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## THE HIGH COSTS OF SHAREHOLDER PARTICIPATION

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### Abstract

*A number of observers contend that the new literature on happiness, the product of the work of psychologists and economists, poses a significant challenge to traditional economics. Economics generally assumes that peoples' choices advance their well-being. By contrast, current happiness literature suggests that people often make poor choices that undermine their subjective well-being. Therefore, more wealth and income are not sufficient to make people better off. In view of the new happiness literature, corporate law scholar James McConvill argues that shareholder empowerment should be seen as an end in itself because it enhances the empowered shareholder's access to happiness-inducing participation. His recent article supplies a novel approach to analyzing corporate governance. Participatory experience is substituted for utility maximization as the relevant investor objective. McConvill disputes prevailing conceptions of rational choice analysis for shareholders 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 brief article is the second of a series of articles that offer critical analysis vitiating McConvill's Panglossian conclusions.*

### I. Introduction

A number of observers contend that the new literature on happiness, the product of psychologists and economists, poses a significant challenge to traditional economics.<sup>1</sup> Economics generally assumes that the choices people

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<sup>1</sup> Matthew Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 1 (2007) available at: <http://ssrn.com/abstract=999928>.

make advance their well-being.<sup>2</sup> Thus it can be argued that the separation of decision and risk-bearing functions within large corporations survives in large part because of an agreement between the parties that is premised on the rationally understood benefits associated with the specialization of management and risk bearing.<sup>3</sup> Implicit in this neoclassical approach to the economics of organizations is the assumption that people can adequately assess what is in their own interest when they make choices. By contrast, many modern legal scholars contend that individuals are subject to a number of systematic behavioral biases which undermine neoclassical economics' assumption of rationality.<sup>4</sup> This intuition is "grounded largely in a substantial experimental literature documenting bounded rationality, errors in judgment, and non-standard preferences."<sup>5</sup> Although some scholars have challenged this empirical literature, they have not generally denied the existence of cognitive biases, or the possibility that behavioral models might have greater predictive power than neoclassical models under some conditions."<sup>6</sup>

It is clear, however, that "scholars, relying on this literature have overwhelmingly concluded that the presence of such cognitive errors favors paternalistic intervention," which in turn leads to the observation that "cognitive psychology supports institutional constraint on individual choice."<sup>7</sup> If individuals' choices do not advance their well-being, an unfettered market system might be a questionable instrument of social organization and thus justify

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<sup>2</sup> Adler & Posner, *supra* note 1 at 1.

<sup>3</sup> Eugene F. Fama and Michael C. Jensen, *Separation of Ownership and Control*, Vol. 26 JOURNAL OF LAW AND ECONOMICS, 1, 1 (1983).

<sup>4</sup> Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer contracts: An Empirical Perspective*, Vol. 2 NYU JOURNAL OF LAW & LIBERTY, 470, 471 (2007).

<sup>5</sup> Wright, *supra* note \_\_\_ at 471. For an introduction to this literature, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

<sup>6</sup> Wright, *supra* note \_\_\_ at 471-72.

<sup>7</sup> Wright, *supra* note \_\_\_ at 472.

a wider scope for a system of government control<sup>8</sup> led by hierarchs with exceptional insight into the well-being of others. This paradigm can be seen as workable if such hierarchs remain unaffected by their own cognitive biases.

Although the evolution of neoclassical economics suggests it remains sufficiently flexible to deal with these new psychological insights, this conclusion has not been uniformly accepted.<sup>9</sup> Nevertheless, it is possible that behavioral economics fails to develop a persuasive case for paternalism. Instead, a “more complete analysis of the long-run costs and benefits of paternalistic regulation implies a much more limited role for government intervention.”<sup>10</sup> For example, regulation “may lessen the incentive to engage in learning and development of rational behavior or exacerbate irrational behavior by introducing moral hazard.”<sup>11</sup>

It can be argued that a theory should be judged by its predictive power.<sup>12</sup> Evidently, behavioralists concur and contend that “behavioral economics attempts to improve the predictive power of law and economics by building in more realistic accounts of actors’ behavior.”<sup>13</sup> Building on behavioralist assumptions, the happiness literature suggests that people often make poor choices which undermine their subjective well-being.<sup>14</sup> Thus understood, more wealth and income are not adequate to make people better off.<sup>15</sup> This critique, paradoxically, may give rise to its own set of cognitive errors because achieving

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<sup>8</sup> Adler & Posner, *supra* note \_\_\_ at 1.

<sup>9</sup> Wright, *supra* note \_\_\_ at 472.

<sup>10</sup> Wright, *supra* note \_\_\_ at 473.

<sup>11</sup> Wright, *supra* note \_\_\_ at 473.

<sup>12</sup> Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS*, 3, 8 (1953).

<sup>13</sup> Christine Jolls, *Behavioral Law and Economics*, in *ECONOMIC INSTITUTIONS AND BEHAVIORAL ECONOMICS* (Peter Diamond ed., Princeton Univ. Press) \_\_\_\_ (2006).

<sup>14</sup> Adler & Posner, *supra* note \_\_\_\_ at 1.

<sup>15</sup> Adler & Posner, *supra* note \_\_\_\_ at 1.

happiness through participation reifies individual choice just as much as neoclassical economics.<sup>16</sup>

Recently, corporate law scholar James McConvill, impelled by the notion that the existing corporate governance framework does not encourage shareholders to make choices that truly improve their subjective well-being, proposed a novel corporate governance approach<sup>17</sup> designed to enable shareholders to rationally pursue happiness through making “experiential” purchases and building relational goods.<sup>18</sup> This view, which can be seen to transcend a conventional understanding of the fundamental rights of shareholders,<sup>19</sup> may or may not support additional paternalistic intervention within the existing corporate governance framework. Prompted by “recent empirical and theoretical literature in the emerging areas of happiness studies and the associated ‘psycho-economics,’” he contends that shareholder participation should be seen as an end in itself, rather than simply a means to a corporate-oriented end.<sup>20</sup> Moreover, McConvill argues that participation should be the goal of both individual retail investors and the individuals working in institutional investment houses.”<sup>21</sup> Ignoring the possibility that fiduciary duties may impose limits on the participatory capacity of both activist shareholders<sup>22</sup> and individuals who work in institutional investment houses, his approach issues forth as an endless

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<sup>16</sup> See e.g., James McConvill, *Shareholder Empowerment as an end in itself: a New Perspective on Allocation of Power in the Modern Corporation*, VOL. 33 OHIO NORTHERN UNI. L. REV. 1013, 1015, 1039 (2007) (reifying happiness through the shareholders’ choice to purchase experiential and relational goods that provide greater participation and concluding that “shareholder participation becomes the rational choice, at least for those shareholders who decide to pursue that course of action).

<sup>17</sup> James McConvill, *Shareholder Empowerment as an end in itself: a New Perspective on Allocation of Power in the Modern Corporation*, VOL. 33 OHIO NORTHERN UNI. L. REV. 1013, 1013-1062 (2007).

<sup>18</sup> McConvill, *supra* note \_\_\_ at 1039.

<sup>19</sup> Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 409 (2006)

<sup>20</sup> McConvill, *supra* note \_\_\_ at 1015.

<sup>21</sup> McConvill, *supra* note \_\_\_ at 1015.

<sup>22</sup> See e.g., Iman Anabtawi & Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, UCLA School of Law, Law & Economics Research Paper No. 08-02, 1-65, available at <http://ssrn.com/abstract=1089606> (accessed on March 11, 2008).

process of participation and self-discovery that combine to form a “new normality”: shareholder empowerment as end in itself.<sup>23</sup> While the satisfaction of selfish motives remains an unruffled objective, material gain as a maximand is exchanged for participatory experience. This proposal is partially consistent with an important trend in corporate governance directed toward increasing “shareholder democracy,”<sup>24</sup> as an accountability device. McConvill, by contrast, is provoked by research in the field psychonomics.<sup>25</sup> Psychonomics, McConvill argues, implies “a close positive correlation between participation (particularly active, direct participation) and one’s level of happiness. He disputes the judgment that, “[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.”<sup>26</sup> Instead, shareholder returns derived from participatory experiences should be the paramount objective.

James McConvill asserts that participatory shareholder activity should be encouraged in the corporations where shareholders invest because participation, rather than economic return makes people happy.<sup>27</sup> However, accurately calibrating the precise amount of participation that would increase happiness the most, is an optimizing problem, not a maximizing problem. While we concede that the proper role of shareholders is not always clear,<sup>28</sup> more participation is not necessarily better. Because shareholder participation is costly, at some point it makes financial and operational sense to stop promoting it. Consistently with

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<sup>23</sup> McConvill, *supra* note \_\_\_ at 1015-1062.

<sup>24</sup> Anabtawi & Stout, *supra* note \_\_ at 1 (abstract).

<sup>25</sup> Harry G. Hutchison & R. Sean Alley, *Against Shareholder Participation: A Treatment for McConvill’s Psychonomiosis*, Vol. 2 BROOKLYN J. OF CORP. FIN’L & COMM’L L 42-67 9 (2008).

<sup>26</sup> Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

<sup>27</sup> McConvill, *supra* note \_\_\_ at 33.

<sup>28</sup> Velasco, *supra* note \_\_\_ at 410.

this intuition, neither corporate law nor corporate practice has ever given shareholders very much power within large publicly traded companies.<sup>29</sup>

There are many groups that would be affected by McConvill's proposal to instantiate participation by provoking a shift in corporate culture. For a variety of reasons a shift in culture prompts uncertainty. Does the effort to increase participation as an end in itself implicate the corporation's other stakeholders? After all, employees, creditors, customers, suppliers, and other groups are also people who might value the experience of participating in running the corporation.<sup>30</sup> Additionally, shareholders themselves are a heterogeneous bunch with many sources of divergence in their interests and goals.<sup>31</sup> They have different time horizons, risk strategies, tax brackets, dividend preferences, free cash preferences, and enthusiasm for new projects.<sup>32</sup> It is unclear how McConvill would evaluate happiness among different and often conflicting groups of stakeholders. Also, it should matter whether the shareholder is a professional with substantial investing experience or whether shareholding is a new experience for the investor. Professional investors are likely to receive less happiness at the margin from participation because it will be less of a novel experience for them, and their primary goal is profit. On the other hand, amateurs and newcomers, who may be initially attracted by the prospect of participation, could harm themselves and others through their participatory efforts due to a lack of experience.

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<sup>29</sup> Velasco, *supra* note \_\_ at 412.

<sup>30</sup> See Stephen Bainbridge, *The Case for Limited Shareholder Voting Rights* 53 UCLA L. REV. 601, 603-04 (2006) [hereinafter, Bainbridge, *The Case for Limited Shareholder Voting*] (noting that other constituencies besides shareholders are interested in corporate governance).

<sup>31</sup> See, e.g., Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 578-93 (2006).

<sup>32</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 623.

As we have suggested elsewhere, the following scenario captures many of the issues that afflict shareholder participation initiatives.<sup>33</sup> Imagine a very simple company with only two investors, person A and person B. Each has a utility function that represents how happy she is with her life. Although participation can influence happiness, it is not the only phenomenon that does:

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

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

where  $U$  = utility and  $P$  = participation. While we accept that participating in life experiences is a positive factor for both A and B, (1) it is not the only thing that promotes their happiness and (2) the 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. More importantly, A's wealth is a function of her own labor and investments. Her investments are affected by her own participation and by the participation of B. This article focuses on why the participation of A and of B in A's investments are negatively related to A's wealth, and thus, to her happiness. Consequently it makes sense that the dominant corporate culture should decline to embrace McConvill's shareholder participation initiative and be wary of embracing similar initiatives as well.

In the sections that follow, we contend that shareholder participation is expensive to (1) the participating investor, (2) other investors and the companies

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<sup>33</sup> Hutchison & Alley, *supra* note \_\_\_\_ at 59-61.

that allow participation, (3) the economy at large, and (4) other institutions. In Part II, we consider the costs to individual investors. Such costs include the expense of acquiring up-to-date information required for adequate participation reinforced by the possibility that some investors free ride on the information gathering capacity of others. In Part III, we examine the externalized costs of participation which are imposed on the corporation. These costs are likely to have an adverse effect on corporate performance. Part IV considers the costs of expanded shareholder participation on non-shareholder stakeholders including directors. Finally, in Part V we question the purported benefits of increased shareholder participation.

## II. Costs to individual investors.

If participation in corporations leads to happiness, it is puzzling that most IPO evidence shows investors do not seek participation.<sup>34</sup> Additionally most shareholders have already expressed a disinclination to embrace Bebchuk's undistorted choice as a vehicle for participation in corporate governance.<sup>35</sup> In fact, shareholders' revealed preferences clearly display that they feel happier with director fiat.<sup>36</sup> Berle and Means criticized the lack of conventional involvement by shareholder-owners.<sup>37</sup> If a corporate governance system dominated by directors and management makes shareholders unhappy, why has it become the dominant mode of business organization since Berle and Means addressed this issue in 1930's? The fact that stock tickers list stock prices and not

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<sup>34</sup> See Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL J. CORP. L. 769, 817 n. 193 [hereinafter, Bainbridge, *Unocal at 20*]; see also Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 873 (2005) (noting that shareholders do not exercise their current participatory powers).

<sup>35</sup> Bebchuk, *supra* note \_\_\_\_\_ at 836; Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1744 (2006) [hereinafter Bainbridge, *Shareholder Disempowerment*] (noting that entrepreneurs do not take a company public to offer increased participation).

<sup>36</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_\_ at 1744.

<sup>37</sup> ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 6 (1932).

availability-of-participatory-experience indices is compelling evidence that investors are not clamoring for the opportunity to participate.

McConvill's assertion that shareholder participation leads to more happiness raises many other related questions. Why are mutual funds so widely held when they offer no participation in the underlying corporations at all? Why do people hire investment advisors to distance themselves from participating in their investments? One explanation is that the participatory experience is not worth its cost to a rational investor.

We are not aware of any current legal impediments that preclude a corporation from offering a participatory experience along with a dividend. McConvill relates the history of Delaware corporate governance law, which puts the board at the helm and limits shareholders' ability to change the charter without board involvement.<sup>38</sup> Still, history standing alone, neither guarantees that all Delaware charters must be indistinguishable nor prohibits companies from adopting a charter, now or in the future, that provides for greater shareholder involvement. Corporations have fifty jurisdictions available to choose from and have had over seventy years to offer an alternative stock experience based on participation, but examples of successful democratically governed companies are few and far between.<sup>39</sup>

Rational shareholders demand participation in their investments only when the benefits of doing so (in the broadest sense) are greater than the costs. Historically, the separation of ownership and control in corporations is the key reason why corporate entities are successful at making profits and attracting

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<sup>38</sup> McConvill, *Shareholder Empowerment*, *supra* note \_\_\_\_ at 9-11.

<sup>39</sup> See Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1757-58 (noting that the persistence of the current institutional governance arrangements indicates some value is attached to their survival).

investments.<sup>40</sup> Accordingly, happiness is enhanced by respecting the survival value inherent in the success and popularity of such separation for investors.

In addition, since informed participation is based on a public good (information), it lends itself to free riding.<sup>41</sup> Intelligent investors have an incentive to let other smart investors bear the expense of collecting good information, which can be costly to obtain.<sup>42</sup> A significant investment of time is required to read long, complex corporate disclosure documents and take part in conferences or proxy votes.<sup>43</sup> While existing laws may not prevent corporations from providing more information to shareholders under generally prevailing state law, this right is generally not very broad except where the board of directors must affirmatively disclose information as a predicate to shareholder action.<sup>44</sup> Premature disclosure of material inside information to shareholders (if such information is necessary for their informed participation) will likely expose shareholders to the temptation of engaging in inside trading and the correlative risk of liability. It is possible that such disclosures may exacerbate agency problems connected with managers' reputational interest which may persuade management to pursue actions that are not necessarily in the shareholders' interests.<sup>45</sup> From the perspective of high-income corporate insiders who have the most at stake and are also likely to be the most financially savvy participants, the opportunity cost of time is especially high. Conversely, the benefits of shareholder participation remain difficult to accurately assess. Participatory benefits are likely to be low when an individual investor does not own enough stock to affect a given corporation's agenda. Moreover, collective action

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<sup>40</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 621.

<sup>41</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1753-54.

<sup>42</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 606.

<sup>43</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1745.

<sup>44</sup> Velasco, *supra* note \_\_\_\_ at 420-422.

<sup>45</sup> See e.g., Benjamin E. Hermalin & Michael S. Weisbach, *Information disclosure and Corporate Governance*, available at <http://ssrn.com/abstract=1082513> page 1. (2008).

problems impair the ability of groups of investors to impose their agenda through participation. The potential benefits are constrained further by the terms of McConvill's own proposal – allow participation only to the extent that it does not undermine managerial authority.<sup>46</sup> This scheme admits virtually no participation that would have a discernible impact on anything. A rational shareholder considering these trifling benefits would rationally abstain from participating in the presence of even the slightest risk of incurring any cost.

Part of McConvill's error is that he creates a straw man out of the theory of rational apathy by ascribing to it (without citation) a narrow focus on financial gain.<sup>47</sup> The more common conception of rational apathy is the one McConvill ascribes to Mill: a rational actor will engage an activity so long as the benefits of doing so exceed the costs.<sup>48</sup> It is clear that the theory of rationally apathetic shareholders does not limit the bounds of rationality to financial gain.

McConvill errs by making an illogical leap to the conclusion that any time a person meets the goal she has set out to meet, she was necessarily being rational because that is what she wanted to do.<sup>49</sup> Under this view, there could be no such thing as an irrational goal. A more palatable understanding of rationality is that a rational goal is one that actually contributes to a person's happiness, which is pursued via an optimal amalgam of wealth, relational experiences, and whatever else the individual values based on the costs and benefits (in the broadest sense) of each activity.

As discussed below, the investor who insists on actively participating in companies where she invests is likely to harm the companies where she participates. This injury will revisit the participatory investor in many

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<sup>46</sup> McConvill, *Shareholder Empowerment*, *supra* note \_\_\_\_ at 35.

<sup>47</sup> *Id.* at 32.

<sup>48</sup> *Id.* (citing Mill's UTILITARIANISM).

<sup>49</sup> *Id.*

unhappiness-inducing ways. First, the value of her investment will decline, leaving her with less wealth and fewer opportunities for consumptive *or* experiential purchases. The power of corporate management is justified by information advantages over shareholders, which means interventions by shareholders are inherently inefficient and irrational,<sup>50</sup> at least from the collective perspective. A participating shareholder is physically detached from the day to day affairs and the technostucture of the firm, which exemplifies how she is separated from relevant knowledge that enables effective corporate control.<sup>51</sup> In order to participate, she may have to work harder and longer and consume less leisure in order to offset the financial losses that result from the extra cost and time she incurs through her participatory activities. Second, she will have to expend resources in order to ascertain which firms she can participate in without maximizing the harm she inflicts on the business entity. This involves, at a minimum, the opportunity cost of her time. The efficient capital market hypothesis claims that (currently) the market is a reliable indicator of performance and that investors can readily check on the performance of their investments.<sup>52</sup> This implies that rational investors would rather switch investments than participate.<sup>53</sup> Increased participation makes it harder for all investors to evaluate companies, as investors need some way to assess how susceptible their investments are to participatory investors' harmful influence. Third, McConvill does not address the possibility that there could be sustained adverse effects on happiness in the form of feelings of inadequacy if repeated participation is ineffective or harmful to the participant. Lastly, recent evidence suggests that shareholders are becoming more powerful while their interests are

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<sup>50</sup> Antoine Reberieux, *Shareholder Primacy and Managerial Accountability*, CLPE RESEARCH PAPER NO. 1/2007 at 13, available at <http://ssrn.com/abstract=961290>.

<sup>51</sup> *Id.* (relating Galbraith's analysis).

<sup>52</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 623.

<sup>53</sup> *Id.*

becoming more heterogeneous.<sup>54</sup> Iman Anabtawi and Lynn Stout contend that “the economic interests of one shareholder or shareholder group conflict with the economic interests of others.”<sup>55</sup> We believe heterogeneity may also implicate shareholders noneconomic interests as well. Thus, it is probable that activist shareholder will use “their growing influence not to improve overall firm performance . . . but to profit at other shareholders’ expense.”<sup>56</sup>

Analogously, Bainbridge’s empirical work suggests that workers either do not care or actively dislike increased involvement in the companies where they work.<sup>57</sup> In a modern corporation, workers invest labor, investors provide capital, and it makes sense that both would prefer an arm’s length in dealing with their income-producing activities. This is because both have a strong incentive to minimize the time they spend either investing or working. Like employees who consider work the antithesis of a holiday, few investors regard managing finances as leisure. For employees or investors, increased participation means increased work and fewer opportunities for other experiential purchases and activities.

In sum, participation-seekers should beware of lobbying for what the Germans refer to as Ein Danaergeschenk, a “fatal gift” that brings misfortune or causes problems.<sup>58</sup> The happiness they would receive from participating would likely be outweighed by the personal costs of such participation, so that only uninformed or irrational investors would want to participate. This should be especially unnerving to the other victims of irrational participation discussed below.

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<sup>54</sup> Anabtawi & Stout, *supra* note \_\_\_ at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Stephen Bainbridge, *Participatory Management within the Theory of the Firm*, 21 IOWA, J. OF CORP. LAW 657, 695-696 & 702-703 (1996) [hereinafter, Bainbridge, *Participatory Management*].

<sup>58</sup> *English-German Idioms: Greeks bearing Gifts*, ABOUT.COM. GERMAN LANGUAGE available at [http://german.about.com/library/blidioms\\_greeks.htm](http://german.about.com/library/blidioms_greeks.htm).

### III. Corporate Performance Costs

It is likely that the primary external costs of increased shareholder participation are borne by the corporations who are forced to endure it. These costs are, of course, ultimately passed on to the participatory investor and all the other shareholders of the corporation.

Collective action problems arise from dispersed control because bounded rationality and complexity affect individuals' abilities to achieve consensus about what is best outcome or corporate policy.<sup>59</sup> It is more efficient for a corporation to collect all relevant information in a central place and transmit a decision based on it than to retransmit the information to all stakeholders and arrange a vote whenever a decision is required.<sup>60</sup> Indeed, "[a]ctive 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."<sup>61</sup> Firms use specialization to take advantage of conditions where it is efficient to substitute fiat for the price mechanism, which is the chief economic virtue of the corporation.<sup>62</sup> After all, if there were no costs of transmitting information and making decisions, there would be no need for corporations in the first place – each individual would merely participate as an individual buyer and seller of whatever she held a comparative advantage in producing and selling.

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<sup>59</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1745.

<sup>60</sup> KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 68-69 (1974).

<sup>61</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1749.

<sup>62</sup> *Id.*; *See also*, Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 389-93 (1937).

Further, shareholders themselves have divergent interests and heterogeneous access to information.<sup>63</sup> These persistent differences naturally lead to conflicting opinions regarding corporate activity. If shareholders participate, there will be constant, expensive bickering over goals (profit maximization versus more participation, for example) and strategies to achieve those goals. Even in the absence of coordination costs, investor involvement raises the expense of doing business because shareholders are generally rationally apathetic thus they are likely to make less informed decisions on average than managers.<sup>64</sup> Day-to-day management of a corporation includes specific knowledge and authority that should be located inside the firm.<sup>65</sup> With increased shareholder participation, companies would be forced to bear the costs of the participatory investors' limited knowledge or to spend resources trying to educate them, and these costs would increase exponentially with the number of decision makers involved.<sup>66</sup>

It is clear that differing groups of investors have conflicting goals and objectives. For example, institutional investors have different time horizons and goals than individual investors. The large holdings of institutional investors may mean such investors are less likely to be rationally apathetic. But increasing the happiness of large mutual fund is unlikely to be the primary objective of available participation-leads-to-happiness literature.<sup>67</sup> Moreover, it is unclear how McConvill's would extend participation rights to individual investors, but not to institutional ones. If a boundary were drawn wherein additional

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<sup>63</sup> See Iman Anabtawi, *Some Skepticism About Increasing Power*, 53 UCLA L. REV. 561, 564 (2006).

<sup>64</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_ at 1749.

<sup>65</sup> See Reberrioux, *supra* note \_\_\_ at 16 (relating A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AMER. ECON. R. 777, 789 (1972)).

<sup>66</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_ at 606.

<sup>67</sup> See Stuart Gillian & Laura Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55, 56 (2007) (noting that institutional investors held over 70% of U.S. equities by the end of 2006).

participation rights were extended only to individuals, investor resources would undoubtedly be spent by agents in order to get various investors reclassified as individuals (or as institutions) so they could gain access to different participatory rights. In any case, institutional investors would likely bear (1) a risk premium due to the increased possibility that *unskilled*, participatory investors may harm (reduce the return to) a given investment, and (2) the search costs incurred in identifying the companies that have taken precautions to prevent such disruptions from investors who are pursuing participation. These moves represent additional costs, as institutional investors currently spend little time on corporate governance.<sup>68</sup>

Participation also invites rent seeking. Under a participatory scheme wherein stakeholders inhabit multiple groups (i.e. shareholder-employees), shareholders and managers may strategically withhold information from one another.<sup>69</sup> As we have previously seen, access to inside information gives rise to both temptation and risk. An addition to this troublesome constellation is the probability that disclosing inside information to divergent stakeholders would increase the risk of the premature disclosure of such information to the workforce, competitors, or the public at large.<sup>70</sup> Such leaks are likely to lower profits because workers may demand higher wages as compensation for the increased risk and competitors may engage in a strategic response to the disclosure of confidential information.<sup>71</sup> Also, activist shareholders can provoke companies to pay them to refrain from participating or to prevent information

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<sup>68</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_7 at 629-30 (citing Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459 (1998)).

<sup>69</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_ at 606-07.

<sup>70</sup> *Id.* at 609.

<sup>71</sup> *Id.*

leaks.<sup>72</sup> Such opportunistic behavior would also further deter stakeholders from transmitting information among one another.<sup>73</sup> Taken together, this naturally has a negative feedback effect on the majority of investors who are primarily interested in profits. All of these parties would have an incentive to induce a would-be participant shareholder to become more passive. Under a participatory regime, even passive investors would have an incentive to *threaten* active participation in order to get payoffs from the corporation (and other stakeholders) who might suffer because of the participation. McConvill asserts that the path to human happiness is paved with opportunities to participate. The question becomes: Would he encourage this sort of extortive behavior in order to achieve more participation?<sup>74</sup>

Additionally, shareholder activism disempowers the managers, which may lead to erratic and deceptive insider behavior.<sup>75</sup> It seems clear that shareholder primacy and control “*weakens*, rather than strengthens managerial accountability.”<sup>76</sup> Divorcing control from internal knowledge may ensure the costs of manager misbehavior are not fully borne by management.<sup>77</sup> Fraudulent behavior is likely to follow, as weak managers must try to influence strong, but uninformed shareholders.<sup>78</sup> The inclusion of additional and highly divergent interests may permit managers, for example, to pursue their own interest by pitting employees and shareholders against one another.<sup>79</sup> This gives rise to a paradox wherein the implementation of shareholder participation as a

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<sup>72</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1753-54, n. 94.

<sup>73</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_ at 609 (describing how concerns about strategic opportunism inhibits information flow from managers to workers).

<sup>74</sup> McConvill, *supra* note \_\_\_\_ at 33. The happiness literature cited in McConvill is not specific (or even related) to corporate governance.

<sup>75</sup> See Reberieux, *supra* note \_\_\_\_ at 2-3.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.* at 28-29.

<sup>79</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 610.

component of shareholder sovereignty conduces toward less managerial accountability.<sup>80</sup> Properly evaluated, increased shareholder participation, appears to be consistent with greater firm instability.<sup>81</sup> The force of this perspective is intensified by noting that if shareholders participate in corporate decisions where it is prudent to exclude employees, thorny problems and perhaps irresolvable questions surface concerning shareholder-employees.

Finally, active shareholder participation means all investors would have to bear a cost associated with increased uncertainty regarding the value of their investments. Due to their divergent information, assets, risk preferences, and time horizons, investors pursue a wide array of investment alternatives. They would have little interest in incurring additional risks and the transactions costs associated with individual investor participation. The presence of activist shareholders would signal rational investors to switch to different investments rather than deal with the adverse consequences of participation.<sup>82</sup> Switching investments generates additional transaction costs for the shareholder. At the same time switching may mean that the firm encounters increased uncertainty and transaction costs due to fleeing capital. For example, potential creditors will decline to lend to firms with less-accountable managers unless lenders are compensated for the additional risks created by a reduction in accountability. Taken together, this decreases profits for the corporation.<sup>83</sup> As a general rule, investors are provided governance arrangements and the value of those arrangements are embedded in the price of the stock. If the arrangements are stacked against investors, the stock price will be discounted.<sup>84</sup> In the face of participation, the cost of capital rises and earnings fall, leaving participation-

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<sup>80</sup> Reberioux, *supra* note \_\_\_ at 29.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 619.

<sup>83</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1736.

<sup>84</sup> *Id.*

friendly companies more vulnerable to a host of dangers such as an unfavorable hostile takeover and bankruptcy.<sup>85</sup>

McConvill suggests that participation be encouraged only to the extent that it does not disrupt management, but disruption coupled with its associated costs to corporations *necessarily* follow increased investor involvement.<sup>86</sup> To be meaningful, shareholder participation must imply (at least) that the shareholders will review business decisions and intervene if they disagree.<sup>87</sup> This threat has tangible effects on the participation-friendly corporation. Even if rights are never exercised, the mere presence of enhanced shareholder participation rights is likely to disrupt managers who know that any risky decision may be second-guessed by shareholders who do not bear the full costs of such intervention.<sup>88</sup> These disruptions impose psychological costs on the managers, as well as time delays, other transaction costs, and distortions with respect to the risk-taking preferences of the managers.

Finally, the shareholder and director primacy debate has centered on tradeoffs between fiat and accountability because both promote values essential to the survival of business organizations.<sup>89</sup> Both Bebchuk and Bainbridge understand that the law attempts to balance authority and accountability.<sup>90</sup> Where does happiness, as a third maximand, fit within this framework? In what manner should the existing corporate governance paradigm trade off the goals of fiat and accountability for more happiness? McConvill offers no insight to these

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<sup>85</sup> *Id.*

<sup>86</sup> McConvill, *supra* note \_\_\_\_ at 25-26.

<sup>87</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 626-27.

<sup>88</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1755-56.

<sup>89</sup> *Id.* at 1747.

<sup>90</sup> *Id.* at 1748. *See also*, Bebchuk, *supra* note \_\_\_\_ at 842-843 (arguing for greater shareholder power).

triangulated questions, indicating that happiness should be the only consideration.<sup>91</sup>

In the end, the shareholder and director primacy debate is about what is good for the corporation. The experiential purchases of shareholders, as McConvill concedes, are unrelated to the survival of the organization, so this sort of participation has been, rightly and persistently, left out of the nation's ongoing conversation about corporate governance. After all, if the organization does not survive, it can not be the source of financial or experiential returns for anyone.

#### **IV. Institutional costs and costs to other stakeholders**

The system of limited shareholder participation is entrenched in the corporate culture and legal institutions of the United States.<sup>92</sup> A fundamental change to these institutions would involve the costs of transitioning to a new system. For example, as referenced above, corporate law stakeholders are a disparate group. Rearranging governance laws to allow participation may mean enacting a public or judicial initiative that helps one group at the expense of others, so it is not a Pareto efficient move. Moreover, in order for McConvill to establish that his system is Kaldor-Hicks superior, he would have to make the case that the increased happiness which is acquired by some participant-investors outweighs the lost happiness that the rest of society would experience from the accumulated costs outlined in this paper. Incontestably, he fails to offer such an evaluation. This evaluation would be difficult to make, since it would necessarily involve non-comparable amenities (wealth versus experiential purchases, for example) and interpersonal comparisons of utility. The widely-

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<sup>91</sup> McConvill, *supra* note \_\_\_\_ at 33.

<sup>92</sup> *Id.* at 33-34; Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_7 at 625 (noting that both the Delaware and New York legal systems acknowledge the value of director primacy).

held attractiveness and success of the current system indicates that most people strongly prefer to limit shareholder participation.<sup>93</sup> Even shareholder primacists understand that increased shareholder participation is unpopular enough, which is some evidence that voters (of whom shareholders are a subset) have concluded that they would be worse off under a regime requiring access to participation unless a compelling case can be made that empowering shareholders improves corporate performance.<sup>94</sup>

Aside from the legal system, other stakeholders would experience unhappiness, generated by the cost of absorbing expenses associated with a new participatory corporate culture. McConvill's proposal for increased shareholder participation would not emerge from empty cogitation; it would have to be wrested from someone else. Directors, for instance, would lose happiness-inducing experiences because their participation would suffer if McConvill's proposal were adopted.<sup>95</sup> It seems reasonable to presume that directors are suffused by a sense of entitlement to perform their role. The position that they have been elected to involves robust and regular participation in corporate decision making. It is very likely, that they would lose more happiness than the shareholders would gain if corporate governance was restructured in the direction that McConvill prefers. Additionally, the participating shareholder would have to forego other activities to ensure that they have sufficient time to engage in participation. The participant's friends, teammates, and family would suffer some understandable dissatisfaction from losing access to the participant. McConvill's plan promotes shareholder happiness in terms of participation

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<sup>93</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1739-40.

<sup>94</sup> See Bebchuk, *supra* note \_\_\_\_ at 842-844.

<sup>95</sup> See ARROW, *supra* note \_\_\_\_ at 78 (noting that giving B the power to review A merely shifts the locus of authority from A to B); *see also* Bainbridge, *Shareholder Disempowerment* at 1747 (pointing out that the business judgment rule prevents shareholders' undermining of director's discretionary authority).

premised on the presumption that no countervailing concerns or costs are on the table.

The existing corporate governance system appears to promote happiness for the largest number of investors. In the face of transaction costs, it is more efficient for the default rule to be what most parties would adopt if they could costlessly bargain for rules governing participation.<sup>96</sup> McConvill's system affects many stakeholders but promotes the interests of only a minority, the participating shareholders. McConvill acknowledges that participation is not for everyone, but the correct default rule, in most cases, is one that serves the majority, minimizing the number of people who must bargain around it.<sup>97</sup> The same approach applies to corporate culture. The current default culture of limited participation means that the idiosyncratic would-be participant is forced to bargain for increased participation. Under McConvill's regime, the default rule would allow participation in order to make the idiosyncratic shareholder happy, which would force all the other stakeholders to pay off the participant so the majority of investors could operate in the environment they wanted. Comprehensively understood, the status quo is more efficient and fairer, as the participant must internalize the costs of her behavior and must pay everyone else for the right to participate if she insists on engaging in this activity.

America's system of competitive federalism provides additional evidence that limited participation is the correct majoritarian default. States compete for corporate charters. Corporations locate in states where corporate law offers adequate accountability for managers, which leads to favorable borrowing conditions.<sup>98</sup> Although federalism is not necessary a perfect system<sup>99</sup>, federalism

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<sup>96</sup>Bainbridge, *Participatory Management*, *supra* note \_\_ at 728.

<sup>97</sup>*Id.*

<sup>98</sup>Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1736.

has produced a situation where limited participation is the most popular default rule among states, which strongly indicates that limited shareholder participation is more efficient.<sup>100</sup>

The web of accountability within corporate law and within corporations is complex and the potential consequences of altering the current balance to make a minority of shareholders happier are, at the very least, partly unforeseeable.<sup>101</sup> The precautionary principle encourages prudence when altering the governance structure.<sup>102</sup> For example, a rule of unlimited participation could lead to less total investment if most people would rather not engage in participation. One can imagine an entirely new, unproductive financial services industry that offers to assume an investor's participatory responsibilities for a fee (a/k/a entirely new transactions cost to society). McConvill contends that unlimited participation does not mean mandatory participation, but unlimited participation means every investor will be forced to participate at least to the extent of evaluating the risks that others' participation will have an adverse effect on potential investments, which are available within the market.<sup>103</sup>

We should be wary of encouraging increased participation because such participation invites strategic behavior. Currently shareholders owe few, if any, fiduciary duties to one another although courts would likely have to invent such duties if shareholders were allowed to participate freely. Some shareholders, for example, might have a strong tax incentive to undermine a corporation in order to take advantage of tax laws regarding capital gains and losses. Additionally,

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<sup>99</sup> See e.g., Brett H. McDonnell, *Recent Skirmishes in the Battle Over Corporate Voting and Governance*, University of Minnesota Law, Legal Studies Research Paper Series, Research Paper No. 07-04 available at <http://ssrn.com/abstract=960278> 1,4 (2007) (arguing that a state system leads to higher quality law as opposed to a national system but also arguing this quality comes at price).

<sup>100</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1736.

<sup>101</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 627-28.

<sup>102</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1739-40 (arguing that the U.S. economy is working very well under current corporate governance arrangements).

<sup>103</sup> See *supra* Part II.

boards of directors are currently subject to a pervasive network of oversight institutions, such as the capital and product markets, internal and external labor markets, and the market for corporate control.<sup>104</sup> The unanswered question becomes, what would happen to the balance of these systems under a regime of unlimited shareholder participation? It is clear that we inhabit a second-best world and logic suggests that we should tolerate some inefficiency where the cure would be worse than the disease.<sup>105</sup>

Finally, the court system is heavily invested in limited shareholder participation. For example, the business judgment rule recognizes that directors are in the best position to make decisions that benefit corporations. Courts, accordingly, presume that directors' decisions are valid if fully informed,<sup>106</sup> made in good faith and comply with the requisites of the duty of loyalty. This rule would be rendered inchoate under an unlimited participatory regime because the board would no longer be primarily accountable for corporate decision-making. Changing the legal system to accommodate the new regime would be costly, as courts are not free to eviscerate precedent, change statutes or reorganize companies, portfolios, and law firms in response to a new default rule.

McConvill's proposal persistently leaves many questions unanswered. Not least, how is the participation regime to be enforced? Many other questions follow. If a company refuses to allow a shareholder to participate as she sees fit, who will foot the costs required to enforce her preference? Should the Securities and Exchange Commission be compelled to monitor participation rights or should a violation give rise to a private cause of action? If so, who has standing to sue? Scare resources would be spent developing laws or precedents,

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<sup>104</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1746-47.

<sup>105</sup> Michael P. Dooley, *Two Models of Corporate Governance*, 47 *BUS. LAW* 461, 525 (1992).

<sup>106</sup> *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

adjudicating disputes, and implementing the new rules. It is probable that shareholders would spend resources searching for violations of the right to participate and corporations would spend scarce resources in order to comply, to avoid compliance, or to demonstrate compliance with the new but inchoate rules. Lastly, utilizing the judicial system to decide disputes about the internal workings of private companies is likely to be expensive because courts lack reliable information that enables them to intervene in a rational and effective manner. Courts are, after all, remote from corporations and lack knowledge of the day-to-day conduct, and the production of firms.<sup>107</sup>

## V. Benefits of increased participation

McConvill encourages the adoption of a new corporate culture that would arguably make some shareholders happier by allowing them to consummate a new experiential purchase, but he ignores the costs (in happiness terms) such a system would impose on the investors and others. Importantly, he does not offer any evidence that *anyone* wants to be a more active participant, nor that the participation literature suggests that *everyone* should be allowed to participate in *everything* they want to.<sup>108</sup> Ironically, the available evidence implies that shareholder requests for increased activism are generally a result of poor performance or poor corporate governance structure, and not because investors are seeking to broaden their participatory horizons.<sup>109</sup> Moreover, since active investors often incur the direct costs of activism while the financial and other benefits (excluding happiness benefits uniquely attained by intervening stockholders), are likely to be distributed to shareholders at large, only

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<sup>107</sup> See Reberioux, *supra* note \_\_\_\_ at 13.

<sup>108</sup> McConvill, *supra* note \_\_\_\_ at 25-26.

<sup>109</sup> Gillan & Starks, *supra* note \_\_\_\_ at 59.

shareholders with large positions (like institutional shareholders) may have sufficient incentives to justify the costs of their participation.<sup>110</sup>

The benefits of McConvill's paradigm are murky and based on a unit of analysis error. He relies on the intuition of Berle and Means, who deliberate about ownership that is divorced from control.<sup>111</sup> Under this view, managers have control over the funds invested by the shareholders, who are passive with respect to management.<sup>112</sup> An individual investor, however, is scarcely powerless with respect to her investment. She can move her capital elsewhere if there are greater returns to her happiness available at other institutions. McConvill erringly applies properties of investors as a group to the investor as an individual. A shareholder has an important participatory alternative to active or passive participation in a company – she may withdraw her investment. Shareholder activism can encompass a range of activities. Alternative activities include simply trading a company's shares, buying minority stakes with some influence on the firm, or initiating fundamental corporate changes.<sup>113</sup> McConvill implies that if shareholders lack unlimited access to participate, then they will not receive any happiness from their investments.<sup>114</sup> In reality, unhappy shareholders vote with their feet (by walking away) or otherwise express dissatisfaction in a variety of important ways.<sup>115</sup>

## VI. Conclusion

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<sup>110</sup> *Id.* at 69.

<sup>111</sup> See McConvill, *supra* note 8 at 4-8 (discussing ADOLPH BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932)).

<sup>112</sup> *Id.*

<sup>113</sup> Gillan & Starks, *supra* note \_\_\_\_ at 55-56.

<sup>114</sup> McConvill, *supra* note \_\_\_\_ at 33-35.

<sup>115</sup> Gillan & Starks, *supra* note \_\_\_\_ at 55-56.

Ultimately McConvill hedges his recommendation for increased participation by stating that investors should be allowed to participate, so long as this activity does not interfere with management.<sup>116</sup> Does this suggest that he has determined that investors should be allowed to participate only to the extent that they agree with what management is doing anyway? There are surely meager psychological benefits to be achieved from participating in something as long as you do not have any tangible effect on decision making outcomes. It is an intellectually disingenuous argument to say that increased participation should be allowed to the extent that it does not interfere with management when: (1) enhanced participation must necessarily interfere with management or (2) if it does not interfere, it is meaningless participation. The relevance of the happiness debate depends on the resolution of Bebchuk's and Bainbridge's disagreement regarding whether increased participation improves stock prices and overcomes shareholders rational antipathy toward participation.<sup>117</sup> If Bebchuk's analysis is correct, then increased participation is justified on shareholder wealth maximization basis alone. If Bainbridge is correct, then participation leads to lower wealth and fewer experiential purchases. By contrast, McConvill fails to offer a persuasive way to resolve which policy choice (an increase or decrease participation) would increase social welfare without making interpersonal utility comparisons. McConvill's deployment of ambiguous and incomparable criteria such as individual investor happiness in some cosmic sense adds little toward resolving the ongoing corporate governance debate.

Current corporate laws are set up to take advantage of specialization of labor – managers make decisions in return for compensation, shareholders bear

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<sup>116</sup> McConvill, *supra* note \_\_\_ at 33-35.

<sup>117</sup> See e.g., Bebchuk, *supra* note \_\_\_ 883-884; Bainbridge, *Unocal* at 20, *supra* note \_\_\_ at 783.

risk in return for a residual claim on the corporate assets.<sup>118</sup> That is how shareholders participate and if they want to manage they have the option of becoming managers. Because our individual activities affect other humans, it is often more efficient to limit the experiential purchases we allow individuals to make. This insight applies with equal force to shareholder participation because it is more efficient for boards of directors to run corporations without it.<sup>119</sup>

At some point, the law should preclude additional participants and affirmatively enjoin individual participation even if the claimant asserts that this activity increases her happiness. The entire body of criminal law is consistent with this intuition.<sup>120</sup> Even if we accept shareholder participation as an end in itself, McConvill makes no claim that it is the only end or even the highest priority end available for contemporary stakeholders. Complications surfaces because commentators, citizens and shareholders have difficulty in fully evaluating the contention that increased happiness necessarily flows from participation when human participation in a large number of circumstances coincides with, and is a source of so much of the world's unhappiness. The status quo corporate culture favoring limited participation serves investor happiness better than a culture that promotes shareholder participation as an end in itself because of the high costs of such participation.

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<sup>118</sup> Bainbridge, *The Case for Limited Shareholder Voting*, *supra* note \_\_\_\_ at 604.

<sup>119</sup> Bainbridge, *Shareholder Disempowerment*, *supra* note \_\_\_\_ at 1746.

<sup>120</sup> *See, e.g.*, 18 U.S.C.A. §§1-123 (2006).