cases mentioned in this article and many more.

judgment rule is not about the utility for stockholders of not second-guessing corporate managers who have no motive other than to increase the profitability of the firm for the benefit of stockholders (Elhauge, 2005; Greenfield and Nilsson, 1997). Central to all these strained arguments is one key factor—in Delaware and certain other states, there is no statement in the corporate code that says something like: “Within the discretion allowed to them under this Code and other provisions of law, the board of directors shall act at all times with the end of advancing the welfare of the company’s stockholders. Other interests may be considered as an instrument to that end, but are not to be considered an end in themselves.”

This is, of course, an odd requirement for a corporate statute, for a reason that will be central to this article. A general corporation statute sets up an enabling structure to be utilized by human beings (and their entity creations) to create new legal structures. As with the constitution of a human polity, the core insight into who is to be served as an end can be found within the terms of authorizing corporate

statute itself and who it empowers and who it does not. By way of example, I am glad that there are members of national and state legislatures throughout the world who view it important to protect endangered species, natural resources, and other interests that are not homo sapien. Recognizing, however, that human governments might decide that protections for wildlife and the environment are important for human beings, does not mean that human governments have a multi-constituency focus in which things like the environment and wildlife are an end in themselves. It is only when the human beings for whom these governments operate recognize that protecting non-human interests is of utility to humans that the governments they choose will engage in such protection.

That, of course, has a “duh” quality to it. For that reason, it almost embarrasses me to have to explain the obvious, which is that when only humans form governments and only humans have any input into who gets to govern, the best interests of humans is the plain end for which those governments were formed.

The reason why repeating this duh proposition is critical is that in the supposedly ruthless and clear-eyed domain of corporate law, the relationship between purpose and power is often ignored altogether, and commonly slighted. Rather than concentrating on the central power dynamics established by corporate authorizing codes, those who wish to pretend the world is different than it is tend to look to particular cases that they believe prove their point (remember the old chestnut involving night baseball games at Wrigley Field, *Shlensky v. Wrigley?* (237 N.E. 2d 776 (Ill. App. Ct. 1968)), or the absence of the statement referenced above in the corporate statute (Bainbridge, 2007). From rather obvious points such as that corporate law allows Google to have a really great cafeteria, on-site dry cleaning, work-out facilities, and good wages (all things that encourage talented people to work at, heck, nearly live at Google, to the benefit of stockholders), they vault to the much different idea that Google's board may actually operate Google as a worker's

cooperative where the workers' best interests are the end, and stockholders are subordinate to them (Dwyer, 2015; Pearlstein, 2013; Stout, 2012).

But, when one takes the duh example that human governments have as their end the best interests of the humans they serve seriously, that lens on corporate conduct is piercingly sharp and high resolution. Under America's leading corporation law, the Delaware General Corporation Law, the board of directors is elected by only one constituency—stockholders (Del. Code Ann. Tit. 8, § 211(b) (2016)). Under America's leading corporation law, major transactions that require approval by more than the board of directors are subject to approval by only one constituency—stockholders (Del. Code Ann. Tit. 8, § 251, § 271 (2016)). Under America's leading corporation law, only one constituency can sue to enforce the legal duties owed by directors and managers under the statute, the certificate of corporation, and the bylaws, and the fiduciary duties owed by them as a matter of equity (Del. Code Ann. Tit. 8, § 327 (2016)). Creditors are the exception that proves

the rule: they do not get rights in equity, that is to say the power to sue, until a company is in bankruptcy—and even then only the power to sue derivatively—and when the creditors are then the residual claimants (*North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)).

These powers translate into purpose because those who run corporations owe their continued employment as managers and directors to the only constituency the corporate law establishes—stockholders.

As a person whose day job involves wearing a robe when I'm in court, I suppose I should be chary about suggesting that the role of judges in corporate power dynamics is, although critically important in protecting stockholders from self-dealing by conflicted fiduciaries and ensuring that stockholders' legitimate expectations are vindicated, not meaningful in influencing the determination of what

interests corporate managers serve when using their legal discretion. But, the reality is that judges have little clout over that topic.

The reason for that is, again, obvious. Corporate directors cannot subordinate the best interests of stockholders to that of other corporate constituencies unless the stockholders themselves support that subordination. And when a conflict emerges between the interests of corporate constituencies without power within the corporate polity—which is all of them other than stockholders—and the one with power—the stockholders—those elected by the stockholders bend to the will of their citizenry. And their citizenry is by statute, those who hold the corporation’s voting equity.

There are many examples of why the core power structure of corporate law translates into purpose. Over the last decade or so, boards of directors who previously made clear that they believed in a classified board structure, have bowed to stockholder sentiment time and again, such that classified boards are becoming an extinguished species (Spencer Stuart, 2015). That sort of bending to the winds

of stockholder sentiment is not anomalous, it is the overwhelming norm. Thus, structural defenses have declined substantially, pay policies reflect the views de jour of institutional investors and their fellow travelers, and most activist campaigns end up with a victory, in whole or in part, by the activist, usually because the elected made concessions in the face of a potential fight before the electorate (Benoit, 2015).

Off to the side in this slide toward a corporate governance system increasingly reflecting a direct democracy model—where immediate market sentiments are the major driver of policy on any contested issue—than a republican model involving a strong hand for the board, are the corporate constituencies other than stockholders.

And in today's markets, that means that human beings are off to the side, as most of the stockholders are not human beings, but other entities such as investment funds, mutual funds, and pension funds who act through agents every bit as subject to conflicts as the directors and managers of the corporations they influence. The power that flows from the core reality that under American corporate statutes only

stockholders have clout has also been demonstrated outside Delaware. Although many states have statutes that say that boards may consider the best interests of other constituencies as an equal end to stockholders, none of these states give other constituencies any power and it is therefore generally acknowledged that these statutes have done nothing meaningful to protect other constituencies (Velasco, 2006; Springer, 1999; Bainbridge, 1992). In short, in most circumstances, when scholars argue that boards already have the legal space to “do the right thing” and treat other constituencies as equal ends of governance, they are in effect arguing that boards should subordinate the board’s only constituency that has any statutory power—stockholders—to constituencies that the corporate law does not consider citizens of the corporate republic.

II.

But, for purposes of this article, I wish to highlight one prominent example of why power is purpose within the corporate polity. An example that is close to my

heart, as someone who came to the State of Delaware when he was nine years old and has spent much of his life in service to Delaware. That is the example of what has happened to E. I. du Pont de Nemours and Company—more commonly referred to today as DuPont—over the past few years. In the remainder of this article I will sketch DuPont’s recent history, a history that illustrates how even a company with a track record of long-term investment and better-than-typical treatment of constituencies other than stockholders still, when push came to activist shareholder shove, chose to focus solely on the interests of one constituency—the constituency with all the power—stockholders.

One of the most influential corporations in the history of the United States, DuPont has been an engine for scientific innovation on many fronts. Household products such as Nylon, Mylar, and Lycra owe their origins to DuPont and its scientists (DuPont, 2016). And Delaware was the birthplace and long-standing home of DuPont.

As with many American corporations, by this century, DuPont was well below its all-time high levels of employment—in no small part due to downsizings because of earlier stock market pressures—and certainly that was true in Delaware (Montgomery, 2015). But entering this decade, DuPont remained one of, if not the most important, private sector employer in Delaware (Bunge, 2015). At the center of our major business city, Wilmington, the DuPont Building stood proudly on Rodney Square. The DuPont Building continued, until recently, to house the headquarters of the DuPont Company, as well as the eponymous Hotel DuPont and the DuPont Playhouse. The Hotel remained a hallmark place to hold a wedding, a major community event, and was a special place to go for brunch. And DuPont retained an interest in one of the country clubs it had originally started as a benefit for and way to attract employees.

Not only that, the DuPont Corporation, although not being as involved in community affairs as it had been in the past, seemed to have turned a business corner.

Its stock price was up substantially, the corporation was profitable, and there had been more stability in local employment (Bunge and Benoit, 2015; Solomon, 2015; Sonnenfeld, 2015). Although the community missed the old DuPont, which was extremely active in the community, it was glad to continue to have DuPont, which continued to be a responsible and giving corporate citizen, even in the wake of globalization. In fact, DuPont had its first Delaware native CEO in some time, and its first woman CEO ever, Ellen Kullman. Consistent with its traditions, DuPont prided itself on core values of safety and health, environmental stewardship, the highest ethical behavior, and respect for people (DuPont, 2016). The firm had a historic reputation as a “paternalistic employer who seemed to promise great pay, first-rate benefits and secure pensions guaranteed to last a lifetime” (Nagengast, 2014).

Then came a big year for both DuPont and even more so for Delaware, in some ways: 2013. The causal chain is debatable but two things happened for sure.

Nelson Peltz, one of the most respected activist investors, and his firm Trian Partners took a large equity interest in DuPont.² While expressing support for Ellen Kullman and crediting her with taking steps to improve DuPont's competitive position, Trian insisted that DuPont was underperforming on key metrics (Trian Fund Management L.P. et al., 2014). Trian proposed reducing DuPont's cost structure by, among other things, having it get out of the hotel, playhouse, and country club business (Trian Fund Management L.P. et al., 2014). More fundamentally, Trian proposed breaking DuPont into three separate businesses. In the same year, DuPont itself announced a partial breakup, by proposing to spin off its performance chemicals business, which

² For the reader interested in the full details of the proxy fight between Trian and DuPont and its aftermath, the following sources are useful: two articles by the *Wall Street Journal* survey the fight: Bunge, J. and Benoit, D. (2015), 'DuPont Repels Push by Peltz to Join Its Board', *Wall Street Journal*, <http://www.wsj.com/articles/dupont-repels-push-by-peltz-to-join-its-board-1431562720>; Bunge, J. and Benoit, D. (2015), 'DuPont Defeats Peltz, Trian in Board fight', *Wall Street Journal*, <http://www.wsj.com/articles/dupont-appears-poised-to-win-over-peltz-1431521564>. Both articles link to a gamut of coverage over the course of the fight. For perspectives on how the proxy fight may effect the Delaware community surrounding DuPont, an article from Wilmington's *The News Journal* provides a broad view on DuPont's presence in the state: Goss, S. and Mordock, J. (2015), 'Delaware's dilemma: A fading DuPont', *The News Journal*, <http://www.delawareonline.com/story/money/industries/2015/10/23/delawares-dilemma-fading-dupont/74329022/>. For those interested in a more financial perspective, Harvard Business School wrote a case study on Trian's intervention with DuPont. Viceria, L., Dhruva, K., and Lee, P. (2016), 'Trian Partners and DuPont,' Harvard Business School Case 216-077.

it gave the name The Chemours Company (Stynes, 2014). For Delaware, that proposed spin off presaged obvious problems because even though Trian had questioned why DuPont itself—a conglomerate chemicals company—needed a hotel, country club and theater, DuPont planned to abandon its Wilmington headquarters building to Chemours, head for the suburbs, and leave the much smaller spin off with that “asset,” formerly called “DuPont’s front door” (Milford and Starkey, 2014), for which Chemours had no need, all the while also trying to sell or give away the theater, hotel, and country club (Kalesse, 2016; Mordock, 2015). When DuPont successfully passed off the DuPont Playhouse to a local nonprofit, it insisted that its name be removed from the theater (Kalesse, 2016).

After some period of engagement, Trian and DuPont eventually went to separate corners and squared off for a proxy fight. Trian’s case was as mentioned: It argued that although DuPont had done decently well in recent years, it was still lagging industry competitors, had an excessive cost structure, and would do better if

it was broken up (Triam Fund Management, L.P. et al., 2015). Triam offered to be a partner with DuPont management in implementing this new strategy (Triam Fund Management, L.P. et al., 2015). But, it wanted Mr. Peltz himself to serve as a director (Triam Fund Management, L.P. et al., 2015). Somehow viewing Peltz—an accomplished corporate manager himself who had come to be regarded as a valuable and constructive colleague in other similar situations when he was added to the board (Benoit, 2015; Weiss, 2013)—as beyond the pale, DuPont would not settle if Peltz himself insisted on serving (Triam Fund Management, L.P. et al., 2015).

Instead, CEO Kullman went to the market with her own platform. On the business side, she pushed the benefits of her own cost-cutting agenda, including the Chemours spin off, and disavowed that it was influenced at all by the emergence of Triam as a large stockholder (DuPont, 2015). The company, as is now standard, went to proxy advisors and investment funds with its own pitch about its future performance, and how investors would be better off sticking with management. And

knowing that Trian had proposed new directors for its slate with serious managerial experience who investors might find attractive, DuPont identified two new candidates for its management slate. Edward Breen had been chairman and CEO of Tyco from 2002 to 2012. DuPont heralded Tyco's 703% total shareholder returns during his tenure but failed to mention that Breen's tenure also saw Tyco break apart into five companies (DuPont, 2015). James Gallogly had shepherded another chemicals company, LyondellBasel, through Chapter 11 with, as DuPont noted, similarly positive outcomes for shareholders: 593% total returns during his tenure (DuPont, 2015).

An expensive and high-profile proxy contest ensued. During that proxy contest, DuPont called on institutional investors to think long term and stand by its plan, which it argued was in the best interests of typical American investors whose money is stuck in the market for decades and who depend on sustainable long-term growth fueled by deep investments in research and development (DuPont, 2015).

DuPont argued that Trian's plan could interfere with long term growth by cutting needed R & D investments and the potential for synergies in innovation among DuPont's diverse base of research scientists, saying things like Trian's proposal "would destroy our innovation platform, diminish global reach, weaken our brand and reduce our opportunity to drive revenue through cross-selling" (DuPont, 2015).

At the same time, DuPont looked for support from its employees and home communities, arguing that it was committed to them and Delaware (DuPont, 2015).

DuPont placed an ad in the Wilmington News Journal reminding "our neighbors, colleagues and shareholders" that DuPont was a "proud pillar of the greater Wilmington community," "a leader in this community," and expressed a desire to be "a strong, contributing corporate citizen and one of the best places to work for Delawareans for many years to come" (DuPont, 2015). Trian retorted that its interests were "fully aligned with . . . the greater Wilmington community" (Trian Fund Management, L.P. et al., 2015).

It all ended in a close “victory” for DuPont. Its proposed slate, including new members Breen and Gallogly, won. The Trian slate, including Peltz himself, was narrowly defeated. The close victory divided the investment community. DuPont pulled out its narrow victory with support from three major money managers Vanguard Group, Blackrock, and State Street, even though the two major proxy advisory firms, ISS and Glass Lewis, recommended that stockholders vote with Trian (Bunge and Benoit, 2015). Fidelity Investments and Capital Research were two notable money managers who sided with Trian and the proxy advisor recommendation (Bunge and Benoit, 2015). Ellen Kullman was hailed by some in the national and local press as a heroic CEO, who had sailed bravely into the winds of prevailing sentiment and stood up for traditional values (Milford, 2015; Sonnenfeld, 2015).

But, victory would not be a word many would put on the struggle’s aftermath, at least not for the other constituencies of DuPont. For starters, Delaware had to deal

with the fall-out of what DuPont had either done on its own without being influenced by Trian, or had been influenced to help DuPont prevail against Trian in a proxy fight.

The spin-off Chemours immediately struggled and made clear that it was not obligated to stay headquartered in Wilmington and might not do so (Mordock, 2015).

With the departure of DuPont itself from the DuPont Building to the suburbs, employment in the DuPont Building in the center of Wilmington declined, both in terms of overall jobs, but also in terms of average wages. This departure from Wilmington by DuPont came at a vulnerable time for Wilmington, which was struggling with a spiraling crime rate and declines in banking employment.

Chemours also closed its Edgemoor plant in Delaware (Rainey, 2015) and reduced employment (Pizzi and Mordock, 2015). As of now, Chemours has announced it intends to stay in Delaware. But, as we shall see, it has only done so after subjecting Delaware to an auction process involving other states and

communities. And as of now, it is not clear that Chemours will remain in the DuPont Building on Rodney Square, leaving the potential for the Square's prime property to be without a major tenant (Pizzi and Mordock, 2015). Consistent with this tenuous situation, the future of the Hotel DuPont and its Playhouse are insecure, although the community itself has stepped up to help the Playhouse continue (DiStefano, 2015). The head of the organization now operating the Playhouse heralded this community spirit, observing that the Playhouse's new "secret weapon" was the close to 200 strong corps of volunteer ushers with "infectious," "sincere enthusiasm" (Kalesse, 2016). In this process, not much has been heard from DuPont itself about any obligations it owes to Wilmington, or Delaware more generally.

At DuPont itself, Kullman and her management team had no chance to savor their win. Having put an aggressive case on the street to win the proxy fight, DuPont was not well-positioned to meet its targets in the face of adversity. And adversity hit in the form of a strong U.S. dollar and a weaker agricultural market, and DuPont

was soon failing to meet the earnings targets it had put out in the proxy fight (Mordock, 2016).

Within a year of supposed triumph, Kullman found herself on the outs, with the DuPont board having discovered that new director, Ed Breen, was a better CEO and that their prior stated view of what was good for the company was, well, now wrong. Almost immediately upon ascending to that post, Breen gave an interview indicating that he had been thinking since he joined the DuPont board about a transaction in which DuPont would merge with its industry rival and fellow target of insurgent investors, Dow Chemical Company, and then break the combined company into three pieces: an agriculture business (“Agriculture”), a specialty products business (“Specialty Products”)—including products such as Kevlar and solar panel components, and a materials science business (“Materials”)—including products like resins and certain kinds of plastics (Mordock, et al., 2016; Faber,

2015). This noodling had not formed part of the proxy materials offered in support of Breen's election.

Breen's assumption to the CEO position and his eventual announcement that DuPont and Dow were merging of course pleased Trian, as his plan largely echoed Trian's plan (Bunge et al., 2015). Trian, in fact, announced its full support, viewing the transaction as "a great outcome for all shareholders" (Bunge et al., 2015).

Not so lucky, however, were DuPont's workers, to whom strong appeals to be loyal had been made during the proxy fight. Between Christmas and New Year's Eve 2015, the historically paternalistic Uncle Dupie (Milford, 2015) was more like pre-reform Scrooge and announced that 1,700 workers in Delaware would be given pink slips. Unlike many Americans, most of these workers could not be faulted for failing to have skills that are relevant in an increasingly sophisticated, science-, and technology-intensive world. Many of these workers had doctoral degrees from

leading research universities, and many others had applied science skills (Benderly, 2016).

Almost as importantly, DuPont and Dow (which was under much more severe market pressure than DuPont and had made large layoffs itself) made clear that bids to keep their downsized operations, after the merger and break-up, would be considered. That is, if the communities that had been the home of their historical business operations wanted to keep them, they should reach into the pockets of their other taxpayers to make that happen.

Out of this bidding war came a preliminary agreement whereby Delaware would be headquarters of two of the three spin-off businesses: Specialty Products and Agriculture. Midland, Michigan, Dow's long time home and a town even more dependent on Dow than Wilmington was on DuPont, would be home to Materials. Meanwhile, Chemours also leveraged Delaware by openly pondering a move of its headquarters to New Jersey or Pennsylvania (Mordock, 2016). In fairness to

Chemours' managers, it must be acknowledged that DuPont had left it with assets that were not assets to it, such as the DuPont Building and a hefty amount of legacy DuPont liabilities. If DuPont itself had no compunction about asking Delaware taxpayers to subsidize it, expecting more of Chemours would have been more the stuff of hope, than of market logic.

As the price for Delaware of keeping the combined Specialty Products and Agriculture businesses and Chemours, Delaware's General Assembly passed legislation that would give DuPont important tax benefits and cost the state over \$57 million in revenues over four years—material funds in the context of Delaware's tight budget situation (Mordock, 2016). These state-level benefits were also accompanied by concessions at the county and state level. Likewise, Iowa provided a package of loans and grants that will cost taxpayers \$17.2 million over several years in exchange for a promise that the 2,600 jobs at DuPont Pioneer in that state were safe (Doering and Hardy, 2016). Indiana too offered a package of incentives

aimed at keeping elements of the new agriculture business in the state (Doering and Hardy, 2016).

If asked whether we prefer to keep what we can of DuPont or not, Delawareans would be overwhelmingly in favor of keeping DuPont. I am strongly in that camp myself, and I know how hard and how fast our elected officials worked to do the best they could by our community in a very difficult, urgent situation.

But, the best way to look at the outcome is like this. Imagine your spouse comes home and says, “I will stay with you and be three-quarters as loving in the future if you give me a new sports car each year.” You might do it, but feel good about it?

For present purposes, what is most important about this scenario is that it illustrates the reality of how power dictates purpose in our corporate governance system. No court was ever going to make DuPont’s board bend to the electorate’s will. And that board had just been elected and had room until the next election.

DuPont was not in financial distress and the headwinds it faced did not threaten its solvency or ability to deliver strong returns in the future. The proxy contest's outcome revealed that this was a debate about whether a profitable company could be made even more profitable.

But when it came down to it, the DuPont board knew who called the shots and surrendered the direction of the company to the prevailing market winds. They knew, as they had long known by downsizing and taking other actions that adversely affected other constituencies over prior decades (Goss and Mordock, 2015), that they were expected to make their end the best interests of their investors, even if that meant hurting other constituencies. And they were not willing to further fight for their previous view of what was best for stockholders in particular, much less the company's other constituencies.

And, therefore, it was without any apology or shame that DuPont and Dow not only presented their historic home communities with gut-wrenching job losses,

facility closures that threatened to hollow out towns, and all the damage to other businesses that came with those decisions, but then asked those home communities to go into the pockets of ordinary taxpayers.

Revealing that stockholders are by no means residual claimants, DuPont and Dow were able to extract exemptions from their pre-existing legal obligations as citizens to pay taxes. The diminished taxes the corporations will pay will be made up by other taxpayers, either by paying higher taxes or by having their governments delivered reduced services. The new corporate “residue” does not come from managerial ingenuity, it comes from the leverage exerted by DuPont and Dow over their home communities, leverage exerted on behalf of only corporate constituency.

This story is not about bad people. I have long considered myself fortunate to live in a community where DuPont was headquartered. If I were put under oath, I would bet that the DuPont board was more community-regarding than the typical public company board, and that that was even more so of its long-term managers.

But, it is telling that when it mattered, not one element of the DuPont board spoke up in any public or meaningful way to go to bat for the company's workers, or to say it is one thing for us to do this, it is another for us to go hat in hand and to ask Delaware, Michigan, and Iowa to give us money when we are reducing employment and cutting facilities.

Vilifying those who work within a power structure for being responsive to its clear design is not only unfair, it is unproductive. There was no braking power given to DuPont or Dow's employees or historic communities to impede the pressure being applied by an aggressive stock market. Ultimately, the fate of those companies was always subject to determination by their only citizens, who are the ones who control the voting of their stock.

Trust me, I get it that is difficult to read the following sentence from someone, Ed Breen, who had far less invested in reality in DuPont than any long-term Delaware resident: "DuPont will be prominently mentioned in the new name going

forward . . . [i]t is nice for the employees that work here and it keeps continuity here. *Our* 213-year history is going to continue” (Mordock et al., 2016). But, the only factual error in that statement, by a person who had first joined DuPont as a director only the year before, is that in terms of actual power over DuPont, the “our” can only really be used by those who can muster a majority of the company’s voting power. Even as to the managers and directors, they are highly paid drivers of the corporate machine, who hold the keys only as long as they please the market.

If, as many of us believe, it would be more socially useful for corporations to be more accountable to their workers, their communities, their consumers, and to society generally than now is the case, then it is important that we be clear-eyed. If we wish corporations to be able to pursue long-term strategies with fewer disruptions from shifting momentary market concerns, then it is time for corporate scholars and commentators to make money managers be faithful representatives of the ordinary human beings whose long-term capital they control. If we wish to protect workers,

consumers, and the environment, then it is time to reinvigorate and extend the legal protections for these constituencies, both within and without corporate law, and to make corporations compete on a fair playing field in which all must treat these important concerns with dignity and respect.

But, what will not help any worker, consumer, or the environment is pretending that American corporate law makes them all an equal end of corporate governance. That is just not true.

Genuine concern for those other constituencies requires facing the truth and supporting changes in the power dynamics affecting corporate governance and behavior that make due regard for them a required obligation for the conduct of business.

REFERENCES

Bainbridge, S. (2007), 'Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency', *Journal of Business and Technology Law*.
(2009), *Corporate Law*, 2d ed., Foundation Press

Benderly, B. (2016), 'DuPont Cutbacks Send a Chill through Delaware's Science Community', *Scientific American*.

Benoit, D. (2015), 'Activism's Long Road From Corporate Raiding to Banner Year', *The Wall Street Journal*.

Benoit, D. (2015), 'Trian's Nelson Peltz: What Happens When Activist Comes on Board', *The Wall Street Journal*.

Bunge, J. (2015), 'Dow-DuPont Merger Sows Anxiety in 2 Cities', *The Wall Street Journal*.

Bunge, J., and Benoit, D. (2015), 'DuPont Defeats Peltz, Trian in Board Fight', *The Wall Street Journal*.

— —, 'DuPont Repels Push by Peltz to Join Its Board', *The Wall Street Journal*.

Bunge, J., et al. (2015), 'DuPont, Dow Chemical Agree to Merge, Then Break Up Into Three Companies', *The Wall Street Journal*.

Del. Code Ann. Tit. 8, § 211(b) (2011).

DiStefano, J. (2015), 'DuPont to divest Wilmington theater', *Philly.com*.

Doering, C., and Hardy, K. (2016), '\$17M deal: No DuPont ag HQ, but no jobs lost either', *Des Moines Register*.

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

DuPont (2016), *2015 DuPont Annual Report*.

— —, *DuPont, Dow Announce Site Structure of Intended Independent Agriculture Company*.

- —, *Innovation Starts Here*, <http://www.dupont.com/corporate-functions/our-company/dupont-history.html>.
- (2015), *A Message to Our Neighbors, Colleagues and Shareholders* (SEC Schedule 14A No. 0001104659-15-028492).
- —, *Vote the Enclosed White Proxy Card Today For DuPont's Highly Qualified Directors* (SEC Schedule 14A No. 0001104659-15-021528).
- Dwyer, P. (2015), 'The Myth of Shareholder Value', *BloombergView*.
- Elhauge, E. (2005), 'Sacrificing Corporate Profits in the Public Interest', *New York University Law Review*, 738.
- Faber, D. (2015), 'First on CNBC: CNBC Transcript: DuPont CEO Edward Breen and Dow CEO Andrew Liveris Speak with CNBC's David Faber on Squawk on the Street Today', *CNBC*.
- Goss, S., and Mordock, J. (2015), 'Delaware's dilemma: A fading DuPont', *The News Journal*.
- Greenfield, K. and Nilsson, J. (1997), 'Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule', *Brooklyn Law Review*, 831.
- Henderson, T. (2009), 'The Story of *Dodge v. Ford Motor Company*', in *Corporate Law Stories*, New York, Foundation Press.
- Henderson, T. (2010), 'The shareholder wealth maximization myth', *Truth on the Market*, <https://truthonthemarket.com/2010/07/27/the-shareholder-wealth-maximization-myth/>.
- Johnson, L. (2013), 'Pluralism in Corporate Form: Corporate Law and Benefit Corps.', *Regent University Law Review*.
- Kalesse, R. (2016), 'Curtain rises on new era for Playhouse Theater', *Delaware Business Times*.

- Manesh, M. (2014), 'Nearing 30, Is *Revlon* Showing Its Age?', *Washington & Lee Law Review Online*.
- Milford, M. (2015), 'DuPont CEO Ellen Kullman called a 'hero'', *The News Journal*.
- Milford, M. (2015), "'Uncle Dupie is dead': Kullman's exit is seismic shift', *The News Journal*.
- Milford, M. and Starkey, J. (2014), 'DuPont Co. to leave downtown Wilmington', *The News Journal*.
- Millon, D. (2013), 'Radical Shareholder Primacy', *University of St. Thomas Law Journal*, 1023–24.
- Montgomery, J. (2015), 'DuPont, Chemours risks deepen concern about economy, jobs', *The News Journal*.
- Mordock, J. (2016), 'A wildly different DuPont a year after Peltz defeat', *The News Journal*.
- —, 'Spinoffs to stay in Delaware after Dow-DuPont merger', *The News Journal*.
- —, 'Chemours to stay in Wilmington; 1,000 jobs kept in Del.', *The News Journal*.
- Mordock, J. (2015), 'Chemours CEO remains noncommittal on staying in Delaware', *The News Journal*.
- Mordock, J. (2015), 'Source: DuPont taking bids for hotel, country club', *The News Journal*.
- Mordock, J., Goss, S., Duvernay, A., and Matthew, A. (2016), 'Spinoffs to Stay in Delaware after Dow-DuPont merger', *The News Journal*.
- Nagengast, L. (2014), 'The Past, Present and Future of DuPont', *Delaware Today*.
- North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)

- Pearlstein, S. (2013), ‘How the cult of shareholder value wrecked American business’, *The Washington Post*.
- Pizzi, J., and Mordock, J. (2015), ‘Downtown business owners worry as Chemours struggles’, *The News Journal*.
- Rainey, D. (2015), ‘DuPont spin off Chemours to close Edgemoor plant’, *Delaware Business Now!*.
- Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*, 506 A.2d 173 (Del. 1986).
- Shlensky v. Wrigley*, 237 N.E. 2d 776 (Ill. App. Ct. 1968).
- Solomon, S. (2015), ‘In DuPont Fight, Activist Investor Picks a Strong Target’, *New York Times DealBook*.
- Sonnenfeld, J. (2015), ‘Another suicidal board? How DuPont’s directors failed Ellen Kullman’, *Fortune*.
- Spencer Stuart (2015), *Spencer Stuart Board Index*, 8, 12.
- Springer, J. (1999), ‘Corporate Constituency Statutes: Hollow Hopes and False Fears’, *1999 Annual Survey of American Law*.
- Stout, L. (2008), ‘Why We Should Stop Teaching *Dodge v. Ford*’, *Virginia Law and Business Review*, 168–71.
- Stout, L. (2012), *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public*, San Francisco, Berrett-Koehler Publishers, Inc., 30–31.
- Stynes, T. (2014), ‘DuPont Names Planned Performance Chemicals Spinoff’, *The Wall Street Journal*.
- Triam Fund Management, L.P. et al. (2015), *Triam Partners Delivers Letter and White Paper Summary to DuPont Board*.
- —, *An Open Letter to DuPont Employees and Retirees* (SEC Schedule 14A No. 0000930413-15-001831).

— —, *Trian Sends Letter to DuPont Stockholders* (SEC Schedule 14A No. 0000930413-15-001679).

Velasco, J. (2006), 'The Fundamental Rights of the Shareholder', *University of California Davis Law Review*.

Viceria, L., Dhruva, K., and Lee, P. (2016), 'Trian Partners and DuPont,' Harvard Business School Case 216-077.

Weiss, M. (2013), 'Peltz Helped Spur Heinz Turnaround Setting Stage for Bid', *Bloomberg*.