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Corporate Tax Avoidance and Honoring the Fiduciary Duties Owed to the Corporation and Its Stockholders

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Abstract: Corporate tax avoidance is a pressing issue of both national and international concern. Corporations usually claim that they are legally required to engage in aggressive tax strategies. But this Article proves that claim is incorrect when based upon the fiduciary duties owed to the corporation and its stockholders. Directors and other corporate managers often look to the classic case of *Dodge v. Ford*, which is ubiquitous in corporate law from the boardroom to the courtroom, as a North Star that guides them toward and defines their fiduciary duties to the corporation and its stockholders. In *Dodge*, the court held, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end." This holding has been interpreted by many directors and other corporate managers not only as a decree to relentlessly seek profit, but also as an absolute edict to maximize profits, even if it means hurting society, damaging the environment, or destroying anything standing in the corporation's path. The problem is that this interpretation of the *Dodge* mandate is wrong. The mandate requires only that directors and other corporate managers run the corporation "primarily for the profit of the stockholders," leaving room for other secondary considerations. Beyond that, many limitations on the *Dodge* mandate exist, including the business judgment rule, which gives directors and other corporate managers substantial discretion in running the corporation. The *Dodge* mandate, while offering general guidance as to how a corporation should be run, i.e. "primarily for the profit of the stockholders," utterly fails to offer guidance in assessing any specific analysis. As a result, other doctrines are needed to fill this gap. This Article discusses some of the doctrines, including corporate social responsibility, sustainability, and economics, that should be employed to protect society from the damage that tax avoid-

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ance can create. It concludes that while some minimal amount of tax avoidance may be acceptable, very aggressive forms of tax avoidance should be avoided.

INTRODUCTION

On July 6, 2016, the United States Department of Justice filed a summons enforcement proceeding in the United States District Court for the Northern District of California to compel Facebook, Inc. to comply with an ongoing Internal Revenue Service (IRS) investigation relating to the alleged undervaluation of property transferred to an Irish subsidiary as part of a tax avoidance scheme.[1] Although the audit year involved was 2010, this filing provided the first public notice of this investigation.[2] The scheme, commonly referred to as a "double Irish strategy" because it involves the creation of two Irish subsidiaries, allows United States corporations to take advantage of Ireland's 12.5% corporate tax rate, which is substantially lower than the corporate tax rate in the United States.[3] The IRS was specifically concerned with the undervaluation of assets transferred from Facebook to the Irish subsidiary for purposes of setting up the scheme.[4] According to a disclosure

[1] *See* Seth Fiegerman, *Facebook Is Being Investigated by the IRS*, CNN (July 7, 2016, 12:43 PM), http://money.cnn.com/2016/07/07/technology/facebook-irs-investigation/?iid=EL [https://perma.cc/4L4B-GNEY] ("The U.S. Justice Department filed a petition in court on [July 6th] to force Facebook . . . to comply with an ongoing IRS investigation into whether the company significantly understated the value of property transferred to an Ireland subsidiary as part of a complex maneuver to reduce its tax payments.").

[2] *See* Seth Fiegerman, *Facebook Could Owe $5 Billion in Taxes*, CNN (July 29, 2016, 2:17 PM), http://money.cnn.com/2016/07/29/technology/facebook-irs-penalty/index.html [https://perma.cc/4WN6-TDF8] ("The tax issue was first disclosed publicly [on July 6th] when the U.S. Justice Department filed a lawsuit forcing Facebook to comply with the ongoing IRS investigation.").

[3] *See* Richard Lyal, *Transfer Pricing Rules and State Aid*, 38 FORDHAM INT'L L.J. 1017, 1023 (2015) ("Among tax planners, Ireland is well known as a base for the technique called 'double Irish,' which exploits mismatches in the tax treatment of companies that are incorporated in Ireland but not resident there for tax purposes."); Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 TAX L. REV. 207, 207–09 (2015) ("Employing a multi-layered configuration of foreign subsidiaries—in a structure known as the 'double Irish, Dutch sandwich'—banner U.S. companies like Apple, Cisco, and Google have significantly reduced their global tax bills by shifting profitable aspects of their businesses to low-tax countries."); Stephen C. Loomis, Recent Development, *The Double Irish Sandwich: Reforming Overseas Tax Havens*, 43 ST. MARY'S L.J. 825, 836–39 (2012) (providing a "walkthrough" of the "double Irish" tax strategy that some large multinational corporations use to reduce their tax liability). Ireland has taken steps to end this controversial tax avoidance scheme. *See Death of the Double Irish*, THE ECONOMIST (Oct. 15, 2014), http://www.economist.com/news/business-and-finance/21625444-irish-government-has-announced-plans-alter-one-its-more-controversial-tax-policies [https://perma.cc/24C2-GJXZ] (discussing the Irish government's reforms designed to eliminate the "double Irish" tax avoidance scheme).

[4] *See* Deepa Seetharaman, *IRS Wants Facebook's Records on Transfer of Assets to Ireland*, WALL ST. J. (July 7, 2016, 5:33 PM), https://www.wsj.com/articles/irs-wants-facebooks-records-

that Facebook filed with the United States Securities and Exchange Commission, the penalty leveled by the IRS, which Facebook plans to contest, could range from between three billion to five billion dollars plus interest.[5]

Although the question of the legality of Facebook's behavior is an interesting one,[6] the deeper question is whether the law requires Facebook's corporate management and corporate managers in general to engage in aggressive tax avoidance strategies. This is a question that directors and other corporate managers face daily, and they would almost certainly answer in the affirmative based upon the fiduciary duties they perceive that they owe to the corporation and its stockholders. Remarkably, they are wrong. This Article explores whether directors' fiduciary duties require them to engage in aggressive tax avoidance strategies. Although surprising to many managers, the law surrounding these duties dictates no such thing.

Directors and other corporate managers often look to the classic case of *Dodge v. Ford Motor Co.* as a North Star, guiding them toward and defining their fiduciary duties to the corporation and its stockholders.[7] This case is ubiquitous in corporate law, from finding its way into the majority of leading textbooks to being implemented in boardrooms and courtrooms throughout the United States.[8] In *Dodge*, the Supreme Court of Michigan

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on-transfer-of-assets-to-ireland-1467923716 ("U.S. tax officials sued Facebook Inc. to force the company to hand over documents related [to] a transfer of assets to Ireland in 2010, part of a yearslong investigation into whether some of those assets were undervalued . . . .").

[5] Facebook, Inc., Quarterly Report (Form 10-Q) 19 (July 28, 2016) ("On July 27, 2016, we received a Statutory Notice of Deficiency (Notice) from the IRS relating to transfer pricing with our foreign subsidiaries in conjunction with the examination of the 2010 tax year . . . . [that] could result in an additional federal tax liability of an estimated aggregate amount of approximately $3.0–$5.0 billion, plus interest and any penalties asserted.").

[6] To be crystal clear, the authors of this Article take no position in this Article on the legality and propriety of Facebook's alleged actions.

[7] 170 N.W. 668, 684 (Mich. 1919) (discussing the duties of directors to corporations and their shareholders).

[8] *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 575 (2003) ("*Dodge*'s theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time."); Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1016 (2011) ("Although subsequent courts have not relied much on *Dodge*'s authority, the case and its statement of shareholder primacy have taken on lives of their own in law school casebooks, in the academic literature, and in the minds and hearts of American businesspeople. In fact, in large part due to *Dodge*, American corporate culture has embraced shareholder primacy and profit maximization as norms."); Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 239–40 (2012) ("Scholars and courts express a director's fiduciary duty to act in the best interest of a corporation as a duty to prioritize the shareholders' interests over interests of other constituencies or to maximize shareholder wealth. A frequently cited case espousing the shareholder wealth maximization norm is *Dodge* . . . .").

held, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[9] This holding, which the authors of this Article will refer to as the "*Dodge* mandate," has been interpreted by many directors and other corporate managers not only as a decree to relentlessly seek profit, but as an absolute edict to maximize profits, even if it means hurting society, damaging the environment, or destroying anything standing in the corporation's path.[10]

The problem is that this interpretation of the *Dodge* mandate is incorrect. The mandate requires only that directors and other corporate managers run the corporation "primarily for the profit of the stockholders," which leaves room for other considerations.[11] Beyond that, many limitations on the *Dodge* mandate exist, including, for example, the business judgment rule, which grants directors and other corporate managers substantial discretion in running the corporation.[12] In addition, relatively new constituency statutes, which have been enacted in a majority of jurisdictions, allow corporate management to consider a wider range of interests beyond just seeking profits for the corporation and its stockholders.[13] Moreover, the initial drafting and potential subsequent amendment of the articles of incorporation and the bylaws, along with seeking approval and ratification by stockholders and directors, provide other avenues to limiting the *Dodge* mandate.[14]

In short, while the *Dodge* mandate remains true in general, it provides scant guidance in specific matters because the limitations placed upon it

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

[10] *See* Vincent S.J. Buccola, *Beyond Insolvency*, 62 U. KAN. L. REV. 1, 24–25 (2013) ("The managerial ideal described in *Dodge* and similar cases is that of shareholder-wealth maximization . . . . On the traditional view, managers deciding how to employ firm assets ought to privilege the common shareholders over competing constituencies."); Keith William Diener, *The Restricted Nature of the Profit Motive: Perspectives from Law, Business, and Economics*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 237 (2016) ("The 1919 Michigan Supreme Court case of *Dodge v. Ford* is often cited as the basis for a legal obligation to maximize shareholder wealth."); Regina Robson, *A New Look at Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 509 (2015) ("[T]he *Dodge* court provided a legal sound bite for the concept that came to be known as profit maximization, and its corollary, shareholder primacy . . . .").

[11] *See Dodge*, 170 N.W. at 684.

[12] *See infra* notes 178–203 and accompanying text (discussing the business judgment rule as a limitation upon the *Dodge* mandate).

[13] *See infra* notes 212–222 and accompanying text (describing constituency statutes as a limitation upon the *Dodge* mandate).

[14] *See infra* notes 204–211 and accompanying text (analyzing stockholder and director approval and ratification as a limitation upon the *Dodge* mandate); *infra* notes 223–228 (describing the initial drafting and potential subsequent amendment of articles of incorporation and corporate bylaws as a possible limitation upon the *Dodge* mandate).

give broad discretion in how profit may be sought. In the past decade, at least one leading commentator has argued that *Dodge* ought to be ignored altogether, and that a better, more wholesome, and comprehensive understanding of the corporation ought to emerge.[15] The debate over teaching *Dodge* rages on and is unlikely to be resolved anytime soon. Regardless, the *Dodge* mandate will loom large over the corporate law landscape for decades, perhaps even centuries, to come.

Currently, a gap exists in the tax law scholarship regarding the application of the *Dodge* mandate, and the fiduciary duties that underlie it, to tax avoidance strategies. While substantial legal and ethical literature exists exploring the metes and bounds of fiduciary duties in the corporate context, this literature has not been applied to questions of tax avoidance. This gap in the applied literature is particularly relevant today because tax avoidance is currently one of the most significant legal questions for corporations. As the public observes corporations engaging in increasingly more aggressive tax practices, such as inversions, offshoring intellectual property, intercompany loans, transferring pricing schemes, non-repatriation of income, and even secret tax deals with tax havens, the public has become increasingly concerned that corporations are not fairly and fully contributing taxes to the nations in which they do business.[16]

In defense of highly aggressive tax strategies, directors and other corporate managers often point to *Dodge*.[17] They suggest that the *Dodge* mandate not only gives them permission to engage in these tax practices, but actually demands that they do so. This suggestion is incorrect. Rather than serving as a North Star in the area of tax avoidance, the *Dodge* mandate and the limitations placed upon it, if properly understood, should leave directors and other corporate managers wandering and unsure of how to proceed.

This Article argues that employing a broader range of doctrines, including doctrines from the fields of corporate social responsibility, sustainability,

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[15] *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 166 (2008) ("This Essay argues that *Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth.").

[16] *See* Tracy A. Kaye, *The Offshore Shell Game: U.S. Corporate Tax Avoidance Through Profit Shifting*, 18 CHAP. L. REV. 185, 185 (2014) ("[T]he public is becoming increasingly aware of the corporate tax avoidance issue. In fact, there is global concern that U.S. multinationals are using transfer pricing rules and other techniques to shift reported income to low-tax countries . . . ."); Michelle D. Layser, *Improving Tax Incentives for Wind Energy Production: The Case for a Refundable Production Tax Credit*, 81 MO. L. REV. 453, 515 (2016) ("[M]any members of the public are undoubtedly frustrated by stories of large corporate taxpayers that escape significant tax liability through aggressive tax planning strategies . . . .").

[17] 170 N.W. 668, 684 (Mich. 1919).

and economics, is necessary for determining when tax avoidance is permissible.[18] This Article ultimately concludes that no general legal duty to engage in tax avoidance exists, and, as a result, a broader conception of the corporation is needed. This conclusion, of course, challenges the popular shareholder primacy model of the corporation, a model that, similar to *Dodge*, seems to be more of a historical artifact with each passing year.

This Article supplements the existing scholarship in three main ways. First, this Article fills the gap in the existing scholarship regarding the application of the *Dodge* mandate and fiduciary duties to tax avoidance. Such a discussion is particularly timely considering how regularly tax avoidance issues continue to arise. Second, this Article provides an analysis of how the *Dodge* mandate should apply to tax avoidance in light of recent scholarship challenging the worth, scope, and validity of that mandate.[19] Such scholarship has demanded a more nuanced understanding of *Dodge*. This Article offers that more nuanced understanding and applies it to the complex issues surrounding tax avoidance strategies to demonstrate that the *Dodge* mandate fails to offer a solution to these issues. Third, in light of the failure of the *Dodge* mandate to offer definitive answers as to when corporate management should engage in tax avoidance strategies, this Article offers other doctrines that might be used as guiding principles to fill that void.

The remainder of this Article is structured as follows. Part I explores the nature of corporate tax avoidance, including contrasting tax avoidance and tax evasion, discussing the importance of tax avoidance and tax minimization to corporations, and exploring the negative externalities that tax avoidance generates.[20] Part II explores the *Dodge* mandate and how it emerges from the fiduciary duties that directors and other corporate managers owe to the corporation and its stockholders.[21] Part III explores the substantial limitations that are placed upon that mandate, including the business judgment rule, the possibility of stockholder and director approval and ratification of non-profit-seeking behavior, constituency statutes, and the ability of articles of incorporation and bylaws to limit the *Dodge* mandate.[22] Part IV provides and explains case law supporting the argument that the *Dodge* mandate does not legally require companies to engage in aggressive tax

[18] *See infra* notes 252–289 and accompanying text (discussing various doctrines that may provide guidance in tax avoidance matters).

[19] *See infra* notes 169–177 (discussing the continued importance of the *Dodge* mandate despite criticisms). *See generally* Stout, *supra* note 15 (criticizing the worth, scope, and validity of *Dodge*).

[20] *See infra* notes 25–67 and accompanying text.

[21] *See infra* notes 68–162 and accompanying text.

[22] *See infra* notes 163–228 and accompanying text.

avoidance strategies.[23] This Part also explores various fields that provide guidance in tax avoidance decision making in the absence of a legal requirement that firms engage in aggressive tax avoidance strategies, including corporate social responsibility, sustainability, and economics.[24] Finally, the Conclusion offers brief closing remarks.

Ultimately, this Article concludes that the negative externalities of tax avoidance are not merely an issue of individual rights, individual action, and individual consequences. Tax avoidance is a behavior that pushes off the costs of a firm's tax avoidance onto society, the business community, and a firm's culture. The *Dodge* mandate, while offering general guidance as to how a corporation should be run—that is, "primarily for the profit of the stockholders"—utterly fails to offer guidance in assessing any specific analysis. As a result, other doctrines are needed to resolve these issues. This Article discusses some of those doctrines, including corporate social responsibility, sustainability, and economics, that should be employed to protect society from the damage that tax avoidance can create. It concludes that while some minimal amount of tax avoidance may be acceptable, overly aggressive forms of tax avoidance should be avoided.

I. EXPLORING CORPORATE TAX AVOIDANCE

A. Defining Tax Avoidance

Corporate tax avoidance has emerged as an issue of both national and international concern; however, aggressively seeking to minimize one's taxes is not a new concept.[25] The extent to which one can and should minimize taxes has spawned disagreement for many, many decades, if not longer.[26]

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[23] *See infra* notes 229–251 and accompanying text.

[24] *See infra* notes 252–289 and accompanying text.

[25] *See, e.g.*, Joshua D. Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641, 1648 (2012) ("In the earliest forms of corporate tax abuse, corporations deployed relatively simple strategies to obtain beneficial tax results. . . . [C]orporations would frequently try to eliminate corporate taxation by disguising payments to shareholders as items that generated tax deductions, such as rental or salary payments, even though in reality such payments to shareholders constituted nondeductible dividends. Other corporations attempted to manipulate the characterization of their tax years by exploiting differences between the calendar year and their fiscal year."); David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 215–17 (2002).

[26] *See* Zoë Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 716 (2010) ("The cases have not provided any principled reason for us to believe that taxpayers are morally entitled to avoid tax. There have been judicial pronouncements on both sides of the debate on the morality of tax avoidance."); Anthony B. Casarona, Comment, *Regulating Corporate Tax Shelters: Seeking Certainty in a Complex World*, 50 CATH. U. L. REV. 111, 130–31 (2000) ("The rules promulgated to counter corporate tax shelters are inadequate because they fail to provide a clear standard to consistently or predictably judge alleged abuses. . . . [S]ubstantial disagreement remains concerning the distinction between abusive tax avoidance schemes and

While the issue persists, it becomes more salient to the public when large corporations grab headlines with their actions. In recent years, the tax strategies of Starbucks,[27] Apple,[28] Pfizer,[29] and numerous other corporations have reminded the public that firms often undertake highly aggressive tax strategies to minimize their corporate taxes. When the public is reminded, tax avoidance strategies draw considerable public scorn. In a March 2015 Pew opinion poll, sixty four percent of Americans surveyed indicated that "they are bothered a lot by the feeling that some corporations [do not pay their fair share of taxes]."[30]

Notably, recent news reports about the tax strategies of Starbucks, Apple, and Pfizer have not alleged legal violations; rather, the reports have alleged highly aggressive tax avoidance.[31] Still, as the Pew opinion poll indicates, concerns persist.

Corporate tax avoidance can be defined as structuring business transactions to reduce a firm's tax obligations in a manner that technically complies with the law, but violates the spirit or underlying policy of the law.[32] Avoid-

legitimate tax planning."); *see also* Elena Marty-Nelson, *Taxing Reciprocal Trusts: Chartering a Doctrine's Fall from Grace*, 75 N.C. L. REV. 1781, 1811 (1997) ("Creative taxpayers can and do arrange their transactions so as to minimize the applicable tax consequences, and there is little disagreement that such stratagems within the system are acceptable. However, somewhere in the continuum, otherwise acceptable machinations rise to a level of manipulation that cannot be tolerated without jeopardizing the integrity of the taxing scheme.").

[27] *See generally* Edward D. Kleinbard, *Through a Latte, Darkly: Starbucks' Stateless Income Planning*, 139 TAX NOTES 1515 (June 24, 2013) (discussing the controversy surrounding the Starbucks Corporation's use of aggressive tax avoidance strategies).

[28] *See generally* Danny Yadron et al., *Apple Avoided Taxes on Overseas Billions, Senate Panel Finds*, WALL ST. J. (May 20, 2013, 7:02 PM), http://www.wsj.com/articles/SB1000142412 7887324787004578495250424727708 (reporting on the Senate investigation into Apple's tax avoidance strategies).

[29] *See generally* James Surowiecki, *Why Firms Are Fleeing*, NEW YORKER (Jan. 11, 2016), http://www.newyorker.com/magazine/2016/01/11/why-firms-are-fleeing [https://perma.cc/4EER-46NB] (noting Pfizer's attempted corporate inversion as a tax avoidance mechanism).

[30] Seth Motel, *5 Facts on How Americans View Taxes*, PEW RES. CTR. (Apr. 10, 2015), http://www.pewresearch.org/fact-tank/2015/04/10/5-facts-on-how-americans-view-taxes/ [https://perma.cc/62RC-KH5J].

[31] *See* Kleinbard, *supra* note 27; Surowiecki; *supra* note 29; Yadron et al., *supra* note 28.

[32] *See* Prebble & Prebble, *supra* note 26, at 702–03 ("Tax avoidance is not illegal. Rather, it is the act of taking advantage of legal opportunities to minimize one's tax liability. Lord Nolan and Lord Hoffman separately captured the essence of avoidance in these passages: 'The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability . . . . [T]ransactions which in commercial terms fall within the charge to tax but have been, intentionally or otherwise, structured in such a way that on a purely juristic analysis they do not. This is what is meant by defeating the intention and application of the statute.'"); *see also* Michelle Hanlon & Shane Heitzman, *A Review of Tax Research*, 50 J. ACCT. & ECON. 127, 137 (2010) ("If tax avoidance represents a continuum of tax planning strategies where something

ance is distinguishable from evasion by the legality of the action.[33] Tax avoidance, for example, is not implicated when taxpayers purchase single family homes and use the home mortgage interest deduction. Such an economic transaction is consistent with congressional intent.[34] Tax avoidance occurs when economic transactions are structured to achieve tax results contrary to those that should typically occur.[35] For example, tax avoidance occurs when U.S.-based firms offshore their intellectual property to a controlled Irish company to take advantage of the low Irish tax rate, while making no other organizational changes and keeping the benefits of ostensibly remaining a U.S.-based firm.[36] Tax avoidance also occurs when a U.S.-based firm intentionally leaves foreign-earned profits offshore to avoid U.S. taxation while simultaneously using a series of short-term, inter-company loans to gain onshore use of the profits.[37] Further, tax avoidance occurs when firms create, within a low-tax jurisdiction, a related subsidiary in its supply chain and employ artificially high/low transfer pricing to shift earnings from a high-tax jurisdiction to a lower-tax jurisdiction.[38]

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like municipal bond investments are at one end, . . . then terms such as 'noncompliance,' 'evasion,' 'aggressiveness,' and 'sheltering' would be closer to the other end of the continuum.").

[33] *See* Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, 62 NAT'L TAX J. 727, 727 (2009) ("Tax avoidance is sometimes used to refer to a legal reduction in taxes, while evasion refers to tax reductions that are illegal. . . . A multinational firm that constructs a factory in a low-tax country rather than in the United States to take advantage of low corporate tax rates and deferral of U.S. tax is engaged in avoidance, while a U.S. citizen who sets up a secret bank account in the Caribbean and does not report the interest income is engaged in evasion. Many activities, particularly by corporations, often referred to as avoidance, could be classified as evasion. One example is transfer pricing, where firms charge low prices for sales to low-tax affiliates but pay high prices for purchases from them. If these prices, which should be at arms-length, are set artificially to reduce total taxes paid, this activity might be viewed as evasion, even if such pricing is not overturned in court because evidence is lacking.").

[34] *See* MARK P. KEIGHTLEY, CONG. RESEARCH SERV., R41596, THE MORTGAGE INTEREST AND PROPERTY TAX DEDUCTIONS: ANALYSIS AND OPTIONS 3–5 (2014) (noting the history of the home mortgage interest deduction).

[35] *See* Prebble & Prebble, *supra* note 26, at 702–03 (describing tax avoidance).

[36] *See, e.g.*, Jennifer DePaul, *Advocacy Group Urges Etsy to Change Tax Structure*, 148 TAX NOTES 1079, 1079–80 (Sept. 7, 2015) (noting critiques of Etsy's use of an Irish subsidiary); Suzanne Kapner, *Etsy Faces Pressure to Abandon Irish Tax Strategy*, WALL ST. J. (Sept. 1, 2015, 12:00 AM), http://www.wsj.com/articles/etsy-faces-pressure-to-abandon-irish-tax-strategy-1441080008 (discussing Etsy's transfer of intellectual property to an Irish subsidiary and the tax consequences).

[37] *See, e.g.*, Andrew Velarde, *Will Wal-Mart's Short-Term Loan Plan Drive Change?*, 148 TAX NOTES 123, 123–25 (July 13, 2015) (noting Wal-Mart's use of short-term loans to transfer profits from a foreign subsidiary).

[38] *See, e.g.*, Kleinbard, *supra* note 27 at 1522–29 (noting Starbucks' use of affiliates, royalties, licensing fees, transfer pricing, and inter-firm loans to avoid taxation); Richard Murphy, Opinion, *Amazon, Google and Starbucks Are Struggling to Defend Their Tax Avoidance*, GUARDIAN (Nov. 13, 2012, 7:47 AM), http://www.theguardian.com/commentisfree/2012/nov/13/amazon-google-starbucks-tax-avoidance (critiquing transfer pricing practices).

While some decry these corporate actions,[39] others defend them as either legally required, accepted business practices, or both. President Donald Trump has claimed that he has a "fiduciary responsibility to his business . . . to pay no more tax than legally required."[40] Senator Rand Paul has suggested that "[a] corporate executive would be fired if he or she passed up known ways to reduce taxes."[41] Even the Organization for Economic Co-operation and Development's (OECD) tax director acknowledges that "tax planning [has] become part of core business models."[42] These statements are indicative of two business realities: first, the belief that tax avoidance is acceptable and pervasive in business, and, second, that managers perceive they must engage in this behavior, either due to peer pressure or a belief that their fiduciary duties require it.

B. The Attraction of Tax Avoidance to the Corporation and Its Managers

Corporations engage in tax avoidance because it is lucrative.[43] The accounting literature refers to tax avoidance as a value-creating activity.[44] The OECD estimates that multinational firms engage in up to $240 billion of tax avoidance annually, which is the equivalent of ten percent of global corpo-

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[39] *See* New York Times Editorial Board, Editorial, *Pfizer's Big Breakthrough: Global Tax Avoidance*, N.Y. TIMES (Nov. 24, 2015), http://www.nytimes.com/2015/11/24/opinion/pfizers-big-breakthrough-global-tax-avoidance.html ("The $160 billion deal to combine Pfizer and Allergan, the maker of Botox, does not appear to be illegal. But it should be. This merger is a tax-dodging maneuver that enriches shareholders and executives while shortchanging the public and robbing the Treasury of money that would pay for a host of government programs—including education, scientific research and other services that also benefit corporations. . . . Reincorporating abroad is a sophisticated variation on the old practice of avoiding corporate taxes by renting a post office box in the Caribbean and calling it corporate headquarters. Congress put a stop to those tactics in 2004. It is past time to shut down inversions as well.").

[40] *See* Sabri Ben-Achour, *Trump: The Law Made Me Do It*, MARKETPLACE (Oct. 4, 2016, 4:31 PM), http://www.marketplace.org/2016/10/04/world/trump-law-made-me-do-it [https://perma.cc/626G-YRPD] (quoting a Trump campaign statement).

[41] Danny Yadron et al., *Apple's Cook Defends Tax Practices as Proper*, WALL ST. J. (May 21, 2013, 11:01 AM), http://www.wsj.com/articles/SB10001424127887323648304578496963468168822 (quoting Senator Rand Paul).

[42] Simon Bowers, *OECD Hopes Tax Reforms Will End Era of Aggressive Avoidance*, GUARDIAN, (Oct. 5, 2015, 1:19 PM), https://www.theguardian.com/business/2015/oct/05/oecd-hopes-reforms-will-end-era-of-aggressive-tax-avoidance [https://perma.cc/Q4NB-C6WN] (quoting OECD tax director Pascal Saint-Amans).

[43] *See* Henry Ordower, *The Culture of Tax Avoidance*, 55 ST. LOUIS U. L.J. 47, 47 (2010) ("Tax planners, like deal planners, 'add value' as they provide their legal and accounting services.").

[44] *See* Bradley S. Blaylock, *Is Tax Avoidance Associated with Economically Significant Rent Extraction Among U.S. Firms?*, 33 CONTEMP. ACCT. RES. 1013, 1015 (2016) ("Consistent with Rego (2003) and with the view that tax avoidance is generally a value creating activity, I consistently find that two of three tax-avoidance proxies are positively associated with future performance . . . .").

rate tax revenues.[45] The United States portion of these losses is astounding: the Congressional Research Service estimates United States tax revenue losses at one hundred billion dollars due to tax avoidance.[46]

Larger and more international firms appear to be more successful at tax avoidance than smaller and/or domestic firms. One scholar has empirically demonstrated that larger firms with more income have greater incentives and are more likely to have the available resources to utilize aggressive tax avoidance strategies.[47] To this point, a recent study indicated that seventy-three percent of Fortune 500 companies use tax havens.[48] While some might argue that the mere existence of a subsidiary within a known tax haven jurisdiction is not evidence of tax avoidance, the underlying data shows otherwise:

> American multinational companies collectively reported 43 percent of their foreign earnings in five small tax haven countries: Bermuda, Ireland, Luxembourg, the Netherlands, and Switzerland. Yet these countries accounted for only 4 percent of the companies' foreign workforces and just 7 percent of their foreign investments. By contrast, American multinationals reported earning just 14 percent of their profits in major U.S. trading partners with higher taxes—Australia, Canada, the UK, Germany, and Mexico—which accounted for 40 percent of their foreign workforce and 34 percent of their foreign investment.[49]

American firms record "profits" from Bermuda and the Caymans that are more than ten times the total annual output these islands claim to have.[50] These statistics are indicative of widespread, high-dollar corporate tax avoidance.

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[45] *See Taxing Multinational Enterprises, Base Erosion and Profits Shifting (BEPS)*, POLICY BRIEF (Org. for Econ. Co-Operation & Dev., Paris, France) Oct. 2015, at 1, http://www.oecd.org/policy-briefs/PB-Base-Erosion-Profit-Shifting-(BEPS-III)-Oct-2015.pdf [https://perma.cc/VY9E-R8ZJ] (providing an estimate of the cost of tax avoidance).

[46] *See* JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 1 (2015) (estimating the effect of tax avoidance on tax revenues).

[47] *See* Sonja Olhoft Rego, *Tax-Avoidance Activities of U.S. Multinational Corporations,* 20 CONTEMP. ACCT. RES. 805, 812–13, 828 (2003) (concluding that firms with greater pre-tax income avoid more income taxes than other firms).

[48] Richard Phillips et al., *Offshore Shell Games 2016: The Use of Offshore Tax Havens by Fortune 500 Companies* 1 (2016), http://ctj.org/pdf/offshoreshellgames2016.pdf [https://perma.cc/GK7K-NT7P].

[49] *Id.* at 6 (citing a 2013 Congressional Research Service Report).

[50] *Id.* at 1.

Significant literature also exists discussing the relationship between stockholders and managers,[51] and in particular, when their interests are aligned and when managers act to further their own interests.[52] While stockholders likely do not object to the increased returns that tax avoidance

[51] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (describing and developing agency theory, which includes the relationship and interests amongst stockholders and managers); *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287 (1999) ("[M]ost contemporary corporate scholars tend to assume that directors' proper role is to maximize the economic interests of the corporation's shareholders. Recent years, however, have seen the rise of a second, opposing camp of theorists known as 'communitarians' or 'progressives.' These scholars object to shareholder primacy on normative grounds, and argue that directors ought to be required to run corporations with due regard for the interests of other potential stakeholders such as employees, creditors, customers, suppliers, or the local community."); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 149 (2013) ("Corporate management (the board and the executive officers it hires) is today widely assumed to derive its authority from the shareholders, who, as owners, authorize it. The argument so far shows this cannot be correct, because shareholders do not own the corporation. Shareholders do have a nominal right to select who occupies the seats on the board of directors; however, as I now argue, neither the office of director nor its authority derives from them, but from the state, via the corporate charter."); Melvin A. Eisenberg, *The Concept That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 832 (1998) ("Most (although by no means all) corporate scholars subscribe to the norm of shareholder primacy, under which the objective of the corporation's management should be to increase shareholder wealth, within the constraints of law and morality. This view is not uncontroversial. In particular, many corporate scholars take a communitarian view, under which the board should manage the corporation in the interests of all actors who have an interest in or reciprocal arrangements with the corporation, including not only shareholders but employees, creditors, customers, suppliers, and the community."); Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1135 (2011) ("On a fundamental level, corporations all share the same governance characteristics. The firm is controlled by a board of directors, who in turn select the officers who run the day-to-day business of the operation. This board is elected by shareholders. The shareholders share in the profits of the corporation through dividends and can sell their shares on the open market. This same basic structure—shareholders elect directors who appoint officers—can be found in every public corporation.").

[52] *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907 (2013) (reflecting on when and why the interests of shareholders align and differ from those of managers); *see also* Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1171–72 (2013) ("[M]anagerial capitalism worked surprisingly well for dispersed and powerless shareholders. To understand why, it is important to recognize that while neither state nor federal law requires directors to use their corporate powers to maximize shareholder wealth, it does prevent them from using their powers to maximize their own. The doctrine known as the business judgment rule allows disinterested directors and executives to sacrifice corporate profits to pursue any lawful corporate objective, including creating good jobs, providing quality products, and protecting creditors. But the duty of loyalty ensures that when directors and executives act self-interestedly in a financial sense—when they try to use their corporate powers to line their own pockets—shareholders can bring derivative suits in which the burden is on the defendant director or executive to demonstrate the ultimate fairness of his or her actions.").

brings them, the decision to engage in tax avoidance belongs to the board, and by extension, to the managers.[53] Decisions regarding the structure of transactions and financial reporting are effectively within the purview of managers.[54] Accordingly, managers have the authority to determine whether to engage in aggressive tax avoidance because tax avoidance is most often an operational decision.

These managers may engage in tax avoidance because it is in their interest to do so. Managers experience constant pressure to perform and provide returns.[55] Performance can be demonstrated through increased revenue or through decreased costs. Managers who struggle to grow a firm will often aggressively manage costs as a mechanism to show performance.[56] Engaging in tax avoidance is a type of cost management. If tax is a cost of doing business, managing that cost will create the appearance of superior performance.[57] Thus, engaging in tax avoidance is a way for managers to "im-

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[53] *See* DEL. CODE ANN. tit. 8, § 141(a) (2017) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."); Nicola Faith Sharpe, *Process over Structure: An Organizational Behavior Approach to Improving Corporate Boards*, 85 S. CAL. L. REV. 261, 305 (2012) ("The board delegates the majority of this work to the top-level managers within the firm. Specifically, overseeing the day-to-day operations of the company, setting strategy, ensuring firm profitability, and managing employees, are all tasks left to the CEO and her closest advisors.").

[54] *See* Blair & Stout, *supra* note 51, at 282 ("[T]he mediating hierarchy model does not imply that directors actually manage the corporation on a day-to-day basis. To the contrary, we expect that most corporate decisions are made collegially among team members at lower levels."); Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1283–84 (1998) ("In practice, boards have for decades done so by delegating to managers the daily running of the business, giving managers the authority to make decisions that incur risks and to respond to changes in the business environment, while regularly monitoring management's performance."); Sharpe, *supra* note 53, at 306 ("While certain indicators of firm success are easily observable (such as stock price), other indicators (such as performance evaluations and the viability of strategic plans) are often heavily influenced by management's own views and cannot be independently verified by the board.").

[55] *See* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 272 (2012) ("[P]ersonal managerial motivations to some degree influenced by a firm's culture explain the desire to meet earnings targets. Managers may lose their jobs, fail to be promoted, or find their opportunities to move to other firms impeded by their failure to meet earnings targets."); Jeong-Bon Kim et al., *Corporate Tax Avoidance and Stock Price Crash Risk: Firm-Level Analysis*, 100 J. FIN. ECON. 639, 639 (2011) ("A wide range of incentives, such as compensation contracts, career concerns, and empire building, motivate managers to conceal adverse operating outcomes.").

[56] *See* Alaa M. Ghalayini & James S. Noble, *The Changing Basis of Performance Measurement*, 16 INT'L J. OPERATIONS & PRODUCTION MGMT. 63, 66 (1996) ("Reducing cost has always been considered an effective weapon to achieve competitive advantage.").

[57] *See* Kim et al., *supra* note 55, at 640 ("Simply put, under the ostensible objective of reducing a firm's tax obligations, managers can manipulate earnings and conceal negative firm-specific information using tax planning technologies.").

prove" their own performance, particularly when they struggle to grow the firm.[58]

This theory is consistent with accounting literature that has argued that tax avoidance is related to managerial rent extraction.[59] But a more recent paper posits the somewhat more nuanced view that outlying levels of tax avoidance are indicative of management monitoring issues.[60] In other words, managers who engage in aggressive tax avoidance are not being adequately monitored by the board or by stockholders.[61] As some scholars have suggested, tax avoidance requires a degree of obfuscation, and that lack of transparency provides opportunistic managers with cover to enrich themselves.[62]

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[58] *Id.*

[59] *See* Blaylock, *supra* note 44, at 1014 ("The corporate governance view of tax avoidance of Desai and Dharmapala (2006), Desai et al. (2007) and Desai and Dharmapala (2009a), proposes that aggressive forms of tax avoidance, such as tax shelters, use technology complementary to that used for managerial rent extraction. According to this theory, managers intentionally obscure the reporting of financial performance to make aggressive tax transactions harder for the tax authority to detect. However, financial reports are one of shareholders' key monitoring mechanisms that allow them to assess managers' performance. Obscuring these reports makes it more difficult for shareholders to monitor managers, which makes it easier for managers to use firm resources for their personal benefit without shareholders' knowledge."); Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and High-Powered Incentives*, 79 J. FIN. ECON. 145, 147–51 (2006) (demonstrating the relationship between managerial rent diversion and tax sheltering); Mihir A. Desai et al., *Theft and Taxes*, 84 J. FIN. ECON. 591, 592–601, 618–20 (2007) (discussing the relationship between corporate governance and tax enforcement); Mihir Desai & Dhammika Dharmapala, *Tax and Corporate Governance: An Economic Approach*, *in* TAX AND CORPORATE GOVERNANCE 14 (Wolfgang Schon ed., 2008) ("The basic intuition for how corporate governance and taxation interact is that tax avoidance demands complexity and obfuscation to prevent detection. These characteristics, in turn, can become a shield for managerial opportunism."). *But see* Christopher S. Armstrong et al., *Corporate Governance, Incentives, and Tax Avoidance*, 60 J. ACCT. & ECON. 1, 2 (2015) ("Under our alternative agency-theoretic view, tax avoidance is one of many risky investment opportunities available to management. Similar to other investment decisions, unresolved agency problems can lead managers to select a level of tax avoidance that differs from what shareholders would prefer. We do not assume that tax avoidance necessarily results in opportunities for managerial diversion. Rather, as with other agency problems, we assume that the various governance mechanisms in place, including managers' incentive-compensation contracts, can mitigate agency problems with respect to tax avoidance.").

[60] *See* Armstrong et al., *supra* note 59, at 2 ("Collectively, these findings suggest that more financially sophisticated and more independent boards attenuate relatively extreme levels of tax avoidance, which are likely to be symptomatic of unresolved agency problems.").

[61] *See id.* ("[B]oard financial expertise and independence both have a negative relation with tax avoidance for high levels of the tax avoidance, which is also consistent with over-investment in tax avoidance in the absence of monitoring.").

[62] *See* Mihir A. Desai & Dhammika Dharmapala, *Earnings Management, Corporate Tax Shelters, and Book—Tax Alignment*, 62 NAT'L TAX J. 169, 172 (2009) ("[T]ax avoidance usually demands such obfuscation to guarantee the tax benefits. Such obfuscation, however, can simultaneously provide a shield for managers engaging in a variety of diversionary activities.").

C. The Negative Externalities of Tax Avoidance

Providing the appearance of improved financial performance and facilitating rent extraction are undoubtedly attractive to managers; however, tax avoidance does not create only winners. Tax avoidance creates losers through a number of negative externalities. Corporate tax avoidance robs the public of revenue to support public goods, including infrastructure, education, and national defense.[63] Avoidance behavior also undermines a well-functioning regulatory system.[64] Regulatory arbitrage forces a more rigorous and costly monitoring system by undermining shared trust between regulators and the regulated.[65] Tax avoidance also undermines the positive business culture needed in an ethical organization.[66] Moreover, tax avoidance requires obfuscation, and that behavior can infect the morale, ethics, and culture of other parts of the firm.[67]

II. THE INTERACTION BETWEEN THE *DODGE* MANDATE AND THE FIDUCIARY DUTIES MANAGEMENT OWES TO THE CORPORATION AND ITS STOCKHOLDERS

The fiduciary duties owed to the corporation and its stockholders permit, but do not require, that corporate management pursue tax avoidance strategies. As held in the classic case of *Dodge v. Ford Motor Co.*, for-profit corporations must be run to produce a profit.[68] Although some have taken issue with this holding, the fiduciary duties that management owes to the corporation and its stockholders support what might appropriately be termed the "*Dodge* mandate." This mandate suggests that corporate management may engage in tax avoidance strategies, although how aggressive these tax avoidance strategies must be is open to debate.[69]

This Part explores the fiduciary duties that corporate management owes to the corporation and its stockholders. A brief overview of these fidu-

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[63] *See* Robert Bird & Karie Davis-Nozemack, *Tax Avoidance as a Sustainability Problem*, J. BUS. ETHICS (June 10, 2016) (discussing the effects of tax avoidance on the public commons).

[64] *See id.* (noting the link between tax avoidance and the regulatory commons).

[65] *See id.* (providing examples of the externalities that tax avoidances visits upon the regulatory commons).

[66] *See id.* (noting the relationship among tax avoidance, management integrity, and firm operation).

[67] *See id.* (discussing the effects of tax avoidance on firm culture and ethics).

[68] 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

[69] *See infra* notes 177–228 and accompanying text (discussing the limitations on the *Dodge* mandate and whether there is a requirement that corporate management engage in tax avoidance strategies).

ciary duties is provided for readers who may not have spent a significant amount of time thinking about them.[70] Then, an analysis is presented of how these duties coalesce into the mandate that the corporation engage in profit maximization, or at least make profit seeking the primary corporate goal.[71] The purpose of this Part is to lay the foundation for discussing why corporate management has wide discretion to engage or refrain from engaging, in tax avoidance strategies.

A. A Brief Overview of the Fiduciary Duties Owed to Corporate Stockholders

Management owes the corporation and its stockholders four major fiduciary duties. Although sometimes given different names, these duties for purposes of this Article are referred to as the duty of care, the duty of loyalty, the duty of good faith, and the duty of disclosure. Each of these duties is examined in turn.

The duty of care requires that corporate managers reasonably inform themselves prior to making business decisions and engage in basic monitoring of the business entity.[72] Mere errors in judgment do not constitute a breach of the duty of care.[73] With the possible exception of waste, which is sometimes described as a breach of the substantive duty of care,[74] the duty

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[70] *See infra* notes 72–124 and accompanying text (defining the fiduciary duties corporate managers owe to the corporation and its stockholders).

[71] *See infra* notes 125–162 and accompanying text (explaining the connection between these duties and the *Dodge* mandate).

[72] *See* Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 251 (2009) ("In order to fulfill the 'duty of care' directors must only be sure to inform themselves regarding business decisions they make on the corporation's behalf and must exercise the most rudimentary monitoring of the corporate enterprise—that is, they must put in place a reporting structure that would allow them to find out about significant problems."); Jorge E. Leal Garrett & Bryan A. Green, *Considerations for Professional Sports Teams Contemplating Going Public*, 31 N. ILL. U. L. REV. 69, 85 (2010) ("Essentially, the duty of care imposes an obligation on the directors of the corporation to inform themselves of material information prior to making any decision."); Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporation*s, 20 FORDHAM J. CORP. & FIN. L. 19, 38 (2014) ("The duty of care has been understood to mainly create a focus on procedure, with the board expected to reasonably inform itself before making a decision.").

[73] *See* Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819, 856 (2003) ("Mere errors of judgment and honest mistakes are insufficient as grounds for breach of the duty of care."); Byron F. Egan, *Fiduciary Duties of Corporate Directors and Officers in Texas*, 43 TEX. J. BUS. L. 45, 339 (2009) ("An error in judgment does not by itself constitute a breach of the duty of care.").

[74] *See* Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 781 (2002) ("A board fails to fulfill its 'substantive due care' duties by making an irrational decision and thereby committing 'waste' or by making a 'gift' unsupported by any consideration."); J. Robert Brown, Jr., *Speaking with Complete*

of care is procedural in nature and focuses on how corporate managers undertake their duties.[75] To breach this duty, corporate managers must fail to inform themselves regarding the material aspects of the corporation and the transactions that the corporation undertakes or contemplates undertaking.[76]

Smith v. Van Gorkom is one of the seminal cases regarding the duty of care.[77] In that case, the Delaware Supreme Court reversed the Court of Chancery and held that members of the board of directors of Trans Union Corporation had breached their duty of care by failing to inform themselves of the company's value during a leveraged buyout of Trans Union.[78] After the board had preliminarily discussed a sale of the company, Trans Union president Jerome Van Gorkom met with Jay Pritzker to discuss having one of Pritzker's companies acquire Trans Union. At the meeting, Van Gorkom suggested a fifty-five dollars per share sale price, and Pritzker agreed.[79] A few days later, Van Gorkom presented the idea at a special meeting of Trans Union's board without giving the board sufficient time to study the merger

Candor: Shareholder Ratification and the Elimination of the Duty of Loyalty, 54 HASTINGS L.J. 641, 655 (2003) ("As a practical matter, waste represents a residual claim in duty of care cases, a substantive standard available even if the procedural safeguards of the business judgment rule have been met."); McDonnell, *supra* note 72, at 43 ("The substantive side of the duty of care is embodied in the extremely weak waste standard: managers may be held liable for actions which are so irrational that they amount to giving away corporate assets.").

[75] *See* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 761 (2012) ("[T]he corporate board's duty of care is a *procedural* duty to carefully consider evidence and to remain attentive to business realities in making decisions."); Stephen Ellis et al., *A Game Changer for the Political Economy of Economic Development Incentives*, 56 ARIZ. L. REV. 953, 976 (2014) ("In the corporate setting, the board of directors is subject to a legal duty of care, which imposes a procedural requirement that it asks the right sorts of questions and considers the right sorts of information when making decisions."); Charles R. Korsmo, *Lost in Translation: Law, Economics, and Subjective Standards of Care in Negligence Law*, 118 PENN ST. L. REV. 285, 336–37 (2013) ("[C]ompliance with the duty of care in corporate law—at least in Delaware—is largely evaluated in procedural terms, i.e., did the board employ a thorough procedure?").

[76] *See* Babatunde M. Animashaun, *The Business Judgment Rule: Fiduciary Duties and Liabilities of Corporate Directors*, 16 S.U. L. REV. 345, 349 (1989) ("The duty of care requires that directors, in the performance of their corporate responsibilities, inform themselves, prior to making a business decision, of all material information reasonably available to them."); Phill Kline et al., *Protecting Charitable Assets in Hospital Conversions: An Important Role for the Attorney General*, 13 KAN. J.L. & PUB. POL'Y 351, 360 (2004) ("The duty of care requires corporate directors to make a reasonable attempt at obtaining all relevant information before taking action."); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 751 (2005) ("The touchstone of the fiduciary duty of care is that prior to pursuing some course of action, the board should be reasonably informed, not only by having the relevant information in hand but also by deliberating with appropriate care and exchanging views regarding the corporation's alternatives.").

[77] 488 A.2d 858 (Del. 1985).

[78] *Id.* at 893.

[79] *Id.* at 867.

agreement.[80] After meeting for two hours, the board approved the merger without ever analyzing whether fifty-five dollars per share was the proper valuation for the company.[81] The court held that directors who fail to make informed decisions have breached their fiduciary duties under Delaware law, and that the Trans Union directors had committed such a breach.[82]

As evidenced by *Van Gorkom*, the extent of the obligations created by the duty of care is far from clear. Since *Van Gorkom*, many states have enacted statutes allowing corporations to include provisions in their articles of incorporation eliminating liability for breaches of the duty of care.[83] Regardless, the duty of care remains one of the four fiduciary duties that management owes by default in overseeing the corporation.

Management also owes the corporation and its stockholders a duty of loyalty. This duty requires that corporate managers place the interests of the corporation and its stockholders ahead of their own.[84] It also requires that

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[80] *Id.* at 868.

[81] *Id.* at 869.

[82] *Id.* at 893.

[83] *See* Janet E. Kerr, *The Financial Meltdown of 2008 and the Government's Intervention: Much Needed Relief or Major Erosion of American Corporate Law? The Continuing Story of Bank of America, Citigroup, and General Motors*, 85 ST. JOHN'S L. REV. 49, 83 (2011) ("Section 102(b)(7) [of the Delaware General Corporation Law] allows shareholders to adopt a clause in their corporation's articles of incorporation protecting directors from personal liability for monetary damages for breaching the duty of care. Since Delaware enacted section 102(b)(7), all other jurisdictions, with the exception of the District of Columbia, have enacted a similar provision."); Sandra K. Miller, *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, 39 J. CORP. L. 295, 317 (2014) ("Virtually all states now permit the articles of incorporation to eliminate monetary damages for a board member's breach of the duty of care (i.e., gross negligence)."); Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647, 652 (2015) ("Under the laws of most states, director liability for breach of the duty of care either is, or can be, limited or even eliminated altogether.").

[84] *See* Norman D. Bishara & Cindy A. Schipani, *A Corporate Governance Perspective on the Franchisor-Franchisee Relationship*, 19 STAN. J.L. BUS. & FIN. 303, 316 (2014) ("Although the duty of loyalty is not breached when a director or officer profits from a decision that also profits the corporation, it requires that directors and officers, when evaluating such decisions, put the corporation's interests above their personal interests."); Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 145 (2015) ("[T]he duty of loyalty, broadly defined, requires directors to avoid positioning themselves so that their self-interest conflicts with the best interests of the corporation and its shareholders, and should any such conflict arise, to place the interests of the corporation and its shareholders ahead of any conflicting personal interest."); Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 112 (2006) ("As both a decision-maker and a potential beneficiary, the official faces the temptation to enrich himself at the expense of the corporation. To protect the corporation and its shareholders against such overreaching, the duty of loyalty requires directors to put the corporation's interests above their own at all times.").

managers do not engage in self-dealing.[85] As a result, managers are limited in their ability to engage in transactions with the corporation and restricted in their ability to take advantage of corporate opportunities.[86] This duty also requires corporate managers to disclose conflicts and to do their best to mitigate them.[87]

Coggins v. New England Patriots Football Club, Inc. is one of the more well-known cases involving a breach of the duty of loyalty.[88] In that case, the Supreme Judicial Court of Massachusetts affirmed a trial court decision holding that William H. Sullivan, Jr., a director and stockholder, had committed a breach of the fiduciary duty of loyalty through an improp-

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[85] *See* Iman Anabtawi, *Predatory Management Buyouts*, 49 U.C. DAVIS L. REV. 1285, 1290 (2016) ("Self-dealing offends the very essence of the fiduciary duty of loyalty applicable to corporate managers."); Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. COLO. L. REV. 477, 506–07 (2015) ("Self-dealing is a breach of the duty of loyalty unless the transaction is objectively fair to the corporation or approved by disinterested and independent directors or shareholders in accordance with a statutory 'safe harbor.'"); John A. Pearce II, *The Rights of Shareholders in Authorizing Corporate Philanthropy*, 60 VILL. L. REV. 251, 270 (2015) ("The duty of loyalty requires directors to act on behalf of the corporation and not engage in acts that constitute self-dealing or benefiting improperly from their positions, to the detriment of shareholders.").

[86] *See* Matthew G. Doré, *The Duties and Liabilities of an Iowa Corporate Director*, 50 DRAKE L. REV. 207, 243 (2002) ("The duty of loyalty prohibits not only misappropriation of corporate assets, but also more subtle misdeeds, like conflict of interest transactions, competition with the corporation, or taking a corporate business opportunity without the corporation's consent."); Mark Klock, *Lighthouse or Hidden Reef? Navigating the Fiduciary Duty of Delaware Corporations' Directors in the Wake of* Malone, 6 STAN. J.L. BUS. & FIN. 1, 13 (2000) ("The duty of loyalty involves the directors' obligation not to put self-interests ahead of corporate interests by engaging in a transaction which benefits the director unfairly at the expense of the corporation or taking a corporate opportunity."); Russell C. Silberglied, *Litigating Fiduciary Duty Claims in Bankruptcy Court and Beyond: Theory and Practical Considerations in an Evolving Environment*, 10 J. BUS. & TECH. L. 181, 185 (2015) ("The duty of loyalty prohibits a corporate director from engaging in self-dealing or usurping corporate opportunities in the performance of his or her duties as a director.").

[87] *See* Thomas H. Boyd & Jonathan Haas, *The Native American Graves Protection and Repatriation Act: Prospects for New Partnerships Between Museums and Native American Groups*, 24 ARIZ. ST. L.J. 253, 257 (1992) ("The duty of loyalty also requires directors to fully disclose opportunities and potential conflicts of interest to allow the board to fairly evaluate the appropriate corporate course of action."); Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 152 (2013) ("At base, the duty of loyalty requires the fiduciary to act in the best interests of the corporation without self-dealing and to disclose the nature of any conflict of interest or opportunity that may confer a financial benefit upon the fiduciary that is unavailable to other shareholders or to the corporation."); Dana M. Muir & Cindy A. Schipani, *Fiduciary Constraints: Correlating Obligation with Liability*, 42 WAKE FOREST L. REV. 697, 717 (2007) ("The duty of loyalty requires that corporate interests supersede personal interests, and when conflicts of interest occur, they must either be avoided or disclosed and approved by disinterested directors.").

[88] 492 N.E.2d 1112 (Mass. 1986).

er freeze-out merger.[89] In 1959, Sullivan purchased a professional football franchise that would eventually become the New England Patriots.[90] The ten original investors, including Sullivan, each received 10,000 shares of voting stock.[91] In July 1960, the corporation issued 120,000 shares of non-voting stock to the public at a cost of five dollars per share.[92] After Sullivan was removed as president and lost operating control, he borrowed a significant amount of money to obtain control of all 100,000 voting shares.[93] As a condition of the loans, the lenders required that the income of the corporation be dedicated to the payment of the loans, and that the assets of the corporation be used to secure the debts.[94] To comply with this condition, Sullivan needed to eliminate the nonvoting stockholders, which he effected by merging the old corporation into a new corporation that he created.[95] David A. Coggins, a fan of the New England Patriots, sued on behalf of himself and other similarly situated stockholders on the ground that the merger was legally impermissible.[96]

Affirming the trial court, the Supreme Judicial Court of Massachusetts held that Sullivan had committed a breach of the duty of loyalty by self-dealing.[97] Writing for the court, Justice Liacos stated, "The freeze-out merger accomplished by William H. Sullivan, Jr., was designed for his own personal benefit to eliminate the interests of the Patriots' minority stockholders."[98] Justice Liacos continued, "The merger did not further the interests of the corporation and therefore was a violation of Sullivan's fiduciary duty to the minority stockholders, and so was impermissible."[99] Notably, the court's holding hinged on the fact that Sullivan's behavior was not founded upon any legitimate business purpose.[100]

As *Coggins* demonstrates, the duty of loyalty is violated when directors put their own interests ahead of, or otherwise fail to pursue, the interests of the corporation and its stockholders. This determination is based upon whether the director is pursuing business interests of the corporation and

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[89] *Id.* at 1121–22.
[90] *Id.* at 1114.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 1114–15.
[95] *Id.* at 1115.
[96] *Id.* at 1115–16.
[97] *Id.* at 1122.
[98] *Id.* at 1121–22.
[99] *Id.* at 1122; *see also* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 11 (2015) (describing a merger involving a controlling shareholder as a classic case of conflict of interest).
[100] *Coggins*, 492 N.E.2d at 1119.

its stockholders, or whether the director has instead elected to pursue personal interests.

In addition to the duties of care and loyalty, management also owes the corporation and its stockholders a duty of good faith. Some courts have treated this duty as an independent fiduciary duty,[101] and other courts, including courts in Delaware, have treated the duty of good faith as a part of the duty of loyalty.[102] The duty of good faith requires that corporate managers deal honestly and fairly with the corporation and its stockholders.[103] This duty is relatively amorphous and is often used as a gap-filler when no other fiduciary duty applies.[104] In addition, it is also commonly coupled

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[101] *See* Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 482 (2004) ("[R]ecent cases discussing and expanding the duty of good faith separate it from the duties of care and loyalty."); Luke Scheuer, *The "Legal" Marijuana Industry's Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 538 (2015) ("[M]anagers owe their businesses and investors a duty of good faith, which some states include as a separate fiduciary duty and some include as a part of the duty of care or loyalty.").

[102] *See* Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 545 n.22 (2010) ("[S]ome courts impose a duty of good faith as part of the duty of loyalty, rather than as an independent fiduciary duty."); J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAW. 33, 50 (2014) ("Delaware law presumes that directors act loyally and in good faith, which is a subsidiary element of the duty of loyalty."); Rock, *supra* note 52, at 1960 ("Part of the fiduciary duty of loyalty is the duty to act in good faith.").

[103] *See* Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 5 (2006) ("The duty of good faith in corporate law is comprised of a general baseline conception . . . [which] consists of four elements: subjective honesty, or sincerity; nonviolation of generally accepted standards of decency applicable to the conduct of business; nonviolation of generally accepted basic corporate norms; and fidelity to office."); Janet E. Kerr, *Developments in Corporate Governance: The Duty of Good Faith and Its Impact on Director Conduct*, 13 GEO. MASON L. REV. 1037, 1051 (2006) ("[D]espite inconsistency and uncertainty, under the emerging definition of the duty of good faith, directors may be held personally liable for corporate misbehavior if their conduct evidences improper motive or ill will, a reckless disregard of known risks, a sustained failure to oversee management, or is so egregious that it is unexplainable on any other grounds other than bad faith."); Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1282 (2010) ("[T]he duty of good faith, which, broadly understood, is to pursue the interests of the corporation and its shareholders honestly and sincerely, and without intentional misconduct of any kind.").

[104] *See* Tara L. Dunn, *The Developing Theory of Good Faith in Director Conduct: Are Delaware Courts Ready to Force Corporate Directors to Go Out-of-Pocket After* Disney IV*?*, 83 DENV. U. L. REV. 531, 545 (2005) ("Although the Delaware courts frequently mention good faith within discussions of the duties of care and loyalty, traditionally the courts have not substantively defined the 'duty' of good faith. Further clouding the issue, good faith is not defined in the Delaware General Corporation Law . . . ."); Jones, *supra* note 84, at 113 ("The contours of this duty of good faith are ill-defined; nonetheless, some scholars predict that good faith could play a significant role in future jurisprudence, representing an independent source of director liability."); Paredes, *supra* note 76, at 754 n.296 ("Precisely because the content of the duty of good faith is uncertain and still unfolding, it can more easily be used as a means of hard-look judicial review, unlike the duty of care and the duty of loyalty. In other words, . . . the duty of good faith is malleable . . . .").

with claims of breaches of the other fiduciary duties as a means of reinforcing the disdain that courts and society in general feel for breaches of those other fiduciary duties.[105]

In recent years, the duty of good faith has garnered more attention in fiduciary duty litigation, especially in Delaware.[106] *In re China Agritech, Inc. Shareholder Derivative Litigation* is one of the more recent cases.[107] In that case, stockholders of China Agritech brought a derivative action alleging various misconduct, including that members of the board had breached their duty of good faith.[108] In 2008, China Agritech publicly acknowledged in documents filed with the United States Securities and Exchange Commission that it was not in compliance with United States financial reporting standards because it did not have adequate internal financial controls.[109] In 2010, the company reported a similar deficiency.[110] As a result, the company hired Ernst & Young Hua Ming as its outside auditor.[111] After conducting an audit, Ernst & Young sent China Agritech a letter "describing matters which, if not appropriately addressed, could result in audit adjustments, significant deficiencies or material weaknesses, and delays in the filing of the Company's Form 10-K for 2010."[112] In addition, Lucas McGee, a private investor, investigated China Agritech and posted a report declaring the company to be a "scam."[113]

As a result, various stockholders brought suit based upon alleged misconduct on the part of the board.[114] In ruling on China Agritech's motion to dismiss for failure to make a demand on the board during the course of the derivative litigation, the Delaware Chancery Court held that the allegations in the complaint regarding the failure to maintain adequate internal controls were sufficient to survive the motion because, if proven, the allegations would constitute a breach of the duty of good faith.[115] The court reached this holding because under Delaware law, if a board knows that the company's internal controls and monitoring systems are inadequate to provide ac-

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[105] *See* Eric C. Chaffee, *An Interdisciplinary Analysis of the Use of Ethical Intuition in Legal Compliance Decisionmaking for Business Entities*, 74 MD. L. REV. 497, 525 (2015) ("[B]reaches of the duty [of good faith] are often coupled with breaches of other fiduciary duties . . . .").

[106] *See, e.g.*, Stone v. Ritter, 911 A.2d 362 (Del. 2006); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006).

[107] C.A. No. 7163-VCL, 2013 WL 2181514, at *1 (Del. Ch. May 21, 2013).

[108] *Id.* at *1.

[109] *Id.* at *2.

[110] *Id.* at *3.

[111] *Id.* at *4.

[112] *Id.*

[113] *Id.* at *4–6.

[114] *Id.* at *1.

[115] *Id.* at *18.

curate information and yet fails to act, such a failure constitutes a breach of the duty of good faith.[116]

In re China Agritech, Inc. and similar cases show how malleable the duty of good faith can be. In fact, courts in Delaware and other jurisdictions have used the duty of good faith to render unlawful behavior that is potentially covered by the duty of care because as previously mentioned, in the wake of *Van Gorkom*, numerous jurisdictions passed statutes that allow corporations to insert provisions in their articles of incorporation eliminating liability for breaches of the duty of care.[117] China Agritech had such a provision in its articles of incorporation.[118]

Finally, management owes the corporation and its stockholders a duty of disclosure. This duty requires that corporate managers disclose to other managers and to stockholders various types of material information that are relevant to the operation of the company and the activities it undertakes.[119] This duty is often viewed as a subsidiary duty of both the duties of care and loyalty.[120] Some courts, however, view the duty of disclosure as a separate

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[116] *Id.*

[117] *See supra* note 83 and accompanying text (discussing the enactment of statutes allowing corporations to include provisions in their articles of incorporation eliminating liability for breaches of the duty of care in the aftermath of *Van Gorkom*).

[118] *In re China Agritech*, *Inc.*, 2013 WL 2181514, at *25.

[119] *See* Craig Ehrlich, *When Minding Your Own Business Means Speaking Up: Criminally Punishing a Corporate Executive for Failing to Blow the Whistle on the Illegal Misconduct of a Colleague*, 32 J.L. & COM. 255, 282 (2014) ("[The] duty of disclosure is a specific application of the general fiduciary duty owed by directors; it obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action."); Jack B. Jacobs, *The Fiduciary Duty of Disclosure After* Dabit, 2 J. BUS. & TECH. L. 391, 395 (2007) ("A classic, although perhaps not complete, definition of the fiduciary duty of disclosure under Delaware law is that corporate directors are required to disclose all material information within their control when they seek stockholder action."); Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 492 (2002) ("The fiduciary duty of disclosure requires directors of Delaware corporations to fully and fairly disclose all material facts within their control when they make certain communications to their shareholders. Put simply, if a director makes a material misrepresentation to shareholders, he has potentially breached his fiduciary duty of disclosure.").

[120] *See, e.g.*, Malpiede v. Townson, 780 A.2d 1075, 1086 (Del. 2001) ("We begin by observing that the board's fiduciary duty of disclosure, like the board's duties under *Revlon* and its progeny, is not an independent duties but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty."); *see also* Carter G. Bishop, *Directorial Abdication and the Taxonomic Role of Good Faith in Delaware Corporate Law*, 2007 MICH. ST. L. REV. 905, 927 ("The Delaware courts have previously determined that the fiduciary duty of disclosure is not an independent duty but rather a part of good faith, loyalty, and care."); Egan, *supra* note 73, at 52–53 ("The term 'duty of disclosure,' however, is somewhat of a misnomer because no separate *duty* of disclosure actually exists. Rather, as indicated, the fiduciary obligations of directors in the disclosure context involve a contextually-specific application of the duties of care and loyalty."); William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Dela-*

fiduciary duty.[121] In addition, significant portions of the duty of disclosure have been codified within state and federal securities regulation.[122] This is especially true with regard to the Securities Act of 1933 and the Securities Exchange Act of 1934.[123] As the Supreme Court held in *SEC v. Capital Gains Research Bureau, Inc.*, the "fundamental purpose" underlying both the Securities Act and the Exchange Act is to "substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."[124] As a result, the federal securities laws are at least in part a statutory embodiment of the duty of disclosure.

B. Deriving the Dodge *Mandate from the Fiduciary Duties Owed to the Corporation and Its Stockholders*

As held in the classic case of *Dodge v. Ford Motor Co.*, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[125] This statement, which the authors of this Article refer to as the "*Dodge* mandate," captures the very essence of a for-profit corporation, which is to make a profit.[126] Although limitations on this mandate exist, the mandate is

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ware Law, 116 PENN ST. L. REV. 837, 848 (2012) ("Like the duty of good faith, the duty of disclosure is not considered to be a free-standing duty under Delaware law, but is instead viewed as being derived from the duties of care and loyalty.").

[121] *See* DOUGLAS M. BRANSON ET AL., BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE, AND POLICY: CASES, MATERIALS, AND PROBLEMS 602 (2012) (reporting that courts have been "somewhat coy pinning down whether the duty of candor springs from the duty of care, the duty of loyalty, or is a free standing obligation"); Kerr, *supra* note 83, at 86 ("Sometimes [the duty of disclosure] is credited as being a stand-alone duty, while at other times it is considered part of the duty of due care and the duty of loyalty.").

[122] *See* Donald C. Langevoort, A*gency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1208 (2003) ("[T]he federal securities laws have . . . created . . . [an] obligation of candor to the marketplace . . . ."); O'Hare, *supra* note 119, at 495 ("There is an inherent overlap between claims brought for breach of fiduciary duty of disclosure and for violations of Rule 10b-5 because claims for breach of fiduciary duty of disclosure and claims under the anti-fraud provisions of the federal securities laws are both based on an allegation that the company made a false or misleading statement."); Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1235 (2002) ("[L]arge public corporations are already under substantial duties of disclosure under the federal securities laws . . . .").

[123] Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp.

[124] 375 U.S. 180, 186 (1963).

[125] 170 N.W. 668, 684 (Mich. 1919).

[126] *See* Chaffee, *supra* note 105, at 541 ("[F]or-profit entities must labor to make a profit . . . ."); Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 293 (2015) ("By definition, for-profit corporations exist to make money; otherwise they would be non-profit."); Carol Goforth, *A Corporation Has No Soul, and Doesn't Go to Church: Relating the Doctrine of Piercing the Veil to* Burwell v. Hobby Lobby, 67 S.C. L. REV. 73, 78 (2015) ("The

foundational to understanding corporate law as well as understanding how corporations approach tax avoidance strategies.[127] This Part explores how the *Dodge* mandate emerges from the fiduciary duties owed to the corporation and its stockholders.

In *Dodge*, the Supreme Court of Michigan held that Ford Motor Company could not operate primarily for the benefit of the public, and so, could not employ its wealth principally to benefit society.[128] Ford Motor Company had become extraordinarily profitable, and as a result, it was retaining an enormous amount of money.[129] In 1916, Henry Ford, who dominated and controlled the company because he owned fifty-eight percent of the common shares, declared that no future special dividends would be issued.[130] The reasons given for this decision were two-fold. First, Ford claimed that he wanted to reduce the price of the cars produced and run the company for the benefit of the public. Ford was even quoted in the press in Detroit and by news media throughout the United States as stating, "My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."[131] Second, the retained profits were also to be used to expand the existing plant and build an iron smelting plant to allow the company to produce its own metal parts.[132] John F. Dodge and Horace E. Dodge, who were stockholders of the company, objected to these courses of action and brought suit.[133]

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purpose of a for-profit corporation is to run a business and make a profit . . . ."); Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 353 (2015) ("Corporations exist primarily to make profit for their shareholders. This has been the black letter rule of law and the reigning orthodoxy of American business for a century."); Christyne J. Vachon, *Playing in the Sandbox: Moral Development and the Duty of Care in Collaborations Between For-Profit and Nonprofit Corporate Persons*, 33 PACE L. REV. 1045, 1067 (2013) ("[T]he underlying constraint on the for-profit is that law restricts its goal as a cooperative enterprise to . . . profit maximization for the benefit of the corporation and its owners."); *see also* Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1779 (2016) (explaining that for-profit corporations exist as a collaboration in which "[t]he state governments almost invariably will be seeking economic growth and innovation while the individuals organizing the corporation will very often be seeking to make a profit").

[127] *See infra* notes 177–228 and accompanying text (exploring various limitations on the *Dodge* mandate).

[128] 170 N.W. at 685.

[129] *Id.* at 670.

[130] *Id.* at 671.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 668.

The Supreme Court of Michigan affirmed in part and reversed in part the holding of the lower court that Ford's actions were impermissible.[134] In regard to running the company for the public benefit, the court held that this management strategy was impermissible because a for-profit corporation must be run "primarily for the profit of stockholders."[135] Writing for the majority, Chief Judge Ostrander stated, "[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others . . . ."[136] Simply put, the primary purpose of a for-profit corporation must be to generate a profit for its stockholders.[137] Notably, the Supreme Court of Michigan reversed the lower court regarding the retention of funds for purposes of expanding the existing plant and building an iron smelting plant.[138] In doing so, the court acknowledged that judges are not "business experts" and held that corporate management must be given deference in making decisions both for immediate profit and long-term competition.[139]

Thus, the *Dodge* mandate requires that for-profit corporations be run primarily for the profit of the stockholders. The question then becomes how this mandate interfaces with the fiduciary duties owed to the corporation and its stockholders. Answering this question is important for at least three reasons. First, for the *Dodge* mandate to be correct, it must be justified by the fiduciary duties owed by corporate management. Otherwise, the mandate should be discarded. Second, understanding how the *Dodge* mandate emerges from these fiduciary duties helps to better understand the requirements of this mandate. Third, understanding how the *Dodge* mandate emerges from these fiduciary duties helps to better understand the mandate's limitations.[140]

Of the four fiduciary duties discussed in the previous Section, the duty of loyalty is the most important in deriving the *Dodge* mandate. As discussed above, this duty requires that corporate managers place the interests of the corporation and its stockholders ahead of their own personal interests.[141] The interests of a for-profit corporation are relatively easy to determine because although modifications can be made in the articles of incorporation or in various other instances, the reason for the existence of for-profit

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[134] *Id.* at 684.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *See infra* notes 177–228 and accompanying text (discussing the limitations on the *Dodge* mandate).
[141] *See supra* notes 84–87 and accompanying text (analyzing the duty of loyalty).

corporations is to make a profit.[142] The interests of the stockholders are more complex. One response is that stockholders are also seeking profit because otherwise, they would invest and spend their money in other ways. For some stockholders, however, this is not the case. For example, in *Coggins*, one of the reasons, likely the primary reason, why Coggins invested was that he wanted to be affiliated with the New England Patriots by owning part of the team.[143]

Because investors may have a multitude of reasons for investing in a corporation, the issue then becomes which reasons are important for determining whether stockholders' interests are being honored for purposes of corporate management abiding by its duty of loyalty. In making this determination, one must remember the contractual nature of investing. By investing in a for-profit corporation, stockholders have purchased equity in a for-profit enterprise.[144] By virtue of their investment, stockholders have communicated their interest in seeking profit to the corporation, and they have tacitly agreed with all other stockholders that they will work together to seek profit.[145] Of course, this agreement may be explicitly altered through the initial drafting and subsequent amendment of the articles of incorporation and bylaws of the corporation, but as a starting point, the interests of the stockholder are presumably directed toward the obtainment of profit.[146] Thus, a for-profit corporation exists to make a profit, and a stockholder's assumed primary interest is making a profit. For corporate managers to

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[142] *See supra* note 126 and accompanying text (explaining the *raison d'être* of the for-profit corporate form).

[143] *See* 492 N.E.2d 1112, 1115 (Mass. 1986) (reporting that David A. Coggins was "a fan of the Patriots from the time of their formation").

[144] *See* Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619, 625 (1999) ("Equity securities have occupied the core of corporate and securities law: stocks carry ownership rights . . . ."); Dana Brakman Reiser & Steven A. Dean, *Financing the Benefit Corporation*, 40 SEATTLE U. L. REV. 793, 797 (2017) ("For incorporated businesses, common stock and corporate bonds are the fundamental building blocks of investment capital. Investors who purchase common stock obtain equity—ultimate ownership of the corporation."); Ann E. Conaway Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors*, 20 DEL. J. CORP. L. 1, 113 (1995) ("[S]tockholders own and indirectly manage the corporation through equity securities of common stock.").

[145] *See* Yueh-Ping (Alex) Yang & Pin-Hsien (Peggy) Lee, *Is Moderation the Highest Virtue? A Comparative Study of a Middle Way of Control Transaction Regimes*, 41 DEL. J. CORP. L. 393, 417–18 (2017) ("[C]orporations can be generally understood as profit-seeking entities and that shareholders investing in a company generally aim to seek profits, shareholder well-being can be simplified into financial interests derived from the company they invest in.").

[146] *See infra* notes 223–228 and accompanying text (explaining that the *Dodge* mandate can be limited through the initial drafting and subsequent amendment of the articles of incorporation and bylaws of the corporation).

meet their duty of loyalty, profit must be of primary concern and all other interests must be secondary, which is in essence the *Dodge* mandate.[147]

What remains is the relationship between the duties of care, good faith, and disclosure and the *Dodge* mandate. The duty of care requires that corporate managers reasonably inform themselves prior to making business decisions and engage in basic monitoring of the business entity.[148] This duty does not require that management always make correct decisions in pursuing profit and fulfilling the *Dodge* mandate.[149] It does, however, require that management must reasonably inform themselves of profit-making opportunities and how to mitigate costs.[150] As mentioned above, many states have allowed this fiduciary duty to be eliminated by including a provision in the corporation's articles of incorporation.[151] Even if such a provision is included within a corporation's articles of incorporation, completely ignoring profit-making opportunities to pursue other goals or out of sheer laziness is likely not permissible as a breach of the duty of loyalty because it would signal management putting its own self-interest ahead of the interests of the corporation and its stockholders.[152] In addition, as also discussed above, the duty of good faith now explicitly covers some of the behavior that the duty of care renders unlawful.[153]

The interaction between the duty of good faith and the *Dodge* mandate is harder to describe with clarity for two reasons. First, the duty of good faith has traditionally been malleable and has been used by courts to express their dismay with particular behavior.[154] As a result, the duty of good faith is not a bright-line standard.[155] Second, as evidenced by *In re China Agritech, Inc.* and other recent cases, the duty of good faith is evolving.[156]

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[147] *See supra* note 125 and accompanying text (providing a summary of the *Dodge* mandate).

[148] *See supra* notes 72–76 and accompanying text (analyzing the duty of care).

[149] *See supra* note 73 and accompanying text (explaining that mere errors in judgment do not constitute a breach of the duty of care).

[150] *See supra* notes 72–76 and accompanying text (analyzing the duty of care).

[151] *See supra* note 83 and accompanying text (explaining that many states have enacted statutes allowing corporations to include provisions in their articles of incorporation eliminating liability for breaches of the duty of care).

[152] *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (interpreting the duty of loyalty to require that the best interests of the corporation and its shareholders outweigh any other interest that a director may have).

[153] *See supra* note 117 and accompanying text (discussing the relationship between the duty of good faith and the duty of care).

[154] *See supra* notes 101–105 and accompanying text (analyzing the duty of good faith).

[155] *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) (defining good faith in terms of bad faith, but declining to provide an exclusive definition of bad faith on the grounds that it was not necessary to do so).

[156] *See* 2013 WL 2181514, at *25–26; Regina F. Burch, *Director Oversight and Monitoring: The Standard of Care and the Standard of Liability Post-Enron*, 6 WYO. L. REV. 481, 525 (2006)

At a minimum, the duty of good faith requires that corporate managers deal honestly and fairly with the corporation and its stockholders in pursuing the primary purpose of the corporation, namely, seeking profit.[157] This requirement equates to displaying good faith in undertaking the *Dodge* mandate.

Finally, as a result of the duty of disclosure, corporate management also needs to be relatively transparent in undertaking the *Dodge* mandate.[158] This need for transparency is especially strong considering that portions of the duty of disclosure have been codified and bolstered by federal and state securities regulation.[159]

In sum, the *Dodge* mandate is founded upon the fiduciary duties that corporate managers owe the corporation and its stockholders.[160] The duty of loyalty specifically requires that the interests of the corporation and its stockholders in seeking profit be given primacy above all other interest of corporate managers.[161] Together, the duties of care, good faith, and disclosure reinforce the *Dodge* mandate and make it unavoidable. With that said, and as will be explored in the next Part, the *Dodge* mandate is not without limitation.[162]

III. LIMITATIONS ON THE *DODGE* MANDATE

Although *Dodge v. Ford Motor Co.* remains a seminal case in corporate law, it is not without its critics.[163] Professor Lynn A. Stout, for example, has written an essay, *Why We Should Stop Teaching* Dodge v. Ford, that explores a number of reasons why this opinion ought to be discarded in the dustbin of history.[164] Her reasons include that the case is outdated, the opin-

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("The contours of the duty of good faith, as a fiduciary duty not subsumed within the duty of loyalty or the duty of care, are still evolving."); Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 434 (2014) ("A corporate director's duty of good faith has evolved over time to include an obligation to attempt in good faith to assure that an adequate corporate information and reporting system exists."); Mark J. Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433, 435 (2009) ("[T]he duty of good faith, which cannot be contracted away in any entity, has evolved into a central doctrine, or tool, to police conduct that seems to need policing.").

157 *See supra* notes 101–105 and accompanying text (analyzing the duty of good faith).

158 *See supra* notes 119–124 and accompanying text (analyzing the duty of disclosure).

159 *See supra* notes 122–124 and accompanying text (explaining that portions of the duty of disclosure have been codified in federal and state securities law).

160 *See supra* notes 141–159 and accompanying text (deriving the *Dodge* mandate from the fiduciary duties corporate managers owe the corporation and its stockholders).

161 *See supra* note 147 and accompanying text (explaining the duty of loyalty).

162 *See infra* notes 177–228 and accompanying text (offering an overview of possible limitations on the *Dodge* mandate).

163 170 N.W. 668, 684 (Mich. 1919).

164 Stout, *supra* note 15.

ion was not issued by a leading court, and the *Dodge* mandate is dicta.[165] Moreover, and perhaps more importantly, Professor Stout also argues that the corporation is not designed or intended to be an instrument of wealth maximization.[166] She reaches this conclusion because corporate charters and bylaws allow limitations to be placed upon the corporation's profit-seeking behavior; state corporate codes do not require corporations to focus on wealth maximization; and later case law has evidenced a weakening of the *Dodge* mandate.[167] She further argues that economic theory suggests that running a corporation to maximize stockholder wealth is inappropriate because "economic theory alone does not permit us to safely assume that corporations are run best when they are run according to the principle of shareholder wealth maximization."[168]

Professor Stout's essay is well-written and well-reasoned; however, the existence of her essay and the arguments contained within it do not undercut the importance of this Article for a number of reasons. First, Professor Stout's essay is much more a telling of what the law ought to be, rather than what the law is. This Article is primarily designed as a guide to help corporate managers and those advising them to navigate through the complex cluster of issues involving fiduciary duties and corporate tax avoidance issues. Professor Stout herself acknowledges that "[t]he facts underlying *Dodge v. Ford* are familiar to virtually every student who has taken a course in corporate law."[169] As a result, the *Dodge* mandate permeates corporate law regardless of whether it ought to have done so.

Second, even if one adopts a less robust reading of the *Dodge* mandate than Professor Stout, which the authors of this Article do, the interaction between this mandate and corporate tax avoidance remains important and likely becomes even more complex. The robust reading of *Dodge* is that it demands profit maximization, meaning that corporate management must seek the maximum amount of profit available.[170] Although the opinion might be read this way, the language of the Supreme Court of Michigan

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[165] *Id.* at 166–68.
[166] *Id.* at 168.
[167] *Id.* at 168–72.
[168] *Id.* at 174.
[169] *Id.* at 164.
[170] A number of commentators have adopted this reading. *See, e.g.*, Bainbridge, *supra* note 8, at 575 ("*Dodge*'s theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time."); Buccola, *supra* note 10, at 24 ("The managerial ideal described in *Dodge* and similar cases is that of shareholder-wealth maximization."); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 605 (2002) ("Since the early-twentieth century case of *Dodge v Ford*, corporations have been deemed to have an 'unyielding' duty to look after the interests of the shareholders, which has been translated into a duty to maximize profits.").

suggests another interpretation. Writing for the majority, Chief Judge Ostrander stated, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[171] The fact that a corporation is to be run "primarily for the profit of the stockholders" does not mean that corporate managers must seek profit maximization.[172] It simply means that making a profit must be the principal objective, and other secondary objectives might be taken into account. The fact that a for-profit entity exists to make a profit is relatively uncontentious.[173] Only when one reads *Dodge* to require profit maximization, which is a legitimate reading, does the case become truly controversial. Professor Stout reads *Dodge* as adopting this aggressive position, but the authors of this Article do not.[174]

Third, as Professor Stout notes, the *Dodge* mandate has substantial limitations that diminish even the weaker version of that mandate.[175] The authors of this Article acknowledge and embrace those limitations. The existence of those limitations and the existence of Professor Stout's essay in general, however, do not undercut the importance of this Article. They both simply demonstrate that the *Dodge* mandate is a lot more complex than it facially appears, which reinforces the need for this Article exploring how this complex mandate interfaces with tax avoidance.[176]

The remainder of this Part explores a number of limitations on the *Dodge* mandate.[177] The purpose of this exploration is to lay a foundation for explaining the complexities of determining when and how corporate management must undertake tax avoidance strategies.

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

[172] *See id.*

[173] *See supra* note 126 and accompanying text (explaining that for-profit corporations exist to make a profit).

[174] *See* Stout, *supra* note 15, at 166 ("This Essay argues that *Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth.").

[175] *See id.* at 170–71 ("In the rare event that . . . a decision is challenged on the grounds that the directors failed to look after shareholder interests [based upon the *Dodge* mandate], courts shield directors from liability under the business judgment rule so long as any plausible connection can be made between the directors' decision and some possible future benefit, however intangible and unlikely, to shareholders.").

[176] *See supra* notes 16–19 and accompanying text (discussing how this article advances the existing scholarship).

[177] *See infra* notes 178–228 and accompanying text (outlining the limitations on the *Dodge* mandate).

A. The Business Judgment Rule and Entire Fairness

As discussed, the *Dodge* mandate is derivable from the various fiduciary duties that management owes the corporation and its stockholders, especially the duty of loyalty.[178] As a result, most violations of the *Dodge* mandate are cast as breaches of fiduciary duty.[179] In adjudicating whether a breach of fiduciary duty has occurred, the business judgment rule grants substantial discretion to management in running the corporation.[180] Therefore, the business judgment rule creates a major limitation on the scope of the *Dodge* mandate.

The business judgment rule, also commonly referred to as the business judgment presumption, is the presumption that corporate directors are informed and act in a good faith manner designed to promote the best interests of the corporation.[181] The rule allows directors a considerable amount of discretion in managing the corporation,[182] and it reflects courts' aversion

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[178] *See supra* notes 125–162 and accompanying text (discussing the interaction between the *Dodge* mandate and the fiduciary duties management owes to the corporation and its stockholders).

[179] *See* Julie A. Nelson, *Does Profit-Seeking Rule Out Love? Evidence (or Not) from Economics and Law*, 35 WASH. U. J.L. & POL'Y 69, 84 (2011) ("Some argue that directors who fail to maximize value for shareholders will commonly face shareholder derivative suits, in which shareholders bring complaints about management decisions before a court. Fear of such suits is thought to goad managers to stay on the narrow path of profit-maximization.").

[180] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors . . . . It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts.") (citations omitted); *see also* Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 499 (2012) ("As a result of the business judgment rule, directors have a tremendous amount of discretion with respect to the management of a corporation's business affairs."); Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 138 (2016) ("[T]he deference provided by courts under the business judgment rule highlights the discretion that corporate managers may have to look beyond shareholder profit.").

[181] *See* Seletha R. Butler, *Business Ethics: Conceptualize Governing with the Ethic of Care and Justice*, 12 N.Y.U. J.L. & BUS. 99, 126–27 (2015) ("The business judgment rule presumes that officers and directors make informed and good faith business decisions that are in the best interest of the organization unless that plaintiff otherwise can prove the agent committed fraud, acted with gross negligence or if self-dealing exists."); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2111 n.163 (2016) ("The business judgment rule is a judicial presumption that boards act in good faith, in the best interests of the corporation, and with adequate information and deliberation."); Arthur R. Pinto, *Protection of Close Corporation Minority Shareholders in the United States*, 62 AM. J. COMP. L. 361, 367 n.40 (2014) ("The business judgment rule provides a presumption that in making a decision, directors were informed, acted in good faith, and honestly believed that the decision was in the best interests of the corporation.").

[182] *See* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 688 (2016) ("The business judgment rule leaves discretion to the board of directors to consider a wide range of interests in the management of a corporation . . . ."); David Rosenberg, *Goodwill and the*

to second-guessing corporate management in making business decisions.[183] Courts are willing to show deference in this context because of their assumed limited expertise in business matters and because business decisions often involve complex decision making without clear correct answers.[184] The business judgment rule creates a strong presumption in favor of the directors that is difficult to overcome for purposes of establishing liability.[185] The rule and the presumption that it creates can be rebutted based

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Excesses of Corporate Political Spending, 11 HASTINGS BUS. L.J. 29, 31 (2015) ("The business judgment rule allows corporate directors extremely broad discretion to make decisions on behalf of the corporation without fear of personal liability even when those decisions result in losses."); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 223 (2013) ("Because of the business judgment rule, directors have near total discretion to run firms the way they see fit.").

[183] *See* Justin Blount & Patricia Nunley, *Social Enterprise, Corporate Objectives, and the Corporate Governance Narrative*, 52 AM. BUS. L.J. 201, 238 (2015) ("Through the business judgment rule, officers and directors can direct the affairs of the corporation the best they are able, without the fear that courts will second guess the difficult decisions they must make."); Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 U. PITT. L. REV. 281, 303 (2016) ("Under the business judgment rule, a court does not second-guess the decision made by a board if the decision could reasonably be thought to be in the best interest of the organization and was the product of reasonable attentiveness."); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 581–82 (2015) ("The business judgment rule means that courts will refuse to second guess directors' substantive business decisions, barring conflicts of interest, corporate waste, or egregious procedural impropriety.").

[184] *See* Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 197 n.104 (2010) ("The business judgment rule is based on the presumption that directors possess more expertise than judges when it comes to making business decisions and so should not be second-guessed by judges as long as appropriate procedures have been followed in the decision-making process."); Kenneth R. Davis, *Cash of the Titans: Arbitrating Challenges to Executive Compensation*, 86 TEMPLE L. REV. 245, 270 (2014) ("One rationale for the business judgment rule is that judges may lack the expertise to evaluate complex business decisions."); Leahy, *supra* note 85, at 537–38 ("The business judgment rule demands that courts defer to boards' business expertise because judges (supposedly) are not qualified to assess the risks and rewards of a business.").

[185] *See* Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 913 (2011) ("Under the business judgment rule, the plaintiffs have the burden to show that the defendants did not act in good faith, were not adequately informed, or did not honestly believe they were acting in the best interests of the corporation. This burden is extremely hard for plaintiffs to overcome; they rarely succeed in cases decided under the business judgment rule."); Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 529 (2013); ("[I]t is difficult for a plaintiff to rebut the business judgment rule, given that, prior to discovery, the information needed might not be readily available."); Douglas R. Richmond et al., *Lawyer Liability and the Vortex of Deepening Insolvency*, 51 ST. LOUIS U. L.J. 127, 153 (2006) ("The business judgment rule . . . requires plaintiffs to overcome a strong presumption against second-guessing the decisions made.").

upon a showing of a breach of the duty of care, loyalty, good faith, or disclosure.[186]

Still, the discretion granted to corporate managers by the business judgment rule is substantial. For example, in *Shlensky v. Wrigley*, a case with similarities to *Dodge*, the Appellate Court of Illinois held that the business judgment rule prevented the finding of a breach of fiduciary duty by directors absent a showing of "fraud, illegality or conflict of interest."[187] In that case, a minority stockholder of the Chicago National League Ball Club brought a derivative suit against the members of the board of directors for refusing to install lights in Wrigley Field and to schedule night baseball games.[188] Philip K. Wrigley, who was president of the corporation, dominated the board, and owned eighty percent of its stock, refused to install lights and schedule night games because he believed that baseball was a "daytime sport" and that the commencing of night games would lead to the deterioration of the neighborhood in which the stadium was located.[189]

Despite the plaintiff invoking the *Dodge* mandate, the court refused to find a breach of fiduciary duty based upon Wrigley's and the rest of the directors' actions absent a finding of "fraud, illegality or conflict of interest."[190] The court even went so far as to suggest that the decision not to install lights might be based on "the long run interest of the corporation in its property value at Wrigley Field[, which] might demand all efforts to keep the neighborhood from deteriorating."[191] Justice Sullivan, writing for the court, also stated, "By these thoughts we do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability."[192] The court was also troubled by the fact that the plaintiff had failed to allege that the installation of lights would have actually increased the profitability of the corporation.[193] The court conclud-

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[186] *See* Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 975 (2009) ("The business judgment rule . . . has no more application to cases involving a breach of the duty of care through unconsidered inaction than it does to cases involving breach of the duty of loyalty."); Silberglied, *supra* note 86, at 186 ("The business judgment rule can be rebutted by a showing of a breach of the duty of care, loyalty, or good faith."); Cornelius Wilk, *U.S. Corporation Going European?—The One-Tier Societas Europaea (SE) in Germany*, 35 SUFFOLK TRANSNAT'L L. REV. 31, 62 (2012) ("[I]f the plaintiff succeeds in proving a breach of one of the director's three fiduciary responsibilities—the duty of care, the duty of loyalty, and the obligation to act in good faith—this director loses the protection of the business judgment rule.").

[187] 237 N.E.2d 776, 780 (Ill. App. Ct. 1968).

[188] *Id.* at 777.

[189] *Id.* at 778.

[190] *Id.*

[191] *Id.* at 780.

[192] *Id.*

[193] *Id.* at 781.

ed that "in the absence of a clear showing of dereliction of duty on the part of the specific directors," the business judgment of directors will be respected.[194]

Shlensky demonstrates the power of the business judgment rule; without a breach of fiduciary duty, courts will not interfere with the business decisions of corporate managers even if they are foolish or ill-conceived.[195] Even in the event that a potential breach of fiduciary duty is shown, corporate managers can still escape liability by showing the entire fairness, also sometimes termed the "intrinsic fairness," of a transaction.[196] Courts analyze entire fairness as both fairness in terms of price and fairness in terms of the dealings surrounding the transaction.[197] As a result, while the *Dodge* mandate appears strong, the business judgment rule and the entire fairness analysis significantly reduce the force of this mandate.

The business judgment rule plays a large role in determining when tax avoidance is required. For example, a few years ago, news reports surfaced in the United Kingdom that Starbucks had been engaging in highly aggressive tax practices while dramatically expanding in the UK market.[198] Star-

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[194] *Id.*

[195] *See id.* (granting broad deference to the decisions of the board of directors).

[196] *See* Lafferty et al., *supra* note 120, at 842 ("If the business judgment rule is rebutted by showing a breach of either the duty of care or the duty of loyalty, the board's action is reviewed using the entire fairness standard, and the directors bear the heavy burden of proving that the challenged decision or transaction is 'entirely fair' to the corporation and its stockholders."); Nancy R. Mansfield et al., *The Shocking Impact of Corporate Scandal on Directors' and Officers' Liability*, 20 U. MIAMI BUS. L. REV. 211, 217 n.20 (2012) ("The plaintiff may rebut the presumption in favor of the directors, resulting in a greater degree of judicial scrutiny, by proving that the director breached its duty of care, loyalty, or good faith. If the plaintiff rebuts the presumption, the Business Judgment Rule will not apply, and the directors must satisfy the formidable 'entire fairness' test."); Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1152 (2013) ("[C]ourts routinely review business decisions under the entire fairness standard upon a plaintiff's rebuttal of the business judgment rule, at which point the court engages in a substantive review of the business decision and must be satisfied of its fairness.").

[197] *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (discussing the entire fariness review); Geeyoung Min, *The SEC and the Courts' Cooperative Policing of Related Party Transactions*, 2014 COLUM. BUS. L. REV. 663, 688 ("Under entire fairness review, the director-defendant bears the burden of proving intrinsic fairness both in the process (fair dealing) and in the substance (fair price or fair terms) of the transaction at issue. If the director-defendant succeeds in proving both conditions, the shareholder-plaintiff can neither enjoin the related party transaction nor seek any damages."); Pearce, *supra* note 85, at 269 ("If the plaintiffs succeed in discrediting the [business judgment] presumption, the responsibility shifts to the board to prove that the decision to make the donations was entirely fair to the shareholders. The defendant's need to prove entire fairness rests on two elements: fair price and fair dealing."); Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 410 (2014) ("[U]nder an entire fairness standard of review the courts allow the board of directors to meet their burden by showing fair dealing and fair price.").

[198] *See* Kleinbard, *supra* note 27 (detailing Starbucks' tax strategies in the United Kingdom); Susan C. Morse, *The Transfer Pricing Regs Need a Good Edit*, 40 PEPP. L. REV. 1415, 1438 n.130

bucks was, among other things, using shockingly high royalties to a related subsidiary with a specially negotiated low tax rate in the Netherlands and inter-company loans to strip earnings from its UK-based Starbucks subsidiary.[199] The use of these and other tax avoidance mechanisms allowed Starbucks to pay a UK tax rate of 0.2% on nearly £3.5 billion in revenue.[200] The press reports of Starbucks' tax avoidance caused outrage and public protests at its normally serene coffeehouses.[201] Ultimately, Starbucks voluntarily remitted £20 million in taxes to the UK to sooth public outrage and regain its social license to operate.[202]

If presented with an opportunity to strip earnings using high royalties and intercompany loans in order to claim an artificially low corporate tax rate, many would believe that the *Dodge* mandate requires them to seize that opportunity.[203] The business judgment rule, however, permits corporate managers to decline to engage in such behavior based upon the potential consequences. One could reasonably conclude that, if highly aggressive tax avoidance techniques are reported widely in the press, consumers may become outraged and protest and boycott, as they did with Starbucks. As a result, although the *Dodge* mandate might appear to suggest that Starbucks' actions were required, the business judgment rule gives corporate managers much wider latitude in making tax avoidance decisions, as long as their decisions are motivated by a business purpose.

(2013) (noting Starbucks' use of Swiss and Dutch subsidiaries in efforts to engage in tax avoidance in the the United Kingdom).

[199] Peter Campbell, *Starbucks Facing Boycott over Tax: Protest Groups Threaten to Try and Close Branches over Revelations It Hasn't Paid for Three Years*, DAILY MAIL (Oct. 16, 2012, 7:32 PM), http://www.dailymail.co.uk/news/article-2218819/Starbucks-facing-boycott-tax.html#ixzz3ubluVeNP; Gonzalo Vina, *U.K. Lawmakers Accuse Starbucks, Amazon, Google of Tax Avoidance*, BLOOMBERG (Nov. 12, 2012, 7:01 PM), http://www.bloomberg.com/news/articles/2012-11-13/u-k-lawmakers-accuse-starbucks-amazon-google-of-tax-avoidance [https://perma.cc/87PC-L2Y2].

[200] Kleinbard, *supra* note 27, at 1519–31.

[201] *Id.*

[202] *See* Allison Christians, *How Starbucks Lost Its Social License—and Paid £20 Million to Get It Back*, 71 TAX NOTES INT'L 637, 637–39 (Aug. 12, 2013); Michael J. Graetz & Rachael Doud, *Technological Innovation, International Competition, and the Challenges of International Income Taxation*, 113 COLUM. L. REV. 347, 402 (2013); Murphy, *supra* note 38.

[203] *See* Reuven S. Avi-Yonah, *Corporate Taxation and Corporate Social Responsibility*, 11 N.Y.U. J.L. & BUS. 1, 24 (2014) ("If tax is considered a cost like any other cost imposed on the corporation, it behooves the management to try to minimize this cost, or even turn it into a profit. Thus, the goal of shareholder profit maximization can naturally lead to corporations trying to minimize taxes and thus enhance earnings per share."); Alexander J. Morgenstern, Note, *Corporate Tax Avoidance: Addressing the Merits of Preventing Multinational Corporations from Engaging in the Practice and Repatriating Overseas Profits*, 16 J. INT'L BUS. & L. 333, 334 (2017) ("Many corporate executives justify corporate participation in tax avoidance as being 'capitalistic' or encompassed in their fiduciary duties owed to shareholders.").

B. Approval and Ratification

The scope of the *Dodge* mandate can also be constrained through the use of stockholder and director approval and ratification. When corporate management engages in a controversial course of action, one way of helping to insulate those managers from liability is by seeking approval or ratification from either the disinterested stockholders or the disinterested directors.[204] Approval and ratification require full knowledge of all material circumstances surrounding the act in question.[205]

The exact results of approval and ratification in combating a claim for breach of fiduciary duty can vary significantly based on the type of act for which approval or ratification is sought and upon whether a situation involves stockholder approval, director approval, stockholder ratification, director ratification, or some combination of the four.[206] If the facts support a claim for breach of fiduciary duty, approval and ratification can sometimes restore the business judgment presumption and terminate the litiga-

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[204] *See* Mark A. Hall, *Rationing Health Care at the Bedside*, 69 N.Y.U. L. REV. 693, 763 (1994) ("[C]orporations law generally permits corporate managers to engage in conflicted dealings if their actions are ratified by a fully informed and disinterested majority of board members or shareholders."); Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1315–16 (2011) ("[G]enerally, if, after full disclosure, these transactions are approved by a majority of disinterested and independent directors or disinterested shareholders, the business-judgment rule is reinstated, and the transaction must pass only the (lenient) standard of waste. Such approvals are also referred to as 'cleansing acts.'"); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 703 (2013) ("To take some pressure off of courts in evaluating substantive business decisions, corporate law provides two primary safe harbor options for cleansing the taint of interested director transactions: (1) approval by a majority of the disinterested directors or (2) ratification through a fully informed vote by a majority of the disinterested shareholders.").

[205] *See* Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1113 (1996) ("[T]he effectiveness of the ratification defense depends upon proof that the stockholders were fully informed about what they were approving when they approved it. If such proof is not forthcoming, the challenged transaction is examined without the curative or burden-shifting effect of stockholder approval."); Marcel Kahan & Edward Rock, *When the Government Is the Controlling Shareholder: Implications for Delaware*, 35 DEL. J. CORP. L. 409, 414 (2010) (reporting that approval and ratification have occurred properly "if the directors are truly independent and function effectively and if shareholders receive full disclosure and their vote is uncoerced"); Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567, 575 (2013) (explaining that in determining whether director or shareholder approval was effective, "[t]he scrutiny centers on the nature of the process for approval, with the central focus on whether all relevant facts pertaining to the conflict were fully disclosed and whether the directors (or shareholders) who approved the transaction were in fact disinterested and acting in good faith").

[206] *See* Mary A. Jacobson, Note, *Interested Director Transactions and the (Equivocal) Effects of Shareholder Ratification*, 21 DEL. J. CORP. L. 981, 982 (1996) ("Unfortunately, the legal effect of ratification is a confusing and unresolved issue in Delaware corporate law.").

tion,[207] can sometimes be weighed in the entire fairness analysis in assessing the breach of fiduciary duty,[208] can sometimes shift the burden to the party asserting the breach to show that the transaction was unfair,[209] and can sometimes be ignored altogether.[210] A complete exploration of how ap-

[207] *See* Jeffrey J. Hass, *Directorial Fiduciary Duties in a Tracking Stock Equity Structure: The Need for a Duty of Fairness*, 94 MICH. L. REV. 2089, 2160 (1996) ("[I]n a conventional corporate context interested directors must show the entire fairness of dealings between themselves and their corporation unless, in accordance with an interested director statute, those dealings have been approved or ratified by an informed majority of disinterested directors or stockholders."); Lyman P.Q. Johnson, *The Audit Committee's Ethical and Legal Responsibilities: The State Law Perspective*, 47 S. TEX. L. REV. 27, 46 (2005) ("Currently, under Delaware law, a director conflict of interest transaction may be substantially immunized from attack on loyalty grounds either by taking, usually in advance, certain procedural safeguards—such as making full disclosure of all material facts and obtaining independent and disinterested director approval, or obtaining stockholder ratification, or by the interested party later proving the entire fairness of the transaction to the corporation."); Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1146 n.358 (2016) ("If a merger has been approved by a fully informed, uncoerced majority of the disinterested shareholders, then in a suit for damages, directors' conduct will be reviewed under the deferential business judgment rule rather than under stricter standards.").

[208] *See* Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma That Should Be Abandoned*, 2015 U. ILL. L. REV. 479, 504 ("[C]ourts are much stricter when a controlling shareholder stands on both sides of the transaction. Here, the general rule is that the transaction remains subject to the entire fairness test even if it has been approved by the shareholders and/or the disinterested directors. The most that the controlling shareholder can obtain is a reversal in the burden of proof.").

[209] *See* Christine Sgarlata Chung, *Government Budgets as the Hunger Games: The Brutal Competition for State and Local Government Resources Given Municipal Securities Debt, Pension and OBEP Obligations, and Taxpayer Needs*, 33 REV. BANKING & FIN. L. 663, 768 n.433 (2014) ("[T]he Delaware Supreme Court [has] held that, while controlling stockholders can never escape entire fairness review, they may shift the burden of persuasion by showing that the transaction was approved either by an independent board majority (or in the alternative, a special committee of independent directors), or, if certain conditions are met, by an informed vote of the majority of the minority shareholders."); Leahy, *supra* note 85, at 549 n.309 ("[E]ven if a disinterested and fully informed board approves a transaction between the corporation and its controlling shareholder, that decision does not automatically receive business judgment rule deference. Rather, the entire fairness standard of review applies, with the burden of proof shifted to the plaintiff . . . unless the transaction also was approved by a majority of the minority shareholders . . . ."); Benjamin A. Templin, *The Public Trust in Private Hands: Social Security and the Politics of Government Investment*, 96 KY. L.J. 369, 422–23 (2008) ("Ratification of the self-interested transaction by a majority of the disinterested directors or disinterested shareholders satisfies the defendant's burden to prove fairness, though some states provide that even if there is ratification, judicial relief will be granted if a plaintiff shows that the transaction was not fair.").

[210] *See* Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 959 (2013) ("Although approval by *disinterested* shareholders may be an adequate substitute for judicial approval such that the business judgment rule may be invoked, few would agree that strict judicial scrutiny for entire fairness should be foreclosed by the affirmative vote of *interested* shareholders."); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 615 (2016) ("Critically, entire-fairness review may be warranted even when the deal was approved by shareholders upon full disclosure of the terms. In other words, because corporate doctrine distrusts shareholders' ability

proval and ratification operate within ligation involving alleged breaches of fiduciary duties is beyond the scope of this Article. It is sufficient to note that approval and ratification can play a significant role in determining whether a breach of fiduciary duty has occurred and how that breach of fiduciary duty should be handled.

Because the *Dodge* mandate is derived at least in part from the fiduciary duties that corporate managers owe to the business entity, anything that helps someone accused of a breach of fiduciary duty serves as a limitation upon the *Dodge* mandate. Put another way, approval and ratification of the non-profit-seeking activities of corporate management can render them legally permissible. As a result, approval and ratification serve as additional means by which the *Dodge* mandate may be restricted.

For instance, application of approval and ratification for the purposes of tax avoidance could have manifested itself in the Starbucks incident. After enduring public shaming in the press and protests at its stores, Starbucks voluntarily remitted a sizable payment to the UK.[211] This payment was not required by law and could have drawn a legal challenge by stockholders. Specifically, the stockholders could have alleged that the voluntary payment was tantamount to corporate waste. The managing director of the UK subsidiary could then have used director or stockholder approval or ratification to insulate himself and his colleagues from stockholder challenges.

C. Constituency Statutes

In many jurisdictions, the business judgment presumption has been strengthened, and consequently the *Dodge* mandate has been weakened, by the adoption of corporate constituency statutes.[212] A constituency statute

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to bargain on their own behalf, the court retains the right to scuttle a deal that shareholders have accepted.").

[211] Christians, *supra* note 202, at 637–39.

[212] *See, e.g.*, ALA. CODE§ 10A-2-11.03(c) (2017); ARIZ. REV. STAT. ANN. §§ 10-1202(C), 10-2702 (2017); ARK. CODE ANN. § 4-27-1202(c) (2017); COLO. REV. STAT. § 7-106-105(7) (2017); CONN. GEN. STAT. § 33-756(g) (West 2017); FLA. STAT. § 607.0830(3) (2017); GA. CODE ANN. § 14-2-202(b)(5) (West 2017); IDAHO CODE § 30-1702 (2017); 805 ILL. COMP. STAT. 5/8.85 (2017); IND. CODE § 23-1-35-1(d) (2017); IOWA CODE § 491.101B (2017); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2017); ME. STAT. tit. 13-C § 831(6) (2017); MASS. GEN. LAWS ch. 156B, § 65 (2017); MINN. STAT. § 302A.251(5) (2017); MISS. CODE ANN. § 79-4-8.30(f) (2017); MO. ANN. STAT. § 351.347(1) (West 2017); MONT. CODE ANN. § 35-1-815(3) (2017); NEV. REV. STAT. § 78.138(4) (2017); N.H. REV. STAT. ANN. § 293-A:12.02(c) (2017); N.J. STAT. ANN. § 14A:6-1(2) (West 2017); N.M. STAT. ANN. § 53-11-35(D) (West 2017); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2017); N.C. GEN. STAT. § 55-11-03(c) (2017); N.D. CENT. CODE § 10-19.1-50(6) (2017); OHIO REV. CODE ANN. § 1701.59(F) (West 2017); OR. REV. STAT. § 60.357(5) (2017); 15 PA. CONS. STAT. § 1715(a) (2017); 7 R.I. GEN. LAWS § 7-5.2-8(a) (2017); S.C. CODE ANN. § 33-11-103(c) (2017); S.D. CODIFIED LAWS § 47-33-4 (2017); TENN. CODE ANN. § 48-

allows directors to consider other interests beyond those of stockholders, such as the interests of creditors, employees, customers, and the public at large, when making management decisions for the corporation.[213] For example, the New York constituency statute provides:

> In taking action, including, without limitation, action which may involve or relate to a change or potential change in the control of the corporation, a director shall be entitled to consider, without limitation, (1) both the long-term and the short-term interests of the corporation and its shareholders and (2) the effects that the corporation's actions may have in the short-term or in the long-term upon any of the following:
>
> (i) the prospects for potential growth, development, productivity and profitability of the corporation;
>
> (ii) the corporation's current employees;
>
> (iii) the corporation's retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the corporation;
>
> (iv) the corporation's customers and creditors; and

103-204 (2017); TEX. BUS. ORGS. CODE ANN. § 21.401 (West 2017); UTAH CODE ANN. §§ 16-10a-840(5), 16-10a-1103(3) (West 2017); VT. STAT. ANN. tit. 11A, § 8.30(a)(3) (2017); VA. CODE ANN. § 13.1-718(B) (2017); WASH. REV. CODE § 23B.11.030(3) (2017); WIS. STAT. § 180.0827 (2017); WYO. STAT. ANN. § 17-16-830(g) (2017); *see also* Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 95 (2015) ("Constituency statutes expand the protection of the business judgment rule by permitting, not mandating, directors to consider nonshareholder constituents. In other words, directors would not face liability for actions justified, in part, by serving nonshareholder interests."); Dana Thompson, *L3CS: An Innovative Choice for Urban Entrepreneurs and Urban Revitalization*, 2 AM. U. BUS. L. REV. 115, 131 (2012) ("Constituency statutes further solidify the business judgment rule protections of corporate managers' decisions that take into account non-shareholder stakeholder interests that may conflict with maximizing shareholder profits.").

[213] *See* Rugger Burke & Samuel P. Bragg, *Sustainability in the Boardroom: Reconsidering Fiduciary Duty Under* Revlon *in the Wake of Public Benefit Corporation Legislation*, 8 VA. L. & BUS. REV. 59, 68 n.34 (2014) ("Constituency statutes, also known as stakeholder statutes, permit a board of directors to consider an enumerated list of constituent (i.e., primary stakeholder) interests as well as shareholder interests when making business decisions."); David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233, 258 (2013) ("Constituency statutes enacted in a majority of states permit—but do not mandate—directors to consider non-shareholder interests."); Tu, *supra* note 180, at 137–38 ("In general, constituency statutes allow corporate managers to consider non-shareholder interests when determining the best interests of the corporation and protect them from liability for doing so.").

> (v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.[214]

Numerous jurisdictions have adopted similar statutes.[215] Notably, Delaware has not.[216]

Some debate has occurred regarding the proper scope of these statutes centering on the purpose that state legislatures originally designed them to serve. During the late 1980s, many states adopted these laws to allow corporate management broader discretion in responding to hostile takeovers.[217]

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[214] N.Y. BUS. CORP. LAW § 717(b).

[215] *See* James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1596 ("[O]ver thirty states have passed so-called 'other constituency' statutes that expressly permit directors to consider the interests of corporate stakeholders other than shareholders . . . ."); Silberglied, *supra* note 86, at 189 ("[T]hirty-two states currently have 'constituency statutes.'"); Zhong Xing Tan, *Stewardship in the Interests of Systemic Stakeholders: Re-conceptualizing the Means and Ends of Anglo-American Corporate Governance in the Wake of the Global Financial Crisis*, 9 J. BUS. & TECH. L. 169, 179 (2014) ("[C]ommentators note the rise of non-shareholder constituency statutes in at least thirty states, which permit or require directors to consider the impact of their decisions on non-shareholding stakeholders.").

[216] *See* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 830–31 (2012) ("Conspicuously absent from the list of states adopting constituency statutes is Delaware, where more than 900,000 business entities have their legal home, including more than fifty percent of all U.S. publicly-traded companies and sixty-three percent of the Fortune 500 companies."); Robert T. Miller, *Inefficient Results in the Market for Corporate Control: Highest Bidders, Highest-Value Users, and Socially Optimal Owners*, 39 J. CORP. L. 71, 122 (2013) ("Some states have so-called constituency statutes that authorize (or, in some cases, require) boards to consider the effects of a corporate control transaction on parties other than the shareholders of the corporation, but Delaware is not one of these states."); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 780–81 (2015) ("[W]hen other states moved to adopt express constituency statutes that allowed their boards of directors to consider the interests of other constituencies on an equal footing with stockholders, Delaware did not join them . . . .").

[217] *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549, 1563 n.43 (2014) ("[S]tates have adopted 'constituency' statutes, which allow, or in some cases require, boards of directors to consider the interests of constituencies other than shareholders in determining how to respond to a hostile takeover offer."); McDonnell, *supra* note 72, at 24–25 ("[I]n the eighties with the growth of first hostile takeovers and then defenses against such takeovers . . . many states adopted 'constituency statutes,' which allow boards to consider non-shareholder interests."); Larry D. Thompson, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 199, 216 (2015) ("Corporate discretion to look past the short-term economic interests of shareholders and consider additional stakeholders, such as employees, suppliers, and the community, was expanded in the 1980s when a host of states enacted laws—generally known as 'constituency statutes'—explicitly authorizing such consideration, largely as a means of enabling local companies to fend off unwelcome takeover attempts.").

Some commentators have argued that these constituency statutes should therefore be limited to the takeover context, but the plain language of many of the statutes, which admittedly does vary, suggests that they apply much more broadly.[218] Importantly, because of the relative newness of these constituency statutes, their application is a developing and still unsettled area of the law.[219] Regardless of the uncertainty surrounding the operation of these statutes, they limit the *Dodge* mandate in states that have adopted such laws because they allow corporate managers to consider a wider array of interests beyond the interests of stockholders in profit maximization or at least profit seeking.

Broad constituency statutes could be of particular importance in cases of tax avoidance, but narrowly written constituency statutes appear to be of lesser to no utility. In the Starbucks example, the relevant constituency statute would have had no impact on issues of tax avoidance. Starbucks is incorporated and headquartered in the state of Washington.[220] While Washington has a constituency statute, the Washington statute is limited to the instance of mergers, meaning that its applicability is relatively narrow.[221] In

[218] *See* Barnali Choudhury, *Aligning Corporate and Community Interests: From Abominable to Symbiotic*, 2014 BYU L. REV. 257, 266 ("[S]tate constituency statutes, which enable corporate managers to consider non-economic interests when faced with a takeover bid, also permit corporations to consider community interests."); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005) ("Although these constituency statutes were prompted by the 1980s takeover wave, most are not limited to takeovers but rather apply to any management decision."); Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 464 (2002) ("[D]irectors governed by constituency statutes will have wider latitude to make decisions consistent with their mission, regardless of the context."); Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 75 (2010) ("[T]he majority of states (Delaware not included) have adopted constituency statutes, which allow directors to consider the impact of corporate decisions on a broad range of stakeholders—not just on shareholders—and permit decisions 'in the best interests of the corporation' even if they are not justified on the basis of shareholders' economic interests.").

[219] *See* Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 995–96 (2016) ("Constituency statutes are controversial and remain an unsettled area of corporate law . . . ."); Lipton, *supra* note 210, at 602 n.112 ("Many states have enacted 'constituency' statutes that permit corporate directors to consider the interests other than stakeholders, although directors rarely rely on these statutes when taking action, because their scope and legal effect are uncertain."); Richard B. Tyler, *Other Constituency Statutes*, 59 MO. L. REV. 373, 400 (1994) ("[C]onstituency statutes are ambiguous and so affected with uncertainties as to virtually insure that they will wreak more havoc than they can possibly cure.").

[220] *See* Starbucks Corp., *Restated Articles of Incorporation* (Mar. 25, 2015), http://globalassets.starbucks.com/assets/6bc40c874ee04752b41b2bd8f729dc1d.pdf [https://perma.cc/V2WC-WDBH].

[221] *See* WASH. REV. CODE ANN. § 23B.11.030(3) (2017) ("The board of directors may condition its submission of the proposed plan of merger or share exchange on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders

other jurisdictions with broader constituency statutes, the application of such laws could dramatically modify the obligations of corporate managers to engage in tax avoidance strategies.[222]

D. Articles of Incorporation and Bylaws

Additional limitations on the *Dodge* mandate can be created through the initial drafting and subsequent amendment of the articles of incorporation and bylaws of the corporation. The default presumption is that individuals invest in for-profit corporations to make a profit.[223] The *Dodge* mandate is the embodiment of that presumption.[224] Through the initial drafting and subsequent amendment of the articles of incorporation and bylaws, however, this default presumption can be altered.[225] If the promoters of a corporation or its stockholders wish to seek profit in a certain manner or to eschew it in certain instances, both the articles of incorporation and bylaws offer a way to achieve this goal.

Admittedly, using the articles of incorporation and bylaws as a way to limit the *Dodge* mandate is not common. The vast majority of articles of incorporation include a provision that the corporation may operate for any lawful business purpose as a means of avoiding claims that the business entity is engaging in *ultra vires* activities.[226] In addition, the vast majority of

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not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed plan of merger or share exchange.").

[222] Illinois, for example, has adopted a very broad constituency statute that provides: "In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors." 805 ILL. COMP. STAT. 5/8.85 (2017).

[223] *See supra* note 126 (explaining that the default presumption is that individuals investing in for-profit corporations do so to make a profit).

[224] *See supra* notes 125–126 and accompanying text (explaining that the *Dodge* mandate is the default presumption that for-profit corporations must be run to make a profit).

[225] *See* Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1112 (2016) ("[T]he Model Business Corporation Act allows directors to take many actions that do not directly seek profit, such as aiding scientific progress or making charitable contributions, and in general corporate charters may specify or authorize goals beyond simple profit-maximization."); Alan J. Meese & Nathan B. Oman, Hobby Lobby*, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 282 (2014) ("[T]hose who set up the corporation may adopt a charter reflecting shareholder views about what business the firm conducts and how to conduct it.").

[226] *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1284 (2008) ("Corporate charters typically describe the purpose of the company as anything lawful."); Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corpo-*

individuals and entities invest in for-profit corporations to make a profit,[227] and if they are unhappy with how a corporation is being managed, the individuals and entities can sell their shares to purchase stock in another company that better aligns with their objectives.[228] Even so, through the initial drafting and subsequent amendment of the articles of incorporation and bylaws of the corporation, stockholders can adjust the metes and bounds of when the *Dodge* mandate applies.

IV. THE *DODGE* MANDATE AND CORPORATE TAX AVOIDANCE

The *Dodge* mandate requiring that directors and other corporate managers run the corporation "primarily for the benefit of the stockholders" is derived from the fiduciary duties of loyalty, care, good faith, and disclosure. As the last Part evidences, this mandate cannot be interpreted in a vacuum.[229] Indeed, a number of legal limitations on the mandate exist, including the business judgment rule, stockholder and director approval and ratification, constituency statutes, and the scope and structure of the articles of incorporation and bylaws.[230] While the intersection of the mandate, fiduciary duties, and the aforementioned limitations set the landscape for corporate

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ration, 50 VA. J. INT'L L. 579, 595 n.64 (2010) ("For U.S. corporations, the charter (typically referred to as the 'articles of incorporation' in corporate statutes) represents the core governance document, and contains a handful of mandatory items, such as the company's name and address, the nature and purpose of the business (generally phrased to embrace 'all lawful acts and activities,' as permitted by the statute), the authorized stock, and the incorporators."); Judd F. Sneirson, *Shareholder Primacy and Corporate Compliance*, 26 FORDHAM ENVTL. L. REV. 450, 464 (2015) ("[T]hose companies that state a corporate purpose in their charters use broad, generic language along the lines of 'the purpose of the corporation is to engage in any lawful act.' As a result, there is little unauthorized corporate action left for the *ultra vires* doctrine to police.").

[227] *See* Thomas K. Cheng, *An Economic Analysis of Limited Shareholder Liability in Contractual Claims*, 11 BERKELEY BUS. L.J. 113, 151 (2014) ("Investors invest to make profit, not to minimize losses."); Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 159 (1992) ("A shareholder does not invest to lose even the initial investment. One invests in the belief that one will derive a profit, from appreciation of shares, or from dividends.").

[228] *See* Rave, *supra* note 204, at 707 ("In the corporate context, if shareholders are unhappy with the behavior of management, they can simply sell their shares and exit the agency relationship."); Robert Sprague & Aaron J. Lyttle, *Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy*, 16 STAN. J.L. BUS. & FIN. 1, 23 (2010) ("If shareholders are nevertheless unhappy with decisions made by the board of directors, they have an available remedy: sell their shares."); Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 414 (2016) ("The dominant strategy for shareholders unhappy with their managers was the Wall Street Rule to simply sell their stock.").

[229] *See supra* notes 177–228 and accompanying text (suggesting that the *Dodge* mandate is not absolute).

[230] *See supra* notes 177–228 and accompanying text (providing an overview of the legal limitations on the *Dodge* mandate).

decision making, the issue that lingers is how to navigate this landscape for tax avoidance issues.

A. The Failure of the Dodge *Mandate to Provide Guidance in Tax Avoidance Matters*

While directors and corporate managers often look to the *Dodge* mandate as a foundational principle defining, shaping, and dictating their fiduciary duties to the corporation and its stockholders, the guidance it offers is far from precise because the limitations placed upon the mandate give wide discretion in how profit may be sought. Thus, although the *Dodge* mandate remains true in general, it provides little guidance in specific matters, including tax avoidance.

Two recent cases adjudicated in Delaware illustrate this point, and they represent a growing body of case law that extends back decades, holding that directors and corporate managers have wide discretion in managing the firm. In *Freedman v. Adams*, the Delaware Supreme Court assessed whether the choice to engage in a tax avoidance strategy is protected by the business judgment presumption.[231] In that case, a stockholder alleged that a corporate executive bonus plan, which did not meet the requirements of tax deductibility, was tantamount to corporate waste.[232] Freedman challenged XTO Energy's payment to its founder and CEO of more than ninety-seven million dollars in non-deductible bonus compensation.[233] Freedman also challenged XTO Energy's non-deductible bonus compensation to other officers.[234] When the bonus plan was adopted, the board knew that the compensation would not be deductible, but the board adopted the plan anyway because it did not wish to be "constrained" by the limitation of the tax code in setting executive compensation.[235] The Chancery Court held that the board's actions in adopting the non-deductible bonus plan were protected by the business judgment rule.[236]

The Delaware Supreme Court affirmed the lower court, holding that "[t]he decision to sacrifice some tax savings in order to retain flexibility in compensation decisions is a classic exercise of business judgment."[237] The Chancery Court's opinion offered more extensive analysis and explained

[231] Freedman v. Adams, 58 A.3d 414, 417 (Del. 2013).
[232] Freedman v. Adams, C.A. No. 4199–VCN, 2012 WL 1345638, at *2 (Del. Ch. Mar. 30, 2012).
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Freedman*, 58 A.3d at 417.
[237] *Id.*

both its deference and the Delaware Supreme Court's deference to the board's business judgment:

> Tax strategy is a complex, dynamic area of corporate decision-making that affects and is affected by many other aspects of a company. A company's tax policy may be implicated in nearly every decision it makes, including decisions about its capital structure, the legal forms of the various entities that comprise the company, which jurisdictions to form these entities in, when to purchase capital goods, whether to rent or purchase real property, where to locate its operations, and so on. Minimizing taxes can also require large expenditures for legal and accounting services and may entail some level of legal risk. As such, decisions regarding a company's tax policy are not well-suited to after-the-fact review by courts and typify an area of corporate decision-making best left to management's business judgment . . . .[238]

In short, while the board has an obligation to seek profit, complex areas of law are left to the business judgment of the corporation's directors and other managers.

The Delaware Chancery Court came to a similar conclusion a few months later in a case with analogous facts. In *Seinfeld v. Slager*, the Chancery Court considered whether a director's failure to minimize taxes violated that director's fiduciary duties.[239] Seinfeld was a stockholder in Republic Services, Inc. and challenged the corporation's compensation decisions.[240] Seinfeld alleged that a $1.25 million incentive award given to the retiring CEO was corporate waste because the payment was not tax deductible.[241] In analyzing Seinfeld's contention that "there is an independent duty to minimize taxes, or alternatively that the failure to minimize taxes is *per se* a waste of corporate assets," the Chancery Court, relying on its decision in *Freedman*,[242] declared that "there is no general fiduciary duty to minimize taxes."[243] The court left open the theoretical possibility that overpayment could result in a breach, but explained that:

> there are a variety of reasons why a company may choose or not choose to take advantage of certain tax savings, and generally a

[238] *Freedman*, 2012 WL 1345638, at *12.
[239] Civil Action No. 6462–VCG, 2012 WL 2501105, at *1, *3 (Del. Ch. June 29, 2012).
[240] *Id.* at *3, *7–8.
[241] *Id.* at *1.
[242] 2012 WL 1345638, at *12.
[243] *Seinfeld*, 2012 WL 2501105 at *3 (quoting *Freedman*, 2012 WL 1345638, at *12).

> company's tax policy "typif[ies] an area of corporate decision-making best left to management's business judgment, so long as it is exercised in an appropriate fashion."[244]

Once again, while the *Dodge* mandate may provide a general duty to seek profit, it fails to provide an answer to any specific question regarding whether to engage in tax avoidance.

These decisions are, at their core, consistent with the Delaware Supreme Court's broad deference to the business judgment of the board and management that stretches back decades. In *Paramount Communications v. Time, Inc*, for example, the Delaware Supreme Court held that directors and other corporate managers are afforded wide discretion under the business judgment rule with regard to when and how to seek profit.[245] In that case, the court reviewed efforts to enjoin Time's tender offer.[246] Even though *Paramount Communications* involved a corporate sale, which can invoke a stronger duty to maximize stockholder return under the *Revlon* standard, the court refused to require directors to engage in short-term maximization for stockholders.[247] Rather, the court permitted directors to "chart a course for [the] corporation which is in its best interests without regard to a fixed investment horizon."[248] In its words and actions, the court stated that there is no "*per se* duty to maximize shareholder value in the short term."[249] Although *Paramount* is over twenty-five years old, Delaware courts continue to follow the deferential path it forged.

Both *Freedman* and *Seinfeld* reveal that Delaware courts will not overturn tax strategy decisions, even decisions that subject the firm to greater tax, under the business judgment rule. One might argue that Delaware courts display such significant deference to tax strategy decisions because the nature of a tax matter is complex and interrelated to numerous other strategic business decisions.[250] More likely, however, this show of deference

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[244] *Id.* (quoting *Freedman*, 2012 WL 1345638, at *12).

[245] 571 A.2d 1140, 1142 (Del. 1990).

[246] *Id.*

[247] *Id.* at 1150; Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. 506 A.2d 173, 182 (Del. 1986). Under the *Revlon* standard, the board of directors are no longer afforded the discretion of the business judgment presumption. *See id.* Rather, the board must maximize short-term profits. *Id*. The *Revlon* standard, however, is only triggered in specific situations such as when "the break-up of the corporate entity is inevitable." *Paramount Commc'ns*, 571 A.2d at 1150.

[248] *Paramount Commc'ns*, 571 A.2d at 1150.

[249] *Id.*

[250] *See* Mark J. Cowan, *A GAAP Critic's Guide to Corporate Income Taxes*, 66 TAX LAW. 209, 232 n.94 (2012) ("The use of the business judgment rule for tax planning shows that there is no precise 'duty' on the board of directors to minimize taxes. That is, taxes are one consideration among many that the board should consider in making decisions, and taxes need not be overemphasized in setting corporate strategy.").

is yet another example demonstrating that it is "not possible or practical for courts to discern ex post when a company is maximizing value for shareholders . . . ."[251] Regardless of whether Delaware courts actually show tax-specific deference, the result is that boards and managers have nearly unlimited discretion in the setting of tax strategy and that discretion will not—absent circumstances that have yet to be seen or litigated—subject them to a viable claim of breach of fiduciary duty. Both *Freedman* and *Seinfeld* were decided remarkably close in time and used reasoning and conclusions that were in lockstep. There have not been subsequent decisions challenging the failure to minimize tax as a breach of fiduciary duty. It is possible, perhaps even likely, that these jurisprudential pronouncements were sufficiently strong and clear to dissuade other plaintiffs from challenging tax strategy decisions as violations of fiduciary duty.

B. Doctrines Providing Guidance for Corporate Tax Strategy

As discussed, the *Dodge* mandate does not provide clear legal guidance in the area of tax avoidance. Further, Delaware courts have not overturned tax strategies under the business judgment presumption. Thus, the question remains how directors and other corporate managers should address tax avoidance decision making. The answer to this question lies in the approach that directors and other corporate managers should use when making determinations regarding environmental compliance, employment matters, and numerous other business decisions. When directors and other managers set firm policies and strategies, they should first seek to satisfy legal compliance, and then they should analyze whether the firm has social obligations, or can achieve strategic advantages, in going beyond mere legal compliance.[252] In doing this additional analysis, managers can use doctrines and theories from the fields of corporate social responsibility, sustainability, and economics to set policy and strategy.[253]

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[251] Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180–81 (2008).

[252] *See* Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 12–38 (2008) (noting and discussing five approaches to legal compliance as avoidance, compliance, prevention, advantage, and transformation); *see also* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance Into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 293 (2017) (noting the strategic advantage of compliance).

[253] *See* Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452, 461–63 (2008) (noting corporate social responsibility as "part of a new consensus on the broader judgment that managers should exercise in the course of doing business" and discussing "people-friendly business strategies"); *see also* David Wheeler et al., *Focusing on Value: Reconciling Corporate Social Responsibility, Sustainability and a Stakeholder Approach in*

The use of extralegal doctrines and theories in setting policy and strategy is standard operating procedure for many firms in a variety of areas, but their use is arguably even more important in setting tax strategies.[254] Environmental and employment law, for example, set clear minimum legal standards.[255] In many cases, tax does not provide clear legal standards because of the relative ease with which firms can adopt tax avoidance strategies.[256] Because the initial analysis of tax compliance is often murky, the use of established and reliable frameworks for firm decision making becomes even more important.[257] Without established and reliable frameworks, managers may be tempted to allow self-interest, personal beliefs, or gut instincts to dictate firm tax policy.

Business scholars have advanced a variety of frameworks to guide business decision making beyond mere legal compliance.[258] This Article focuses on the importance of drawing frameworks from the fields of corporate social responsibility, sustainability, and economics because frameworks from these fields will be especially useful in setting tax policy and strategies. A few words ought to be said about these fields to help illuminate why this Article posits that insights from them will be very helpful in determining tax policy and strategy.

Corporate social responsibility ("CSR") is a well-established field that offers numerous theories and doctrines to guide directors and other corporate managers in determining their obligations as to social and ethical con-

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a Network World, J. GEN. MGMT., Spring 2003, at 2 (discussing how CSR and sustainability integrate with value creation).

[254] *See* Gill, *supra* note 253, at 461–63 (discussing mainstreaming and strategic use of CSR and noting that "the CSR movement was gradually absorbed into the corporate ethos, part of a new consensus on the broader judgment that managers should exercise in the course of doing business").

[255] *See, e.g.*, Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 83 (2009) (noting that federal minimum standards are found in "wage and hour, occupational safety and health, status discrimination, and leave law"); Richard Webster, *Federal Environmental Enforcement: Is Less More?*, 18 FORDHAM ENVTL. L. REV. 303, 303–04 (2007) (noting the existence of federal minimum environmental standards).

[256] *See* Alex Raskolnikov, *Probabilistic Compliance*, 34 YALE J. REG. 491, 493 (2017) ("Even the tax law—the domain often perceived as dominated by bright-line rules—is infused with tension resulting from legal uncertainty. For instance, it took the Internal Revenue Service (IRS) and the Treasury Department ten years and three tries to interpret a key uncertain term related to controversial corporate inversion transactions. These involve U.S. corporations moving offshore, often to reduce their U.S. tax bills.").

[257] *See* Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1021 (2009) (noting "tax law's uniquely problematic types and degrees of uncertainty" and explaining that "[i]t is often unclear ex ante whether a position will (or should) be subject to a penalty ex post, and this uncertainty, or chance of incorrectness, has been incorporated into the law itself").

[258] *See, e.g.*, Wheeler et al., *supra* note 253, at 2.

duct.[259] CSR recognizes that a firm has fundamental responsibilities to others, including its broadly defined stakeholders.[260] While CSR is premised upon a firm's responsibilities to others, the doctrines and theories within this field permit firms to fulfill their duties to act socially responsible while continuing to seek a profit.[261]

CSR is often construed to subsume both legal compliance and adherence to ethical norms.[262] Uniform agreement among CSR scholars and practitioners as to the ideal balance between profit motive and social responsibility does not exist.[263] Although CSR is a well-established field, it remains the subject of much scholarly debate because CSR is linked to the intersec-

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[259] *See* Andrew Crane et al., *The Corporate Social Responsibility Agenda*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 3–5, 11 (Andrew Crane et al. eds., 2009) (describing CSR's "phenomenal rise to prominence in the 1990s and 2000s" and noting CSR "is an essentially American idea that reflects a specific understanding of the role of markets, governments, business, and civil society"); Phillipe Haspeslagh, *Foreword* to INNOVATIVE CSR: FROM RISK MANAGEMENT TO VALUE CREATION ix, ix–x (Celine Louche et al. eds., 2010) (discussing CSR).

[260] *See* Jill A. Brown & William R. Forster, *CSR and Stakeholder Theory: A Tale of Adam Smith*, 112 J. BUS. ETHICS 301, 302–03 (2013) (discussing the various conceptions of CSR and its relationship to stakeholder theory).

[261] *See* JOSEPH WILLIAM MCGUIRE, BUSINESS AND SOCIETY 144 (1963) ("The idea of social responsibilities supposes that the corporation has not only economic and legal obligations, but also certain responsibilities to society which extend beyond these obligations."); Crane et al., *supra* note 259, at 12 ("While many see CSR as an imperative based on non-economic, most notably ethical and social grounds, a vast majority of the CSR literature has aimed at showing that socially responsible behavior in fact can also make very good business sense."). *See generally* Elisabet Garriga & Domènec Melé, *Corporate Social Responsibility Theories: Mapping the Territory*, 53 J. BUS. ETHICS 51 (2004) (presenting a CSR classification in which several conceptions of CSR suggest that a firm's responsibilities to society and wealth maximization are compatible).

[262] *See* Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, BUS. HORIZONS, July-Aug. 1991, at 39, 41–43 (1991) (proferring a theory of CSR that includes legal compliance and adherence to ethical norms). *See generally* Garriga & Melé, *supra* note 261 (presenting a CSR classification that identifies several CSR variations that are grounded in ethical theory).

[263] *See* Kevin T. Jackson, *The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights*, 22 MINN. J. INT'L L. 71, 96–97 (2013) ("CSR is decentralized, carries conflicting norms, is orchestrated by unelected activists, business executives, and bureaucrats, and does not employ any hard sanctions that can be administered following non-compliance."); Susan S. Kuo & Benjamin Means, *Corporate Social Responsibility After Disaster*, 89 WASH. U. L. REV. 973, 1000 (2012) (reporting that "classical" and "progressive" corporate law scholars "disagree on almost every significant point concerning corporate social responsibility"); Colin Marks & Nancy B. Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269, 1274–75 (2009) ("[C]ommentators disagree on the discretionary nature of philanthropic activities . . . . [T]he debate appears to center on whether CSR only includes, as its essential parts, the economic, legal, and ethical responsibilities, or whether CSR should also include philanthropic activities.").

tion of complex issues of ethics and economics.[264] Still, corporate social responsibility generally demands that corporations engage in socially responsible behavior that promotes the well-being of society.[265] In addition, even though many aspects of the field are hotly debated, the impact of the field can be felt broadly in the behavior of corporations throughout the United States.[266] Many corporations have explicitly embraced the field, and many firms use guidance from the field to assist with managerial decision making.[267] Large corporations often report their efforts and activities relating to CSR to their stakeholders.[268]

CSR has a significant amount to offer to tax avoidance decision making. This field provides various doctrines and theories that can be used for setting nearly all firm policies, including tax strategy.[269] A small but expanding body of scholarship exists applying the theories and lessons of CSR specifically to taxation. The first calls to use CSR to analyze tax strategy were made during the late 1970s, but those calls remained largely unanswered until 2006, when Mihir Desai and Dhammika Dharmapala published a brief but persuasive article calling for the application of CSR to tax avoid-

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[264] *See* Jackson, *supra* note 263, at 96–97; Kuo & Means, *supra* note 263, at 1000; Marks & Rapoport, *supra* note 263, at 1274–75.

[265] *See* Seema Mohapatra, *Time to Lift the Veil of Inequality in Health Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 175 (2015) ("CSR is also known as 'corporate citizenship' and can involve incurring short-term costs that do not provide an immediate financial benefit to the company, but instead promote positive social and environmental change."); Doron Narotzki, *Corporate Social Responsibility and Taxation: The Next Step of the Evolution*, 16 HOUS. BUS. & TAX L.J. 167, 183 (2016) ("To summarize, in the last 25 years of extensive research, CSR has made significant progress and transitioned from very general statements about shareholders' responsibility toward society, to a list of very specific socially responsible activities expected from the corporation, itself."). *See generally* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017) (discussing when corporations are required and permitted to engage in corporate social responsibility activities).

[266] *See* Kasturi Rangan et al., *The Truth About CSR*, HARV. BUS. REV., Jan.–Feb. 2015, at 42–49 (arguing that a majority of corporations have been practicing CSR for some time now and detailing how firms have approached CSR activities).

[267] *See* Mark S. Schwartz & Archie B. Carroll, *Corporate Social Responsibility: A Three-Domain Approach*, 13 BUS. ETHICS Q. 503, 504 (2003) ("Carroll's CSR domains and pyramid framework remain a leading paradigm of CSR in the social issues in management field.").

[268] *See generally* Joseph A. Johnson, The Influence of Alternative CSR Reporting Models on Managers' Capital Allocation Decisions (Aug. 2015) (unpublished Ph.D. dissertation, Georgia Institute of Technology) (on file with Georgia Tech Library) https://smartech.gatech.edu/bitstream/handle/1853/53905/JOHNSON-DISSERTATION-2015.pdf [https://perma.cc/RDJ8-SPBQ] (analyzing how firms communicate CSR efforts to stakeholders).

[269] *See generally* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane et al. eds., 2009) (providing a comprehensive overview of the diversity of perspectives, definitions, and applications of CSR, including stakeholder theory).

ance.[270] Since then, the lion's share of the work in tax and CSR has been published by accountancy scholars.[271] Empirical work is beginning to show a correlation between a firm's socially responsible behavior and less aggressive corporate tax strategies.[272] While significant work, both theoretical and empirical, remains to be done in the area of CSR and tax avoidance, directors and other managers can look to the field for guidance in determining tax policy within their firms.[273]

Because of the limited guidance afforded by the *Dodge* mandate, the field of CSR has much to offer corporations in terms of striking the proper balance between profit seeking and socially responsible behavior in tax compliance decision making. While CSR is premised upon a firm's responsibilities to others, CSR also allows the firm to balance these responsibilities with its implicit profit motive.[274] The exact balance in the area of tax avoidance decision making is a complex issue and is beyond the scope of a single law review article. At a minimum, however, the fact that a balance is needed suggests that the most aggressive tax avoidance strategies should not be employed because they avoid a corporation's responsibility to pay a reasonable amount of taxes to the communities from which it derives revenue.

Sustainability theory offers a second source of guidance in tax avoidance decision making. Sustainability is the management and coordination of

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[270] *See* Mihir Desai & Dhammika Dharmapala, *Corporate Social Responsibility and Taxation: The Missing Link*, LEADING PERSPECTIVES, 4, 5 (2006), http://docs.wixstatic.com/ugd/b391a0_2cbcf4c9530e4290a4735c3e779646da.pdf [https://perma.cc/55AV-L8XR] (arguing that CSR is a good lens for addressing tax avoidance because, for a variety of reasons, tax compliance aligns the interests of shareholders and the government).

[271] *See, e.g.*, John Hasseldine & Gregory Morris, *Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection*, 37 ACCT. F. 1 (2013); Chun Keung Hoi et al., *Is Corporate Social Responsibility (CSR) Associated with Tax Avoidance? Evidence from Irresponsible CSR Activities*, 88 ACCT. REV. 2025 (2013); Roman Lanis & Grant Richardson, *Corporate Social Responsibility and Tax Aggressiveness: A Test of Legitimacy Theory*, 26 ACCT., AUDITING & ACCOUNTABILITY J. 75 (2012) [hereinafter Lanis & Richardson, *Legitimate Theory*]; Roman Lanis & Grant Richardson, *Is Corporate Social Responsibility Performance Associated with Tax Avoidance*?, 127 J. BUS. ETHICS 439 (2015) [hereinafter Lanis & Richardson, *Tax Avoidance*].

[272] *See, e.g.*, Hoi et al., *supra* note 271, at 2051 (finding a correlation between a lack of commitment to CSR and aggressive tax avoidance); Lanis & Richardson, *Tax Avoidance*, *supra* note 271, at 449, 454 (showing a correlation between higher commitment levels to CSR and lower levels of tax avoidance); Lutz Preuss, *Tax Avoidance and Corporate Social Responsibility: You Can't Do Both, or Can You?*, 10 CORP. GOVERNANCE 365, 369–70 (2010) (showing that firms located in tax havens (thereby engaging in tax avoidance) made fewer substantive CSR commitments within their codes of conduct than comparable U.S. firms).

[273] *See* Grahame R. Dowling, *The Curious Case of Corporate Tax Avoidance: Is It Socially Irresponsible?*, 124 J. BUS. ETHICS 173, 181–83 (2014) (discussing tax and CSR).

[274] *See generally* Garriga & Melé, *supra* note 261 (noting CSR conceptions that acknowledge a firm's responsibilities to society and to its owners).

financial, social, and environmental resources to ensure sufficiency of those resources for current and future needs.[275] While most often used when considering natural resource conservation, sustainability is also a useful theoretical construct for considering the sufficiency and use of corporate resources in general. Unlike CSR, which is usually based on duty or responsibility, sustainability is by definition focused on resources.[276] Sustainability acknowledges the role that people and entities within a community play in the protection of resources for current and future use, and it inquires how those resources can best be deployed and managed.[277] Sustainability is accepted by numerous corporations around the globe, and public sustainability reporting is nearly universally employed by the largest multinational firms.[278]

Sustainability is an excellent lens for formulating tax strategy because it acknowledges and addresses the actual consequences and externalities of tax avoidance, namley the erosion of revenue and other social and governmental mechanisms.[279] The leading sustainability reporting framework, which eighty-two percent of the largest global firms use, has already begun to incorporate sustainable tax reporting.[280] Full and complete compliance with the leading sustainability framework requires firms to report "[a]ll organization taxes (such as corporate, income, property) and related penalties

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[275] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) ("[T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all."); *see also* Matthew T. Bodie, *NASCAR Green: The Problem of Sustainability in Corporations and Corporate Law*, 46 WAKE FOREST L. REV. 491, 492–93 (2011) (defining the sustainability movement and explaining how sustainability theorists want firms to look to sustainability theory instead of, or at least in addition to, shareholder primacy theory).

[276] *See* Bodie, *supra* note 275, at 492 (defining sustainability as "'meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs'" (quoting Rep. of World Comm'n on Env't & Dev., *Our Common Future*, Ch. 2, ¶ 1, U.N. Doc. A/42/427 (June 8–19, 1987)).

[277] *See id.*

[278] Ninety-three percent of the largest 250 global firms provide such reporting. KPMG, THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 11 (2013), https://assets.kpmg.com/content/dam/kpmg/pdf/2015/08/kpmg-survey-of-corporate-responsibility-reporting-2013.pdf [https://perma.cc/4MC7-W6RX].

[279] *See* Bird & Davis-Nozemack, *supra* note 63.

[280] *See generally* GLOB. REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES: IMPLEMENTATION MANUAL (2013), https://www.globalreporting.org/resourcelibrary/GRIG4-Part2-Implementation-Manual.pdf [https://perma.cc/3WVY-FDCL].

paid at the international, national, and local levels."[281] The framework also requires firms to disclose any tax credits or tax relief from which the firm benefits.[282] The framework does not require firms to delineate the types, recipients, and timing of the taxes paid, which is necessary to determine whether a firm's tax strategy fairly contributes to the communities it impacts.[283] Nonetheless, the inclusion of tax into the leading sustainability reporting framework guarantees that firms will begin to consider the impacts of their tax strategies, including their tax avoidance.

Considering the limited guidance afforded by the *Dodge* mandate, sustainability theory has much to offer directors and other corporate managers formulating tax avoidance strategies. Similar to CSR, most conceptions of sustainability also likely caution against directors and other corporate managers engaging in extremely aggressive tax avoidance strategies. As this Article demonstrates, because of the various limitations on the *Dodge* mandate, including the business judgment rule, directors and other corporate managers are permitted to take a long-term approach to profitability.[284] This type of approach is compatible with most conceptions of sustainability. After all, most conceptions of sustainability are founded upon the idea of creating long-term balance, and extreme strategies tend to interfere with that balance.[285]

In addition to appealing to notions of CSR and sustainability in light of the limited guidance afforded by the *Dodge* mandate, the field of economics may also be useful in helping directors and other corporate managers decide how to address tax avoidance issues. This observation may seem surprising considering that the *Dodge* mandate is viewed by some as a blatant appeal to the idea undergirding a great deal of economic theory that individuals are and should be focused on profit and wealth maximization.[286] This Article,

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[281] *Id.* at 70.
[282] *Id.* at 74.
[283] *See generally id.*
[284] *See supra* notes 245–251 and accompanying text.
[285] *See supra* notes 275–277 and accompanying text.
[286] *See* John Stuart Mill, *On the Definition of Political Economy; and On the Method of Philosophical Investigation in That Science*, 26 LONDON & WESTMINSTER REV. 1, 12 (1836) ("What is now commonly understood by the term 'Political Economy' is not the science of speculative politics, but a branch of that science. It does not treat of the whole of man's nature as modified by the social state, nor of the whole conduct of man in society. It is concerned with him solely as a being who desires to possess wealth, and who is capable of judging of the comparative efficacy of means for obtaining that end."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (8th ed. 2010) (arguing that the purpose of economics is "to explore the implications of assuming that man is a rational maximizer of his ends in life"); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14 (Edwin Cannan ed., The Modern Library 1937) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.").

however, has examined the issue of whether the *Dodge* mandate creates a legal requirement that directors and corporate managers unabashedly engage in wealth maximization and seek profit in all instances. As this Article has explained, while the *Dodge* mandate remains true in general based upon the fiduciary duties owed within the firm, the limitations upon the mandate give directors and other corporate managers broad discretion in determining any specific tax avoidance strategy.[287] Just because the *Dodge* mandate and the classical economic theory that underlies it fail to create a legal requirement does not mean that the *Dodge* mandate and this underlying theory cannot be used to provide non-legally enforceable guidance.

Even if directors and other corporate managers look to economic theory for guidance, this theory does not require that directors and other corporate managers blindly engage in aggressive tax avoidance strategies. Taking such an approach is both simplistic and short-sighted. The American public is increasingly concerned about corporations engaging in aggressive tax avoidance strategies.[288] In non-tax matters, recent cases such as *Citizens United v. Federal Election Commission* and *Burwell v. Hobby Lobby Stores, Inc.* have increased the scrutiny on corporations.[289] As a result, if a corporation engages in aggressive tax avoidance strategies, it risks drawing the condemnation of the public, which may impact the corporation's business prospects, and which also risks additional government scrutiny and potential litigation. In short, a rational cost-benefit analysis suggests that directors and corporate managers should use tax avoidance strategies sparingly to prevent the costs and problems associated with their corporation developing a reputation as an unscrupulous tax avoider.

CONCLUSION

Tax avoidance is a common activity for firms, particularly large firms and those with an international presence. Directors and managers often believe that the *Dodge* mandate requires them to pursue highly aggressive tax avoidance strategies. This Article has shown that belief to be a false premise. The *Dodge* mandate, while emerging from the fiduciary duties of loyal-

[287] *See supra* notes 178–251 and accompanying text (making clear that the mandate does not compel any one tax strategy based upon the limitations upon it).

[288] *See* Motel, *supra* note 30 (polling Americans on how they view taxes and finding that most Americans are frustrated with corporate tax avoidance); *see also* Lanis & Richardson, *Legitimate Theory*, *supra* note 271, at 93 ("[T]ax aggressive corporations have greater CSR disclosures to alleviate potential public concerns arising from the negative impact of their tax aggressiveness on the community, and to show that they are meeting community expectations in other ways.").

[289] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

ty, care, good faith, and disclosure, is quite limited. Limitations can be found in the business judgment rule, stockholder and director approval and ratification, constituency statutes, and articles of incorporation and bylaw amendments. As demonstrated through Delaware case law, the business judgment rule all but eliminates the effect of the *Dodge* mandate on corporate tax decisions. Indeed, boards and management have virtual *carte blanche* to set tax strategy, including tax strategies that do not minimize taxation. Because the *Dodge* mandate does not provide definitive guidance for tax strategy, directors and management must look outside the law to other doctrines. The fields of corporate social responsibility, sustainability, and economics can all serve as mechanisms to uncover tax strategies that allow firms to purse a primary profit motive, while continuing to honor their obligations to stakeholders, and to ensure that the firm and the communities it impacts have sufficient resources for the future.