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AN INTELLECTUAL HISTORY OF SHAREHOLDER PRIMACY FROM DODGE V. FORD THROUGH THE RISE OF FINANCIALISM

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ABSTRACT

Standing in the way of some sustainable business practices is the belief that corporate fiduciaries must maximize shareholder wealth at all costs. In my previous work, I have sought to dispel that myth, showing that American corporate law imposes no such duty, and that the object of shareholder wealth maximization is at most a stubborn norm. This Article will explore this norm further, tracing the idea from its inception, to its famous articulation in the classic case of Dodge v. Ford*, and through the influence of the law and economics movement and the rise of financialism at the end of the last century. The Article will then examine the current debate over shareholder primacy, sustainability, and corporate social responsibility, arguing that the shareholder primacy norm is on the decline in the United States and will fail to take hold internationally. A new norm of enlightened stakeholderism, I posit, is gradually taking its place, pursuant to which firms aim to be not just profitable but environmentally and socially responsible, as well.*

INTRODUCTION

The conventional view in American business that corporations are to be managed for the exclusive benefit of shareholders stands in stark contrast to notions of corporate social responsibility, where the firm is seen as serving broader objectives: shareholder profits, to be sure, but benefits for the corporation's other constituencies, as well. The former view—variously known as "shareholder primacy," "the shareholder value movement," and "shareholder wealth maximization"—now dominates corporate law and

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practice, and its persistence renders it difficult for firms wishing to take a socially responsible approach to doing business to do so. Simply put, a firm cannot maximize its shareholders' returns and at the same time be more than minimally generous with employees, more than minimally compliant with applicable environmental laws, or more than minimally benefit the communities in which it does business.

Shareholder primacy and corporate social responsibility are, in other words, largely incompatible. Likewise for shareholder primacy and sustainable business practices, which aim to benefit the environment and larger society as well as the company's finances over the long term.[1] To be sure, many socially responsible and sustainable business practices substantial carry financial benefits, generating, if not quite maximizing, shareholder profits.[2] But a profit-maximizing imperative may discourage even these profitable forms of corporate social responsibility, on the assumption that they might detract from profits and on the ground that corporations should not engage in public-minded activity.

This has not always been the case. In fact, although shareholder primacy as an idea has been around for over a century, it did not come to dominate corporate law and practice until relatively recently. This Article traces this development and speculates about the future of shareholder primacy in the United States and internationally. Part I will begin with a closer look at shareholder primacy, arguing that its profit-maximization imperative is not a legal requirement but rather a social norm now firmly entrenched in American business. Part II will then trace the history of the shareholder primacy concept, from its inception with Adam Smith, to its famous articulation in *Dodge v. Ford*,[3] through the law and economics movement, the rise of financialism, to today. Part III will relate this history to the corporate social responsibility debate and argue that the shareholder primacy norm is on the decline and being gradually replaced by an enlightened stakeholderism norm whereby firms aim to be not just profitable but environmentally and socially responsible, as well.

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[1] See Judd F. Sneirson, The Sustainable Corporation and Shareholder Profits, 46 Wake Forest Law Review — (forthcoming 2011) (describing sustainability in the business context).

[2] See id. at — (noting the frequent overlap between environmental, social, and financial goals and citing studies); see also Dennis D. Hirsch, Green Business and the Importance of Reflexive Law: What Michael Porter Didn't Say, 62 Administrative Law Review 1063, 1072 (2010) (identifying areas in which a company's financial and environmental goals might overlap).

[3] See Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

I. The Shareholder Primacy Norm

Under the shareholder primacy view, corporate managers should put shareholders and shareholder returns first, striving to maximize the value of the corporation's shares and eschewing the interests of other corporate constituencies, such as the corporation's creditors, suppliers, customers, employees, and the communities in which the company operates.[4] Tending to these "other constituencies" might detract from what would otherwise contribute to shareholder profits, and as such shareholder primacy discourages it.

American corporate law does not mandate this approach to doing business, although many in law and business believe that it does.[5] No statute, in Delaware or elsewhere, requires directors or officers to maximize shareholder profits. On the contrary, most corporate statutes explicitly endorse departures from a profit-maximizing objective in two respects. First, most state corporation codes permit corporate fiduciaries to take the interests of non-shareholder groups into account when evaluating merger proposals or charting the course for the firm.[6] And second, most corporation codes empower firms to make charitable contributions; although such donations frequently carry public-relations benefits, they on the whole detract from more than contribute to company profits.

Decisional corporate law is less clear on this issue. A small handful of decisions, most notably *Dodge v. Ford Motor Company*,[7] assert that the primary purpose of the corporation is to make profits for shareholders.[8] But

[4] See D. Gordon Smith, The Shareholder Primacy Norm, 23 Journal of Corporation Law 277, 290-91 (1998).

[5] See generally Judd F. Sneirson, Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance, 94 Iowa Law Review 987, 995-1007 (2009).

[6] See id. at 997-98. About two-thirds of the states have such "other constituency" statutes and although Delaware is not among them, decisional Delaware accomplishes the same result. See id. at —.

[7] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); infra Part II.B.

[8] See 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, to the reduction of profits, or to the nondistribution of profits among its stockholders in order to devote them to other purposes."); see also Katz v. Oak Indus., Inc., 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 shareholders."); Long v. Norwood Hills Corp., 380 S.W.2d 451, 454 (Mo. Ct. App. 1964) ("The ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders."); Granada Investments, Inc. v. DWG Corp., 823 F. Supp. 448, 459 (N.D. Ohio 1993) ("[T]he sole duty of a corporation's officers is to maximize shareholders' wealth."). Academics, by contrast, make much of *Dodge v. Ford*, featuring it

these passages are dicta, however, and later cases do not even cite these decisions for the shareholder-profit-maximization proposition.[9] Some Delaware cases note that while corporate decisionmakers may have regard for non-shareholder constituencies like workers and the environment, such decisions must benefit the firm's shareholders, too.[10] In choosing between two competing merger partners or in making ordinary operational decisions, therefore, corporate fiduciaries may deliberately benefit non-shareholder constituencies if some benefit will ultimately redound to corporation's shareholders.[11]

The American Law Institute's *Principles of Corporate Governance* perhaps best summarizes these principles.[12] According to the ALI, "a corporation should have as its objective the conduct of business activities with a view to enhancing"—as opposed to maximizing—"corporate profit and shareholder gain."[13] The ALI also notes that firms may pursue limited objectives beyond profit and shareholder gain, for example taking into account "ethical considerations that are reasonably regarded as appropriate to the responsible conduct of businesses."[14]

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in corporate-law casebooks and holding it out as binding authority. See, e.g., Stephen M. Bainbridge, Corporation Law and Economics § 9.2, at 410-11 n.1 (2008); Lynn A. Stout, Why We Should Stop Teaching Dodge v. Ford, 3 Virginia Law & Business Review 163 (2008) (noting *Dodge*'s prevalence in casebooks).

[9] See Sneirson, supra note 5, at 1003-04 (examining the citation history of these decisions). Interestingly, a recent reexamination of *Dodge v. Ford* concluded that the case was more about close corporations and minority-shareholder oppression than dividends and shareholder wealth. See Smith, supra note 4, at 318-19.

[10] See Revlon, Inc. v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173, 182 (Del. 1985) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); see also eBay Domestic Holdings, Inc. v. Newmark, 2010 WL 3516473 (Del. Ch. Sep. 9, 2010), at *22 ("Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders."). Where the company is undergoing a "change in control" or sale and inevitable breakup, shareholder-centric *Revlon* duties supersede this rule and preclude the board from sacrificing shareholder interests to serve other stakeholders. See Revlon, 506 A.2d at 182.

[11] See, e.g., Paramount Comms., Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989) (validating Time's efforts to prefer Warner over Paramount as merger partners, which preference was ostensibly motivated to protect the "Time culture" of journalistic integrity). This assumes the *Revlon* duties described supra note 10 have not been triggered.

[12] See American Law Institute, Principles of Corporate Governance (1994).

[13] See id. § 2.01(a) cmt. f ("[E]nhancing corporate profit and shareholder gain . . . does not mean that the objective of the corporation must be to realize corporate profit and shareholder gain in the short run."); see also id. illus. 1 & 2; William W. Bratton, Confronting the Ethical Case Against the Ethical Case for Constituency Rights, 50 Washington & Lee Law Review 1449, 1456 (1993) (noting that the ALI eschews the term "maximization" for the more equivocal term "enhancement").

[14] See ALI, supra note 12, § 2.01(b) ("Even if corporate profit and shareholder gain are

That said, courts decidedly do not enforce any profit-maximizing or even profit-enhancing requirement.[15] Under the business judgment rule, courts defer to fiduciaries' business judgments so long as no conflict of interest is present and the decision is reached conscientiously, on the basis of reasonably full information, and with a good-faith belief that the decision is in the best interests of the firm.[16] If these predicates are met, company decisions, including decisions that depart from a profit-maximizing objective, will withstand shareholder challenges.[17] Thus, while corporate decisional law endorses shareholder primacy in principle, it does not amount to an enforceable legal obligation.[18]

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not thereby enhanced, the corporation, in the conduct of its business . . . may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of businesses; and may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.").

[15] See Jill E. Fisch, Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 Journal of Corpation Law 637, 651 (2007) ("Although *Dodge v. Ford* is frequently cited, no modern court has struck down an operational decision on the ground that it favors stakeholder interests over shareholder interests."); Thomas W. Joo, Race, Corporate Law, and Shareholder Value, 54 Journal of Legal Education 351, 361 (2004) ("Directors' supposed duty to 'maximize' shareholder wealth is a toothless one. No courts actually require management to maximize shareholder wealth . . . [i]ndeed, such a showing would be all but impossible."); Jonathan R. Macey, A Close Read of an Excellent Commentary on Dodge v. Ford, 3 Virginia Law & Business Review 177, 180-81 (2008) (arguing that corporate law requires shareholder wealth maximization but conceding that, like the speed limit on the Merritt Parkway, it is not enforced because enforcement would prove to be difficult or impossible); Mark J. Roe, The Shareholder Wealth Maximization Norm and Industrial Organization, 149 University of Pennsylvania Law Review 2063, 2072 (2001) (noting that "corporate law's instructions to managers" to enhance shareholder gain do not "determine what they do"); Smith, supra note 4, at 286 ("[T]he business judgment rule makes the shareholder primacy norm virtually unenforceable against public corporations' managers.").

[16] See Joy v. North, 692 F.2d 880, 885-86 (2d Cir. 1982) (presenting rationales for the business judgment rule); William T. Allen et al., Function over Form: A Reassessment of Standards of Review in Delaware, 56 Business Lawyer 1287, 1297 (2001) (describing the business judgment rule as "an expression of a policy of non-review of a board of directors' decision); see also Bainbridge, supra note 8, § 6.2 (viewing the business judgment rule as an abstention doctrine).

[17] See, e.g., Joy, 692 F.2d at 880; Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996); Shlensky v. Wrigley, 237 N.E. 776 (Ill. App. 1978) (upholding the decision not to install lights at Wrigley Field); Kamin v. American Express Co., 383 N.Y.S.2d 807 (Sup. Ct. 1976) (upholding a dividend that squandered a sizable corporate tax deduction). Further, the "other constituency" statutes discussed above reaffirm this latitude and similarly protect business decisions made in the best interests of the firm, broadly speaking.

[18] See William T. Allen et al., The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide, 69 University of Chicago Law Review 1067 (2002) (identifying this ambivalence); Christopher M. Bruner, The Enduring Ambivalence of Corporate Law, 59 Alabama Law Review 1385 (2008) (same); Lyman Johnson, The Delaware Judiciary

So then what role does shareholder primacy play in modern corporate governance? Shareholder primacy is not as much a legal obligation as it is a powerful social norm. Norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both."[19] Thus, whether or not the law actually requires managers to maximize shareholder returns, social norms might induce them to do so, because that is how they view their jobs, because they perceive it is expected of them, and because they believe—rightly or wrongly—that the law requires it. The shareholder primacy norm is an incredibly powerful one; some conclude it has "been fully internalized by American managers" and constitutes the only legitimate way of running a business.[20]

Market forces bolster the shareholder primacy norm's strength. Because stock price is a commonly used metric for assessing executive performance, corporate executives pay considerable attention to it, particularly when their compensation is tied to it.[21] Robust stock prices also facilitate raising capital and fend off unwelcome takeover attempts that might culminate in executives losing their positions.[22] These realities give corporate decisionmakers strong incentives to maximize shareholder returns and avoid behaviors that might detract from them.[23]

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and the Meaning of Corporate Life and Corporate Law, 68 Texas Law Review 865, 902 (1990) (same).

[19] See Richard H. MacAdams, The Origin, Development, and Regulation of Norms, 96 Michigan Law Review 338, 340 (1997); see also Lawrence Lessig, Code and Other Laws of Cyberspace 235 (1999) (defining norms as "normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other"); Cass R. Sunstein, Social Norms and Social Roles, 96 Columbia Law Review 903, 914 (1996) (defining norms as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done"). See generally Symposium, Norms and Corporate Law, 149 University of Pennsylvania Law Review 1607 (2001) (discussing the role that social norms play in corporate settings).

[20] See Stephen M. Bainbridge, Participatory Management Within a Theory of the Firm, 21 Journal of Corporation Law 657, 717 (1996); Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Georgetown Law Journal 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."); Roe, supra note 15, at 2065 (noting that "[s]hareholder wealth maximization is usually accepted as the appropriate goal in American business circles").

[21] See, e.g., Richard A. Posner, Are American CEOs Overpaid, and, if so, What if Anything Should be Done About It?, 58 Duke Law Journal 1013, 1026-27 (2009) (criticizing the common practice of showering CEOs with stock options as unduly focusing executives on the short term).

[22] See Sneirson, supra note 5, at 1007-09.

[23] This focus on stock price also contributed to the corporate scandals of the last decade as managers manipulated company financials to meet or exceed Wall Street

Casuistry and peer pressure likewise encourage decisionmakers to adhere to the shareholder primacy norm. . . .[24]

In sum, shareholder primacy is not so much a legal requirement to maximize shareholder returns as much as it is a powerful social norm that largely dictates managerial behavior today. The next part explores the roots of this norm and traces how this idea rose to its current prominence in corporate law and practice.

II. AN INTELLECTUAL HISTORY

How did the shareholder primacy norm come to dominate American corporate law and practice? This part looks to the history of this idea in search of an answer.

A. Origins

Adam Smith laid the groundwork for shareholder primacy in *The Wealth of Nations*,[25] the classical economics text where he surmised "that individual acts of economic self-interest combine, through the 'invisible hand' of market forces, to further the best interests of society at large."[26] Smith premised this idea "on the single individual . . . an entrepreneur who both owned a small, private enterprise and managed it."[27] Smith "imagined that the individual owner would necessarily . . . be solely entitled to all the fruits of his property, the profits."[28] Smith also believed that self-interest would drive this hypothetical entrepreneur "to use his industrial property and labor 'efficiently' and grow [the business] for the strict purpose of accumulating profit" for himself.[29]

This "pivotal sequence—ownership, control, full access to profits, efficiency" does not easily translate to today's joint-stock corporations, where professional managers manage the investments of others.[30] In such companies, managers do not necessarily have investors' interests at heart and, in fact, managerial self-interest naturally drives them to pursue their

expectations. See, e.g., ...

[24] See Ronald J. Colombo, Toward a Nexus of Virtue, manuscript at 31-32.

[25] Adam Smith, The Wealth of Nations (1776).

[26] Karen Ho, Liquidated: An Ethnography of Wall Street 172 (2009); see also Lawrence E. Mitchell, Financialism: A (Very) Brief History, 43 Creighton Law Review 323 (2010) ("Smith's theory . . . was grounded in the behavior of the self-interested, but nonetheless morally sensitive, economic man . . . .").

[27] Ho, supra note 26, at 172.

[28] Id at 173.

[29] Id. (emphasis in original).

[30] Id.

own ends over those of their investors.[31] Recognizing this conflict, which later thinkers would term an "agency cost,"[32] Smith concluded that the managerial corporation could not effectively compete with singular owner-entrepreneurs and would, in fact, ultimately fail as a form of business association.[33]

"The shareholder was (and still is) the perfect device to reconcile the structure of the modern corporation" with Smith's classical economic views.[34] By treating shareholders as a stand-in for owner-entrepreneurs, neoclassical economists in the nineteenth and early twentieth centuries applied Smith's chain of "ownership, control, full access to profits, efficiency" to modern firms, as well.[35] This does nothing to solve the agency-cost problem Smith identified, as professional managers' self-interest continues to drive them to benefit themselves, not their shareholders. To close this gap, shareholders must become the "sole locus of concern and analysis," and corporate managers must by law or otherwise become obligated to serve shareholder interests alone.[36]

B. Dodge v. Ford

Some court decisions of the day reflected these views, taking the position that the purpose of corporations is to generate profits for their shareholders. The Michigan Supreme Court famously articulated as much in *Dodge v. Ford*,[37] a case still prominently featured in most corporate-law casebooks.[38] John and Horace Dodge—then minority shareholders in the Ford Motor Company—had challenged the decision of company founder and majority shareholder Henry Ford to suspend the company's practice of

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[31] See Smith, supra note 25, at – ("[I]t cannot well be expected that [directors of join-stock companies] should watch over [the firm] with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. . . ."). Later thinkers would classify this conflict as an agency cost. See Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property 6-7 (1947) (recognizing the problem of agency costs); Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 Journal of Financial Economics 305 (1976) (defining agency costs as the cost of the agent's divergence from the principal's best interests—i.e., the agent's disloyalty, negligence, or slacking—plus the expenditures the principal makes to safeguard against, monitor, and insure against such departures).

[32] See supra note 31.

[33] See Ho, supra note 26, at 173; Smith, supra note 25, at --.

[34] Ho, supra note 26, at 174.

[35] See supra note 30 and accompanying text.

[36] Ho, supra note 26, at 175.

[37] See Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

[38] See supra note 8.

paying special dividends.[39] Ford instead sought to direct the firm's resources toward expanding its business, lowering the price of its cars, and paying the company's workers better wages.[40] He may have also sought to deprive the Dodge brothers of the capital necessary to go into business in competition with Ford.[41] In any event, Ford testified at trial that he believed the company made too much money and he preferred it to be less profitable.[42]

Seizing on this testimony, the Dodge brothers argued, and the court agreed, that Ford's actions perverted the corporation's purpose. The court wrote:

> 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, to the reduction of profits, or to the nondistribution of profits among its stockholders in order to devote them to other purposes.[43]

Although the court ultimately deferred to much of Ford's business judgment, it ordered the company to declare a special dividend.[44]

The decision's lasting effects went well beyond the special dividend and even the financing for the Dodge brothers' new automobile venture. *Dodge v. Ford* eventually became shorthand for shareholder primacy for generations of lawyers, often the only thing retained from the entire course in corporations,[45] despite the questionable validity of the case's legal propositions under modern corporate law.[46] Later proponents of

[39] See Dodge, 170 N.W. at 671. The company had five other shareholders in addition to Ford and the Dodge brothers, and had regularly paid out generous special dividends. Id. at 670; see Bainbridge, supra note 8, § 9.2, at 411 (stating that between 1911 and 1915 the company "regularly paid huge 'special dividends' totaling over $40 million").

[40] See Dodge, 170 N.W. at 671.

[41] See Bainbridge, supra note 8, at 412 n.4 (suggesting that Ford's decision to cease special dividends "was a shrewd and ruthless attempt to stifle competition" and speculating that Ford did not testify as to this purpose because he "feared antitrust litigation").

[42] See Dodge, 170 N.W. at 683–84 (stating that the company's profits should be shared with the public, by reducing the price of Ford cars).

[43] Id. at 684 ("[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others . . . .").

[44] Id. at 685. The court did not interfere with Ford's decision to expand the company's operations, however, in a straightforward application of the business-judgment rule. See id. at 684 (deferring to the Ford's business judgment).

[45] See Stout, supra note 8, at —.

[46] See supra Part I. The court's intrusion into the Ford board's dividend decision is more clearly contrary to modern corporate law and the business judgment rule in particular. See, e.g., Kamin v. American Express Co., 383 N.Y.S.2d 807, 811–12 (N.Y. Sup. Ct.

shareholder primacy would also hold the decision out as the gospel, proclaiming its authority in academic papers without qualification . . . .[47]

C. Berle, Means & Dodd

Adolf A. Berle, "the grandfather of modern shareholder primacy," began writing about corporate law soon after the *Dodge* decision.[48] At that time, corporate managers had few restraints on their behavior beyond whatever contractual obligations they owed shareholders.[49] Managers were not yet treated as fiduciaries owing duties and as a result many of them dealt with shareholders in a freewheeling and opportunistic manner.[50] This troubled Berle, who also worried that the concentration of so much economic power in business elites amounted to "a dangerous misstep toward plutocracy and away from egalitarianism and democracy."[51]

In a series of law review articles in the 1920s and 30s, Berle proposed treating corporate managers more like trustees, with fiduciary obligations to act for the benefit of shareholders and to treat them evenhandedly.[52] This would constrain managerial self-interest and irresponsibility and hold managers accountable when they misbehave.[53] Importantly for Berle, it would also redistribute economic and corporate power from elite corporate managers and financial groups to "the people," represented in Berle's eyes by working class and middle class American shareholders.[54]

Berle based his argument in part on property rights, reasoning that "the corporation was the private property of its shareholders, and because managers had a fiduciary relationship with these owners, managers owed a

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1976) (deferring to the American Express board's questionable business judgment re dividends).

[47] See, e.g., Bainbridge, supra note 8, § 9.2, at 413 (noting that *Dodge*'s "theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time").

[48] See William W. Bratton & Michael L. Wachter, Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation, 34 Journal of Corporation Law 99, 101 (2008).

[49] See Fenner Stewart, Jr., Berle's Conception of Shareholder Primacy: A Forgotten Perspective for Reconsideration During the Rise of Finance, 34 Seattle University Law Review 1457, 1464 (2011).

[50] See id. (quoting Berle's personal diary).

[51] Id. at 1460.

[52] See See Adolf A. Berle, Jr., Participating Preferred Stock, 26 Columbia Law Review 303, 303, 305, 317 (1926); Adolf A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harvard Law Review 1049, 1049 (1931) [hereinafter Berle, Powers in Trust].

[53] See Stewart, supra note 49, at 1465.

[54] See id. at 1463.

duty of care to owners."[55] He and Gardiner Means continued the argument in *The Modern Corporation and Private Property*.[56] There, the two noted that the ever-increasing dispersion of stock ownership concentrated corporate control in managers more than ever, and that managers' incentives were to pay shareholders only a fair return, keeping the reminder for themselves.[57] Rather, Berle and Means contended, owner-shareholders "ought to receive the profits of the corporation because they acquired ownership of the corporate venture and are the rightful benefactors of all corporate economic surplus to the exclusion of non-owners."[58]

Berle reprised these themes in his subsequent debate with Merrick Dodd, arguing in the first of their three-article exchange that "all powers granted to a corporation . . . [were] at all times exercisable only for the ratable benefits of all the shareholders as their interest appears."[59] Dodd's response the following year questioned the propriety of fiduciary duties requiring corporate managers to act on behalf of and for the sole benefit of the company's shareholders.[60] This ignores corporations' other stakeholders, such as labor, customers, and the general public, Dodd wrote; the better view, he said, is that corporate managers owe their allegiances to the corporate entity, as "fiduciaries for the institution rather than for its members."[61] Dodd recognized that managing corporations for the combined benefit of sometimes-conflicting constituencies might prove difficult, and affording managers the discretion with which to do so might prove dangerous.[62]

Berle met Dodd's criticism with a forceful reply, arguing that if the fiduciary constraints on managers were weakened or eliminated, managers would become free "to pursue their own interests, under the guise of social responsibility, at the expense of shareholders and non-shareholders alike."[63]

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[55] Id. at 1466.

[56] See Berle & Means, supra note 31, at —.

[57] See id. at —.

[58] Stewart, supra note 49, at 1470; see also Berle & Means, supra note 31, at 220.

[59] See Berle, Powers in Trust, supra note 52, at —.

[60] See E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harvard Law Review 1145, 1147-48 (1932).

[61] See id. at 1154, 1160, 1163 (quoting Owen Young's view of his fiduciary obligations while at General Electric: not "to take from labor for the benefit of capital, nor from the public for the benefit of both, but rather to administer wisely and fairly in the interest of all"); see also id. at 1157 (citing *Dodge v. Ford* to support the proposition that "managers are guardians of all the interests which the corporation affects and not merely its absentee owners").

[62] See id. at 1161-62 (noting that balancing multiple constituencies "can happen only if the managers of such corporations have some degree of legal freedom to act upon such an attitude").

[63] See Ian B. Lee, Corporate Law, Profit Maximization, and the "Responsible"

As a result, even though he was on some level hopeful for a world in which corporations were more socially responsible,[64] Berle could not agree with Dodd's proposal to lighten managers' fiduciary obligations and leave in their place sheer discretion and "a pious wish that something nice will come out of it."[65] Berle therefore urged Dodd not to "abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."[66]

D. The Law & Economics Movement

In the 1960s, as the law and economics movement began taking hold in legal academia, Henry Manne picked up and transformed Berle's shareholder primacy argument.[67] Whereas Berle's motivation was to protect corporate shareholders from managerial overreaching, Manne's interest was economic efficiency and reducing agency costs.[68] By focusing management on shareholder interests, and holding them accountable to this goal, shareholder primacy can minimize the agency costs inherent in the managerial corporate form and give managers a singular objective to work towards.[69] Manne's extension of shareholder primacy emerged as "a powerful reconceptualization of the corporation in legal thought" and gained substantial influence in academic circles along with the rest of the law and economics movement.[70]

Also: Easterbrook & Fischel, Hansmann & Kraakman

E. The Rise of Financialism

In the 1980s, shareholder primacy made the jump from academia to the business world and Wall Street. During this time, the stock prices became

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Shareholder, 10 Stanford Journal of Law Business & Finance 31, 42 (2005).

[64] See C.A. Harwell Wells, The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century, 51 University of Kansas Law Review 77, 95-96 (2002).

[65] See Adolf A. Berle, Jr., For Whom Are Corporate Managers Trustees: A Note, 45 Harvard Law Review 365, 1367-68 (1932).

[66] See id.

[67] See, e.g., Stewart, supra note 47, at 1457 n.3 (listing sources). Stewart describes Manne's use of shareholder primacy as a "flip" of Berle's theory, in that Berle meant the theory to open the corporation up to public interest concerns whereas Manne intended the opposite effect. See id. at 1457-59 (citing Duncan Kennedy, A Critique of Adjudication: Fin de Siècle (1998) and noting Berle's opposition to Manne's flip).

[68] See id. at 1459.

[69] See id. at 1458-59.

[70] Id. at 1458.

"the sole measure of corporate success and the means by which corporations allocate resources and define priorities."[71] Soon, stock and finance began to take precedence over the underlying companies that issued the shares.

One cause of this development was the introduction of the capital asset pricing model. "The capital asset pricing model reduced stock selection to a single number, beta . . . [in order] to permit investors to make rational decisions balancing risk and return, [but] its unintentional consequence was to separate the investment decision from any need to be interested in, or concerned with, the underlying corporation issuing the stock, leading to a separation of stock ownership from the underlying business . . . ."[72]

At about the same time, corporate practice gradually shifted to look to Wall Street rather than accumulated retained earnings to obtain capital.[73] "For most of the twentieth century, most corporations raised capital through the issuance of bonds, meaning that the stock market did not have to skyrocket for corporations to have access to more capital."[74] "These corporations relied on the stock market, not for original funding, but for founders and entrepreneurs to cash out of their enterprise and to find 'a convenient way to transfer ownership between limited circles of business associates.'"[75]

widespread stock ownership[76] & 401(k)s, merger boom

Executive compensation

F. Today

Accounting scandals, Wall Street Journal editorials

III. THE END OF HISTORY FOR SHAREHOLDER PRIMACY?

The norms governing business decisionmaking may be evolving to reflect a business purpose broader than shareholder profit as environmental and social issues continue to enter the American mainstream.[77] Business

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[71] See Ho, supra note 25, at 188.

[72] Mitchell at 3.

[73] See Ho, supra note 25, at —.

[74] Id. at 179.

[75] Id.

[76] Mitchell at 5.

[77] *See* Lisa M. Fairfax, The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms, 31 Journal of Corporation Law 675, 677–78, 699, 710 (2006) (suggesting "a growing [societal and investor] dissatisfaction with the shareholder primacy norm" and that these groups find the broader stakeholder model of corporate governance "acceptable if not more palatable than shareholder primacy"); Robert C. Illig,

schools have reflected "this trend, integrating [stakeholder] concepts in core and extracurricular courses, and in the increasing desire by MBA students to fuse social endeavors with profit-making ones."[78] While these changes may not indicate a wholesale abandonment of the shareholder primacy norm, they perhaps portend a "paradigm shift" toward a new norm of balancing the shareholder-profit objective with longer-term, sustainable, and socially responsible business practices.

CONCLUSION

Al Gore, Oprah, and Silicon Valley: Bringing Main Street and Corporate America into the Environmental Movement, 23 Journal of Environmental Law & Litigation 223, 229 (2008) (noting popular acceptance of environmental concerns).

[78] See Fairfax, supra note 77, at 677.