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Sticking the Landing: Making the Most of the "Stakeholder Moment"

KENT GREENFIELD[*]

Abstract

This paper illustrates that the shareholder primacy model is still the prevailing model especially as the proponents of the stakeholder model have not come up with a theoretically sound alternative. It is argued that all corporations' principal stakeholders should be protected by the imposition of fiduciary duties on managerial decision makers. Homogeneity on corporate boards can reinforce thinking that leads to bad decision making. The findings of various researchers into behavioural economics are considered. It is pointed out that the interests of the shareholders are rarely, if ever, the same as those of other stakeholders. This supports the idea that a shift away from shareholder primacy is needed. The trade-offs that are often made in managerial decision making are represented graphically and discussed as an analytical tool supporting the central thesis that fiduciary duties with a broader range are the way to ensure that decisions take account of all relevant interests.

Introduction

One of the longstanding debates in the theory and practice of corporate governance is whether the corporation should be managed either with an eye toward the interests of shareholders primarily or instead on behalf of a broader set of stakeholders. This debate's most famous iteration is the classic dialogue between Adolf Berle and E. Merrick Dodd, which famously asked 'For Whom are Corporate Managers Trustees?'[1] But there have been other examples of this dialogue both before and since, usually coming in bursts brought about by economic or social shocks.[2] For the past generation or so, shareholder primacy has been the dominant theory in the United States and in many other jurisdictions around the world – so dominant in fact that in the begin-

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[1] See Adolf Berle, *Corporate Powers as Powers in Trust* 44 Harv. L. Rev. 1049 (1931); E Merrick Dodd, *For Whom Are Corporate Managers Trustees?* 45 Harv. L. Rev. 1145 (1932).

[2] Kent Greenfield, *The Progressive Possibility of Corporate Law* 28.3 Austl. J. Corporate Law 3 (2013).

ning of the twenty-first century two prominent corporate governance scholars proclaimed that we had seen the 'end of history' for corporate law.[3]

That was not true, of course. In fact, we have experienced over the past decade a significant pushback against the shareholder primacy norm, coming in legal and business scholarship as well as in the popular press.[4] Spurred in part by examples from Europe, where the legal and normative expectations of corporations were quite different even at the height of shareholder primacy, and by economic and political shocks that revealed the limits and indeed perverse effects of shareholder primacy, the skepticism of shareholder primacy is as high as it has been in years.[5]

But accounts of the imminent death of the shareholder primacy norm are exaggerated. The theoretical arguments in favor of shareholder primacy continue to be forcefully made, and can hardly be called frivolous.[6] The best arguments in favor of shareholder primacy – that such a legal rule best constrains management from selfish and careless behavior, and that the monitoring costs of compliance with such a straightforward rule are less than those in alternative regimes – have coherence. Moreover, the underlying assumption of shareholder primacy that other stakeholders voluntarily engage with the corporation and can protect themselves through contract resonates with the libertarian mood inside and outside academia.[7]

Moreover, those academics advocating for the downfall of the shareholder primacy model, this author included, have had difficulty fully theorizing an alternative approach to corporate governance. Not only have we been inconsistent and even conflicting with the alternatives proposed, we have failed to answer some of the more obvious objections to alternative models.

This essay will attempt to improve on this situation by making three points.

First, this essay will suggest that the progressive response to shareholder primacy has been inhibited because of the tension between those who seek to emphasize 'shareholder activism' to further progressive ends and those who want to defeat shareholder primacy by a greater emphasis on managerial discretion and autonomy. I will argue that progressive corporate law scholars should instead choose a 'third way,' a set of articulated and enforced fiduciary duties that run to the firm's principal stakeholders. Shareholders will no longer be supreme, but managerial discretion will be constrained rather than loosened.

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[3] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* 89 Geo. L.J. 439 (2000).

[4] Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy* 37 Seattle U. L. Rev. 749 (2014).

[5] Greenfield, *The Progressive Possibility, supra* n 2.

[6] Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power* 118 Harv. L. Rev. 833 (2005).

[7] Kent Greenfield, *Unconscionability and Consent in Corporate Law (A Comment on Cunningham)* 96 Iowa L. Rev. Bull. 1177 (2011); Kent Greenfield, *The End of Contractarianism? Behavioral Economic and Law of Corporations* in Eyal Zamir & Doron Teichman (eds), *The Oxford Handbook on Behavioral Economics and the Law* (Oxford University Press, 2014); Kent Greenfield, *Corporate Law and the Rhetoric of Choice*, in Dana L Gold (ed.), *Law and Economics: Toward Social Justice*, Vol. 24 of *Research in Law and Economics* (Emerald Group Publishing 2009).

Second, this essay will suggest that the arguments often made in favor of shareholder primacy on the grounds that it provides a clear rule for board decision-making are less persuasive than usually thought. In fact, there is reason to believe that adding more diverse perspectives to board decision making would create material benefits to the company. Here, I will argue that recent advances in behavioral economics indicate that the decision making of stakeholder boards would likely be superior to homogeneous boards representing shareholder interests only.

Finally, I want to address the suggestion, frequently put forward, that a shift away from shareholder primacy is unnecessary, since in the long term the interests of shareholders and stakeholders coalesce.[8] I have long found this claim to be unpersuasive, since there are many instances in which the interests of various stakeholders of the firm diverge even in the long term. Most stakeholders do benefit when the firm survives as a going concern, so there is correlation of interests in some circumstances. But in other instances, public policy or corporate governance rules fairly clearly benefit one or more stakeholders more than others or at the expense of others. Here, my primary purpose is to propose a graphical way of portraying the tradeoffs inherent in a range of policy choices. I will not analyze such choices in depth; I will use them only to illustrate the new analytical tool I present.

I. The Third Way

For decades, corporate law has been dominated by a conceptual dichotomy between shareholder supremacists on the one hand and managerialists on the other. All too often, moments of ferment in the field have brought about merely a swing of the pendulum from one of these paradigms toward the other.[9]

Shareholder supremacists lament the instances of managerial mismanagement and self-dealing and offer a remedy of increased shareholder power.[10] If only management were constrained, they argue, by additional shareholder power to nominate directors, approve executive pay, or receive financial disclosures, then management's incentives would better align with shareholder interests. The downside of this remedy is that many of the risks of corporate power would *increase* with increased shareholder say. Shareholder empowerment would hardly resolve the problems of short-

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[8] George W Dent, *Academics in Wonderland: The Team Production and Direction Primacy Models of Corporate Governance* 44 Hous. L. Rev. 1213 (2008).

[9] While labeled differently, these two paradigms map fairly closely to the two schools of thought identified and analyzed by David Millon. David Millon, *Radical Shareholder Primacy* 10 U. St. Thomas L.J. 1013 (2014). Millon labels the two schools 'radical shareholder primacy' and the manager-protective 'traditional model.' Both, as he points out, ultimately are aimed at shareholder benefit, though the former is more skeptical of managerial agency, and the latter is more permissive of it.

[10] The leading voice of the shareholder supremacists is probably Lucian Bebchuck. See Bebchuk, *supra* n 6. He is not alone of course. For other examples *see,* e.g., Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value* 96 Nw. U. L. Rev. 521, 522 (2002); Hansmann & Kraakman, *supra* n 3; Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered* 93 Colum. L. Rev. 795 (1993).

termism, environmental degradation, employee mistreatment and disempowerment, and risk externalization. In fact, the opposite would likely be true. This is because the interests of shareholders at best align with the interests of other stakeholders and of society as a whole only haphazardly, and at worst not at all.[11]

Meanwhile, the managerial and directorial apologists suggest that the way forward is to protect managerial prerogative.[12] The goal is to empower the benevolent corporate elites to resist the short-sighted urges of the marketplace and manage the firm for the long-term benefit of its investors and perhaps even society as a whole. If only management would be loosened from the bothersome constraints of shareholder activism and government regulation, we would witness a burst of competitive energy that would carry us toward economic nirvana. The downside of this remedy is that managerial prerogative is, as a descriptive matter, overwhelmingly used to benefit managers. Explosions in executive compensation and perquisites, the manipulation of financial reporting and disclosure, and self-dealing in various guises are a more common outcome than benevolence. If the treatment for the ills of shareholder primacy is managerial empowerment, the cure may be worse than the disease.

There is a third way. Managerial obligation could be increased, without the obligation running solely to the holders of equity. Fiduciaries of companies could be subject to meaningful constraints and obligations, enforceable by courts, without disabling their ability to use the corporate form for economic gain. The conceptual innovation of this third way – I use 'innovation' though the idea is actually quite ancient – is for the fiduciary obligations of management to run to the firm as a whole, which would include an obligation to take into account the interests of all those who make material investments in the firm. Within this framework, it would continue to be a violation of fiduciary duties for management to self-deal, act carelessly, or exercise something less than good faith judgment. It would also be a violation of their duties to prioritize one stakeholder over others consistently and persistently, or to fail to consider the interests of all stakeholders in significant corporate decisions.

My argument is simply that we should consider a new kind of regulatory effort that builds a public interest element into corporate governance itself, creating the possibility that businesses become a more positive social force on their own. I am not urging that corporations become altruistic or charitable institutions. Indeed, the best way for corporations to serve the public interest is to create wealth, primarily by selling worthwhile goods and services for a profit.[13] What I do suggest is that we should define wealth broadly, and require corporations to focus on creating it with both a

[11] See Kent Greenfield, *Defending Stakeholder Governance* 58 Case W. R. L. Rev. 1043, 1055–9 (2008).

[12] The most prominent of these scholars is probably Stephen Bainbridge. See Stephen M Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance* 97 Nw. U. L. Rev. 547 (2003); see *also* Lawrence A Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?* 73 Tul. L. Rev. 409 (1998); Jonathan R Macey, *The Legality and Utility of the Shareholder Rights Bylaw* 26 Hofstra L. Rev. 835, 835, 837 (1998).

[13] I develop this point extensively in *The Failure of Corporate Law*. Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* 125–42 (University of Chicago Press 2006).

greater awareness of the costs inherent in its creation and the benefits that flow from broadly distributing it.

Often, the battle within corporate law has been between managerialists on the one hand and shareholder supremacists on the other. Efforts to protect the other stakeholders of the corporation have been left to the 'external' regulation of antitrust law, environmental law, labor law, and the like. But these efforts have mostly been of the 'command-and-control' type, working like a fleet of tugboats to pull the corporate tanker ship away from what would otherwise be their natural course.[14] If we can create the initiative within large corporations to head in the correct direction on their own, we will need fewer tugboats to correct their course later.

To move forward with this grand project, the most crucial reform is conceptual rather than legal or political. We should cease thinking of corporations as property owned by shareholders, whose ownership in any event is recognized only in the breach. Instead, we should conceptualize businesses as team-like collective economic enterprises making use of a multitude of inputs from various kinds of investors. As I have said elsewhere, 'Corporations are collective enterprises, drawing on investments from various stakeholders who contribute to the firm's success.'[15] The success of corporations depends on the contributions of many different stakeholders, and the governance of corporations should recognize those contributions. Fixating on the contributions of only one of these groups – shareholders – blinds us to the essential investments of the others, and encourages management to prioritize shareholder interest alone. But for a business to succeed people and institutions must invest financial capital; other people must invest labor, intelligence, skill, and attention; local communities must invest infrastructure of various kinds.

None of these investors makes its contribution out of altruism or obligation. What they are doing is contributing in hopes of potential gain if things go well. They expect management to gather inputs from other contributors, put them together in a way that will enable the company to produce goods or services for a profit, and then distribute the wealth that is created. The benefits can come in various forms – goods and services for consumers, jobs for employees, tax bases for communities, financial returns for investors. Each of the contributors has a stake in the company, and the company depends on the contributions of each stakeholder. Unfortunately, in our current regulatory scheme in the United States, the concerns of the other stakeholders are not considered within the internal, structural machinery of corporate governance. These stakeholders are to be taken care of, to the extent they are at all, by way of protections they can gain through contract or external regulation.

Compare this to the UK model of corporate governance, which at least recognizes the obligations to consider these interests, and the European model, which requires

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[14] See Kent Greenfield, *Proposition: Saving the World with Corporate Law* 57 Emory L. J. 948, 970–74 (2008).

[15] Greenfield, *Defending Stakeholder Governance*, *supra* n 11, 1043. The classic description of the 'team' theory of the firm, some of which I accept and some of which I do not, is by Blair and Stout. Margaret M Blair & Lynn A Stout, *A Team Production Theory of Corporate Law* 85 Va. L. Rev. 247, 318–22 (1999).

much more robust social obligation on the part of corporations embodied both in cultural norms and law.[16] Under the European model, the duty to disclose information and consult with employees is much more robust, and many large European companies include labor representatives on their boards. These efforts to include employees in company governance are intended to embody norms of workplace democracy and economic fairness. But they are also seen as an important component of economic success, and indeed Germany – where co-determination is strongest – is now the economic powerhouse of Europe. The CEO of the German company Siemens argues that codetermination is a 'comparative advantage' for Germany;[17] the senior managing director of the U.S. investment firm Blackstone Group has said board-level employee representation was one of the factors that allowed Germany to avoid the worst of the financial crisis.[18]

Once we escape the conceptual stranglehold of shareholder-as-owner, then we can ask the kind of robust questions that go to the heart of the matter. Most crucially: How can we create, empower, and regulate business entities so that they are most likely to create wealth, broadly defined and distributed, while minimizing their harms both immediate and latent? There are a wide range of possible answers to this question, but allow me to propose a few specific regulatory changes for corporate law and governance that would fit within this framework.

First, the law of corporate governance should expand the fiduciary duties of management to include an obligation to consider the interests of all stakeholders in the firm. For decades, the fiduciary obligations of management have been categorized as including a duty of care and a duty of loyalty. Under current judicial interpretation in the United States, both mean something less than one might assume – 'care' has essentially become the duty to gather information and avoid gross negligence; 'loyalty' has devolved into a mere ban on undisclosed self-dealing, such as managers doing special deals with the company on the side.

While it would not hurt if both of these duties were more robust with regard to shareholders, what I am suggesting here is that they run to all the stakeholders of the company, not just shareholders. With regard to the duty of care, this would mean that when senior management or the board makes decisions on the strategic course of the company, they would need to gather and consider information on the effects of the decision on the company's stakeholders. They would not be able to meet their obligation simply by evaluating the impact of the decision on the company balance sheet but by assessing the long-term impact of the decision on the company as a whole, including its implications for employees, consumers, and other stakeholders. As to the duty of loyalty, little would change except to whom the duty would run, meaning

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[16] Aline Conchon, *Board Level Employee Representation Rights in Europe*: *Facts and Trends*, http://www.etui.org/Publications2/Reports/Board-level-employee-representation-rights-in-Europe (2011); see also worker-participation.eu, *MAP: Board-Level Representation in the European Economic Area,* http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/MAP-Board-level-representation-in-the-European-Economic-Area2 (27 Sept. 2013).

[17] Conchon, *supra* n 16.

[18] *Ibid.,* 8.

there would be a greater number of people interested in monitoring the possible malfeasance of management. And, by the way, if a broader duty also meant that the duties were more seriously enforced, the shareholders, too, would be happier.

Admittedly, this change would be more in terms of process than in required results. But process matters, especially when we are talking about the choices of some of the most powerful group decision makers in the world. At the very least, corporate directors (and the executives who putatively report to them) would not be able to make decisions in which the only metric that matters is stock price, measured day-to-day or even quarter-by-quarter.

Besides, this broader fiduciary duty would benefit the company over time. Fiduciary obligations build trust in those who contribute, since they know management has a duty to look after their interests. If management owes obligations of care and loyalty to all the firm's important stakeholders, they are both more likely to invest in the first place and more likely to leave their investment in place over time. This has long been thought to be true of shareholders; but it is true for other kinds of 'investors' as well. For example, employees who do not fear that their interests will be shoved aside any time they are in conflict with short-term profitability will be more loyal and will be more willing to develop firm-specific skills that benefit the company over time, and they will take less of an us-versus-them attitude toward management.[19]

The second specific regulatory change I propose would be to change the actual structure of company boards to allow for the nomination and election of board members who embody or can credibly speak for the interests of stakeholders.[20] Currently, the boards of US companies embody the interests of two groups: senior management and large shareholders. Once we recognize that a variety of stakeholders make essential contributions to the firm, we must face the reality that the current structure does not serve most of those stakeholders well. The way to change this is to require boards to reflect a broader cross section of those who contribute to their companies' success.

How to do this? Figuring out which stakeholders deserve representation and how much they deserve would undoubtedly be tricky. But it need not be impossible. Employee representatives would be fairly straightforward to elect; either we could use the German model, in which employee representatives are selected by the company workforce, or we could simply issue each employee one share of a special class of stock and have a number of board seats elected by that class. If we wanted other stakeholders represented, there are various ways it could be done. Community leaders in the localities where the company has a major presence could nominate a director; long-term business partners and creditors could be represented as well. We could even draw on the Dutch experience and require companies to include a 'public interest

[19] Evidence from Europe bears this out – countries that have strong worker involvement in corporate governance enjoy higher rates of worker productivity, and fewer days lost to strikes, than in countries without such involvement. Stuart Vitols, *Prospects for Trade Unions in the Evolving European System of Corporate Governance*, http://library.fes.de/pdf-files/gurn/00299.pdf, Table 5 (2005).

[20] See Greenfield, *Defending Stakeholder Governance*, *supra* n 11.

director,' whose special obligation would be to vet company decisions from the standpoint of the public.[21]

Clearly, more work needs to be done here, both to develop the theory and the practical prescriptions to test and implement it. But rather than careening between the poles of shareholder primacy or managerial prerogative, this third way of robust fiduciary duties to the company as a whole – which broadens the duty beyond shareholders and creates mechanisms to make such duty more than merely precatory – offers a viable alternative around which stakeholder theorists can coalesce.

II. Diversity and Corporate Decision Making

One of the paradigmatic arguments in favor of shareholder primacy is that it provides a clear rule for board and managerial decision-making. The clarity of the rule means both that managers will not be in doubt as to the ultimate objective in their decision-making and that it will be easier to monitor whether they satisfy it. If the duties of the board are expanded, the argument goes, corporate managers will have more than one 'master' and could then avoid real responsibility to any stakeholder by claiming their actions are to further the interests of another. Economists call this an "agency costs" argument: enlarging the duties of management will increase the agency costs inherent in managing the firm, since it will be more difficult to monitor whether the managers are in fact doing their jobs carefully and in good faith.

There are a number of answers to this argument, many of which I have set out elsewhere.[22] One additional argument deserves to be made now, based on recent insights offered by behavioral research into group decision-making. At base, the argument against stakeholder involvement in corporate decision-making is that the inclusion of their interests will weaken the quality of such decision-making. But there are increasing indications that decision-making would instead be improved with the inclusion of stakeholder representatives and interests.

Behavioral economics began to be taken seriously in the legal academy in the last decade of the twentieth century,[23] and by the early 2000s was beginning to gain traction in corporate law scholarship.[24] Behavioral economics presented a profound chal-

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[21] Waheed Hussain, *The Law Should Make Boards More Diverse*, NY Times, http://www.nytimes.com/roomfordebate/2012/07/04/who-are-corporate-directors-working-for-anyway/the-law-should-make-boards-more-diverse (4 July 2012).

[22] Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age* 2 Harv. L. & Pol'y. Rev. 501, 529–31 (2008).

[23] Christine Jolls, Cass R Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics* 50 Stan. L. Rev. 1471 (1998); Donald Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review* 51 Vand. L. Rev. 1499 (1998); Russell B Korobkin & Thomas S Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics* 88 Calif. L. Rev. 1051 (2000).

[24] Donald Langevoort, *Behavioral Law and Economics* in Cass R Sunstein (ed.), *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)* (Cambridge University Press 2000); Margaret M Blair & Lynn A Stout, *Trust, Trust-*

lenge to corporate law, since it revealed the depth of and ubiquity of cognitive errors that weaken the ability of corporate law to rely on 'the Coasean prediction' that the law can and should presumptively rely on the decisions of private parties 'to allocate rights and obligations optimally.'[25] Among the implications of behavioral economics for corporate and securities law are an increased skepticism of the notion of an efficient capital market, and a deceased reliance on disclosure as a cure-all.[26] Potentially, the most profound implications of behavioral research for corporate governance relates to the question of whether the structure and makeup of corporate boards suppress or inflate irrationalities.

The structure and makeup of boards are quite important for two reasons. First, the fact that the corporation has a sophisticated group decision-maker at the top of the structural hierarchy is seen as a distinctive element of the success of the corporation as a business form.[27] The board functions as a group decision maker for the most important questions that the company faces, and in the words of Stephen Bainbridge, 'it seems useful to think of the board as a production team' with decisions being the product produced.[28] When working properly, boards offer material benefits as compared to solitary, individual decision-makers typical in sole proprietorships or to small groups of decision makers typical in partnerships or similar enterprises. The benefits of group decision making can be significant and in many cases so outpace individual decision-making that the success of groups is higher not only than the average individual in the group but even higher than the best individual in the group.[29] In complex organizations such as corporations, the benefits of group decision-making may be even more profound, since 'the effective oversight of an organization exceeds the capabilities of any individual' and 'collective knowledge and deliberation are better suited to this task.'[30]

Second, the form and process of the board is a central issue in corporate law because it is the primary focus of judicial oversight. Courts are typically reluctant to second-guess the substantive business judgment of management, so courts instead evaluate the propriety of challenged managerial judgments on the basis of the process followed by the board, the information available to it, and its disinterestedness. '[S]o long as a sufficiently independent decision-maker within the approved corporate

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worthiness, and the Behavioral Foundations of Corporate Law 149 U. Pa. L. Rev. 1753 (2001); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool* 35 U.C. Davis L. Rev. 581 (2002).

25 J Jennifer Arlen, Matt Spitzer & Eric Talley, *Endowment Effects Within Corporate Agency Relationships* 31 J. Legal Stud. 1, 2 (2002).

26 Greenfield, *Handbook, supra* n 7.

27 Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press, 1977); Stephen Bainbridge, *Why a Board? Group Decision Making in Corporate Governance* 55 Vand. L. Rev. 1 (2002); Greenfield, *Saving the World with Corporate Law*, *supra* n 24.

28 Bainbridge, *Why a Board?*, *supra* n 27, 8.

29 *Ibid.*

30 Daniel Forbes & Frances Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups* 24 Acad. Mgmt. Rev. 489, 490 (1999).

hierarchy has been given all the material facts and approved some action after due deliberation, the action is beyond serious judicial review.'[31]

Traditionally, the disinterestedness obligation of board members was deemed to be violated only when decision-makers had some kind of pecuniary interest at stake, or had a close family member so interested. The worry, of course, was that corporate leaders were acting on the basis of self-interest rather than for the benefit of the corporation. Courts and commentators, therefore, often concentrated on the 'independence' of members of the board, as defined by the lack of employment or financial relationship with the company. Decisions made by a board dominated by non-independent members were seen as tainted; decisions validated by independent members were deemed trustworthy.[32] The academic literature generally looked at function more than form, but even there the key question was whether board members were sufficiently independent in perspective and attitude to satisfy the board's monitoring obligation.[33]

Especially in the light of the judicial focus on structure and process and on economic ties as sources of disloyalty, behavioral research revealing predictable flaws in group decision making is likely to pose difficulties for traditional corporate law doctrine. For example, behavioral studies have shown significant skewing effects on decision-making springing from sources other than economic interests. One such effect is that of in-group/out-group identification. When those inside a group (board members, for example) are challenged by someone outside the group (a shareholder plaintiff alleging a breach of fiduciary duty, for example) they tend to defend and defer to their fellow group members.[34] So even if a group member is independent in that she has no financial interest in the conflict, the psychological tendency to align against the challenger will influence her review of the merits of the challenge. More generally, any psychological effect that makes it difficult for a director truly to provide an independent check on management is largely ignored by corporate doctrine, even when decision-making is biased significantly.[35]

In addition, behavioral research has shown predictable defects in decision making that have less to do with self-interest or disloyalty than with other kinds of bias and mistake. As mentioned above, group decision-making is thought to be a significant reason for the success of corporations as a business form, in part because of a group's

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[31] Daniel Langevoort, *Behavioral Approaches to Corporate Law* in CA Hill et al. (eds), *Research Handbook on the Economics of Corporate Law*, 446 (Edward Elgar 2012).

[32] *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *In re Walt Disney Company Derivative Litigation*, 906 A.2d 27 (2006).

[33] Victor Brudney, *The Independent Director: Heavenly City or Potemkin Village?* 95 Harv. L. Rev. 597 (1982); Daniel Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability* 89 Geo. L. J. 797 (2001).

[34] Kristin Lane, Jerry Kang, & Mahzarin R Banaji, *Implicit Social Cognition and Law* 3 Ann. Rev. Law and Soc. Sci. 427 (2007); Margaret M Blair & Lynn A Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law* in William Peter Robinson (ed.), *Social Groups and Identities: Developing the Legacy of Henri Taifel* (Butterworth-Heinemann 1996).

[35] Claire A Hill & Brett McDonnell, *Disney, Good Faith, and Structural Bias* 32 J. Corp. L. 833 (2007).

ability to improve on the decision-making of individuals by exposing and mitigating bias and mistake. But these benefits can vanish, and indeed transform into costs, if the group reinforces bias and submerges mistakes, worsening irrationalities. As Avishalom Tor has recently written, 'the evidence shows small-groups outperform individual rationality in some cases but at other times exhibit similar or even more extreme judgmental biases and decision errors.'[36]

'Groupthink' is the most common example of this phenomenon, and is particularly relevant for corporate governance. 'Groupthink' is the label attached to mistakes made by institutional decision-makers when the presence of similarly thinking participants in a group results in biases being reinforced rather than challenged, and mistakes validated rather than exposed.[37] Another example of group tendencies that worsen decision-making is the inclination for discussion within groups comprised of individuals with similar worldviews and perspectives to harden those perspectives and views. In discussions about political issues, for example, groups on the extremes of political discourse become more extreme after discussion within the group.[38] These implications are greater within groups that are homogeneous in perspective and in racial, gender, and class composition, since 'defective' decision making is 'strongly correlated' with structural flaws such as 'insulation and homogeneity.'[39] As Jolls and Sunstein have articulated, 'erroneous judgments often result when deliberations are undertaken by like-minded people.'[40]

The worry from a corporate governance perspective is that the quality of the decision-making of the board is eroded when its homogeneity and insularity make it less likely that ideas will be properly vetted or assumptions appropriately challenged.[41] If a key element of the success of the corporation as a business form is the presence of a sophisticated group decision-maker at the top of the business structure, this success is put at risk when the board suffers from structural or formational defects that weaken the decisional process or skews the results.

Like the worry about bias and disloyalty, this concern about the insularity and homogeneity of the board is not mitigated by the traditional corporate law insistence on board member independence. The mere fact that a board member is not employed by the company does not correlate well with the needed diversity of perspective. Instead, attention needs to turn to the actual makeup of the board, with the goal of

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[36] Avishalom Tor, *The Market, The Firm, and Behavioral Antitrust* in *The Oxford Handbook of Behavioral Economics and the Law*, 63 (Notre Dame Legal Studies 2013).

[37] Kath Hall, *Looking beneath the Surface: The Impact of Psychology on Corporate Decision Making* 49 Managerial Law 3, 93 (2007); Irving Lester Janis, *Groupthink: Psychological Studies of Political Decisions And Fiascoes* (Houghton Mifflin 1983); Marleen O'Connor, *The Enron Board: The Perils of Groupthink* 71 U. Cin. L. Rev. 1233 (2003).

[38] Daniel Isenberg, *Group Polarization: A Critical Review and Meta-Analysis* 50 J. Personality and Soc. Psychol. 1141 (1986); Cass R Sunstein, *Group Judgments: Deliberation, Statistical Means, and Information Markets* 80 N.Y.U. L. Rev. 962 (2005); Tor, *supra* n 36, 63.

[39] Cass R Sunstein, *Why Societies Need Dissent* (Harvard University Press 2003).

[40] Christine Jolls & Cass R Sunstein, *Debiasing Through Law* 35 J. Legal Stud. 199, 218 (2006).

[41] Greenfield, *Saving the World with Corporate Law*, *supra* n 24.

using greater board pluralism as a tool to create a board culture that encourages dissent and challenge.

If the homogeneity of groups is a reason to worry about the quality of its decisions, then the current makeup of most boards is quite flawed. In fact, corporate boards may be the least diverse powerful institutions in the United States. Scholars increasingly point out the gender and racial homogeneity of boards and executive suites, and the dangers to decision-making posed by such narrowness.[42]

Indeed, the value of more diverse boards is an area where behavioral research is likely to be quite helpful going forward. If diversity does indeed assist in debiasing boards, then more diverse boards should experience improvements in their decision-making. While the question of how to measure such improvements is tricky, behavioral research is beginning to amass a fairly convincing set of studies that bolster the hypothesis that diversity improves board (as opposed to company) performance. For example, boards with more women have been shown to be more active and independent in monitoring management, to be more likely to engage with the company's stakeholders, to show more attention to risk oversight and control, and to be more likely to be concerned about social responsibility.[43] There is also evidence that the presence of women on a board improves the quality of board deliberations, in part by empowering 'constructive dissent' that can lead to 'board unity,' which is 'essential to setting a clear strategic direction and to overseeing risk and resources.'[44,45] One notable finding is that male directors attend more board meetings when the board is more gender diverse.[46] Other recent findings indicate that more diverse business teams are able to take advantage of a wider pool of relevant knowledge.[47] In the words

[42] Lisa M Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?* 89 N.C. L. Rev. 855 (2011); Douglas M Branson, *The Last Male Bastion: Gender and the CEO Suite at Public Companies* (NYU Press 2010); Lissa L Broome & Kimberly D Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?* 77 U. Cin. L. Rev. 341 (2008); Douglas M Branson, *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* (NYU Press 2007); Devon W Carbado & G Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities do When they get There* 61 Wash & Lee L. Rev. 1643 (2004).

[43] David AH Brown, Debra L Brown & Vanessa Anastosopoulos, *Women on Boards: Not Just the Right Thing... But the "Bright" Thing* (Conference Board of Canada 2002).

[44] Ronald J Burke & Susan Vinnicombe, *Women on Corporate Boards of Directions: International Research and Practice* in Susan Vinnicombe et. al. (eds), *Women on Corporate Boards of Directors: International Issues and Opportunities* (Edward Elgar 2008); Quinetta M Robertson & Hyeon Jeong Park, *Examining the Link Between Diversity and Firm Performance: The Effects of Diversity Reputation and Leader Racial Diversity* 32 Group and Org. Mgmt. 548 (2007); Morton Huse & Anne Grethe Solberg, *Gender-Related Boardroom Dynamics: How Scandinavian Women Make and Can Make Contributions on Corporate Boards* 21(2) Women in Mgmt. Rev. 113 (2006); Nicholas Van der Walt & Coral Ingley, *Board Dynamics and the Influence of Professional Background, Gender, and Ethnic Diversity of Directors* 15 Corp. Governance 291 (2003).

[45] Brown, Brown, & Anastosopoulos, *Women on Boards*, *supra* n 43, 5.

[46] Renee B Adams & Daniel Ferreira, *Women in the Boardroom and their Impact on Governance and Performance* 94 J. Fin. Econ. 291 (2009).

[47] Sander Hoogendoorn & Mirjam van Praag, *Ethnic Performance and Team Performance: A Field Experiment*, Discussion Paper 6731 (Inst. for the Study of Labor 2012).

of Aaron Dhir, 'establishing a level of "cognitive diversity" in the boardroom is … a key strategic asset which serves to assist the firm in averting the perils and docile conduct associated with groupthink.'[48]

Two caveats to this body of research need articulation. The first is that any benefits to diversity will have to be measured against the possible costs of diversity, including a less streamlined decision-making process and less intragroup trust, at least initially.[49] From the standpoint of institutional design (as opposed to justice, for example) the goal is to have boards with 'enough diversity to encourage the sharing of information and active consideration of alternatives, but enough collegiality to sustain mutual commitment and make consensus-reaching practicable.'[50]

The other caveat has to do with the link between board performance and company financial performance. Assuming board management matters, we should expect to see improvements in board decision-making manifested in improvement in company financial performance. To date, however, the evidence as to whether diversity of boards leads to measurable improvements in company financial performance is largely equivocal.[51] Dhir, for example, reports that while some studies find a correlation between board diversity and profitability, the causal link is unclear and its direction uncertain.[52] And even when a causal link is indicated, the data suggest that some board functions benefit from diversity while others do not.[53]

Of course these equivocal data do not disprove the arguments in favor of board diversity. The data might be unclear because the correct 'mix' of diversity has yet to be calibrated, or it could suggest that the benefits of diversity to board performance accrue in ways that do not appear in the financial data in the short term. It is also important to note that evaluating the benefits of diversity only in terms of financial data ignores diversity's nonfinancial benefits and undervalues its other rationales.[54]

All in all, the research remains undeveloped enough that it is yet unknown how best to create the conditions whereby the benefits of diversity are maximized and the costs minimized. It seems clear enough that sufficient numbers are necessary to overcome the problems of tokenism and self-censorship. Efforts to clarify how best to cure the problems of homogeneity are almost certainly to be worth the scholarly and regulatory attention.

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48 Aaron A Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity* 35 Queen's L. J. 569, 595 (2010).

49 Langevoort, *The Human Nature of Corporate Boards, supra* n 33.

50 *Ibid.,* 810–1.

51 David Carter, Frank P D'Souza, Betty J Simkins & W Gary Simpson, *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance* 18(5) Corp. Governance: An Int'l Rev. (2010); Dhir, *supra* n 48; Branson, *No Seat at the Table, supra* n 42; Kathleen A Farrell & Philip L Hersch, *Additions to Corporate Boards: The Effect of Gender* 11 J. Corp. Fin. 85 (2005).

52 Dhir, *supra* n 48.

53 *Ibid.*

54 Fairfax, *Board Diversity Revisited, supra* n 42; Thomas W Joo, *Race, Corporate Law, and Shareholder Value* 54 J. Legal Ed. 351 (2004).

Moreover, it is also worth considering that gender and racial diversities are hardly the only kinds of pluralism likely to be effectual in debiasing board decisions and protecting against groupthink. In fact, class differences may trump racial and gender differences as proxies for distinctiveness of perspective.[55] As I argued above, broadening the board (even by way of mandatory rule) to include directors elected by employees and other stakeholders would improve board deliberation.[56] There are firm-level and country-level data that can be cited in support of 'co-determined' boards, if not for stakeholder boards.[57] Some business leaders, for example, have suggested that the resilience of Germany in the face of the global financial crisis is owing, at least in part, to German companies' inclusion of employee representatives on supervisory boards.[58] But behavioral research is quite thin in this area, with insights coming from extrapolating from behavioral research regarding political differences among members of groups, the creation of in-group identity, and the salience of the tendency for reciprocity.[59]

As behavioral scholarship on diversity grows in influence and scope, it is worth emphasizing that traditional corporate law jurisprudence is unlikely to be sufficiently nimble or accommodating to do much about its insights. The board's own makeup falls squarely within the sphere of business judgment toward which US courts generally genuflect. As of 2010, the Securities and Exchange Commission does require US companies to disclose 'whether, and if so how, the nominating committee…considers diversity in identifying nominees for director,' but there is no teeth in the provision and the kinds of diversity at issue are few.[60] The Sarbanes-Oxley Act of 2002 incentivized greater board member independence, especially on auditing committees, which some have argued will help with the debiasing project.[61] But as mentioned above, behavioral research suggests that the independence called for is not the kind that will lead to real diversity of perspectives.[62]

For our purposes, however, these behavioral studies indicate that diversity on boards will likely improve the quality of their decision making, especially in guarding against the perils of 'groupthink.' As this research grows in scope and persuasiveness, so will the arguments in favor of stakeholder boards.

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[55] Lisa M Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards* 2005 Wis. L. Rev. 795 (2005).

[56] Kent Greenfield, *The Stakeholder Strategy* 26 Democracy: A Journal of Ideas 47 (2012); Greenfield, *Defending Stakeholder Governance*, *supra* n 11; Greenfield, *Saving the World with Corporate Law*, *supra* n 24; Greenfield, *The Failure of Corporate Law, supra* n 13.

[57] Conchon, *supra* n 16.

[58] *Ibid.*

[59] Greenfield, *The Failure of Corporate Law, supra* n 13.

[60] Fairfax, *Board Diversity Revisited, supra* n 42.

[61] Jolls & Sunstein, *supra* n 40.

[62] Oliver Marnet, *Behavior and Rationality in Corporate Governance* 1 Int'l J. Behav. Acct. and Fin. 4 (2008).

III. Competing Interests

1. The Debate

In most discussions of the age-old question of whether stakeholder interests are served by the shareholder primacy norm, the analysis from the shareholder primacists is fairly rudimentary and follows a straightforward logical syllogism. In the long run, they say, all stakeholders benefit from the survival of the firm. And because there is unity between the interests of the firm as a whole with those of shareholders as residual claimants, as long as managers act with care and loyalty toward shareholders they will satisfy the interests of other stakeholders as well.

One hears this argument in various guises, and it is ultimately unpersuasive.[63] It is true that stakeholders tend to benefit from the firm's survival over time; a company that is losing money is not much good to anyone with any kind of investment in the firm. (There are exceptions to even this assertion. Consider, for example, whether the environment and those who depend on it benefit from the eternal survival of Exxon Mobil.) But when we look past the narrow circumstance of when a firm is failing, the claim that stakeholder and shareholder interests coalesce becomes tenuous. A company that makes money for shareholders does not necessarily create wealth for others or for society. Without a mechanism within the corporation to force it to absorb externalities or to share profits with all stakeholders, there is no necessary gain on the part of employees, for example, even when the firm is making a great deal of money. The 'trickle down' is not inevitable. Shareholder gain could come, in fact, as a result of a transfer of wealth *from* labor or *from* society.

Moreover, shareholders will prefer managers to engage in decisions that may be overly risky from the perspective of other stakeholders and of society as a whole. Because of limited liability, shareholders are protected from bearing the full downside costs of risky decisions, whereas on a societal basis all costs have to be accounted for. As I have said elsewhere, '[t]here is no such thing as a "limited liability society" in which society contributes to the corporation in very meaningful ways (providing workers, real property) without fear of bearing the negative impact of its operation.'[64]

Another reason why I find unpersuasive the argument that the long-term interests of stakeholder and shareholder coalesce is that, following Keynes, 'in the long run we are all dead.'[65] In other words, even if the shareholder primacists were correct that such coalescence occurs, the time horizon assumed is many years in the future. This weakens the argument in two ways. First, shareholders who care only about the financial aspect of their share ownership (which, we are told to assume, are all of them)

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[63] I explained why I do not find this argument persuasive elsewhere. For a sampling, *see* Greenfield, *The Failure of Corporate Law, supra* n 13, 137.

[64] For an argument that employee interests are a better proxy for the interests of the firm, and for society as a whole, see *ibid.,* 41–71.

[65] 'But this long run is a misleading guide to current affairs. In the long run we are all dead.' John Maynard Keynes, *A Tract on Monetary Reform* 80 (MacMillan 1924).

will have any long-term gains or losses swamped by short-term losses or gains. This is a financial truism – assuming a reasonable discount rate, the long-term financial implications of decisions trend toward zero as the time horizon moves further out. For example, at a seven percent discount rate – the rate assumed by the US government for some projects, based on a typical rate of return for private investments[66] – a $100 benefit in one hundred years is worth only twelve cents today. So any rational shareholder would prefer a thirteen-cent gain today rather than a $100 gain in a hundred years, even if all the gain inured to them rather than others.[67] A more troubling example, assuming the same discount rate: even if shareholders were convinced that climate change will be a major crisis in the long-term, causing a $100 trillion dollars in damage 500 years from now (and assuming they were not able to externalize any of the costs to others), what would they rationally spend now to avoid it? Twenty cents.[68] So shareholders will not likely push for decisions that benefit the firm as a whole – much less other stakeholders – if the payoff is likely to be far in the future.[69]

Second, the potential payoffs to stakeholders of shareholder primacy are too far in the future to be worthy of deference. In a sense, this is the same point about the discount rate made above with regard to shareholders, only more concrete. At heart, the argument for shareholder primacy is an argument that attention to shareholder interests will naturally, as by an invisible hand, benefit other stakeholders. A necessary corollary to this claim is that corporate managers should be *prohibited* from taking into account the interests of other stakeholders. But note the audacity of the claim – the best way to benefit other stakeholders is for their benefit never to enter the managerial decision making calculus. Not even Adam Smith, who created the notion of the invisible hand, ever suggested that those in charge of capital should be prohibited from taking into account the implications of its use on those who do not own it.

So the claim about the long-term interests of other stakeholders reduces to the notion that the bare survival of firms is the best way to benefit all stakeholders. This can only be true, if at all, in the longest of long terms, and only if a host of other conditions are met. One example will suffice to illustrate the tenuous nature of the claim. Imagine a company facing the choice of whether to close a unionized, high-wage factory and moving production to a sweatshop in a country that has no health and safety protections for workers. Shareholders will certainly prefer the change, holding all else equal. The decrease in labor costs will flow to the corporation's bottom line, available for distribution to shareholders. Revenue flowing to labor shifts from one locale to another, and decreases in the aggregate.[70] How is labor, or society as a whole,

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[66] See OMB Circular A-94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*, http://www.whitehouse.give/omb/circulars_a094, 9 (29 October 1992).

[67] For an excellent and accessible explanation of this point, *see* Frank Partnoy, *WAIT: The Art and Science of Delay* 236–40 (PublicAffairs 2012).

[68] *Ibid.,* 239.

[69] For an explanation of why long-term costs are not internalized in short-term security prices, see Kent Greenfield, *The Puzzle of Short-Termism* 46 Wake Forest L. Rev. 627 (2011).

[70] For simplicity, I am ignoring the possible difference in the marginal utility of income between the higher income (former) employees and the lower income (new) employees, as well as the possible

benefited? Only if the benefit to the shareholders, or to the firm, outweighs the net costs suffered by the employees, *and those benefits flow from the shareholders to others.* To believe it would, one has to rely on trickle-down economics or trust the redistributional efforts of government. The former is dubious; the latter is contentious and unreliable.

2. *Representing Competing Interests*

A more sophisticated way to think about the relationship among various stakeholders would recognize that some policies, norms, and laws work to the benefit of a subset of stakeholders, some are consistent with the interests of only one stakeholder, and a few are valuable to all. At its simplest, one could represent such a tradeoff between two stakeholders with a simple two-by-two quadrant. For example, the potential relationships between shareholder and employee interests could be represented as in Figure 1.

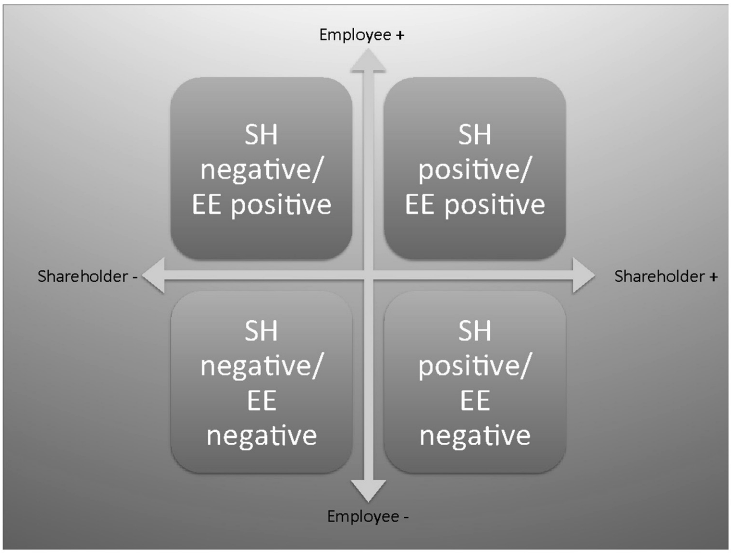

Figure 1.

Some policies would likely be in the interests of both, and would fit in the northeast quadrant. Limits on executive compensation, for example, would best go there. Some would benefit neither, and would fit in the southwest quadrant. An example of this would be judicial deference to 'selfish' charitable spending by management.[71] Some

difference in the marginal utility of the gain enjoyed by the shareholders and the marginal disutility of the loss suffered by labor.

[71] See, for example, *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991) 54–5 (upholding a corporate expenditure to fund an art museum as homage to the company's CEO).

policies benefit one stakeholder at the expense of the other. A high minimum wage, for example, most likely benefits employees and costs shareholders, putting it in the northwest quadrant. An enforceable profit-maximization norm benefits shareholders and most likely hurts employees, putting it in the southeast quadrant. (A more nuanced analysis would place policies and norms as a point in relation to each axis. It is possible, for example, for a policy to be very beneficial to employees, and thus high on the north/south *y*-axis, but neutral on the east/west *x*-axis.)

One might dicker about which policy or norm fits in which quadrant, and it is possible that variations in time horizon influences which quadrant a policy belongs in. But this figure helps concretize the argument. For example, when shareholder primacists argue that shareholder and stakeholder interests coalesce, they are in effect arguing that all policies and rules trend over time toward a line stretching from the southwest corner to the northeast corner.

Of course such a two-dimensional figure does not capture much. Many of the most troubling dilemmas in corporate governance are not between shareholders and employees, but between managers and other stakeholders. How can managerial discretion be limited while still giving them true responsibility to manage the firm? Indeed, much tension in the policy and law governing corporations can be described as the interplay among shareholders, managers, and employees. To represent such tension, one option is a Venn diagram. See Figure 2.

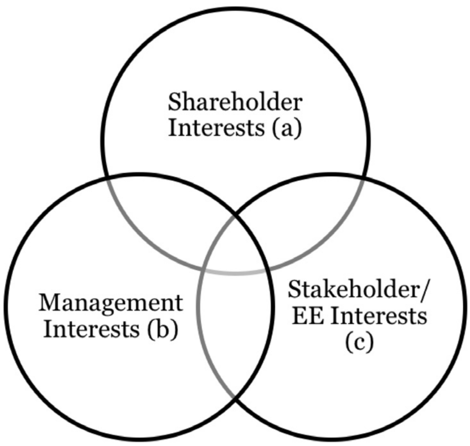

Figure 2.

The intuition is straightforward. Some policies benefit one group over the other two; some benefit two out of the three, a few all three.

The best way to represent the interplay among these three groups, however, is to add a third (*z)* axis to our previous figure. Again, the intuition is straightforward. Policies have a different range of benefits and costs or limitations for the three groups. Any given policy, rule, or norm can be represented on a 3-axis figure according to those benefits and costs. See Figure 3.

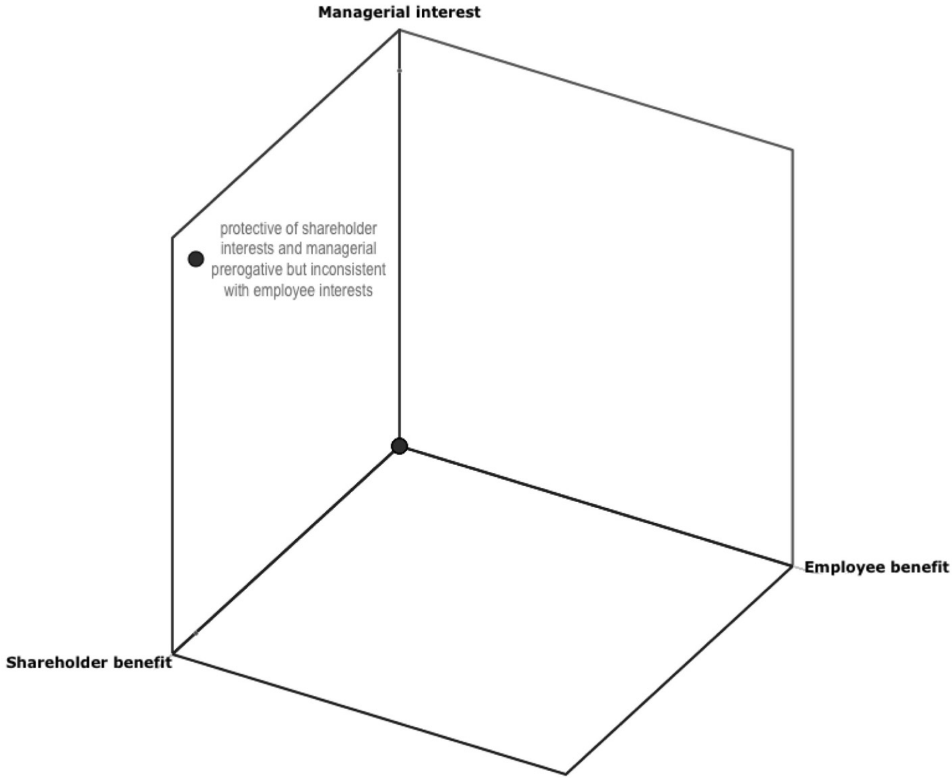

Figure 3.

Playing with this concept, allow me to suggest where some possible policies and rules would properly be located on this figure. A policy that would be protective of shareholder interests and managerial prerogative, but inconsistent with employee interests would fit as noted on Figure 3, near the northwest corner of the left wall. An example of such a policy would be executive compensation policies, such as options tied to share price, which align the interests of management with those of shareholders. Such policies reduce the possible disparity of interests between managers and shareholders, but most likely increases the disparity of interests between those two parties on the one hand and employees (and other stakeholders for that matter) on the other.

A policy that protected employee interests and managerial prerogative, at the expense of shareholders, would lie at the northeast corner of the right-hand wall of the figure. See Figure 4. An example of such a policy would be a rule of judicial deference to management, such as the business judgment rule in the United States, when used by management to increase wages or benefits to employees. Another example would be deference to a managerial decision to use corporate funds for pro-employee charities.

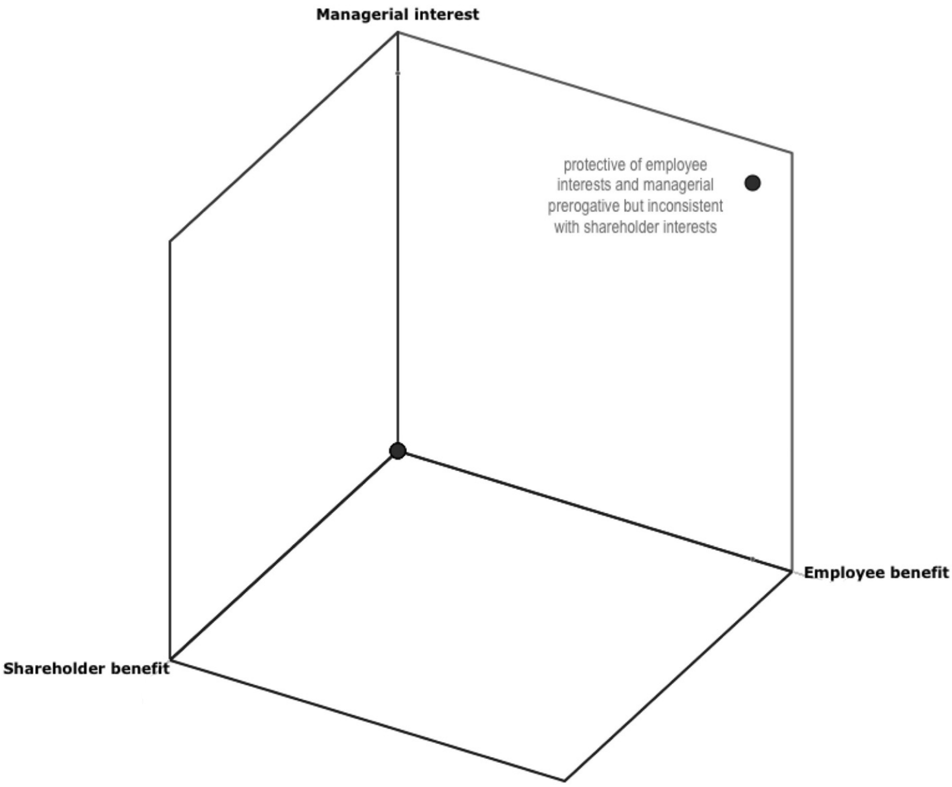

Figure 4.

A policy that limited managerial discretion to the benefit of both employees and shareholders would lie at the southern corner of the floor of the figure. See Figure 5. An example of such a policy would be a strong, enforceable duty of loyalty that would make it difficult for managers to engage in self-dealing.

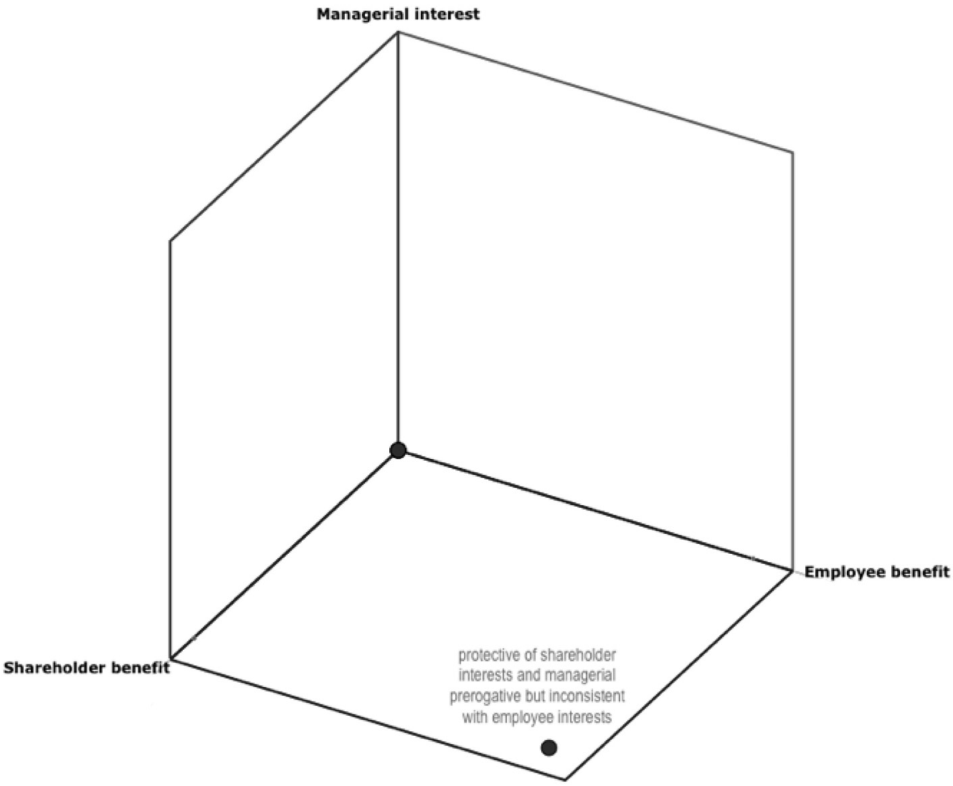

Figure 5.

Policies that benefit one party at the expense of the other two would lie at the point of each axis. A policy protecting managers at the others' expense – for example a business judgment rule so strong as to protect managerial carelessness or selfishness would lie at the top of the figure at the high point of the 'managerial interest' axis. See Figure 6. A policy protecting employees alone – strong protection for trade unions, for example – would lie at the end of the 'employee benefit' axis. See Figure 7. A shareholder policy that comes at the expense of the other two parties, such as an enforceable profit maximization norm, would lie at the end of the 'shareholder benefit' axis. See Figure 8.

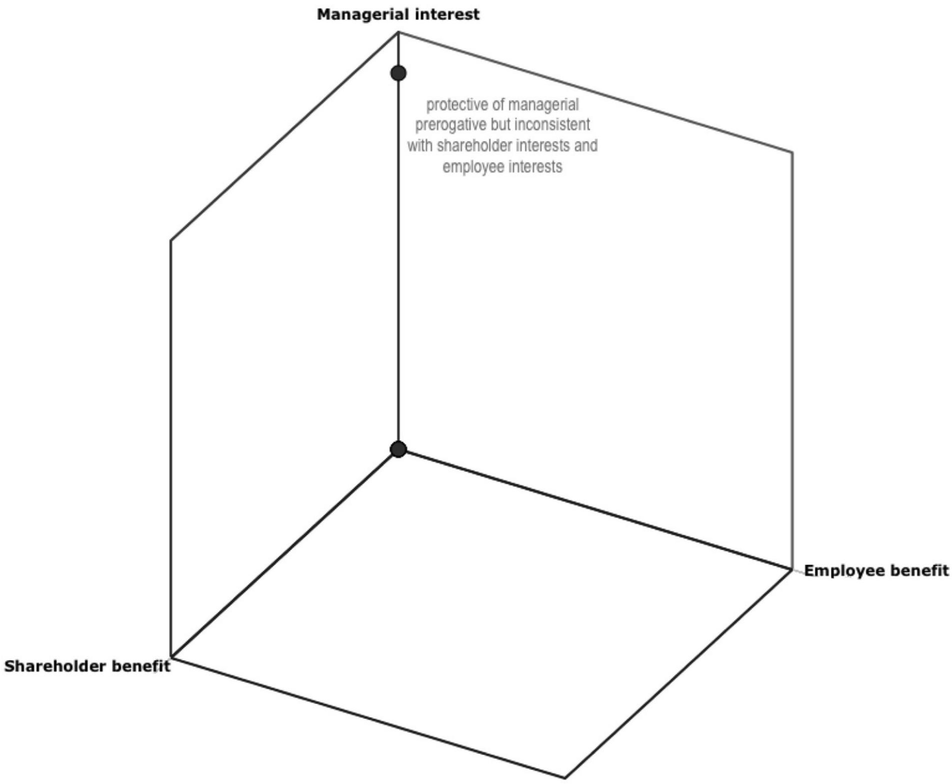

Figure 6.

Mapping the possible interaction among these three parties along three axes essentially creates a two-by-two-by-two matrix of possibilities. For simplicity, they are best represented here by a pair of two-by-two quadrants, one which holds constant managerial constraint, and the other holding constant managerial prerogative. See Chart 1. These two quadrants can be imagined sitting on top of each other, with managerial interests running along a vertical *z*-axis.

Then any policy, rule, law, or norm affecting corporate governance can be placed in one of the eight boxes created by the matrix. (I have included some illustrative policies in each box.) Policies consistent with the interests of all three – a strong business judgment rule when used by management to manage for the long-term benefit of all stakeholders, example – would be diagonal from a box containing policies inconsistent with all three – for example a rule protecting a stakeholder not among the three at the expense of the company.

Again, one can reasonably disagree as to the location in this matrix of any given policy or rule. In any event, my hope is that these figures aid in furthering a more sophisticated analysis of the interplay among the interests of the various parties. Such interplay is not always bipolar; rather, there are more possibilities for how they interact.

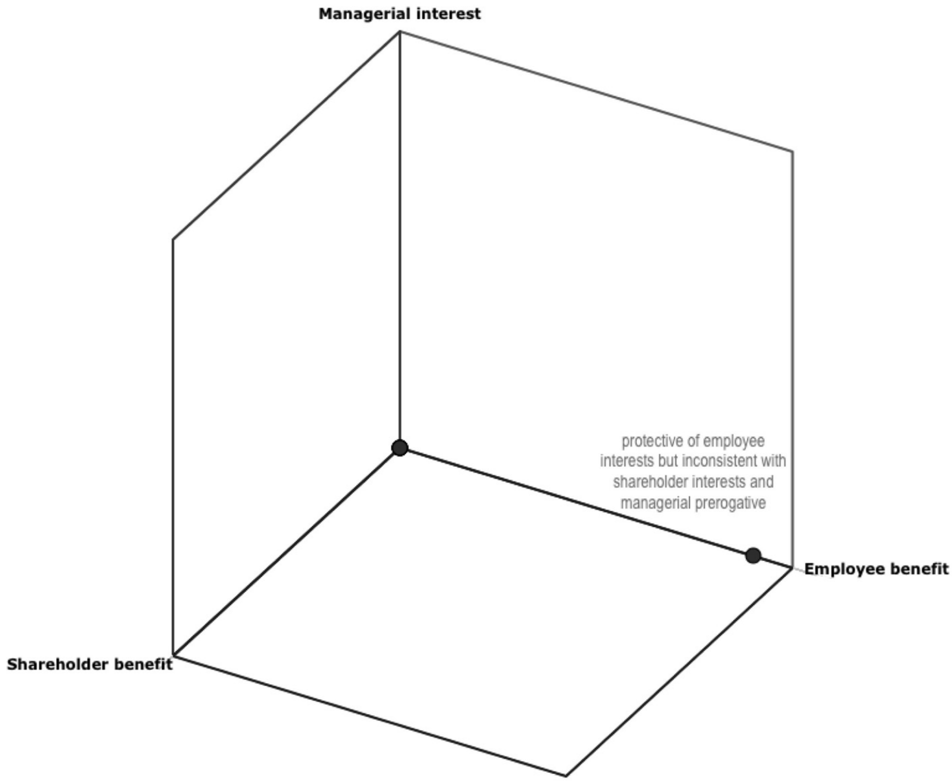

Figure 7.

IV. Conclusion

Much work lies ahead of those predicting, and advocating for, the downfall of shareholder primacy. Stakeholder scholars should coalesce around a coherent alternative theory, should offer cogent reasons for switching, and offer tools to analyze whether such a switch is necessary. In this paper I have sketched the beginnings of a contribution in each area of scholarly need. This is only a beginning, to be sure. But the window of opportunity for challenging the deeply embedded assumptions of conventional theories of corporate governance will not stay ajar forever. Stakeholder theorists should take advantage of such an opportunity now, before the window closes.

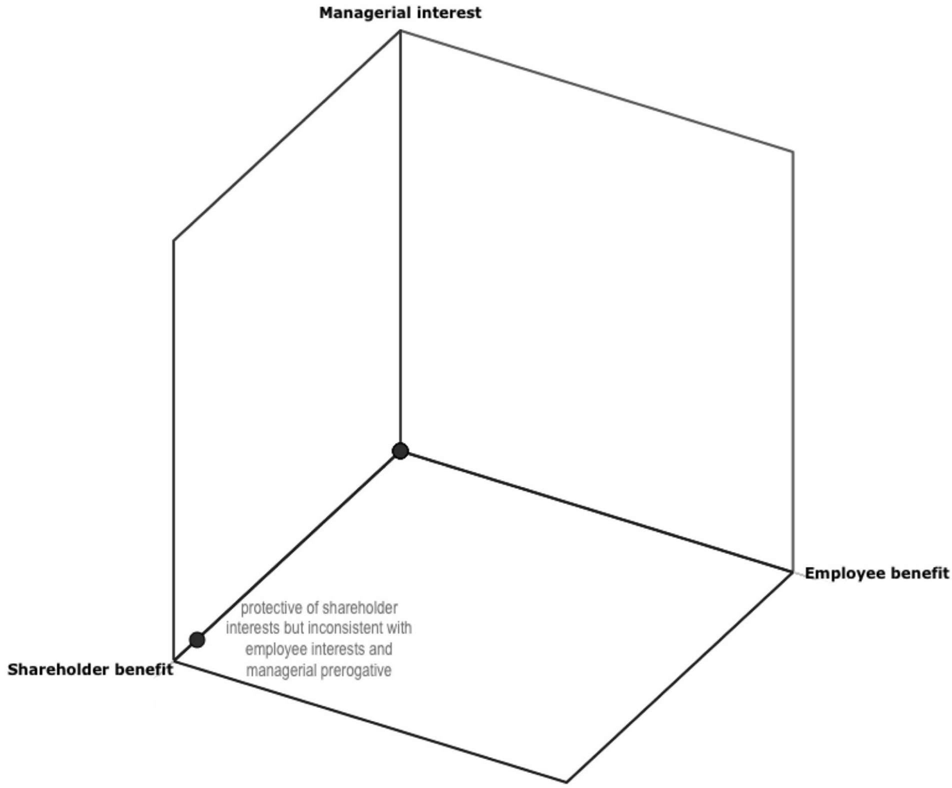
Managerial interest
Employee benefit
Shareholder benefit
protective of shareholder interests but inconsistent with employee interests and managerial prerogative

Figure 8.

Limits and Constraints on Management

	Inconsistent w SH interests	Consistent w SH interests
Consistent w EE interests	*minimum wage *union organizing protection *(some) environmental protection	*limits on exec compensation *management of tort/disaster risks to labor (eg factory fires) *limits on insider trading? *insistence on obedience to law *strong duty of loyalty *strong duty of care (in Germany?)
Inconsistent w EE interests	*consumer protection *(some) environmental protection	*profit maximization norm *strong duty of care (in US)

Protections of/Allowances to Management

	Inconsistent w SH interests	Consistent w SH interests
Consistent w EE interests	*BJR (when used to benefit ees) *pro-ee charity	*BJR (when used to manage for long-term success)
Inconsistent w EE interests	*BJR (when used to protect mgrial self-dealing or carelessness) *(some) political spending *selfish charities (eg Armand Hammer)	*(some) political spending *strong link b/w exec comp and share price

Chart 1.