

## NOTE

WALMART AND GUNS: A CASE STUDY IN  
MODERN CORPORATE GOVERNANCE

Clare Curran\*

*In August 2019, the Business Roundtable issued a new Statement on the Purpose of a Corporation. The statement, signed by 181 CEOs, including Doug McMillon of Walmart, declared that corporations should seek to serve the interests of all stakeholders—a marked departure from the Roundtable’s prior embrace of shareholder primacy. This shift in position reinvigorated debate among business and legal scholars about the proper purpose of a corporation.*

*Using Walmart as a case study, this Note argues that corporations are indeed adopting a more flexible and responsive conception of corporate purpose. This Note begins with a discussion of corporate governance theories, detailing four distinct visions of corporate purpose and control. It then examines Walmart’s decisionmaking process regarding ammunition and firearm sales in the wake of a tragic mass shooting at one of its stores. Finally, it concludes by reconciling Walmart’s conduct with the prevailing theories of corporate governance, ultimately finding team production theory—which calls for the balancing stakeholder interests—to be most applicable.*

I.	Introduction .....	1072
II.	Corporate Governance Theories .....	1074
	A. Corporate Purpose: Shareholder Versus Stakeholder Interests .....	1075

---

\* J.D. Candidate 2021, Columbia Law School; B.A. 2015, Yale University. Many thanks to Professor Kathryn Judge for her guidance and to the staff of the *Columbia Business Law Review* for their assistance in preparing this Note for publication.

B.	Corporate Control: Shareholder Versus Director Primacy .....	1078
C.	Corporate Control: Managerialism Versus Team Production Theory .....	1081
D.	Corporate Governance Theories in Law and Practice .....	1084
III.	Case Study: Walmart.....	1091
A.	A “Loaded” Relationship with Firearm Sales ...	1094
B.	Tragedy Strikes and Pressure Mounts .....	1102
C.	The September 3, 2019 Decision .....	1107
IV.	A Lesson of Stakeholder Influence.....	1111
A.	Reconciling Corporate Governance Theories....	1112
B.	The Role of Corporate Law.....	1117
V.	Conclusion .....	1120

## I. INTRODUCTION

On September 3, 2019, Walmart chief executive Doug McMillon announced in an open letter to associates the company’s decision to discontinue sales of ammunition that could be used in handguns or military-style weapons.<sup>1</sup> The announcement came in the wake of several mass shootings, including one at a Walmart store in El Paso, Texas.<sup>2</sup> In addition to announcing Walmart’s merchandising decision, McMillon’s letter advocated for certain gun control policies, including strengthened background checks.<sup>3</sup> He soberly acknowledged the likelihood of decreased market share and “inconvenience” to customers.<sup>4</sup>

<sup>1</sup> See Letter from Doug McMillon, CEO, Walmart, to Walmart Associates, Our Next Steps in Response to the Tragedies in El Paso and Southaven (Sept. 3, 2019),

<https://corporate.walmart.com/newsroom/2019/09/03/mcmillon-to-associates-our-next-steps-in-response-to-the-tragedies-in-el-paso-and-southaven> [<https://perma.cc/WL4Z-NZ9H>]. This decision built on prior decisions to limit the sale of handguns and military-style rifles themselves. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *id.*

Just weeks later, the Business Roundtable elected McMillon as its chairman.<sup>5</sup> An influential association of CEOs from leading companies, the Business Roundtable had been making headlines itself after releasing an updated Statement on the Purpose of a Corporation.<sup>6</sup> The statement, signed by 181 CEOs, set forth a new standard of corporate responsibility, eschewing principles of shareholder primacy to which the Roundtable previously adhered.<sup>7</sup> Under that standard, a corporation should deliver value to all stakeholders: customers, employees, suppliers, and communities, as well as shareholders.<sup>8</sup> The Roundtable's shift has reinvigorated debate among business and legal scholars about corporate purpose.<sup>9</sup>

---

<sup>5</sup> Press Release, Bus. Roundtable, Walmart President and CEO Doug McMillon Named Chairman of Business Roundtable (Sept. 19, 2019), <https://www.businessroundtable.org/walmart-president-and-ceo-doug-mcmillon-named-chairman-of-business-roundtable> [<https://perma.cc/RT3Y-4PWD>].

<sup>6</sup> See Richard Henderson & Patrick Temple-West, *Group of US Corporate Leaders Ditches Shareholder-First Mantra*, FIN. TIMES (Aug. 19, 2019), <https://www.ft.com/content/e21a9fac-c1f5-11e9-a8e9-296ca66511c9> (on file with the Columbia Business Law Review) (describing the statement); Press Release, Bus. Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans' (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/25SH-ZZB4>] [hereinafter Business Roundtable Redefines the Purpose of a Corporation] (announcing the statement).

<sup>7</sup> See Press Release, Bus. Roundtable, *supra* note 6. More CEOs have signed the statement since. See *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (last updated Oct. 2020), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf> [<https://perma.cc/XV7D-EQWG>].

<sup>8</sup> See *Statement on the Purpose of a Corporation*, *supra* note 7.

<sup>9</sup> Compare, e.g., Jesse Fried, *Shareholders Always Come First and That's a Good Thing*, FIN. TIMES (Oct. 7, 2019), <https://www.ft.com/content/fff170a0-e5e0-11e9-b8e0-026e07cbe5b4> (on file with the Columbia Business Law Review) (arguing for shareholder-centric governance), with Todd H. Baker, *Shareholder Primacy Isn't the Best of All Possible Worlds*, THE CLS BLUE SKY BLOG (Oct. 23, 2019),

Using Walmart as a case study, this Note argues that modern corporations are adopting a more flexible, responsive conception of corporate purpose. Walmart's recent actions regarding ammunition sales and gun control policy illustrate a shift in the ends and means of the company's decisionmaking—a shift with the potential to influence how other corporations operate and the proper approach of corporate law. Part II of this Note outlines the four prevailing theories of corporate governance (shareholder primacy, director primacy, managerialism, and team production theory) and their effects on corporate law and practice. Part III examines Walmart's decisionmaking process regarding firearm and ammunition sales, detailing both why and how the company arrived at its ultimate decision. Finally, Part IV finds team production theory most applicable to Walmart's conduct and comments on the role *vel non* of corporate law in evolving perceptions of corporate purpose.

## II. CORPORATE GOVERNANCE THEORIES

Corporate theories are the result of a long-running debate over the true nature of a corporation.<sup>10</sup> Various corporate theories advance different explanations for the corporation's unique legal characteristics.<sup>11</sup> Some theories focus on the statutory or contractual origins of a corporation, while others focus on a corporation's legal personhood.<sup>12</sup> This Note concerns corporate governance theories—corporate theories

---

<http://clsbluesky.law.columbia.edu/2019/10/23/shareholder-primacy-isnt-the-best-of-all-possible-worlds/> [<https://perma.cc/G6D7-MRD3>] (arguing against shareholder-centric governance).

<sup>10</sup> See, e.g., generally David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201; William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

<sup>11</sup> See Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 586 (2018) (listing several explanations).

<sup>12</sup> See *id.* at 586–88; Millon, *supra* note 10, at 205–06, 211–13.

focusing on the means and ends of corporate decisionmaking.<sup>13</sup>

Crucially, different corporate governance theories posit different conceptions of corporate purpose. Among theories, the most fundamental disagreement—reanimated by the recent Business Roundtable statement—regards the extent to which corporations can pursue the interests of stakeholders other than shareholders.<sup>14</sup> In outlining the prevailing theories of corporate governance, this Part describes the opposing sides of the corporate purpose debate and then sets forth the varying accounts of control over corporate decisionmaking. It concludes by assessing the support for and influence of these theories in corporate law and practice.

#### A. Corporate Purpose: Shareholder Versus Stakeholder Interests

At the highest level, corporate governance theories fall into two categories: theories holding that corporations should maximize shareholders' pecuniary interests and theories holding that corporations should consider the interests of other stakeholders as well.<sup>15</sup> Shareholder primacy (the idea that the proper purpose of a corporation is to maximize shareholder wealth) has been the prevailing theory of corporate purpose for several decades.<sup>16</sup> Business leaders and

---

<sup>13</sup> Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 549–50 (2003) (“Essentially, all of these models [of the corporation] are ways of thinking about the means and ends of corporate governance. They seek to answer two basic sets of questions: (1) as to the means of corporate governance, who holds ultimate decisionmaking power? and (2) as to the ends of corporate governance, whose interests should prevail?”).

<sup>14</sup> See Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 386 (2016); Dalia T. Mitchell, *From Dodge to eBay: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 157 (2019); Allen, *supra* note 10, at 264–65.

<sup>15</sup> Cf. Bainbridge, *supra* note 13, at 549 (describing these two categories as poles of a spectrum of corporate governance theories).

<sup>16</sup> See LYNN A. STOUT, *THE PROBLEM OF CORPORATE PURPOSE* 2–3 (Brookings Issues in Governance Stud. No. 48, 2012),

scholars largely have accepted shareholder primacy as the best approach to managing a corporation.<sup>17</sup> There are signs, however, that the shareholder primacy consensus has begun to unravel.<sup>18</sup>

Against shareholder primacy, stakeholder theories argue that corporations can serve broader social purposes by advancing the interests of constituencies like workers, customers, and communities, in addition to shareholders.<sup>19</sup> For most of the twentieth century up to the 1980s, officers and directors embraced “managerialism.”<sup>20</sup> According to this stakeholder theory, corporations have a broad, nearly-charitable obligation to serve the interests of all stakeholders,

---

[https://www.brookings.edu/wp-content/uploads/2016/06/Stout\\_Corporate-Issues.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf) [<https://perma.cc/FMD8-3DXQ>]; Hansmann & Kraakman, *supra* note 10, at 439 (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1529–30 (2007) (“By the end of the 1990s, the triumph of the shareholder value criterion was nearly complete.”).

<sup>17</sup> See STOUT, *supra* note 16, at 1, 5; Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1923 (2013) (“Companies, shareholders, business schools, corporate law professors, and judges all seem to believe that the primary responsibility of directors is to maximize shareholder value.”).

<sup>18</sup> See, e.g., Press Release, Bus. Roundtable, *supra* note 6; Letter from Larry Fink, Chairman & CEO, BlackRock, to CEOs, 2018 Letter to CEOs (last visited Nov. 16, 2020), <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/6EY2-K85X>] (“To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.”).

<sup>19</sup> Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 339 (2015); STOUT, *supra* note 16, at 2.

<sup>20</sup> See GERALD F. DAVIS, *MANAGED BY THE MARKETS: HOW FINANCE RE-SHAPED AMERICA* 63 (2009); cf. also Gordon, *supra* note 16, at 1519–20 (describing the persistence of managerialism in the 1970s).

and managers are responsible for satisfying that obligation.<sup>21</sup> Indeed, the Business Roundtable's October 1981 Statement on Corporate Responsibility declared that a corporation "must be a thoughtful institution which rises above the bottom line to consider the impact of its actions on all, from shareholders to the society at large."<sup>22</sup>

Managerialism and its emphasis on stakeholder interests fell out of vogue as the hostile takeover movement of the 1980s and the rise of institutional investors necessitated a singular focus on shareholder wealth.<sup>23</sup> Shareholder primacy increasingly supplanted managerialism throughout the 1990s.<sup>24</sup> In 1997, the Business Roundtable confirmed the shift, stating "the paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of

---

<sup>21</sup> See DAVIS, *supra* note 20, at 74; David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659, 660–61 (2019).

<sup>22</sup> Kristin Bresnahan, *The Purpose Debate Back to the '80s: Business Roundtable's "Purpose" Statement Redux*, DIRS. & BDS., 3d Quarter 2019, <https://www.directorsandboards.com/articles/singlepurpose-debate-back-%E2%80%9880s-business-roundtable%E2%80%99s-%E2%80%9Cpurpose%E2%80%9D-statement-redux> [https://perma.cc/8QAH-XBDN]. The 1981 statement identifies customers, employees, suppliers, communities, and society at large, in addition to shareholders, as constituencies "to which business owes a responsibility." *Id.*

<sup>23</sup> See Gordon, *supra* note 16, at 1521–22, 1526–27; DAVIS, *supra* note 20, at 85–86.

<sup>24</sup> See Gordon, *supra* note 16, at 1528–29.

the duty to stockholders.”<sup>25</sup> The 1997 statement stood until 2019’s update.<sup>26</sup>

## B. Corporate Control: Shareholder Versus Director Primacy

Corporate governance theories describe not only the purpose of a corporation but also the way in which a corporation operates.<sup>27</sup> Within shareholder primacy broadly, there are two sub-theories explaining *how* corporations advance the purpose of maximizing shareholder wealth: shareholder control and director primacy.<sup>28</sup>

The shareholder control sub-theory holds that “shareholders own and ultimately ought to control

---

<sup>25</sup> STATEMENT ON CORPORATE GOVERNANCE, BUS. ROUNDTABLE 3 (1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf> [<https://perma.cc/MLS9-MFSW>]. The Business Roundtable sought to signal the importance of shareholders in part due to pressure from corporate raiders. See *Redefined Purpose of a Corporation: Welcoming the Debate*, BUS. ROUNDTABLE (Aug. 25, 2019), <https://medium.com/@BizRoundtable/redefined-purpose-of-a-corporation-welcoming-the-debate-8f03176f7ad8> [<https://perma.cc/RU5M-MRNS>] [hereinafter *Welcoming the Debate*].

<sup>26</sup> See *Welcoming the Debate*, *supra* note 25. The Business Roundtable updated its statement in order to “reflect more accurately how . . . CEOs operate their companies and to challenge [CEOs] to do more.” *Id.*

<sup>27</sup> See Bainbridge, *supra* note 13, at 547–50.

<sup>28</sup> See *id.* at 547–49 (describing the “means” of corporate governance). To avoid confusion with the broader category of shareholder primacy, I use the term “shareholder control” where some scholars would use “shareholder primacy” instead. See Stephen Bainbridge, *Director Primacy in 5 Minutes Worth of Bullet Points: Bumped*, PROFESSORBAINBRIDGE.COM (Sept. 29, 2011),

<https://www.professorbainbridge.com/professorbainbridgecom/2011/09/director-primacy-in-5-minutes-worth-of-bullet-points.html> [<https://perma.cc/P5CL-4V3V>] (“[S]hareholder primacy really makes two distinct claims. As to the ends of corporate governance—in other words, the social purpose and role of the corporation—shareholder primacy claims that the duty of directors and managers is to maximize shareholder returns within the bounds of law. Director primacy concurs. As to the means of corporate governance—who ultimately has decision-making authority—shareholder primacy says it is—or, rather, ought to be—the shareholders. Here, director primacy says no.” (bullet point omitted)).



corporations.”<sup>29</sup> Though shareholders typically lack day-to-day authority over corporate operations, “they . . . exercise ultimate decisionmaking authority through proxy contests,” shareholder proposals, shareholder litigation, and the market for corporate control.<sup>30</sup> Accordingly, shareholders, with their ownership-like rights, are chief among the corporation’s stakeholders.<sup>31</sup> Directors and officers work for the shareholders, and they must make decisions solely on the basis of long-term shareholder value.<sup>32</sup> Because shareholders provide capital for the sole purpose of pecuniary gain, the thinking goes, directors and officers cannot act legitimately for any other purpose.<sup>33</sup> Corporations can consider other interests only to the extent that they serve the ultimate goal of shareholder profit.<sup>34</sup>

Proponents of the shareholder control sub-theory believe that maximizing shareholder value best serves society because unconstrained managers impose agency costs and because the interests of shareholding and non-shareholding stakeholders generally align.<sup>35</sup> Singular focus on shareholder wealth can incentivize corporations to shift costs to non-

---

<sup>29</sup> See Belinfanti & Stout, *supra* note 11, at 582 (citing Hansmann & Kraakman, *supra* note 10, at 440–41). *But see* Bainbridge, *supra* note 13, at 547–48 (noting that some modern theorists deny shareholder ownership but maintain that “[s]hareholders . . . retain a privileged position among the corporation’s various” stakeholders, enjoying “ownership-like rights”).

<sup>30</sup> See Bainbridge, *supra* note 13, at 573; Fried, *supra* note 9 (observing that shareholders decide how a corporation operates by choosing the board of directors and litigating breaches of fiduciary duties).

<sup>31</sup> See Bainbridge, *supra* note 13, at 548; Hansmann & Kraakman, *supra* note 10, at 441 (“[S]hareholders alone are the parties to whom corporate managers should be accountable.”).

<sup>32</sup> See Bainbridge, *supra* note 13, at 573; *cf. also* Hansmann & Kraakman, *supra* note 10, at 441 (“[C]orporate managers [should be] strongly accountable to shareholder interests and, at least in direct terms, only to those interests.”).

<sup>33</sup> See Strine & Walter, *supra* note 19, at 340.

<sup>34</sup> See *id.* at 338.

<sup>35</sup> See STOUT, *supra* note 16, at 2 (discussing the agency cost justification); David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 258–59 (2009) (discussing the alignment justification).

shareholders through, for example, “unfair treatment of their workers [or] environmental shortcuts,”<sup>36</sup> but shareholder control theorists believe that regulation is the proper way to protect constituencies harmed by negative externalities.<sup>37</sup> This puts the onus on government to protect society from corporations.<sup>38</sup>

The director primacy sub-theory agrees that the corporation’s purpose is to maximize shareholder wealth but posits that directors, not shareholders, control the corporation.<sup>39</sup> A director’s duty to shareholders derives from a contractual commitment to maximize the value of their residual claims because the “[s]hareholders do not own the corporation.”<sup>40</sup> Director primacy theory characterizes board powers as “original and undelegated”<sup>41</sup> and points to state corporate codes—all of which grant nearly absolute authority to the board—for support.<sup>42</sup> Indeed, in practice, the board controls most corporate decisions, whether it acts directly or by authority delegated to managers.<sup>43</sup> Shareholders have no real decisionmaking control, and shareholder rights are merely a mechanism to keep directors accountable *ex post*.<sup>44</sup>

---

<sup>36</sup> See Strine & Walter, *supra* note 19, at 356.

<sup>37</sup> See *id.* at 356–59.

<sup>38</sup> See Hansmann & Kraakman, *supra* note 10, at 441 (“[O]ther corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance.”).

<sup>39</sup> See Bainbridge, *supra* note 13, at 550.

<sup>40</sup> See *id.* at 551.

<sup>41</sup> See *id.* at 560 (quoting *Manson v. Curtis*, 119 N.E. 559, 562 (N.Y. 1918)).

<sup>42</sup> See *id.* at 559 & n.61 (citing MODEL BUS. CORP. ACT § 8.01 cmt. (AM. BAR ASS’N 1995)).

<sup>43</sup> See *id.* at 559 (“[T]he vast majority of corporation decisions are made by the board of directors alone, or by managers acting under delegated authority from the board of directors.”).

<sup>44</sup> See *id.* at 559, 569. In Delaware, for example, “shareholder voting rights are essentially limited to the election of directors, and the approval of charter or by-law amendments, mergers, sales of substantially all of the corporation’s assets, and voluntary dissolution.” *Id.* at 569. Moreover, all

Though the board has broad powers, it still may consider only shareholders' pecuniary interests when making decisions. If allowed to pursue other objectives, directors would lack a metric for evaluating options and be tempted to act in their own self-interest.<sup>45</sup> Like shareholder control, director primacy holds that non-shareholder contracts and government regulations better protect stakeholder interests than participation in corporate decisionmaking would.<sup>46</sup>

### C. Corporate Control: Managerialism Versus Team Production Theory

Contrary to shareholder primacy, other corporate governance theories argue that corporations may balance the interests of shareholders with those of other stakeholders—workers, customers, communities, and even society as a whole.<sup>47</sup> “Because . . . these [stakeholders] are important to corporate success,” corporations may pursue their interests as ends in and of themselves.<sup>48</sup> Corporations may even have a mandate to act for non-shareholders, like employees or consumers, when government regulation proves an insufficient protection to their welfare.<sup>49</sup> Within the stakeholder theory of corporate purpose, as within the shareholder primacy theory, there are two sub-theories describing how corporations act: managerialism and team production theory.<sup>50</sup>

---

but the election of directors and the amendment of bylaws “require board approval before shareholder action is possible.” *Id.* at 569.

<sup>45</sup> *See id.* at 581–82.

<sup>46</sup> *See id.* at 592.

<sup>47</sup> *See* Yosifon, *supra* note 35, at 286; Strine & Walter, *supra* note 19, at 339; Bainbridge, *supra* note 13, at 549.

<sup>48</sup> Strine & Walter, *supra* note 19, at 339. Under shareholder primacy, by contrast, stakeholder interests may be considered only as means to maximizing shareholder wealth. *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See* Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 6 (2015); Bainbridge, *supra* note 13, at 592; Yosifon, *supra* note 35, at 286–90 (describing team production theory as a modern version of managerialism).

Managerialism presents the corporation as a hierarchical economic and social institution controlled by professional managers.<sup>51</sup> This theory arose in the post-Industrial Revolution era as mass production necessitated a managerial bureaucracy that could supervise and coordinate expansive corporate operations.<sup>52</sup> Management thus became the strategic core of the new corporate system.<sup>53</sup> By the 1950s, boards of directors were “passive instruments” unlikely to “challenge [management’s] decisions or authority.”<sup>54</sup>

Critically, under managerialism, managers are not agents of the corporation’s shareholders but rather stewards or trustees with responsibilities to the corporation itself.<sup>55</sup> The corporation has an obligation to the community at large; managers, in turn, play the role of “industrial statesmen,” directing business activity for the common good.<sup>56</sup> As a Standard Oil executive put it in 1951, managers should conduct the “affairs of the enterprise in such a way as to maintain an *equitable and working balance* among the claims of the various directly interested groups—stockholders, employees, customers, and the public at large.”<sup>57</sup>

---

<sup>51</sup> See Harwell Wells, “Corporation Law is Dead”: Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century, 15 U. PA. J. BUS. L. 305, 326 (2013); ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 486 (1977).

<sup>52</sup> See CHANDLER, *supra* note 51, at 486.

<sup>53</sup> See Wells, *supra* note 51, at 326–27; William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989) (“The managerialist picture put corporate management groups at the large corporation’s strategic center.”).

<sup>54</sup> Gordon, *supra* note 16, at 1511.

<sup>55</sup> See DAVIS, *supra* note 20, at 74.

<sup>56</sup> See Wells, *supra* note 51, at 312, 329 (internal quotation marks omitted) (quoting WALTER LIPPMAN, DRIFT AND MASTERY 328 (Henry Holt & Co. 1917)).

<sup>57</sup> *Id.* at 328 (quoting FORTUNE WITH RUSSELL W. DAVENPORT, U.S.A.: THE PERMANENT REVOLUTION 80 (1951)).

Shareholders are one class of stakeholders, but they do not reign supreme.<sup>58</sup> Likewise, profit maximization is an appropriate objective, but by no means is it the only purpose of a corporation.<sup>59</sup> Managerialism affords management the prerogative, for example, to prioritize providing opportunities for employees or creating “reliable products for customers.”<sup>60</sup> Critics argue that this flexibility allows managers to exercise control without accountability.<sup>61</sup> Advocates of managerialism respond that managers’ professional expertise and capacities for statesmanship justify their decisionmaking power.<sup>62</sup>

On the other hand, team production theory argues that control of a corporation rests not with managers but with the board of directors.<sup>63</sup> This theory conceptualizes the corporation as a team of stakeholders led by an independent and all-powerful board.<sup>64</sup> Members of the team, which includes “[e]xecutives, rank-and-file employees, and even creditors or the local community,” contribute to the corporation and have a shared interest in its success.<sup>65</sup> Corporate assets belong to the corporation, not shareholders.<sup>66</sup> The board exercises nearly absolute control over these assets, with the goal of pursuing the interests of the team overall.<sup>67</sup>

---

<sup>58</sup> Berger, *supra* note 21, at 661. Managerialism tends to dismiss shareholder voting rights as “ceremonial” or, at least, marginally important in comparison to the power of management. See Wells, *supra* note 51, at 342.

<sup>59</sup> See STOUT, *supra* note 16, at 2; Wells, *supra* note 51, at 329–30.

<sup>60</sup> See STOUT, *supra* note 16, at 2.

<sup>61</sup> See Bratton, *supra* note 53, at 1476.

<sup>62</sup> See *id.*

<sup>63</sup> See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–51 (1999).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 250.

<sup>66</sup> *Id.* at 250–51.

<sup>67</sup> See *id.* at 251, 271. Team production theory accordingly refers to the board as a “mediating hierarch,” responsible for balancing stakeholders’ individual interests and advancing the collective interests of the team. See *id.* at 271.

Directors are trustees for the corporation, tasked with balancing team members' various, sometimes competing interests.<sup>68</sup> This theory accordingly contends that neither shareholders nor any other stakeholder group—such as managers—should control the board.<sup>69</sup> “Shareholders enjoy special legal rights not because they have some unique claim on directors, but because they are often in the best position to represent the interests of the coalition that comprises the firm.”<sup>70</sup> Indeed, director “independence from individual team members . . . is protected by law.”<sup>71</sup> While the board enjoys ultimate control, team production theory stresses the lateral coordination (as opposed to top-down direction) involved in corporate decisionmaking.<sup>72</sup> It recognizes that “some kinds of outcomes can only be achieved through joint effort—sometimes the joint effort of large numbers of people.”<sup>73</sup>

#### D. Corporate Governance Theories in Law and Practice

Both shareholder and stakeholder views of corporate purpose find support in various elements of corporate law. Advocates of shareholder primacy argue that case law—in particular, Delaware case law—proves the correctness of their theory:<sup>74</sup> Delaware courts require corporate directors to pursue profits, though they grant directors discretion in determining their methods.<sup>75</sup>

---

<sup>68</sup> *Id.* at 280–81.

<sup>69</sup> *Id.* at 254.

<sup>70</sup> *Id.* at 289. Team production theory thus characterizes shareholder rights as “merely instrumental.” *Id.*

<sup>71</sup> *Id.* at 251.

<sup>72</sup> *Id.* at 264.

<sup>73</sup> *Id.*

<sup>74</sup> *See e.g.*, Strine & Walter, *supra* note 19, at 350 & n.38 (noting that Delaware law supports shareholder primacy but also that other states' laws provide less support); Bainbridge, *supra* note 13, at 575 (noting Delaware law as one source of support for shareholder wealth maximization).

<sup>75</sup> *See e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (“A board may have regard for various constituencies in discharging its responsibilities, provided that there are rationally related benefits accruing to the stockholders.”); Katz v. Oak

The classic case *Dodge v. Ford Motor Co.* represents an early and drastic embrace of shareholder primacy.<sup>76</sup> In 1916, Ford Motor Company terminated its special dividend policy, announcing that it would reinvest excess earnings in the business instead of distributing them to shareholders.<sup>77</sup> Director and controlling shareholder Henry Ford said he wished “to employ still more men . . . [and] help them build up their lives and their homes.”<sup>78</sup> The Dodge brothers, in their capacities as shareholders, challenged Ford’s decision as inimical to shareholder interests.<sup>79</sup> The Michigan Supreme Court, reasoning that a board could not run a corporation “for the merely incidental benefit of shareholders and for the primary purpose of benefiting others,” agreed with the Dodge brothers and held that Ford Motor Company could not devote earnings to a purpose other than shareholder wealth.<sup>80</sup> Today, while directors’ decisions regarding dividend payments fall squarely within the ambit of the business judgment rule

---

Indus., 508 A.2d 873, 879 (Del. Ch. 1986) (“It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders[.]”). According to Leo Strine, former Chief Justice of the Delaware Supreme Court, “the case of *Revlon* as a practical matter settled the [corporate purpose] question in Delaware, by making clear that other corporate constituencies may only be considered instrumentally in terms of their relationship to creating profits for stockholders.” Strine & Walter, *supra* note 19, at 350 n.38. Further, an empirical review found that Delaware decisions figured prominently in the rise of shareholder primacy beginning in the mid-1980s. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1988–89 (2018).

<sup>76</sup> See Allen, *supra* note 10, at 267.

<sup>77</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (Mich. 1919).

<sup>78</sup> *Id.* (internal quotation marks omitted).

<sup>79</sup> See *id.* at 681. The Dodge brothers also criticized what they perceived to be Ford’s effort to run the company as a “semi-eleemosynary institution.” *Id.* at 683.

<sup>80</sup> *Id.* at 684 (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself[.]”).

protecting their discretion,<sup>81</sup> courts continue to suggest that shareholder wealth is the proper purpose of a corporation.

The Delaware Chancery Court provides a recent example echoing *Dodge*.<sup>82</sup> In *eBay Domestic Holdings, Inc. v. Newmark*, the directors and controlling shareholders of Craigslist adopted a rights plan (also known as a poison pill), which minority shareholder eBay challenged as a breach of fiduciary duty.<sup>83</sup> The controlling shareholders argued that the plan was necessary to protect Craigslist's public-service mission from attempts at increased monetization.<sup>84</sup> The court rejected this argument, holding that a "for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization[.]"<sup>85</sup> While corporations may adopt rights plans for proper corporate purposes, "[p]romoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders."<sup>86</sup> "Proponents of . . . shareholder primacy" applauded the court's opinion, while "those who maintain that corporations should be socially responsible . . . argued that the decision was at odds with the Delaware courts' typical deference to the board's business judgment."<sup>87</sup>

Advocates of stakeholder theories argue that corporate law should, and in some ways already does, empower corporate leaders to "give[] weight to the best interests of the corporation's employees, consumers, . . . communities. . . , and society as a whole."<sup>88</sup> Delaware law, for example, states that

---

<sup>81</sup> See *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 812 (N.Y. Sup. Ct. 1976).

<sup>82</sup> Rhee, *supra* note 75, at 1960, 2000 ("*eBay Domestic Holdings, Inc. v. Newmark* seems to have ushered a new period in which courts have become comfortable with explicitly linking shareholder wealth maximization to a generalized judicial statement of a board's obligation.").

<sup>83</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 6–7, 26 (Del. Ch. 2010).

<sup>84</sup> See *id.* at 32.

<sup>85</sup> *Id.* at 35.

<sup>86</sup> *Id.* at 32–33.

<sup>87</sup> Mitchell, *supra* note 14, at 157.

<sup>88</sup> See Strine & Walter, *supra* note 19, at 339.



“[a] corporation may be incorporated . . . to conduct or promote any lawful . . . purpose[.]”<sup>89</sup> Advocates also point to the business judgment rule as a legal doctrine reflecting managerialist assumptions.<sup>90</sup> They argue that case law interpreting the business judgment rule effectively permits corporate leaders to serve other stakeholders at the expense of shareholders.<sup>91</sup> Further, most state corporation laws “explicitly authorize[] directors to consider the interests of constituencies other than shareholders” in responding to hostile takeover attempts.<sup>92</sup> Indeed, in *Paramount Communications v. Time Inc.*, the Delaware Supreme Court concluded that directors may take action that precludes short-term shareholder profit if they are protecting their vision for the corporation’s long-term welfare.<sup>93</sup>

Advocates of stakeholder theories also cite the legal doctrine surrounding charitable giving as evidence that a corporation is a social institution committed to interests beyond shareholder profit.<sup>94</sup> In the landmark postwar case *A.P. Smith Manufacturing Co. v. Barlow*, for example, the Supreme Court of New Jersey found corporate donations to Princeton University *intra vires*, concluding “modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.”<sup>95</sup> The view that corporations should advance the interests of a host of stakeholders fits comfortably with this case law.

---

<sup>89</sup> DEL. CODE ANN. tit. 8, § 101(b) (2020). The corporation statutes of the other 49 states are similar. See Rhee, *supra* note 75, at 1957.

<sup>90</sup> See Wells, *supra* note 51, at 345.

<sup>91</sup> See Blair & Stout, *supra* note 63, at 303.

<sup>92</sup> Yosifon, *supra* note 35, at 288.

<sup>93</sup> See Allen, *supra* note 10, at 276. *Paramount Commc’ns, Inc., v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (holding that Time’s directors were under no obligation to abandon their strategic plan and accept Paramount’s tender offer despite the substantial short-term profit possible through the deal).

<sup>94</sup> See Wells, *supra* note 51, at 334–35.

<sup>95</sup> *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 586 (N.J. 1953).

As the above discussion illustrates, corporate governance theories on either side of the corporate purpose spectrum can point to existing corporate law for support.<sup>96</sup> While corporate governance theories can be conceptualized as varying syntheses of positive law, they have real-world impacts beyond academia. They both explain and justify evolutions in corporate law.<sup>97</sup> Shareholder primacy, in particular, has influenced changes to federal securities and tax laws.<sup>98</sup> In the 1990s, the Securities and Exchange Commission (SEC) updated a range of rules for the avowed purpose of making corporate boards more responsive to shareholder demands.<sup>99</sup> Similarly, Congress amended the tax code to encourage corporations to link executive compensation with stock price performance.<sup>100</sup>

Shareholder primacy has also influenced corporate practice. Exploiting strengthened shareholder proposal rules, activist shareholders have advocated for changes in corporate governance—such as the elimination of “staggered” boards—in the name of increasing shareholder control and value.<sup>101</sup> Institutional investors have successfully pressured boards to engage in buy-backs and asset sales and to ignore corporate responsibility issues.<sup>102</sup> Corporations have also embraced

---

<sup>96</sup> See Rhee, *supra* note 75, at 1966–67 (describing the legal uncertainty on this point).

<sup>97</sup> See Millon, *supra* note 10, at 204 (“At any point in time, particular theories of the corporation are perceived to justify particular rules or, at a more general level, a particular approach to regulation of business activity. . . . The relationship between legal theories of the corporation and corporate doctrine is thus dynamic and interdependent: Each simultaneously influences the other.”).

<sup>98</sup> See STOUT, *supra* note 16, at 3.

<sup>99</sup> See STOUT, *supra* note 16, at 3; Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 686 (2007).

<sup>100</sup> See STOUT, *supra* note 16, at 3; Gordon, *supra* note 16, at 1531 & n.268.

<sup>101</sup> See STOUT, *supra* note 16, at 3; *cf. also* Berger, *supra* note 21, at 662 (discussing the growth of shareholder activism promoting “the ideology of stockholder value”).

<sup>102</sup> See STOUT, *supra* note 16, at 11.

shareholder primacy voluntarily by adopting stock-based executive compensation plans and outsourcing jobs in an effort to maximize share prices.<sup>103</sup>

Shareholder primacy is now entrenched in the directorial ethos. A 2008 survey of business groups summarized their advice to members with language like “[t]he overriding objective of the corporation should be to optimize . . . returns to its shareholders. Corporate governance practices should focus board attention on this objective.”<sup>104</sup> Colleges likewise teach directors that their principal objective is to increase shareholder value because of the shareholders’ ownership stakes in the corporation.<sup>105</sup> Executive compensation and job security tied to stock price reinforce the lesson.<sup>106</sup>

Stakeholder theories’ influences on law and practice are less clear.<sup>107</sup> The rise of B Corps and public benefit corporations reflects efforts to institutionalize notions of managerialism or broader stakeholder purpose.<sup>108</sup> In thirty-

---

<sup>103</sup> *Id.* Corporations, oftentimes at the encouragement of institutional investors, adopted stock-based compensation schemes to align better managerial and shareholder objectives. *See id.* at 1529–30. The effect was a rise in compensation packages explicitly focused on shareholder value. *Id.* at 1531.

<sup>104</sup> HOLLY J. GREGORY & LYN F. FAY, WEIL, GOTSHAL & MANGES LLP, COMPARISON OF SIGNIFICANT VIEWS ON CORPORATE GOVERNANCE PRACTICE 2 tbl.I.a (2008), [https://corpgov.law.harvard.edu/wp-content/uploads/2008/11/key-agreed-principles-of-corporate-governance\\_-appendixa.pdf](https://corpgov.law.harvard.edu/wp-content/uploads/2008/11/key-agreed-principles-of-corporate-governance_-appendixa.pdf) [<https://perma.cc/J2C3-F2GL>].

<sup>105</sup> *See* Berger, *supra* note 21, at 662. *But see* Jim Rossman, Christopher Couvelier & Quinn Pitcher, *Under Pressure: Directors in an Era of Shareholder Primacy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 23, 2019), <https://corpgov.law.harvard.edu/2019/07/23/under-pressure-directors-in-an-era-of-shareholder-primacy/> [<https://perma.cc/CJ4T-2P4S>] (summarizing the a presentation to directors addressing both shareholder interests and, to some extent, stakeholder interests).

<sup>106</sup> *See* Gordon, *supra* note 16, at 1529–31.

<sup>107</sup> Even when managerialism was popular, it “did not radically change the substance of corporate law.” Wells, *supra* note 51, at 348.

<sup>108</sup> *See* Berger, *supra* note 21, at 674; *see also* Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. L. 381, 386 (2016) (“Benefit corporations are a contemporary effort to permit other

seven states,<sup>109</sup> companies can legitimize their social or environmental objectives by seeking B Corp certification or incorporating as public benefit corporations.<sup>110</sup> Even corporations without B Corp certification have started to use B Corp metrics to measure their environmental and social performance.<sup>111</sup> The Business Roundtable's 2019 statement appears to encourage such action.<sup>112</sup>

At bottom, corporate governance theories—in particular their teachings regarding corporate purpose—are important to the extent that they reflect and inform the law and the ways companies actually operate. The influence of certain theories has changed over time; at least in the past, the Business Roundtable's position has proven a bellwether. Accordingly, the remainder of this Note evaluates Walmart's gun selling

---

participants to limit the reach of shareholder primacy in corporations.”); cf. Rodgin Cohen, *It's Good for Shareholders When Boards Consider Public Interest*, FIN. TIMES (Oct. 15, 2019), <https://www.ft.com/content/40e06550-ee72-11e9-a55a-30afa498db1b> (on file with the Columbia Business Law Review) (“[T]he existence of [public benefit corporations] makes clear that shareholder primacy is the ‘default’ standard for ordinary companies.”).

<sup>109</sup> *State by State Status of Legislation*, BENEFIT CORP. (last visited Dec. 1, 2020), <https://benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/SU4K-9W2C>].

<sup>110</sup> See Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 30, 2014, 9:00 AM), <https://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation/> [<https://perma.cc/L6LJ-A9K7>] (discussing benefit corporations). To become a certified B Corp, a company must satisfy certain social and environmental standards and “formally incorporate its social and environmental mission into its governance articles[.]” Berger, *supra* note 21, at 674. The legal requirements for benefit corporations vary by state, but in California, for example, a company “must state that it is a benefit corporation within its articles of incorporation,” and it “may” add “a specific purpose” to its articles, “but it is not required to do so.” Bend & King, *supra*.

<sup>111</sup> See Gillian Tett, *Does Capitalism Need Saving from Itself?*, FIN. TIMES (Sept. 6, 2019), <https://www.ft.com/content/b35342fe-cda4-11e9-99a4-b5ded7a7fe3f> [<https://perma.cc/8ZL5-H8N7>].

<sup>112</sup> See *Business Culture Has Shifted*, CERTIFIED B CORP. (last visited Sept. 11, 2020), <https://bcorporation.net/news/business-culture-has-shifted> [<https://perma.cc/MYT5-QPZP>] (“The Business Roundtable just mainstreamed the principles of the B Corp Movement in a Statement on the Purpose of the Corporation.”).

policies against the backdrop of prevailing theories of corporate governance in an attempt to shed light on the ends and means of modern corporate decisionmaking.

### III. CASE STUDY: WALMART

Sam Walton opened the first Walmart store in 1962 in Rogers, Arkansas.<sup>113</sup> In the years since, Walmart has become the world's largest retailer, operating nearly five thousand stores and employing over 1.5 million associates in the United States alone.<sup>114</sup> Walton's articulation of the company's purpose—"saving people money so they can live better"—remains the driving force behind Walmart's operations.<sup>115</sup>

From the beginning, Walmart's business model was selling products at the lowest prices available.<sup>116</sup> The dogma of low price permeated Walmart's operations.<sup>117</sup> The company's price competition strategy sacrificed possible gains from markups, so profitability depended on keeping costs low and sales volume high.<sup>118</sup> Management assiduously avoided excess costs, analyzing the effect of each potential business decision on the retailer's ability to offer the lowest prices.<sup>119</sup> Retail experts observed that "[e]verything Wal-Mart does is focused on enhancing its position as the low-price leader. . . . the drive for lower prices for the consumer defines every

---

<sup>113</sup> *Our History*, WALMART (last visited Sept. 11, 2020), <https://corporate.walmart.com/our-story/our-history> [<https://perma.cc/CC64-UW6C>].

<sup>114</sup> *Location Facts*, WALMART (last visited Sept. 12, 2020), <https://corporate.walmart.com/our-story/our-locations> [<https://perma.cc/8JWN-MMXF>]; *About Us*, WALMART (last visited Oct. 11, 2020), <https://corporate.walmart.com/our-story> [<https://perma.cc/NTA7-D6WD>].

<sup>115</sup> *Our History*, *supra* note 113.

<sup>116</sup> *See id.*

<sup>117</sup> *See* Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 100 (2011).

<sup>118</sup> *See id.* at 99–100.

<sup>119</sup> *See id.* at 100–01.

action that the company takes. It is at the heart of Wal-Mart's mission, its very reason for being."<sup>120</sup>

Walmart's conservative Arkansas roots informed its buying decisions, as well as its culture and approach to public policy.<sup>121</sup> Walmart long has placed a premium on maintaining its corporate culture, often "characterized as praising small-town values, hard work, conformism, and strong patriotism."<sup>122</sup> Indeed, when new managers and executives do not "fit in" easily, the retailer may encourage them to leave the company altogether.<sup>123</sup> With its insular culture and single-minded focus on price, Walmart largely avoided taking a position on social issues.<sup>124</sup>

In the mid-2000s, however, Walmart began to engage publicly with social issues after facing criticism from organized labor for its business practices.<sup>125</sup> In an effort to improve its bottom line, the retailer began to dabble in areas like environmental sustainability.<sup>126</sup> In 2005, for example, then-CEO Lee Scott announced Walmart's plan to reduce waste and use more renewable energy, rhetorically asking,

---

<sup>120</sup> WILLARD N. ANDER & NEIL Z. STERN, WINNING AT RETAIL: DEVELOPING A SUSTAINED MODEL FOR RETAIL SUCCESS 10–11 (2004).

<sup>121</sup> See Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 42 (2004).

<sup>122</sup> See Gary Gereffi & Michelle Christian, *The Impacts of Wal-Mart: The Rise and Consequences of the World's Dominant Retailer*, 35 ANN. REV. SOCIO. 573, 580 (2009); SAM WALTON, SAM WALTON: MADE IN AMERICA 160–62 (1992) (describing the small-town origins of Walmart's culture).

<sup>123</sup> Cf. DON SODERQUIST, THE WAL-MART WAY: THE INSIDE STORY OF THE SUCCESS OF THE WORLD'S LARGEST COMPANY 42 (2005) ("[W]e constantly asked our leadership team to make sure our people were aware of what our culture was all about . . . . The best thing for [some] was to leave and join companies where they were in alignment with those companies' cultures. And frankly, I believe our emphasis on the Wal-Mart culture was probably a big favor to them. Why stay in a job you can't enjoy?").

<sup>124</sup> See Hiroko Tabuchi & Michael Barbaro, *Walmart Emerges as Unlikely Social Force*, N.Y. TIMES (Apr. 1, 2015), <https://www.nytimes.com/2015/04/02/business/walmart-emerges-as-unlikely-social-force.html?rref=collection%2Ftimestopic%2FWal-Mart%20Stores%20Inc> [https://perma.cc/C3GX-MCGP].

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

“[w]hat if we used our size and resources to make this country and this earth an even better place for all of us: customers, associates, our children and generations unborn?”<sup>127</sup>

Nevertheless, Walmart continued to face criticism about labor and other issues in late 2013 as Doug McMillon prepared to assume the position of CEO.<sup>128</sup> One of McMillon’s first initiatives together with the board was to raise the company’s minimum wage in an effort to combat concerns that stores were in disarray and worker turnover was too high.<sup>129</sup>

The political climate in the United States has increased pressure on Walmart and other companies to weigh in on various social issues.<sup>130</sup> While McMillon has opted for a more liberal position at times—a risk for a company based in conservative Arkansas—executives have viewed his approach as part of the company’s efforts to show customers and employees that it is “socially engaged.”<sup>131</sup> According to a survey cited by Walmart’s chief marketing officer Tony

---

<sup>127</sup> Andrew Spicer & David Graham Hyatt, *Walmart Wants To Be Environmentally Friendly—and Discovers Just How Difficult “Sustainability” Is*, MARKETWATCH (Aug. 14, 2018, 10:24 AM), [https://www.marketwatch.com/story/walmart-wants-to-be-environmentally-friendly-and-discovers-just-how-difficult-sustainability-is-2018-08-14?mod=article\\_inline](https://www.marketwatch.com/story/walmart-wants-to-be-environmentally-friendly-and-discovers-just-how-difficult-sustainability-is-2018-08-14?mod=article_inline) [https://perma.cc/8QUM-WJMD] (internal quotation marks omitted).

<sup>128</sup> See Barney Jopson, *Doug McMillon: The Southern Charmer Taking over Walmart’s Retail Empire*, FIN. TIMES (Nov. 29, 2013), <https://www.ft.com/content/befa30ca-5796-11e3-86d1-00144feabdc0> (on file with the Columbia Business Law Review).

<sup>129</sup> See Sarah Nassauer, *Walmart Takes a Stand on Guns, Gay Rights To Get People To Like It More*, WALL ST. J. (July 5, 2018, 11:38 AM), <https://www.wsj.com/articles/walmart-takes-a-stand-on-guns-gay-rights-to-get-people-to-like-it-more-1530805106> (on file with the Columbia Business Law Review).

<sup>130</sup> See Don Mayer, *The Law and Ethics of CEO Social Activism*, 23 J.L. BUS. & ETHICS 21, 39 (2017); Aaron K. Chatterji & Michael W. Toffel, *Assessing the Impact of CEO Activism*, 32 ORG. & ENV’T 159, 159–60 (2019); Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV., Jan.–Feb. 2018, <https://hbr.org/2018/01/the-new-ceo-activists> [https://perma.cc/HY6P-X6CS] [hereinafter Chatterji & Toffel, *The New CEO Activists*].

<sup>131</sup> See Nassauer, *supra* note 129.

Rogers, about seventy-two percent of its “shoppers want the company to ‘take a stand on important social issues’ and eighty-five percent want the retailer to ‘make it clear what values [it] stand[s] for[.]’”<sup>132</sup>

Still, McMillon has acknowledged that it can be tough for the company to speak out on certain topics.<sup>133</sup> Since becoming CEO, McMillon has driven Walmart’s “fast follower” approach to social issues: the company generally only weighs in after other companies or politicians have taken a stand.<sup>134</sup> “Ideally,” says McMillon, “we wouldn’t lead on very many things.”<sup>135</sup>

#### A. A “Loaded” Relationship with Firearm Sales

Walmart’s history with firearms can be traced to the inception of the company itself.<sup>136</sup> Founder Sam Walton was a hunting enthusiast,<sup>137</sup> and he “made [hunting] part of [his] way of doing business from early on.”<sup>138</sup> Indeed, Bentonville, Arkansas’s proximity to various quail hunting areas influenced his decision to headquarter his company there.<sup>139</sup>

Walmart’s first decisive move regarding firearm sales occurred in 1993—less than a year after Walton’s death—when it stopped selling handguns in every state but Alaska.<sup>140</sup>

---

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> *Id.* (internal quotation marks omitted).

<sup>136</sup> *See* Derek Hawkins & Morgan Krakow, *Walmart, Site of Recent Shootings, Has a Complicated History with Guns*, WASH. POST (Aug. 3, 2019, 9:00 PM), <https://www.washingtonpost.com/nation/2019/08/04/tragedy-walmart-store-with-complex-history-gun-sales/> [<https://perma.cc/JM8X-P9QG>]; Philip Bourjaily & Thomas McIntyre, *What Would Walton Do?*, FIELD & STREAM, July 2006, at 19 (detailing the influence of Walton’s hunting on Walmart).

<sup>137</sup> WALTON, *supra* note 122, at 144–48 (describing Walton’s “passion” for hunting).

<sup>138</sup> *Id.* at 145.

<sup>139</sup> *See id.*

<sup>140</sup> *See* Hawkins & Krakow, *supra* note 136; Miguel Bustillo, *Wal-Mart Adds Guns Alongside Butter*, WALL ST. J. (Apr. 28, 2011, 12:01 AM),



Walmart said it made the decision based on marketing surveys illustrating customers' discomfort with seeing pistols alongside general merchandise.<sup>141</sup> Though the retailer "continued to carry rifles and shotguns, some worried" that the decision regarding handguns would erode Walmart's founding values.<sup>142</sup> In 2006, Walmart went further, announcing that it would stop selling firearms altogether in about two-thirds of its stores because of diminished customer interest in urban areas.<sup>143</sup> "Hunting and firearm enthusiasts" again expressed concern that Walmart was abandoning its heritage.<sup>144</sup>

Nonetheless, Walmart continued to tighten its firearm policies: in 2008, the retailer introduced a range of safeguards—including digital purchase logs, strict inventory controls, and video recordings of each firearm sale—which made Walmart's sales protocol tougher than the federal requirements.<sup>145</sup> Walmart voluntarily adopted these stricter policies as part of an agreement with Mayors Against Illegal Guns, an organization co-founded by former New York City mayor Michael Bloomberg.<sup>146</sup>

Walmart appeared to reverse course in 2011. Partially in response to rising gun sales nationally and as part of a

---

<https://www.wsj.com/articles/SB10001424052748703367004576289230488920802> (on file with the Columbia Business Law Review).

<sup>141</sup> Hawkins & Krakow, *supra* note 136.

<sup>142</sup> *See id.*

<sup>143</sup> *Id.*; Bustillo, *supra* note 140.

<sup>144</sup> *See* Hawkins & Krakow, *supra* note 136. Hunting and shooting organization representatives were surprised that Walmart would surrender its position in the firearms market given its "strong hunting tradition." The Associated Press, *Wal-Mart Will Stop Selling Guns in a Third of Its U.S. Stores*, N.Y. TIMES (Apr. 15, 2006), <https://www.nytimes.com/2006/04/15/business/walmart-will-stop-selling-guns-in-a-third-of-its-us-stores.html> [<https://perma.cc/K7WL-KL66>]. *Field & Stream* magazine called the decision "ironic." Bourjaily & McIntyre, *supra* note 136, at 19.

<sup>145</sup> Press Release, Everytown, Wal-Mart and Mayors Against Illegal Guns Announce "Responsible Firearms Retailer Partnership": A 10-Point Voluntary Code (Apr. 14, 2008) (on file with the Columbia Business Law Review); Hawkins & Krakow, *supra* note 136.

<sup>146</sup> Bustillo, *supra* note 140.

campaign to bring back “heritage categories,” Walmart discreetly restocked shotguns, rifles, and ammunition in half of its nearly 4,000 stores, including some located in urban areas.<sup>147</sup> This move, which came during a prolonged period of declining overall sales for the retailer, was an effort to restore Walmart’s one-stop shopping status, drive store traffic, and compete with specialty stores like Bass Pro Shops.<sup>148</sup> Walmart acknowledged it may have underestimated previously the importance of offering firearms; spokesman David Tovar explained, “[w]e made a business decision to sell them in certain stores because we have realized the appeal was perhaps broader than we thought.”<sup>149</sup>

Around the same time, authorities disclosed that the Arizona man who shot Representative Gabrielle Giffords (and killed six others) had purchased ammunition from Walmart just before the rampage.<sup>150</sup> The revelation drew attention to the company’s firearms policies, but Walmart remained committed to its merchandising decision.<sup>151</sup> Walmart likewise resisted calls to stop selling assault-style rifles in the wake of the 2012 mass shooting at Sandy Hook Elementary School.<sup>152</sup>

This may have paid off as a business decision. After President Obama’s reelection in 2012, Walmart stores across the country sold out of semi-automatic rifles and had to ration ammunition sales in response to increased demand.<sup>153</sup> Then-

---

<sup>147</sup> See *id.*; Hawkins & Krakow, *supra* note 136. “Heritage categories” included merchandise such as fishing rods and sewing fabric. Bustillo, *supra* note 140.

<sup>148</sup> See Bustillo, *supra* note 140.

<sup>149</sup> *Id.* (internal quotation marks omitted).

<sup>150</sup> *Id.*

<sup>151</sup> See *id.*; Stephanie Clifford, *Some Gun Retailers Make Changes After School Shootings*, N.Y. TIMES (Dec. 18, 2012), <https://www.nytimes.com/2012/12/19/business/some-gun-retailers-make-changes-in-aftermath-of-newtown-shootings.html> [<https://perma.cc/M28M-3LJN>] (noting Walmart’s minimal responses to the Giffords shooting and the later shooting at Sandy Hook Elementary School).

<sup>152</sup> See Hawkins & Krakow, *supra* note 136.

<sup>153</sup> See Emily Jane Fox, *As Firearm Sales Soar, Wal-Mart Rations Sale of Ammunition*, CNN: BUS. (Feb. 1, 2013, 11:12 AM),

chief merchandising officer Duncan MacNaughton celebrated the rise in gun sales, which jumped seventy-six percent.<sup>154</sup> Referring to “firearm displays inside [Walmart’s] biggest Supercenters,” MacNaughton remarked, “It’s about being proud of the merchandise that we have.”<sup>155</sup>

Walmart’s commitment to firearm sales made it the target of shareholder action. Alarmed by the number of mass shootings in America, Trinity Wall Street, an Episcopal church based in New York City, decided to use its power as an investor to address the accessibility of assault-style rifles.<sup>156</sup> Trinity assessed the activities of the companies in which it held stock and focused on Walmart, the country’s largest gun retailer.<sup>157</sup>

Trinity first asked Walmart to explain why it had stopped selling handguns but continued to sell other types of firearms, including assault-style rifles.<sup>158</sup> Walmart responded that it was “very purposeful about finding the right balance between serving hunters and sportsmen and ensuring we sell firearms responsibly,” but “merchandising decisions are based on customer demand and . . . most hunters and sportsmen use firearms responsibly and wish to continue to do so[.]”<sup>159</sup> According to Walmart, while some people asked the retailer to

---

<https://money.cnn.com/2013/01/31/news/companies/walmart-gun-ammunition/index.html> [<https://perma.cc/SJZ2-NB67>]; Matt Townsend, *Guns Sold out at Wal-Mart as Ammo-Magazine Sales Surge*, BLOOMBERG (Dec. 19, 2012, 4:29 PM) <https://www.bloomberg.com/news/articles/2012-12-19/guns-sold-out-at-wal-mart-as-ammo-surge-on-e-bay> (on file with the Columbia Business Law Review).

<sup>154</sup> Tom Braithwaite, *Chief Executives Need Not Be Shy of Gun Control*, FIN. TIMES (Sept. 6, 2019), <https://www.ft.com/content/2feb558-cfe0-11e9-b018-ca4456540ea6> (on file with the Columbia Business Law Review).

<sup>155</sup> *Id.* (internal quotation marks omitted).

<sup>156</sup> *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 327–28 (3d Cir. 2015) (“Alarmed by the spate of mass murders in America, in particular the shooting at Sandy Hook Elementary School in December 2012, Trinity resolved to use its investment portfolio to address the ease of access to rifles equipped with high-capacity magazines[.]”)

<sup>157</sup> See Appellee’s Answering Brief at 14–17, *Trinity Wall St.*, 792 F.3d 323 (No. 14-4764).

<sup>158</sup> See *id.* at 15.

<sup>159</sup> *Trinity Wall St.*, 792 F.3d at 329.

stop selling firearms, many customers asked that they continue to be sold.<sup>160</sup>

Unsatisfied by this response, Trinity invoked SEC Rule 14a-8 and submitted a shareholder proposal for inclusion in Walmart's 2014 proxy materials.<sup>161</sup> The proposal decried Walmart's inconsistent merchandising approach, which resulted in the "sale of products, such as guns equipped with high capacity magazines, that facilitate mass killings, even as [Walmart] prohibits sales of passive products such as music that merely depict such violent rampages."<sup>162</sup> In light of these inconsistencies, Trinity's proposal asked Walmart's board to

[p]rovid[e] oversight concerning . . . policies and standards that determine whether or not the Company should sell a product that:

- 1) especially endangers public safety and well-being;
- 2) has the substantial potential to impair the reputation of the Company; and/or
- 3) would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand.<sup>163</sup>

Trinity's proposal was unlikely to win a majority shareholder vote because the Walton family owned about fifty percent of Walmart's shares, but the church hoped to win enough support to make the board "look more closely at the issues."<sup>164</sup> Nonetheless, Walmart sought to exclude Trinity's

---

<sup>160</sup> *Id.*

<sup>161</sup> Appellee's Answering Brief, *supra* note 157, at 17. Proxy materials include the proxy statement and proxy card distributed to shareholders in advance of the annual shareholder meeting. *See Trinity Wall St.*, 792 F.3d at 334. The proxy statement contains information about the matters on which shareholders may vote. *Id.* The proxy card allows shareholders to empower another shareholder to vote on their behalf. *Id.* Rule 14a-8 gives shareholders a right to have certain proposals included in the corporation's proxy materials for consideration. *Id.* at 335.

<sup>162</sup> *Trinity Wall St.*, 792 F.3d at 330 (quoting Joint Appendix at 301–02, *Trinity Wall St.*, 792 F.3d 323 (No. 14-4764)).

<sup>163</sup> *Id.* at 329–30 (internal quotation marks omitted) (quoting Joint Appendix, *supra* note 162, at 268).

<sup>164</sup> Joann S. Lublin & Paul Ziobro, *Wal-Mart Fights Bid To Curb Gun Sales*, WALL ST. J. (Mar. 22, 2015, 7:38 PM),

proposal under SEC Rule 14a-8(i)(7), which permits a company to omit from its proxy materials a shareholder proposal relating to “ordinary business operations.”<sup>165</sup> Walmart argued that Trinity’s proposal impermissibly sought to give shareholders control over merchandising decisions—a fundamental responsibility of management.<sup>166</sup> The SEC found Walmart’s argument credible and issued a no-action letter on the retailer’s behalf.<sup>167</sup>

Notwithstanding the no-action letter, Trinity brought suit in the District of Delaware, challenging Walmart’s decision to exclude the proposal.<sup>168</sup> The ensuing court battle, which ultimately reached the Third Circuit Court of Appeals, attracted broad attention from both legal scholars and industry insiders.<sup>169</sup> After Trinity prevailed at the district court level,<sup>170</sup> the Business Roundtable filed an amicus brief in support of Walmart’s appeal. It argued that affirming the lower court’s ruling could cause an increase in the number and complexity of shareholder proposals.<sup>171</sup> The brief contended that this increase would impose both fiscal and efficiency costs

---

<https://www.wsj.com/articles/wal-mart-fights-bid-to-curb-gun-sales-1427067506> (on file with the Columbia Business Law Review).

<sup>165</sup> Wal-Mart Stores, Inc., SEC Staff No-Action Letter, 2014 WL 409085, at \*10 (Mar. 20, 2014). Rule 14a-8(i) lists specific circumstances under which a company may exclude a shareholder proposal from its proxy materials. Shareholder Proposals, 17 C.F.R. § 240.14a-8(i) (2020). Rule 14a-8(i)(7)—(“Management functions”)—permits exclusion “[i]f the proposal deals with a matter relating to the company’s ordinary business operations[.]” *Id.* § 14a-8(i)(7).

<sup>166</sup> In Trinity’s summary, Walmart urged that “oversee[ing] the formulation and implementation of merchandizing policies and standards” is part of “ordinary business operations.” *See* Wal-Mart Stores, Inc., *supra* note 165, at \*4–6.

<sup>167</sup> *Id.* at \*1.

<sup>168</sup> *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 75 F. Supp. 3d 617, 621 (D. Del. 2014).

<sup>169</sup> *See* Lublin & Ziobro, *supra* note 164.

<sup>170</sup> *See* Trinity Wall St., 75 F. Supp. 3d at 634.

<sup>171</sup> Brief for the Am. Petroleum Inst. et al. as *Amici Curiae* in Support of Defendant-Appellant at 17–21, Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323 (3d Cir. 2015) (No. 14-4764).

on public companies that shareholders ultimately would bear.<sup>172</sup>

Walmart too asserted that the district court's holding would have adverse effects. Spokesman Randy Hargrove argued the inclusion of Trinity's proposal would have "far-reaching implications for the entire retail industry because it could force public companies to have a shareholder vote to make decisions on ordinary business matters like what products a retailer sells."<sup>173</sup> In July 2015, the Third Circuit ultimately sided with Walmart, holding that Trinity's proposal was indeed excludable under the "ordinary business" exclusion.<sup>174</sup>

Despite its victory in the Third Circuit, Walmart announced only four months later that it would stop selling semi-automatic rifles.<sup>175</sup> Walmart cited sluggish customer demand as the basis for its decision, dismissing suggestions that mass shootings had played any role.<sup>176</sup> Some commentators nonetheless intimated that the decision reflected a growing sensitivity to social issues among Walmart's leadership, now headed by McMillon.<sup>177</sup>

Though Walmart resumed tightening its gun policies during McMillon's tenure as CEO, the retailer avoided discussing gun violence and took pains to maintain its

---

<sup>172</sup> *Id.*

<sup>173</sup> Mark Friedman, *Wal-Mart Fighting Proposal on Firearms*, ARK. BUS. (Feb. 23, 2015), <https://www.arkansasbusiness.com/article/103513/wal-mart-fighting-proposal-on-firearms> (on file with the Columbia Business Law Review) (internal quotation marks omitted).

<sup>174</sup> *Trinity Wall Street*, 792 F.3d at 341.

<sup>175</sup> Nathan Layne, *Wal-Mart To Stop Selling AR-15, Other Semi-Automatic Rifles*, REUTERS (Aug. 26, 2015, 2:21 PM), <https://www.reuters.com/article/us-wal-mart-stores-rifles/wal-mart-to-stop-selling-ar-15-other-semi-automatic-rifles-idUSKCN0QV26520150826> (on file with the Columbia Business Law Review).

<sup>176</sup> *Id.* ("This is done solely on what customer demand was . . . We are instead focusing on hunting and sportsman firearms." (internal quotation marks omitted)).

<sup>177</sup> See Hawkins & Krakow, *supra* note 136.

reputation for serving sportsmen and hunters.<sup>178</sup> In a 2015 interview, McMillon emphasized Walmart's commitment to these customers: "Our focus as it relates to firearms should be hunters and people who shoot sporting clays and things like that . . . . We believe in serving those customers, we have for a long time, and we believe we should continue to."<sup>179</sup>

In February 2018, a week after the school shooting in Parkland, Florida, McMillon and other Walmart executives gathered to discuss how the company should sell guns moving forward.<sup>180</sup> As one of the country's largest gun retailers, Walmart anticipated it would be drawn into public debate over gun control—particularly after President Trump and some Florida Republicans voiced support for raising the minimum age to buy guns.<sup>181</sup> After remaining silent for an additional week, Walmart issued a public statement announcing its decision to raise the age restriction for the purchase of firearms and ammunition from eighteen to twenty-one years of age.<sup>182</sup> The statement was especially notable because it acknowledged that Walmart reviewed its firearm sales policy "[i]n light of recent events"—a rare concession that gun violence influenced its decision.<sup>183</sup>

---

<sup>178</sup> See Michael Corkery, *Walmart To Limit Ammunition Sales and Discourage "Open Carry" of Guns in Stores*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/business/walmart-guns-ammunition-sales.html> [<https://perma.cc/VR8S-AS5P>].

<sup>179</sup> Hawkins & Krakow, *supra* note 136 (internal quotation marks omitted).

<sup>180</sup> Nassauer, *supra* note 129.

<sup>181</sup> *Id.*

<sup>182</sup> Press Release, Walmart, Walmart Statement on Firearms Policy (Feb. 28, 2018),

<https://corporate.walmart.com/newsroom/2018/02/28/walmart-statement-on-firearms-policy> [<https://perma.cc/YAN5-26WX>]. In line with Walmart's "fast follower" approach to social issues, Walmart announced it would raise the minimum age the evening after Dick's Sporting Goods' CEO had announced on Good Morning America his company's decision to do the same. Nassauer, *supra* note 129.

<sup>183</sup> See Press Release, Walmart, *supra* note 182; *cf. also supra* text accompanying notes 149–152, 175–177 (describing instances in which Walmart declined to connect its firearms policies with current events).

In a further effort to characterize the company as “a responsible seller of firearms” true to its “heritage as a company . . . serving sportsmen and hunters,” the statement described Walmart’s stringent background check protocols and policy against selling bump stocks or high-capacity magazines.<sup>184</sup> Still, executives recognized the sensitivity of the issue, evidenced by their decision to warn some stakeholders who might disagree with their new policies—including Arkansas governor Asa Hutchinson—before releasing the statement.<sup>185</sup>

## B. Tragedy Strikes and Pressure Mounts

During summer 2019, gun violence struck particularly close to home for Walmart when shootings at its El Paso, Texas and Southaven, Mississippi stores killed twenty-four people in the course of five days.<sup>186</sup> Spokesman Randy Hargrove said the company had no plans to adjust its firearm policies, but calls for Walmart to take action came swiftly.<sup>187</sup>

---

<sup>184</sup> See Press Release, Walmart, *supra* note 182.

<sup>185</sup> Nassauer, *supra* note 129.

<sup>186</sup> Sarah Mervosh, *Shooting at Walmart in Mississippi Kills 2*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/walmart-shooting-mississippi.html> [<https://perma.cc/RT5H-6VVP>]; Sarah Nassauer & Chip Cutter, *Walmart Workers’ New Security Threat Is Active Shooters, Not Shoplifters*, WALL ST. J. (Aug. 5, 2019, 1:12 PM), <https://www.wsj.com/articles/walmart-workers-new-security-threat-is-active-shooters-not-shoplifters-11564941183?mod=searchresults&page=1&pos=11> (on file with the Columbia Business Law Review).

<sup>187</sup> See Abha Bhattarai, *Walmart Says It Will Keep Selling Guns, Even as Advocacy Groups and Workers Voice Concerns*, WASH. POST (Aug. 5, 2019, 5:39 PM), <https://www.washingtonpost.com/business/2019/08/05/walmart-says-it-will-keep-selling-guns-even-advocacy-groups-workers-voice-concerns/> [<https://perma.cc/L3QY-76YP>]. Hargrove also said that the El Paso shooting had “not prompted any discussions among [Walmart’s] senior management about further restricting gun sales.” Michael Corkery, *Walmart Shooting in El Paso Renews Attention on Crime Frequency at Its Stores*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/business/walmart-crime-rate.html?searchResultPosition=7> [<https://perma.cc/CNW3-RAVB>].



Pressure grew from a diverse swath of stakeholders including investors, customers, employees, and other activists.<sup>188</sup>

Investors focusing on environmental, social, and governance (ESG) issues provided a reason for Walmart to change its firearm policies. The rising influence of socially responsible investors had already raised the financial stakes of the debate over gun sales.<sup>189</sup> In 2018, BlackRock, the world's largest investment manager, announced it would allow institutional investors to screen firearm manufacturers and retailers from their portfolios even if they did not commit to full ESG investment strategies.<sup>190</sup> A number of prominent investors—including the California Teachers Pension Fund System—divested from companies that manufacture or sell civilian firearms in response to prior mass shootings.<sup>191</sup> Following the El Paso shooting, John Streur, an influential ESG investor and CEO of Calvert Research and Management,

---

<sup>188</sup> See Alistair Gray & Andrew Edgecliffe-Johnson, *Walmart Says Curbs on Ammunition Sales Will Halve Its Market Share*, FIN. TIMES (Sept. 3, 2019), <https://www.ft.com/content/465f856a-ce6f-11e9-b018-ca4456540ea6> (on file with the Columbia Business Law Review); Pamela N. Danziger, *As Pressure Mounts for Walmart To Stop Selling Guns, There Is A Workable Business Solution*, FORBES (Aug. 17, 2019, 9:18 AM), <https://www.forbes.com/sites/pamdanziger/2019/08/17/as-pressure-mounts-for-walmart-to-stop-selling-guns-there-is-a-workable-business-solution/#2ca8e92d7e09> [<https://perma.cc/7QQ9-3D8U>]; Julia Jacobo, *Walmart Facing Pressure To Stop Selling Guns in Wake of Recent Mass Shootings*, ABC NEWS (Aug. 5, 2019, 12:33 PM), <https://abcnews.go.com/Business/walmart-facing-pressure-stop-selling-guns-wake-recent/story?id=64780717> [<https://perma.cc/647L-UEQT>].

<sup>189</sup> Gray & Edgecliffe-Johnson, *supra* note 188.

<sup>190</sup> Brooke Masters, *BlackRock's Gun-Free Funds Show Ethical Investing Is a Good Bet*, FIN. TIMES (Apr. 10, 2018), <https://www.ft.com/content/77e45bc8-3bdc-11e8-b9f9-de94fa33a81e> (on file with the Columbia Business Law Review). Some investors hesitate to commit to a full ESG portfolio because it may result in lower returns than a standard investment portfolio. *See id.*

<sup>191</sup> Damien Fruchart, Michael Jenks & Verena Simmel, *Firearms—Investor Responses amid Political Inaction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 9, 2019), <https://corpgov.law.harvard.edu/2019/09/09/firearms-investor-responses-amid-political-inaction/> [<https://perma.cc/DN2N-WC8U>].

wrote to Walmart Chairman Gregory Penner urging the retailer to strengthen its gun and ammunition safety policies.<sup>192</sup> Streur argued that this reform could bolster Walmart's investment from ESG funds—many of which, including Calvert, did not own shares in the retailer.<sup>193</sup>

Customer groups, too, urged Walmart to take decisive action in response to the gun violence at its stores. Randi Weingarten, president of the largest teachers' union in the country, wrote McMillon a letter calling for Walmart to stop selling guns and contributing funds to politicians backed by the NRA.<sup>194</sup> She threatened to call for a boycott of Walmart if it failed to take adequate action.<sup>195</sup>

Customers themselves reported feeling fearful while shopping and “thought twice” about visiting Walmart stores altogether.<sup>196</sup> A heavily-armed man equipped with a tactical rifle, handgun, and 100 rounds of ammunition visited a Missouri Walmart less than a week after the El Paso shooting—apparently seeking to test his Second Amendment rights—causing panic throughout the store and further

---

<sup>192</sup> Leslie P. Norton, *Meet the Man Who Helped Curb Gun Sales at Walmart*, BARRON'S (Sept. 6, 2019, 5:18 PM), [https://www.barrons.com/articles/the-investor-who-helped-curb-gun-sales-at-walmart-51567804707?mod=hp\\_DAY\\_6](https://www.barrons.com/articles/the-investor-who-helped-curb-gun-sales-at-walmart-51567804707?mod=hp_DAY_6) [https://perma.cc/9D8M-9TYC].

<sup>193</sup> *Id.* As of April 30, 2019, two prominent ESG exchange-traded funds offered by BlackRock declined to invest in Walmart. Leslie P. Norton, *Walmart's Move on Ammunition Sales Could Aid Its ESG Ratings*, BARRON'S (Sept. 3, 2019, 4:55 PM), <https://www.barrons.com/articles/walmarts-assault-weapons-ammunition-sales-esg-ratings-51567544036> [https://perma.cc/CZ3S-MFZE].

<sup>194</sup> See Gray & Edgecliffe-Johnson, *supra* note 188; Harmeet Kaur, *One of America's Biggest Teacher's Unions Calls on Walmart To Stop Selling Guns*, CNN (Aug. 9, 2019, 8:19 PM), <https://www.cnn.com/2019/08/09/us/teachers-union-walmart-gun-sales-trnd/index.html> [https://perma.cc/3EYP-M76E].

<sup>195</sup> Kaur, *supra* note 194.

<sup>196</sup> See Paul Takahashi, *Nervous Shoppers Take Stock in Wake of Walmart Shooting*, HOUS. CHRON. (Aug. 5, 2019, 6:57 PM), <https://www.houstonchronicle.com/business/article/Nervous-shoppers-take-stock-in-wake-of-Walmart-14282495.php> [https://perma.cc/CB69-B474].

escalating customer anxieties.<sup>197</sup> Some customers demanded Walmart increase its security measures.<sup>198</sup>

Walmart employees took action of their own after the fatal El Paso and Southaven shootings, protesting the retailer's gun policies.<sup>199</sup> Employees at Walmart's e-commerce office in San Bruno, California organized a walkout, declaring they "no longer want to be complicit by working for a company that profits off the sale of firearms."<sup>200</sup> They also created and circulated a petition urging Walmart to end all firearm sales, stop funding NRA-backed candidates, and prohibit shoppers from carrying guns in Walmart stores.<sup>201</sup> Worker safety drove many of the petition's demands; an in-store associate said that she and her colleagues were "on edge . . . all afraid [they were] going to die" and wished their Walmart location would not sell guns or ammunition.<sup>202</sup> Almost 130,000 people had

---

<sup>197</sup> Neil Vigdor, *Armed Man Who Caused Panic at Missouri Walmart Said It Was 2nd Amendment Test, Authorities Say*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/us/missouri-walmart-terrorist-threat.html> [<https://perma.cc/K7XX-VQE5>].

<sup>198</sup> Takahashi, *supra* note 196. Several victims of the shooting in El Paso have filed suit against Walmart, arguing that the store negligently failed to provide adequate security measures. Aaron Martinez, *'We Need Change: El Paso Mass Shooting Survivors File Lawsuit Against Walmart*, USA TODAY (last updated Sept. 5, 2019, 8:34 AM), <https://www.usatoday.com/story/money/2019/09/04/el-paso-walmart-mass-shooting-victims-file-lawsuit-against-walmart/2215523001/> [<https://perma.cc/K2WQ-GK4G>].

<sup>199</sup> Abha Bhattarai & Greg Bensinger, *Walmart Employees Stage a Walkout To Protest Gun Sales*, WASH. POST (Aug. 7, 2019, 8:29 PM), <https://www.washingtonpost.com/business/2019/08/07/walmart-employees-staging-walkout-protest-gun-sales/> [<https://perma.cc/6HTZ-4TSY>].

<sup>200</sup> *Id.* (internal quotation marks omitted) (reporting one employee's statement).

<sup>201</sup> See *Stop the Sale of Guns at Walmart Stores*, CHANGE.ORG (last visited Sept. 14, 2020), [https://www.change.org/p/doug-mcmillon-stop-the-sale-of-guns-at-walmart-stores?utm\\_content=bandit-starter\\_cl\\_share\\_content\\_en-us%3Av4&recruited\\_by\\_id=fc7b5740-b810-11e9-be8a-6fbcafd3c27d&recruiter=989859201&utm\\_source=share\\_petition&utm\\_medium=copylink&utm\\_campaign=share\\_petition](https://www.change.org/p/doug-mcmillon-stop-the-sale-of-guns-at-walmart-stores?utm_content=bandit-starter_cl_share_content_en-us%3Av4&recruited_by_id=fc7b5740-b810-11e9-be8a-6fbcafd3c27d&recruiter=989859201&utm_source=share_petition&utm_medium=copylink&utm_campaign=share_petition) [<https://perma.cc/28CW-JVNK>].

<sup>202</sup> See Bhattarai, *supra* note 187 (internal quotation marks omitted).

signed the petition when organizers sent it to McMillon on August 20, 2019.<sup>203</sup> McMillon responded by assuring employees that leadership was “considering a number of additional steps,” with safety as the “number one priority.”<sup>204</sup> “Sales and profits are not driving our decisions here,” he added.<sup>205</sup>

Several prominent politicians supported the employees’ position.<sup>206</sup> Senator Bernie Sanders tweeted, “Walmart should respect the voices of its workers who are calling on the company to stop selling guns.”<sup>207</sup> Senators Elizabeth Warren and Cory Booker echoed this sentiment, calling on Walmart to exercise market leadership and put safety over profit.<sup>208</sup>

Other politicians, including President Trump and Texas Lieutenant Governor Dan Patrick, linked the shootings with video games glorifying violence.<sup>209</sup> In the days following the El Paso shooting, Walmart announced it would remove video game displays and other in-store signs referencing violence.<sup>210</sup> The decision prompted further criticism from at least one employee who noted the irony in the retailer selling firearms but not displaying cartoon characters holding guns.<sup>211</sup>

---

<sup>203</sup> *We Sent Our Petition to Doug McMillon*, CHANGE.ORG (Aug. 20, 2019), <https://www.change.org/p/doug-mcmillon-stop-the-sale-of-guns-at-walmart-stores/u/24967130> [<https://perma.cc/UJ6V-5SDM>].

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See Thomas Kaplan, *Four Democratic Candidates Call on Walmart To Stop Selling Guns*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/us/politics/elizabeth-warren-bernie-sanders-walmart-guns.html?searchResultPosition=12> [<https://perma.cc/3DEK-8EZ5>].

<sup>207</sup> Bernie Sanders (@BernieSanders), TWITTER (Aug. 9, 2019, 12:00 PM), <https://twitter.com/BernieSanders/status/1159856870024048641> (on file with the Columbia Business Law Review).

<sup>208</sup> See Kaplan, *supra* note 206.

<sup>209</sup> Jacey Fortin, *Walmart Pulls Violent Video Game Signs*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/business/walmart-video-games-mass-shootings.html> [<https://perma.cc/M2KJ-CPTT>].

<sup>210</sup> *Id.*

<sup>211</sup> *See id.*

Gun control groups and other activists urged Walmart to take more “substantive measures.”<sup>212</sup> An organization called Guns Down America,<sup>213</sup> for example, petitioned the retailer “to stop selling guns and to stop supporting NRA-backed politicians, and to devote its lobbying heft to advocating for stricter gun laws.”<sup>214</sup> In the weeks following the El Paso shooting, Guns Down America encouraged rallies at local Walmart stores across the country.<sup>215</sup> A variety of other groups, including MoveOn<sup>216</sup> and March For Our Lives,<sup>217</sup> also joined in the effort to pressure Walmart.<sup>218</sup>

### C. The September 3, 2019 Decision

By late August, pressure from investors, customers, employees, politicians, and other advocacy groups came to a head. In the days following the shootings in El Paso and Southaven, McMillon had said that Walmart leadership would be “thoughtful and deliberate” in formulating a response that “reflects the best values and ideals of our company, with a focus on serving the needs of our customers,

---

<sup>212</sup> Corkery, *supra* note 178.

<sup>213</sup> Guns Down describes itself as “running campaigns to weaken the gun industry, the gun lobby, and the lawmakers who support them.” Guns Down Main Page, GUNS DOWN (last visited Nov. 26, 2020), <https://gunsdownamerica.org/> [<https://perma.cc/4C67-FLFK>].

<sup>214</sup> Amy B. Wang et al., ‘People Are Fed Up’: After El Paso and Dayton Shootings, Gun-Control Groups Seize Momentum, WASH. POST (Aug. 13, 2019, 7:01 PM), <https://www.washingtonpost.com/politics/2019/08/13/people-are-fed-up-after-el-paso-dayton-shootings-gun-control-groups-seize-momentum/> [<https://perma.cc/BC23-8WNA>].

<sup>215</sup> *See id.*

<sup>216</sup> MoveOn describes itself as “committed to an inclusive and progressive future.” *See* MoveOn Main Page, MOVEON (last visited Nov. 26, 2020), <https://front.moveon.org/> [<https://perma.cc/UEC7-644J>].

<sup>217</sup> March For Our Lives aims to “end the gun violence epidemic in America.” *See* March For Our Lives Main Page, MARCH FOR OUR LIVES (last visited Nov. 26, 2020), <https://marchforourlives.com/> [<https://perma.cc/N63C-NVHF>].

<sup>218</sup> *See* Danziger, *supra* note 188.

associates, and communities.”<sup>219</sup> Still, spokesman Randy Hargrove made clear that there were then “no plans” to change company policies around gun sales.<sup>220</sup>

In a mid-August report to investors, Walmart signaled that it continued to consider the appropriate response.<sup>221</sup> McMillon told investors that Walmart “will strive to use the[] experiences [of the shootings] to identify additional actions we can take to strengthen our processes, improve our technology and create an even safer environment in our stores.”<sup>222</sup> Importantly, McMillon added that Walmart was “also thinking through the broader issues related to gun violence and things we should do to help create safer communities.”<sup>223</sup> Still, after reiterating Walmart’s past efforts to restrict gun sales, McMillon detailed the retailer’s market share in firearms and ammunition—a move some commenters interpreted as indicating that Walmart remained primarily concerned with profits.<sup>224</sup>

McMillon estimated that Walmart held two percent and twenty percent shares in the markets for firearms and ammunition, respectively.<sup>225</sup> For most large retailers, gun and ammunition purchases account for only a small portion of total sales.<sup>226</sup> The relatively low revenues associated with

---

<sup>219</sup> Letter from Doug McMillon, CEO, Walmart, to Walmart Associates, Dear Associates, LINKEDIN (Aug. 6, 2019), <https://www.linkedin.com/pulse/dear-associates-doug-mcmillon/> [<https://perma.cc/66VT-E4B3>].

<sup>220</sup> Sarah Nassauer, *Walmart Examines Role in Confronting Gun Violence*, WALL ST. J. (Aug. 7, 2019, 2:51 PM), <https://www.wsj.com/articles/walmart-ceo-says-rethinking-role-in-confronting-gun-violence-11565203862> (on file with the Columbia Business Law Review) (internal quotation marks omitted).

<sup>221</sup> See WALMART INC., SECOND QUARTER FISCAL YEAR 2020 EARNINGS 2 (2019), [https://s2.q4cdn.com/056532643/files/doc\\_financials/2020/Q2/v2/Q2FY20-Combined-Script-Final.pdf](https://s2.q4cdn.com/056532643/files/doc_financials/2020/Q2/v2/Q2FY20-Combined-Script-Final.pdf) [<https://perma.cc/XP3L-PUGH>].

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See, e.g., Danziger, *supra* note 188.

<sup>225</sup> WALMART INC., *supra* note 221.

<sup>226</sup> Fruchart et al., *supra* note 191.

these categories make retailers particularly susceptible to public pressure.<sup>227</sup> Accordingly, a number of Walmart's competitors have replaced guns and ammunition with more profitable products—often in response to pressure following tragic events.<sup>228</sup> Still, while firearms and ammunition may represent only a small portion of Walmart's total sales, they are products steeped in Walmart history, and leadership has appeared correspondingly sensitive to customer demand.<sup>229</sup>

On September 3, 2019, McMillon finally declared the “status quo . . . unacceptable.”<sup>230</sup> In an open letter to associates, McMillon announced Walmart's decision to limit further ammunition and firearm purchases by discontinuing sales of short-barrel rifle ammunition, handgun ammunition, and, in Alaska (the only state where they were still sold), handguns.<sup>231</sup> He also announced that Walmart would discourage customers from openly carrying guns in its stores and would encourage Congress to adopt gun control legislation.<sup>232</sup>

Walmart said that it made the decision “after weeks of discussion and research” regarding the proper response to the gun violence in its stores.<sup>233</sup> In the statement announcing the

---

<sup>227</sup> *Id.*

<sup>228</sup> *See id.* Dick's Sporting Goods, for example, experienced an increase in sales in stores where it removed firearms. *See* Braithwaite, *supra* note 154.

<sup>229</sup> *See supra* Section III.A; *cf.* Corkery, *supra* note 178 (“Firearms are not a particularly vital business for Walmart.”). *But see* Hawkins & Krakow, *supra* note 136 (“Firearms have long made up a key part of Walmart's business.”).

<sup>230</sup> Letter from Doug McMillon to Walmart Associates, *supra* note 1.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Corkery, *supra* note 178. Walmart included organizations like Everytown and Moms Demand Action in its ongoing conversations about increasing public safety. *See* Press Release, Everytown for Gun Safety, Everytown for Gun Safety, Moms Demand Action Applaud Walmart Decision to Prohibit Open Carry and Limit Ammunition Sales in Wake of El Paso Mass Shooting (Sept. 3, 2019),

<https://everytown.org/press/everytown-for-gun-safety-moms-demand-action-applaud-walmart-decision-to-prohibit-open-carry-and-limit->

decision, McMillon noted that Walmart had “been listening to a lot of people inside and outside our company as we think about the role we can play in helping to make the country safer.”<sup>234</sup> The mention of “people inside and outside our company” suggests that engagement by a range of stakeholders had an impact on Walmart’s decision.<sup>235</sup>

In any event, Walmart’s decision accords with polls showing that Americans favor more gun control.<sup>236</sup> A survey published shortly thereafter revealed that almost seventy percent of Americans “would feel more favourable towards a company whose [CEO] supported mandatory background checks on gun purchases”<sup>237</sup>—a legislative measure McMillon endorsed in his September 3 statement.<sup>238</sup> Still, while Walmart has locations across the country, the retailer historically has targeted more conservative regions, primarily rural and suburban communities where gun rights are particularly important.<sup>239</sup> Adopting a firmer stance on gun control risked alienating these core customers.<sup>240</sup> McMillon recognized as much. He acknowledged that Walmart’s

---

ammunition-sales-in-wake-of-el-paso-mass-shooting/  
[<https://perma.cc/D44Q-FJJZ>].

<sup>234</sup> Letter from Doug McMillon to Walmart Associates, *supra* note 1.

<sup>235</sup> John Streur, *Can Walmart Change the Status Quo of the US on Guns?*, INVESTORDAILY (Sept. 10, 2019), <https://www.investordaily.com.au/analysis/45653-can-walmart-change-the-status-quo-of-the-us-on-guns> [<https://perma.cc/5RU9-KNFS>].

<sup>236</sup> See Corkery, *supra* note 178.

<sup>237</sup> See Braithwaite, *supra* note 154.

<sup>238</sup> Letter from Doug McMillon to Walmart Associates, *supra* note 1.

<sup>239</sup> See Abha Bhattarai, *‘The Status Quo Is Unacceptable’: Walmart Will Stop Selling Some Ammunition and Exit the Handgun Market*, WASH. POST (Sept. 3, 2019, 7:13 PM), <https://www.washingtonpost.com/business/2019/09/03/status-quo-is-unacceptable-walmart-will-stop-selling-some-ammunition-exit-handgun-market/> [<https://perma.cc/FQD5-QJUH>]; Nassauer, *supra* note 220.

<sup>240</sup> See Nassauer, *supra* note 220. For example, Walmart faced backlash for its prior decision to raise the minimum age of purchase for guns to twenty-one. *Id.*



“decisions will inconvenience some of [its] customers” but “hope[d] they [would] understand.”<sup>241</sup>

Unsurprisingly, gun rights advocacy groups rebuked Walmart’s decision. The NRA criticized “Walmart for caving to ‘anti-gun elites’”<sup>242</sup> and predicted it “would lose business to other retailers, ‘who are more supportive of America’s fundamental freedoms.’”<sup>243</sup> The hashtag #BoycottWalmart began trending on Twitter as customers protested the decision.<sup>244</sup> Still, when asked whether Walmart had experienced blowback from customers, McMillon responded, “A little bit. But no, not much. I think most people understand that we’re not trying to make a political statement here. We’re just trying to help create a safer environment.”<sup>245</sup>

#### IV. A LESSON OF STAKEHOLDER INFLUENCE

Industry observers immediately sensed the significance of Walmart’s announcement.<sup>246</sup> And they were right to do so. The September 3 statement marked a shift in both the means and ends of Walmart’s decisionmaking. It signaled not only Walmart’s increased sensitivity to stakeholder demands but

---

<sup>241</sup> Letter from Doug McMillon to Walmart Associates, *supra* note 1.

<sup>242</sup> Braithwaite, *supra* note 154.

<sup>243</sup> Corkery, *supra* note 178.

<sup>244</sup> See Jeanine Marie Russaw, *#BoycottWalmart Trends as Company Makes Decision To Limit Ammunitions Sales*, NEWSWEEK (Sept. 3, 2019, 5:41 PM), <https://www.newsweek.com/boycottwalmart-trends-company-makes-decision-limit-ammunitions-sales-1457522> [<https://perma.cc/D94Q-ZKR3>].

<sup>245</sup> Jessica Bursztynsky, *Walmart CEO: We’ve Seen ‘a Little’ Customer Blow-Back over Our Stricter Gun and Ammo Policies*, CNBC (last updated Nov. 21, 2019, 2:47 PM), <https://www.cnbc.com/2019/11/20/walmart-ceo-sees-a-little-customer-blow-back-over-gun-ammo-policies.html> [<https://perma.cc/YY94-ELVM>] (internal quotation marks omitted).

<sup>246</sup> See Andrew Ross Sorkin, *Walmart’s C.E.O. Steps into the Gun Debate. Other C.E.O.s Should Follow*, N.Y. TIMES (last updated Sept. 5, 2019), <https://www.nytimes.com/2019/09/03/business/walmart-ceo-guns.html> [<https://perma.cc/P8YJ-FHGU>] (“McMillon’s move could prove to be a watershed.”); Bhattarai, *supra* note 239 (“‘This is a major move,’ [a crisis management expert] said. . . . ‘This is Walmart saying, ‘This is how we’re going to do business going forward. Take note.’”).

also the evolution of Walmart's purpose from pursuing low prices at any cost to serving more diverse stakeholder interests.

A limitation of this analysis, of course, is the inability to actually hear boardroom conversations or get inside the heads of McMillon and other Walmart insiders. Public statements are unlikely to provide a complete explanation of the company's decisionmaking and may even be inaccurate or self-serving. Yet, they remain useful material for assessing the applicability of corporate governance theories to Walmart's conduct.

Examining the shift in Walmart's behavior regarding guns and ammunition suggests team production theory best captures the modern realities of corporate decisionmaking. Walmart not only explicitly rejected shareholder value as the basis for its decision but also arrived at that decision by considering and balancing input from a variety of stakeholder groups. Accordingly, of the prevailing theories of corporate governance, both the ends and the means of Walmart's conduct are most consistent with team production theory. And while corporate law did not drive the change in Walmart's approach, future changes in corporate law should reflect the theoretical underpinnings of Walmart's corporate governance.

#### A. Reconciling Corporate Governance Theories

For most of its history, in service of shareholder value, Walmart based its firearm sales decisions on market forces. The retailer cited customer demand when explaining (a) its 2006 decision to stop selling firearms in two-thirds of Walmart locations;<sup>247</sup> (b) its 2011 decision to reintroduce guns and ammunition in stores across the country;<sup>248</sup> (c) its continued commitment to selling assault-style rifles in the early 2010s;<sup>249</sup> and (d) its 2015 decision to stop selling these kinds of rifles.<sup>250</sup> Indeed, when Walmart faced pressure from

---

<sup>247</sup> See *supra* note 143 and accompanying text.

<sup>248</sup> See *supra* notes 147–52 and accompanying text.

<sup>249</sup> See *supra* notes 153–55 and accompanying text.

<sup>250</sup> See *supra* notes 175–77 and accompanying text.

Trinity, it said it based its merchandising decisions on demand, suggesting that economics tied its hands.<sup>251</sup> Likewise, Walmart repeatedly dismissed the notion that gun violence or any particular mass shooting had an impact on the company's policies.<sup>252</sup> The retailer's focus on market forces apparently came at the expense of its stakeholders' social interests.

In recent years, however, Walmart has signaled that broader stakeholder concern has driven—or at least played a role in—its restrictions on gun and ammunition sales. In 2018, while announcing its decision to raise the minimum age for purchasing firearms and ammunition, Walmart said that it had decided to review its policies “[i]n light of recent events.”<sup>253</sup> This rhetoric—referencing the school shooting in Parkland, Florida two weeks prior—suggested the company was reacting to social concerns surrounding gun violence, not economic imperatives.

Walmart appeared to confirm its desire to serve the non-pecuniary interests of its stakeholders—particularly workers and customers—with its action in the wake of the El Paso and Southaven shootings. In response to a worker-initiated petition protesting the retailer's continued sale of guns and ammunition, McMillon assured employees that “[s]ales and profits are not driving our decisions here.”<sup>254</sup> With this statement, McMillon explicitly rejected shareholder wealth maximization.<sup>255</sup> McMillon said the company instead “want[ed] what's best for our customers, our associates and our communities.”<sup>256</sup> Indeed, Walmart's ultimate decision, predicted to cost the retailer over half of its market share in

---

<sup>251</sup> See *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 329 (3d Cir. 2015).

<sup>252</sup> See, e.g., *supra* notes 175–77 and accompanying text.

<sup>253</sup> See *supra* notes 182–83 and accompanying text.

<sup>254</sup> See *We Sent Our Petition to Doug McMillon*, *supra* note 203.

<sup>255</sup> While Walmart's actions may have had shareholder wealth maximizing justifications internally, it is instructive that McMillon expressly denied that purpose.

<sup>256</sup> Letter from Doug McMillon to Walmart Associates, *supra* note 1.

ammunition,<sup>257</sup> meant Walmart would suffer a loss in revenue if it could not recoup these sales in another product category.

Non-shareholder groups have also played larger roles in Walmart's decisionmaking process. While the *Trinity* case was ongoing, Walmart expressly disavowed the notion that shareholders should have control or influence over the company's operations, particularly merchandising decisions.<sup>258</sup> Nonetheless, Walmart's recent actions limiting firearm and ammunition sales show that it is susceptible to influence from stakeholder groups—particularly workers and customers.<sup>259</sup> In the wake of the El Paso and Southaven shootings, workers,<sup>260</sup> customers,<sup>261</sup> and community advocacy groups<sup>262</sup> urged Walmart to make stores safer, reduce the availability of guns, and leverage its political power in a constructive way. Leaders and organizers across these constituencies engaged directly with McMillon, and Walmart's action ultimately mirrored their requests.<sup>263</sup>

Several points indicate that shareholder primacy theories do not adequately explain Walmart's conduct. Walmart's emphasis on stakeholder interests—namely the safety of its workers, customers, and communities—runs contrary to the principle that shareholder profit must be the sole object of corporate action.<sup>264</sup> Walmart made no suggestion that it

---

<sup>257</sup> *Id.* (“We believe these actions will reduce our market share of ammunition from around 20% to a range of approximately 6 to 9%.”).

<sup>258</sup> *See supra* notes 165–66 and accompanying text.

<sup>259</sup> Walmart also may be more likely to heed shareholder input moving forward. Board engagement with ESG investor John Streur on the issue of firearm sales may indicate a potential shift. *See supra* notes 192–93 and accompanying text. Such an increase in responsiveness to shareholder demands—particularly demands to advance non-pecuniary interests—is consistent with the argument that Walmart is now more responsive to its stakeholders (which, of course, include shareholders).

<sup>260</sup> *See supra* notes 199–205 and accompanying text.

<sup>261</sup> *See supra* notes 194–98 and accompanying text.

<sup>262</sup> *See supra* notes 212–218 and accompanying text.

<sup>263</sup> *See* Letter from Doug McMillon to Walmart Associates, *supra* note 1.

<sup>264</sup> *See* Bainbridge, *supra* note 13, at 549; *see also supra* note 16 and accompanying text.

sought—or even expected—any benefit to shareholder value. McMillon’s promise that sales and profits would not drive the company’s decision sounds like an outright rejection of shareholder primacy.

And neither is Walmart’s approach merely shareholder primacy cloaked in stakeholder rhetoric. It is true that some corporate decisions can be rationalized as advancing either shareholder or stakeholder interests, or both. This makes sense: corporate decisionmaking is not a zero-sum game. Shareholders are themselves stakeholders, and actions that advance stakeholder interests in the short term may benefit shareholders in the long term.<sup>265</sup> Sometimes these two competing views of corporate purpose will converge.

But even when actions to advance shareholder or stakeholder interests look the same, the central tension of the corporate purpose debate remains: is stakeholder welfare a goal in and of itself, or is it only legitimate to the extent it serves as a means to advancing shareholder interests? An independent concern for the social interests of non-shareholder stakeholders motivated Walmart’s decision. Thus, it is inconsistent with shareholder primacy even if Walmart’s shareholders did happen to benefit.<sup>266</sup>

The fact that Walmart has taken initiative to protect stakeholders’ interests in the face of government inaction also runs afoul of a key tenet of shareholder primacy. Walmart’s choice to raise the minimum age for purchasing guns and ammunition above legal requirements, for example, demonstrates the corporation’s rejection of the idea that government regulation, not corporate action, is the only

---

<sup>265</sup> See Cohen, *supra* note 108. Company decisions on issues relating to its workforce (e.g., “diversity programmes, equal pay, minimum wage and healthcare benefits, retirement and other benefits”) in particular can lead to substantial shareholder benefits by enhancing the company’s reputation and helping it attract talent. See *id.* According to Cohen, “[a]ctions taken by a board to build and preserve the company’s reputation will almost always be in the shareholders’ best interest.” *Id.*

<sup>266</sup> For instance, it is possible that shareholders will benefit more from an improvement in firm reputation than from continued sale of firearms, especially given the relatively low revenue and margins associated with the products. See *supra* text accompanying notes 226–28.

proper way to protect non-shareholding constituencies.<sup>267</sup> In today's political climate, employees and customers increasingly demand that corporations and CEOs commit to broader stakeholder purposes and take a stand on social and political issues.<sup>268</sup> Disappointed by the government's inability to address major problems in society, many look to corporations to fill the void.<sup>269</sup> Walmart's willingness to respond to this type of public pressure only widens the gap between its approach to corporate governance and shareholder primacy's ideals.

Walmart's recent focus on stakeholder interests in the realm of gun control more closely aligns with the inclusive corporate purpose advocated by managerialism and team production theory.<sup>270</sup> McMillon's claim that Walmart had listened and responded to "a lot of people inside and outside our company" sounds especially like team production theory, which stresses the lateral coordination involved in corporate decisionmaking.<sup>271</sup> Under the managerialist view, by contrast, corporate managers make decisions, largely unilaterally and in accordance with their personal views.<sup>272</sup>

Team production theory stands for the proposition that corporate directors weigh the interests of various stakeholders, making the decision "that maximizes the *joint welfare of the team as a whole*."<sup>273</sup> Any individual decision may have benefits for some team members and costs for

---

<sup>267</sup> See *supra* notes 36–38, 46 and accompanying text. In fact, Walmart's increased involvement in policymaking evokes managerialism's conception of corporate managers as "industrial statesmen." See *supra* notes 56–57 and accompanying text.

<sup>268</sup> See Andrew Hill, *The Limits of the Pursuit of Profit*, FIN. TIMES (Sept. 23, 2019), <https://www.ft.com/content/c998cc32-d93e-11e9-8f9b-77216ebe1f17> [<https://perma.cc/2GU7-2MPL>]; Nassauer, *supra* note 129; Chatterji & Toffel, *The New CEO Activists*, *supra* note 130, at 1–2.

<sup>269</sup> See Hill, *supra* note 268.

<sup>270</sup> For a discussion of these theories, see *supra* Section II.C.

<sup>271</sup> For a discussion of this aspect of team production theory, see *supra* text accompanying notes 72–73. For a summary of McMillon's deliberations, see *supra* text accompanying notes 233–35.

<sup>272</sup> See *supra* text accompanying notes 51–62.

<sup>273</sup> Blair & Stout, *supra* note 63, at 271.

others. Walmart's decisionmaking process is illustrative. The company's leadership considered the interests of its various stakeholders in firearms sales: customer interest in purchasing the products, employee interest in a safe work environment, community interest in the reduced availability of weapons, and shareholder interest in profits driven by firearm sales. Following the El Paso and Southaven shootings, McMillon appeared to rule out quickly consideration of shareholder interests. The ultimate decision seemed to be a function of other stakeholders' interests.

The fact that Walmart made its decision on the basis of non-shareholder interests in this instance does not mean the same calculus will dictate other decisions. Certain future decisions may weigh shareholder team members' interests most heavily, depending on the context and the significance of the interests at stake. Accordingly, the flexibility of the team production theory framework best accords with Walmart's conduct as documented here and as anticipated moving forward. Team production theory accommodates the multi-stakeholder input characteristic of Walmart's September 3 decision,<sup>274</sup> while recognizing other decisions may involve different considerations.

Acknowledging this flexibility is not to say that Walmart has not experienced a shift in its conception of corporate purpose. Assuming firearms are a representative area, the extent to which Walmart has moved from economics-driven decisionmaking to a more open-minded and balanced evaluation of stakeholder interests is remarkable.

## B. The Role of Corporate Law

Walmart's conduct represents an evolution in the way corporations interact with their stakeholders and with government. The retailer's recent experience shows that large corporations are increasingly responsive to the demands of workers, customers, and other constituencies. Unlike shareholder-centric governance, this increased coordination

---

<sup>274</sup> For a discussion of the September 3, 2019 decision, see *supra* Section III.C.

between corporations and their stakeholders is not a result of positive corporate law.<sup>275</sup> Instead, at least in the context of gun control, stakeholders now demand more from corporations, largely due to the lack of regulations protecting their interests.<sup>276</sup>

Corporations listen to these demands because stakeholder satisfaction is important to corporate success, and because corporations want to control how regulatory policy develops.<sup>277</sup> Walmart's conduct reflects this tactic. For instance, the retailer stopped selling military-style rifles and ammunition and is now urging Congress to debate reauthorization of the Federal Assault Weapons Ban.<sup>278</sup> Enactment of such legislation would impose little cost on Walmart, as it already has implemented a consistent policy internally.<sup>279</sup>

The corporate impulse to preempt or shape government regulation likely contributed to the Business Roundtable's new statement on corporate purpose.<sup>280</sup> Business leaders like McMillon might want to demonstrate their commitment to stakeholder needs, while also preventing any government

---

<sup>275</sup> See *supra* notes 97–100 and accompanying text (explaining how shareholder primacy affected practice under securities and tax laws).

<sup>276</sup> See *supra* text accompanying notes 268–70.

<sup>277</sup> See Alison Frankel, *Citing 'Crisis' for Corporations, Marty Lipton Launches Feud with Investors' Council*, REUTERS (Aug. 21, 2019, 4:00 PM), <https://www.reuters.com/article/us-otc-lipton/citing-crisis-for-corporations-marty-lipton-launches-feud-with-investors-council-idUSKCN1VB2DV> (on file with the Columbia Business Law Review) (“If corporations and their shareholders fail to acknowledge that businesses must be accountable not just to shareholders but to their employees, customers, and communities . . . they’re exposing themselves to government imposition of that accountability.”).

<sup>278</sup> See Letter from Doug McMillon to Walmart Associates, *supra* note 1.

<sup>279</sup> Cf. Sarah Min, *Walmart Will Stop Selling Guns in New Mexico*, CBS NEWS (July 9, 2019, 4:25 PM), <https://www.cbsnews.com/news/walmart-to-stop-selling-guns-in-new-mexico/> [https://perma.cc/XGV2-4DG7] (discussing Walmart's willingness to stop firearms sales in response to a state gun control law).

<sup>280</sup> See Frankel, *supra* note 277.



regulation directly imposing accountability.<sup>281</sup> The same reasoning helps explain why many companies have embraced B Corp metrics to assess their non-economic performance, though relatively few have sought certification under that label.<sup>282</sup> Corporations want to address criticism without subjecting themselves to additional oversight.

Importantly, corporate law is not driving changes in corporate purpose.<sup>283</sup> Though the prior consensus on shareholder primacy contributed to developments in the law, it did not alter the law so much as to preclude the resurgence of stakeholder purpose. The flexibility of the business judgment rule provides ample room for directors and managers to consider the interests of workers, customers, and other stakeholders when making decisions on behalf of the corporation,<sup>284</sup> including decisions about corporate purpose.<sup>285</sup>

Leaders like McMillon thus can define the purpose of the corporation. The move towards stakeholder purpose likely will continue so long as workers, customers, and communities see corporations (as opposed to government) as the institution most responsive to their needs. Corporations would be well advised to keep listening to diverse stakeholder voices. Today, non-shareholder stakeholders largely engage with corporations outside the structure of corporate law. However, if stakeholders grow dissatisfied with corporate responsiveness, they could demand their own legal rights under corporate law. Should this occur, team production theory should serve as the theoretical basis for changes in the law. Corporate law should be based on how corporations

---

<sup>281</sup> *See id.*

<sup>282</sup> *See Tett, supra* note 111.

<sup>283</sup> *See* MARTIN LIPTON ET AL., WACHTELL, LIPTON, ROSEN & KATZ, SOME THOUGHTS FOR BOARDS OF DIRECTORS IN 2020 3–4 (2019), <http://www.wlrk.com/files/2019/SomeThoughtsforBoardsOfDirectorsIn2020.pdf> [<https://perma.cc/F5LH-4UZZ>]; *cf. also* Edward B. Rock, *supra* note 17, at 1910 (arguing that the earlier shift to a shareholder-centric system occurred with relatively change to the law).

<sup>284</sup> *See* LIPTON ET AL., *supra* note 283.

<sup>285</sup> *See* Mitchell, *supra* note 14, at 210–11.

actually operate, and team production theory accommodates the flexibility that today's corporations require.

## V. CONCLUSION

Walmart's commitment to stakeholder interest reaches beyond the realm of firearms. In the midst of the COVID-19 pandemic, Walmart, in an effort to "protect the health and well-being of the communities we serve," announced a nationwide face-covering requirement for shoppers in its stores.<sup>286</sup> Here again, the retailer surpassed government regulations by extending its requirement to states and municipalities without mask mandates.<sup>287</sup> Walmart and other large corporations have taken a leadership role regarding public health during the pandemic.<sup>288</sup> According to an August 2020 study, the companies whose CEOs signed the Business Roundtable's updated statement have provided significantly greater employee, customer, and community support during the crisis.<sup>289</sup>

---

<sup>286</sup> Press Release, Dacona Smith, Chief Operating Officer, Walmart U.S. & Lance de la Rosa, Chief Operating Officer, Sam's Club, A Simple Step To Help Keep You Safe: Walmart and Sam's Club Require Shoppers to Wear Face Coverings (July 15, 2020), <https://corporate.walmart.com/newsroom/2020/07/15/a-simple-step-to-help-keep-you-safe-walmart-and-sams-club-require-shoppers-to-wear-face-coverings> [<https://perma.cc/N77H-EXXL>].

<sup>287</sup> *See id.*

<sup>288</sup> *See* Dave Sebastian & Sharon Terlep, *Walmart, Kroger To Require Shoppers To Wear Masks in All U.S. Stores*, WALL ST. J. (July 15, 2020, 6:46 PM), <https://www.wsj.com/articles/walmart-to-require-face-masks-in-all-u-s-stores-starting-july-20-11594824256> [<https://perma.cc/W4AK-WNUQ>].

<sup>289</sup> *See* Kavya Vaghul, Amanda Keating, & Michelle Mullineaux, *How Business Roundtable Companies Have Responded to Six Critical Stakeholder Issues During the COVID-19 Pandemic*, JUST CAP. (last visited Sept. 17, 2020), <https://justcapital.com/reports/how-business-roundtable-companies-have-responded-to-six-critical-stakeholder-issues-during-the-covid-19-pandemic/> [<https://perma.cc/Z6GA-TXHZ>] (comparing the performance of Business Roundtable statement signatories to other Russell 1000 companies on six critical issues related to the pandemic: back-up dependent care, personal protective equipment, paid sick leave, financial assistance, customer accommodations, and community relief funds). Additional data cited by JUST Capital indicate that 72% of Americans trust

It is likely that other corporations will continue to follow Walmart's lead in embracing a broader stakeholder purpose. In September 2019, the Business Roundtable elected McMillon as its next chairman.<sup>290</sup> In January 2020, McMillon began his two-year term as the leader of the association of CEOs.<sup>291</sup> With its new statement on corporate purpose and McMillon at the helm, the Business Roundtable appears poised once again to usher in a new era of corporate governance.

---

companies more than the federal government to address COVID-19 and racial equality issues. *See id.*

<sup>290</sup> Press Release, Bus. Roundtable, *supra* note 6.

<sup>291</sup> *Id.*