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From Primacy to Commitment: Revising corporate governance theories to account for recent legal innovations in the US

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Abstract

For more than twenty years now, Corporate Governance scholars have hesitated between shareholder, director and stakeholder primacy, making the purpose of the corporation "*the* most important issue in corporate law". In this paper, we conduct an extensive review of the arguments supporting either of these views in the US context, which shows that analyzing corporate governance through the lens of "primacy" inevitably leads to inconsistent and contradictory interpretations. In the current exploration of new business practices to deal with urgent societal challenges, this misinterpretation undermines the search for conditions to temper the dominant "shareholder value maximization" norm without jeopardizing control and efficiency. Instead we show that interpreting recent US legal innovation requires to drop the concept of "primacy" and to view corporate law as enabling a variety of distribution of decision rights between shareholders and directors. In this light, our model shows that if one is to foster companies' responsible behaviors, it appears necessary to *secure both shareholders' and directors' commitment* towards a broader purpose. This "commitment" model opens avenues for designing new effective governance practices, including the recent "*Benefit Corporation*" forms.

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Introduction

Over the past few decades, the shareholder-oriented interpretations of corporate governance, such as the agency theory-driven governance model, have sparked soaring criticism in management research and among law scholars, for being deceptive to the reality of the corporate setting (Stout, 2012), and causing harmful economic and societal consequences (Ghoshal, 2005). More and more research work is devoted to developing and anchoring a broader view of corporate governance, one which would allow for a consideration of the interest of other constituencies than shareholders. Even if this is still work in progress, these developments today are scattered among a variety of different theoretical interpretations of the actual US corporate governance framework, each sparking both descriptive and prescriptive contributions blending judicial analysis, normative economic justification and observations of business practices. As a consequence, the scientific controversy around the purpose of the corporation – deemed to be "*the* most important issue in corporate law" (Yosifon, 2014) – has given birth to a number of contrasted arguments. To some scholars (e.g. Blair & Stout, 1999; Lan & Heracleous, 2010), corporate law does not support the principal-agent model, nor the shareholder value maximization (SVM) principle that was derived from it, but already enables directors to manage the company for the interests of broader constituencies. The majority, however, is skeptical about this interpretation of current legal frameworks (e.g. Greenfield, 2007; Millon, 2000; Mitchell, Weaver, Agle, Bailey, & Carlson, 2016; Yosifon, 2014). Following them, a change in corporate law would be necessary if one is to curb the prevalence of the SVM norm in business practice.

And corporate law is changing. Twelve years ago, the section 172 of the UK Company Act of 2006[1] introduced an explicit duty for directors to "act in the way they consider […] would be most likely to promote the long-term success of the company for the benefit of its members as a whole" (Lan & Heracleous, 2010). In 2008, both chambers of California had accepted the introduction of a constituency statute creating in essence similar duties for all Californian boards of directors. This provision was finally vetoed by the governor. However, two years later, several states started adopting new corporate forms, such as the *Public Benefit* and *Social Purpose* Corporations, which change the balance of interest and power between corporate constituencies.

Are those recent legal changes clarifying the position of corporate law regarding the purpose of the corporation? Do they offer new insights that can help scholars to find a way-out of this controversy? In this paper, we argue that the continued scientific debate on the question the purpose of the corporation and the role of its board of directors, at the heart of corporate governance theory, is constrained by hypotheses deriving from the initial Law & Economics approach. Indeed, this approach, which is at the origin of the dominant models in corporate governance theory such as the principal-agent model, has taught us to interpret the legal framework through the lens of economic efficiency, forcefully blending prescriptive and descriptive arguments. Given the difficulty of these models to build a theoretical framework that is consistent with empirical facts, it appears necessary today to review some of the underlying hypotheses of this approach. In this paper, we specifically engage with the view that corporate governance must be analyzed from the angle of the "primacy", i.e. who holds the ultimate control in the corporate setting. This view has indeed led most of the current models to support contradictory arguments while drawing from the same sources (the most

[1] This section is again under review by the British government currently. See for example this article in Board Agenda: https://boardagenda.com/2017/12/08/draft-new-governance-code-social-mission/

frequently used being case law from the Delaware Supreme Court), and to highlight a deep legal ambiguity, which cannot be satisfactorily leveled out by economic analysis.

After reviewing these contradictory arguments through an extensive literature review, we engage in this paper with another interpretation of corporate law which might better suit empirical observations and ensure case law consistency. We argue that corporate law does not prescribe any purpose (either shareholder- or stakeholder-oriented) to the collective action taking place in corporations, but only create decision rights that accrue to the different constituencies and that might overlap in rare cases. Instead of a “shareholder primacy”, we argue that corporate law organizes a “shareholder asymmetry”, which does not systematically entrust them with ultimate control rights, but puts them in a favorable position to determine the purpose of the corporation and orientate directors’ decision-making. This asymmetry explains why although not being formally written in law, the SVM norm is deeply anchored in most corporate governance settings.

Consequently, if one is to promote different purposes for the corporation than SVM (a wish that this article does not aim at questioning), then it is necessary to understand the conditions under which such an orientation can be fostered or even guaranteed within this view of corporate law. Consistently with the recently observed legal changes, such an objective might require modifying the legal framework itself. In the last section, we thus exhibit a possible legal change, among other changes possible, by delineating a “commitment” approach rather than a “primacy” approach, based on the newly introduced corporate forms that are the Benefit and Social Purpose Corporations.

Beyond Law & Economics: the inconclusive quest for “primacy”

Two main competing economic interpretations of the firm

The raging debate about the purpose of the corporation in contemporary corporate governance theory originates from the Law & Economics movement taking its roots in the University of Chicago's Law School (Millon, 2013: 1026). In the 1970s, the idea became prevalent that economic analysis could be applied to any area of the law, not only as interpretative tool but also as a normative framework that could be used to improve the efficiency of the law. The now dominant model for corporate governance, the principal-agent model, stemmed from this conception.

The principal-agent model for corporate governance

Following up on the Coasean questioning about the nature of the firm, Alchian and Demsetz (1972) marked a milestone in the contractual theory of the firm by eliciting the conditions under which an efficient "team production" could take place. Highlighting the risks of shirking in this situation, they model the classical firm by the requirement to "monitor" the performance of all team members. To effectively steer the team's effort, this monitor must be able to renegotiate the contracts with every input provider, and exempt himself of shirking by holding only the "residual claim", i.e. value created "above prescribed amounts" (Alchian & Demsetz, 1972: 782). According to Jensen and Meckling (1976), the fundamental issue in usual corporations is that monitors (management in their view) and residual claimants (shareholders) are separate individuals. To ensure that managers will not, in turn, adopt an opportunistic behavior, they are thus led to assume that there exists a relation of agency between these two groups, i.e. that managers are "agents" to shareholders who are the "principals". The potential discrepancy in the interests of these two groups thus creates "agency costs", which the setting of the corporation aims at minimizing through various legal and extralegal (e.g. incentives) mechanisms.

Seduced by this economic argumentation, Chicago Law professors promptly imported this agency model as an interpretation of the legal relationship between management and shareholders (Easterbrook & Fischel, 1991; Fischel, 1982), thus popularizing what has later been called the “radical shareholder primacy” model of corporate governance (Millon, 2013). In this model, managers act on behalf of the shareholders – who hold the ultimate control rights on the corporation’s activities – and have the duty to maximize the shareholders’ return on investments.

An alternative view: The Team Production model

Although the principal-agent model was to become the dominant framework in corporate governance theory, notable effort has been dedicated to demonstrating the inaccuracy of this view, from multiple disciplinary standpoints. Among these critiques, one alternate view of the firm has accrued significant theoretical support, while also combining both descriptive legal interpretation and normative economic justification. Finding its origins in the same contractual view of the firm as Alchian and Demsetz’s, the Team Production theory builds more specifically on the notion of “specific investment” to refute the economic efficiency of a principal-agent framework. It argues that because numerous stakeholders cannot reap the benefits of their investment outside the joint production, and are not in a position to freely negotiate the terms of their contracts, shareholders are *not* the only residual claimants of the corporation (Blair & Stout, 2001; Stout, 2002). In this view, economic efficiency requires the different stakeholders to willingly designate an independent third party to monitor their effort, not for the benefit of one constituency in particular, but “to maximize the sum of all risk-adjusted returns enjoyed by the groups that participate in team production” (Lan & Heracleous, 2010: 298) and balance their interests to ensure continued investment. From a legal standpoint, this third party is the board of directors, thus necessarily “insulated” from the pressure of any group in particular – including the shareholders (Blair & Stout,

1999). This last point is interpreted as the main reason why a corporation as a separate legal entity is created in the first place. By acting on behalf of the corporation, directors are logically not bound to maximize the interests of the shareholders.

Finding a way out of the controversy

These two interpretations of corporate governance obviously lead to different conclusions as to the purpose of the corporation and the role of the board of directors in the corporate setting. Yet, both those approaches claim to rely on a careful reading of code and case US corporate law, which would guarantee their reliability. Faced with such irreconcilable theoretical positions, several corporate governance scholars in the management and law fields, have attempted to carry out a careful reexamination of the "facts" supporting each view over the past fifteen years.

Although there are some consistent findings, the meticulous analysis of legal provisions both in code and in case law in fact highlights persistent discrepancies, giving birth to a variety of other interpretative models, building only in part on the premises of the two major interpretations presented above. The next section is dedicated to briefly present these models.

Who has it right? An outburst of interpretations as to who holds the "primacy"

Since our objective is to review the main different legal-based interpretative models of the balance of powers and interests between the different constituencies in corporate governance, we voluntarily exclude from this list the normative models that imply a desired change in corporate law rather than build on current legal frameworks.

Shareholder wealth maximization

Supporting the main argument of the agency theory, several papers have exhibited the legal grounds for the shareholder wealth maximization principle. A recent review of these arguments has been published by Yosifon (2014), based on Delaware corporate law, as the leading source on "good corporate governance" in the United States. The first observation is that the Delaware General Corporation Law does not rule on the corporate purpose. It states that "*a corporation may be incorporated or organized […] to conduct or promote any lawful business or purposes*" and further that "*The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors*". However, according to the author, the code makes indirectly clear that "by default directors owe fiduciary obligations of care, loyalty, and good faith to the corporation and its stockholders" (Yosifon, 2014: 186). As such, directors are "legally accountable to shareholders" (Kaufman & Englander, 2005).

It is mostly in case law that Delaware jurists have made clear that corporations were managed in the objective of maximizing shareholders' wealth. Beyond the oft-cited *Dodge v. Ford* 1919 case, which remains debatable to date (see e.g. Stout, 2008), recent cases made the rule clear, such as *Unocal v. Mesa* (1985), *Revlon, Inc. v. Mac Andrews & Forbes Holdings, Inc.* (1986) – where the Delaware Supreme Court stated that "a board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders" – and more recently *eBay v. Newmark* (2010) opposing a founder of Craigslist, Inc. to eBay. In the latter case, Chancellor Chandler stated in a widely taken up sentence:

> "Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that."

Director primacy and the "corporation as a principal" model

The previous shareholder primacy thesis, however, does not clarify whether shareholders and directors are indeed in an agency relationship. As Bainbridge (2002) showed and Yosifon (2014) wrote in a footnote (p.184), there are indeed two different but intertwined meanings of "shareholder primacy" as to whether it designates the "ends" or purposes of corporate governance – meaning the shareholder wealth maximization principle – or its "means" or methods – meaning that shareholders do have ultimate control rights over the corporate decisions.

This dual definition mirrors the two different conceptions of Agency itself, whether it is understood in the legal or in the economic sense (Millon, 2013: 1022). Agency law designates a specific regime under which "the agent shall act on the principal's behalf and subject to the principal's control" and gives their assent to do so, whereas the economic notion of agency, as commonly understood, only states that agents must act in the interests of their principals (Eisenberg, 1989). Clark argued as soon as 1985 that directors were not agents to shareholders in the legal sense (Clark, 1985). However, because many scholars do not carefully separate the "means" and "ends" or "purposes" and "methods" of corporate governance (Sjåfjell, Johnston, Anker-Sørensen, & Millon, 2015), it appeared necessary to coin a specific term to describe the autonomy that directors are given in law in relation to the shareholders: the "director primacy" (Bainbridge, 2002). In the following, we are thus referring to "primacy" as to answering the question "who ultimately is in control".

The director primacy model states that contrary to the "radical shareholder primacy" model, directors enjoy a large autonomy in exercising their power and are not, as such, "agents" to the shareholders. Several legal arguments support this view. First, as Bainbridge puts it:

> "The vast majority of decisions […] are made by the directors alone (or by managers acting under delegated authority). Shareholders essentially have no power to initiate corporate action and, moreover, are entitled to approve or disapprove only a very few board actions"

Second, directors are given the power to hire and dismiss the top managers of the corporation. As such, director primacy must not be confused with managerialism where top executive officers would be deemed to dispose of the ultimate control over the corporation. Third, directors' decisions are protected by the "Business Judgment Rule", aiming at preventing the judges to second-guess the business decisions as long as there is no suspicion of self-dealing or fraud on the part of the directors. In addition to this, shareholders are imposed limitations when they pass thresholds in the level of control that they are susceptible of exerting over the corporation, such as limited rights to form large blocks, and to conduct coordinated action in the general assembly (Bainbridge, 2002). Finally, numerous authorized practices (such as poison pills and staggered boards) prevent shareholder from dismissing the whole board at once. Further arguments, brought up by Bebchuk (2005), include the fact that several decisions where shareholders are consulted are only brought to a vote of approval by the board, such as charter amendments or the change of state of incorporation.

Nevertheless, the main point of difference between the director primacy model and the team production theory is that the fact that directors are "autonomous fiduciaries" does not mean they are not bound to serve the interests of the shareholders. As such it is not contradictory with the previous "shareholder primacy" seen as the "ends" of corporate governance. The directors' discretion is thus interpreted as the best means to pursue the interests of the shareholders as a group, better so than by giving control to the shareholders themselves. The director primacy model is consistent with the "enlightened shareholder value", stating that considering the interest of various

constituencies is desirable, but only to the extent to which it contributes *in fine* to the creation of shareholder value (Ho, 2010; Jensen, 2001; Keay, 2007).

Because of this conception of the "ends" of corporate governance, the "director primacy" model should not be confused with other models also building on the autonomy of the board. For instance, Lan and Heracleous (2010) have proposed another legal-based model of corporate governance in which they retain the principal-agent model but make the corporation, as a separate legal entity, the rightful principal. In their view, several decisions in Delaware case law advocate for separating the interests of the corporation from the interests of the shareholders. Some cases would even require taking the interests of various stakeholders explicitly into account when making decisions as directors (Elhauge, 2005), also, interestingly enough, in change of control situations (Lan & Heracleous, 2010: 301). In this "corporation as a principal" model, it is not the board that should be considered the agent (directors are "autonomous fiduciaries" to the corporation) but the management (Johnson & Millon, 2005; Lan & Heracleous, 2010: 305).

"Traditional" shareholder primacy

In the director primacy model, shareholders hold a specific position as undoubted beneficiaries of the business decisions, but directors hold the "ultimate control" over the corporation. However, following Mizruchi (1983), the definitions of control might include different markers than decision-making, for example the means dedicated to monitoring, and the possible sanctions exerted by the controller, such as dismissal. And in practice, shareholders indeed retain several specific rights, a position that puts the director primacy view into question.

To level out this ambiguity, Millon (2013) introduced the "traditional shareholder primacy" model (opposed to "radical shareholder primacy"), which accounts for a specific position of shareholders

also regarding the "means" of corporate governance. For instance, shareholders are vested the powers to have access to corporate books and records, nominate and dismiss directors without cause, approve of changes in bylaws, approve of sales of substantial assets, or decide a voluntary dissolution. Additionally, the shareholders have the power to file derivative suits against the directors of the corporation when there is suspicion that a decision was made regardless of their interests. Because it follows a potentially opposite direction to the Business Judgment Rule, the derivative suits are one of the most discussed provisions in corporate law, with some lawyers arguing that it creates a legal risk greatly influencing business practices (Mac Cormac & Haney, 2012).

How the control rights of shareholders and directors interfere in the quest for ultimate control thus remains an open question, and in the end, corporate law does not give a definite answer on the topic of residual control between a clear director primacy or a shareholder primacy.

Shareholder influence

To overcome this ambiguity, researchers have looked beyond legal rules at actual business practices (e.g. Bebchuk, 2005, 2007), where it generally comes down to case by case understanding. Then, numerous empirical factors (such as the level of dispersion of ownership, the level of independence of the board, etc.) play a decisive role in the outcome of a potential dissent between shareholders and directors. For instance, Bebchuk's survey showed that over a panel of 118 cases of electoral challenges where shareholders opposed the nomination of directors proposed by the board, 38% were won by the shareholders (Bebchuk, 2007). While disproving the shareholder primacy practically, it nevertheless shows that directors are certainly not granted free rein in exerting their decisional power.

In this line, shareholder influence (Gelter, 2009) precisely designates the different legal means shareholders dispose of to exert influence, if not control, on the decisions of the directors and the managers. Gelter makes a distinction between "explicit" and "implicit" shareholder influence. Explicit shareholder influence relates to the direct intervention of shareholders in management affairs, which mainly occurs in situations of concentrated ownership and in the presence of a controlling shareholders. Implicit shareholder influence "refers to incentives created by the institutional framework that might force managers to act as if shareholders were directing business" (Gelter, 2009: 147).

Although Gelter quickly discards the explicit influence in US corporations due to the fact that concentrated ownership is rare in large US holding corporations, two elements should still be taken into account at this stage. First, it is still an important issue in subsidiary companies in which most economic activities take place because they have, by definition, a controlling shareholder. The case *eBay v. craigslist* cited above is typically a widely-cited case where craigslist had only one shareholder, eBay (Murray & Hwang, 2011). Second, it should be noted that the common preconception that shareholders are dispersed in US large corporations should be reappraised by taking into account the increasing dominance of non-shareholder structures that have strong influence on voting schemes such as proxy agencies, and which escape the limits imposed on joint action by the Williams Act (see e.g. Coffee Jr & Palia, 2016).

Regarding implicit influence, Gelter mostly mentions change of control situations where the market for corporate control is an indirect way for shareholder to exert pressure on the board, but these implicit mechanisms also include every scheme devised to align the interests of directors and managers with those of the shareholders. The design of these mechanisms strengthens the previous discussion about shareholder primacy: despite not being mechanisms prescribed by the law, they

rely on the possibility for shareholders (at least founding ones) to devise some of the "Rules of the game" (Bebchuk, 2007). Beyond the generic structure imposed by corporate law, fine-grained governance mechanisms (executive pay with stock options, golden parachutes, governance committees, etc.) are indeed forged by the articles of incorporation, which, in doing so, delineate part of the rights that accrue to shareholders or to directors during the day-to-day business. Therefore, even if both Bebchuk and Gelter conclude that shareholder influence is fairly limited in the US context, it must be acknowledged that part of the design of the institutional means shareholders dispose of to exert influence on the board is incumbent on the shareholders themselves.

CEO domination and Managerialism

Lastly, some authors argue that actual business practices demonstrate that the observable "ends" of corporate governance are the interests of the directors themselves, although this is undoubtedly proscribed by the law. Despite fiduciary duties explicitly preventing self-dealing, directors are suspected in some cases to leverage their decisional power to favor their own position, for instance by implementing staggered board practices, appointing independent directors that are supportive to the chairman in place, or by fighting against takeovers to preserve their own tenure (Bainbridge, 1991; Bebchuk, 2005). The fact that, in most cases, chairmen of the board are also CEOs of the company offers them a particularly favored position to exert power both on the directors and the employees of the company. These corporations would instead be run under CEO domination {Dent Jr, 2007 #589}, in direct line with the "managerialist" view of the firm, largely popularized by Berle and Means (1932) and forcefully criticized by the upholders of the agency theory advocating for stronger control rights for shareholders. Conversely, other observations and economic models, such as the stewardship model, instead support managerial discretion by arguing that managers'

position leads them to adopt a benevolent attitude regarding the corporation and its constituencies, and that preserving their leeway is instead beneficial both financially and socially (Davis, Schoorman, & Donaldson, 1997).

Tables 1 and 2 represent a mapping of the main arguments supporting the different models of corporate governance, differentiating between the "means" and "ends" for each constituency, and the nature of the argument (legal interpretation, economic justification or practice observation). Arguments for shareholder wealth maximization included in Table 1, generally used against stakeholder-oriented models, are not reproduced in Table 2. Besides, the observations supporting a CEO domination practice are included in Table 2.

-- INSERT TABLES 1 & 2 ABOUT HERE --

From "primacy" to "asymmetry": corporate law as a bundle of decision rights

Until the next jurisprudential decision on the matter in Delaware, the debate over primacy in corporate governance theory seems to have reached a dead end. As summarized in Table 3, scholars have concluded to almost every configuration one could think of between the Means and the Ends of corporate governance (except allocating the ultimate control to other stakeholders than shareholders, a model that is nonetheless prescribed by some authors as a desirable change in corporate law, which is addressed in the discussion).

-- INSERT TABLE 3 ABOUT HERE --

Although several strong arguments seem to exclude the interpretation that shareholders indeed are in the situation of a principal in the legal sense, the distribution of control rights between directors and shareholders does not allow to definitely conclude towards a primacy of the ones over the

others. Similarly, regarding the question of whose interests should the corporation pursue, both code and case law seem to organize a confusion regarding the difference between the interest of the corporation and those of the shareholders, as well as to the circumstances in which it is acceptable or desirable to focus on broader stakeholders' or on the shareholders' interests when making decisions[2].

Keeping the status quo or changing corporate law?

Is this ambiguity a problem? After all, it might be this openness of corporate law regarding the actual purpose of the corporation and the intertwining of various control sources that enables complex settings for collective action, which explains the success of the business corporate form in an astonishing variety of contexts, sectors and environments. Yet, it is problematic if one ambition of research is to prescribe desirable changes in corporate governance practice for the sake of better economic efficiency, or in the face of current social, environmental and economic challenges. And this ambition was one powerful motivation for the development of alternative frameworks to the agency theory in the first place. While it is not in the scope of this article to review the various arguments that have been made to call for a change in corporate governance theory, we take note of the countless papers that have advocated for developing new theories of the firm and its governance, which would for instance take into account its innovation capability (e.g. Lazonick, 2014; O'Sullivan, 2000; Pitelis & Teece, 2009), the systemic nature of its financial risks (e.g. Ahrens, Filatotchev, & Thomsen, 2011; Deakin, 2011; Ingley, Mueller, & Cocks, 2011), its impact on the society at large (Canals, 2011; Kemper & Martin, 2010), social welfare (Mitchell et

[2] In more details, there is even controversy between scholars accepting the shareholder primacy norm on whether corporate law promotes a maximization objective or just a primacy of their interests.

al., 2016), or social issues (Margolis & Walsh, 2003). However, without a consistent theoretical framework to analyze the current situation, it is not surprising to find contradictory prescriptions as to how corporate governance could improve, the most significant one being on *the necessity to change corporate law itself*.

According to the team production theorists, the legal framework in place relegates the principle of shareholder value maximization as a “myth” (Heracleous & Lan, 2010; Stout, 2012) and is simply misapplied by corporate leaders when they rely on this norm to make decisions in their company. Accordingly, these scholars advocate for looking at what is already “in the law” to protect stakeholders’ interests when the quest for shareholder value causes harmful impact on a broader set of constituencies. In this view, directors, as autonomous fiduciaries, would be responsible for disseminating a vision of the company that departs from the SVM principle and builds on the best available management frameworks to thrive.

On the contrary, several authors point out that such a theoretical position is tantamount to a sophisticated argument to keep a harmful status quo in the matter of corporate governance (Millon, 2000; Sjåfjell et al., 2015). Even if the widespread recognition of SVM as a corporate objective is not in itself proof that this principle is prescribed by corporate law, it demonstrates *a minima* the incapability of law to oppose this practice, which has become more of a social norm than a legal one (Sjåfjell et al., 2015: 123). Directors’ discretion would thus in practice be fettered to a large extent by this overarching objective (Segrestin & Hatchuel, 2011), which constrains strategies and creates biases in decision-making[3].

[3] Of course, the opposite position of “shareholder empowerment”, namely that changes in corporate law must on the contrary reinforce shareholders’ control rights over seemingly unfettered directors, is also well represented in corporate governance’s literature (see e.g. Bebchuk 2005).

If not primacy then what? Shared bundles of rights and obligations

The question of who effectively holds the ultimate rights in the corporation setting, though an apparently trivial and decisive question, remains to date largely unanswered. Given the considerable scientific effort that has been carried out to settle the matter to no avail, we suggest considering the possibility that corporate law shall not provide any answer to this question, and that it is pointless to search for a definite view over this. There are numerous arguments supporting this position.

Corporate law organizes a series of nested bundles of rights and obligations for the various constituencies of corporate governance. Corporations are born through the filing by an "incorporator" of a document called "certificate of incorporation" (for instance in Delaware – DGCL– or New York corporation codes) or "articles of incorporation" (for instance in the Model Business Corporation Act or in California). This document shall contain, among other things, the name and location of the corporation, its purpose if it is to be more limited than the mention "any lawful purpose" generally accepted, the aggregate number of shares it is authorized to issue (and possibly the different classes of shares if there are to be more than one), and the name of the first directors if they are to be different from the incorporators. If not, directors are elected during the first general assembly by the shareholders entitled to vote. Once the corporation has come to an existence, the incorporators or directors shall adopt bylaws which define with a very large discretion the repartition of powers between the different constituencies of corporate law, namely shareholders, directors, and corporate officers if it is deemed useful to delegate the managerial powers of the board to corporate officers. Statutorily, directors are to be elected each year during the general assembly, and can be dismissed without cause; but bylaws can decide otherwise, for example by adopting a staggered structure and requiring cause. Corporation law also provides a

threshold in the number of shares above which shareholders can call a general meeting in, but the bylaws can state otherwise. The DGCL even provides a possibility for the corporation not to be under the direction of a board if the certificate of incorporation provides otherwise. Shareholders' and directors' rights might therefore greatly vary depending on what was written in the certificate of incorporation, including the rights to modify the bylaws themselves.

Corporation law, articles of incorporation and bylaws consequently serve as means to distribute decision rights, which will shape decision spaces that accrue to shareholders, directors, officers or other constituencies. Depending on the distribution chosen, control rights might therefore foster a strong director primacy, or on the contrary protect shareholders' means of action to enforce their interests. Governance mechanisms may include strong alignment mechanisms between directors' and shareholders' interest, or they may not. Boards might include representatives of non-shareholder stakeholders, or they might not. Founders might hold class shares with specific voting rights, or they might not. Bebchuk's result (2007) on the mitigated success of electoral challenges reflects the interplay between this variety of schemes and the variety of ownership structures, and shareholders' profiles.

From shareholder primacy to shareholder asymmetry: why the SVM norm is so prevalent

How can then be explained the weight of the shareholder value maximization principle? On the specific matter of corporate purpose, the law does not appear as prescriptive of the SVM principle as it may seem by reading Chancellor Chandler's judgment (see above). What corporate law offers is a set of means to protect this carefully devised bundle of decision spaces. Derivative suits, for example, enabling shareholders to sue directors for breaches of fiduciary duties, are not designed to enforce shareholders' interests but to create a potential opposing power, should directors

disrespect the rules set up in the governing documents, or find themselves in situations of conflict of interests. Most Delaware cases cited to back the SVM principle might very well be interpreted as situations where the balance of control rights between shareholders and directors could easily be set off, as it is the case in hostile takeover bids (*Unocal* and *Revlon* cases). Even in the *eBay v. Craigslist* case, the main litigious point was "the indefinite implementation of a poison pill" attempted by the directors of craigslist to curb the potential influence of their unique shareholders, eBay. A defensive measure that would have considerably reinforced the power of the directors, the need for which was insufficiently justified in the view of the Court (Murray & Hwang, 2011).

What is observable, however, is that the subtle balance of rights and obligations places shareholders in a favorable position when it comes to determine what the purpose of the corporation should be. First, because founding shareholders play a preeminent role in the incorporation of the company when devising what should be included in the articles of incorporation and in the bylaws, including the potential clause specifying what would the purpose of the corporation be. Second, because shareholders are the only stakeholders to hold the voting power that will shape the governance means to align directors' and managers' interests with theirs (including their remuneration), to dismiss directors whose vision differs from theirs, and to exert pressure through the market for corporate control. And third, because only shareholders can file derivative suits, which are creating legal risks high enough to deter directors from considering mitigating shareholders' interests, even if the motive of such suit is later to be found inadmissible by Courts of Chancery (Mac Cormac & Haney, 2012).

This favorable position does not imply that SVM is the unique acceptable purpose for corporations, neither that it is what is implied by corporate law itself. It does not even systematically give the power to dispersed shareholders to decide what this purpose should be. But it first makes it harder

for other stakeholders, including officers themselves, to defend a different strategic purpose from the interests of the shareholders because they do not have the legal tools to exert a similar influence. Second, as soon as shareholders' voting opinion is aligned, even without joint action, their power is strongly increased through existing means, because they pass the necessary thresholds for action. Meanwhile, the popularization of the principal-agent model has progressively made pervasive the idea that because shareholders own the corporation – a view that has been proven legally incorrect – the best "corporate objective function" (Jensen, 2001) should be the SVM, thus effectively channeling shareholders' opinion. And simultaneously, the influence of proxy agencies and activist funds inciting shareholder to propagate this doctrine has significantly increased over the past few decades. Therefore, the purpose of the corporation is in practice virtually controlled by the SVM doctrine, although this is not explicitly prescribed by corporate law (Sjåfjell et al., 2015).

In other words, shareholders only benefit from an *asymmetrical position* in the balance of rights and obligations created by corporate law compared with other stakeholders. This asymmetry, rooted in corporate law from long before the advent of the principal-agent model in governance theory, explains the rapidity with which the SVM principle has taken over the previous representations of the company as paternalistic or crippled with managerialism. Shareholders' influence on the course of action of the company mainly depends on their own involvement in the matter, but is very difficult to counter without appropriate legal tools. Hence the now spreading call for a change in corporate law by scholars that are concerned with the negative impacts of the SVM norm on economic, social and environmental performance.

From "asymmetry" to "commitment": Conditions for deterring the SVM norm

Switching from a "primacy" view to the assessment of an "asymmetry" in corporate law in favor of shareholders compared with other constituencies sheds a new light on the desirable changes in corporate law if one wants to curb the influence of the shareholder value maximization doctrine. As corporate law does not explicitly force shareholder wealth as the main corporate purpose, nor prevents other purposes from being chosen, one might rightfully think, along the lines of the team production scholars, that changing the corporate law is an unnecessary struggle. Indeed, over the long term, other doctrines might well replace the SVM principle without any legal intervention (Mac Cormac & Haney, 2012). However, without any change in the legal framework, the current position of shareholders is likely to enable them to strongly influence the actual purpose of each corporation taken individually. If so, what changes would really be efficient in tempering the entrenched SVM doctrine? In this section, we review three different avenues that have been explored by recent attempts at legal changes: constituency statutes, stakeholder governance, and profit-with-purpose corporations. By analyzing them through the lens of our model, we explain why the first two avenues have not yet met with success in the US context, while the third one, not relying on a "primacy" model of corporate governance, holds a major potential in tempering the SVM doctrine. In the discussion, we explore further the potential of this last "shareholder commitment" model.

Forcing stakeholder view as a purpose into the law: Whistling in the wind?

Regularly cited as a major change in the corporations' code of UK, the change in section 172 of the Company Act 2006 is representative of the first approach usually considered to modify corporate law. This section states that the director of a company "must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit

of its members as a whole". In essence, this phrasing inscribes directly into the law the purpose of the directors' actions, namely the benefit of a wide variety of constituencies, including the employees, suppliers, customers etc. Similar provisions were discussed in the US setting, under the term "constituency statutes", providing directors performing their duties to serve the "best interests of the corporation" with the right (or the obligation depending on the legislation) to consider "the interests of the corporation's employees, the impact on the community, […] and the environment"[4]. Introduced in a number of states in the 1980s, when a steep rise in the numbers mergers and acquisitions caused social trouble, to explicitly enable directors to oppose takeovers that would harm public interest, these constituency statutes have to date never actually been used in Court (Keay, 2011; McDonnell, 2004). Introduced in 2008, a similar statute was vetoed by the governor of California on the motive that it would have created "unknown ramifications" in the governance of every Californian corporation.

In the 1990s, the adoption of constituency statutes sparked considerable debate among US law scholars, some of them fearing that opening the fiduciary duties of the directors to virtually any stakeholder could justify any of the directors' decisions and thus dangerously increase the risk of managerial opportunism (for a review, see e.g. Keay, 2011; McDonnell, 2004; Wallman, 1991). In practice, their adoption caused little to no difference in the states where they were voted, and some say that the new section 172 of UK Company Act will probably have the same innocuousness (Keay, 2011). At best, it reaffirms that corporate law does not condone the SVM as the single purpose for the corporation.

[4] See Assembly Bill 2944 introduced in California in 2008. http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_bill_20080222_introduced.html (last accessed July 2017).

Considering our analysis on the sources of SVM in the current legal framework, this comes to no surprise. In the first place, directors were already expected to make decisions in the “best interests of the corporation” and the rephrasing does not prioritize stakeholders’ interests over the corporations’. And secondly, no changes in the decision spaces and control rights of any stakeholders were introduced. Shareholders still are in an asymmetric position, and no other stakeholders hold rights to pursue the corporation of its directors for not having chosen to protect their interests even after “considering” them. In other words, shareholders’ influence can still practically define the bests interests of the corporation.

Creating decision spaces for other stakeholders: Using brute force

Acknowledging the limited impact of a change in the formulation of directors’ duties in corporate law to promote a more stakeholder-oriented governance model, several scholars suggest tackling the issue of shareholder asymmetry head on. Using the argument that shareholders are not in a specific economic position regarding their risks, especially not the only ones in a position of residual claimants (Sjåfjell et al., 2015), these authors argue that they should not be given a privileged position in corporate governance. On the contrary, similar rights and obligations should be distributed to a variety of stakeholders, beginning with employees. These models can be referred to as “Stakeholder governance” models (Greenfield, 2007; Lenssen, Bevan, Fontrodona, Spitzeck, & Hansen, 2010; Turnbull, 1997) or “Progressive Corporate Law” models (Ho, 2010; Mitchell, 1995; Page & Katz, 2011).

The principle behind these models is to provide non-shareholder stakeholders with decision rights that even out their influence on the conduct of business. To some, it would require granting these stakeholders (employees, customers, public authorities) the right to elect representatives in the

board of directors and governance committees if any (Ayuso & Argandoña, 2009; Osterloh & Frey, 2006). As such, the model of the German "*mitbestimmung*" would be a more efficient model to run the corporation by benefiting from the knowledge and the engagement of those actors (Osterloh, Frey, & Zeitoun, 2011), especially where shareholder influence is strong (Gelter, 2009). To others, a solution would be to make all employees shareholders, for example by pushing a co-operative model, thus granting them the same rights and obligations as traditional shareholders (Bowles & Gintis, 2002; Turnbull, 1997).

Here again, changes in the US corporate law have been attempted, notably through the introduction of the "Socially Responsible Company" in 2009 in Minnesota[5] (Page & Katz, 2011), and quickly discarded. Although this functioning might be desirable to effectively push forward the thinking about corporations' purpose and behavior, our model might explain some of the difficulties to implement such a change in the US context[6]. The legal model of the corporation only explicitly mentions the role of incorporators, shareholders, directors and possible delegates of the directors to manage the company in their place. The corporation's "constituencies" are therefore only composed of these actors, and other stakeholders are necessarily third-parties that contract directly with the corporation as an entity. As a result, although there would be no formal impossibility to write bylaws that enable other parties to participate to governance decision-making, it is not easily conceivable to integrate those in codified corporate law. Some authors further argue that the stakeholder model is not formal enough to delineate the frontier to which the list of relevant stakeholders to integrate into governance decision spaces should be expanded (Orts & Strudler,

[5] See Senate File 1153, 2007-2008.

[6] We do not explore the political reasons why such a change might be still more complicated to consider in the US (see Page & Katz, 2011 for a brief discussion). However, this path has already been implemented in several countries, notably in Europe (Gelter, 2009).

2010). We would just assume that such a change, although formally achievable, is a big leap forward for corporate governance that is not very likely to happen in the next few years in the US context.

Demanding shareholders' commitment: Leveraging the opponent's strength

The latest changes in corporate law in the US open a third avenue, much more recent, which harnesses the potential of the "decision spaces" model of corporate governance. If compensating the asymmetry currently favoring shareholders through the distribution of new rights for other constituencies remains a distant horizon in the US, another way would be to directly make use of this asymmetry by acknowledging the decision rights that accrue to shareholders, and incorporating a broader purpose than SVM explicitly into these shareholders' engagement.

This is in essence the idea behind new corporate forms that have been instituted in various states in the US under the names "*Benefit Corporations*", "*Public Benefit Corporations*" or "*Social Purpose Corporations*" (Alexander, 2017; Clark Jr & Babson, 2011; Hiller, 2013; Rawhouser, Cummings, & Crane, 2015; Reiser, 2012). We will refer to these corporate forms as "Profit-with-Purpose Corporations", or "PPCs" (Prior, Cohen, & Fox, 2014). These corporate forms request that an additional purpose, of a social or environmental nature, be introduced in the articles of incorporation alongside the usual profit-making motive. To turn a company into a PPC, the company's shareholders must accept the change in the articles of incorporation with the positive vote of two thirds of each class of shares. As long as this purpose is included in the articles, the shareholders relinquish their rights to sue the directors for a breach of fiduciary duties if the potentially incriminated decision was made in the light of this purpose. Then, a majority of two thirds is required again for changing or deleting the purpose, and reverting back to a more

conventional corporation. Conversely, following the purpose is now part of the directors' duties, meaning that their duty of care includes the requirement to be informed on, and to consider, the impacts of their decision on the capacity of the company to pursue its purpose. In some cases, shareholders might therefore have the capacity to sue directors for not considering this purpose in their decision making.

Essentially, this model thus does not need to assume any form of radical primacy, on the part of either shareholders or directors. On the contrary, it assumes that the decision rights are split between these two particular constituencies: for instance, the right of approving the changes made in the corporate bylaws accrue ultimately to shareholders, which might also exert a strong influence through the use of legal action for breaches of fiduciary duties. Consequently, it would be pointless to expect the company to pursue a broader purpose than SVM if both shareholders and directors are not explicitly bound to this purpose.

We suggest calling this new governance model a "*shareholder commitment*" model rather than "shareholder primacy". This view acknowledges that any type of non-legal engagement on the part of managers of the company, for instance towards socially or environmentally responsible behaviors, remains subjected to shareholders' and directors' acceptance, which might change over time. Therefore, if one is willing to anchor a broader orientation of the corporate purpose, for instance towards broader constituencies than shareholders, the first step is necessarily to demand shareholders' and directors' commitment towards this purpose. This commitment is a necessary condition to deter the SVM in a reliable way, because it simultaneously enables to "give corporate managers more ability to and impose upon them an enforceable duty to 'do the right thing.'" (Strine Jr, 2014: 235).

The potential of a "commitment" model of corporate governance

Dropping the notion of "primacy" to conceptualize corporate governance opens new avenues for realistic descriptive and prescriptive models that might take into account the variety of ownership and decision rights structures that firms actually present.

New effective governance mechanisms

In the first place, specifying an explicit purpose for the corporation in its bylaws simplifies the ever-present issue of delineating what are the "interests of the corporation and its shareholders" (Sjåfjell et al., 2015; Yosifon, 2014). Whereas the classical economic approach relies on interpreting an enigmatic body of law on the question, the PPC model requires shareholders and directors to explicitly find an agreement as to what the overarching corporate interest should be. Note that in the case of Social Purpose Corporations, there is no public body to ascertain what a "social or environmental" purpose should be, meaning that the formulation of a purpose is virtually unrestricted. This means that the formerly implicit relationship between the corporation's objective and the society at large, for instance at the origin of a "social contract" or "license to operate" view of stakeholder theory (Donaldson & Dunfee, 1994; Wilburn & Wilburn, 2011), now becomes explicit and publicly knowable. In the context of the agency theory, Raelin and Bondy (2013) have shown that this implicit link, postulated in Friedman's famous 1970 article, can be conceptualized as a "second-layer" agency relationship between shareholders and the society at large. This PPC mechanism is therefore a means to make this second-layer explicit.

Consequently, new governance mechanisms such as oversight boards dedicated to monitor the performance and strategy of the company regarding the fulfillment of the purpose can be proposed

(Kay & Silberston, 1995; Raelin & Bondy, 2013), as well as dedicated assessment tools and methods, which complement traditional accountability mechanisms (Ebrahim, Battilana, & Mair, 2014; Mac Cormac & Haney, 2012). At the same time, the legal nature of the purpose included in corporate bylaws may serve as a standard for judges to assess whether directors indeed followed their fiduciary duties or not. This is particularly useful in change of control situations where the heightened level of scrutiny from the court so far meant a heightened importance of the SVM (Bainbridge, 1991).

Limitations of the "beyond the law" traditional approach of CSR

In the second place, the PPC model based on the introduction of a commitment both from shareholders and directors highlight the reasons why the conventional corporate governance framework made traditional CSR engagements susceptible of greenwashing behaviors or early disengagement (Fleming & Jones, 2013). The distribution of decision rights both to shareholders and directors might put top managers under conflicting demands, without any clear reference to an overarching strategic goal. Similarly, the stakeholder governance models might exacerbate the tension between the contrasted interests of the different stakeholders rather than foster the emergence of a common purpose driving corporate strategy.

However, the introduction of this type of common purpose into the corporate articles is not a guarantee that other means of influence, on the part of any stakeholder, might not still exert pressure on directors to depart from the purpose in making day-to-day decisions. Potential limitations include the need to review incentive mechanisms, the ability for majority shareholders to easily change the formulation of the purpose, or the capacity to dismiss directors.

From a Law & Economics to a Law & Management approach?

In the end, the most interesting feature of the "shareholder commitment" model from a research point of view is perhaps the way it reverses the traditional Law & Economics rationale. Instead of using models in economics to understand law as to what is the most economically efficient way to interpret corporate law provisions, the proponents of PPC forms suggest shaping the content of corporate law in order to promote the type of management that is better suited to societal challenges at one point in time. Conversely to an approach advocating for a universal interpretation of "corporate purpose" (which includes the Team Production Theory in which the view that the corporation is the true principal serves as an argument to promote the interests of all corporate constituencies involved in the joint production process), these new models invite scholars and practitioners to design legal and organizational forms that foster specific conceptions of this purpose, deriving from management models (such as the stakeholder model).

In this paper, however, we only focused on the current US corporate governance framework. Similar analysis is still required to understand whether the development of a "shareholder commitment" approach is necessary in other legislations, for instance in various European countries where the decision rights accruing to shareholders greatly vary, as well as the explicit and implicit influence shareholders can exert on the companies' management (Gelter, 2009).

Overall, we would argue that promoting a variety of governance frameworks, rather than the one best way promised two decades ago by Hansmann and Kraakman (2000) would help preventing such a scientific controversy to thrive.

Conclusion

Corporate Governance theory has been stuck in the debate between shareholder, director and stakeholder primacy for more than twenty years now. In this paper, we have reviewed the various arguments supporting either of these views, and showed that far from being free-standing independent models, none of these interpretations were consistently describing the reality of corporate law and the practice of corporate governance. In effect, it seems that corporate law does not prescribe any form of primacy in itself, and only interpretations based on economic theories have introduced a notion of efficiency of corporate governance settings, which necessarily depart from both the letter and spirit of the law. Acknowledging that corporate law enables a variety of distribution of decision rights mostly between shareholders and directors opens new ways for solving the scientific controversy and designing governance settings with predictable effects. It helps explaining with the shareholder value maximization norm, although not being explicitly prescribed by corporate law, remains dominant today. In the end, if one is to curb the influence of this norm on business practice, and to foster companies' responsible behaviors, it appears necessary to *secure shareholders' and directors' commitment* towards a broader purpose than SVM. One way of doing this is to promote a "Profit-with-Purpose Corporation" setting where a social or environmental purpose is included in the corporate bylaws. However, numerous other ways might still be built, either at the legislative or at the company levels.

References

Ahrens, T., Filatotchev, I., & Thomsen, S. 2011. The research frontier in corporate governance. ***Journal of Management and Governance***, 15(3): 311-325.

Alchian, A. A., & Demsetz, H. 1972. Production, information costs, and economic organization. ***The American Economic Review***, 62(5): 777–795.

Alexander, F. H. 2017. ***Pursuing Profit With Purpose***: Berrett-Koehler.

Ayuso, S., & Argandoña, A. 2009. Responsible corporate governance: towards a stakeholder Board of Directors?

Bainbridge, S. M. 1991. Interpreting Nonshareholder Constituency Statutes. ***Pepperdine Law Review***, 19: 971.

Bainbridge, S. M. 2002. Director primacy: The means and ends of corporate governance. ***Nw. UL Rev.***, 97: 547.

Bainbridge, S. M. 2004. Business Judgment Rule as Abstention Doctrine, The. ***Vand. L. Rev.***, 57: 83.

Bebchuk, L. A. 2005. The case for increasing shareholder power. ***Harvard Law Review***: 833-914.

Bebchuk, L. A. 2007. The myth of the shareholder franchise. ***Virginia Law Review***: 675-732.

Berle, A. A., & Means, G. C. 1932. ***The modern corporation and private property***: Transaction Pub.

Blair, M. M. 1995. ***Ownership and control : rethinking corporate governance for the twenty-first century***. Washington, D.C.: Brookings Institution.

Blair, M. M. 1998. For whom should corporations be run?: An economic rationale for stakeholder management. ***Long Range Planning***, 31(2): 195–200.

Blair, M. M. 2014. Boards of Directors as Mediating Hierarchs. ***Seattle UL Rev.***, 38: 297.

Blair, M. M., & Stout, L. A. 1999. A team production theory of corporate law. ***Virginia Law Review***, 85(2): 247–328.

Blair, M. M., & Stout, L. A. 2001. Trust, trustworthiness, and the behavioral foundations of corporate law. ***University of Pennsylvania Law Review***, 149(6): 1735–1810.

Bowles, S., & Gintis, H. 2002. Social capital and community governance. ***The Economic Journal***, 112(483).

Canals, J. L. 2011. Rethinking the Firm's Mission and Purpose. ***European Management Review***, 7(4): 195–204.

Clark Jr, W. H., & Babson, E. K. 2011. How Benefit Corporations are redefining the purpose of business corporations. ***Wm. Mitchell L. Rev.***, 38: 817.

Clark, R. C. 1985. Agency costs versus fiduciary duties. In J. W. P. R. J. Zeckhauser (Ed.), ***PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS***.

Coffee Jr, J. C., & Palia, D. 2016. The wolf at the door: The impact of hedge fund activism on corporate governance. ***Annals of Corporate Governance***, 1(1): 1-94.

Davis, J. H., Schoorman, F. D., & Donaldson, L. 1997. Toward a stewardship theory of management ***Academy of Management Review***, 22(1): 20-47.

Deakin, S. 2011. The corporation as commons: rethinking property rights, governance and sustainability in the business enterprise. ***Queen's LJ***, 37: 339.

Dent Jr, G. W. 2007. Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance. ***Hous. L. Rev.***, 44: 1213.

Donaldson, T., & Dunfee, T. W. 1994. Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory. ***Academy of Management Review***, 19(2): 252–284.

Easterbrook, F. H., & Fischel, D. R. 1991. ***The economic structure of corporate law***: Harvard University Press.

Ebrahim, A., Battilana, J., & Mair, J. 2014. The governance of social enterprises: Mission drift and accountability challenges in hybrid organizations. ***Research in Organizational Behavior***, 34: 81-100.

Eisenberg, M. A. 1989. The structure of corporation law. ***Columbia Law Review***, 89(7): 1461-1525.

Elhauge, E. 2005. Sacrificing corporate profits in the public interest. ***NyUL Rev.***, 80: 733.

Fama, E. F., & Jensen, M. C. 1983. Separation of ownership and control. ***Journal of law and economics***: 301-325.

Fischel, D. R. 1982. Corporate Governance Movement, The. ***Vand. L. rev.***, 35: 1259.

Fleming, P., & Jones, M. 2013. ***The end of corporate social responsibility: Crisis and critique***: Sage.

Gelter, M. 2009. The dark side of shareholder influence: Managerial autonomy and stakeholder orientation in comparative corporate governance. ***Harvard International Law Journal***, 50(1): 129-194.

Ghoshal, S. 2005. Bad Management Theories Are Destroying Good Management Practices. ***Academy of Management Learning & Education***, 4(1): 75-91.

Greenfield, K. 2007. Defending Stakeholder Governance. ***Case W. Res. L. Rev.***, 58: 1043.

Hansmann, H., & Kraakman, R. 2000. The End Of History For Corporate Law. ***Georgetown Law Journal***.

Heracleous, L., & Lan, L. L. 2010. The Myth of Shareholder Capitalism. ***Harvard Business Review***, 88(4): 24.

Hiller, J. S. 2013. The Benefit Corporation and Corporate Social Responsibility. ***Journal of Business Ethics***, 118(2): 287-301.

Ho, V. H. 2010. Enlightened shareholder value: Corporate governance beyond the shareholder-stakeholder divide. ***J. Corp. L.***, 36: 59.

Ingley, C., Mueller, J., & Cocks, G. 2011. The financial crisis, investor activists and corporate strategy: will this mean shareholders in the boardroom? ***Journal of Management and Governance***, 15(4): 557-587.

Jensen, M. C. 2001. Value Maximization, Stakeholder Theory, and the Corporate Objective Function. ***European Financial Management***, 7(3): 297-317.

Jensen, M. C., & Meckling, W. H. 1976. Theory of the firm: Managerial behavior, agency costs and ownership structure. ***Journal of Financial Economics***, 3(4): 305-360.

Johnson, L. P., & Millon, D. 2005. Recalling why corporate officers are fiduciaries. ***Wm. & Mary L. Rev.***, 46: 1597.

Kaufman, A., & Englander, E. 2005. A team production model of corporate governance. ***The Academy of Management Executive***, 19(3): 9-22.

Kay, J., & Silberston, A. 1995. Corporate Governance. ***National Institute Economic Review***, 153(1): 84-107.

Keay, A. 2007. Tackling the issue of the corporate objective: an analysis of the United Kingdom's enlightened shareholder value approach. ***Sydney L. Rev.***, 29: 577.

Keay, A. 2011. Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado About Little? ***European Business Law Review***, 22(1): 1-49.

Kemper, A., & Martin, R. L. 2010. After the fall: The global financial crisis as a test of corporate social responsibility theories. ***European Management Review***, 7(4): 229-239.

Lan, L. L., & Heracleous, L. 2010. Rethinking Agency Theory : the View from the Law. ***Academy of Management Review***, 35(2): 294-314.

Lazonick, W. 2014. Profits without Prosperity. ***Harvard Business Review***, 92(9): 46-55.

Lenssen, G., Bevan, D., Fontrodona, J., Spitzeck, H., & Hansen, E. G. 2010. Stakeholder governance: how stakeholders influence corporate decision making. ***Corporate Governance: The international journal of business in society***, 10(4): 378-391.

Mac Cormac, S., & Haney, H. 2012. New Corporate Forms : One Viable Solution to Advancing Environmental Sustainability. ***Journal of Applied Corporate Finance***, 24(2).

Margolis, J. D., & Walsh, J. P. 2003. Misery loves companies: Rethinking social initiatives by business. ***Administrative Science Quarterly***, 48(2): 268–305.

McDonnell, B. 2004. Corporate Constituency Statutes and Employee Governance. ***William Mitchell Law Review***, 30: 1227.

Millon, D. 2000. New game plan or business as usual? A critique of the team production model of corporate law. ***Virginia Law Review***, 86(5): 1001-1045.

Millon, D. 2013. Radical Shareholder Primacy. ***U. St. Thomas Law Journal***, 10: 1013-1123.

Mitchell, L. E. 1995. ***Progressive corporate law***: Westview Press.

Mitchell, R. K., Weaver, G. R., Agle, B. R., Bailey, A. D., & Carlson, J. 2016. Stakeholder Agency and Social Welfare: Pluralism and Decision Making in the Multi-Objective Corporation. ***Academy of Management Review***, 41(2): 252-275.

Mizruchi, M. S. 1983. Who controls whom? An examination of the relation between management and boards of directors in large American corporations. ***Academy of management Review***, 8(3): 426-435.

Murray, J. H., & Hwang, E. I. 2011. Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies. ***University of Miami Law Review***, 66(1).

O'Sullivan, M. 2000. The innovative enterprise and corporate governance. ***Cambridge Journal of Economics***, 24(4): 393.

Orts, E. W., & Strudler, A. 2010. Putting a Stake in Stakeholder Theory. ***Journal of Business Ethics***, 88(S4): 605-615.

Osterloh, M., & Frey, B. S. 2006. Shareholders should welcome knowledge workers as directors. ***Journal of Management and Governance***, 10(3): 325-345.

Osterloh, M., Frey, B. S., & Zeitoun, H. 2011. Voluntary co-determination produces sustainable competitive advantage, ***Corporate Social Responsibility and Corporate Governance***: 332-352: Springer.

Page, A., & Katz, R. A. 2011. Is Social Enterprise the New Corporate Social Responsibility? ***Seattle University Law Review***, 34.

Pitelis, C. N., & Teece, D. J. 2009. The (new) nature and essence of the firm. ***European Management Review***, 6(1): 5–15.

Prior, C., Cohen, S. R., & Fox, T. 2014. Profit-with-Purpose Businesses - Subject paper of the Mission Alignment Working Group: Social Impact Investment Taskforce, G8.

Raelin, J. D., & Bondy, K. 2013. Putting the Good Back in Good Corporate Governance: The Presence and Problems of Double-Layered Agency Theory. ***Corporate Governance: An International Review***, 21(5): 420-435.

Rawhouser, H., Cummings, M. E., & Crane, A. 2015. Benefit Corporation Legislation and the Emergence of a Social Hybrid Category. ***California Management Review***.

Reiser, D. B. 2012. Next Big Thing: Flexible Purpose Corporations, The.

Segrestin, B., & Hatchuel, A. 2011. Beyond Agency Theory, a Post-crisis View of Corporate Law. ***British Journal of Management***, 22(3): 484–499.

Sjåfjell, B., Johnston, A., Anker-Sørensen, L., & Millon, D. 2015. Shareholder primacy: the main barrier to sustainable companies. In B. J. R. Beate Sjåfjell (Ed.), ***Company Law and Sustainability, Legal Barriers and Opportunities***: Cambridge University Press.

Stout, L. A. 2002. Bad and not-so-bad arguments for shareholder primacy. ***S. Cal. L. Rev.***, 75: 1189.

Stout, L. A. 2008. Why We Should Stop Teaching Dodge v. Ford. ***Va. L. & Bus. Rev.***, 3: 163.

Stout, L. A. 2012. ***The shareholder value myth: How putting shareholders first harms investors, corporations, and the public***: Berrett-Koehler Publishers.

Strine Jr, L. E. 2014. Making It Easier for Directors to Do the Right Thing. ***Harv. Bus. L. Rev.***, 4: 235.

Sundaram, A. K., & Inkpen, A. C. 2004. The Corporate Objective Revisited. ***Organization Science***, 15(3): 350-363.

Turnbull, S. 1997. Stakeholder governance: A cybernetic and property rights analysis. ***Corporate Governance: An International Review***, 5(1): 11-23.

Wallman, S. M. 1991. Proper interpretation of corporate constituency statutes and formulation of director duties, the. ***Stetson L. Rev.***, 21: 163.

Wilburn, K. M., & Wilburn, R. 2011. Achieving social license to operate using stakeholder theory. ***Journal of International Business Ethics***, 4(2): 3.

Yosifon, D. G. 2014. The Law of Corporate Purpose. ***Berkeley Business Law Journal***, 10: 181-230.

Tables & Figures

		Shareholders' Means (control rights)	Shareholders' Ends (interests)
Legal justifications	In favor	Shareholders' specific rights : Director nomination and dismissal, Approval of changes in bylaws, Sales of substantial assets, Voluntary dissolution, Derivative suits (Bainbridge, 2002) Access to corporate books and records (Millon, 2013)	Obligation to maximize shareholders' interests in case law (Dodge v. Ford 1919, Craigslist v. eBay 2010), and in cases of change of control (Unocal 1085, Revlon 1986) Fiduciary Duties, Interpretation of Business Judgment Rule as favoring the long-term interest of the shareholders (Bainbridge, 2002; Yosifon, 2014)
	Against	Limited rights to form large blocks, Limited rights to cooperate for coordinated action, Staggered board allowed (Bainbridge, 2002) Charter amendments must be initiated and brought to a shareholder vote of approval by the board, Shareholders also lack the power to initiate changes to the state of incorporation (Bebchuk, 2005) The limited liability of shareholders is justified by their absence of control (Lan & Heracleous, 2010)	Shareholders are but one constituency, the interests of the corporation as a separate legal entity does not equate those of the shareholders (Blair, 1995, 1998; Elhauge, 2005) Dodge v. Ford is a matter of minority vs controlling shareholder (Stout, 2008) A corporation may conduct or promote any lawful business or purposes in DGCL (Yosifon, 2014) Fiduciary duties are only shareholder protection against management fraud (Gelter, 2009)
Economic justifications	In favor	Shareholders are residual claimants and in a position to monitor management (Jensen & Meckling, 1976)	Shareholder only accept to bring capital in exchange for wealth maximization (Bainbridge, 2002) Shareholders are owners of the corporation (Fama & Jensen, 1983)
	Against	Shareholders are not the only residual claimants and are susceptible of biases if given control (Blair & Stout, 1999; Lan & Heracleous, 2010)	Unbalanced objective jeopardizes team production (Blair & Stout, 1999) and create harmful economic and societal consequences (Ghoshal, 2005)
Observations	Supportive	Shareholder influence – explicit through intervention into management or implicit through institutional factors such as the market for corporate control (Gelter, 2009)	Strong incentives to align with shareholders' interests (Millon, 2013)
	Unsupportive	Rational apathy and cost of electoral challenges in dispersed ownership (Bebchuk, 2007; Gelter, 2009) Studies show activists have low influence on performance (Bainbridge, 2002)	

Table 1 - Arguments in favor and against shareholder wealth maximization and primacy

		Directors' Means (control rights)	Stakeholders' Ends (interests)
Legal justifications	**In favor**	"Corporate affairs shall be managed by or under the direction of a board" in DGCL, Directors have the power to hire top managers (Bainbridge, 2002) Their power is vested by the corporation as a separate legal entity (Blair & Stout, 1999) Board are insulated from all stakeholders' pressure and are autonomous fiduciaries of the corporation (Lan) (Lan & Heracleous, 2010) The Business Judgment Rule protects their day-to-day business decisions (Bainbridge, 2004) Board has full authority over most "Rules-of-the-game" decisions including wealth distribution (Bebchuk, 2005)	Several Delaware law cases where directors could promote the long-term success of the company for the benefit of its constituencies as a whole (Lan & Heracleous, 2010) Directors are mediating hierarchs ensuring the balance of power and wealth between the constituencies (Blair, 2014)
	Against	Board's authority prevails (Bainbridge) Directors appoint and decide the compensation of CEOs (Lan & H)	Stakeholders' interests are considered in regular complete contracts (Jensen & Meckling, 1976)
Economic justifications	**In favor**	In the firm as a nexus of contracts, the board is at the center, Fiat is exercised by hierarchs to enable cooperation (Bainbridge, 2002) Stakeholder voluntarily vest a third party with the power to make decisions and distribute wealth (Blair & Stout, 1999)	For the team production to be sustainable it is necessary to balance the interests of all stakeholders (Blair & Stout, 1999)
	Against		Stakeholders' interests are not convergent and following multiple objective might make the corporation unmanageable (Sundaram & Inkpen, 2004)
Observations	**Supportive**	Boards are protected from CEO pressure through a growing number of non-executive directors (Bainbridge, 2002)	
	Unsupportive	CEOs are often chairman of the board, CEOs often decide directors nomination and pay, Information to the board is provided by CEOs, Board openings are proposed by CEOs (Dent Jr, 2007)	CEO entrenchment (Dent Jr, 2007)

Table 2 - Arguments in favor and against director primacy and stakeholders interest consideration

<table>
<tr><td></td><td></td><td colspan="4">“Means”</td></tr>
<tr><td></td><td></td><td>Shareholders</td><td>Directors</td><td>Stakeholders</td><td>CEOs</td></tr>
<tr><td rowspan="6">“ Ends”</td><td rowspan="2">Shareholders</td><td>Radical shareholder primacy and Shareholder Empowerment*</td><td>Director primacy</td><td rowspan="3"></td><td rowspan="3">Stewardship models</td></tr>
<tr><td colspan="2">Traditional shareholder primacy</td></tr>
<tr><td>The Corporation</td><td></td><td>Corporation as a principal</td></tr>
<tr><td>Stakeholders or the Community</td><td>Double-layered agency*</td><td>Team Production Theory</td><td>Progressive Corporate Law and Stakeholder models*</td><td></td></tr>
<tr><td>CEOs</td><td></td><td></td><td></td><td>Managerialism</td></tr>
</table>

**These models are prescriptive models based on a change of corporate law*

Table 3 - Mapping of the main descriptive and prescriptive models of corporate governance