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AGAINST SHAREHOLDER PARTICIPATION: A TREATMENT FOR MCCONVILL'S PSYCHONOMICOSIS

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Draft

Abstract

It is possible that the director primacy model risks increased agency costs in exchange for more managerial freedom of initiative which leads to superior corporate performance while the shareholder primacy model, if viable, contributes to ex post and ex ante inefficiencies. As an empirical matter, share prices likely reflect the terms of corporate governance. Limited shareholder power regarding day-to-day management and takeover attempts is consistent with an accurate description of how corporations work as well as with the necessity of constraining accountability to preserve authority. Since we are contractarians, we prefer the director primacy model and embrace shareholder weakness. Whether we are right or not, it seems clear that there is a growing debate in corporate governance law about how power should be allocated among directors, shareholders and management. There has been a blizzard of scholarship which shares the goal of increasing the power of shareholders as a vehicle for improving corporate performance by constraining agency cost. By contrast, corporate law scholar, James McConvill, avoids the agency cost argument for increased shareholder control and instead, argues that shareholder empowerment should be seen as an end in itself. His recent article supplies a novel approach to corporate governance. While the satisfaction of selfish motives remains an undisturbed objective, material gain as a maximand is exchanged for a participatory experience. McConvill disputes prevailing conceptions of rational choice analysis and argues that the perceived logic which encapsulates rational choice theory fails to appreciate the non-financial benefits (shareholder happiness) that can be derived from increasing shareholder power. McConvill's fresh look requires an explanation and a critique. This article is the first of a series of articles that offer critical analysis to vitiate McConvill's Panglossian conclusions.

Introduction.

A current debate in corporate law and governance concerns how power should be allocated among directors, shareholders and management. Proposals to strengthen the power of shareholders include the SEC's proposed rule 14a-11 allowing shareholders to nominate candidates to the board,[1] an ABA proposal to amend the Model Business Corporation Act to require a majority vote for the election of directors,[2] a recent Congressional initiative mandating advisory shareholder votes on executive pay plans[3] and Lucien Bebchuk's effort to vindicate undistorted shareholder choice in a takeover context.[4] The "Delaware General Assembly has recently adopted a provision to the Delaware General Corporation Law which provides that where shareholders have adopted a majority voting bylaw for corporate elections over the traditional plurality scheme, a corporation may not subsequently amend its bylaws to return to plurality voting without shareholder approval."[5] While these initiatives may have little positive impact on stock prices,[6] various efforts to strengthen shareholders' power at the expense of insiders have become more potent in the wake of Enron, WorldCom and the Sarbanes-Oxley Act.[7] Lawmakers, for instance, have become heavily reliant on the regulatory role of independent

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[1]For a discussion of this proposal, *see e.g.*, Adam R. Hochhauser, *SEC Proposed Rule 14a-11: An Analysis of the Commissions Authority under Section 14(A) of the Securities Exchange Act of 1934 to Allow Shareholder's to Nominate Director Candidates via the Companies Proxy Statement* (April 12, 2005). *ExpressO Preprint Series.* Working Paper 594, *available at* http://law.bepress.com/expresso/eps/594

[2] *See*, *Corporate Laws Committee Releases Preliminary Report on Director Voting available at* http://www.abanet.org/buslaw/committees/CL270000pub/directorvoting/20060117000000.pdf (accessed on March 13, 2007).

[3] Securities Regulation & Law Report, *Frank Urges Advisory Shareholder Vote on CEO Pay Gives Alternative to Divestiture*, March 12, 2007. BNA, Volume 39, Number 10 at page 1.

[4] Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) (explaining an undistorted shareholder choice approach to corporate takeovers).

[5] Jay Verret, *Pandora's Ballot Box or a Proxy with Moxie? The Majority Voting Amendment to a Delaware Corporate Law*, BUSINESS LAWYER, 1, January 15, 2007) (electronic version) *available at* http://ssrn.com/abstract=960172 .

[6] *See* William K. Sjostrom, Jr & Young Sang Kim, *Majority Voting for the Election of Directors*, *Working Paper* 51 (2007) *available* at http://ssrn.com/abstract=962784 (offering an empirical study of market reaction to the adoption by firms of a majority voting requirement for the election of directors and showing that at least when shareholders lack veto authority over candidates these so-called reforms amount to little more than smoke and mirrors).

[7] *See e.g.*, Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law* 41 Wake Forest L. Rev.1131, 1131 (2006).

directors in overseeing audit committees and executive compensation.[8] Given this environment and despite evidence that verifies stronger corporate governance rules do not necessarily "reduce the agency problems of moral hazard and adverse selection,"[9] much academic commentary supports contemporary governance initiatives.[10]

Some commentators welcome the move toward shareholder empowerment. Hansmann and Kraakman offer this claim: "Since the dominant corporate ideology of shareholder primacy is unlikely to be undone, its success represents the 'end of history' for corporate law."[11] Regardless of whether this provocative claim is true or simply wishful thinking, new proposals for increasing shareholder power proliferate. This occurs despite the probability that most (but not all)[12] initiatives ignore evidence showing that separation of ownership and control justifies the current regime of limited shareholder voting rights and director control as the default rule.[13] Notwithstanding the blizzard of proposals, it is widely recognized that neither the notion of shareholder ownership nor the assertion that stockholders are risk-bearing residual claimants provides a convincing ground for shareholder primacy.[14] The business judgment rule rightly effects a compromise between two competing values: authority and accountability.[15] This compromise favors the director primacy model as the best

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[8] *See e.g.*, Bruner, *supra* note ___ at 1131.

[9] Valentina G, Bruno and Stijn Claessens, *Corporate Governance and Regulation: Can There Be Too Much of a Good Thing?* Finance Working Paper Number 142/2007, 10 (2007) *available at* http://ssrn.com/abstract_id=956329 (evidence does not unambiguously show that corporate governance reduces agency costs problems because of reverse causality wherein companies improve their corporate governance practices as a commitment device when raising new funds or alternatively, when companies become more dependent on external financing which may trigger changes in the companies governance structure in part because investors require such changes).

[10] *See e.g.*, Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 835, 847-8 (2005) (raising a number of proposals which might increase the power of shareholders). *But see* Stephen Bainbridge, *The Case for Limited Shareholder Voting Rights* 53 UCLA L. REV. 601, 622-624 (2006) [hereinafter, Bainbridge, *The Case for Limited Shareholder Voting*] (pointing out the mechanical difficulties of achieving consensus among thousands of shareholders impede their active role).

[11] Hans Hansmann and Renier Kraakman, *The End of History for Corporate Law*, 89 GEORGETOWN L. J. 43, 89 (2001).

[12] For an innovative reform proposal that might maintain directors' discretion in light of the separation of ownership and control but which might also help more properly align directorial oversight, *see*, Assaf Hamdani and Reinier Kraakman, *Rewarding Outside Directors* (January 2007) Harvard Law & Economics Discussion Paper No. 578 *available at* http://ssrn.com/abstract=959210 .

[13] *See e.g.*, Stephen Bainbridge, *Director Primacy and Shareholder Disempowerment*, 199 HARV. L. REVIEW, 1, 36 (2006) [hereinafter, Bainbridge, *Director Primacy and Shareholder Disempowerment*].

[14] Antoine Rebérioux, *Shareholder Primacy and Managerial Accountability*, CLPE Research Paper, January, 2007, Volume 3 No. 01 *available at* http://ssrn.com/abstract=961290 at pages 1-2 (suggesting among other things that when contracts are incomplete, non-shareholder constituencies—and in particular workers investing in specific human capital—do bear risk).

[15] *See e.g.*, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 Vand. L. Rev. 83, 85-87 [hereinafter, Bainbridge, *The Business Judgment Rule as Abstention*] (arguing that the business

explanation of authority and disfavors (but does not necessarily eliminate) the accountability role of shareholders. Taken together, this gives rise to the intuition that contemporary shareholder empowerment initiatives unwisely endeavor to vindicate accountability fears at the expense of necessary authority. Despite this intuition, corporate law scholar, James McConvill, offers a brand new article that contests traditional corporate law scholarship and related economics assumptions.[16] Instead of concentrating on economic return, he proposes shareholder participation as a happiness realization vehicle in order to create a new approach to corporate governance.

Since Vilfredo Pareto the world has been haunted by the possibility that "one situation, one system, one allocation is better than another if every individual feels it is better according to his own individual values."[17] Kenneth Arrow contends that one approach, the price system can be attacked "on grounds that it harnesses motives which our ethical systems frequently condemn . . . and we are always disturbed by a system which relies completely on selfish motives."[18] Legal application of a few basic tools of neoclassical microeconomics – cost-benefit analysis, collective action theory, decision making under uncertainty, risk aversion and the like – may have transformed thinking and formed a sound basis for regulating future behavior,[19] but it has also sparked disagreement. The corporate governance debate has been kindled, in part, by the conclusion that market economies must tackle the growing despair concerning the ability of positive or normative economics to provide a sound understanding of the economy as a whole and the governance of financial institutions.[20] "It is law and economics' normative claims that arouse the most controversy. In its normative guise, law and economics claims that society should make efficient decisions . . . [that] maximize social wealth."[21] Efficiency as a normative tool rests on two critical assumptions about appropriate social goals: wealth maximization and rational choice.[22] While efficiency may be achievable through a particular kind of social system – the price system[23] – questions arise

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judgment rule is designed to effect a compromise between two competing values: authority and accountability).

[16] James McConvill, *Shareholder Empowerment as an end in itself: a New Perspective on Allocation of Power in the Modern Corporation*, OHIO NORTHERN UNI. L. REV. (forthcoming) *available at* http://ssrn.com/abstract=943907.

[17] KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 19 (1974).

[18] ARROW, *supra* note ___ at 21.

[19] STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 19 (2002) [hereinafter BAINBRIDGE, CORPORATION LAW AND ECONOMICS].

[20] Narayana Jayaram, *Introduction*, in RAMESH DEOSARAN, PSYCHONOMICS AND POVERTY: TOWARDS GOVERNANCE AND A CIVIL SOCIETY, xvii (2000).

[21] BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* ____ at 20.

[22] BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* ____ at 20.

[23] ARROW, *supra* note ___ at 20.

concerning whether the cost of production have been fully internalized, whether other market failure exists, whether government diminishes or contributes to market failures and whether government has been or will be captured by special interest groups or others in search of rent-seeking.

Postmodernism and discontentment with Enlightenment rationalism have combined to fashion "a society that is waiting, but does not know what it is waiting for. The feeling of being locked in implies the dream of liberation and implies, too, the suspicion of something hidden beyond the confines of daily life, however adequate daily life is claimed to be."[24] Christopher Shannon contends that part of this quandary can be related to modern social science. Attempts to clarify existing social and economic arrangements through "social science is inherently self-defeating—useful in identifying the essential preconditions of social order, but profoundly unhelpful in the end, because it does so by means of a language that . . . [may] make it impossible to believe in the legitimacy of that social order."[25] The problematizing of either the existing social order or existing corporate governance regimes, may lead to an iatrogenic result: a disease caused by the process of diagnosis and treatment.[26] Dependably, with this possibility, current efforts aimed at finding social and/or corporate legitimacy elevate uncertainty concerning the substance and significance of preferences, self-interest, the boundaries of consent, the nature of autonomy, the constitutive components of human cognition and the benefits and costs of collective action. This move triggers attempts to fuse politics, economics,[27] and psychology as well as an effort to find security in an endless, evolutionary process of discovering "new normalities."[28]

Uncertainties coupled with introspective and public dissatisfaction, have risen to prominence ever since Americans discovered that democracy and radical human autonomy yield less than they promised. Critics of the existing social and economic order, driven by social psychology or otherwise seek non-market solutions or advance proposals that are disconnected to the price system in an

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[24] Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WILLIAM & MARY BILL OF RIGHTS J. 1309, 1311 (2006) [hereinafter, Hutchison, *A Clearing in the Forest*] (citing CHANTAL DELSOL, ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD xxvii (2003)).

[25] Wilfred McClay, *Foreword* in CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT xi (2006).

[26] McClay, *supra* note ___ at xi.

[27] Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1311.

[28] As Christopher Shannon explains, Ruth Benedict's, book, PATTERNS AND CULTURES, is part of an effort that sees the idea of culture as a pattern of values that organizes a way of life of a people. Cultural diversity leads to cultural relativity that challenges customary opinions which leads to a process by which new normalities are created by the next generation. Security is found in an endless process of change and plasticity. SHANNON, *supra* note ____ at 93 & 102-104.

effort to change the existing order. This move appears to be grounded in the inability of standard economics and market forces to justify a human life that appears, for all its contemporary advantages, nasty, brutish, unfair and beyond the control of individuals and, thus, without meaning. In other words shareholders like other partly rational human agents, lead incompletely explained and unfulfilled lives that conform to Aldous Huxley's perdurable perception of modern humanity.[29] An individual's sense of despair and unfairness and her craving for alternative doors of perception may correlate inversely with her sense of freedom.[30] Since an individual's sense of freedom and the definition of freedom itself are apt to vary across the population, the resultant disenchantment reflects the inability of any existing approach to solve all problems or justify the current allocations of resources and the current ends of economic institutions on terms that all will endorse.

Far from endorsing the existing state of affairs, James McConvill proposes a novel corporate governance approach that issues forth as an endless process of participation and self-discovery that combine to form a "new normality": shareholder empowerment as end in itself.[31] While the satisfaction of selfish motives remains an unruffled objective, material gain as a maximand is exchanged for participatory experience. This approach echoes John Dewey's partly scientific but largely unsuccessful effort to apply evolutionary biology to human life wherein participation as a form of communication replaces contract as the nexus of scientific rather than economic exchange.[32] Provoked by research in the field of happiness studies and psychonomics, McConvill proposes the expansion of the role of shareholders in the governance of the corporation. He disputes the judgment that:

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[29] ALDOUS HUXLEY, THE DOORS OF PERCEPTION 26 (1970) ("Most men and women leads lives at the worst so painful, at the best so monotonous, poor and limited that the urge to escape, the longing to transcend themselves if only for a few moments, is and has always been one of the principal appetites of the soul.").

[30] Sebasitiano Bavetta, Dario Marimone Andsaldo Patti, Ram Mudambi & Pietro Navarra, *Autonomy Freedom and Preferences for Redistribution*, 2-3 (2007) *available at* http://ssrn.com/abstract=958948. ("People who enjoy autonomy have, to a large extent, control over their achievements so, what they perceive as fair or unfair is likely to depend upon the degree of autonomy they enjoy. [Thus] the higher is the extent of autonomy freedom perceived by an individual, the higher is the probability that he supports the view that larger income differences are needed as incentives for individual effort.")

[31] James McConvill, *Shareholder Empowerment as an end in itself: a New Perspective on Allocation of Power in the Modern Corporation*, OHIO NORTHERN UNI. L. REV. (forthcoming) *available at* http://ssrn.com/abstract=943907.

[32] *See e.g.*, SHANNON, *supra* note ___ at 87 ("The conception of the social whole that Dewey invokes as an antidote to the old individualism is ultimately as fragmenting as that individualism. The new, scientific, communicative individualism replaces the variety of individual desires with the variety of individual problems . . .").

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.[33]

In the traditional corporate model, shareholders have little room to originate action or participate in corporate decision making. McConvill contests customary conceptions of rational choice analysis for shareholders,[34] and argues that "the perceived logic which encapsulates rational choice theory fails to appreciate the non-financial benefits that can be derived from increasing shareholder power."[35] Just as a chalkboard has predisposed itself to be receptive to certain kinds of writing instruments, shareholders have predisposed themselves to become both receptors of participatory happiness, and vehicles of corporate governance reform. McConvill's fresh look requires an explanation and a critique. This article is the first of a series of articles[36] that offer critical analysis that serves to vitiate McConvill's Panglossian conclusions.

McConvill embarks on a venture to expand the behavioral foundations of human actions and decisions but avoids positing an alternative to either (A) Oliver Williamson's proposition that the economic institutions of capitalism including the firm "have the main purpose and effect of economizing on transaction costs,"[37] or (B) Coase's insight that hierarchy, authority and direction can be economically superior to market relations in the face of positive transaction costs.[38] He also evades the implications of Stephen Bainbridge's claim that "there never was a time in which unity of control and ownership was not a central feature of U.S. corporations. It appears that ownership and control separated at a very early date."[39] It is probable that "the separation of ownership and control may be an essential economic characteristic of"[40] large publicly

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[33] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).
[34] McConvill, *supra* note ___ at 31-33.
[35] McConvill, *supra* note ___ at 32.
[36] *See e.g.*, Harry G. Hutchison & R. Sean Alley, *The High Costs of Shareholder Empowerment As an End in Itself* (forthcoming) [hereinafter, Hutchison & Alley, *The High Costs of Shareholder Empowerment*]; Harry G. Hutchison & R. Sean Alley, *Shareholder Empowerment as an End in Itself in the Mirror of Authority* (forthcoming).
[37] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM, 17 (1985).
[38] *See e.g.*, Giulio Palermo, *Misconceptions of Power*: *From Alchian and Demsetz to Bowles and Gintis*, Discussion Paper 05/10, Dipartimento di Sienze Economiche, Universitá di Brescia, page 2 (undated) *available at* http://ideas.repec.org/p/ubs/wpaper/ubs0510.html#abstract (accessed April, 16, 2007)
[39] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 621.
[40] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 621. McConvill admits, the "manner in which U.S. corporation law provides for the allocation of power in the public corporation both reflects and reinforces the long-standing separation of ownership and control. This is also the case in other developed jurisdictions." Delaware's General Corporation Law provides in section 141 (a): "The business and affairs of every organization under this chapter shall be managed by or under the direction of the board of directors, except as may be otherwise provided this chapter or in its certificate of incorporation."

traded firms. Since modern, neoclassical economics assesses the human agent as represented by the model of rational choice and the environment in which the agent operates,[41] evidence that the separation of ownership and control and the wealth maximization norm operate successfully in explaining human behavior is of importance.[42]

Contrasting models of human behavior exist including the psychological model of the human agent.[43] Despite the "withering of research that sought to explore the intellectual interface between economics, psychology and other behavioral and social science disciplines"[44] during the middle part of the twentieth century,[45] contemporary efforts aimed at exploring and expanding the foundations of behavioral analysis have occurred with increasing frequency.[46] Resisting the influence and explanatory power of traditional neoclassical economics, these myriad efforts reflect film noir's struggle to counter the Enlightenment vision of the city as the locus of human bliss, wherein human autonomy and rational economics could combine to bring about the satisfaction of human desires.[47] Instead of Enlightenment progress and some lucid sense of where we are and where we are going, we are left with the conclusion that progress and autonomy are debilitating illusions[48] aided by impoverished conceptions of human rationality

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McConvill, *supra* note____ at 8. Delaware Courts apparently agree. "Delaware's corporation law vests managerial power in the board of directors because it is not feasible for shareholders, the owners of the corporation, to exercise day-to-day power over the company's business and affairs." Unisuper Ltd and others v. News Corp. et. al. 2005 Del. Ch. LEXIS 25 (2005).

[41] Bruce E. Kaufman, *Expanding the Behavioral Foundations of Labor Economics*, 52 IND. & LABOR. REL. REV. 361, 361 (1999) (discussing the human agent within the framework of labor economics). Put simply rational choice theory posits an autonomous individual who makes rational choices that maximize his satisfaction. *See*, BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note ___ at 23.

[42] As Bainbridge shows corporate managers operate within a pervasive web of accountability mechanisms that substitute for monitoring by residual claimants including the capital and product markets, the internal and external employment markets, and the market for corporate control constrain shirking by firm agents. Additionally, he shows that agency costs are the inescapable result of placing ultimate decisionmaking authority in the hands of someone other than the residual claimant. "Neither the power to wield discretionary authority nor the necessity to ensure that power is used responsibly can be ignored because both promote values essential to the survival of business organizations." *See e.g.*, Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 625.

[43] Kaufman, *supra* note ___at 361.

[44] Kaufman, *supra* note ___at 362.

[45] Kaufman, *supra* note ___at 362.

[46] *See e.g.*, Kaufman, *supra* note ___at 362.

[47] Thomas Hibbs, *Seeking with Groans: The Moral Universe of Film Noir*, BOOKS & CULTURE, March/April, 41, 41 (2007).

[48] Hibbs, *supra* note ___ at 41.

While we agree that Enlightenment progress[49] can be illusory, this critique of human rationality is of a piece with Professor Gedicks' observation that contemporary attempts to overcome post-Enlightenment gloom reflect the postmodern conclusion that our world has fallen apart and that we live at the end of the neoclassical age as society struggles through the aftermath of confusion and helplessness wherein the real world, including the world of economics lacks reality.[50] Manifestly influenced by this intuition, McConvill emphasizes this paradoxical claim: Society should move away from the self-referential world of economics and embrace a different kind of rationality that is *even* more enlightened and more considered as the axiomatic forces of neoclassicalism are placed on the run.[51] He offers a "new" paradigm of rationality. "Rather than a decision being rational because an economist thinks it is, a decision is rational because it is in [the] best interests of the decision-maker."[52] This fuels an inescapable question: who ought to be the appropriate decision-maker – the shareholders or McConvill and the other members of the psychonomical community.

In Part I, this article supplies comments regarding our understanding of economics, its limitations, and the prevailing terms of the debate as part of our consideration of McConvill's dissatisfaction with the current state of affairs. Part II supplies a general critique. We examine McConvill's failure to provide empirical research that sustains the claim that shareholder empowerment is a necessary ideal.[53] The absence of justificatory evidence reinforces a difficulty that he admits: the failure to outline what does and does not fit the bill of desirable shareholder empowerment.[54] McConvill also disregards shareholders as they are a disparate group with often inharmonious and incommensurable interests[55] who do not "own" and may not be the residual claimants of the corporation.[56] Coordination problems may arise. Attempts to aggregate stockholders'

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[49] *See e.g.*, SHANNON, *supra* note ____ at 196 (Among the Enlightenment "fictions is the notion that morality has an objective basis apart from any spiritual or ontological order. Therefore achieving progress in the "quest for a moral order initially saw its tasks as getting people to behave properly, but it has subsequently foundered on the problem of what precisely constitutes proper conduct.").

[50] Fredrick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197-1198 (2006).

[51] McConvill, *supra* note ___ at 32.

[52] McConvill, *supra* note ___ at 32.

[53] Instead of empirical evidence linked to shareholders, McConvill provides analogies. *See infra* Part II.

[54] McConvill, *supra* note ___ at 35.

[55] *See e.g.*, Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 564 (2006).

[56] On this point *see*, Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190-1195 (2002) (shareholders do not own the corporation but rather they own a type of corporate security and unless the firm is in bankruptcy it is grossly misleading to suggest that the firm's shareholders are somehow entitled to everything left over after the firm's explicit contractual obligations have been met.)

participatory impulses (if any) may give rise to a search for private benefits that undermine shareholder wealth. We also try to answer a series of questions largely related to the cost of increased shareholder participation including the costs incurred in initiating and implementing changes to the current system and related implications for corporate performance. We provide preliminary answers here and reserve a more thorough analysis of costs for a forthcoming article. We argue that social happiness through participation is an optimizing problem, not a maximizing problem, so that more participation is not necessarily better. Taken together, we contend that the evidence serves to destabilize McConvill's contention that increased shareholder participation can ever be a cost-free good.

Part I: Examining the Background and McConvill's Paradigm.

A. Background: Providing a Framework for Analysis.

In order to grapple with the ideas and currents that ripple through McConvill's essay, it is helpful to appreciate that his article echoes an emerging tension between active participation and shareholder passivity. There is a case to be made for shareholder passivity in the face of organizational and transactional complexity tied to traditional economics and cost benefit analysis. Most scholars, since "the days of Adolph Berle and Gardiner Means . . . have understood that in public corporations, shareholder 'ownership' does not mean shareholder control."[57] Antoine Rebérioux contends that separation of ownership and control has been aided by "one essential characteristics of stock markets . . . their liquidity. This liquidity induces a dispersion of stock ownership."[58] The familiar Berle-Means description illustrates that public corporations were getting larger and issuing new shares to raise additional capital for expansion.[59] McConvill observes that separation of ownership and control "had naturally developed through the simultaneous evolution of control in the hands of professional directors and diminished [the] status of ownership, resulting from control being removed as one of the characterizing features of property."[60] This trend was accelerated by the dispersion of ownership—the absence of a single shareholder with a large enough stake to exercise control—and accompanied by managers holding only a small stake in the enterprise.[61]

McConvill asserts that the position of shareholders has changed from an active to a passive role and shares of stock have become simply pieces of paper containing certain financial expectations but providing little or no control over

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[57] Lynn Stout, *The Shareholder as Ulysses: Some Empirical Evidence On Why Investors in Public Corporations Tolerate Board Governance*, 152 U. PA. L. REV. 667, 667-78 (2003) [hereinafter, Stout, *The Shareholder as Ulysses*].
[58] Rebérioux, *supra* note ___ at 4.
[59] McConvill, *supra* note ___ at 5.
[60] McConvill, *supra* note ___ at 6.
[61] McConvill, *supra* note ____at 6.

the physical property and the instruments of production of the enterprise.[62] The shares represent a financial interest in the affairs of the corporation while allowing the firm's directors and executives to get on with managing the firm.[63] Since shareholders operate within a framework characterized by bounded rationality and complexity, are widely dispersed, have different time horizons and have difficulty reaching collective decisions, typical corporate law scholarship implies the null hypothesis that shareholders are rationally apathetic[64] because they lack both the interest and the incentive to "devote much time to, or to acquire significant expertise, in the firm's affairs."[65] Evidently shareholders aware of their own opportunity costs decide not to tradeoff their time for more corporate participation. They desire primarily material well-being which directors as platonic guardians seek to maximize.

Separation of ownership and control has suggested a particular solution to America's leading corporate jurisdiction. Delaware courts have declared that section 141 (a) of Delaware's General Corporation law is grounded in the conclusion that "it is not feasible for shareholders, the owners of the corporation, to exercise day-to-day power over the company's business and affairs."[66] Although this version of shareholder primacy, coupled with management by directors, may be rooted in what Rebérioux calls the philosophy of dispossession,"[67] one might argue that "boards can . . . retain power pursuant a

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[62] McConvill, *supra* note ___ at 6.

[63] McConvill, *supra* note ___ at 7.

[64] *See* Stout, *The Shareholder as Ulysses*, *supra* note ___ at 673 ("The typical public firm has thousands or even hundreds of thousands of shareholders. How can these individuals reach a collective decision? Shareholder voting is slow, difficult and expensive, even with modern information technology. In contrast, a board of ten or twelve members can meet and vote on these issues relatively quickly, easily and cheaply . . . Director voting offers other important advantages over shareholder voting as well. In the typical public firm, ownership is widely dispersed, with most investors holding only a relatively small portion of the firm's outstanding shares. As a result, few shareholders have the incentive to devote much time to, or to acquire significant expertise in, the firm's affairs."). *See also*, Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 622-624 (pointing out the mechanical difficulties of achieving consensus among thousands of shareholder impede their active role).

[65] Lynn Stout, *The Shareholder as Ulysses*, *supra* note ___at, 667-78. *See also*, Harry G. Hutchison, *Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm* 36 LOY. UNI. CHI. L. J.1111, 1201 (2005) [hereinafter, Hutchison, *Director Primacy and Corporate Governance*] ("The capability of shareholders (as a disparate group) to manage relatively large corporations is hindered by collective action problems tied to disparate preferences, different persuasive abilities, different time horizons, as well as differing capacities to digest pertinent financial, microeconomic and macroeconomic information even when widely available..").

[66] UniSuper Ltd. v. News Corp., 2005 Del. Ch. LEXIS 205, at 25. The Supreme Court of Delaware has been drawn increasingly to the conclusion that shareholders are both the true owners and the true principals of the firm. *But see*, Hutchison, *Director Primacy and Corporate Governance*, *supra* note ___ at 1196-1200 (disagreeing with this move because it delimits beneficial risk-taking by the board of directors).

[67] Rebérioux, *supra* note ___ at 5 ("This situation has led to an exclusive focus on the question of control: how can the lost power be recovered."). *See also*, Hutchison, *Director Primacy and Corporate Governance*, *supra* note ____ at 1175 (discussing the interplay between *Unocal* and *Blasius* and criticizing

Madisonian conception of corporate governance that allows contracting parties to agree in advance via the corporate charter to allow the board to entrench itself."[68] Thus understood, shareholders engage in a form of private ordering called "precommitment whereby shareholders by binding themselves ex ante may be able to improve their collective position ex post."[69] Board "empowerment has a cost – it risks entrenchment and self-interested behavior, which may reduce shareholder wealth. Courts and shareholders are properly concerned about accountability."[70] The authority of directors is not unlimited[71] but accountability concerns, standing alone cannot serve as the basis to empower shareholders. It is possible that the director primacy model risks increased agency costs[72] in exchange for more managerial freedom of initiative which leads to superior corporate performance[73] but the shareholder primacy model, if viable, contributes to ex post and ex ante inefficiencies.[74] Bainbridge shows the director primacy-based system of corporate governance as explained by the model of rational choice, has served investors and society well and "this record of success has occurred not in spite of the separation of ownership and control, but *because* of that separation."[75] As an empirical matter, share prices reflect the terms of corporate governance.[76] Limited shareholder power is consistent with an accurate description of how corporations work[77] as well as with the necessity of constraining accountability in order to preserve authority.[78]

This largely contractarian model is not without its critics. After all corporate governance structures are commonly adopted without contractual commitments to maintain them and corporate contracts maintain a high degree of uniformity.[79] One scholar implies the contractarian model is deficient because it is based

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the validation of voting rights independent of the shareholders' contract rights because that might incorrectly imply stockholder control and shareholder-based authority as the null hypothesis).

[68] Hutchison, *Director Primacy and Corporate Governance*, *supra* note ___ at 114.

[69] Marcel Kahan & Edward B. Rock, *Precommitment and Managerial Incentives: Corporate Constitutionalism: Antitakeover Charter Provisions as Precommitment*, 152 U. PA. L. REV. 473, 522 (1998).

[70] Hutchison, *Director Primacy and Corporate Governance*, *supra* note ___ at 1201.

[71] *See* Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 525 (1992).

[72] Stout, *Bad and Not-so-bad Argument for Shareholder Primacy*, *supra* note ___ at 1200.

[73] *See e.g.*, Bruno and Claessens, *supra* note ___ at 36 (providing empirical evidence on a cross-country basis indicating that optimal corporate governance does not imply either greater regulation or greater accountability).

[74] *See*, Stout, *Bad and Not-so-bad Argument for Shareholder Primacy*, *supra* note ___ at 1200.

[75] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note___ at 636.

[76] Stephen M. Bainbridge, *Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735 (2006) [hereinafter, Bainbridge, *Response to Increasing Shareholder Power*].

[77] Bainbridge, *Response to Increasing Shareholder Power*, *supra* note____ at 1735.

[78] ARROW, *supra* note ___ at 78.

[79] Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 779, 781(2007), Working Paper No. 334, *available at* http://ssrn.com/abstract=957501.

largely on the perfect market assumption.[80] We concede that the market may be imperfect and that contract theory may not be flawless but similar or worse imperfections plague other theories of corporate governance without responding adequately to the authority versus accountability conflicts raised by Arrow. We admit the possibility that introduction of authority as a specific coordination mechanism operating within the firm may solve some problems but may also crack the harmonious vision of interpersonal relations provided by the general equilibrium model of neoclassical economics.[81] In spite of the problems, and the critics including Alchian and Demsetz[82] we remain contractarians[83] who are animated by the necessity of fiat.[84] As such, our analysis is informed by the director primacy model and we embrace shareholder weakness.[85]

Economic assumptions are embedded in the separation of ownership and control paradigm. Tension surfaces because law and economics, as a general rule, tend to produce distributive results that are not universally agreed upon. Typical corporate governance models operate as forms of private ordering that require decisions to be made by hierarchs. When directors make decisions that ostensibly benefit the firm and create shareholder wealth, they engage in trade-offs that are protected by the business judgment rule, but corporate managers and the board often discover their interests are not completely aligned with shareholders which raises the dynamic specter of agency costs. This development is complemented presumably by unfair distributions, undemocratic decision making and inadequate control by capital holders. Thus, the underlying economic

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[80] Klausner, *supra* note ___781.

[81] Palermo, *supra* note____ at 2.

[82] Alchian and Demsetz's property rights approach denies the existence of authority. For a summary, *see* Palermo, *supra* note ___ at 2-4. *See also*, Armen A. Alchian and Harold Demsetz, *Production, Information Costs and Economic Organization*, Vol. 62 THE AMERICAN ECONOMIC REVIEW, 777, 777-795 (1972) ("It is common to see the firm characterized by the power to settle issues by fiat, by authority, or by disciplinary action as superior to that available in the conventional market. This is delusion. The firm does not own all its inputs. It has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people."). *But see* Oliver Williamson, *Efficiency, Power, Authority and Economic Organization, in Transaction, in* TRANSACTION COSTS ECONOMICS AND BEYOND 33 (John Groenewegen, ed., 1996) (suggesting that Alchian and Demsetz are wrong: "firms can and do exercise fiat that markets cannot.") as quoted in Palermo, *supra* note ____ at 4.

[83] We accept this description for purposes of corporate governance but we do not necessarily accept, for example, the external derivation of ideals that culminates in John Rawls contractarianism. For an accessible discussion of these issues *see* NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING, 25-27 (2005).

[84] *See e g.,* William T. Allen, *Contracts and Communities in Corporation Law* 50 WASH. & LEE L. REV. 1395, 1400 (1993) (acknowledging that contractarianism is the "dominant legal academic view."); *see also*, Stephen M Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, VILLANOVA JOURNAL OF LAW AND INVESTMENT MANAGEMENT 1, 17(2002) [hereinafter, Bainbridge, *The Bishops and the Corporate Stakeholder Debate*]*available at* http://ssrn.com/abstract=308604.

[85] *See e.g.,* Bainbridge, *Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment*, *supra* note __ at 1735.

assumptions supporting the customary default rule leading to director empowerment are challenged by many observers.

McConvill concentrates on one particular source of disagreement: the application of economics to understand human behavior. On one hand classical economics implies that humans can be defined and human capability can be measured by the concept of rationality.[86] Rationality presupposes the capacity of individual choice.[87] On the other hand, notions of revealed preferences and rational utility maximization materialize potentially as an empty suit. Many observers are troubled by both the distributional consequences and the dissatisfying implications for human life in a postmodern age that seems increasingly adrift where individuals are unable to experience the happiness that material goods and consumption once fostered. The foundational notion of rational economic man and it's implied of norm, "wealth maximization" have come under attack. This assault persists despite the fact that rational choice implicates the fulfillment of *both* pecuniary and nonpecuniary wants.[88]

On one account, "[e]conomics can be distinguished from other social sciences by the belief that most behavior can be explained by assuming that agents have stable, well-defined preferences and make rational choices consistent with those preferences in markets that (eventually) clear."[89] Even if preferences can change because of circumstances, it is unlikely that preferences are subject to significant fluctuations or radical change.[90] "Economics has assumed that all men pursue their private interest."[91] That is to say, they maximize something, but whatever that something may be is the subject of some debate.[92] Controversially, law and economics, frequently explains outcomes via the normative criterion of wealth maximization rather than social welfare maximization.[93] Opposing that

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[86] Sandra J. Peart & David M. Levy, *Attitudes Towards Race, Hierarchy and Transformation in the 19th Century*, Vo. 47 THE HISTORY OF ECONOMIC THOUGHT 15, 18 (2005).
[87] Peart & Levy, *supra* note ___ at 18.
[88] Kaufman, *supra* note ____ at 363.
[89] Kaufman, *supra* note ____ at 364.
[90] GEORGAKOPOULOS, *supra* note ____ at 33.
[91] DENNIS C. MUELLER, PUBLIC CHOICE II, at 1 (rev. ed. 1989).
[92] Adam Smith may be the source of this debate. *See e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, (2006 Dover edition which is an unabridged republication of the 6th edition published by A. Millar, London, 1790) ("However selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.").
[93] Christine Jolls, *Behavioral Law and Economics* 1 (2007) (suggesting that the focus on the maximization of wealth rather than social welfare is driven by the conclusion that the distributional issues that bear on social welfare can be best addressed through the tax system) *available at* Working Paper 12879 http://www.nber.org/papers/w12879 (copyright Christine Jolls) [hereinafter, Jolls, *Behavioral Law and Economics*]. As an elementary matter of course, the "idea of a social welfare function is part of normative economics . . . [beginning] with the fundamental idea of utility as a conception or measure of the good. Economists may disagree about the nature of utility, the relationship of utility to social welfare, and the

intuition, one observer examining fiduciary duties endeavors to diminish contractarian explanations of corporate law by invoking *trust.* Intuitively, trust with its moral underpinnings provides non-pecuniary benefits and implicates richer normative values than monetary wealth-maximization.[94] Disappointed perhaps by the debate over ordinal or cardinal utility[95] as well as the non-interpersonal comparability of such measures (or alternatively provoked by Gary Becker's observations) commentators conclude that, "'An important step in expanding the traditional analysis of individual rational choice is to incorporate into the theory a much richer class of attitudes, preferences and calculations.'"[96]

Dissatisfaction with the notion of revealed preference and rational utility maximization is grounded in the premise that people often do not know what is in their interest.[97] This development is related to the concepts of bounded rationality, bounded willpower and bounded self-interest.[98] Frustration with traditional economic tools of analysis has been directed towards "everything from breast augmentation, to dwarf throwing, to surrogate motherhood."[99] Indeed, if we admit "that human consciousness has content and character and that it is not an empty box, there is no limit to the range of human activity that can be found wanting,"[100] including a complete explanation of why dozens of drivers (self-described tree-huggers) bypass petroleum-based diesel stations for more expensive biodiesel at Dr. Dan's Alternative Fuel Werks[101] or why John Dober and David Nitschman, Moravian missionaries were prepared to sell themselves into slavery in order to reach the slaves of the West Indies.[102] These puzzles lead to the contention that human irrationality is an epistemological

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role of welfare in public policy, but most (if not all) economists would assent to the abstract proposition that ceteris paribus more utility is a good thing." Lawrence Solum, *Legal Theory Lexicon*, *available at* http://lsolum.typepad.com/legaltheory/ accessed February 25, 2007.

[94] Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C.L. REV. 595, 596-598 (1997).

[95] For an explanation of cardinal and ordinal measurement, *see e.g.*, Ralph Byrns, *Cardinal Measures and Ordinal Measures available at* http://www.unc.edu/depts/econ/byrns_web/Economicae/Essays/CardOrdinal.htm (Cardinal measurement of utility assumes satisfaction is measurable in absolute number. That is it provides a constant and reasonably objective measure of utility. Ordinal measurement of utility assumes that satisfaction is not cardinally measurable. Instead, relative numbers provide rankings).

[96] Kaufman, *supra* note ____ at 362 (quoting Gary Becker).

[97] For an incisive discussion of this issue and related ones, *see* Lloyd R. Cohen, *The Lure of the Lottery* 36 WAKE FOREST L. REV. 705, 737& 737-744 (2001).

[98] Mullainathan & Thaler, *supra* note ___ at 1 (abstract) (Bounded rationality reflects the limited cognitive abilities that constrain human problem solving. Bounded willpower captures the fact that people sometimes make choices that are not in their long-run interest. Bounded self-interest incorporates the facts that human are often willing to sacrifice their own interests to help others.).

[99] Cohen, *supra* note ___ at 737.

[100] Cohen, *supra* note ___ at 737.

[101] Mark Bergin, *Greener Pastures*, WORLD MAGAZINE, March 17, 2007 at page 30.

[102] David Smithers, *Zinzendorf and the Moravians*, THE WATCHWORD NEWSLETTER Volume 22 *available at*: http://www.christianword.org/revival/zinzendorf.html (accessed March 18, 2007).

challenge to any pretensions of normative economic analysis,[103] including existing shareholder participation rights.

We agree with this critique up to a point, but attempts to undermine the notion of the rational decision-maker must tackle an endogeneity problem. Unless they come from a different gene pool than the rest of us, the architects of such critiques face the risk that their analysis is tainted by their own irrationality.[104] That said, economics has much to say about social welfare in a broad sense, but it cannot explain all of life. We offer no meta-theory of our own. We embrace neither Kaplow and Shavell's welfarism[105] nor Richard Posner's pragmatism.[106] Perhaps the clearest thinker on social science and its shortcomings, Christopher Shannon challenges both conceptions by arguing, "Acceptance of ordinary life requires an acceptance of waste."[107] Although some commentators imply that human self-interest can be explained simply as avaricious greed or monetary self-interest,[108] we believe a more complete description of human rationality admits a wider array of explanations for the choices humans make than those supplied by theorists who concentrate on instrumental rationality in some strict sense.[109] Adam Smith would agree.[110] Simple material gain supplies only "one of many motives propelling economic [and other] activity."[111] We accept the conclusion that "a richer appreciation of self-interest helps to explain human behavior in the contemporary world."[112] We also accept that individuals retain the capacity of choice. Thus we reject the vanity of philosophers who imply that individuals require the assistance and guidance of experts—who can be regarded as superior to mere observable subjects—in order to reach defensible decisions.[113] Still, the controversy concerning the source and consequences of individual choice persists.

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[103] Cohen, *supra* note ___737.

[104] *See e.g.*, Stephen M. Bainbridge, *The Government is Endogenous available at* http://www.professorbainbridge.com/2007/02/the_government_.htm..

[105] *See*. GEORGAKOPOULOS, *supra* note ___ at 24 (describing Kaplow and Shavell).

[106] GEORGAKOPOULOS, *supra* note ___ at 24 (describing Posner).

[107] SHANNON, *supra* note ___ at 203.

[108] *CF*. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 7 (1991) (suggesting that self-interest simply means avaricious greed in a simple monetary sense and thus implying that self-interest can be separated from ideological/nonmaterial considerations).

[109] *See* Jeffrey Friedman, *Introduction: Economic Approaches to Politics, in* THE RATIONAL CHOICE CONTROVERSY: ECONOMIC MODELS OF POLITICS RECONSIDERED 1, 20-21 (Jeffrey Friedman ed., 1996) (discussing instrumental rationality and its limits as well as alternative views on how human choice is formed).

[110] SMITH, *supra* note____3-19 (discussing sympathy, mutual sympathy as well as the amiable and respectable virtues which suggest that neither self-interest nor human nature can be cabined solely by financial considerations).

[111] Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1312.

[112] Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1312.

[113] Peart & Levy, *supra* note ____ 16 (describing this move).

In response to this controversy, new or hybrid fields have been instantiated to fill perceived epistemic voids in the distribution of goods and the provision of human welfare. These developments have led to social psychology, which in combination with economics, morphs into behavioral economics[114] or psychonomics as a poverty fighting device that has the capability of diminishing the economic void.[115] In a country comprised of highly autonomous individuals who insists on bowling alone[116] commentators have expressed concern about the absence of active participation. Some have insisted that citizens must not be mere passive beneficiaries, but instead must be active participants in the control process.[117] The theory proceeds as follows: diminished participation leads to diminished happiness. In his effort to fill the perceived "happiness" void in western societies,[118] McConvill offers a rather open-ended form of shareholder participation as a fulfillment device.

The two most important institutions in America's politico-economic system, democracy and the market, make individual preferences decisive in the formation of policy and the allocation of resources.[119] In corporate law and prevailing modes of corporate governance, individual choice is reflected in contractarianism.[120] Contractarianism is grounded in the conclusion that individual preferences lead to decisions which denote the perceived preferences of the organizers and investors within the firm. Typically, in large publicly traded firms, these preferences yield governance structures wherein directors and managers, ably assisted by the business judgment rule,[121] direct and

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[114] Sendhil Mullainathan & Richard H. Thaler, *Behavioral Economics* (written as an entry in the International Encyclopedia of the Social and Behavioral Sciences) *available at* http://www.iies.su.se/nobel/papers/Encyclopedia%2020.0.pdf (accessed February 23, 2007).

[115] DEOSARAN, *supra* note ____ at 45-46 (describing the deficiencies of traditional measures of poverty – income and consumption – in contrast to social and psychological measures that concentrate on the quality of life rather than poverty narrowly defined)

[116] ROBERT PUTNAM, BOWLING ALONE (2000).

[117] SHANNON, *supra* note ___ at 121 (describing but not agreeing with this move).

[118] *See generally*, McConvill, *supra* note ____ at 19-34.

[119] Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 4 (1994). Hovenkamp asserts that there are two sub-disciplines within legal study that have come to reflect the importance of preferences in our governmental system: law and economics and the theory of public choice. "[U]nder neoclassical economics, the only human needs or wishes taken into account are those expressed through "revealed preference," or utility maximization where 'utility' is understood as the individual's rank ordering of preferences." The "[t]heory of public choice . . . also applies economic theory, but this time to the behavior of voting or political markets. The model of public choice assumes that voters vote their preferences or that elected representatives behave in a way that will maximize their chances for re-election or for some other enhancement of their position." *Id* at 4-5.

[120] *But see*, Klausner, *supra* note ___ at 779 (Although, "the contractarian theory was a useful starting point for economic analysis of corporate law, more recent research demonstrates that as a description of reality, or a basis for policy prescription, the theory falls short.").

[121] One argument in favor of the business judgment rule is that in its absence, "officers and directors would fail to make the risk-neutral business decisions desired by investors who can limit their overall investment risk through diversification." *See* Jolls, *Behavioral Economics*, *supra* note ___ at 27.

participate while shareholders rarely initiate activity. There is a limited role for shareholders in ensuring that "corporate decisions are unbiased, informed, established in good faith, [and] made in the best interest of shareholders."[122] This limited accountability role for shareholders is vindicated when they file derivative actions to redress alleged corporate injuries for breach of fiduciary duties.[123] Shareholders also have a role in approving mergers or the sale of substantial assets but often have no role in either defending the corporation against takeovers or accepting a non-statutory acquisition.

This limited role prompts dissatisfaction. Provoked by the absence of corporate democracy, the presence of disillusionment with postmodern life or otherwise, commentators have engaged in a pressing search for alternative conceptions of corporate governance to justify a more robust role for shareholders. Leading scholars continue to make the case for increasing shareholder power[124] as part of a major debate in corporate law concerning the manner in which power should be allocated between directors and shareholders in large public corporations."[125] This debate has led to a "series of recent initiatives in the [United States] to increase the participatory rights, and hence the power of shareholders,"[126] including James McConvill's proposal.

B. McConvill's Claims

On one level McConvill appears to be a contractarian who accepts the possibility that the existing default rules may accord with the preferences of shareholders.[127] On another, he is dissatisfied with the customary outcome of this contractual exchange. He accepts the claim that greater personal happiness comes "when participating with others to build relational goods"[128] and contends

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[122] Harry G. Hutchison, *Presumptive Business Judgment, Substantive Good Faith, Litigation Control: Vindicating The Socioeconomic Meaning of Harhen v. Brown*, 26 J. OF CORP. LAW 285, 286 (2001) [hereinafter, Hutchison, *Presumptive Business Judgment*].

[123] Hutchison, *Presumptive Business Judgment, supra* note___ at 286.

[124] *See e.g.*, Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 835 (2005) [hereinafter, Bebchuk, *The Case for Increasing Shareholder Power*]; Lucian Bebchuk, *The Case Against Board Veto In Corporate Takeovers*, 69 UNI. OF CHI. L. REV. 974 (2002) [hereinafter Bebchuk, *The Case Against Board Veto*] (asserting that once undistorted shareholder choice is ensured by requiring the hostile bidder to win a shareholder vote, boards should not have a veto over takeover bids); Lucian Bebchuk, John Coates IV, and Guhan Subramanian, *The Anti-Takeover Power of Classified Boards: Theory, Evidence and Policy* 54 STAN. L. REV (2002) (the combination of poison pills and a staggered board which exists in a majority of publicly traded firms acts a powerful anti-takeover device requiring correction in the form of shareholder empowerment). *But see* Anabtawi, *supra* note ____ at 564. (challenging the claim of shareholder primacists that reapportioning corporate governance power away from boards of directors and toward shareholders will benefit shareholders as a class).

[125] McConvill, *supra* note ___ at 2.

[126] McConvill, *supra* note ___ at 2.

[127] McConvill, *supra* note ___ at 35 (suggesting that shareholders could change the terms of the contract).

[128] McConvill, *supra* note __ at 22.

that the pursuit of happiness is the ultimate objective of human beings.[129] Thus, participation rather than passivity is the rational choice for shareholders.[130] He emphasizes that shareholders, in addition to purchasing a risk-adjusted economic return for their capital investment, should have the right to participate in the firm's governance and decision making if they so wish. Dividing purchases into categories of material and experiential goods, participation rights become an experiential purchase leading to relational goods that augment the happiness and welfare of shareholders. Consequently, shareholder participation ought to become an end in itself. McConvill's paradigm asserts the right for shareholders to demand (and corporations to accommodate) participation wherein shareholders achieve enhanced happiness benefits in combination with undiminished material gains. Theoretically, his proposal would allow ultimate control to remain in the hands of directors/managers as opposed to shareholders. McConvill posits a floating nodal point of synthesis[131] between director and shareholder primacy. The centripetal tendency of this approach shrinks directorial control and insists on shareholder participation as the new ordering principle. We call this scheme *indeterminate-participation-without-complete-control.*

Because participation requires the interaction of others, and since happiness varies directly with the level of this interaction, McConvill's approach can be analogized to network effects. The value/benefit received by an investor can be separated into two distinct parts. Following Liebowitz and Margolis, one can create categories of benefits.[132] One component, material gain, can be branded as autarky value that is generated by the economic returns to stock ownership. The second component can be labeled as synchronization value, which represents the additional benefit derived from being able to use one's stock to interact with others, and therefore, gain participatory life experiences with others. If shareholders fail to fully internalize the costs associated with the creation of synchronization benefits, then, consistent with the network effects analogy, this creates network externalities.[133]

McConvill's model can be depicted by the following: "Even if active involvement in the corporation seems less desirable at the time [of purchase] than sitting back and collecting the dividend check, empirical findings . . . show that when looking back on the decision, shareholders, even in the largest of corporations, are likely to be happier by following the participation path."[134]

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[129] McConvill, *supra* note ____ at 19-23.
[130] McConvill, *supra* note ___ at 33.
[131] *See* SHANNON, *supra* note ___ at 166 (describing a perspective on social science).
[132] S. J. Liebowitz and Stephen E. Margolis, *Network Externalities (Effects*) at page 1, *available at* http://www.utdallas.edu/~liebowit/palgrave/network.html (accessed March 20, 2007).
[133] Liebowitz and Margolis *supra* note ___ at 1.
[134] McConvill, *supra* note ___ at 33.

McConvill contends that relational goods like investor participation can be purchased without any costs to either shareholders or the firm. Hence, economic returns to the firm remain unaffected. He also neglects to explore the opportunity cost of shareholder participation. McConvill emphasizes this argument: the commonly held view regarding the value of participation has been either inappropriately or incompletely addressed.[135] McConvill's rendering of applied psychonomics as conducive to shareholder participation[136] may be analogized to civic democracy.[137] This analogy remains inapt given that investors *choose* the corporate form where they invest (firms, partnerships, limited liability companies, sole proprietorship, or none at all), whereas citizenship in a civic polity is not premised on choice.[138] Within the corporate governance debate, psychonomics reflects theoretically the disavowal of individual preferences (narrowly described) in collective determination and prescription of the appropriate governance regime. This rejection is premised on an imaginative conception of human cravings underlining psychological accounts of human wants. Whatever psychonomics and happiness studies are, they imply[139] that shareholders ought to enjoy greater, longer-lasting happiness by using their shares to create a participatory role in the corporation.[140] Eschewing the rational choice model of the human agent, McConvill contests the assertion that shareholders are rationally apathetic and introduces greater psychological complexity into the model of the human agent.[141] McConvill concludes that taken together "happiness theory" and psychonomics imply that neither shareholder wealth maximization nor the protection of stakeholders' interest ought to occupy the high ground in debates about corporate governance.

If one can prescind from concluding that McConvill's theory (1) is fatally counterintuitive and (2) lacks persuasive evidence, one notes that many corporate law scholars are animated either by shareholder primacy norms[142] or

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[135] McConvill, *supra* note ___ at 1-34.
[136] McConvill, *supra* note____ at 1.
[137] *See e.g.*, Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 1-32 (2006) *available at* http://ssrn/com/abstract=951712 (critiquing the comparison of shareholding and civic democracy). *But see*, Colleen A. Dunlavy, *Social Conception of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH & LEE L. REV. 2007.
[138] Rodrigues, *supra* note ___ at 17.
[139] Psychonomics may take many forms but appears to include exploring the intellectual interface between economics, psychology and other behavioral and social science disciplines. *See e.g.*, Kaufman, *supra* note ___ at 361-62.
[140] McConvill, *supra* note ___ at 19.
[141] *See* Kaufman, *supra* note ___ at 363. (Describing this move in a labor context, *see* Kaufman).
[142] *See e.g.*, D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277 (1998) (" . . . shareholders claim the corporation's heart. This shareholder-centric focus of corporation law is often referred to as shareholder primacy.").
See also, Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, *supra* note ___ at 974-77.

by director primacy reality.[143] They have accordingly invested much of their scarce resources in conflicting views of corporate governance. Assuming the soundness of McConvill's proposal, it may provide a "third way" forward by specifying a model that *simultaneously* achieves wealth maximization and contributes to shareholder happiness.

Leading shareholder primacists concede the possibility but reject the defensibility of the "third way." Bebchuk states: "Some supporters of shareholder access have 'shareholder voice' and 'corporate democracy' as objectives. But the case for shareholder access does not depend on such."[144] Instead, he concentrates "on the sole objective of effective corporate governance that enhances corporate value."[145] Implicit in Bebchuk's approach is the affirmation that providing space for more robust shareholder activity and decision making leads to value-enhancing corporate behavior.[146] Bainbridge's director primacy framework separates accountability from authority and contends that shareholders have, and ought to have, a very limited role in corporate governance and concludes that the shareholder empowerment fails to offer the benefit of improved corporate performance. Both Bebchuk's and Bainbridge's approaches provide a testable hypotheses. Nevertheless, McConvill contests both claims by maintaining that shareholder participation can be accommodated "without unduly interfering with the traditional default rule of managerial authority which is the best guarantee of corporate performance."[147] He insists that any allegation that shareholders are rationally apathetic, and therefore, that shareholder empowerment is not warranted is an intellectually lazy argument because it rests on a simple, overly-narrow assumption that shareholders are interested primarily in wealth maximization.[148]

Part II: A General Critique.

Many riddles and a few shibboleths pervade McConvill's analysis. He avoids presenting any empirical evidence that substantiates the claim that shareholder empowerment is necessary and refuses to deal with shareholders as

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[143] *See e.g.* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention supra* note ____at 86 (Describing "the corporation as a vehicle by which the board of directors hires various factors of production. The board of directors is not an agent of the shareholders; rather, the board is the embodiment of the corporate principal, serving as the nexus of the various contracts making up the corporation.").

[144] Lucian Bebchuk, The *Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 44 (2003) [hereinafter, Bebchuk *The Case for Shareholder Access*].

[145] Bebchuk, *The Case For Shareholder Access*, *supra* note ___ at 44.

[146] Consistent with Bebchuk's intuition but not necessarily his view, some cross-country empirical evidence derived from a large number of firms from different countries shows that appropriate "corporate governance acts as a monitoring and discipline device, ensuring that management pursues value-maximizing goals." Bruno & Claessens, *supra* note ____ at 35.

[147] McConvill, *supra* note ___ at 32.

[148] McConvill, *supra* note ___ at 32.

they are – a disparate group with often inharmonious and incommensurable interests. He also declines to provide a convincing theory that delineates how material goods can be transformed into experiential ones. Hence, the terms of the debate are grounded in cloudy if not conflicting terms. McConvill also ignores the cost of shareholder participation including coordination cost as well as the cost resulting from the search for private benefits.

A. The Absence of Empirical Evidence.

By our count, McConvill presents more than twenty studies or references. None of the studies deal directly with whether shareholders desire McConvill's preferred outcome. He does provide information derived from Tim Kasser's book the HIGH PRICE OF MATERIALISM, Bruni & Stanca's study examining relational goods as opposed to watching television,[149] investigations derived from brain scans recording how certain events or sensations impact the parts of the brain that generate happiness or sorrow,[150] and discussions of positive psychology and the law, which suggest that a high degree of liberty allowing individuals to pursue individual goals is important for enabling individuals to pursue happiness.[151] McConvill's most cherished study—"particularly relevant to shareholder participation"—on close inspection, reveals something far more general: the importance of relational activities to happiness and life satisfaction.[152] Taken together, the studies (1) provide descriptions of what makes people happy in general terms and (2) are entirely without any direct connection to shareholders as a group and the allocation of corporate power debate in particular. None of the studies show why it is essential that participatory activities be provided within a corporate governance context. The evidence presented fails to support a defensible prescription for the allocation of power debate that favors shareholder empowerment.

B. Shareholders Are a Disparate Group.

Even if evidence can be found showing that retail, institutional, short-term and long-term shareholders are captivated by the compulsion to participate, it is likely that some shareholders will view participation in different ways than others, thus exposing McConvill's paradigm to interest divergence. Shareholders committed to happiness may have differing definitions of what happiness means for them as well as differing ideas about how much and what type of participation is required in order to generate the happiness they seek.

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[149] Luigino Bruni & Luca Stanca, *Watching Alone: Relational Goods, Television and Happiness*, Working Paper, Economics Department, University of Biocca (June 2005) *available at* http://dipeco.economia.unimib.it/pdf/publicazioni/wp90_05.pdf.

[150] McConvill, *supra* note ___ at 20.

[151] McConvill, *supra* note ___ at 20.

[152] McConvill, *supra* note ___ at 30 (citing Bruni & Stanca's study).

Participation by individual or institutional shareholders who are animated by divergent interests may have adverse implications for the community of shareholders. McConvill (like many shareholder primacists), ignores this fact and presumes that reapportioning corporate governance power away from boards of directors and toward shareholders will benefit shareholders as a class.[153]

Most shareholder primacists "contend that shareholders would like managers to maximize the long-term value of their shares but that managers are unlikely to do so because their interests are insufficiently aligned with those of shareholders."[154] Solving this agency cost problem requires increasing shareholder power[155] with the objective of maximizing shareholder value in some largely material sense.[156] McConvill supports shareholder empowerment, but not as a solution to the agency cost question. Expanding shareholder power solves a different problem – the happiness void in western societies – by providing necessary relational goods for shareholders. In contrast to typical shareholder primacists, McConvill concentrates on shareholder empowerment for a different purpose: maximization of life experiences but his program suffers from the same error (the presumption that shareholders have harmonious interests). In accord with that intuition, Bebchuk, perhaps the leading shareholder primacist, argues that "shareholders are much more homogenous in their interests than are voters in the political system."[157] McConvill argues that both director-primacists and shareholder-primacists underplay the importance of shareholder participation.[158] We contend that McConvill, like other shareholder primacists underplays "deep rifts among the interests of large blockholders, those shareholders most likely to exercise shareholder power."[159] He also ignores differences between institutional and individual shareholders. McConvill's willingness to ignore and underplay riffs and differences among shareholders, is especially odd because McConvill recognizes at least two groups of investors, those who would like to participate for happiness' sake and those who would not.[160]

Assuming for the moment that participation does not primarily contribute to the acquisition of private benefits, the "case for increasing shareholder power assumes that shareholders would overcome [the]collective action problem to

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[153] *See* Anabtawi, *supra* note __ at 561-599 (discussing this issue fully).
[154] Anabtawi, *supra* note __ at 562.
[155] Anatawi, *supra* note ___ at 562.
[156] Anatawi, *supra* note ___ at 564.
[157] Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note ___ at 891.
[158] McConvill, *supra* note ___ at 4.
[159] Anabtawi, *supra* note ___ at 564.
[160] McConvill, *supra* note at ____ 33(stating that "participation will, of course, not appeal to all shareholders.").

make use of the power being transferred to them."[161] Stephen Bainbridge clarifies:

> All organizations must have some mechanism for aggregating the preferences of the organization's constituencies and converting them into collective decisions. As Professor Kenneth Arrow explains such mechanisms fall out on a spectrum between 'consensus' and 'authority.' Authority-based decisionmaking structures, which are characterized by a central agency empowered to make decisions binding on the firm as a whole, tend to arise when the firm's constituencies face information asymmetries and have differing interests. Because the corporation demonstrably satisfies those conditions, vesting the power of fiat in a central decisionmaker is the essential characteristic of its governance.[162]

A public corporation raises capital from widely dispersed or atomized shareholders.[163] Information asymmetry coupled with a polymorphous diversity of perspectives presents difficulties for collective rationality and collective action. Collective action problems could be surmounted through coordination, but coordination generally is impractical to achieve in the context of widely dispersed ownership.[164] Coordination does not necessarily imply fiat, as shown by the democratic decision making processes of many partnerships, limited liability companies, closely-held corporations and other small firms.[165] In publicly-traded firms, when shareholders attempt to discipline managers, it becomes collectively desirable to do so only when the collective benefits exceed the costs.[166] Unsurprisingly, "authority-based decisionmaking structures—characterized by the existence of a central office empowered to make decisions binding on the firm as a whole – arise where the firm's constituencies have different interests and access to information."[167] This result typifies publicly traded corporations in the United States.

Participation, as a social good jointly produced by a corporation and its shareholders, surfaces as a difficult proposition because of certain root facts – "the incommensurability and incomplete communicability of human wants and

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[161] Anabtawi, *supra* note ___ at 571.
[162] Bainbridge, *Response to Increasing Shareholder Power*: *Director Primacy and Shareholder Disempowerment*, *supra* note ___ at 1745.
[163] Anabtawi, *supra* note ___ at 572.
[164] Anabtawi, *supra* note ___ at 572.
[165] BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note ___ at 201.
[166] Anabtawi, *supra* note ___ at 572.
[167] BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note ___ at 201.

values."[168] Thus the tastes of shareholders like the tastes of employees' for participation or any other good are heterogeneous.[169] This is not a new development. Deciding how and in what form the "new" social good – participation – is to be constructed requires the aggregation of individually expressed or incompletely expressed preferences and "always lead[s] to the possibility of paradox."[170] Predictably, this creates difficulties in attaining and the implausibility of sustaining a "completely consistent meaning . . . [for] collective rationality"[171] that conduces to either agency costs reduction or participatory happiness. Even if one accepts social scientist Ruth Benedict's assertion that the promotion of happiness and the alleviation of suffering is the proper bottom line for our socio-economic order,[172] the question becomes: Doesn't McConvill's preferred outcome require interpersonal comparisons wherein the happiness achieved via participation by one or a group of shareholders must be weighed against the costs and suffering imposed on others?

Pitted against shareholders' common interests are significant private interests.[173] Bebchuk contends management may often trade shareholder premia in exchange for personal benefits that they can obtain by ending their filibuster against a takeover.[174] There is little to reason to presume that shareholders given the power to more fully participate in corporate decisions would act differently. Like many shareholder primacists, McConvill under-recognizes the possibility that investors with significant private interests and sufficient incentives might use any incremental power conferred upon them to pursue those interests to the detriment of shareholders as a class.[175] Enlarged shareholder power can be transformed into a vehicle to subordinate overall shareholder material welfare as some shareholders increase their participation in order to secure private benefits. This quandary is sharpened in the presence of institutional investors driven by a happiness objective. Does institutional happiness require the greatest good for the greatest number of beneficiaries of the pension fund or does happiness as self-interest implicate the welfare of pension board members such as Phil Angelides?[176] Mr. Angelides was California's state treasurer, and as such served

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[168] ARROW, *supra* note ___ at 24.
[169] *See e.g.*, Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 769 (1998).
[170] ARROW, *supra* note ___ at 25.
[171] ARROW, *supra* note ___ at 25.
[172] SHANNON, *supra* note ____ at 104 (discussing but not agreeing with Benedict's claims).
[173] Anabtawi, *supra* note ___ at 564.
[174] Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note ___ at 899-900 (citing Jay Hartzell, Eli Ofek, and David Yermack).
[175] Anabtawi, *supra* note ___ at 564.
[176] Bainbridge, *Response To Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment*, *supra* note __ at 1755.

as a CALPERS (a public employee pension fund) board member.[177] Recent activism by CALPERS was reportedly fueled partly by his political ambitions.[178] Participation evidently yields private benefits which are not shared equally by all shareholders. This outcome may be the opposite of what McConvill predicts. [179]

As more fully developed below, participation by large numbers of investors in search of life experiences or private benefits threatens negative externalities in the form of additional risk, transaction costs and rent-seeking. The prospect of receiving a disproportionate share of returns (either material or psychological) provides an incentive for shareholders to overcome collective action problems through rent-seeking, which can take a financial or non-financial shape.[180] Disparate interests require a mediating structure that is capable of adjudicating between the potentially endless varieties of shareholder interests. In a stunning capitulation to irony, McConvill ignores coordination issues and the existing role of directors in conciliating the conflicting interests of shareholders.[181] McConvill's scaffold, properly juxtaposed against the probability that selfish-motives can be transmuted into private benefits and collective costs, seems conspicuously fragile.

C. The Costs of McConvill's Program

McConvill asserts that participation ought to be encouraged and accommodated because it makes people happy. However, discovering the amount of participation that increases happiness the most is an optimizing problem, not a maximizing problem. More participation is not necessarily better. Participation by shareholders or others is costly in many ways. For example, participation by individual shareholders with divergent interest imposes costs on, and reduces the happiness of, the community of shareholders. Since these costs accumulate as the amount of participation increases, it stands to reason that, beyond some point at least, it makes sense to stop promoting it.

Moreover, there are many groups that would be affected if McConvill's proposal is accepted as normative. It is possible that employees, creditors, customers, suppliers, and members of other stakeholder groups might value the experience of influencing and controlling the firm.[182] Shouldn't participation be seen as an end in itself for all of these other stakeholders as well? Ignoring this

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[177] Bainbridge, *Response To Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment*, *supra* note __ at 1755.
[178] Bainbridge, *Response To Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment*, *supra* note __ at 1755.
[179] S*ee* Anabtawi, *supra* note ___ at 565.
[180] *See e.g*., Anabtawi, *supra* note ___ at 575-77.
[181] Anabtawi, *supra* note ____ at 564.
[182] *See* Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 604 (noting that other constituencies besides shareholders are interested in corporate governance).

critical issue for the moment and concentrating on investors themselves, it seems clear that shareholders are a heterogeneous bunch plagued by divergent interests and goals. They have different time horizons, risk strategies, tax brackets, dividend preferences, free cash preferences and enthusiasm for new projects.[183] It is unclear how McConvill would evaluate the happiness of different groups of shareholders. Compounding this issue are the costs of coordinating participation incurred by investors and the firm itself.

Imagine a very simple company, Widgets Transnational, with only two investors, person A and person B. Each investor has a utility function that determines how happy she is with her life. Assume A's and B's happiness is affected by only a few things, including participation. Then:

$$U_A = f[\text{Wealth}_A (\text{Labor}_A, \text{Investments}_A (P_A, P_B)), \text{Health}_A, P_A, P_B]; \text{ and}$$
$$U_B = f[\text{Wealth}_B (\text{Labor}_B, \text{Investments}_A (P_A, P_B)), \text{Health}_B, P_A, P_B],$$

Where U = utility, P = participation, and A's and B's participation agendas may differ. While we accept that participating in their own life experiences could be a positive factor for both A and B, (1) it is not the only thing that promotes their happiness and (2) the positive and negative effects of each one's participation are not fully internalized. A's utility is a function of her own wealth, health, participation, and of B's participation. A is happier when she is wealthier, healthier, and can participate more. A may or may not be happier due to B's participation, but it could affect her in some direct way (positively or negatively). More importantly, A's wealth is a function of her own labor and investments. Her investment returns are a function of her participation and the participation of B. Because participation is costly, any participation by A or B in A's investments may be negatively related to A's wealth, and thus, to her happiness.[184] So, B's participation affects A's happiness both directly in whatever way A feels about B's participation and indirectly by reducing the value of A's wealth (which reduces her happiness). If we now relax the assumption of a simple company and consider the likelihood that publicly traded corporations have thousands of investors, then it is likely that the overall transaction and coordination costs derived from the participation of large numbers of shareholders reduce the happiness benefits that accrue to the community of shareholders. Shareholder participation is likely to be expensive to (1) the

[183] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ____ at 623.
[184] *See* Hutchison & Alley, *The High Price of Shareholder Participation*, *supra* note _____ at___.

participating investor (2) other investors and (3) the companies that allow participation, as well as others.[185]

Investors as a class are made up of small- and medium-sized individual investors, public employee pension funds, unions, and others, all with differing time horizons, differing objectives and differing conceptions of happiness. Reconfiguring the purchase of stock as well as corporate governance to satisfy McConvill's stated preference for participatory activities would require the investment of scarce economic resources including time by shareholders and shareholder groups (mutual funds, unions, and pension funds) to gather information, deliberate and convey their views on corporate issues to management. This would reduce the amount of time that they could spend on alternative participatory or nonparticipatory activities. As a rule "[s]hareholders lack incentives to gather the information necessary to actively participate in decisionmaking. A rational shareholder will expend the effort necessary to make informed decisions only if the expected benefits of doing so outweigh the costs."[186] McConvill's approach necessarily requires interpersonal utility comparisons and mandates the weighing the happiness benefits against the costs of human suffering that necessarily accompanies the implementation of this scheme. Our intuition suggests greater shareholder participation would negatively affect corporate performance. If true, this refutes McConvill's claim that shareholder wealth maximization remains unaffected.[187]

McConvill argues the investment of scarce economic/psychological resources by shareholders in contrast to Bebchuk's agency costs reduction objective would not hinder economic returns because increasing shareholder power emerges within a sustainable wealth (material) maximization framework wherein shareholders (possibly risking happiness-inducing participatory experiences) decline to interfere unduly with the default rule of managerial/directorial authority. He fails to specify what constitutes undue interference. Nonetheless, he contends this development fashions an appealing proposition that allows shareholders, "to have their cake, and help bake it too."[188] That is they gain the psychological benefits of participation while retaining all of the expected material benefits that are derived from managerial/directorial fiat and the wealth maximization norm. This claim ignores the direct costs to shareholders as well as the external costs of increased shareholder participation that are borne by the corporations who endure it.

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[185] Shareholder participation is likely to be costly for the economy at large as well as other institutions. *See id.*.
[186] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 623.
[187] McConvill, *supra* note ____ at 33.
[188] McConvill, *supra* note ___ at 29.

These costs are, of course, ultimately passed on to the participatory investor as well as all of the other shareholders of the corporation.

Collective action problems arise from dispersed control because it is more efficient for a corporation to collect all relevant information in a central place and transmit a decision than to retransmit the information to all stakeholders and have a vote whenever a decision needs to be made.[189] "Active investor involvement in corporate decision making seems likely to disrupt the very mechanism that makes the public corporation practicable; namely, the centralization of essentially non-reviewable decision making authority in the board of directors."[190] Indeed, the chief economic virtue of the corporation is its hierarchical decision making, which helps coordinate stakeholders.[191] If there were no costs of transmitting information and making decisions, there would be no need for corporations in the first place – each individual could merely participate as an individual buyer and seller of whatever she wanted to buy and sell. Firms take advantage of conditions where it is efficient to substitute fiat for the price mechanism.[192] Bounded rationality and complexity affect individuals' abilities to achieve consensus about what is best.[193]

Participation also invites rent seeking. Under a participatory scheme, shareholders and managers may strategically withhold information from one another.[194] There is also the risk that making divergent stakeholders privy to insider information leads to leaks of valuable private information to the workforce, competitors, or the public at large.[195] Such leaks can lower profits due to higher wages and strategic responses from competitors.[196] Also, activist shareholders can provoke companies to pay them to stop participating or to stop leaking information.[197] While this would certainly make the recipient of greenmail happy, it raises the costs of doing business.[198] It may also discourage stakeholders from transmitting information among themselves.[199] This, of course, has a negative feedback effect on other investors who invest solely for profit (most of them). McConvill's happiness literature provides a basis for allowing investors to gain the happiness that comes from experiential participation, leaving one to wonder whether he would support this sort of

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[189] ARROW, *supra* note ____ at 68-69
[190] Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note ___ at 25.
[191] Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note ___ at 25.
[192] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 621.
[193] Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note ___ at 20.
[194] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note____ at 607.
[195] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note____ at 609.
[196] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note____ at 609.
[197] Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note ___ at 30, n. 125.
[198] Anabtawi, *supra*, note____ at 14.
[199] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 609.

extortive behavior which is closely tied to his program.[200] Additionally, shareholder primacy disempowers the managers, which leads to erratic and deceptive insider behavior.[201] Divorcing control from internal knowledge means the costs of manager misbehavior are fully externalized as to them.[202] Fraudulent behavior is likely to follow, as weak managers must try to influence strong, uninformed shareholders.[203] The inclusion of more divergent interests may permit managers, for example, to pursue their own interest by playing employees and shareholders against one another.[204]

Many rational investors would simply use the presence of activist shareholders as a signal to switch to a different investment rather than deal with participation minded shareholders.[205] Potential creditors will not lend to firms with less accountable managers without compensation for the risks posed by the lack of accountability.[206] Investors are provided governance arrangements, and these arrangements are rolled into the price of the stock. If the arrangements are stacked against investors, the stock price will be discounted. Using governance terms preferred by investors reduces the firm's cost of capital by attracting a higher price for the securities.[207] In the face of participation, the cost of capital rises due to less favorable borrowing terms, and earnings fall.

McConvill asserts increased shareholder participation does not affect the bottom line, but the price of participation is eternal surveillance. This requires the acquisition and digestion of information by dispersed and diverse individuals, which imposes costs on either participants or shareholders and consequently reduces shareholder welfare. McConvill's proposition is doubtful and gives rise to the following question: is there any place in the corporate governance for increased shareholder power that does not aim to strengthen the bottom line but instead aims at enhancing something else?

D. Other Difficulties.

Other difficulties remain. First, McConvill is largely captivated by utilitarian ideals, but at times, his approach risks conflating deontology with consequentialism. Hence his analysis lacks clarity with respect to *what* constitutes an appropriate conception of happiness. Second, he fails to untangle the impact of human choice and intent for purposes of ascertaining the goal associated with a given stock purchase. Finally, McConvill neglects to describe how one

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[200] *See generally*, McConvill, *supra* note ___ at 19-31.
[201] Rebérioux, *supra* note _____at 2-3.
[202] Rebérioux, *supra* note____ at 17.
[203] Rebérioux, *supra* note _____ at 28-29.
[204] Bainbridge, The *Case for Limited Shareholder Voting*, *supra* note ___ at 611.
[205] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 619.
[206] Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note____ at 3.
[207] Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note ____at 5.

determines the constitutive components of an experiential good as opposed to a material one.

Consider this question: what does happiness consists of? McConvill asserts, "In the normal scheme of things, law should be evaluated by one criterion: its capacity to promote human well-being or 'happiness.'"[208] McConvill contributes to the vagueness of this enterprise[209] by relying, ostensibly, on Aristotle's Nicomachean Ethics. McConvill claims that Aristotle favors happiness as a first principle that consists of virtuous activities.[210] On the other hand, a more sophisticated understanding of Aristotelian thought precludes "us from accepting *any* view which treats enjoyment or pleasure or happiness as a criterion for guiding out actions."[211] Putting this objection to one side, for the moment, McConvill's approach intimates that morality dictates that happiness is the primary objective of humans and issues forth in the conclusion that only virtuous activities have the capacity to produce happiness. Happiness-desiring humans, therefore, ought to prefer virtuous activities to less virtuous ones. Later, McConvill invokes a largely hedonic conception of utilitarianism: happiness consists of obtaining more pleasure with the absence of pain where human satisfaction is tied to whatever goals an individual sets forward.[212] This statement results in a moral argument that happiness-desiring humans should maximize pleasure constrained only by the possible infliction of pain. Whether one is concerned by the occurrence of collective or individuated happiness or the infliction of group-wide or individual pain, an unavoidable question arises concerning whether McConvill is driven by the necessity of finding and encouraging virtuous activities, or energized by utilitarianism as a wide-ranging theory that could include hedonic or other conceptions? As an alternative to accepting utilitarianism as a general and comprehensive theory, Kant, for example, recommends that we should promote happiness not from inclination but from duty and by doing so, an individual's conduct acquires true moral worth.[213] McConvill refrains from illuminating *which* understanding of happiness investors ought to prefer – Kantian duty or Epicurean desert.[214]

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[208] McConvill, *supra* note ___ at 19.
[209] McConvill, *supra* note ___ at 19 (stating that "happiness has always been viewed as being too vague and subjective to provide pointed answers regarding the things that are conducive to human flourishing").
[210] McConvill, *supra* note ___ at 20.
[211] ALASDAIR MACINTYRE, AFTER VIRTUE, 160 (1984).
[212] McConvill, *supra* note ___ at 32.
[213] IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 24 (Trans. T. K. Abbot, 1998).
[214] He appears to present claims signifying investors should adopt either or both views. *See e.g.*, McConvill, *supra* note ____ at 21 (noting that "To discover who is happiest, and why, we need only assume that those who say they are 'very happy' or 'completely satisfied' do experience greater well-being than those who

But, presuming McConvill is a utilitarian, it still remains unclear which category of utilitarianism applies. G.E. Moore's utilitarianism for example, revolves around the judgment that "every action is to be evaluated solely by its consequences, as compared with the consequences of alternative possible courses of action."[215] This utilitarian category issues forth in cost/benefit analysis. Another type suggests that utilitarian principles lead to the conclusion "that no action is ever right or wrong as such"[216] and *anything* under certain circumstances may be permitted and encouraged.[217] Broadly understood, this category specifies that a defensible account of happiness is not necessarily confined to participatory experiences so long as other alternatives (anything including material goods) allows one to reach the desired result. Coherent to this conception, McConvill asserts that though "individuals live their lives in a variety of different ways, these different pursuits have a common goal: the fulfillment of happiness. Each of us engages in different types of 'need expression' but our central or overriding need is to be happy."[218] Later, McConvill concludes that humans should seek happiness for its own sake and without regard to the consequences for others.[219] This stance appears to: (1) increase the probability that participation may impose both pain and costs on others as well increase the possibility that such costs and suffering will be disregarded and (2) snub Mill's opinion that "happiness *cannot* result from seeking pleasure as an end in itself, but must result from the pursuit of higher goals."[220] Despite citing Mill with approval, the happiness that McConvill favors seems difficult to imagine. McConvill provides little reason why Americans committed to autonomy, or shareholders in particular, would favor his understanding rather than Mill's opinion. McConvill contends that happiness is the first principle because "everything that we choose we choose for the sake something else—except happiness which is an end."[221] Yet it is doubtful that this claim can be true and that participation can be the optimal choice for all shareholders since other happiness-producing activities are available. Even assuming McConvill's scheme results in utilitarian benefits, unless mandated by the government or some other hierarchy, the attainment of such benefits

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say they are unhappy or dissatisfied."). Later, McConvill, specifies a distinction between pleasure and gratification implying that gratification is derived from right action. McConvill, *supra* note ___ at 23.

[215] MACINTYRE, *supra* note ___ at 15.

[216] MACINTYRE, *supra* note ___ at 15.

[217] MACINTYRE, *supra* note ___ at 15.

[218] McConvill, *supra* note ___ at 20.

[219] McConvill, *supra* note ___ at 33 (averring that "the pursuit of happiness is the ultimate objective of human beings").

[220] Patrick Haden, *Introduction*, in ON LIBERTY, JOHN STUART MILL *i*, *xii* (2004).

[221] McConvill, *supra* note ___ at 20.

unavoidably remains subject to the self-centered rational calculations of shareholders.[222]

Second, McConvill insists the goals associated with the purchase of stock are defined exclusively by human choice and intent. He accepts that individuals actually choose to structure their lives to pursue material goods when what they really should be doing is focusing their attention on building relational ones.[223] Bafflingly, he states that human choice/intent can transmute a material good into a relational one while simultaneously, he reprimands corporations which offer, and shareholders who accept the "choice" of purchasing stock that primarily provides material benefits. What contributes to this puzzle? McConvill's assertion that shareholders' "true" interests (happiness-producing activities) are missing in this contractual exchange model. McConvill's psychonomics are a source of disjunction because if shareholders do not know their own interests, why will they have reason to choose participatory goods as an alternative to material ones, assuming participatory goods are available?

Finally, McConvill fails to delineate a theory that describes clearly what constitutes an experiential as opposed to a material purchase or why people will choose to take advantage of experiential/participatory goods if they are made available. Consider the latter point first. McConvill constructs his case for greater participation by relying (at least partially) on studies authored by Bruno Frey & Alois Stutzer.[224] Frey and Stutzer's studies insinuate that people are dissatisfied with passive activities and become happier as a result of participation. Our research has found an additional study authored by Frey, Benesch & Stutzer. This study's examination of passive activities by Americans shows that during the period 1965 to 1995 the average leisure time of adults rose by 6.2 hours per week while TV viewing time rose by almost the same amount, 6.0 hours.[225] During that 40-year period, doubtlessly alternative participatory activities were available in contradistinction to passive ones. Sufficiently motivated Americans could have taken advantage of existing participatory opportunities. The evidence verifies that they have, thus far, failed to do so. Why should we expect human behavior to be any different when additional experiential goods such as shareholder participation are made available when there is little evidence that humans take advantage of existing participatory activities? Two alternative

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[222] *See e.g.*, Albert O. Hirschman, *Interests*, *in* THE NEW PALGRAVE, THE INVISIBLE HAND, 156, 157 (ed., John Eatwell, Murray Milgate & Peter Newman, 1989) (describing self-interested behavior).
[223] McConvill, *supra* note ___, at 31.
[224] McConvill, *supra* note ___, at 25.
[225] Bruno S. Frey, Christine Benesch & Alois Stutzer, *Does Watching TV Make Us Happy*, University of Zurich, 4 (2005) Working Paper Series, *available at* http://scholar.google.com/scholar?q=author:%22Frey%22+intitle:%22Does+Watching+TV+make+us+Happy%3F%22+&hl=en&client=firefox-a&rls=org.mozilla:en-US:official&hs=OR4&um=1&oi=scholarr.

explanations exist: (1) in keeping with the premise that people know their own interest, participation yields less happiness than McConvill claims for such activities and (2) in accord with Pippa Norris' thesis, putatively passive activities such as television watching may well contribute to participation and civic engagement in the United States or constitute a break from such activities.[226]

Constitutively whether a purchase is experiential or material "depends on the intention of the purchaser."[227] An experiential purchase is defined when the actor has the primary intention of acquiring a life experience through her purchase.[228] A particular purchase could be defined as an experiential activity by one person and as a material possession by another.[229] There is no way of knowing ex ante which purchases by which individuals will constitute an experiential purchase because we have no way of discerning intention until intention occurs. Thus understood, intention is an unstable epiphenomenon of the physical activity of the brain that presupposes the reliability of the body's sensory perception to comprehend the shareholder's internal realities. When intention occurs, it remains fluid and operates in opposition to stasis. McConvill's effort to locate intention mimics Ruth Benedict's effort to situate and relocate culture.[230] His conception of intentionality, like her understanding of culture, aims at liberating the individual through infinite plasticity.[231] Benedict's approach conduces to individual liberation from social conformity[232] whereas McConvill's framework offers liberation from confining constraints imposed by conventional corporate governance regimes. Indeed, he declares the "only barrier standing in the way of greater shareholder participation is corporate culture."[233] Whether or not corporate culture is the true enemy of happiness, intentionality as a fluid impulse can move in two directions. It can change ex post. A good acquired for one purpose can metamorphose into a good that achieves another. The acquisition of shares of stock could be primarily a material purchase animated by profits but that does not rule out utilizing the shares as an experiential purchase later.[234] There is no way of knowing why such plasticity

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[226] Pippa Norris, *Does Television Erode Social Capital? A Reply to Putnam*, 29 J. SCI & POLITICS 474, 479 (1996) ("We get, from American television, a diversity of channels, programs and choices. If some choose [certain channels] . . . they are likely to end up somewhat more interested in the complex problems and issues facing American government at the end of the twentieth century . . . But compared with most democracies America is already high as nation of joiners, with a dense network of civic engagement").
[227] McConvill, *supra* note ___ at 28.
[228] McConvill, *supra* note ___ at 28.
[229] McConvill, *supra* note ___ at 28.
[230] SHANNON, *supra* note ____ at 99-100.
[231] SHANNON, *supra* note ____ at 100.
[232] *See e.g.*, SHANNON, *supra* note ____ at 99-100 (discussing Ruth Benedict's book, PATTERNS OF CULTURE).
[233] McConvill, *supra* note ___ at 34.
[234] McConvill, *supra* note ___ at 28.

ought to cut in the direction that McConvill prefers. Thus the human flourishing that he pursues may remain elusive.

E. Implementing McConvill's Program.

Despite the elusiveness of human flourishing, McConvill insists shareholders should seek and firms should accommodate the transformation of corporate governance into a shareholder empowerment regime. Though the persistent antinomy of authority and accountability is a source of tension, we concede that individuals could contract with corporate entities for greater participation rights and boards directors could cede much of their existing authority to the shareholders.[235] Ceding authority enhances the power and putatively the happiness of shareholders by reducing the power of directors. This development comes at a price. But if fiat is defined as the restriction of access to the means of decision making, then in harmony with the mandates of happiness and democratic governance the task at hand becomes one of expanding participation in decisions that affect the arrangements under which shareholders live their lives.[236] Although Bebchuk, unlike McConvill, contends that there are limitations on the board's ability to be more accommodating,[237] and while the empirical record does not necessarily disclose substantial contract innovation or diversity,[238] we accept the possibility that "corporate law is generally comprised of default rules, from which shareholders are free to depart, rather than mandatory rules."[239] This approach seems straight-forward if we examine contracting parties at the time of the initial agreement. Accommodation, however, may have a cost ex post.

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[235] *See e.g.*, McConvill, *supra* note ___ at 33-34.

[236] *See* SHANNON, *supra* note ___ at 174-75.

[237] *See e.g.*, Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note __ 888-90 (outlining limits on the board's ability to accommodate shareholder including the Model Business Corporation Act's explicit prohibition on shareholder invention power when and if a corporation is listed on a national securities exchange as well as the difficulties associated with opting out of default provisions under Delaware law). *See also id* at 844-47 (outlining the difficulties that shareholders face in amending company bylaws, charter provisions and shareholders under current law).

[238] Klausner, *supra* note _____ at 781 (corporate contracts are rather uniform).

[239] Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 860 (1997).; *see also* Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, *supra* note ____ ,at 1200-1202 (discussing the possibility of accommodating shareholders and others within a corporate governance framework but suggesting that when forced to choose, managers and shareholder as well as most judges and legislators favor the entity model). If the corporation is a thing that is capable of being owned, then it may be possible to treat the firm as an entity separate from its various constituents but if we deny the possibility of ownership, calling a corporation an entity may provide a necessary but misleading semantic shorthand. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, *supra* note ___ ,at 16-17. Although it is true that in some context corporations have been viewed consistently with the entity model, it is possible to assert that "[b]uilding on Coase's work, modern law and economics scholars view the corporation not as an entity but as an aggregate of various inputs acting together to produce goods or services." Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, *supra* note ___ at 17.

Consider the following. If one accepts the existence of a contract between shareholders and the firm with the board as the appropriate nexus,[240] one could argue that shareholders ought to be bound by the contract and, therefore, ex post attempts to change the terms of the pertinent agreement should be void in the absence of either fresh consideration or unless the shareholders can show duress.[241] Christine Jolls insists that contracts have traditionally been regarded as a means by which individuals commit themselves to a specified course of conduct[242] in an effort to maximize their welfare. "However, a contract is not a means by which the parties collectively may achieve such commitment. Contract law permits parties to modify contractual terms by mutual agreement. Contracts are individual commitments, but nothing more; both parties' commitments are only as strong as their contracting partners' desire to hold them to their original promise." [243] The notion of bounded willpower[244] may make it difficult to stick to even the best-laid plans."[245] Thus, unless the law precludes nonrenegotiable contracts with respect to shareholding, shareholders and the corporation should be allowed to renegotiate when such renegotiation is truly welfare-enhancing at the time it occurs[246]--unless, so the theory goes, the original agreement was in the interest of the parties so that sticking to the original plan as a nonwaivable precommitment gives rise to an enforceable obligation. It can argued, the "commitment to stick with an original contract, even if both parties later want to modify that contract, may improve contractors' welfare."[247] The full development of this possibility will have to await future articles. This much seems clear, however, contract modification between shareholders and the firm will not necessarily enhance shareholder welfare and this possibility certainly arises when and if modification occurs based on majority-rule changes to the charter or the bylaws. Shareholders either individually or as members of groups (unless they are controlling shareholders) rarely owe fiduciary duties to other shareholders. However, directors do. Although Bebchuk asserts that changes in the charter or bylaws would only be adopted if they were value-enhancing,[248] it

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[240] Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note ___ at 624.
[241] *See e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, 100 &115-16 (2007).
[242] Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 203 (1997) [hereinafter, Jolls, *Contracts as Bilateral Commitments*].
[243] Jolls, *Contracts as Bilateral Commitments*, *supra* note ___ at 203.
[244] Jolls, *Behavioral Law and Economics*, *supra* note ___ at 28.
[245] Jolls, *Behavioral Law and Economics*, *supra* note ___ at 28.
[246] Jolls, *Behavioral Law and Economics*, *supra* note ___ at 29.
[247] Jolls, *Contracts as Bilateral Commitments*, *supra* note ___ at 204.
[248] Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note ___ at 839 (arguing that by allowing shareholder-initiated governance changes to go into effect only if they enjoy shareholder majority support in two successive annual meeting, then changes would be adopted only if they are viewed as value-enhancing by a stable majority of shareholders over a considerable period of time and this approach would safeguard the interest of most shareholders).

is possible that ex post contract modification, predicated on McConvill's initiative, offers an opportunity for newly empowered shareholder groups (and complicit managers) to diminish the welfare of other shareholders and the firm without being fully constrained by fiduciary duties.

F. Summary Comments.

McConvill's shareholder participation framework relies on psychonomics. Apparently, psychonomics heralds a certain kind of expert, a superior one. This new mode of expert, like former varieties, appears to be predisposed to disapprove of allowing the individual to make unfettered choices in the marketplace.[249] As Peart and Levy illustrate:

> As long as the expert maintains that he possesses insight into the sorts of preferences people "should" possess—if they only knew better—he must also accept, and may perhaps even demand, responsibility for directing those preferences until the subjects gain the sort of sophistication that he enjoys.[250]

It is possible to make the case that the ability of shareholders, boards and firms to reason, make judgments, and reach contractual agreements that empower directors and not shareholders, is not to be trusted unless directed by experts.[251] It is equally possible, but we think unlikely, that classical economists' erred by believing that people make choices in response to incentives.[252] If the judgment of shareholders cannot be trusted, and if shareholders do not respond adequately to incentives, then it is possible to posit the necessity of transformative intervention by experts to ensure the achievement of a certain level of human status and happiness.[253] We remain unconvinced for a number of reasons.

McConvill's program commends participation leading to happiness, but cannot avoid an empty circularity. He offers the following conclusion: "[s]hareholder participation *should* be the end-game, recognizing the direct benefits to shareholders through treating their shares as an experiential purchase."[254] If McConvill is simply arguing that shareholders and firms should adopt his preferences for participatory, relational and experiential happiness as a possibility among a myriad others that is one thing. If, on the other hand, he wishes to convert his preferences into a universal ideal, then that is another.

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[249] Peart & Levy, *supra* note ___ at 16.
[250] Peart & Levy, *supra* note ___ at 16.
[251] Peart & Levy, *supra* note ___ at 19.
[252] Peart & Levy, *supra* note ___ at 20.
[253] Peart & Levy, *supra* note ___ at 20.
[254] McConvill, *supra* note ___ at 28.

McConvill's approach seems to be a set of preferences just like any other set. As preferences, they could "be part of any welfarist approach, but their weight and importance would be dramatically smaller than if they were believed to be universal ideals."[255] Individuals and institutions that seize upon McConvill's thesis as a socially desirable approach to change the world will be disappointed. McConvill's attempt at universalization collapses into welfarism wherein the proper locus of rational choice remains as the price system implies, the self-interested individual. Hirschman shows,

> Two essential elements appear to characterize interest-propelled action: self-centredness [sic], that is, predominant attention of the actor to the consequences of any contemplated action for himself: and rational calculation, that is a systematic attempt at evaluating prospective costs, benefits, satisfactions, and the like.[256]

In harmony with economic theory and the notion of the rational actor, Americans, shareholders or not, already have extensive experience sorting through alternative courses of action and concluding which option is in their own self-interest.

In McConvill's world, selfish motives are employed for two purposes: material gain *and* the opportunity to obtain relational goods providing experiential and happiness benefits to investors. McConvill constructs a system that mimics the price system but with a different metric of utility: experiential welfare instead of material wealth. Shareholders have always had such a choice. Even if shareholders prefer participatory goods to material ones, McConvill fails to specify why they must have an opportunity to purchase an increased array of participatory goods as a constitutive component of corporate governance when alternative highly-participatory frameworks are already available. Investors who crave participatory experiences can confront a rich stew of alternative activities which are readily available in both the profit and non-profit sectors. Investors who seek profits plus control can enjoy partnerships, LLC's, LLP's, as well sole proprietorships. Additionally, McConvill appears to ignore the cost of implementing his program and the probable interest divergence among shareholders which taken together undermine his proposal.

Despite its short-comings,[257] social science has something to say about the nature of humans when they act as citizens, politicians, managers, academics,

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[255] GEORGAKOPOULOS, *supra* note ____ at 33.
[256] Hirschman, *supra* note ___ at 157.
[257] For a comprehensive examination of the short-comings of social science, *see* SHANNON, *supra* note _____ at 1-203. In sum social science culminates the tradition of conspicuous criticism. SHANNON, *supra*

professionals or factory workers.[258] Most of these individuals can be seen as resourceful, evaluative maximizers who respond creatively to optimize the opportunities the environment presents.[259] It is doubtful that McConvill's analysis has extended this research to investors in particularly useful ways.

John Dewey saw "the epochal developments of evolutionary biology as a model for immediate, constant, revolutionary social change"[260] creating a new society comprised of new, non-conforming individuals.[261] This new society would be led by individuals who were enthralled by the new possibilities associated with collaborative and participatory activities. This move would liberate humans from tradition and hierarchs and lead ultimately to self-creation.[262] As Shannon shows this move in the hands of Dewey's intellectual heirs led not to order but to chaos.[263] McConvill formulates a "new normality" wherein participation issues as a fresh effort to expand human frontiers, enabling investors to continuously reinterpret relational experiences while liberating their personal strengths and virtues from confining constraints imposed by corporate hierarchs. In turn, this generates positive emotions for shareholders[264] and defies the status quo.[265] Professor Shannon shows that Dewey's metaphor of cellular growth as an alternative to stasis suggests not evolution so much as cancer.[266] Not unlike Dewey's aspiration, McConvill creates a new corporate governance model that offers the give and take of participation as an effort to deepen the significance and satisfaction of human interaction against the conformity[267] and stasis provided by the director primacy hierarchy and its concurrent embrace of shareholder weakness. This evolutionary move, unconstrained by fiduciary duties, has no defined stopping point yet appears to flounder. This is because social organisms populated by individuals and groups (including investors and

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note ___ at189 (" . . . it demands that one approach self and society with no assumptions or preconceptions; that one accept no relation among people or between people and their physical environment, as 'natural': and that one engage in a rigorous process of inquiry that will issue in some 'new' perspective on self and society. . .it is capable of producing an infinite number of conflicting perspective; that each perspective becomes obsolete upon formulation, . . . and offers no way of adjudicating between these perspective other than by engaging in a more rigorous version of the kind of inquiry that produces the chaos of perspectives it seeks to order.").

[258] *See e.g.*, Michael C. Jensen & William H. Meckling, *The Nature of Man*, (abstract) 7 J. OF APPLIED CORP. FINANCE, 1, 4-19 (1994) *available at* http://papers.ssrn.com/abstract=5471.

[259] *Id*. at 35.

[260] SHANNON, *supra* note ___ at 89-90.

[261] *See e.g.*, SHANNON, *supra* note ___ at 65-91.

[262] SHANNON, *supra* note ____ at 125 (describing the triumph of John Dewey's social scientific view in the form of Robert Lynd's demand for self-creation).

[263] SHANNON, *supra* note _____ at 189.

[264] McConvill, *supra* note ___ at 26.

[265] McConvill, *supra* note ___ at 35.

[266] SHANNON, *supra* note ___ at 89.

[267] *See e.g.*, SHANNON, *supra* note ___ at 88.

fellow contractors) work to maintain existing structures or alternatively decide to exit the firm based on the prudential and normative assessments of their own interests. McConvill's shareholder happiness initiative may be ephemeral. Instead of augmenting happiness, it may prove susceptible to infection in the form of rent seeking, additional costs and less material wealth. In light of this critique, the appropriate default rule for shareholder participation rights, as a general matter, is not to have any beyond the limits that the director primacy model prescribes.

Conclusion.

McConvill like postmodern social critic, Richard Rorty advocates this social vision: maximum material prosperity (shareholder wealth) combined with a constantly transforming culture (corporate or otherwise) composed of participatory, self-creating[268] actively engaged individuals seeking happiness in a rather continuous process. In such a world, hierarchical authority is absorbed and rendered obsolete by newly empowered "liberated" individuals. These individuals, as members of a new corporate or social community, search for evidence of human progress, however evanescent that search may be. The necessity and constancy of change that characterize such a move reinforces the likelihood of an iatrogenic end result. McConvill's model valorizes a regnant social scientific and regulatory view requiring that human life be studied—perhaps endlessly.[269] While such an iatrogenic outcome may have limiting implications for both corporate law and for economics it is probable that the very attempt to find meaning and happiness (led by experts) diminishes what meaning and happiness exist. Shannon's account of this development "speaks directly to the condition here being described, a mad compulsion to create textual 'meaning' against the "emptiness of everyday life, a compulsive cycle that is itself a chief cause of the very emptiness it would counteract."[270] Following Shannon, the very attempt to study and construct a platform sufficient to organize, if not compel, shareholder happiness may contribute to less of it. Properly understood, McConvill's contention that a strong case can be made for empowering shareholders as an end in itself is Panglossian.

[268] SHANNON, *supra* note ___ at 190.
[269] *See* McClay, *supra* note ___ at vii-xii (discussing Shannon's book).
[270] McClay, *supra* note ___ at x.