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Consumer Interest in Corporate Law

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This Article provides a comprehensive assessment of the consumer interest in dominant theories of the corporation and in the fundamental doctrines of corporate law. In so doing, the Article fills a void in contemporary corporate law scholarship, which has failed to give sustained attention to consumers in favor of exploring the interests of other corporate stakeholders, especially shareholders, creditors, and workers. Utilizing insights derived from the law and behavioralism movement, this Article examines, in particular, the limitations of the shareholder primacy norm at the heart of prevailing "nexus of contracts" and "team production" theories of the firm. The Article concludes that fundamental reforms in corporate governance may be needed in order to vindicate the consumer interest in corporate enterprise.

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INTRODUCTION

Corporations exist to serve a socially useful purpose.[1] Successful corporations provide shareholders with profits, employees with jobs, and consumers with products. Although each of these groups has a stake in the successful operation of the firm, the law makes corporate directors fiduciaries of shareholders only. Dominant theories of corporate law insist upon the social utility of this shareholder primacy norm in corporate governance. Indeed, most corporate law scholarship focuses on how corporate law can best implement this basic principle. In the shadows of shareholder primacy, critical corporate law scholars have developed robust critiques of the dominant regime. These critiques typically focus on the ways in which shareholder primacy fails to vindicate employee interests in corporate undertakings. With mainstream analysis focused on shareholders, and critical work devoted to workers, the consumer interest has been left relatively unexamined in corporate law scholarship.

This Article endeavors first to explain the absence of sustained attention to the consumer interest in corporate law, and then seeks to begin filling in that gap with an analysis suggesting that fundamental reforms in corporate governance may be needed to vindicate the consumer interest in corporate enterprise. Part I explains why corporations should be made to serve the interests of society generally, and explores conventional justifications for how contemporary corporate law is thought to advance consumer interests.[2] Part II explicates the ways in which corporate law fails this task. Subpart A critiques the dominant view of the consumer interest in corporate law through an analytic framework informed by insights from the law and behavioralism movement.[3] Subpart B examines three consumer markets where the failure of corporate law in connection with consumers can readily be seen — markets in cigarettes, food, and dietary supplements.[4] Subpart C specifies that the problems in these markets are failures of corporate law in particular, and not simply market exchange or capitalism generally.[5] Although most of Part II focuses on ways in which corporate law fails individual consumers, subpart D emphasizes that corporate law also presently fails to provide

[1] *See infra* Part I.A.
[2] *See infra* Part I.
[3] *See infra* Part II.A.
[4] *See infra* Part II.B.1-3.
[5] *See infra* Part II.C.

consumers a mechanism to overcome collective action problems inhibiting socially responsible consumption patterns.[6] Finally, Part III explores potential corporate law solutions to these problems.[7] Subpart A analyzes the merits of providing corporate directors greater latitude to attend to consumer interests.[8] Subpart B first examines the possibility of expanding the fiduciary obligations of corporate directors to *require* them to attend to the consumer interest, and then considers the plausibility of involving consumers in the election of corporate directors.[9] Part III concludes by exploring the viability of allowing consumers to propose and vote on specific proposals for the reform of corporate policies, a privilege that the federal securities laws presently provide to shareholders.[10]

I. THE CONSUMER INTEREST AT THE END OF HISTORY FOR CORPORATE LAW

A. *The Purpose of Corporate Law*

Large, publicly traded corporations take their present powerful form because of concessions bestowed on them by the state. These concessions include limited liability for corporate shareholders, and the rights of firms to enter into contracts and buy, hold, and sell property as independent entities.[11] The state can legitimately grant these concessions only if it does so to advance a public purpose.[12]

This "concession" theory of the corporation easily explains why corporations should be constructed and regulated in a way that advances the public interest generally. But the concession model is passé in contemporary corporate theory. Leading theorists today purport to look past the fiction of the firm as an independent entity created by the state, and instead see the corporation as a series of intersecting, voluntary arrangements — a "nexus of contracts" —

[6] *See infra* Part II.D.

[7] *See infra* Part III.

[8] *See infra* Part III.A.

[9] *See infra* Part III.B.1-2.

[10] *See infra* Part III.C.

[11] *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205-11 (1990) (discussing this concession theory of corporation). *See generally* Paul G. Mahoney, *Contract or Concession?: An Essay on the History of Corporate Law*, 34 GA. L. REV. 873 (2000) (examining "concession" theory of firm). This Article is primarily concerned with theoretical and policy issues relating to large, publicly traded corporations operating on a regional, national, or international scale.

[12] *See* Millon, *supra* note 11, at 205-07; *supra* note 11 and accompanying text.

formed by parties to corporate dealings.[13] These parties include shareholders, creditors, directors, workers, and consumers.[14] Under the nexus of contracts theory, corporate law does not create any entity, but rather serves only to supply efficient terms to the contracts that the various stakeholders in the corporate nexus would agree to if they went to the trouble and cost of actually negotiating them.[15] This nexus of contracts approach to the corporation, however, must ultimately advance under the same banner of social purpose as does the concession theory.

Corporate law scholars recognize that contracting regimes include pervasive state involvement that can only be justified by a social purpose.[16] This pervasiveness is well evidenced in the corporate arena by the extensive public institutions employed in advancing corporate operations, such as regulation of the securities markets. But at the most fundamental level, pervasive state involvement must be seen in the state's willingness and ability to enforce contracts, including those that comprise the corporate nexus.[17] Recognizing this inevitable

[13] *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1996) (elaborating nexus of contracts approach to corporate law); Stephen A. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 859 (1997) (" '[C]ontractarians' model the firm not as a single entity, but as an aggregate of various inputs . . . . Employees provide labor. Creditors provide debt capital. Shareholders provide equity capital, bear the risk of losses, and monitor the performance of management.").

[14] *See supra* note 13 and accompanying text.

[15] *See* EASTERBROOK & FISCHEL, *supra* note 13, at 15 ("The normative thesis [of nexus of contracts theory] is that corporate law should contain the terms people would have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low. The positive thesis is that corporate law almost always conforms to this model."). The contractarian view is especially celebrated in contemporary legal scholarship, but the nexus of contracts conception of the firm has long been a part of the literature. *See, e.g.*, Merrick Dodd, Note, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145-46 (1932) (describing contractarian view as "widely prevalent theory").

[16] *See infra* note 17 and accompanying text.

[17] This crucial insight — the "private market . . . [as] an artifact of 'public violence,' " — is easily forgotten or ignored in discussions of contract generally, and the nexus of contracts theory of the corporation in particular. Perhaps that is because the insight is treated as abstract, and thus wanes in our thinking for want of salience. *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 438-39 (1989). The conceptual can be made salient, and in its salience be afforded an attention commensurate with its importance, through storytelling. *Cf.* Mae Kuykendall, *No Imagination: The Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007) (lamenting limited use of storytelling in corporate law). There is a scene in Michael Moore's ROGER AND ME (1989) in which Moore,

statism in corporate law, leading corporate scholars Henry Hansmann and Reinier Kraakman assert that "all thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other member of society."[18] The social purpose principle thus must drive the analysis of corporate law irrespective of the theory of the firm with which one begins.[19]

B. *Shareholder Primacy and the Consumer Interest*

The consensus regarding the core social purpose of corporate law is sometimes obscured by the seemingly contradictory doctrinal prescription that nexus of contracts theorists also universally reach — that corporate law should require firm managers to pursue maximum profits for shareholders.[20] Nexus of contract theorists insist that there is no contradiction afoot because shareholder primacy *is* the corporate governance principle that serves *all* stakeholder interests better than any other rule.[21] These theorists argue that shareholder primacy is

depicting the consequences of General Motors' massive, swift downsizing in the 1980s on the people of Flint, Michigan, follows a curly-mustached, not unamiable, middle-aged constable around the neighborhoods of Flint. He raps on poor people's doors and announces, "I'm here to put you out," whereupon he moves typically women, their children, and their belongings to the sidewalk and locks them out of what is now no longer their home for failure to pay rent. *Id.* The central part played by affirmative law and state power in basic contract and property law, no less than in corporate law, can very clearly be seen after viewing these scenes.

[18] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001). This is also a longstanding trope in corporate law scholarship. *See, e.g.*, Dodd, *supra* note 15, at 1149 ("[B]usiness is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profit to its owners.").

[19] *See* Hansmann & Kraakman, *supra* note 18, at 441 n.5 ("The traditional debate between concession and contract theorists is simply confused . . . . Corporations — whether 'concessions' or contracts — should be regulated when it is in the public interest to do so.").

[20] *See id.* at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."); *see also* EASTERBROOK & FISCHEL, *supra* note 13, at 35-39. As will be examined *infra* text accompanying notes 137-61, there is considerable debate among corporate scholars as to whether positive law does indeed presently reflect this norm of shareholder primacy, but the view that it should be the dominant rule is ensconced in prevailing corporate theory.

[21] *See* Hansmann & Kraakman, *supra* note 18, at 441 n.5 ("[T]he standard model is, in effect, an assertion that social welfare is best served by encouraging corporate managers to pursue shareholder interests.").

therefore the principle that all stakeholders in the corporate nexus would agree to if they actually negotiated terms.

Nexus of contracts theorists rely on a host of interrelated arguments that purport to demonstrate the social utility of shareholder primacy in corporate governance. First among these is the claim that the interests of all corporate stakeholders (investors, workers, and consumers, among others) are closely aligned. The corporation's promise to pursue profits for their shareholders gives shareholders the incentive to invest their capital in corporate enterprise. Such capital pooling generates economies of scale, which creates jobs, thus making workers better off. Large-scale collaborations of capital and labor can produce better and cheaper goods and services, which benefits consumers. Therefore, "maximizing profits for equity investors assists the other 'constituencies' automatically."[22]

Firm governance on behalf of passive shareholders, the dominant theory holds, is also necessary to counterbalance advantages enjoyed by other stakeholders. Workers, for example, are physically present on the corporate shop floor, and thus can protect their interests in the corporate enterprise through specifically negotiated terms of employment and compensation.[23] Similarly, consumers' presence at the cash register makes contract a viable mechanism through which they can monitor and negotiate their stake in their corporate undertakings. Nexus of contract theorists contend that even though in most markets workers and consumers do not actually negotiate terms with firm managers, these corporate stakeholders indirectly bargain through their acceptance or rejection of employment or goods at the offered price. As bellwether nexus of contract theorists Frank Easterbrook and Daniel Fischel explain: "Entrepreneurs or managers may adopt a set of rules and say, 'take them or leave them.' This is contracting . . . . The terms

[22] EASTERBROOK & FISCHEL, *supra* note 13, at 38.

[23] *Id.* at 24. The gains to trade from corporate enterprise can be:

> [D]ivided by decision or default among four broad groups of claimants: (1) the managers — in salary increments, bonuses, perquisites, and fringe benefits; (2) the stockholders — directly by way of higher dividends or indirectly by way of internal investment and capital gains; (3) the workers and suppliers of productive inputs . . . in higher than competitive wages and other higher input prices; and (4) the consumers of the product — in lower output prices and/or higher quality.

Martin Bronfenbrenner, *The Consumer*, *in* SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 169, 173 (James W. Mckie ed., 1974).

in rental contracts, warranties, and the like are real contracts because their value (or detriment) is reflected in price."[24]

As long as corporations operate in competitive markets, corporate managers must offer wages and prices that are favorable to their nonshareholding stakeholders lest these constituencies take their business elsewhere.[25] Where monopolies or disparities in bargaining power make this kind of contracting insufficient to protect the interests of workers or consumers, nexus of contract theorists argue that the interests of these nonshareholding stakeholders should be protected by external regulation, such as labor laws and consumer protection statutes. Overall social utility, shareholder primacists insist, is best accomplished by unbowed adherence to the principle of shareholder primacy in firm governance within the regulatory environments that such laws provide.[26] Nexus of contract theorists also prescribe collateral regulatory regimes to contain the shareholder primacy corporation's tendency to externalize its costs to the general public with whom it has no contractual relationship at all, such as through pollution or waste of natural resources.[27]

The dominance of the nexus of contracts, shareholder primacy model of the corporation "among the academic, business, and governmental elites in leading jurisdictions" is well proclaimed by the title of Hansmann and Kraakman's prominent apologia for the approach, *The End of History for Corporate Law*.[28] The prevailing view is that corporate law is complete — the shareholder primacy norm provides the best of all possible worlds of corporate governance. The global economic crisis of 2008 and 2009 will perhaps usher in an era of doubt regarding conventional corporate theory. If it does, this Article's arguments may find a more sympathetic audience than initially anticipated. Nevertheless, while the Obama Administration was ushered in with appetite all around for "more regulation" in the financial markets, there is little in presently contemplated

[24] EASTERBROOK & FISCHEL, *supra* note 13, at 16-17.

[25] *Id.* at 22-25.

[26] *See, e.g.*, Hansmann & Kraakman, *supra* note 18, at 442 (indicating that external regulation is called for where contract is insufficient to protect nonshareholder interests).

[27] *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 7 EUR. FIN. MGMT. 297, 309 (2001) ("[R]esolving externality and monopoly problems . . . is the legitimate domain of the government in its rule-setting function."); *see also* Ron Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 33-42 (2004) (elaborating this "macro-script" of corporate policy).

[28] Hansmann & Kraakman, *supra* note 18, at 440.

administrative or congressional response to the crisis that is motivated by or would effectuate a repudiation of shareholder primacy in corporate governance.

II. CRITIQUING THE CONSUMER INTEREST IN CORPORATE THEORY

A. *The Problem of Common Sense in Corporate Theory*

> Two hundred years' worth of work in economics and finance indicates that social welfare is maximized when all firms in an economy maximize total firm value. The *intuition* behind this criterion is simply that (social) value is created — when I say "value" I mean "social" value — whenever a firm produces an output, or set of outputs, that is valued by its customers at more than the value of the inputs it consumes . . . in the production of the outputs.[29]
>
> — Michael C. Jensen

Nexus of contract scholars typically list consumers among the parties in the corporate nexus, but they do not typically give sustained attention to how the model vindicates consumer interests.[30] The standard account of shareholder primacy presumes that the profit motive forces firms in competitive markets to discern and satisfy consumer preferences in order to remain profitable. The view that consumer choices in competitive markets reflect consumers' private preferences is the bedrock "intuition" that Jensen, in the quote above, argues authorizes two-hundred years worth of economic analysis on how firms maximize social utility.[31] This intuition animates the basic rational actor conception of the human beings who engage in the contracting that the nexus of contracts theory describes.[32] Rational

[29] Jensen, *supra* note 27, at 302 (emphasis added).

[30] *See, e.g.*, Bainbridge, *supra* note 13, at 877 (listing consumers among parties to corporate nexus, but not examining consumer interest in detail).

[31] *See supra* note 29 and accompanying text; *see also* EASTERBROOK & FISCHEL, *supra* note 13, at 4 ("[Firms] must attract customers and investors by promising *and delivering* what those people value. Corporations that do not do so will not survive. When people observe that firms are very large . . . they observe the product of success in satisfying investors and customers."); *id.* at 38 ("A successful firm provides . . . goods and services for consumers. The more appealing the goods to consumers, the more profit . . . .").

[32] Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 8-15, 138-52 (2004) [hereinafter *The Situational Character*] (demonstrating dominance of rational actor model in contract

actors are presumed, either explicitly or implicitly, to have within them a set of privately ordered preferences for goods and services, among other interests and desires.[33] As rational actors, consumers gather and evaluate appropriate amounts of information regarding options available to them in the market in order to maximize their preference satisfaction through their consumption, which reveals those preferences.

The prominence of the rational actor model within contemporary legal scholarship is bolstered by its consonance with intuitive, common sense ways of thinking about human decision-making and behavior.[34] As social psychologists demonstrate, and as most people's personal experience will attest, human beings tend to view their own choices and behavior as arising from the intersection of their conscious thinking about personal preferences and the exercise of their will.[35] We cannot see inside the hearts or heads of other people, but when we see their choices or actions, we tend to assume that their conduct is driven by the same causal schema that we see within ourselves. We thus tend to draw conclusions about other people's thoughts, preferences, and will, based on their choices and conduct.[36] The rational actor model, generally, and the revealed preference theory of consumer behavior, in particular, reflect these intuitions.

Revealed preference theory does a lot of work in the standard account of corporate law. With it in place, the consumer becomes the most crucial protagonist in the nexus of contracts saga, and, indeed, the entire social system of which it is a part:

> The consumer is and should be sovereign in allocating an economy's resources — ultimately determining by his [or her] choices in free markets what should be produced and in what quantities, by what methods it should be produced, how not only consumer goods but also other goods should be evaluated [e.g., raw materials]. This amounts to indirectly deciding the

law); *see also* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 171-72, 217-24 (2007) (analyzing role of rational actor in corporate law). *See generally* Chen & Hanson, *supra* note 27 (describing role of rational actor in "meta-scripts" of corporate theory).

[33] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 6-8, 144-52.

[34] *See generally* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter *The Situation*] (developing this argument).

[35] *See generally* Hanson & Yosifon, *The Situational Character*, *supra* note 32 (reviewing studies establishing ubiquity of these causal schemas in human thinking).

[36] *See id.* at 5-8, 22-34.

> distribution of income and wealth and the social provision for growth and change.[37]

As familiar as this causal schema is, it is always incomplete, and often misleading.[38] Social psychologists describe the framework as "lay dispositionism" because it focuses predominately on the role of individual disposition in accounting for human behavior, to the exclusion of fully appreciating the ubiquity and power of unseen situational influences over human conduct.[39] Such situational influences include features of our internal lives, such as cognitive heuristics and biases, motivations, and visceral dynamics, which function within us in ways which are usually opaque to our conscious awareness, but which nevertheless profoundly shape the limited features of our self-schema that we do see (such as conscious thoughts and will).[40] Situational influences, as social psychologists use the term, also consist of external features of the world around us, including social and environmental contexts, which profoundly influence human behavior, but often remain unseen in our conscious evaluation

[37] Bronfenbrenner, *supra* note 23, at 172; *see* Michael E. DeBow & Dwight R. Lee, *Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 417-18 (1993) ("[S]ociety is the real principal of business decisions, since the primary objective of all economic activity is to serve the interests of consumers . . . . An evolutionary process prevails in which those firms that organize in ways that best facilitate the cooperation of owners, managers, and workers for the purpose of creating consumer value have the best long-run prospects for survival."). Sometimes the consumer interest is considered co-extensive with the social interest because, as Henry Simons put it, "[o]ne gets the right answers usually by regarding simply the interests of consumers, since we are all consumers . . . ." HENRY C. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 123 (1948). Shareholder primacists sometimes make a similar analytic move and argue that there is no problem in privileging shareholder interests in corporate governance given that, as a result of equity holdings in retirement plans, investments in mutual funds, etc., we are all shareholders now. *See, e.g.*, Hansmann & Kraakman, *supra* note 18, at 451-53 (making this argument). This is, again, a longstanding trope in corporate scholarship. *See* Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367-68 (1932) (arguing that "not less than half the population of the country" had a direct equity interest in publicly traded corporations). *But see* GREENFIELD, *supra* note 32, at 156 (arguing that in fact we are not all shareholders, as wealthiest 20 percent of Americans own 90 percent of stocks).

[38] *See generally* Hanson & Yosifon, *The Situational Character*, *supra* note 32 (reviewing divergence between intuitive and social scientific conceptions of human behavior).

[39] *See* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 139-43 (1991). *See generally* Chi-yue Chiu et al., *Lay Dispositionism and Implicit Theories of Personality*, 73 J. PERSONALITY & SOC. PSYCHOL. 19 (1997) (explicating concept of lay dispositionism).

[40] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 5-8, 22-33.

of our own and other people's conduct.[41] This dispositionism carries over from our intuitions and informs our legal theories and the law, which, in many areas, emphasizes or assumes the importance of private, internal sources of individual behavior, while unduly discounting its situational sources.[42] Conventional corporate theory, in particular, embraces this dispositionism in its conception of consumer behavior, which under the dominant view is presumed more or less exclusively to reveal privately ordered preferences, rather than to reflect situational influences in any meaningful way.

Instead of the intuition-driven rational actor model, corporate law scholars might instead deploy a social-science based "situational character" approach to human behavior.[43] This approach strives to highlight and grapple with the myriad of situational influences on conduct that human beings tend to miss unaided by social science, while simultaneously restraining the authority of unreliable, dispositionist intuitions in our assessment of the sources of behavior.[44]

An example of an insight from the heuristics and biases literature that has already received significant attention in legal scholarship through the influence of the law and behavioralism movement is the "availability heuristic."[45] The availability heuristic denotes the widespread human tendency to make probability assessments based on the ease with which instances of a circumstance automatically come to mind, rather than through anything like a formal actuarial analysis of relevant data.[46] Heuristic thinking is a necessary part of human existence, as both our brains and our time on earth are

[41] Social psychologists, and legal scholars making use of them, sometimes refer to the problem of dispositionism as the "fundamental attribution error." *See* Hanson & Yosifon, *The Situation*, *supra* note 34, at 149-79.

[42] *See id.* at 285-303; *see also* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 8-18.

[43] *See generally* Hanson & Yosifon, *The Situational Character*, *supra* note 32 (developing situational character approach to human behavior for use in legal analysis).

[44] *See supra* note 43 and accompanying text (summarizing studies and their implications for legal analysis). *See generally* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) [hereinafter *TBS I*] (reviewing studies and analyzing implications of social psychology for tort law); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (summarizing studies).

[45] *See* Hanson & Kysar, *TBS I*, *supra* note 44, at 662 (discussing availability heuristic). In addition to availability, other prominent heuristics and biases that have made their way into legal academic discourse include framing effects, anchoring effects, hindsight bias, and confirmatory bias, among others. *See id.*

[46] *See id.* at 662 (discussing availability heuristic).

limited.[47] Cognitive shortcuts often serve us well, as when we accurately assess that a car careening towards us will harm us if we do not move away from it, drawing not on elaborate deductions from formal rules of physics, but from easily recalled instances of automobile accidents. As useful as heuristics are, they also can be misleading, for example, when in the wake of a statistically rare but exceptionally vivid airplane crash, one mistakenly concludes that air travel is more dangerous than car travel, which actually carries far greater risk. Perhaps the most crucial insight for legal theory that emerges from the heuristics and biases literature — as well as the law and behavioralism movement generally — is the recognition that heuristics and other cognitive processes on which humans unknowingly rely in making decisions are highly susceptible to unseen influences through the manipulation of our decision-making environments. That this is true has been well documented in the literally thousands of laboratory studies discerning, tracking, tweaking, and testing the contours of the myriad cognitive mechanisms that shape human thinking and behavior.[48]

Beyond the heuristics and biases literature, many other insights from the social sciences are relevant to developing a realistic conception of human behavior for use in corporate theory. Studies concerning the function of motivations and motivated reasoning, for example, are also highly relevant. Human beings are powerfully, though usually unconsciously, motivated to view themselves, the groups with which they associate, and even the social system in which

[47] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 22-25.

[48] To give just one example, consider the following study from Amos Tversky and Daniel Kahneman's seminal paper on the availability heuristic. Tversky and Kahneman exposed subjects to a recording of a list of names. One variant of the study included nineteen female names, including some famous names (e.g., Elizabeth Taylor), and twenty male names, none of which were famous. In another variant, the recording consisted of nineteen male names, some of which were famous (e.g., Richard Nixon), and twenty female names, none of which were famous. After listening to the recording subjects were asked to assess whether there were more female or male names in the list they had heard. The research concluded that "[a]mong the 99 subjects who compared the frequency of men and women in the lists, 80 erroneously judged the class consisting of the more famous names to be more frequent." Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 220-21 (1973). By manipulating the salience of the names in their lists, Tverskey and Kahneman were able to predictably manipulate the accuracy of their subjects' assessments of the lists. *Id.*; *see also* Hanson & Kysar, *TBS I*, *supra* note 44, at 643-87; Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 39-41; *infra* Section II.B (providing examples of manipulation of processes involved in consumer risk perception in retail markets).

they live, in a positive and affirming fashion.[49] These motivations provide us with confidence and faith in our own capabilities, which serve us well in navigating life's challenges. They can mislead us in particular contexts, however, and such motivations are, like unseen cognitive processes, subject to manipulation in ways that are difficult to consciously anticipate or appreciate.[50] In addition to motivation studies, other important insights into human thinking and behavior emerge from the study of "basal" human drives such as the eating and sexual systems. These drives influence human behavior in ways that either are not appraised or are affirmatively misconstrued in our intuitive self-conceptions, and thus are far more vulnerable to manipulation than our intuitions lead us to appreciate.[51]

This social science literature undermines the reliability of the revealed preference assumption that lies at the heart of conventional corporate theory's conception of consumer behavior.[52] Indeed, inserting the situational character into the dominant corporate law paradigm yields a troubling conjecture. If corporate law is structured to require and enable firms to maximize shareholder value, then corporations will have the incentive and ability to discern and make use of many of the same heuristics, motivations, and visceral drives that social psychologists have tracked, but which lay people themselves tend not to see. By exercising control over external situations, corporations can manipulate the formation and manifestation of preferences, thoughts, and will in ways difficult for consumers and regulators, guided by dispositionist schemas, to track.[53] The pressures of competitive markets will require profit-seeking firms to engage in such conduct, or else firms willing to do so will subsume them. Indeed, those firms that unintentionally conform to such business practices, even by accident, will prevail over firms that fail to do so through the "evolutionary process" of market competition.[54] This problem of "power economics" takes many forms, but most palpably, it can be witnessed in the manipulation of

[49] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 90-114.

[50] *See id.*; *see also infra* Part II.B (discussing manipulation of often-unseen motivations in retail consumer markets).

[51] *See infra* notes 88-92 and accompanying text (discussing human eating system).

[52] *See supra* notes 29-37 and accompanying text.

[53] *See* Hanson & Yosifon, *The Situation*, *supra* note 34, at 230-84.

[54] *See supra* note 37 (quoting Debow & Lee on "evolutionary process" of firm practice engendered by market competition).

consumer risk perceptions regarding the health or other effects of consuming particular goods or services.[55]

With a framework in place that anticipates the problem of market manipulation, efforts to achieve such manipulation are perceptible in many markets.[56] That such efforts are widespread in the business practices of firms in retail markets is indeed an open secret. Law and behavioralism allows scholars and researchers to make explicit in corporate theory what is already obvious in corporate practice. One leading market research firm, for example, recently published a freely available paper on the Social Science Research Network, co-authored by Harvey H. Hartman and a team of six Ph.D.s, which takes it as a given that

> [T]he ultimate goal of consumer research, of course, is to sell products and services — to determine what consumers want and/or to convince them they want what is or can be produced. When we say we want to understand consumers better, it is with the intention of influencing them or otherwise taking advantage of the opportunities that such understanding reveals.[57]

If consumer preferences and decision-making are in significant ways susceptible to unseen but potent influence or manipulation by other actors within the market, then the reliability of both the consumer sovereignty assumption, and the shareholder primacy norm in corporate governance that it supports, are cast into doubt.

To be sure, the dominant corporate law framework does anticipate some circumstances where externalities, monopolies, or information asymmetries between the consumer and the firm frustrates the maximization of social utility generally, and the satisfaction of consumer preferences in particular. As noted above, in such circumstances the "end of history" approach urges continued adherence to shareholder primacy in corporate governance, claiming that external regulatory institutions, such as environmental, antitrust, and consumer protection regimes, should manage such market

[55] *See* Hanson & Yosifon, *The Situation*, *supra* note 34, at 193-202.

[56] *See infra* Part II.B.

[57] Harvey H. Hartman et al., *Extending Shopper Insights: Understanding Cultural Dynamics* 4 (The Hartman Group Working Paper, 2005), *available at* http://ssrn.com/abstract=758546. The rest of their article goes on to describe an elaborate social scientific framework that the Hartman Group uses to study how "cultural dynamics" can be harnessed to influence consumer behavior. *Id.*

failures.[58] However, as Dan Kahan has recently reminded us, "ought implies can."[59] In an effort to maximize shareholder wealth, powerfully efficient corporations work to undermine the performance of the same external regulatory institutions that the dominant

[58] *See supra* notes 25-27 and accompanying text. Indeed, one might track the rise of several significant governmental bureaucracies, including the National Labor Relations Act of 1935, and the expansion of the Federal Trade Commission ("FTC") into consumer protection concerns, concomitant to the strengthening of shareholder interests in corporate governance through expansion of the federal securities laws. *See* David Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 535-36 (2006) [hereinafter *Resisting Deep Capture*] (describing historical development of FTC jurisdiction); *see also* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 113-15 (2004) (discussing historical development of institutions for nonshareholding stakeholders in corporation). Shareholder primacists emphasize the ubiquitous pressures that collateral law places on corporate decision-making. *See, e.g.*, *id.* at 128:

> Despite the common conception of corporate governance as pertaining to shareholder-management relations, the actual decisionmaking of corporate officers is heavily constrained by legal rules from outside of corporate law. One must take into account environmental law, labor law, civil rights law, workplace safety law, and pension law, lest one be left with a distorted and incomplete view of how the law actually shapes those corporate decision matrices. Basic business decisions — whom to hire, which products to produce, how to produce, how to market, and how to structure firm finances — are all profoundly affected by the law of business, over and above the demands of corporate law or the capital markets.

The regulatory gauntlet may be elaborate, but corporations do run it successfully. The regulatory infrastructure may be vast, but it is the shareholder primacy norm that stands "over and above" other stakeholders interests at the end of it. Further, although it is true that there are collateral institutions for other stakeholders, there are also collateral institutions for shareholders in addition to shareholder primacy in corporate law itself, including federal securities regulation, as well as the FTC, which protects not just consumer interests, but also the rights of corporations to fair competition. *See generally* Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911 (2005) (summarizing history of FTC's regulation of unfair trade practices).

[59] Dan Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 154 (2008). Kahan argues that the "norm of public reason" traditionally advocated by liberal political theorists — in which political discourse must be framed in terms that appeal to objective, overlapping consensus values, rather than subjective, private, or community-based world-views — is impossible as a cognitive matter. Kahan develops his previously articulated conception of "discursive overdeterminism" as an alternative norm of discourse appropriate to the needs of pluralistic, democratic societies. *See* David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 724-33 (2008) [hereinafter *Legal Theoretic Inadequacy*] (critiquing Kahan).

paradigm purports to rely on to contain corporate exploitation of nonshareholder interests.[60] Where manipulation is profitable, consumers and corporations compete for regulation to allow or restrain it. Corporations, by virtue of their smaller numbers, singular interest, and wealth, are better positioned to succeed in this competition than are consumers, who are scattered, have multiple overlapping interests, and cannot pool their resources and energies effectively to pursue regulatory intervention. This "public choice" problem is a corporate law problem, and an unanswered challenge to the shareholder primacy paradigm.[61]

Moreover, just as profit-maximizing corporations strive to "capture" formal regulation, they also aggressively promote to regulators and consumers a view of consumer behavior that reflects the dispositionist framework that humans are already psychologically primed to see. This view of consumer behavior helps firms evade legal or moral responsibility for the consequences of consumer dealings with them. To the extent that consumers view their own behavior through a dispositionist framework, and miss the situational influences that firms exercise over them, consumers will not recognize a need to develop and call upon regulatory institutions for protection. This is the problem of "deep capture."[62]

Corporate law scholars are traditionally resistant to any formalization of the market manipulation problem. As one economist put it, "It is always admitted in the abstract that any consumer's tastes and choices are determined largely by his [or her] social milieu and can therefore be affected by producer devices such as advertising and salesmanship. In practice, however, producer influence on demand and utility is downgraded by utility economists as ephemeral."[63] Indeed, in prominent corporate law scholarship, the reliability of revealed preference theory is taken for granted, resting as it does on uncontroverted common sense. The reliability of revealed preference

[60] *See, e.g.*, *infra* notes 25-27 and accompanying text.

[61] *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 9-17 (1997) (synthesizing and extending modern work on capture theory); Hanson & Yosifon, *The Situation*, *supra* note 34, at 202-06 (discussing capture literature); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (explicating fundamentals of capture theory).

[62] *See generally* Hanson & Yosifon, *The Situation*, *supra* note 34, at 206-30 (explicating problem of deep capture).

[63] Bronfenbrenner, *supra* note 23, at 172. *See generally* Yosifon, *Legal Theoretic Inadequacy*, *supra* note 59 (analyzing failure of emerging behavioral law and economics scholarship to address problem of market manipulation).

theory is so self-evident that Easterbrook and Fischel conclude that anyone who doubts it must be engaged in motivated reasoning:

> The critic who says that some important term of corporate governance has escaped this mechanism [competitive pricing] is saying either that the costs and benefits are not knowable or that he [or she] alone knows the costs and benefits . . . . The more likely hypothesis, however, is that the people who are backing their beliefs with cash are correct; they have every reason to avoid mistakes, while critics (be they academics or regulators) are rewarded for novel rather than accurate beliefs.[64]

Easterbrook and Fischel view the problem of motivated reasoning as important to understanding academic behavior, but are certain that consumer behavior can be explained by nothing other than "correct" figuring of costs and benefits in consumption decisions. Other than their intuitions about the sources of human behavior, nothing in this conclusory assertion, or in their analysis generally, explains why this is "the more likely hypothesis."

B. *Failing the Consumer Interest in Corporate Law: Examples*

Theoretical failure begets empirical suffering. This subpart briefly explores the problem of market manipulation in three retail consumer markets — cigarettes, food, and dietary supplements. This examination is not proffered as hypothesis testing. Rather, it is meant to vivify, by use of real world illustrations, the theoretical critique of the dominant corporate law paradigm developed in subpart A. Feminist legal scholars, who have recognized that diverse discursive strategies are

[64] EASTERBROOK & FISCHEL, *supra* note 13, at 31. Easterbrook and Fischel's discourse here perhaps reflects what social psychologists have labeled "naïve realism" — the human tendency to believe that our own thinking is objective and rational while other people's thinking is biased and motivated. In fact, we are usually right about others but wrong about ourselves. *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 94-100. Obviously, in suggesting that the standard-bearers of conventional corporate theory are misled in their assessment of their theory because of their dispositionist bias, I have myself satisfied at least one prong in the expected pattern. Although my arguments and conclusions are no doubt more motivated than I appreciate in formulating them, I nevertheless endeavor to restrain the distorting effects of such unseen impulses by explicitly employing a social scientific framework dedicated to the containment of falsified intuition. I am also cognizant of the fact that the reception of these arguments by the reader is no simple function of the cogency of my claims, but will depend heavily on the reader's precommitments.

essential to exposing realities that would otherwise remain unseen under narrow analytic techniques, promote this methodology.[65] One might argue that the examples described below are highly selective and not generally representative of consumer markets. A sampling of consumer markets might just as easily include vignettes describing advances in pharmaceuticals and their amelioration of human misery, or illustrations of the unmitigated delights of consumer electronics, all enabled by the shareholder primacy norm. This Article, however, is not intended to offer a typical or even an average account. Instead, it aims to highlight a kind of problem — the manipulation of consumers — that predictably and demonstrably emerges through our corporate law, and demands remedy.

1. Tobacco

The retail market for cigarettes provides a trenchant example of the kind of exploitation of consumers that conventional corporate law enables. Smoking-related illnesses — including numerous forms of cancer, emphysema, and heart disease — are the leading cause of preventable death in the United States, with more than 435,000 consumers killed each year.[66]

Cigarettes are one of the most heavily promoted consumer goods in human history.[67] Throughout the 20th century, corporations involved in the manufacture and sale of cigarettes undertook monumental efforts to upend or mitigate consumer concerns about the health consequences of smoking.[68] In a path-breaking series of articles, Jon Hanson and Douglas Kysar examined the ways in which the tobacco industry systematically exploited heuristics and biases in human cognition to reduce consumer risk perceptions and induce

[65] *See, e.g.*, Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 1-2 (1995) (opening her essay with vignette on ordeal of Lorena Bobbitt, who severed her husband's penis in response to acts of sexual violence); Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1258-66 (2003) (employing stories from her own life, as well as fictional vignettes, as feminist method of uncovering corporate law's failure to compel efficient investment in "human capital").

[66] U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, SMOKING — ATTRIBUTABLE MORTALITY, MORBIDITY, AND ECONOMIC COSTS (2006), *available at* http://www.cdc.gov/tobacco/mmwr/preview/mmwrhtml/mm5745a3.htm.

[67] *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467 (1999) [hereinafter *TBS II*].

[68] *Id.* at 1471.

consumption of cigarette products.[69] In the 1930s, for example, tobacco companies actually employed doctors and nurses in print advertisements recommending the companies' brands.[70] In the 1950s and 1960s, as the federal government and public health advocates began to alert consumers to the serious health risks associated with smoking, the industry ramped up its own efforts to assuage those concerns. Tobacco firms developed "health reassurance cigarettes," products which were in fact not healthier, but which could plausibly be perceived as healthy by consumers who were otherwise already motivated to conclude that smoking could be consistent with a healthy lifestyle.[71] These efforts included the manufacture of filter-tipped and "low-tar" cigarettes. Tobacco firm managers knew that "smoker compensation" in the form of increasing the number of cigarettes smoked or covering the filter holes with their fingers made these products just as deadly to smoke as "regular" cigarettes, but the impression of a healthier product was successfully conveyed to consumers such that "by 1980, over fifty percent of cigarettes sold were 'low-tar.' "[72]

The industry also altered their products to manipulate consumers in ways unrelated to advertising. For example, one firm genetically engineered a strain of tobacco with twice the nicotine — the key addictive ingredient in cigarettes — of traditional tobacco products.[73] Other tobacco corporations developed chemical mixes that triggered a more substantial release of nicotine during cigarette consumption, including adding ammonia to the tobacco, thereby increasing the addictiveness of the product in ways difficult for consumers to anticipate or discern.[74]

Pursuing multi-institutional capture, the tobacco industry undertook substantial efforts to influence the production and dissemination of scientific knowledge about smoking.[75] By the 1950s, there was a well-established consensus in the mainstream scientific community that cigarette smoking was addictive and highly correlated

[69] *Id.* at 1467-1502. *See generally* Jon D. Hanson & Kyle D. Logue, *The Cost of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998) (reviewing tobacco regulation proposals in light of erroneous consumer perception of health risks associated with smoking).

[70] Hanson & Kysar, *TBS II*, *supra* note 67, at 1472-73.

[71] *Id.* at 1473-79.

[72] *Id.*

[73] *Id.* at 1476-77.

[74] *Id.* at 1477.

[75] *Id.* at 1483-1500.

to many debilitating health effects.[76] In an effort to maintain profitability, tobacco companies responded to the "tobacco scare" of the 1950s with a decades-long effort to capture the scientific debate about their product.[77] Tobacco firms provided millions of dollars to fund purportedly independent research centers and controlled the publication of knowledge such efforts produced. Specifically, the industry suppressed findings that furthered conventional conclusions about the relationship between smoking and illness, and broadly circulated idiosyncratic studies focusing on genetic or "constitutional" (that is, dispositional) causes of diseases attributed to smoking.[78]

Tobacco corporations also undertook sweeping efforts to insulate themselves from the regulatory power of legislative, administrative, and judicial institutions. For example, the tort system's capacity to contain adverse industry conduct was stymied by relentless litigation manipulation by tobacco defendants. Such manipulation included the destruction of documents showing industry knowledge of the harmfulness of its products, the artificial construction of attorney-client privilege around such evidence by placing attorneys in charge of fundamental research projects, and the abuse of discovery mechanics within specific trials, such as overwhelming plaintiffs with dubious demands and obfuscatory document production.[79] The industry also poured millions of dollars into lobbying and campaign contributions at the federal, state, and local levels in efforts to forestall profit-cutting regulation.[80]

These various efforts by the tobacco industry were highly successful and helped make tobacco companies extremely profitable.[81] One scholar estimated total profits from the domestic tobacco industry in 1996 to be $7.2 billion, with about 24 billion packs of cigarettes consumed.[82] Since that time, regulation of the tobacco industry has

[76] *Id.* at 1484, 1500-02.

[77] *See id.* at 1489-94; *id.* at 1488 (citing STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 190-91 (1996)) ("Perhaps the most succinct statement of these objectives comes from a memorandum, believed to have been written by J.V. Blalock, B & W's director of public relations: 'Doubt is our product since it is the best means of competing with the "body of fact" that exists in the mind of the general public. It is also the means of establishing a controversy.' ").

[78] *Id.* at 1488-92.

[79] *Id.* at 1488-94 & n.448.

[80] *See* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 681-90 (1997).

[81] *See supra* note 82 and accompanying text.

[82] Jeffery E. Harris, *American Cigarette Manufacturers Ability to Pay Damages: Overview and a Rough Calculation*, 5 TOBACCO CONTROL 292, 292 (1996).

increased substantially.[83] In 1997, the leading tobacco companies entered into a Master Settlement Agreement with the attorneys general of all fifty states. The Agreement limited future suits by state governments seeking to recover the costs of their own health expenditures related to smoking, and imposed billions of dollars in annual lump sum payments from tobacco companies to the states, in perpetuity. Private tort suits, after forty years of failure, have begun to find success largely because of the revelation, however late, of the kinds of practices described above.[84] Federal and state taxation of tobacco products has also increased dramatically in recent years, as have other regulations, including prohibitions against smoking in restaurants, bars, and other public places.[85] Smoking has decreased somewhat because of these various measures, but the many millions of premature consumer deaths that preceded them, and that continue despite them, evidence an ignominious failure of corporate law.[86]

2. Food

The problem of market manipulation is also evident in the spread of overweight and obesity across all segments of our society, especially among the poor and communities of color.[87] Obesity-related illnesses, including heart, liver and kidney diseases, diabetes, and various forms of cancer, account for an estimated 400,000 deaths per year in the

[83] *See generally* Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331 (2001) (reviewing contemporary tobacco regulation).

[84] *See* Rabin, *supra* note 83, at 337-38.

[85] *See* Kevin Sack, *States Look to Tobacco Tax for Budget Holes*, N.Y. TIMES, Apr. 21, 2008, http://www.nytimes.com/2008/04/21/us/21tobacco.html (describing recent developments in state and federal taxation of tobacco products); *see also* Marot Williamson, *When One Person's Habit Becomes Everyone's Problem: The Battle Over Smoking Bans in Bars and Restaurants*, 14 VILL. SPORTS & ENT. L.J. 161, 161 (analyzing recent developments regarding regulation of smoking in public places).

[86] According to Centers for Disease Control and Prevention estimates, 487 billion cigarettes were consumed in the United States in 1996, compared with 388 billion in 2004. *See* Centers for Disease Control & Prevention, *Smoking and Tobacco Abuse*, http://www.cdc.gov/tobacco/data_statistics/tables/economics/expdcom/index.htm (last visited Oct. 6, 2009); *see also* Marc Kaufman, *Decades-Long Decrease in Smoking Rates Levels Off*, WASH. POST, Nov. 9, 2007, at A7, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/08/AR2007110801094.html ("Adult smoking rates declined more than 15 percent from 1997 to 2004 but have been stubbornly unchanged since.").

[87] *See* Yosifon, *Legal Theoretic Inadequacy*, *supra* note 59, at 682-84; *see also* Yosifon, *Resisting Deep Capture*, *supra* note 58, at 510-25. *See generally* Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1675-89 (2004) (examining problem of obesity).

United States, making obesity second only to smoking as the leading cause of preventable death in the United States.[88]

The human eating system operates in a manner that is particularly opaque to conscious human understanding.[89] Guided only by intuition and common sense, individuals frequently misunderstand it. This nescience makes eating behavior an aspect of human life that is particularly vulnerable to unseen influence.[90] Yet, unlike with smoking, nearly all consumers must patronize retail markets in food at some level. These two realities combine to present a market context in which consumers are acutely, and perhaps uniquely, vulnerable to manipulation and exploitation.

Evolution has left our species with an eating system oriented towards consuming highly caloric foods in large quantities whenever such food is available, irrespective of whether our present energy needs require such consumption.[91] During the eons of human history in which food scarcity was a constant problem, the ability to store food as fat, combined with an internal compulsion to consume more food than presently needed, conferred a tremendous survival advantage.[92] The mechanics of the system are most cunning. When in the presence of food, and rhythmically at times of the day that the body comes to associate with feeding, the eating system produces the visceral, subjective experience of hunger (such as the lowering of blood sugar in anticipation of the otherwise destabilizing influx of sugar about to be ingested). Humans consciously and intuitively interpret the routine experience of hunger as the body signaling an imminent need for energy, rather than seeing the process as a tactic in the body's strategy for long-term energy accumulation. Although highly beneficial in earlier periods of human evolution, these clandestine dynamics in our eating systems are both highly manipulable and potentially deadly under present circumstances.[93]

Even as lay people typically misperceive the operation of our eating system, profit-seeking corporations, driven by the pressures of

[88] *See* Benforado et al., *supra* note 87, at 1649 n.5.

[89] *See* Yosifon, *Resisting Deep Capture*, *supra* note 58, at 516-18.

[90] *Id.*

[91] *See* Benforado et al., *supra* note 87, at 1678-84.

[92] *See id.* at 1675-78. *See generally* ALEXANDRA W. LOGUE, THE PSYCHOLOGY OF EATING AND DRINKING: AN INTRODUCTION (3d ed. 2004) (synthesizing research on evolutionary and psychological dimensions of eating behavior); J.C. Peters et al., *From Instinct to Intellect: The Challenge of Maintaining Healthy Weight in the Modern World*, 3 OBESITY REVS. 69 (2002) (analyzing evolutionary development of human eating system).

[93] *See* Benforado et al., *supra* note 87, at 1675-78.

competitive markets, have discovered as much as (or more than) evolutionary theorists and biologists about the reality of what moves humans to eat.[94] For example, one of the methods of unseen influence that retail food corporations have pursued is making food — especially highly caloric food rich in fat and salt content — ubiquitously available to consumers in the lived environment. Corporations make such food available in the places consumers work, rest, drive, study, play, fill up their cars with gasoline, or wait for trains and planes en route to life's pursuits.[95] Surrounded by such consumption opportunities, the subjective experience of hunger is triggered in our viscera. When we respond to that impulse by eating, our dispositionism leads us to the view the food corporations with which we transact as merely satisfying the internal, privately ordered preference that we and others around us have revealed through our consumption.

Another important means through which retail food corporations have manipulated consumer perceptions, preferences, and risk assessments, is through advertising.[96] In particular, food corporations have spent billions of dollars promoting "junk food" in a manner that does little to inform consumers about the consequences of food consumption, and much to exploit intuitive misconceptions about it.[97] Junk food advertising, for example, typically associates junk food consumption with health and vitality, sexuality, and especially in advertising directed at children, with fantasy and magic.[98] Given the operation of the cognitive heuristics and biases referenced above, it should come as little surprise that in the wake of multi-billion dollar promotion of such marketing strategies Americans largely underestimate the health consequences of the dramatic increases in weight gain and obesity witnessed in recent decades.[99] Prevailing consumer-protection statutes construe this kind of advertising as mere "puffery" and "bluster" that would not influence a person of ordinary

[94] *Cf.* Hanson & Kysar, *TBS II*, *supra* note 67, at 1467 n.254 ("A different approach might be to examine the actual market behavior of manufacturers in order to learn more about cognitive anomalies. Given the powerful market forces driving the manipulative practices of manufacturers, consumer product markets may represent the ultimate laboratory for behavioral researchers.").

[95] *See* Benforado et al., *supra* note 87, at 1689-1711 (describing efforts of food corporations to occupy ever-increasing areas of human landscape with retail opportunities for food consumption).

[96] *See* Yosifon, *Resisting Deep Capture*, *supra* note 58, at 510-25.

[97] *Id.*

[98] *Id.*

[99] *See* Yosifon, *Legal Theoretic Inadequacy*, *supra* note 59, at 693 n.82 (reviewing studies).

reason, therefore holding it to be unactionable as fraud or false advertising.[100] Such consumer protection regimes begin and end with a highly dispositionist conception of the reasonable person, and thus mistakenly conclude that the thoughts, preferences, and behavior of actual ordinary, normal consumers are not influenced or misled by such techniques. Of course, the billions spent on puffery by profit-seeking corporations cleanse such dispositionist delusions with the "acid bath of economics."[101]

In addition to promotion and advertising, retail food corporations also deploy considerable resources to stagnate legislative and other regulatory responses to the obesity epidemic.[102] These firms have pursued such efforts through the plain method of campaign contributions, and the more subtle technique of promoting the dispositional view of consumer behavior to regulators and consumers.[103] Such efforts have been extremely successful in forestalling robust regulatory responses to the obesity epidemic and insulating food corporations from liability for the harms associated with their products. At least twenty-three states have passed so-called cheeseburger bills, forbidding tort suits against food corporations in connection with obesity-related illnesses.[104] Congress is entertaining similar proposals at the federal level, with legislation such as the Personal Responsibility in Food Consumer Act in the House and the Commonsense Consumption Act in the Senate.[105] Meanwhile, with obesity spreading unabated, some demographers anticipate that in the United States, "as a result of the substantial rise in the prevalence of obesity and its life-shortening complications . . . life expectancy at birth and at older ages could level off or even decline within the first

[100] *Id.* at 687-88.

[101] RICHARD A. POSNER, SEX AND REASON 437 (1992) ("Clear thinking . . . is obstructed by layers of ignorance, ideology, superstition, and prejudice that the acid bath of economics can help us peel away."). On the implausibility of the puffery doctrine in consumer protection law, see Yosifon, *Resisting Deep Capture*, *supra* note 58, at 525-38.

[102] *See supra* note 94 and accompanying text.

[103] *See* Benforado et al., *supra* note 87, at 1727-68; Yosifon, *Resisting Deep Capture*, *supra* note 58, at 529-38. *See generally* MICHELE SIMON, APPETITE FOR PROFIT (2006) (reviewing food corporations' efforts to stymie regulatory response to obesity problem). One study found that "the various sectors of the food industry made more than $34 million in campaign contributions just in election year 2000." KELLY D. BROWNELL & KATHERINE BATTLE HORGEN, FOOD FIGHT 260 (2004).

[104] *See* David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 365 (2007).

[105] *See id.*

half of this century," reversing long-term trends of ever increasing longevity.[106]

3. Dietary Supplements

A third illustration of the problem of consumer exploitation under the dominant corporate paradigm is the burgeoning retail market for dietary supplements. Dietary supplements include a wide variety of products promising to provide the consumer with nutrients that improve the functioning of the human body, mind, or emotional system.[107] The Dietary Supplement Health and Education Act of 1994 ("DSHEA") defines dietary supplements as products that include a vitamin, mineral, herb or botanical (other than tobacco), amino acid, or any combination of these, which is ingested in the form of a pill, capsule, powder, or liquid.[108] The supplements industry has grown dramatically in recent years, spiking from $4 billion in sales in 1994 to more than $20 billion by 2003.[109] By some estimates, approximately 60 percent of Americans now regularly ingest some form of dietary supplement, and nearly 40 percent do so daily.[110] In part, the DSHEA itself may be responsible for this growth because the legislation regulates supplements as food products and not as medicines, thus ensuring that corporations need no pre-approval from the Food and Drug Administration before bringing their products to market.[111] At the same time, the DSHEA allows firms to advertise their products in medicinal-like terms as improving the functioning of fundamental bodily processes and structures (such as sleep patterns, digestion, or

[106] Stuart J. Olshansky et al., *A Potential Decline in Life Expectancy in the United States in the 21st Century*, 352 NEW ENG. J. MED. 1138, 1142 (2005).

[107] *See* Michael A. McCann, *Dietary Supplement Labeling: Cognitive Biases, Market Manipulation, and Consumer Choice*, 31 AM. J.L. & MED. 215, 217 (2005); *see also* Lars Noah & Barbara A. Noah, *A Drug by Any Other Name . . . ?: Paradoxes in Dietary Supplement Risk Regulation*, 17 STAN. L. & POL'Y REV. 165, 165 (2006).

[108] Dietary Supplement Health & Education Act of 1994, 21 U.S.C. § 321(ff) (1994).

[109] McCann, *supra* note 107, at 218.

[110] *Id.* at 219. Corporate influence in the development and legislative adoption of the DSHEA is plain to see. According to one report, up to twenty percent of the $20 billion domestic supplements market is controlled by firms based in Utah. Senator Orrin Hatch (R-Utah), who has received hundreds of thousands of dollars in political support from the supplements companies, championed the DSHEA in a willing, free-market Congress. *See also* Jesse Hyde, *Healthy Business: Snake Oil or Cure All? Nutrition Supplements are Booming in Utah*, SALT LAKE CITY DESERET NEWS, May 22, 2005, http://www.redorbit.com/news/health/151236/healthy_business_snake_oil_or_cureall_nutrition_supplements_are_booming/ (last visited July 19, 2008).

[111] *See* McCann, *supra* note 107, at 219.

bone, muscle, and joint strength).[112] This combination of food-like regulation and medicine-like promotion presents substantial opportunity for consumer confusion and manipulation.[113]

According to one study of promotional practices in this market, "largely unregulated supplement labels . . . often express unrealistic claims and inaccurate content."[114] Although these claims may seem "unrealistic" to a rational actor, actual consumers nevertheless tend to believe that a responsible agency has vetted and substantiated the claims.[115] For example, studies show that consumers tend not only to believe associations that are promoted in the marketing of food supplements (such as Echinacea remedying flu symptoms and Gingko improving memory), but also that the claims have received scientific validation, which is often not the case.[116] Supplements corporations stoke such beliefs through a variety of methods, including by "obscur[ing] distinctions between their products and medicines through misleading product names, such as . . . the supplement 'herbal fen-phen,' which sounds uncannily similar to the diet drug combination fenflurami."[117] Because of practices like these, one scholar concludes that "certain population groups, including the young and the economically-disadvantaged, excessively underestimate the relevant risks of dietary supplement consumption."[118]

In his book on the supplements industry, Dan Hurley relays a disturbing episode that illustrates the ways in which lawyers may be involved in undermining what regulatory protections consumers do enjoy in this area. Describing the inefficacy of the DSHEA's prohibitions against retail sellers of supplements giving medical advice to customers, Hurley writes:

> Although large retailers like Vitamin Shoppe and GNC insist that they train their employees not to give any advice, the

[112] *Id.* at 245.

[113] *Id.* at 246.

[114] *Id.* at 221.

[115] DAN HURLEY, NATURAL CAUSES: DEATH, LIES, AND POLITICS IN AMERICA'S VITAMIN AND HERBAL SUPPLEMENT INDUSTRY 19 (2006) ("[A] recent Harris poll found that 68 percent of Americans believe the government requires herbal manufacturers to report potential side effects or dangers (untrue), 58 percent believe the [Food and Drug Administration] must approve herbal products before they can be sold (untrue), and 55 percent believe that manufacturers cannot make claims for their safety or efficacy without firm scientific evidence (untrue).").

[116] McCann, *supra* note 107, at 223.

[117] *Id.* at 222.

[118] *Id.* at 258.

> difficulty of enforcing such policies was addressed at the Las Vegas meeting of the National Nutritional Foods Association .... Rakesh Amin, a Chicago attorney [whose firm lists numerous supplements corporations among its clients][119] attempted to untwist DSHEA's pretzel logic .... After explaining that retailers of supplements cannot prescribe or recommend a particular product for the treatment of any disease or the relief of any symptoms, Amin asked, "How do you get around it? Trust me, these consumers are smart. You have to ask them, 'Have you seen a doctor? Has he diagnosed anything?' Let *them* say it. Sometimes you have to act dumb. 'Do *you* know what you have?' Jay [a fellow speaker, referenced here as a hypothetical customer] would probably say he has arthritis. If not, I can tell you a way to get the word 'arthritis' out there. 'We have products that help support healthy cartilage and joint function.' Then you take them to a reference area in your store. Without saying 'arthritis,' you point to [an article about] glucosamine. It's going to say 'arthritis' there."[120]

According to Hurley, a retailer in the audience asked Amin if it was permissible to read "third-party literature" provided by the store to consumers who asked the retailer to read it to them, a request the questioner suggested was a frequent occurrence in her store.[121] " 'Technically you can't do it,' Amin said. But realistically, he added, 'You're not going to get caught.' "[122] Hurley reports that retailers typically fail to abide even by these kinds of subtle evasions of consumer protections. Employees at twelve out of fifteen retailer supplement stores Hurley visited in 2004 "did not hesitate to recommend multiple supplements to treat multiple conditions."[123]

The point, for present purposes, is that consumer vulnerability and manipulation, rather than simply consumer competence and genuine satisfaction of preferences, may be an important factor in accounting for the profitability of firms operating in the supplements market. The

[119] *See* Amin Talati, *Representative Clients*, http://www.amintalati.com/RepresentativeClients/tabid/1155/default.aspx (last visited Oct. 6, 2009).

[120] HURLEY, *supra* note 115, at 212-13; *see also* E-mail from author to Rakesh M. Amin, Partner at Amin Talati (Oct. 10, 2008) (on file with author) (asking Mr. Amin if he wanted to comment on characterization of his words in Hurley's book; after acknowledging receipt of my query, he supplied no reaction).

[121] HURLEY, *supra* note 115, at 213.

[122] *Id.*

[123] *Id.*

imperatives of shareholder primacy operating in competitive markets forces firms to discern and exploit the reality that consumers are far more susceptible to situational influence in their thinking and behavior than consumers or corporate law appreciates.

C. *The Corporate Nature of the Market Manipulation Problem*

The routine preparation and provision of food and fundamental nutrition has, until relatively recently, been regulated within the home or extended community networks under an ethic of care.[124] Long after human societies developed from subsistence hunting and gathering arrangements into social systems characterized by specialized production, wage labor, and trade, fundamental consumption needs continued to be managed within the intimate confines of the private sphere.[125] Without romanticizing an ahistorical conception of the home as a haven in a heartless world, one can appreciate that

[124] As recently as 1977, for example, Americans consumed 82 percent of their total calories at home. By 1994, that figure had dropped to 67 percent. GREG CRITSER, FAT LAND: HOW AMERICANS BECAME THE FATTEST PEOPLE IN THE WORLD 32-33 (2004) (citing Biing-Hwan Lin et al., *Nutrient Contribution of Food Away from Home*, *in America's Eating Habits: Changes and Consequences*, *in* AGRICULTURAL INFORMATION BULLETIN 213 (1999) ("[I]f food away from home had the same average nutritional densities as food at home . . . Americans would have consumed 197 fewer calories per day.")).

[125] *See* O'Connor-Felman, *supra* note 65, at 1281 ("[T]he factory detached work from the household, transforming the family from a self-sufficient production and consumption unit to a consumption division."); *see also* Gardiner C. Means, *Collective Capitalism and Economic Theory*, *in* THE CORPORATION TAKE-OVER 62, 64 (Andrew Hacker ed., 1964) (noting that in substance systems, "each economic unit produced only for its own consumption and . . . there was no buying and selling"). In such systems:

> [T]he market plays a negligible role, and production is organized within the village or tribe on a collective basis to meet the needs of the produces who are also consumer. In such subsistence economies, consumers are in control of production, or what is more important . . . consumer, worker, owner and management are combined in a single economic unit. As a result production policy and the instruments of production are controlled by units which combine the interests of consumer, worker, owner, and management.

Id. at 67. One need not regard this merely as symbolic discourse on imagined human social origins; indeed, it can concretely be seen in the first legal corporations to operate in America, such as in the corporate colonial settlements in Virginia. *Id.* at 69. All of the other categorizations of "nongovernmental" control of production identified by Means exclude consumers from the equation. These include individual control over production (with no wage-labor) and market-based consumption; private control over production (with wage labor) and market-based consumption; and finally, separation of ownership and control over production (with widely held equity stakeholder and wage labor) with market-based consumption. *See id.* at 64.

fundamental elements of human existence have only recently been turned over as expansively to competitive retail markets and the potentially manipulative dynamics therein as they are today.[126]

However, it is not market activity alone that induces the market manipulation dynamic. The corporate form unleashes market manipulation even where such opportunities would go unused in other market-based systems. Part of what is absent (or marginalized) in corporate activity is the operation of powerful norms and moral restraints against exploitation, which in noncorporate contexts constrain the manipulative purveyance of goods. An individual or a family that would never consider hawking junk food to children for a living might be willing to invest a small part of their income, earned through labor they confidently consider both remunerative and socially useful, in a junk food corporation. The moral impulse that would keep one from engaging in exploitative conduct is visceral.[127] It is the subjective experience of moral sentiment, not abstract moral reasoning and deduction, which has the most direct influence on conduct.[128]

The nesting that occurs through institutional investment exacerbates this loss of the moral restraint on exploitation. Even people who would not invest their own savings directly in a junk food corporation might easily place their savings with institutional funds run by managers who would think nothing of doing so. Indeed, the fund managers might think that it was their obligation to do so if it would maximize return to their investors.[129] Individuals contributing

[126] O'Connor-Felman, *supra* note 65, at 1288 (citing SHIRLEY P. BURGGRAF, THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF FAMILY IN THE POST-INDUSTRIAL AGE x (1997) ("Getting 'women's work' done when women are no longer volunteering their unpaid or underpaid labor is what much of the public discussion of family values is really about.")). If we appreciate that some consumer interests are not satisfactorily left to competitive markets, the public discussion of corporate law might usefully join public conversations about family values.

[127] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 115-20 (stressing crucial role of salience in dynamics of human affective evaluations and in concomitant behavioral responses). *See generally* June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOL. 345 (2007) (emphasizing importance of "moral emotions" as crucial mediating factor between intellectual embrace of moral standards and practice of moral behavior).

[128] *See* Tangney et al., *supra* note 127, at 346 ("Moral emotions provide the motivational force — the power and energy — to do good and to avoid doing bad.").

[129] *See* O'Connor-Felman, *supra* note 65, at 1329 ("[I]nstitutional shareholders have become the dominant owners in corporate America; the one thousand largest companies in the United States have an average institutional ownership of sixty percent."); *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80

their capital to corporate enterprise through participation in savings plans typically do not know where their money is going. The human consequences of diversified equity investments in corporate enterprises are distant and pallid, absent from one's immediate experience of personal influence in the world. Where the restraining regulatory impulse of norms and values is lost, as it is in the context of the large publicly traded corporation, consumers lose an important extra-legal mechanism for monitoring their interests. It is in this sense that market manipulation is distinctly a corporate law problem, and not simply endemic to all systems of contract or market exchange.

D. *Social Responsibility and the Consumer Collective Action Problem*

The preceding Parts explored the corporate manipulation of consumer risk perception. Another important category of consumer interest relates to the social consequences of consumption and of corporate activities in general.[130] Under the conventional paradigm, the elevation of the consumer to the position of sovereign, both in the sense of being free and in the sense of commanding the firm, scapegoats the consumer as the party truly responsible for socially deleterious corporate activity.[131] After all, if corporations devour rainforests, fill landfills with nondegradable waste, and pollute the waters and air, it can only be because consumers demand ever more products at ever-cheaper prices. If consumers do indeed represent society generally, then such consumption demonstrates that the social effects of corporate behavior are not actually adverse after all, because they reflect collective preferences.[132] If consumers really cared about corporate social responsibility, they would only patronize socially responsible firms.

The kind of manipulation of consumer perceptions discussed above, however, also applies to corporate social responsibility concerns. Consumers may find it difficult to understand the social issues involved in producing or consuming particular products or services.

N.Y.U. L. REV. 733, 817 (2005) ("They may not even know what corporations their investment fund managers invest in, let alone precisely what all those corporations are doing, and they won't appear on the shareholder lists of any rapacious corporations.").

[130] *See generally* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 528-29 (2004) (exploring these two senses of consumer interest).

[131] *Cf.* Bronfenbrenner, *supra* note 23, at 178-82 (criticizing consumers not only for impact of their socially adverse preferences, but also, writing in 1974, for rampant shoplifting and vandalism of corporate property).

[132] *See* Debow & Lee, *supra* note 37, at 417-18.

Indeed, where the effects are deleterious, this is an understanding that firms have a stake in obfuscating. Even where certain corporations are associated with socially pernicious business practices, consumers will often find it difficult to track which firms are associated with what products. Consumers identify products by brand name, not by the corporation selling them, in no small part because this is how corporations advertise the items.[133] Contemporary consumer protection statutes are even less likely to insulate consumers from misleading practices with respect to the social consequence of production than they are with respect to the personal consequences of consumption.[134]

Even where consumers have all the information they need about the social effects of consumption, however, a collective action problem undermines the viability of consumer sovereignty as a reliable device for advancing consumer interests in the social effects of consumption. Consider the following situation: suppose that pâté de foie gras sells for $9 per unit if firms produce it through husbanding methods that are destructive to the environment, and that it sells for $10 if produced by more sustainable methods.[135] Suppose also that consumers individually understand and care about the social harm caused by the polluting production method, and that they would prefer that firms not use such production methods. Even under this scenario, individual consumers still have an incentive to purchase the $9 pâté de foie gras. If each consumer thinks she has an idiosyncratic view of the production issue, and doubts that her fellow consumers will care enough to patronize the more expense pâté, then she knows that the environment will be degraded no matter what she does. Thus, she might as well purchase the cheaper pâté and pocket the $1 savings. On the other hand, if she believes her fellow consumers care enough about environmental degradation that they will patronize the more expensive pâté, then she knows that the environment will be saved no matter what she does. Thus, she will purchase the $9 pâté in order to pocket the $1 savings and still enjoy the sustained environment. Because all consumers make these same assessments, nobody forebears from consuming the

[133] *See* CHRISTOPHER STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATIONS 89-90 (1975).

[134] *See* Kysar, *supra* note 130, at 553-62, 569-79.

[135] The following discussion is based on Elhauge's analysis, *supra* note 129, at 750-51. I have substituted pâté for Elhauge's discussion of furniture production in order to presage my discussion of *Lovenheim v. Iroquois Brands, Ltd.*, *infra* text accompanying notes 240-46.

cheaper, environmentally degrading pâté, even though all consumers individually would prefer the $10 pâté.

Although this example is highly stylized, real-world scenarios of this sort may be evident in certain markets. For example, one study showed that while consumers in surveys express a willingness to pay more for gasoline that is environmentally sensitive, actual consumer behavior indicates that, given the option, consumers tend to choose the cheaper, environmentally unfriendly option.[136] Rather than reading this as evidence that consumers are duplicitous in surveys about their preferences, the finding instead may reflect the consumer collective action problem. Where this problem arises, consumer choices do not reveal consumer preferences and do not provide the disciplining power over socially deleterious corporate conduct that the dominant paradigm promises. Nexus of contracts theorists might be undisturbed by this collective action problem, as they would likely seek escape in the rescuing power of external regulation. But the consumer collective action problem can no more readily be overcome by consumers acting in the political realm than it can through collective consumptive action in the market.

III. VINDICATING THE CONSUMER INTEREST IN CORPORATE LAW

> Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.
>
> — Judge Benjamin N. Cardozo[137]

> Now I submit that you can not abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their shareholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.
>
> — Adolf A. Berle[138]

[136] *See* Elhauge, *supra* note 129, at 751 n.28 (citing Paul R. Portney, *Corporate Social Responsibility: An Economic and Public Policy Perspective*, *in* ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS (Bruce Hay et al. eds., 2005)).

[137] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (describing standard of conduct required of fiduciary to her principal).

[138] Berle, *supra* note 37, at 1367.

I speak the pass-word primeval, I give the sign of democracy.

— Walt Whitman[139]

A. *The Benevolent Throne: Managerialism*

1. Operational Restraint and Corporate Giving

There are alternative models of corporate governance that might vindicate the consumer interest in corporate governance where the nexus of contracts shareholder primacy model falls short. One important alternative argues that corporate directors should have (and do in fact have) the discretion to balance the interests of shareholders with the interests of other corporate stakeholders, including workers, creditors, communities, and, potentially, consumers. "Managerialism," as this approach might broadly be called, has a long pedigree in corporate theory, but Margaret Blair and Lynn Stout have most recently given it sophisticated explication in their "team production" model of the corporation.[140]

Blair and Stout argue that the corporation is best conceived of as a "team" comprised of various stakeholders whose contributions are managed and distributed by the crucial "mediating hierarch" that is the firm's board of directors.[141] The directors are not supposed to maximize the interests of any individual team member, but rather the performance of the team as a whole such that there are greater spoils for all to share.[142] Team members submit to the mediating hierarch because they know that collective action problems, transaction costs, and failures of imagination keep them from plausibly "contracting" to a superior arrangement with other parties to the team.[143]

[139] Walt Whitman, *Song of Myself*, *in* LEAVES OF GRASS 45 (The Modern Library, Inc. 1921). Thanks to Stephen Yosifon for sending me this Whitman line.

[140] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 251 (1999).

[141] *See id.*

[142] *See id.*

[143] *Id.* at 250-51 (building on progressive critiques of nexus of contracts theory that have emphasized indeterminate, unfixed, and relational nature of stakeholder interactions housed uncomfortably in nexus of contracts conception). Kent Greenfield summarizes the inadequacy of "contract" in construing workers' necessarily relational corporate involvement:

> [W]orkers' claims against the corporation are not, in any meaningful sense, fixed . . . . [they] have both implicit and explicit claims against the enterprise that are more valuable when the company does well and are worth less (or nothing) when the company does poorly. Unfixed, explicit

Team production theorists contend that their model is not only more desirable than the dominant shareholder primacy approach, but that it also has the added benefit of better explaining positive corporate law. Notwithstanding oft-repeated citations to *Dodge v. Ford Motor Co.*,[144] these scholars argue that because of the "business judgment rule," directors have tremendous discretion to manage firms however they see fit.[145] Under the business judgment rule, courts will not evaluate the substance of corporate decisions nor hold directors liable for poor or even negligent decisions that harm shareholders, so long as directors make business decisions in good faith, in an informed manner, and are themselves disinterested in the transactions. Proponents of the nexus of contracts theory view the business

> claims against the company might include pension plans, 401(k) accounts, or other retirement benefits . . . . Unfixed, implicit claims might include understandings about job security or promotion policies, the development of firm-specific human capital, and the safety of working conditions.

GREENFIELD, *supra* note 32, at 55. Progressive critiques have also claimed that there are numerous reasons that nonshareholding stakeholders — paradigmatically workers — may have a greater need for their interests to be monitored at the corporate governance level than do shareholders. For example, highly robust and efficient contemporary capital markets make it very easy for shareholders to "exit" underperforming firms by selling their stock and re-investing in more promising enterprises. Workers, on the other hand, once having invested their labor in a particular firm, have much less flexibility with respect to exit. This suggests that workers may be in as much, if not greater, need for "primacy" in the firm's concerns as are shareholders. *Id.*

[144] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (holding that "[a] business corporation is organized and carried on primarily for the profit of the stockholders"). The Michigan Supreme Court concluded that Henry Ford's refusal to pay dividends violated his fiduciary duty to the Dodge brothers, who were minority shareholders in Ford Motor Company, because of Ford's express intention to instead use the firm's profits to lower prices and "employ still more men, to spread the benefits of this industrial system to the greatest possible number." Blair and Stout argue that the case is best read as an outlier in which the court is responding more to Ford's cavalier attitude towards minority shareholders than it is an adumbration of bedrock corporate governance law, which is typically extremely deferential to directorial discretion. The court's decision can also be read as a curb on Ford's self-dealing, in that his announced reasons for refusing to pay dividends may have been pretext for his desire to keep the Dodge brothers from using their dividends to fund their own automobile company, which they ultimately did. *See* Blair & Stout, *supra* note 140, at 301-05; *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 170-72 (2009) (arguing that central lesson of shareholder primacy that is typically drawn by teachers and students from *Dodge* inaccurately expresses fundamental tenets of corporate law).

[145] *See, e.g.*, Kamin v. Am. Express Co., 383 N.Y.S.2d 809 (N.Y. 1976) ("Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those entrusted with corporate management are largely discretionary.").

judgment rule as necessary to give directors, rather than unqualified shareholders or courts, the authority to make judgments about the most prudent paths to profit.[146] Team production theorists, however, argue that the business judgment rule is better understood as a rule that provides directors sufficient insulation from shareholder demands such that they can successfully balance and advance all stakeholders' interests in firm management.[147] Team production theory also finds support for the mediating hierarch concept in the fact that nearly every state's corporate law explicitly authorizes directors to consider the interests of constituencies other than shareholders when navigating the firm through predatory hostile takeover attempts.[148] Further, corporate law in most states authorizes directors to engage in charitable activity even where such giving is unrelated to profit-maximization.[149] Shareholders do serve a unique and crucial corporate monitoring role by voting, suing (principally for breaches of loyalty by firm directors), and threatening exit, but such monitoring activity should not, team production theorists insist, be mistaken as evidencing shareholders' exclusive right to the benefits of corporate governance.[150]

Scholars employing the team production framework typically focus on the implications of the model for worker interests in firm operations.[151] Most team production theorists gloss over the consumer interest just as cursorily as do conventional nexus of contracts scholars. Indeed, while nexus of contract scholars typically list consumers in their first-cut description of the parties to the nexus, it is not clear whether team production scholars consider consumers "part

[146] The rule is a way of enforcing the basic governance design of corporations, which is that they are to be managed by a board of directors. Any substantive approach to duty of care analysis would simply replace these decision-makers with some other less competent group. *See* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 106-08 (2008) [hereinafter NEW CORPORATE GOVERNANCE]; *see also* EASTERBOOK & FISCHEL, *supra* note 13, at 93-102.

[147] *See* Blair & Stout, *supra* note 140, at 299-306.

[148] *See generally* Steven Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991) (compiling and analyzing statutes).

[149] *See* Elhauge, *supra* note 129, at 763.

[150] *See* Blair & Stout, *supra* note 140, at 289 ("Shareholders enjoy special legal rights not because they have some unique claim on directors, but because they often are in the best position to represent the interests of the coalition that comprises the firm."); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 598 (1992) (discussing mistaken conflation of fiduciary obligation with monitoring task of shareholders).

[151] *See generally* GREENFIELD, *supra* note 32 (synthesizing literature).

of the team" at all.[152] Nevertheless, the team production model provides a more flexible framework through which to analyze the consumer interest in the corporate world. In particular, the mediating hierarch concept has made a place for an exciting new literature on the place of moral values and social norms in corporate governance, emphasizing as it does the role of extra-contractual collaboration.[153] For example, Einer Elhauge builds on team production theory and argues that firm managers must (and do) have the discretion to give effect to profit-sacrificing norms and morality in their management of the firm.[154] Norms and morality shape our behavior in a socially useful direction, with both the threat of opprobrium, and the mental anguish that comes with it, and the promise of approbation and its attendant visceral delight.[155] Elhauge contends that in many areas of social life, norms and morality (e.g., the proscription of exploitative conduct) operate alongside law in a manner that produces greater social utility than could either norms or law operating alone.[156] Indeed, "social and moral sanctions are efficient precisely because they can induce each of us to engage in conduct that is collectively beneficial yet individually unprofitable."[157] If this is true, then "[a] norm of pure profit-

[152] Blair & Stout, *supra* note 140, at 278. Elsewhere the consumer seems to be almost explicitly excluded from Blair and Stout's definition of the team:

> The interests of the corporation . . . can be understood as a joint welfare function of all the individuals who make firm-specific investments and agree to participate in the extracontractual, internal mediation process within the firm. For most public corporations, these are primarily executives, rank-and-file employees, and equity investors, but in particular cases the corporate team may also include other stakeholders such as creditors, or even the local community if the firm has strong geographic ties.

Id. at 288.

[153] *See id.* at 264 ("Our break with previous work is to stress the importance of the coordination that happens not from the top down, but in the lateral interaction among team members.").

[154] *See* Elhauge, *supra* note 129, at 796-805.

[155] *See id.* at 747-56.

[156] *Id.* at 752.

[157] *Id.* at 752. In the corporate context, Elhauge argues:

> [T]he typical example involves others (like workers or suppliers) making firm-specific investments that increase the business's efficiency because they trust that the business will comply with social or moral norms against opportunistically exploiting those investments later by failing to reward them. Such a norm is efficient ex ante, but compliance with it after sunk benefits are received can be ex post unprofitable and thus require non-monetary social or moral sanctions for enforcement.

maximization" in corporate governance law "overinclusively demands that managers also maximize corporate profits even when such activity . . . violates the social and moral norms we traditionally use to optimize behavior."[158] Thus, scholars and policymakers must embrace profit-sacrificing norms and morality manifesting in the decision-making of directors, as an important mechanism in corporate governance.[159]

Elhauge argues that corporate law has always given the corporate boards the discretion to pursue the synergy of law and norms to restrain corporate activity that would otherwise unduly and inefficiently harm nonshareholding stakeholders.[160] After all, directors, as the public face of the firm, are the parties most likely to be socially sanctioned or rewarded by the firm's moral failure or accomplishment. If shareholders challenged such profit-sacrificing conduct, directors could plausibly claim that their conduct, although appearing to privilege nonshareholder interests, was in fact aimed at advancing the profitability of the firm, such as by improving relationships with consumers, workers, or the community.[161] Elhauge argues that the hostile takeover movement of the 1980s gave the lie to such pre-textual justifications and forced the corporate world to recognize that not all socially responsible firm conduct is profitable.[162] Multiple-constituency and antitakeover statutes redeemed and made explicit

Id. at 753.

[158] *Id.* at 814.

[159] Elhauge acknowledges, but does not snag on the possibility, that socially useful conduct can be profitable; he is interested, as I am, in examining corporate conduct that is profitable but not socially useful. *Id.*

[160] Elhauge recognizes that the social utility of norms and morals regulation presupposes the correctness, or the utility, of the norms that are given effect. Racist and sexist norms, for example, may undermine social utility. But this problem does not deter Elhauge's profit-sacrificing corporate law agenda, for "this problem is equally true of legal and economic sanctions" on which we would otherwise be relying to advance the social weal. *Id.* at 755. "[I]t is enough that social and moral sanctions would on balance advance the outcomes that our society views as desirable, which is the normative perspective relevant for determining the level of managerial discretion that society will want to allow." *Id.*

[161] *Id.* at 770-72 (citing Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. 1968)) (finding that where shareholders of Chicago Cubs sued Wrigley for failing to install lights at Cubs' ballpark, business judgment rule precluded shareholders from second-guessing Wrigley's decision, which he asserted was in best interests of company).

[162] That is, if there are individuals or funds that are genuinely unmoved to sacrifice profit for moral or norms reasons, then they will find it profitable to take over firms that can be made to operate more profitably than they presently do, restrained as they are by norms and morals. That the takeover movement happened demonstrates that there was such profit-sacrificing restraint in the market.

what had long been obvious in corporate governance — directors have wide discretion to operate firms in a profit-sacrificing manner that is responsive to the needs of multiple stakeholders, including in the public interest, broadly construed.

Some of the central arguments of feminist corporate law scholars contribute to the norms, values, and morality trajectory in the "managerialist" style.[163] Feminist scholars have repeatedly pointed to the diversification of corporate boards as a way of advancing women's interests in corporate enterprise, and the interests of nonshareholding stakeholders generally. These scholars argue that corporate boards, presently comprised of more than 80 percent men in publicly traded companies, suffer from a dearth of women's perspectives, experiences, and capacities in corporate governance.[164] Feminist "concepts of care and connection" can enable attention to a "wider array of constituents" than is presently seen in corporate governance.[165] This can be accomplished both by repudiating the limitations of gendered conceptions of the directors' proper role and by diversifying the composition of the boards charged with those responsibilities.[166] For example, Marleen O'Connor-Felman has argued that, "[m]ore women on corporate boards are needed to present different perspectives about work-family policies. Work-family scholars report that one of the main problems preventing the successful implementation of work-family programs is that CEOs set the tone of the corporation's culture and most CEOs simply do not 'get it.' "[167] Feminist corporate law

[163] *See infra* note 164 and accompanying text.

[164] *See* Kelly Y. Testy, *Capitalism and Freedom — For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 95-99 (2004); *see also* Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH. L. REV. 944, 951-54 (2002). Other feminist corporate law scholarship has challenged even more basic doctrines of the modern corporate form, such as limited shareholder liability. *See, e.g.*, Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up from the Bottom (Line)*, 2 AM. U. J. GENDER SOC. POL'Y & L. 1, 24 (1994) ("One of the defining characteristics of the modern corporation, the concept of limited shareholder liability, is anti-feminist from the outset. Alienation and compartmentalization of different spheres of existence is one of the main themes criticized in feminist thought. Separation of the investor from the productive use of her assets is but one pernicious form of alienation.").

[165] Testy, *supra* note 164, at 98.

[166] *See, e.g.*, *id.* at 106 ("The dominant conception of directors' duties looks rather much like the traditional conceptions of a father's parenting role: sitting in an easy chair, feet up, martini in hand, and glad that no one is telling him that there is any trouble in the house. Duties of care and loyalty need to move from a fatherly configuration to a motherly one.").

[167] O'Connor-Felman, *supra* note 65, at 1349.

scholars have not specifically turned their attention to the predicament of consumers. Nevertheless, their ideas contribute to the managerialist claim that directors may be able to prevent consumer exploitation if corporate boards encompass sufficient sensitivities and are granted sufficient discretion.

But relying on the benevolent discretion of firm managers is a very limited mechanism for protecting otherwise vulnerable consumer interests. For example, Elhauge envisions a kind of reasonable-shopkeeper standard in his conception of permissible profit-sacrificing conduct by corporate boards.[168] Elhauge contends that "[t]he affirmative reason to allow corporate management to temper profit-maximization is to subject corporate decisions to the same social and moral processes that apply to sole proprietors when they run businesses."[169] But such discretion should be bound, in Elhauge's estimation, to 10 percent of the profits that could be obtained in unfettered corporate operations.[170] That kind of sacrifice may advance the consumer interest to some extent. But the limited discretion of directors is insufficient protection against the relentlessly competitive market that shareholder primacy in corporate governance otherwise unleashes. The profit-sacrificing conduct Elhauge claims exists is "powerfully limited by managerial profit-sharing or stock options, product market competition, the labor market for corporate officials, the need to raise capital, the threat of takeover, and the prospect of being ousted by shareholder vote."[171] Managerialism is weak medicine, it is limited not only by the shareholder-centric monitoring of efficient capital markets, but also by positive law, which, for example, puts

[168] *See infra* note 169 and accompanying text.

[169] Elhauge, *supra* note 129, at 844. This idea, while formally elaborated by Elhauge, has been in the literature for some time. *See* Dodd, *supra* note 15, at 1161 ("[A] development of business ethics which goes beyond the requirements of law and beyond the dictates of enlightened self-interest is impossible in these days when most business is incorporated unless it can touch incorporated business enterprises as well as those conducted by individual owners. As a practical matter, this can happen only if the managers of such corporations have some degree of legal freedom to act upon such an attitude . . . .").

[170] Elhauge, *supra* note 129, at 836. Corporate charitable giving represents "only 1.0-1.3% of corporate income." *Id.* Nevertheless, Elhauge's "tithing" parameter is meant to capture both categories. *Id.* at 846.

[171] *Id.* at 840. For Elhauge this is as it should be. His account shares the Panglosian tone familiar to the economic analysis of law. We already have the best of all possible worlds, corporate law is complete, coherent, and correct: "The law just needs to be careful to bound the amount of profit-sacrificing discretion . . . when special circumstances undermine the ordinary ability of market constraints to do so." *Id.* at 813.

substantive limits on corporate charitable giving and makes directors vulnerable to weak but still threatening shareholder derivative suits.[172]

Without duties to consumers that are enforceable by consumers, directors have an incentive to err always on the side of advancing shareholder interests rather than the interests of the corporation as a whole. Lawrence Mitchell argues that "notwithstanding judicial suggestions that directors' duties to the corporation may be broader than those to the stockholders . . . without any contradictory method of enforcement, directors can be expected to act solely in the interests of stockholders."[173] Perhaps not solely, according to the insights of team production theory, but still, absent some alternative enforcement mechanism, directors can be expected to act mostly in the interests of stockholders.

2. Shareholder Activism

Among corporate stakeholders, only shareholders have the power to influence corporate governance directly. One could consider reliance on shareholders to exercise that power in service of the consumer interest a subcategory of managerialism. Shareholders are responsible for the routine election of directors and the episodic authorization of major transactions, such as mergers or dissolutions. Through voting on such matters, shareholders could theoretically expand or narrow the bounds of operational restraint in the consumer interest. In practice, however, the vast majority of shareholders remain rationally ignorant of routine corporate elections, knowing that their own votes will have little effect on the outcome of an election and that their diversified investments leave them with little stake in any given corporate election.[174]

Beyond voting for directors, the most prominent method of shareholder influence is the "shareholder proposal" mechanism provided by the federal securities laws.[175] Rules promulgated by the

[172] For example, the federal tax code allows corporations to deduct up to 10 percent of pre-tax profits as charitable donations. I.R.C. § 170(b)(2) (West 2008). In Delaware, corporate giving is capped by a "reasonableness" standard, which looks to the tax code for guidance. *See* Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991).

[173] Mitchell, *supra* note 150, at 605.

[174] Frank Easterbrook & Daniel Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1171 (1981) (explaining that rational shareholders have little incentive to become informed about routine corporate elections).

[175] *See generally* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 495-505 (2002) (analyzing shareholder proposal mechanism).

Securities Exchange Commission ("SEC") permit shareholders to include proposals for reforming corporate policies in the firm's proxy materials.[176] The SEC allows shareholders to make proposals with respect to "social issues" relating to the firm, even if the social issue does not bear directly on the profitability of the corporate enterprise.[177] For example, shareholder activists used social issue proposals to pressure firms to divest from South Africa during the apartheid era. Contemporary efforts include shareholder proposals to require firms to offer health benefits to the families of gay workers on the same terms as those provided heterosexual families.[178] To date, however, the mechanism has not been taken up directly in favor of consumer concerns. Indeed, far from ameliorating the excesses of shareholder primacy, the shareholder proposal mechanism may ultimately come to exacerbate the problem. Today, institutional shareholders increasingly use the proposal mechanism to promote corporate governance reforms that narrow directors' (potentially profit-sacrificing) discretion and make them more accountable to shareholders.[179] In any event, social issue shareholder proposals are usually opposed by incumbent boards, which can use the corporate treasury to promote their opposition. Such proposals typically fail when put before all shareholders for a vote.[180]

In the annals of attempted corporate governance reform, the historic failure of The Campaign to Make General Motors More Responsible ("Project GM") provides an effective illustration of the limited utility of shareholder activism as a means of advancing consumer interests.[181]

[176] *Id.*

[177] *Id.* at 501-05.

[178] *Id.*

[179] *Id.* at 496 ("[T]he rule . . . is increasingly being used by institutional investors to press matters more closely related to corporate governance. For example, proposals in recent years have included such topics as repealing takeover defenses, confidential proxy voting, regulating executive compensation, and the like."). Hansmann and Kraakman point to the fact that worker pension programs have been especially vocal in advocating the view that firms should maximize profits on behalf of shareholders as evidence in support of their "end of the world" thesis. Some progressive scholars, on the other hand, argue that unions as institutional investors have used their shareholder powers to influence corporate receptivity to union organizing activity, settling strikes, and ensuring against the entrenchment of anti-union managers. *See* Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 97, 114-15 (2000).

[180] *See* Harwell Wells, *Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 113-17 (2002).

[181] *See generally* Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Project GM*, 69 MICH. L. REV. 419 (1971) (chronicling and analyzing implications of

Undertaken in 1970 by a group of corporate law reformers, with the backing of consumer activist Ralph Nader, Project GM bought twelve shares of stock in General Motors, Inc. ("GM") and authored several potentially transformative shareholder proposals.[182] The most prominent one called for GM to create a Shareholders Committee for Corporate Responsibility, which would gather facts and make recommendations on some basic questions concerning GM's "role in modern society and its prospects for and possible means of achieving a proper balance between the interests of shareholders, employees, consumers, and the general public."[183] Another proposal sought to expand the number of directors on GM's board — slots that Project GM hoped to fill with socially conscious directors. In short, Project GM sought to stoke a managerialist ethos within GM through shareholder activism, and to provide an institutional mechanism that could advance the interests of multiple stakeholders. The campaign attracted substantial attention in the business community and in the mainstream press.[184] GM's board of directors, however, opposed Project GM's proposals and deployed considerable resources urging shareholders to defeat them.[185] The shareholders obliged in massive proportions.[186] Neither of the proposals received more than 3 percent of the voted shares. According to one scholar who served as counsel for Project GM, "Project leaders believed that a proxy contest with General Motors would afford them an opportunity to gain attention for their efforts and would provide a test of the ability of corporate and economic system to reform itself."[187] The failure of that test illustrates the limitations of managerialism and shareholder activism as a means to vindicate consumer interests.

B. *The Golden Yoke: Multifiduciarism*

1. Stakeholder Duty and Enforcement

One way to improve upon the impotence of managerialism would be to require, rather than merely allow, directors to attend to consumer

"Project GM").

[182] *Id.* at 423.

[183] *Id.* at 424.

[184] *Id.*

[185] David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1, 29 (1970).

[186] *Id.* at 30.

[187] Schwartz, *supra* note 181, at 423.

interests at the firm governance level.[188] Proponents of shareholder primacy have rejected the possibility of a multiple fiduciary corporate governance regime, arguing that it is impossible for directors to serve more than one principal at the same time, and that directors would only seize on the intractability of a multi-fiduciary injunction to more easily exploit the firm for their own interests. As Easterbrook and Fischel put it, "[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither."[189] This view is logically suspicious, as the problem of simultaneously serving multiple interests is present even under a strict shareholder primacy regime — directors must determine how to balance the short-term, mid-term, and long-term interest of shareholders, and the sometimes-distinct interests of different classes of shareholders.[190] Ron Chen and Jon Hanson have also noted that the claim that multiple fiduciary obligations would be cacophonous in corporate governance contradicts the dominant view's basic certainty that shareholder primacy serves all stakeholders because all stakeholders' interests already align.[191] Nor is the obligation to attend to multiple interests unknown in human activity; it is of course always present in our most personal decision making, and in our most public governance (e.g., adversarial litigation, bicameral legislatures, and three-branched governance). The objection is further cast into doubt

[188] Proponents of the dominant regime often mistakenly conflate multifiduciary regimes with permissive managerialist approaches. For example, after quoting from statutes stating that directors "may" consider other stakeholders, DeBow and Lee write: "Both the antitakeover statutes and the constituency statutes change the focus of directors' and managers' efforts and legal duties in hostile takeovers from the welfare of shareholder-owners to the welfare of both shareholder and nonshareholder constituencies." Debow & Lee, *supra* note 37, at 403. Compare in the area of legal ethics a rule permitting lawyers to reveal client confidences in support of third-party interests, and one requiring them to do so. See in particular the controversy over Sarbanes-Oxley's permissive rather than mandatory approach to lawyers' responsibilities in the reporting of managerial misconduct. *See* STEPHEN GILLERS, REGULATION OF LAWYERS 37-38 (2009).

[189] *See* EASTERBROOK & FISCHEL, *supra* note 13, at 38; *cf. Matthew* 6:24 (The New American Bible) ("No one can serve two masters. He will either hate one and love the other, or be devoted to one and despise the other. You cannot serve God and mammon.").

[190] *See* Chen & Hanson, *supra* note 27, at 111-21. Greenfield calls the dominant paradigm's arguments against the plausibility of multifiduciarism the "Emperor's New Clothes" of corporate law scholarship. Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 104 (2005). *But cf.* Mark Roe, *German Securities Markets and German Codetermination*, 1998 COLUM. BUS. L. REV. 167 (arguing that codetermination weakens efficacy of German corporate boards).

[191] Chen & Hanson, *supra* note 27, at 111.

by the cogency of team production theory's insights that directors must always already engage in the constant balancing of sometimes synergistic and sometimes competing interests.[192]

But progressive corporate law scholars have struggled to describe a mechanism through which multiple-stakeholder fiduciary obligations could be enforced.[193] Indeed, as indicated in the quote from Adolf Berle at the start of Part III, shareholder primacists have long regarded the problem of "unenforceability" as a fatal flaw in the multifiduciary approach.[194] Nonetheless, I believe that a multifiduciary regime could be institutionalized through modest expansions of the same basic mechanisms presently in place to vindicate the fiduciary duties of loyalty and care presently owed to shareholders by corporate boards.

For starters, consumer interests could be represented on the board through either a "classified" or an "unclassified" directorial regime. "Classified" directors would be individually assigned to represent specific stakeholders, with one director representing consumers, another representing stakeholders, one for workers, etc.[195] In an

[192] *See supra* text accompanying notes 137-47.

[193] *See* DeBow & Lee, *supra* note 37, at 419 ("Nonshareholder constituency claims would regularly be in conflict with one another and, in principle, would be inexhaustible. We can foresee no principled way for our hypothetical enforcement agency, or the courts, to develop predictable rules for determining 'who gets what' under this sort of regulatory regime.").

[194] *See supra* text accompanying note 141.

[195] References to such classification schemes are few and far between in corporate scholarship. In 1950, Beardsley Ruml, former chairperson of the Federal Reserve Bank and intellectual architect of the "withholding" program in federal income taxation, suggested "one modest step" of asking one director, nominated by the board and elected in the normal manner by shareholders, to act as "trustee" for a stakeholder group, including in Ruml's treatment, consumers. *See* Beardsley Ruml, *Corporate Managers as a Locus of Power*, *in* SOCIAL MEANING OF LEGAL CONCEPTS NO. 3: THE POWERS AND DUTIES OF CORPORATE MANAGEMENT 219, 235 (1950). Ruml suggested that "these 'director-trustees' would sit, not as 'representatives' of the interest for which they speak, but as designees of their fellow directors to give particular attention to their trustee assignments." *Id.* at 236. In their call for federal chartering of publicly traded corporations, Ralph Nader, Mark Green, and Joel Seligman called for the government appointment of a certain number of directors on corporate boards, who would give voice in corporate decision making to various dimensions of the public interest. *See* RALPH NADER ET AL., TAMING THE GIANT CORPORATION 75-132 (1976); *see also* Michael Shanks, *The Consumer as Stakeholder and the Implication for Consumer Obligations*, 6 J. CONSUMER POL'Y 133, 133 (1983). Shanks's brief essay is one of the only published works that endeavors to directly address the consumer as stakeholder in the corporation. Writing within a European context (addressing Denmark and the UK in particular), Shanks provides a useful if not theoretically or programmatically elaborate account of the difficulties with various noncorporate approaches to attending to the consumer interest. *Id.*; *see also* ROBERT A. DAHL, AFTER THE

"unclassified" system every director would represent all stakeholder interests in a fiduciary fashion.[196] The extant structure and mechanics of board composition would probably be least disturbed by the latter unclassified approach. This approach would also provide directors the broad latitude they need to attend flexibly to each group's interests in the course of ongoing corporate decisions in dynamic market environments.

With respect to the duty of loyalty, consumers, as corporate stakeholders, have the same interests in preventing directorial misappropriation of corporate assets as do shareholders. When directors steal corporate value for themselves, they take not only from what would otherwise go to shareholders, but also from what would otherwise be shared among shareholders, workers, and consumers, in the form of dividends, wages, prices, operational restraint and corporate giving. Empowering consumers to sue corporate directors for loyalty violations provides another set of eyes on the corporate till. Thus, shareholders and workers, in addition to consumers, would benefit from the availability of such consumer driven suits.

As for the duty of care, multifiduciary directors, like unifiduciary directors, would be required to give the same level of care in their management of the corporation as a person of ordinary prudence would give to the management of their own affairs.[197] Corporate law presently circumscribes enforcement of the duty of care with the business judgment rule. Under this rule, judicial review of the quality of directorial decision-making is limited to examination of the adequacy of the process by which the directors became informed and deliberated on the decision. This juristic restraint is essential to maintaining the leeway directors need to balance and manage the intersection of multiple corporate stakeholders.[198] The expansion of fiduciary obligation need not work an abandonment of this fundamentally deferential framework.[199] Nonetheless, it would expand

REVOLUTION 123 (1970); Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* THE CORPORATION IN MODERN SOCIETY 25, 40-41 (Edward S. Mason ed., 1966).

[196] *See* GREENFIELD, *supra* note 32, at 146-52.

[197] *See* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963) (stating that "directors of a corporation in managing the corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances").

[198] *See supra* text accompanying notes 13-16 (explicating nexus-of-contracts theory of firm).

[199] *See* Ratner, *supra* note 185, at 48 (exploring multifiduciary framework and noting that substantive tradeoffs between constituencies could not give rise to cause of action for delinquency, "[h]owever, it would be appropriate to hold management

to consumers the right to have their concerns known to directors and deliberated on by them. Courts are not fit to evaluate the substance of decisions, but "they appear quite capable of detecting process flaws that lead to substantively problematic results."[200] Violations of these expanded fiduciary obligations, or sham proceedings brought only to cosmetically satisfy the requirements, would subject directors to liability in care suits brought by consumers.

The specifics of how directors would manage their fiduciary obligations to consumers would vary with every industry and in every firm. However, if the corporation owes fiduciary obligations to multiple constituencies, then it must at least be the case that managers cannot advance the interests of one group of stakeholders by manipulating another group. Put differently:

> Joint adventurers . . . owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[201]

The corporate enterprise is composed of multiple "adventurers," among them shareholders and consumers.[202] Extending a fiduciary obligation to consumers would mean that as agents of both principles, directors would be forbidden from advantaging shareholders by exploiting consumers.[203] In practice, a multifiduciary regime might

liable where it utterly failed to consider the interests of one of its constituencies or otherwise dealt unfairly with them"). As Ratner points out, this is essentially the standard presently employed where directors must balance the interests of cofiduciary obligations owed to shareholders of different classes of stock. *Id.* at 48 n.172.

[200] Bainbridge, *supra* note 13, at 868 n.49.

[201] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Meinhard and Salmon had been partners in a real estate development project; under a twenty-year lease, they improved and operated the Hotel Bristol in New York City. Meinhard had put up the capital and Salmon used his know-how and sweat to make it work. After nineteen years and eight months, Salmon entered into an agreement with the landowner, on his own, for a new lease lasting up to eighty years and contemplating major new developments on the land. When Meinhard got wind of the deal, he claimed Salmon had violated his fiduciary obligations to their partnership in seizing the opportunity for himself. Cardozo agreed. *Id.* at 472.

[202] *See supra* notes 57-60 and accompanying text.

[203] Lawrence Mitchell proposed a system for enforcing multifiduciary obligations that would mirror a framework presently used to vindicate the interests of minority stakeholders in closely held corporations. Stakeholders would have the right to

mean for consumers little more than greater transparency and access to corporate information, a right to good faith, fair dealing, and full disclosure in all corporate dealings of the quality to which shareholders are presently entitled.[204]

Certainly, fiduciary duty claims offer only limited protection even for shareholders given the wide latitude that directors enjoy under the business judgment rule.[205] However, the process obligations

challenge corporate decisions they believed advanced the interests of some other stakeholder at the expense of their own interests. The board would then be required to show that their decision was in the best interest of the "corporation" as a whole, after which the matter would be concluded unless the challenging stakeholder could demonstrate that the same corporate purpose could have been accomplished in a manner less harmful to their interest. *See* Mitchell, *supra* note 150, at 634-37. Again, Mitchell has in mind a fiduciary protection for workers, but such an approach might usefully be applied to protect the consumer interest. *Id.* There may indeed be business arrangements that would benefit other stakeholders just as well and make consumers better off, but which are not pursued under a strict shareholder primacy regime. But this test is difficult enough to administer, as it puts courts in the position of evaluating the substantive merits of directorial decisions, a task that corporate law generally accepts courts are ill-equipped to manage. My approach instead favors process obligations on behalf of multiple stakeholders, which courts are more capable of monitoring.

[204] I contend that this standard of care cannot be accomplished by rooting the standard in collateral regulatory institutions rather than in firm governance. Practically, the public choice problem engendered by shareholder primacy precludes the establishment or maintenance of such regimes. Even if this were not a problem, however, the fiduciary standard can only be implemented in firm governance because it is in its essence about process and deliberation; it is not imposing an external rule or standard, it is establishing an internal governance procedure that continually evolves over the life of the corporation's relationship with its consumers. To establish such a standard in a regulatory agency or in common law courts would simply be to install those institutions as firm directors. They could no more accomplish the task than can courts or administrative agencies make substantive business decisions on behalf of shareholders.

[205] Both nexus of contract shareholder primacists and their progressive critics are more or less nonplused by the inefficacy of enforcing traditional fiduciary duties through shareholder derivative suits, but for contradictory reasons. The former are unworried because they believe in the power of the market, the latter are unworried because they doubt that power. Nexus of contract theorists rely on the efficiency of markets, specifically the market for control, to discipline directors, who are threatened with losing their posts unless they are competitive. EASTERBROOK & FISCHEL, *supra* note 13, at 13 ("The history of corporations has been that firms failing to adapt their governance structures are ground under by competition."). Progressive corporate scholars, on the other hand, take the weakness of fiduciary obligation as evidence for the latitude that directors must and do have to manage the firm on behalf of all stakeholders. But both perspectives recognize that at some level managers as a class are able to slack across the market as they "satisfice" (rather than maximize) shareholder interests, giving sufficient return on investment as to keep investors from exiting or pursuing managerial change, but not maximizing firm value either. *See*

impounded into the duty of care may have a substantive impact on the consumer interest. Pointing to social psychological literature on the operation of "fairness" concerns in human decision-making, Kent Greenfield has recently argued that group decisions are more likely to be substantively fair when fairness concerns are explicitly communicated during group deliberation.[206] Articulating and listening to the concerns of numerous perspectives also promotes the formation of a group identity among participants to the conversation. When individuals believe their decisions will affect a group with which they associate themselves, they tend to make distributionally equitable decisions.[207] Further, social psychologists have noted the ease with which even arbitrarily designating individuals as members of a specified group can induced group-serving motivations within individuals assigned to the group, even where shared interests other than the fact of group designation are absent.[208] In scholarship exploring the plausibility of fiduciary protections in firm governance for workers, progressive corporate law scholars have also argued that the entire corporation, and by extension society generally, stands to benefit from the efficiencies gained from the cooperative reciprocation that is unleashed under the multifiduciary regime.[209]

Of course, the multifiduciary prescription does not advocate a complete abandonment of the profit-principle in corporate theory or law. The corporation must benefit all its stakeholders; for shareholders, this means making profits. The pursuit of residual profits for shareholders will thus remain the basic orientation and measuring stick of firm performance. Though profits are not a sufficient indicator of the social utility of the firm, they are a necessary component of it. The important question from a social policy perspective is not how to ensure shareholders maximum profits, but

Elhauge, *supra* note 129, at 804. In both approaches the lax duty of care standard yields to a strict duty of loyalty standard, which aggressively polices severe mulcting of the firm by its directorate.

[206] GREENFIELD, *supra* note 32, at 175-78.

[207] *See id.* at 175-79.

[208] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 94-115 (describing group preference dynamics).

[209] *See* GREENFIELD, *supra* note 32, at 162 ("Employees' positive beliefs about the fairness of the firm provide appreciable benefits to the firm by decreasing the need to monitor employee behavior."); *see also* Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Co-Operation*, 78 CORNELL. L. Rev. 899 (1993) (arguing that greater investments in the well-being of workers will make firms more productive and socially useful).

how to provide them sufficient profits in order to induce investment in the socially useful work of the firm.

2. Stakeholder Democracy

A further way to make corporate governance more responsive to consumer interests would be to enable consumer participation in the election of firm directors. All of a corporation's stakeholders have an interest in its successful operation. However, some stakeholders' interests collectively are more consistently aligned than others'. For example, shareholders and workers may at times have interests that are more closely aligned with each other's interests than they are with those of consumers; indeed, shareholders and workers may collude against consumers. Although shareholders, managers and consumers all benefit from "efficiency and economy in management," only shareholders and managers benefit from high prices.[210] This misalignment is likely to emerge even in a multifiduciary regime, so long as only shareholders, or shareholders and workers, are electing directors. In some markets, consumers might benefit from representation not only at the cash register, but also in the boardroom. As Gardiner Means noted, the proper "allocation of resources through corporate enterprise is both a matter of efficiency in production and importantly a matter of what is produced. A consumer veto over wasteful use of resources after the use has been made is by no means the same as consumer control over the issue."[211]

Few corporate scholars have considered the possibility of involving consumers in firm governance by expanding the franchise to them; fewer still have endorsed the idea. Even progressive commentators have concluded that "[i]n contrast to employees and customers [i.e., businesses that buy from other businesses], ultimate consumers . . .

[210] Alfred F. Conrad, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 952 (1977); *see also* Chayes, *supra* note 195, at 43 ("[T]he growth of strong unions has [not] been free of problems. It may be said that the bargain can too easily become an agreement to pursue joint ends at the expense of unrepresented parties. Such 'collusion' has been said to characterize wage negotiations in the 'administered price' industries."); Ratner, *supra* note 185, at 35-36 ("Under current labor laws, there is a good deal of bona fide arm's-length bargaining between management and labor representatives over real questions of allocation of economic benefits and decision-making power within the corporate organization . . . . [I]t is quite possible, and indeed common, for the negotiations to result in an agreement that satisfies both employees and management at the expense of consumers or other unrepresented economic or social interest groups.").

[211] Means, *supra* note 125, at 82.

seem[] to be inherently unsuitable as electorates."[212] In his touchstone article on corporate governance, business scholar Oliver Williamson provides a representative summary of reasons for rejecting the idea. With respect to consumers' corporate dealings, as usual, "[T]he main protection . . . is generally the option to take their trade elsewhere."[213] Williamson acknowledges, however, that consumer markets sometimes fail; for example, "[p]roducts that have delayed health effects are an exception"[214] to the reliability of market regulation. In such circumstances, you guessed it, "A regulatory agency equipped to receive complaints and screen products for health hazards could serve to infuse confidence."[215] Whatever the inadequacies of the market and external regulation, "[m]embership on the board of directors is not . . . clearly indicated" as a solution.[216] Williamson asks:

> Who are representative consumers? How do they communicate with their constituency? Token representation may create only unwarranted confidence.... Further innovations to offer consumer protection on a discriminating basis may be needed.... [H]owever, a general case for inclusion of consumers on the board of directors is not compelling.[217]

212 Conrad, *supra* note 210, at 956. Conrad continues: "Even the most outspoken advocates of their interests — such as Nader and Stone — have refrained from proposing that they be given a role in director selection." *Id.* Yet, Conrad notes that the idea is not as illogical as it seems to have been taken to be, after all, "[b]oth customers and employees have an interest in the long-term welfare of the enterprise even greater than that of many shareholders, who can switch their loyalties as fast as they can dial [sic] Merrill Lynch." *Id.* at 959-60. Chayes makes a similar point, noting that shareholders may be a "misconceived" candidate for the franchise:

> Of all those standing in relation to the large corporation, the shareholder is least subject to its power. Through the mechanisms of the security markets, his [or her] relation to the corporation is rendered highly abstract and formal, quite limited in scope, and readily reducible to monetary terms. The market affords him [or her] a way of breaking this relation that is simple and effective . . . . Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation . . . . If they are, it is only in the most limited sense.

Chayes, *supra* note 195, at 40.

213 Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1213 (1984).

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 1213-14. Williamson's critique of consumer suffrage in the corporation parallels Henry Hansmann's explanation for the very limited use of consumer cooperatives in most retail markets. *See* HENRY HANSMANN, THE OWNERSHIP OF

This Article has already analyzed the limitations of consumer sovereignty and backstop regulatory institutions as exclusive guardians of the consumer interest. Given these limitations, one might consider whether there are viable answers to the rhetorical questions Williamson poses. His suggestion that the problem of identifying "representative consumers" to sit on the board stands in the way of consumer participation in firm governance seems oddly to assume that such a regime requires finding some genuine "Joe the Consumer" to sit in representation of all other consumers. This is unnecessary; consumers could elect professional representatives — directors — to advance their interests in corporate governance, just as shareholders now do. Perhaps the deeper sense of his question is the substantive issue of what these directors would do to advance the interests of consumers. But the question of what substantive decisions directors should make is a question that corporate law rightfully evades, always deferring to the good faith determination of the incumbent board. Corporate law can only ensure that directors undertake procedures, such as investigation, examination, and deliberation, in good faith. Consumer representatives would be charged with doing good business in the interests of consumers, just as directors are presently charged to do so solely for shareholders.

With regard to the problem of "token representation," Williamson is afraid that a superficial form of consumer representation might lull

ENTERPRISE 161-62 (1996) ("[C]onsumer cooperatives have an insignificant share of the market for nearly all retail goods in the United States and, with a few exceptions, in other developed nations as well."). For Hansmann, this is easily understood and is not troubling:

> [T]he costs of customer ownership for many retail goods and services are high, because the customers of any given retail firm are commonly too numerous, transitory, and dispersed to organize easily or effectively. The costs of market contracting are commonly low: retail markets for most ordinary items are sufficiently competitive to keep prices close to cost, and the goods and services themselves are sufficiently simple or standardized, or are purchased so repetitively, that asymmetric information about quality is not a serious problem.

Id. Where contract fails, as always, the backstop is collateral regulation. *Id.* at 151 ("In effect, regulation can be a substitute for customer ownership in protecting consumers from market failure."). Pursuing the consumer interest through corporate governance, by expanding fiduciary protections, corporate suffrage, and federal securities law protection to consumers, may provide a useful middle course between inefficient consumer co-operatives and exploitive markets backed by ineffective regulation. *See supra* notes 60-63 and accompanying text. The very dynamics that keep consumers from forming consumer co-operatives keeps them from collectively acting in their own interests in the legislative and regulatory arenas.

consumers and regulators into a false confidence that consumer interests are being monitored, leaving them vulnerable to continuing efforts by firms to exploit consumers.[218] Fearing that consumers will be easily misled or betrayed by tokenism is somewhat incongruous, given that the standard account (which Williamson is propounding) is deeply committed to the view that consumers are *not* easily misled and are able to look to their own interests in the market. The problem of tokenism may indeed be a real threat to consumers, but it is a problem that can be overcome by making consumer suffrage and representation genuine and robust. This would be accomplished either by giving classified consumer directors a substantial number of seats on the board, or, by requiring all directors, in an unclassified system, to attend to consumer interests in firm governance. The "lulling" critique of consumer representation at the board level also proves too much, as the argument could also be used to suggest that directors should not purport to represent shareholder interests, lest shareholders take insufficient personal responsibility for evaluating the merits of firms in which they might invest — an argument that proponents of the standard approach never make.

The question of how consumer directors would "communicate with their constituency" is a crucial practical issue, but it is not the showstopper that Williamson and other critics have assumed it to be. First, consumer-elected directors could communicate with consumers in much the same way that directors presently communicate with their shareholder constituents — through press releases and occasional direct mailings. The ability of the firm to communicate with consumers is already taken for granted in the shareholder primacy norm. Corporate law assumes firms are capable of reaching their consumers and communicating to them about the price and quality of their goods. Corporations could harness the same mechanisms to communicate with consumers regarding matters of corporate governance. The more important communication issue that Williamson seems to have in mind is the problem of identifying who the firms' consumers are and figuring out how they could communicate their votes to the corporation. Other commentators have also fixated on the impracticality of consumer suffrage as a decisive reason for not pursuing the idea. David Ratner wrote that the idea of consumers voting was "absurd only because it is unworkable"[219] and

[218] *See supra* notes 60-63 and accompanying text.

[219] Ratner, *supra* note 185, at 33. In theory the notion made sense to him:

> The purchasers of GE light bulbs, as a group, have a real and substantial

closed his thought experiment on expanding the corporate franchise based on that assumption, claiming "[t]he absence of workable alternatives forces us to return to the concept of the shareholders as the electorate."[220]

These objections are logistical, not conceptual. And these scholars' reckoning of the logistical limitations of consumer suffrage is dated. In fact, many retail corporations have already put in place the rudiments of a viable technological infrastructure for facilitating a consumer suffrage regime. Today national retail firms maintain elaborate records of what their consumers purchase and how their consumers can be contacted. Firms track such information through "consumer loyalty" programs that provide consumers with magnetized cards and identifying numbers that consumers or retail clerks swipe at the register, or type into an online interface, each time a consumer makes a purchase. Consumers interested in participating in corporate governance could be issued a voting identification number. Instead of (or in addition to) consumers accumulating "points" or "miles" redeemable for future discounts or prizes, consumers could with each purchase accumulate votes, or fractions of votes, to be exercised at regular intervals in corporate elections. Consumers not wishing to participate in corporate democracy would simply not have their purchases registered in the suffrage database, just as consumers for privacy reasons or indifference presently avoid consumer loyalty programs. Other technological advances, most crucially the Internet, would allow interested consumers to easily keep abreast of corporate governance issues and even become involved in active campaigning with their fellow consumers for different pro-consumer slates of directors. Consumers could cast their votes online as well.[221]

> interest in whether GE management incorporates known improvements in the product. The problem is finding the most appropriate means by which this interest can be taken into account in management decisions. To say that the customers' only right is to buy the goods of a competing manufacturer is akin to saying that a shareholder does not need a vote in a publicly-held corporation because he [or she] is fully protected by his [or her] right to sell his [or her] shares on the market at any time.

Id.

[220] *Id.*; *see also* Conrad, *supra* note 210, at 959 (concluding that "obstacle[] for which no solutions have been suggested" is "the difficulty of finding the consumers and persuading them to concern themselves with their representation").

[221] *Cf.* Internet Availability of Proxy Materials, SEC Release No. 34-52926, 70 Fed. Reg. 74,598 (Dec. 15, 2005) (allowing online proxy voting); *see also* Richard H. Grubaugh, *Technological Advances in the Proxy System*, 1405 PLI/CORP 515, 518-19 (Jan. 14, 2004) (providing overview of advances in online proxy solicitation and

Eugene Rostow, a former dean of Yale Law School and Undersecretary of State in Lyndon Johnson's administration, once lampooned proponents of an expanded corporate franchise who "would apparently hope to cure the present shortcomings of corporate democracy in endocratic [i.e., publicly held] corporations by adding new groups of apathetic and disinterested voters to the masses of stockholders who now fail to exercise their franchise intelligently."[222] However, by working through contemporary communicative systems, the expansion of corporate suffrage might yield some of the innovative organizing advantages that have emerged in social, professional, and political online collaboration sometimes referred to as "Web 2.0."[223] Management need not fear harassment by the consumer electorate; very likely, they can expect apathy except where directors persist in anti-consumer conduct.[224]

Many scholars have doubted that a broadly representative corporate governance regime could realistically work. Alfred Conrad described a representative corporate governance regime as the "dream" of corporate law reformers but was sure that "to most executives, the vision of a board of directors composed of advocates of competing objectives would be a nightmare."[225] Blair and Stout solute the parade of horribles: "Imagine the chaos and politicking likely to attend an election in which a firm's creditors, executives, rank-and-file employees, and other stakeholders with unique and often conflicting

voting); Blake Smith, Note, *Proxy Access and the Internet Age: Using Electronic Shareholder Forums to Improve Corporate Governance*, 2008 COLUM. BUS. L. REV. 1111, 1138 (2008).

[222] Eugene Rostow, *To Whom and for What Ends is Corporate Management Responsible*, *in* THE CORPORATION IN MODERN SOCIETY 46, 55-56 (Edward S. Mason ed., 1966). Conrad argues that "[t]he prosperity of any particular manufacturer is of little concern to [consumers]; their 'customer loyalty' readily gives way to offer of a larger rebate on a competing brand. The likelihood that their representatives will contribute much to the joint concerns of a multipurpose board of directors seems small." Conrad, *supra* note 210, at 954-55. But the situation is no different for shareholders; they want maximum profitability in the market, not in any one firm, and this they pursue in part by urging directors to focus on shareholder interests in individual companies. More importantly, the notion that the pursuit of consumer interests will not always simultaneously advance all other interests is precisely the reason why consumer representation is necessary, rather than a justification for why it is undesirable.

[223] *See generally* Christophe Aguiton & Dominque Cardon, *The Strength of Weak Cooperation: An Attempt to Understand the Meaning of Web 2.0*, 65 COMM. & STRATEGIES 51 (2007) (examining co-operative possibilities in Web 2.0 that allow innovative ways to overcome traditional collective action problems).

[224] *See* Ratner, *supra* note 185, at 47.

[225] Conrad, *supra* note 210, at 947, 950.

interests could vote on their favored candidates."[226] Beardsley Ruml, who entertained the idea of select directors serving as "trustees" for nonshareholding stakeholders, thought that the idea of direct representation of multiple stakeholders on the corporate board would be a "travesty" that "would result in business political gangsterism that would destroy the efficiency of business management. It would inject into circles requiring the most intimate confidence individuals whose reliability was uncertain and whose motives and ambitions would be in doubt."[227]

There is an important irony or incoherence in this oft-heard claim among apologists for shareholder exclusivity in corporate governance that "[r]eplicating governmental and political structures and processes within the business world would produce the same sort of interest group politics and incentive and information problems that plague government action."[228] Such a claim gives the lie to the proposition, also central to the dominant view, that collateral governmental institutions can be relied upon to look after the interests of nonshareholding constituents when markets fail.[229]

In any event, this "gangsterism" problem, if there is one, would be most persistent under a classified system in which distinct "consumer" directors were elected by and represented only consumers on a board comprised also of representatives of other stakeholders. Other approaches, however, could ensure more peaceful, collaborative governance, while still giving distinct voice to different stakeholders in board formation. For example, consumers could vote along with other

[226] Blair & Stout, *supra* note 140, at 313.

[227] *Id.* at 234. *But cf.* Robert Dahl, *Power to the Workers?*, 15 N.Y. REV. OF BOOKS, Nov. 19, 1970, at 9 ("[I]n addition to workers, others whose interests would be affected by the decisions of an enterprise might be given the right to participate in decisions — to have a direct say in management, for example, through representatives on the board of directors of the firm. Thus the board of directors might consist of one-third representatives elected by employees, one-third consumer representatives, and one-third delegates of federal, state, and local governments."). Dahl unfortunately did not develop this idea of consumer representation further in any of his numerous writings.

[228] Debow & Lee, *supra* note 37, at 404.

[229] The feasibility of codetermination regimes is also evidenced by corporate governance structures in Europe and Asia, which have to some extent involved worker representatives in firm governance. *See* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Styles*, 29 DEL. J. CORP. L. 649, 735 (2004) ("Employee participation in the supervisory organ is . . . mandated (with qualifications) in Austria, Denmark, Germany, Luxembourg, the Netherlands, and Sweden. In France, Ireland, Portugal, and other EU Member States, the law includes aspects of employee participation in corporate governance.").

stakeholders on unclassified slates of directors who would then represent all stakeholder interests. Or a third compromise approach would be for consumers to elect a classified set of directors who would then have fiduciary duties to the corporation and all its stakeholders, just as directors elected by other stakeholders would owe duties to consumers and to the group that elected them. However they are elected, board members become the agents representing the interests of the different stakeholders who put them in office, and embody in their discursive practices on the board the kind of fellowship needed to activate cooperative reciprocation, from which all stakeholders benefit.[230]

Proponents of shareholder primacy have also sometimes scoffed at the idea that multifiduciarism and codetermination can add value for all stakeholders, including shareholders, claiming that if this were true then profit-maximizing firms operating in competitive markets would already have developed such institutional arrangements.[231] Legal economists would likely cast the same doubt on the potential of consumer contribution to sound firm governance.[232] The Panglossian style in corporate theory cannot be falsified, but neither can it be believed. Corporate law is replete with examples of central mechanisms that have not spontaneously arrived or evolved out of corporate practice. The federal securities regulation apparatus and state courts adjudicating corporate disputes are just two of them. Finally, recall that under the nexus of contract regime corporate law must provide the shareholder primacy norm as background law because corporate stakeholders find it very burdensome to actually

[230] Proponents of shareholder primacy have belittled progressive corporate law scholars' use of the reciprocal cooperation insight, arguing that it has no application in corporate interactions, given that shareholders, workers, directors, and consumers all have non-intimate, arms length associations with each other. Bainbridge argues that the "notions of trust and mutual interdependence" stressed by progressive corporation law scholars is "almost wholly unrecognizable" in large markets in which "individuals increasingly hold widely diversified portfolios" and for whom "corporate stock evidences not a relationship of trust and mutual interdependence. . . ." Bainbridge, *supra* note 13, at 875-76. These scholars seem not to recognize the importance of directors embodying the different stakeholders through their performance of board duties, which requires the examination of and deliberation on the interests of the various stakeholders. These directors are assigned the role and have a constituency to whom they are in principle and, through the electoral mechanism, accountable to. *See supra* note 189 and accompanying text (referencing social psychological findings regarding ease with which group identification and concomitant decision-making dynamics can be created).

[231] Williamson, *supra* note 213, at 1209 & n.41.

[232] *Id.*

negotiate their arrangements with specificity.[233] Corporate law is already committed to the view that it is difficult for stakeholders to privately order in the most desirable fashion. Opting out of default regimes is often just as difficult as specifying a regime where no defaults are provided. Given social scientific insights regarding psychological dynamics such as the endowment effect and the status quo bias, contracting out of the default regime provided by positive corporate law may be even more difficult than is assumed in the standard account.[234]

There are numerous ways to apportion voting powers among consumers. For example, one could track the basic "one share, one vote" approach found in conventional corporate governance, which usually apportions voting power relative to shareholders' equity in the firm. Such a system would allot consumer votes in proportion to the dollar amount the consumer spends on the corporate product. This is probably the most sensible approach. Proportional suffrage, however, is not the only available corporate voting system. According to David Ratner, the "one share, one vote" paradigm in corporate governance is of relatively recent vintage.[235] The one share, one vote paradigm, he argues, "is inherently no more logical than making voting rights in school district elections proportional to the school taxes paid by the voters or the numbers of their children enrolled in the school system."[236] Ratner looks for guidance in the contours of the "one person, one vote" principle in the Supreme Court's equal protection jurisprudence. The Court has held that the Fourteenth Amendment imposes a one person, one vote rule wherever elections bear on the appointment of representatives charged with governance that is of general public interest. For example, the rule applies not only in the election of state governments, but also in the election of school boards or utility boards.[237] Extending this thinking to the corporation, Ratner argues that when a firm "makes a public offering of its securities," it "presumes to perform a public function," and should therefore be

[233] *See supra* notes 175-83 and accompanying text.

[234] *See* Hanson & Yosifon, *The Situational Character*, *supra* note 32, at 39-42.

[235] *See* Ratner, *supra* note 185, at 9 ("[T]he emergence of a general rule of one vote per share did not result from enlightened awareness of the inadequacies of an inappropriate common law rule, but was the nineteenth-century culmination of a 300-year political controversy over the degree and type of control that should be retained over the managers of corporations chartered for economic purposes."); *see also* BAINBRIDGE, *supra* note 177, at 450 (describing one-share, one vote as "the modern standard, but . . . not the sole historical pattern").

[236] Ratner, *supra* note 185, at 19.

[237] *See id.* at 38-44.

subject to a one constituent, one vote rule.[238] Applying Ratner's analysis to consumer suffrage, one might give all consumers of a firm's products the right to one vote in a given election cycle. In certain markets, it might be useful for all consumers to have an equal voice in corporate governance.

C. *Protecting the Consumer Interest with the Federal Securities Laws*

The federal securities laws supplement state-based common law and statutory tools available to shareholders for disciplining directors and otherwise influencing firm governance. These federal devices could be extended in the consumer interest. For example, one plausible idea would be to allow consumers to vote on social issue proposals made by shareholders under Rule 14 of the Securities Exchange Act.[239] Consumers certainly have as much interest in the subject matter of social issue proposals as do shareholders, and sometimes more. Consider, for example, the famous case of *Lovenheim v. Iroquois Brands, Ltd.*, in which Lovenheim, a shareholder, sought to include a proposal in Iroquois' proxy materials that would require the firm to review its use of the gruesome practice of force-feeding geese in the production of pâté.[240] According to the proposal:

> Force-feeding usually begins when the geese are four months old. On some farms where feeding is mechanized, the bird's body and wings are placed in a metal brace and its neck is stretched. Through a funnel inserted 10-12 inches down the throat of the goose, a machine pumps up to 400 grams of corn-based mash into its stomach. An elastic band around the goose's throat prevents regurgitation. When feeding is manual, a handler uses a funnel and stick to force the mash down.[241]

Shareholders might author this proposal because they are worried about the reputational effects of such practices on the value of the firm, or out of concern for the ethics and morality of the practice. Consumers also have both concerns. If they enjoy Iroquois pâté or other Iroquois products, they might fear that the reputational

[238] *Id.* at 43.

[239] *See* 17 C.F.R. § 240.14a-8 (2005); *see also* BAINBRIDGE, *supra* note 177, at 495-505 (adumbrating law of shareholder proposals); *supra* notes 168-181 and accompanying text (discussing limited power of shareholder proposals to protect consumer interests).

[240] Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 556 (D.C. 1985).

[241] *Id.* at 556 n.2.

consequences of the practice will undermine the firm's long-term profitability, resulting in product discontinuation or higher prices. Consumers also might be concerned about the morality and ethics of the production methods used in the pâté. Indeed, here the consumer interest might be regarded as more intense than shareholder concerns, as it is consumers who actually ingest into their own bodies products forged through such abusive conduct.

A more advanced reform would allow consumers to author proposals and submit them to the shareholders, or further still, to all of the voting stakeholders in the firm, including consumers. The Rule 14 mechanism would allow consumers to address broad issues that may be implicated in the firm's operation but which are nevertheless not salient at the point of the consumptive act, such as the long-term consequences of consumption, or the social consequences of consumption.[242] With Rule 14, the SEC decisively takes the position that the threat of exit is an insufficient mechanism for the expression of nonpecuniary, or even profit-sacrificing, interests of shareholders.[243] Similarly, allowing consumers to vote on shareholder proposals might provide them a more potent mechanism for influencing corporate conduct than is available to them in the market alone. Access to such a mechanism might help consumers to overcome collective action problems.[244] As described above, a consumer may prefer that a product be made in a more socially responsible fashion, but may doubt that her singular refusal to purchase the product will have any influence. Because everyone makes this calculation, nobody forebears from consumption. A vote on such matters would allow consumers to have their cake (or pâté) and eat it too, at least until such a time when they can convince the corporation to make the product with healthier or more ethical ingredients.

CONCLUSION

In some markets, consumers are vulnerable to manipulation and exploitation in ways that the dominant corporate law paradigm fails to anticipate, recognize, or cure. In such markets, where contract is inadequate and government regulation, due to public choice problems that shareholder primacy in corporate governance helps to create, is unreliable, the social purpose of corporate enterprise might be advanced

[242] *See* § 240.14a-8.

[243] *Id.*

[244] *See supra* notes 127-134 and accompanying text (discussing consumer collective action problems).

by attending to consumer interests at the level of firm governance. Merely giving authority to corporate directors to attend to consumer interests is probably inadequate. Indeed, increasing managerial discretion might only exacerbate the problem of managerial slack and give directors little incentive to look beyond traditional shareholder interests. Instead, directors must be obliged to comport themselves as fiduciaries to their consumers, an obligation which consumers could enforce through the same mechanisms presently available to shareholders, including lawsuits for loyalty and care violations. Consumers might also be integrated into corporate democracy, electing specific representatives to the board or participating in the election of general directors who will serve the interests of all corporate stakeholders. Finally, consumers might participate in corporate governance mechanisms presently provided to shareholders through the federal securities laws, including the proposal mechanism.

These kinds of innovations, while explored here only in broad conceptual outline, could be implemented through overlapping developments in legislation and judicial interpretation of existing corporate law.[245] Corporate law always exists in the context of the state's reservation of the prerogative of alteration.[246] The institutional experimentation discussed here is not offered as a blanket prescription applicable to all publicly traded corporations, but is rather the exploration of one kind of institutional arrangement that might usefully be deployed in situations where consumers are particularly vulnerable to shareholder primacy in corporate governance. It is, most importantly, an exploration of how corporate law might provide the solution to what is at heart a corporate law problem. This analysis shares with proponents of the dominant corporate law paradigm both a deep skepticism about the feasibility of government regulation alone as a response to social problems, and an abiding faith in the power of the corporation as a mechanism of social organization.

[245] *See* O'Connor, *supra* note 179, at 106 ("In creating new fiduciary rights . . . courts do not look to the legislature for permission. Courts have a long history of judicial activism in creating fiduciary duties in business settings, such as shareholders' fiduciary duties in close corporations and majority shareholders fiduciary duties to minority shareholders. This process of creating new fiduciary duties is necessary to allow judges to formulate standards over time through an evolutionary process not available to legislatures.").

[246] *See* Elhauge, *supra* note 129, at 788 n.134 (citing Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986)) ("[T]ypically the degree of reliance parties place on any status quo will be more efficient if the relying parties bear the risk that the status quo might change.").

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