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Stakeholder Theory in Corporate Law: Has It Got What It Takes?

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STAKEHOLDER THEORY IN CORPORATE LAW: HAS IT GOT WHAT IT TAKES?

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I. INTRODUCTION

There has been much debate for many years regarding what should be the objective of the large public corporation. This issue is important for a number of reasons, not least of which is that the theory nominated will underpin corporate governance and dictate, to a large extent, the kind of corporate governance system that will exist. As far as the corporation's objective is concerned, two theories have been dominant: the shareholder primacy theory and the stakeholder theory. The former is operative in what I will call "Anglo-American jurisdictions," namely jurisdictions that model their law and practice on one or both of the United States or the United Kingdom. Jurisdictions falling within this category also include Canada, Australia, and New Zealand. The stakeholder theory operates in many continental European and East Asian countries. Prime examples are Germany and Japan.

Notwithstanding the fact that the United States, United Kingdom, and other Anglo-American jurisdictions regularly embrace shareholder primacy, there are many who feel that some of these jurisdictions are moving towards more of a stakeholder approach to corporate governance. This is due to a number of factors such as: the constituency statutes enacted in more than forty U.S. states;[1] the

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[1] The literature is too voluminous to cite in full. *See* Andrew Keay, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value and All That: Much Ado about Little*? (Univ. of Leeds School of Law Centre for Business Law and Practice, Working Paper, 2010) *available at* http://ssrn.com/abstract=1530990, for a recent discussion of these statutes. For more detailed discussions of these statutes, see generally Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085 (2000); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992); William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385 (1990); Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173 (1997); James J. Hanks, Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97 (1991); Jonathan R. Macey, *Fiduciary Duties as Residual Claim: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84

growth of literature in Anglo-American countries advocating stakeholder theory written by a wide range of people, including academics from various disciplines, lawyers, and directors and the assertion that the concerns raised by the stakeholder debate in the 1990s have not disappeared or been addressed;[2] the advent of enlightened shareholder value in the U.K. Companies Act of 2006; U.S. cases which specifically hold that no duty is imposed on directors to maximize shareholder wealth;[3] research which indicates there has been greater use of stakeholder rhetoric in documents and communications of large U.S. public corporations;[4] two critically important decisions by the Supreme Court of Canada[5] in the past five years which appear to reject the idea that shareholder primacy is mandatory for Canadian corporations and that directors are permitted to consider a wide range of constituent interests; recent empirical research from a study of Australian directors which found "the majority of directors had a 'stakeholder' understanding of their obligations;"[6] the increased amount of social reporting;[7]

CORNELL L. REV. 1266 (1999); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992); Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227 (2004); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999); Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991); *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990); Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765 (2009); Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823 (2003).

2 John Armour et al., *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRIT. J. INDUS. REL. 531, 549–50 (2003).

3 *See, e.g.,* Paramount Commc'n Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989); *see also* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy,* 31 J. CORP. L. 637, 650–51; Fordham Law Legal Studies Research Paper No. 105 (2006), *available at* SSRN: http://ssrn.com/abstract=878391(last visited Mar. 1, 2010) (discussing how the directors' duty to maximize shareholder wealth is limited).

4 Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 676 (2006); Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 774 (2007).

5 People's Dept Stores v. Wise, [2004] 3 S.C.R. 461 (Can.); BCE Inc. v. 1976 Debentureholders [2008] 3 S.C.R 560 (Can.).

6 Meredith Jones, Shelley Marshall, Richard Mitchell & Ian M. Ramsay, *Company Directors' Views Regarding Stakeholders*, Research Report, University of Melbourne, *available at* http://cclsr.law.unimelb.edu.au/go/centre-activities/research/

and the comments of some writers questioning whether the dominance of the shareholder primacy theory may be problematic due to recent developments in law and finance.[8] Furthermore, in 2000 many proclaimed that the Anglo-American corporate governance system based on shareholder primacy had become paramount and the European stakeholder systems were converging to the Anglo-American approach.[9] However, since 2000, the world has witnessed the collapse of Enron and Worldcom; and, more recently, the demise of major banks such as Northern Rock in the United Kingdom, Lehman Bros in the United States, and the provision of government support for other banks and financial institutions, to such a degree that there is the virtual part nationalisation of several U.K. banks. These recent developments could well lead to a change of direction, since there is much questioning of the financial regulatory system in Anglo-American jurisdictions, and corporate governance in general. It is arguable that some of the problems to hit financial institutions have laid bare the deficiencies in corporate governance in Anglo-American jurisdictions.[10]

This article analyzes whether stakeholder theory should overtake shareholder primacy as the leading theory in Anglo-American jurisdictions. Specifically, the article examines the arguments propounded in support of stakeholder theory and evaluates the strength of these arguments with the aim of determining if there is sufficient justification for the theory to become wholeheartedly embraced in Anglo-American jurisdictions.

The article is structured as follows. Part II offers a brief background of the stakeholder theory. This is followed by an explanation of what the theory actually stands for. Part IV examines the rationales given for the theory's existence as well as the leading arguments put

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research-reports-and-research-papers/index/cfm ("Centre Activities" hyperlink to "Research" and follow hyperlink "Research Reports and Research Papers") (last visited Mar. 1, 2010) (containing research findings undertaken by members of the Corporate Governance and Workplace Partnerships Project at the University of Melbourne).

[7] *See generally* Steen Thomsen, *The Convergence of Corporate Governance Systems and European and Anglo-American Standards*, 4 EUR. BUS. ORG. L. REV. 31 (2003).

[8] Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309, 1311 (2008); Frederick Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors,* 57 EMORY L.J. 809, 853 (2008).

[9] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

[10] *Cf.* Brian R. Cheffins, *Did Corporate Governance 'Fail' During the 2008 Stock Market Meltdown? The Case of the S & P 500* (Univ. of Cambridge and Eur. Corp. Gov. Inst., Working Paper No. 124, 2009), *available at* http://ssrn.com/abstract=1396126.

forth in its favor by all corporations. Next, there is an identification and analysis of some of the primary arguments directed against the theory. Finally, some concluding remarks are offered.

II. BACKGROUND

There are more than just shareholders who contribute to a corporation, and there are others, in addition to shareholders, who are affected by the actions of the corporation. Scholars refer to persons and groups who contribute to the corporation as stakeholders,[11] constituencies, contributors, or even investors. As far as public corporations are concerned, it has been contended that a corporation's affairs are of such broad public concern and affect the lives and interests of so many that a corporation can no longer be managed solely for the benefit of shareholders.[12]

Several approaches may be classified as stakeholder in orientation. Of particular note are the communitarian (or progressive) and pluralist theories that have become popular in corporate law in the past twenty years. Reference to them will be made in places, but the focus of this article is on what is termed "stakeholder theory." This may imply there is only one form of the theory, but that is incorrect. It has actually been suggested that there is a genre of stakeholder theories, and not just one basic theory.[13] This article intends to discuss the main aspects of stakeholder theory with the caveat that it does not purport to cover all possible views that may be influential in the development of stakeholder theory.[14] There are many variations of certain points that may be seen as critical to the theory, and this has led to no little confusion. The following statement goes some way to explaining the situation: "The result [of the literature in the field] is a baffling exchange of stakeholder interpretations and aims that often have little in common and serve to mystify rather than clarify the intellectual terrain, rendering practical applications implausible if not impossi-

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[11] R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 25 CAL. MGMT. REV. 88, 89 (1983) (discussing how the term "stakeholder" can be traced back to a 1963 Stanford Research Institute memorandum where it was used to refer to "those groups without whose support the organization would cease to exist.").

[12] Robert S. Karmel, *Implications of the Stakeholder Model*, 61GEO. WASH. L. REV. 1156, 1171–75 (1993); Lyman Johnson & David Millon, *Corporate Takeovers and Corporate Law: Who's in Control?*, 61 GEO. WASH. L. REV. 1177, 1197–1207 (1993).

[13] R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 413 (1994).

[14] See generally Morten Huse & Dorthe Eide, *Stakeholder Management and the Avoidance of Corporate Control*, 35 BUS. & SOC'Y 211 (1996), for a discussion on the different types of prevalent stakeholder theories.

ble."[15] Those who would place themselves in the stakeholder theory group vary in thinking, so what is considered here are only what can be regarded as the views held by the majority of scholars and practitioners of the theory. The wide-ranging views that exist are consonant with the fact that stakeholding is a broad concept. The theory also continues to evolve as scholars address old and new issues. It should be noted that the stakeholder theory is also known as the "stakeholder model," "stakeholder framework" or "stakeholder management."[16]

Stakeholder theory, in broader social terms, has been invoked by several theorists for a great number of years, and one can trace it back to the work of the seventeenth century German social theorist, Johannes Althusius,[17] and incipient forms of stakeholder theory have existed since the advent of industrialism.[18] As one might expect, the theory changed throughout corporate history. Perhaps stakeholder ideas as we know them today can be traced back to J. Maurice Clark in an article from 1916,[19] and it seems the first writer to develop the stakeholder idea in modern thought, but who did not use the term, was Mary Parker Follett in 1918.[20] It is possible to see the modern theory in some embryonic form in the work of Professor E. Merrick Dodd in the early 1930s. A more advanced form of stakeholder theory (referred to by one scholar as the "benign managerial model"[21]) was applied by academics like Edward Mason[22] and Carl Kaysen[23] in the 1950s. The 1950s edition of stakeholder theory was also practiced by many successful American corporations (who made reference to their adoption of a "stakeholder management" approach) in the period from the 1920s

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[15] Christopher Stoney & Diana Winstanley, *Stakeholding: Confusion or Utopia? Mapping the Conceptual Terrain*, 38 J. MGMT. STUD. 603, 604 (2001).

[16] R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 25 (1984). Some regard the last descriptor to be outdated, see Jörg Andriof et al., *Introduction* to UNFOLDING STAKEHOLDER THINKING 9 (J. Andriof, B. Hunter, S. Waddock & S. Rahman eds., 2002), for a more recent account.

[17] E. Orts, *A North American Legal Perspective on Stakeholder Management Theory*, *in* PERSPECTIVES ON COMPANY LAW 170 (F. MacMillan Patfield ed., 1997).

[18] Thomas Clarke, *The Stakeholder Corporation: A Business Philosophy for the Information Age*, 31 LONG RANGE PLAN. 182, 186 (1998).

[19] J. Maurice Clark, *The Changing Basis of Economic Responsibility*, 24 J. POL. ECON. 203 (1916).

[20] JAMES E. POST ET AL., REDEFINING THE CORPORATION—STAKEHOLDER MANAGEMENT AND ORGANIZATIONAL WEALTH 18 (Stanford Business Books 2002).

[21] John Parkinson, *Models of the Company and the Employment Relationship*, 41 BRIT J. INDUS. REL. 481, 493.

[22] *See generally* Edward S. Mason, *The Apologetics of "Managerialism"*, 31 J. BUS. 1 (1958).

[23] *See generally* Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AMER. ECON. REV. 311 (1957).

to the 1950s.[24] For instance, in the 1920s, Owen Young, President of General Electric, acknowledged he had an obligation to the stockholders to pay a fair rate of return, but that he also had an obligation to the laborers, customers, and the public.[25] The chairman of the U.S. corporation, Standard Oil, stated, in 1946, that the business of corporations should be carried on in such a way as to maintain "an equitable and working balance among the claims of the various directly interested groups—stockholders, employees, customers and the public at large."[26] The development of the theory in its organised modern form is usually traced to R. Edward Freeman and his influential book, Strategic Management: A Stakeholder Approach, published in 1984.[27] In the early 1980s, Freeman called for a rethinking of business organisations, arguing that the economic theories that had been preeminent in the 1970s were outdated.[28] Notwithstanding the fact that many years have now passed since Freeman's first articulation of a stakeholder theory in relation to corporations, we have yet to see a robust and workable theory formulated, something on which critics often focus.

III. WHAT IS STAKEHOLDER THEORY?

Stakeholder theory is a theory of organisational management and ethics. The theory has been evolving as scholars address new aspects and confront alleged weaknesses. It purports to provide an account of the purpose of the corporation.[29] Before articulating the basic theory we should note that there are three aspects of the theory: normative, descriptive, and instrumental. The normative is an explanation, on a moral basis, of how those who are able to be classified as stakeholders should be treated, and it holds that stakeholders should be seen as "ends" and not "means." Stakeholders are inherently valuable to the corporation and should be treated as such in the management of the affairs of the corporation.[30] This is a legitimacy claim,

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[24] *See* Lee E. Preston & Harry J. Sapienza, *Stakeholder Management and Corporate Performance*, 19 J. BEHAV. ECON. 361, 362 (1990). John Hendry, *Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate*, 11 BUS. ETHICS. Q. 159, 160 (2001) (describing the 1930s through 1970s marked by "industrial managerialism").

[25] E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154 (1932).

[26] MARGARET BLAIR, OWNERSHIP AND CONTROL 212 (The Brookings Institute 1995).

[27] *See generally* FREEMAN, *supra* note 16.

[28] Thus, the theory was a response to the shareholder primacy theory. *Id.* at 52.

[29] *See* Bruce Langtry, *Stakeholders and the Moral Responsibilities of Business*, 4 BUS. ETHICS Q. 431, 431 (1994).

[30] Scott Reynolds et al., *Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests*, 64 J. BUS. ETHICS 285, 293 (2006).

and, at its heart, is a clear disagreement with shareholder primacy,[31] that managers should run corporations primarily for the shareholders and to ensure that their wealth is maximised.[32] The descriptive aspect of stakeholder theory is that it is used to explain specific corporate behavior. The instrumental aspect provides a framework for examining the links between the practice of stakeholder management and a corporation's performance, and is concerned with looking at how stakeholderism can improve a corporation's efficiency and success. There is a fourth aspect of the theory that is supported by some, and that is the convergent approach. It is a combination of the normative and instrumental aspects.[33]

The core of the theory is normative,[34] and this article focuses on that aspect, but there is also discussion of some issues that are relevant to the instrumental aspect. This latter aspect tends to provide an approach that is closer to the Anglo-American idea of private ownership in corporate governance. While it does not advocate moving away from ownership rights, it does assert that emphasis should not be on the sole ownership of the corporation by shareholders, as many shareholder primacists do, because other stakeholders can claim ownership rights.[35] Perhaps the comment of Andrew Campbell that, "I support stakeholder theory not from some left wing reason of equity, but because I believe it to be fundamental to understanding how to make money in business"[36] is somewhat indicative of some who would take an instrumental approach.

Stakeholding notes that shareholders are merely one of many competing and diverse groups that have an interest in the affairs of a corporation. A stakeholder approach, in general terms, is premised on

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[31] Bert Van de Ven, *Human Rights as a Normative Basis for Stakeholder Legitimacy*, 5 CORP. GOVERNANCE 48, 51 (2005).

[32] There is much written on the theory. *See generally* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002); Jill Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637 (2006), *available at* http://ssrn.com/abstract=878391 (last visited July 27, 2009); Andrew Keay, *Shareholder Primacy in Corporate Law. Can it Survive? Should it Survive?*, http://ssrn.com/abstract=1498065.

[33] Thomas Jones & Andrew Wicks, *Convergent Stakeholder Theory*, 24 ACAD. MGMT. REV. 206 (1999).

[34] Thomas Donaldson & Lee Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, ACAD. MGMT. REV., Jan. 1995, at 65, 74 (1995).

[35] Steve Letza et al., *Shareholding Versus Stakeholding: A Critical Review of Corporate Governance*, 12 CORP. GOVERNANCE: AN INT'L. REV. 242, 251 (2004).

[36] Andrew Campbell, *Stakeholders, the Case in Favour,* 30 LONG RANGE PLAN. 446, 446 (1997).

the notion that an inclusive approach towards all contributors is—from a social, economic and political perspective—valuable. The theory focuses on fostering the full potential of all contributors. The ideal in stakeholderism is that "all parties work together for a common goal and obtain shared benefits, 'opting in' to the business's project."[37] All those who contribute critical resources to the corporation should benefit. So, rather than the corporation working to create value for shareholders, the stakeholder theory adheres to the idea that the corporation works towards creation of value for all stakeholders. Furthermore, it is fundamental to stakeholding that organisations are managed for the benefit of, and accountable to, all stakeholders.[38] Stakeholding sees the purpose of the corporation as providing a vehicle to serve in such a way as to coordinate the interests of stakeholders,[39] and it is concerned about the damage that externalities can have on participants in the corporate enterprise.[40] Externalising is the practice of managers transferring the costs of the corporation to stakeholders and retaining resulting benefits for shareholders.[41] This occurs, for example, where a corporation makes workers redundant so that dividends can be paid to shareholders and the share price will increase.[42]

Under stakeholder theory, the duty of managers of corporations is to create optimal value for all social actors who might be regarded as parties who can affect or are affected by a corporation's decisions.[43] The argument is that those who are able to affect or be affected by the corporation are stakeholders, and all stakeholders play

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[37] JANICE DEAN, DIRECTING PUBLIC COMPANIES, 94 (Cavendish 2001).

[38] *See generally* WILL HUTTON, THE STATE WE'RE IN (Jonathan Cape 1995).

[39] Chris Metcalfe, *The Stakeholder Corporation,* 7 BUS. ETHICS: EURO. REV. 30, 30 (1998) (*quoting* W. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation*, *in* ETHICAL THEORY AND BUSINESS (Tom Beauchamp & Norman Bowie eds., 1974)).

[40] *Principles of Stakeholder Management*, 12 BUS. ETHICS Q. 257, 258 (2002).

[41] It is argued by some shareholder primacy theorists that departing from shareholder primacy to ensure no externalities exist would add to agency costs and reduce social wealth. *See* Ian Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 539 (2006).

[42] A prime example of this is the decision of Shell in late 2009 to boost the dollar value of the dividend by five per cent, notwithstanding a large decrease in profits. This occurred only after the corporation had axed 5,000 jobs : Carl Mortished, *Shell to Axe 5,000 Jobs Amid 73% Profit Fall*, THE TIMES, Oct. 29, 2009.

[43] FREEMAN, *supra* note 16. Some would restrict this more than Freeman. For instance, Professor Margaret Blair in the mid-1990s (she has subsequently embraced team production) limited those social actors who made specific investments in the company (something that she continues to hold to under the Team Production Approach). *See generally* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law,* 85 VA. L. REV. 247 (1999).

a vital role in the success of the corporate enterprise. Stakeholders have a right to be regarded as an end, and not a means to an end (i.e. they are not used just to benefit the corporation in the long run, but their benefits are an end for the corporation).[44] As a consequence, it is necessary for the managers to balance the interests of all stakeholders when making decisions.[45] The aim should be to make the corporation a place where stakeholder interests can be maximised in due course.[46]

Stakeholder theory sees the role of directors as mediators, where they mediate between the various stakeholders.[47] This is related to the directors' obligation to engage in balancing the interests of stakeholders. Balancing involves "assessing, weighing and addressing the competing claims of those who have a stake in the actions of the organization."[48] In undertaking balancing, it must be noted that while all stakeholders might be regarded as equal, not all claims and interests of stakeholders are equal or relevant in a given situation. The facts will determine how one is to balance, and the outcome of managers' decision-making and who gets what from corporation outputs is based on a meritocracy, namely what did stakeholders contribute to the enterprise.[49] Managers should engage with stakeholders in mutual respect and ascertain what they are saying, so that there is not one-sided management.[50]

The people who have a stake generally include the corporation's: customers, suppliers, financiers, creditors, shareholders, employees, and local communities, as well as local and national governments (including tax authorities). The rights of these groups must be honored, and, further, the groups must participate, in some sense, in decisions that substantially affect their welfare.[51] Besides the fact that all stakeholder interests must be taken into account, the theory does not endorse any prioritisation of interests of stakeholders in relation to one another. Stakeholderism is "premised on the theory

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[44] FREEMAN, *supra* note 16, at 97.

[45] Some might restrict it to "main" stakeholders. *See, e.g.*, John Plender, *Giving People a Stake in the Future,* 31 LONG RANGE PLAN. 211, 214 (1998).

[46] R. Edward Freeman & Robert Phillips, *Stakeholder Theory: A Libertarian Defense*, 12 BUS. ETHICS Q. 331, 333 (2002).

[47] Karmel, *supra* note 12, at 1157.

[48] Scott Reynolds, et al., *Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests*, 64 J. BUS. ETHICS 285, 286 (2006).

[49] Robert Phillips, Edward Freeman & Andrew Wicks, *What Stakeholder Theory Is Not*, 13 BUS. ETHICS Q. 488 (2003).

[50] Andriof, et al., *supra* note 16, at 9.

[51] W. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, *in* ETHICAL THEORY AND BUSINESS 103, 103 (Tom Beauchamp & Norman Bowie eds., 1988).

that groups in addition to shareholders have claims on a corporation's assets and earnings because those groups contribute to a corporation's capital."[52] Inequality among stakeholders would be acceptable only if the action causing it improved the situation of the stakeholder most in need.[53] So, stakeholder theory rejects the idea of maximising a single objective, as one gets with shareholder primacy where the focus is all on maximising shareholder wealth. As a normative thesis, stakeholder theory holds to the legitimacy of the claims on the corporation by many different groups and people.[54] Managers are obliged to deal transparently and honestly with all stakeholders,[55] and ask: What will stakeholders think about the decision we are contemplating? They then should consider which stakeholders warrant or require consideration.[56]

The notion of "stakeholder" involves people or groups being seen as having a stake in the corporation. A stake "is an asserted or real interest, claim or right, whether legal or moral, or an ownership share in an undertaking."[57] It is where someone has something that is at risk due to corporate action.[58] The idea of "stakeholder" connotes legitimacy, so it is legitimate for managers to spend time and resources on such persons.[59] William Evan and R. Edward Freeman have sought to extend acknowledgement of who are stakeholders to people and groups who have morally valid claims on the corporation, as opposed to just economic claims, thus covering a wider spread than those recognised by others.[60] The critical thing is that the corporation must "manage its relationships with its specific stakeholder groups in an action-oriented way."[61] This involves directors being aware of the

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[52] Karmel, *supra* note 12, at 1171.

[53] Freeman, *supra* note 13, at 415–416.

[54] *See* Donaldson & Preston, *supra* note 34, at 66–67. Freeman has said that it is necessary for a company to identify those who are its stakeholders. FREEMAN *supra* note 16, at 54, 196.

[55] *Principles of Stakeholder Management*, *supra* note 40, at 259. How managers should act is set out on page 260 of the article and the principles reproduce those contained in THE CLARKSON CENTRE FOR BUSINESS ETHICS, PRINCIPLES OF STAKEHOLDER MANAGEMENT 60 (Univ. of Toronto, 1999).

[56] Ronald Mitchell, et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. OF MGMT. REV. 853, 855 (1997).

[57] Leo V. Ryan, *The Evolution of Stakeholder Management: Challenges and Potential Conflicts*, 3 INT.'L J. VALUE BASED MGMT. 105, 108 (1990).

[58] *Principles of Stakeholder Management*, *supra* note 40, at 257–58.

[59] FREEMAN, *supra* note 16, at 45.

[60] Bruce Lantry, *Stakeholders and the Moral Responsibilities of Business*, 4 BUS. ETHICS Q. 431, 432 (1994).

[61] FREEMAN, *supra* note, 16 at 53.

effect of their decisions on stakeholder groups, and then acting accordingly.[62]

Identifying a corporation's stakeholders is not a straightforward issue. There are a number of approaches adopted for determining who are stakeholders, and there were twenty-eight different definitions of "stakeholder" proposed between 1963 and 1995.[63] A leading advocate of stakeholder theory, Professor Max Clarkson, adopted a narrow definition of stakeholders and regarded them as those who "bear some form of risk as a result of having invested some form of capital, human or financial, something of value, in a firm."[64] The approach has been endorsed by a substantial number of commentators.[65] Many commentators have distinguished between primary (inside or internal) stakeholders, on the one hand, and secondary (outside or external) stakeholders, on the other, with the former being the focus of the theory.

Primary stakeholders are seen as those who have a formal, official, or contractual relationship with the corporation, and without whom the corporation could not function. Many stakeholder theorists have identified five primary stakeholders: financiers, customers, suppliers, employees, and shareholders (some might also add communities). These various stakeholders will have priority at different times. There is a fair degree of interdependence between the corporation and these stakeholders.

Secondary stakeholders are those who have not negotiated with the corporation, but who can have influence and can affect the corporation. Their interests may, on occasion, require the corporation to refrain from a particular course of action.[66] Some deny that such persons and groups are stakeholders as they are not involved, arguably, in value exchanges.[67] Others deny them standing as stakeholders as they have no financial interest in the corporation.[68] Often it is said

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[62] *Id*. at 196.

[63] Mitchell, et al., *supra* note 56 at 853.

[64] Max Clarkson, "A risk based model of stakeholder theory," Proceedings of the Second Toronto Conference on Stakeholder Theory, Centre for Corporate Social Performance, University of Toronto, 1994 at 5, *quoted in* Amy Hillman and Gerald D. Klein, *Shareholder Value, Stakeholder Management and Social Issue. What's the Bottom Line?*, 22 STRATEGIC MGMT. J. 125, 126 (2001).

[65] *See, e.g.*, Eric W. Orts & Alan Strudler, *The Ethical and Environmental Limits of Stakeholder Theory,* 12 BUS. ETHICS Q. 215 (2002).

[66] DEAN, *supra* note 37, at 99, 103.

[67] *See, e.g.,* Richard Lee Miller, *Ethical Challenges in Corporate-Shareholder Investor Relations: Using the Value Exchange Model to Analyze and Respond*, 7 J. BUS. ETHICS 117, 121 (1988).

[68] Orts & Strudler, *supra* note 65, at 215.

that there are six secondary stakeholders: governments, environmentalists, NGOs, critics, the media, and others.[69]

Archie Carroll divides stakeholders into three categories: those who have ownership, those who have a right or claim on the corporation (and this could be legal or moral), and those who assert an interest in the outcome of the corporation's business.[70] Some theorists distinguish those who merely influence the corporation from those who are truly stakeholders.[71] In sum, most writers see the following as stakeholders: employees, shareholders, suppliers, financial institutions and lenders, general creditors, customers, the local community, local and national governments, and the environment. Of course, several people might possess a number of overlapping interests and may be both primary and secondary stakeholders or fall into more than one group of primary or secondary stakeholders. For instance, employees might hold shares in their corporation, buy products from their corporation, and live in the community where the corporation's factory/office is located, thereby falling into several stakeholder groups.

Unlike shareholder primacy which focuses on efficiency, stakeholder theory embraces a number of other values, whilst not rejecting efficiency. The value of trust is an important element in this theory. It is argued that it is critical that the corporation secures the trust and cooperation of its main stakeholder groups.[72] The existence of trust means that there is no need for elaborate contracts to be formulated. As Dr. Janice Dean states, "The decision to trust, in business as elsewhere centres on interpersonal expectations, the willingness to accept temporary vulnerability and optimism about one's partner's behaviour."[73] Stakeholder theorists will argue that trust can lead to enhanced reputation. It also means that if action contrary to a stakeholder's interests is contemplated, the managers need to explain both the thinking behind the action and the consequences of it. The emphasis of the theory on values such as trust means that the involvement of stakeholders cannot be priced.

It has been said that there should be a provision for rules in corporations that insure the relations between stakeholders are governed by justice, and these rules must be endorsed by the stakeholders.[74] Some have even argued that there should be a board of directors

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69 Yves Fassin, *The Stakeholder Model Refined*, 84 J. BUS. ETHICS 113, 115 (2009).

70 ARCHIE B. CARROL, BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT 56–57 (South-Western 1989).

71 Donaldson & Preston, *supra* note 34, at 86.

72 CHARLES HANDY, THE HUNGRY SPIRIT 181 (Broadway Books 1997).

73 DEAN, *supra* note 37, at 107.

74 Norman E. Bowie, *A Kantian Theory of Capitalism*, 8 BUS. ETHICS Q. 37, 47 (1998).

that is representative of the stakeholders in a corporation,[75] so stakeholders, in addition to shareholders, should have the opportunity to vote for the directors. Professor Kent Greenfield asserts that the best way for a board to engage in decision-making is to have all important stakeholders represented on it. Greenfield acknowledges that this mechanism presents difficulties but argues that employees, the communities in which the corporation employs a significant portion of its workers, long-term business partners, and creditors could all be represented.[76] We shall return to this issue later.

Directors in a stakeholding system are perceived as trustees of the stakeholders' interests. They are to have a focus on the long-term future of the corporation, and act as stewards of all that they manage.[77] As directors, they are to be trusted and relied on as professionals. Nevertheless, accountability measures should be put in place, but unlike with shareholder primacy, there is no presumption that the directors will act opportunistically or shirk.

In an attempt to have the theory taken seriously, Dean has suggested the following as an appropriate legislative provision that allows for stakeholding:

> A director of a public limited company shall in all his/her conduct and decision making so act as to advance the development of the company in the interests of its customers, its employees and its shareholders and with proper regard for the effect of its operations on the environment and on the community. The interests to which a director of a public company should give due consideration include:
>
> The provision for customers of safe and effective goods and services of good quality at fair prices;
>
> The provision for employees of fair remuneration and secure work with reasonable opportunity for their interests to be heard within the company and for their promotion and development of skills;
>
> The provision for shareholders of fair returns to remunerate past investment and encourage future investment in the company;

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[75] *See, e.g.,* Kent Greenfield & D. Gordon Smith, *Debate: Saving the World With Corporate Law?*, 57 EMORY L.J. 947, 978 (2008); Frederick R. Post, *A Response to "The Social Responsibility of Corporate Management: A Classical Critique*," 18 MID-AMERICAN J. BUS. 25, 32 (2003).
[76] Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 24 (2008).
[77] Plender, *supra* note 45, at 215.

> The provision for key business associates including suppliers of goods and services of secure relationships and ongoing co-operation where such connections offer advantages to both parties;
>
> The provision for the community of programmes to monitor and minimise the environmental impact of the company's operations and advance responsible conduct towards the company's neighbours.[78]

Unlike shareholder value and communitarianism, both of which separate economics and ethics, stakeholder theory embraces both, with the theory being used as a basis for translating business ethics to management practice and strategy.[79] The separation provided for under shareholder primacy, with its focus on a single objective, means that shareholder value provides a narrow approach that, it is asserted, cannot "do justice to the panoply of human activity that is value creation and trade, i.e., business."[80] Stakeholder theory seeks to remedy that situation by being far broader.

The relationship between economics and ethics has always been ambiguous,[81] and stakeholder theory seeks to bring the two together.[82] Some stakeholder theorists even embrace a form of agency theory, with stakeholders being regarded as principals.[83] Also, while the nexus of contracts metaphor[84] for the corporation is often associated with the shareholder primacy theory, some of those holding to

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[78] DEAN, *supra* note 37, at 138.

[79] Fassin, *supra* note 69, at 113.

[80] R. Edward Freeman et al., *Stakeholder Theory and the Corporate Objective Revisited,* 15 ORG. SCI. 364, 364 (2004).

[81] John Hendry, *Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate* 11 BUS. ETHICS Q. 159, 161 (2001).

[82] Interestingly, Elaine Sternberg, a shareholder primacy supporter also purports to bring them together. ELAINE STERNBERG, JUST BUSINESS (Little, Brown & Co., 2d ed. 2000).

[83] Charles W. Hill & Thomas M. Jones, *Stakeholder-Agency Theory,* 19 J. MGMT. STUD. 131 (1992).

[84] This is a theory that provides that the company is to be seen as nothing more than a number of complex, private consensual transactions or contract-based relations, either express or implied, and they consist of many different kinds of relations that are worked out by those voluntarily associating in a company. Frank Easterbrook & Daniel R. Fischel, *The Corporate Contract,* 89 COLUM. L. REV. 1416, 1426 (1989). The literature considering the nexus of contracts is too voluminous to cite. *See generally* Armen Alchian & Harold Demsetz, *Production, Information Costs and Economic Organizations*, 62 AMERICAN ECON. REV. 777 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure,* 3 J. FIN. ECON. 305 (1976); Eugene F. Fama, *Agency Problems and the Theory of the Firm,* 88 J. POL. ECON. 228 at 290

stakeholder theory accept such a metaphor on the basis that all corporate constituents are part of the nexus and all are on an equal footing.[85] This is contrasted with the traditional articulation of nexus of contracts theory which does not see some who are generally thought of as stakeholders in most corporations, such as suppliers and customers, as actually part of the corporation.[86] Under stakeholder theory, corporations should be prepared to make disclosures to stakeholders where appropriate, and stakeholders should be encouraged by the corporation to be involved in the life of the corporation.[87] There is often an emphasis on the relationship between stakeholders and the corporation (represented by the managers). Theorists also emphasise that stakeholders interact with one another. This fosters the idea of interdependence that is a primary feature of stakeholder theory.

Stakeholder theory desires that stakeholders have a voice in the decision-making process in corporations, as well as an interest in the results of that process.[88] Consequently, some theorists have argued for institutional representation—places on the board of directors for the various stakeholders—something which has been high on the pluralist theory's agenda.[89] This is possible as Denmark, Sweden, and Luxembourg all have employee representatives on one-tier boards of directors.[90] While few theorists come to terms with how they see the nature of the corporation because they are more concerned with what the corporation does, it might be said that many would agree that a corporation is "a public association constituted through political and legal processes and as a social entity for the pursuing of collective goals with public obligations."[91]

(1980); William W. Bratton Jr, *The 'Nexus of Contracts Corporation': A Critical Appraisal,* 74 CORNELL L. REV. 407 (1989).

[85] *See, e.g.,* Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm,* 24 J. CORP. L. 819, 833 (1999).

[86] Luigi Zingales, *In Search of New Foundations,* 55 J. FIN. 1623, 1634 (2000).

[87] DEAN, *supra* note 37, at 101.

[88] FREEMAN, *supra* note 16, at 196; *see generally* Phillips, Freeman & Wicks, *supra* note 49.

[89] *See generally* Evan & Freeman, *supra* note 51. For a brief critique of this, see Andrew Keay, *The Ultimate Objective of the Public Company and the Enforcement of the Entity Maximisation and Sustainability Model,* (on file with author), *available at* http://ssrn.com/abstract=1481250.

[90] Franklin Allen, Elena Carletti, & Robert Marquez, *Stakeholder Capitalism, Corporate Governance and Firm Value*, 6 (Wharton Financial Institutions Center, Working Paper No. 09-28, 2007), *available at* http://knowledge.wharton.upenn.edu/papers/1344.pdf.

[91] Silvia Ayuso et al., *Maximising Stakeholders' Interests: An Empirical Analysis of the Stakeholder Approach to Corporate Governance*, 3 (IESE Business School, Univ. of Navarra Working Paper No. 670, 2007).

Finally, stakeholder theory appeals to many people because, *inter alia*, it has been said to be a matter of "taming" the "harsher aspects of capitalism."[92] The theory asserts that there is more to business than just making money, and it seeks to ensure that the vision of managers is broadened.[93] In her study of the documents of Fortune 100 corporations in the United States, Professor Lisa Fairfax found that all but the documents and communications of two corporations included stakeholder rhetoric.[94] Additionally, it might be concluded from this that corporations engage in stakeholder rhetoric to offset the negative feelings that come from the pursuit of the maximisation of shareholder wealth, especially in difficult financial times. Stakeholder theory has portrayed the image of being able to right the wrongs caused by the perceived worst excesses of shareholder primacy in the management of corporations such as Enron.[95] It has become "the vocabulary and methodology for doing this because it is seen as being capable of satisfaction by the construction of a passive notion of social responsibility."[96]

IV. THE RATIONALE FOR, AND ARGUMENTS IN FAVOR OF, THE THEORY

Some take the view that shareholder primacy damages the interests of non-shareholding stakeholders, and this forms the basis for a legitimate claim that these stakeholders warrant consideration and protection in the management of a corporation's affairs.[97] Others provide different rationales for stakeholding. One of the classic statements is made by R. Edward Freeman and his co-authors when they express the rationale behind the theory in this way:

> Business is about putting together a deal so that suppliers, customers, employees, communities, managers and shareholders all win continuously over time. In short, at some level, stakeholder interests have to be joint—they must be traveling in the same direction—or else there will be exit, and a new collaboration formed.[98]

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92 J. Plender, The Stakeholding Solution, London, Nicholas Brealey, 1997 *cited in* J. Dean, *Directing Public Companies*, (London, Cavendish, 2001) at 117.

93 Orts & Strudler, *supra* note 65, at 216.

94 Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 21 J. CORP. L. 675, 677–678, 713–715 (2005).

95 *See generally* Jones & Wicks, *supra* note 33.

96 Sally Wheeler, *Works Councils: Towards Stakeholding?,* 24 J.L. & SOC'Y 44, 49 (1997).

97 David Millon, *Communitarianism in Corporate Law : Foundations and Law Reform Strategies, in* PROGRESSIVE CORPORATE LAW 3 (Lawrence Mitchell ed., 1995).

98 Freeman et al., *supra* note 80, at 365.

There are two points here. First, a corporation needs a number of contributors to ensure that it thrives and survives. If directors do not consider other stakeholders then these people and groups will have no commitment to the corporation and this might lead to withdrawal of their investment or their unwillingness to support the corporation when it is in need. All of this could affect the performance and wealth of the corporation, thereby failing to enhance social wealth.

The second point is that it is best for everyone if the corporation functions so that stakeholders obtain as much value as possible.[99] Shareholder value advocates make a similar argument, but get there via a different route. The stakeholder theory school argues that it is more reasonable and beneficial to take into account all stakeholders rather than pursue shareholder primacy. For a corporation to thrive it must, *inter alia*, produce competitive returns for shareholders, satisfy customers in order to produce profits, recruit and motivate excellent employees, and build successful relationships with suppliers.[100] Stakeholding is the instrument through which efficiency, profitability, competition, and economic success can be promoted on the basis that if one removed cohesion among stakeholders it would not be possible for corporations to be competitive.[101] The huge mining corporation, BHP Billiton, has effectively acknowledged this, and states that it seeks a competitive advantage by exploring new ways of approaching and engaging in relationships with its key stakeholders.[102]

The theory provides that if the interests of stakeholders are catered for, and such stakeholders are shown loyalty; then the shareholders will benefit more than if shareholder wealth maximisation were practised, because the corporation would benefit and it would also produce greater social wealth.[103] However, many shareholder primacy theorists argue that shareholders' interests have to be the first priority or the corporation will not prosper. The fact of the matter is that it is probably a matter of the degree to which stakeholder interests are taken into account, and what happens when there is a conflict between shareholder interests and the interests of other stakeholders that really matters. Shareholder primacy scholars would say that the former are automatically to be preferred, while stakeholder theory

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[99] *Id.*

[100] DEAN, *supra* note 37, at 251.

[101] Andrew Campbell, *Stakeholders: The Case in Favour,* 30 LONG RANGE PLAN. 446 (1997).

[102] BHP Billiton, *Submission 13*, p. 1 to the Australian Joint Parliamentary Committee on Corporations and Financial Services and referred to at para 3.18 of the report (*Corporate Responsibility: Managing Risk and Creating Value*, June 2006 at para 4.46 *available at* http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/index.htm.

[103] Greenfield & Smith, *supra* note 75, at 975.

would say that it depends on balancing a number of factors and the interests of stakeholders. Dean states that "[i]f the board had to consider the interests of all relevant stakeholders and the standards expected of directors were more clearly defined in law, the position would become simpler overall."[104] The reason for this is that considering a broad range of stakeholders will enhance the corporation's reputation and lead others to feel that the corporation is principled and can be trusted. Dean asserts that this would benefit everyone involved.[105] If stakeholders' interests are taken into account by managers in running the corporation, and stakeholders are going to be rewarded, it is likely that they will be more ready to "go the extra mile" in their dealings with the corporation.[106] Employees might devote more time and care to their labor, suppliers might be ready to deliver smaller quantities of goods when doing so might be of marginal economic benefit to them, and customers will remain loyal through difficult times.

Besides relying on the need to keep stakeholders involved in corporations, Freeman and Philips have argued for the theory on the basis that stakeholders deserve protection as they have property rights in the corporation to which they have contributed.[107] For instance, suppliers have a property interest in what they supply to the corporation.[108] The idea is that stakeholder groups have a claim on the corporation's property and profits as they contributed to the capital of the corporation.[109] Like shareholders, they have risked their investment in the corporation. Stakeholders make firm, specific investments in the corporation. For instance, employees may make an investment in corporations by way of undergoing specialised training that might not be able to be used elsewhere in other employment. Suppliers might acquire specialised machinery to enable them to supply the corporation with particular kinds of products, even if this machinery could not be used on any other current or future contract.

Leaving aside any notion of property rights, stakeholders warrant protection on other grounds. Shareholder primacists argue that non-shareholder constituencies are protected by contract, but the riposte is that most stakeholders are unable to negotiate on an even footing as there is inequality of bargaining power. So, a normative foundation for providing protection for stakeholders is that it makes sure that the legitimate expectations of such people, and those are

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[104] DEAN, *supra* note 37, at 108
[105] *Id*. at 108.
[106] Plender, *supra* note 45, at 215.
[107] Freeman & Philips, *supra* note 46, at 338.
[108] *Id*.
[109] Karmel, *supra* note 12, at 1171.

above and beyond the terms of any contract, are fulfilled.[110] When stakeholders get involved with a corporation this elicits an implied promise from the corporation that the directors will consider the interests of the stakeholders. This is a form of social contract approach to the issue.

From an efficiency viewpoint managers do not generally have a personal association or ties with shareholders, yet they do with many stakeholders.[111] Managers regularly deal with: employees, regarding work performance and working conditions; suppliers, concerning the quality of the goods delivered and non-delivery of goods; customers, who complain about the goods that the corporation markets; and local communities, concerning what the corporation is doing or not doing as a corporate citizen. If managers practice stakeholder theory, they can take into account stakeholder concerns, and, in many cases, demonstrate that they are considering the interests of the stakeholders. Consequently, managers gain respect and trust in the eyes of stakeholders; and, importantly for the corporation, they can do their job better and more efficiently.

Running a modern corporation leads to interdependencies involving many groups for whom the corporation should have a legitimate concern.[112] If the reasonable expectations of such groups are not met, then the long-term profitability of the corporation will suffer and stakeholder theory is concerned about the long-term. Taking into account all stakeholders' interests recognises the interdependence of parties involved in corporations and is likely to pre-empt selfish competition among constituents.[113] Where conflict between stakeholders cannot be avoided, managers are to embrace actions that will at least compensate stakeholders for any loss suffered.[114]

It has been noted that the stakeholder theory rejects the idea of maximising a single objective. As a normative thesis, the theory holds to the legitimacy of the claims on the corporation that many different groups and people have, and this justifies its implementation.[115] "[T]he economic and social purpose of the corporation is to create and distribute wealth and value to all its primary stakeholder groups with-

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110 Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 589, 622 (1997).

111 E. Merrick Dodd Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 202–03 (1935).

112 Karmel, *supra* note 12, at 1169.

113 *See* Mitchell, *supra* note 1, at 641–43.

114 Millon, *supra* note 97, at 12.

115 *See* Donaldson & Preston, *supra* note 34, at 66–67.

out favoring one group at the expense of others."[116] Unlike shareholder primacy, no grouping has prima facie priority over another,[117] and no group warrants priority over any other groups.[118] Donaldson and Preston have said, that "each group of stakeholders merits consideration for its own sake and not merely because of its ability to further the interests of some group, such as shareowners."[119] In shareholder primacy, stakeholders are treated as a means, whereas the stakeholder theory holds that stakeholders should be treated as ends. The adherents to this latter theory have advocated concepts of individual autonomy and fairness to all members of society.[120] The theory posits the equality of all stakeholders in that they all have intrinsic value and all are morally entitled to be considered in the management of the corporation's affairs, and to be considered simultaneously,[121] even if this does not advance the interests of shareholders.[122] The rights of these groups must be assured, and further, the groups must participate in decisions that substantially affect their welfare.[123] The moral basis is that a duty is imposed on all organisations in relation to all individuals who are involved with them. Failure to do so would be a breach of human rights irrespective of who was the stakeholder prejudiced.[124]

This ties in with the arguments of the communitarian (or progressive) school, which asserts that stakeholders who are not shareholders are entitled to be shown consideration because they are owed more than what they have bargained for. Those involved in a corporation owe each other respect and support.[125] As mentioned earlier, stakeholder theory emphasizes trust, and a number of stakeholders have to rely on trust and virtually nothing else. The advantage of trustworthiness for the corporation is that it might enhance its reputation. Trust between corporations and their stakeholders can arguably

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[116] Max B.E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92, 112 (1995).
[117] *See* Donaldson & Preston, *supra* note 34, at 68.
[118] Mohammed Omran et al., *Shareholders Versus Stakeholders: Corporate Mission Statements and Investor Returns*, 11 BUS. ETHICS: EURO. REV. 318, 318 (2002).
[119] Donaldson & Preston, *supra* note 34, at 67.
[120] *See generally* John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's So Special About Shareholders?,* 4 BUS. ETHICS Q. 393 (1994).
[121] Mitchell et al., *supra* note 56, at 862.
[122] Richard Marens & Andrew Wicks, *Getting Real: Stakeholder Theory, Managerial Practice and the General Irrelevance of Fiduciary Duties Owed to Shareholders,* 9 BUS. ETHICS Q. 273, 274 (1999).
[123] Evan & Freeman, *supra* note 51, at 103.
[124] Phillips, Freeman & Wicks, *supra* note 49, at 494.
[125] Millon, *supra* note 97, at 4.

reduce costs, as stakeholders seldom have to monitor the managers; they can trust the managers to do their job properly.

The theory posits that many stakeholders—who cannot obtain protection for reasons such as lack of bargaining power, ignorance, or insufficient funds to pay necessary costs (e.g. legal costs)—must rely on fair treatment. In actuality, contractual arrangements between equals occurs infrequently. Many contracts assume a "take it or leave it" approach with the result that costs are imposed on third parties with whom the corporation does business.[126] Several scholars have reported that contracts involving stakeholders are "neither complete nor perfectly priced."[127]

The theory may reflect the fact that the world has become more complex, and, as a result, the affairs and decisions of corporations affect or are affected by an increasing number of people and groups. For example, until recently, environmental issues have not been regularly or widely seen as causing major concern to corporations. Stakeholder theorists often argue that their theory takes into account the complexity of the world, whereas shareholder primacy is far too glib.

Undoubtedly, this model has a lot of attraction. It emphasizes endearing values like trust and fairness. The model also embraces both economics and ethics, elements which have been difficult to balance. The focus on stakeholders has, as we have noted, several advantages; however, a number of concerns have been raised in relation to the theory, which we now turn to examine.

V. CONCERNS WITH, AND ARGUMENTS AGAINST, THE THEORY

Some leading scholars have boldly proclaimed that the preeminence of stakeholder theory has extinguished shareholder primacy.[128] While the stakeholder theory has spread rapidly in both influence and application,[129] criticism of the theory endures. In general terms the theory has been described as, "naive, superficial and unrealistic. . . ."[130] One trenchant critic has said that the theory is "deeply dangerous and wholly unjustified"[131] on the basis that it undercuts

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[126] Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers,* 80 MICH. L. REV. 1155, 1156 (1982).
[127] Fisch, *supra* note 32, at 659.
[128] *See* Freeman*, supra* note 13, at 413.
[129] Paddy Ireland, *Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?,* 23 J.L. & SOC'Y 287, 296 (1996).
[130] Christopher Stoney & Diana Winstanley, *Stakeholding: Confusion or Utopia? Mapping the Conceptual Terrain*, 38 J. MGMT. STUD. 600, 606 (2001).
[131] Elaine Sternberg, *The Defects of Stakeholder Theory*, 5 CORP. GOVERNANCE: AN INT'L REV. 3, 8 (1997).

private property, denies agents' duties to principals, and destroys wealth.[132] It has even been said that it lacks the status of a theory and is instead merely a research tradition or framework.[133] As such, the literature dealing with stakeholder theory has tended to focus on justifying the approach rather than developing a systematic theory.[134]

This part of the article seeks to identify and examine the concerns that have been expressed about the stakeholder theory, as well as analyzing the primary arguments that critics have raised. A number of the concerns considered and arguments put forward against the theory overlap but are separately categorized for purposes of exposition and clarity.

A. *Lack of Solid Normative Foundations*

The point has been made that stakeholder theory has failed to provide any normative foundations for its justification.[135] In particular, it fails to provide a normative base on which to ascertain who can be a stakeholder and what weight ought to be given to each stakeholder.[136] Consequently, there is no basis for a manager, in running the corporation, to prefer stakeholderism to other moral approaches. Freeman has asserted that no normative foundational justification is necessary, but does offer one, as explained below.[137]

Many arguments in favor of the theory are grounded in economics, but stakeholding does have a moral basis in that it provides for how agents should treat each other. However, various apologists for the theory have differed in their explanations of the theory's philosophical bases. Some theorists have sought to build a foundation us-

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[132] *Id.* at 9.

[133] Linda Klebe Treviño & Gary R. Weaver, *The Stakeholder Research Tradition: Converging Theorists–Not Convergent Theory*, 24 ACAD. MGMT. REV. 222, 224 (1999).

[134] *See generally* Simon Learmount, *Theorizing Corporate Governance: New Organizational Alternatives* ESRC Centre for Business Research, University of Cambridge Working Paper No. 237, available at http://www.cbr.cam.ac.uk/pdf/WP237.pdf (last visited March 31, 2010).

[135] THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 45 (Oxford Univ. P, 1989); *see* Antonio Argandoña, *The Stakeholder Theory and the Common Good*, 17 J. BUS. ETHICS 1093, 1098 (1998); François Lépineux, *Stakeholder Theory, Society and Social Cohesion*, 5 CORP. GOVERNANCE 99, 99 (2005); SALLY WHEELER, CORPORATIONS AND THE THIRD WAY 6 (Hart Publishing 2002).

[136] Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 254–55 (1994).

[137] R. Edward Freeman, *Ending the So-Called 'Friedman-Freeman' Debate*, *in Dialogue: Toward Superior Stakeholder Theory*, 18 BUS. ETHICS Q. 153, 162, 163 (2008).

ing the principle of fairness,[138] which entitles those who provide resources to the corporation to a return on their contributions.[139] As Robert Phillips explained:

> Whenever persons or groups of persons voluntarily accept the benefits of a mutually beneficial scheme of co-operation requiring sacrifice or contribution on the parts of the participants and there exists the possibility of free-riding, obligations of fairness are created among the participants in the co-operative scheme in proportion to the benefits accepted.[140]

Phillips argues that the concept of cooperative schemes encompasses commercial transactions and that consent is not necessary for a person to be regarded as a stakeholder.[141] He suggests that the fairness principle is able to reconceptualize business relations as cooperative rather than adversarial.[142] This approach, he argues, is likely to enable a resolution to a conflict situation between stakeholders.

Other scholars rely on different moral bases for the theory. For example, Evan and Freeman propose a deontological or duty foundation (rooted in Kantian philosophical foundations, with some reliance on social contract theory)[143] which provides that persons should respect others as equals.[144] As a corollary, all people and groups have intrinsic value and are to be regarded not as means to ends, but as ends themselves.[145] Hence, corporations should not be seen simply as profit producers for shareholders. A criticism of this view is that while the Kantian approach provides that humans are, as rational, moral agents, to be regarded as ends in themselves, the stakeholder theory also identifies non-persons, such as the environment and the community, as stakeholders, and is therefore inappropriate.[146]

Another moral basis suggests that distributive justice entitles stakeholders to a share of corporate earnings as they contributed to the creation of the earnings and had legitimate expectations that they

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138 *See generally* FREEMAN, *supra* note 16.
139 Metcalfe, *supra* note 39, at 32.
140 FREEMAN, *supra* note 16, at 57.
141 *Id.* at 59.
142 *Id.* at 64.
143 IMMANUEL KANT, THE MORAL LAW OR KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS 95 (H. J. Paton trans., 1956) ("[E]very rational being . . . must in all his actions, whether they are directed to himself or to other rational beings, always be viewed *at the same time as an end*.").
144 *See generally,* Evan & Freeman, *supra* note 51.
145 Kevin Gibson, *The Moral Basis of Stakeholder Theory*, 26 J. BUS. ETHICS 245, 248 (2000). *See* Donaldson & Preston, *supra* note 34, at 67.
146 Sternberg, *supra* note 131, at 6.

would share in the corporation's success. Antonio Argandoña argues that the theory can be based on the concept of the common good.[147] The common good involves establishing the conditions that enable those linked with a corporation to achieve their personal goals.[148] While they do not develop it, Thomas Donaldson and Lee Preston suggest the theory is built upon property rights, and posit the idea that stakeholder rights can compete with those of shareholders.[149] Yet another basis given is that failure by managers to consider stakeholders would be a breach of the latter's human rights.[150] In fairness, many corporate law theories have various bases. But this concern is the least of stakeholder theory's problems.

B. Lack of Clarity

One of the major criticisms of stakeholder theory is that its underlying concepts lack clarity.[151] Even zealous stakeholder theorists have admitted the theory suffers from vagueness, ambiguity, and breadth.[152] James Humber views the theory as a collage of elements that are at odds with one another, thereby producing no systematic coherence.[153] Goyder compares adopting stakeholderism in lieu of shareholder primacy to sacrificing clarity for blancmange, presumably because blancmange is difficult to get a hold of.[154] One of the theory's major problems is that it is not always clearly articulated. It has been said that stakeholding is "a slippery creature . . . used by different people to mean widely different things which happen to suit their arguments."[155]

Another reason that is given is that "most work in this field appears to be preoccupied with justifying a stakeholder approach to the firm, rather than the construction of systematic theory to describe more adequately contemporary organizational practices."[156] Further confusion might come from the fact that the theory provides that it is

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[147] Antonio Argandoña, *supra* note 135, at 1093.
[148] *Id.* at 1097.
[149] Donaldson & Preston, *supra* note 34, at 83.
[150] B. Van de Ven, *Human Rights as a Normative Basis for Stakeholder Legitimacy*, 5 CORP. GOVERNANCE 48 (2005).
[151] *See* Christopher Stoney & Diana Winstanley, *Stakeholding: Confusion or Utopia? Mapping the Conceptual Terrain*, 38 J. MGMT. STUD., 603, 605–06; (2001); Lépineux, *supra* note 135, at 100.
[152] Phillips, Feeman, & Wicks, *supra* note 49, at 479–80.
[153] James M. Humber, *Beyond Stockholders and Stakeholders: A Plea for Moral Autonomy*, 36 J. BUS. ETHICS 207, 215 (2002).
[154] MARK GOYDER, LIVING TOMORROW'S COMPANY 3 (Gower, 1998).
[155] Martin Vander Weyer, *In an Ideal World*, MANAGEMENT TODAY, Sept. 1996, at 35.
[156] *See generally* Learmount, *supra* note 134.

morally correct for corporations to be managed for stakeholders, and that means that it is inconsistent with the relativism of the theory.[157]

We now turn to specific issues with stakeholder theory. First and foremost, stakeholder theory has been a difficult concept to define.[158] One of the main difficulties for the theory, in this respect, and acknowledged by stakeholder theorists,[159] has been in identifying and defining who are, in fact, stakeholders.[160] Defining stakeholders is crucial as it is the first critical step in applying the theory.[161] Notwithstanding the volume of the literature in the field, the concept of stakeholder is seen as vague and blurred.[162] The concept is probably much more indefinite today than in the early days of modern stakeholderism, because more and more scholars have attempted to devise a definition. Definitions have varied from the narrow to the very broad. It is easier to broaden the concept, but when that is done the theory becomes more and more meaningless, and, therefore, according to some, useless.[163] Professors Simon Deakin and Alan Hughes have said that if the theory is so wide as to embrace interests of a broader range of people and groups, such as potential consumers and the interests of society, then the theory risks being regarded as irrelevant.[164]

Our discussion about who stakeholders are starts from the admission that "there is no easy way to delineate the stakeholder class."[165] Probably the first articulation of the concept was provided in an internal memorandum at the Stanford Research Institute in 1963,[166] which said that stakeholders were "those groups without whose support the organization would cease to exist."[167] This tended to be narrow and the groups covered by the term were said to be shareholders, employees, customers, suppliers, lenders, and society.[168] Freeman built on this, and in 1984, he opined that the term "stake-

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157 Humber, *supra* note 153, at 215.
158 M. Omran, et al., *Shareholders Versus Stakeholders: Corporate Mission Statements and Investor Returns*, 11 BUS. ETHICS: EUR. REV. 318, 318 (2002).
159 *See* R. Phillips, *Stakeholder Legitimacy,* 13 BUS. ETHICS Q. 25, 25 (2003).
160 Mitchell, et al., *supra* note 56, at 858 (identifying 27 definitions for stakeholders); *see also* Leung, *supra* note 110, at 618 (demonstrating this has also been a problem with the various so-called constituency statutes in the United States).
161 Fassin, *supra* note 69, at 125.
162 *See* Otts & Strutter, *supra* note 65, at 215.
163 *Id.* at 218.
164 Simon Deakin & Alan Hughes, *Comparative Corporate Governance: An Interdisciplinary Agenda*, 24 J. L. & SOC'Y 1, 4 (1997).
165 Leung, *supra* note 110, at 622.
166 FREEMAN, *supra* note 16, at 31.
167 *Id.*
168 *Id.* at 32.

holder" should denote those who make a difference, and defined stakeholders as "any group or individual who can affect or is affected by the achievement of the organization's objectives."[169] This broadens the category of stakeholders to include governments, customers, environmental groups, etc. The criticism often voiced is that managers are given no basis or method for identifying who are stakeholders.[170] Furthermore, some stakeholders are more important than others, but there is no guidance to determine who are the more important stakeholders.[171] There are a huge number of potential stakeholders, and the problem is determining how to address the needs of divergent groups.[172]

The stakeholder case has probably been harmed by the fact that Freeman included terrorist groups as stakeholders in some corporations (on the basis that they can affect how corporations are run).[173] Many have sought to distance the theory from this approach. Some commentators have said that one must distinguish between those who influence the corporation and those who are true stakeholders.[174] Some investors are in both categories, while some, such as the media, are in the first category only.[175] Other commentators distinguish between primary or inside stakeholders, on the one hand, and secondary or outside stakeholders, on the other, with the former being the focus of attention.[176] Primary stakeholders are seen as those who have a formal, official or contractual relationship with the corporation.[177] Professor John Parkinson said that stakeholders included those who entered a long-term relationship with the corporation and held legitimate expectations of mutual gain from the continuing relationship.[178]

Several commentators have introduced other ways of defining and differentiating stakeholders. Robert Phillips referred to normative, derivative, and dormant stakeholders.[179] Normative stakeholders are those to whom the corporation owes a moral obligation, while derivative stakeholders are ones who can either damage or benefit the

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169 *Id*. at 246.
170 Humber, *supra* note 153, at 211.
171 Anant K. Sundaram, & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORG. SCI. 350, 352 (2004).
172 Leung, *supra* note 110, at 621.
173 FREEMAN, *supra* note 16, at 53.
174 Donaldson & Preston, *supra* note 34, at 86.
175 *Id*.
176 Fassin, *supra* note 69, at 129.
177 ARCHIE CARROLL, BUSINESS AND SOCIETY 62 (1993).
178 John Parkinson, *Company Law and Stakeholder Governance, in* STAKEHOLDER CAPITALISM 149–150 (Gavin Kelly et al. eds., 1997).
179 *See generally* Phillips, *supra* note 159.

corporation, and no moral obligation is owed to them.[180] Dormant stakeholders are groups such as terrorists who may never affect the corporation, but can do so at some indeterminate point in the life of the corporation.[181]

The main distinction, as far as stakeholders are concerned, is between those without whom the corporation cannot function and those who can affect or be affected by the corporation, with the latter being the classical and managerial approach, and the former as more of a legal view.[182] The latter approach is far broader, and, given the way that trade has developed, could encompass just about anyone.[183] Technically, it is not just actors who have contact with the corporation that could be included under this approach. Parties who deal with those who contract with the corporation also could be said to be stakeholders.[184] For example, a corporation, X, supplies bolts to Y corporation. Y supplies engine parts to carmaker, Z corporation. X could be regarded as a stakeholder in Z, even though there is no direct contact between the two corporations. Certainly, if Y lost its business with Z, it is likely that X would be affected significantly. Stakeholders of a corporation have their own subset of stakeholders, so the net grows ever wider.[185] In recent research, Yves Fassin found in excess of 100 stakeholders groups and sub-groups identified in the literature.[186] Dr. Elaine Sternberg has said that:

> [G]iven the increasing internationalisation of modern life and the global connections made possible by improved transportation, telecommunications and computing power, those affected (at least distantly or indirectly) by any given organisation, and thus counting as its stakeholders includes virtually everyone, everything, everywhere.[187]

Whilst she might be using hyperbole, the general point has merit. For instance, taking the illustration above, Z will be at the end of a chain of trading arrangements, and all of the businesses in the chain could be regarded as stakeholders of the large corporation that might be at the end of the chain. This means that a large corporation

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[180] *Id.*

[181] *Id*. at 31.

[182] Fassin, *supra* note 69, at 117.

[183] Metcalfe, *supra* note 39.

[184] Fassin, *supra* note 69, at 119.

[185] Phillips, *supra* note 159, at 34.

[186] Fassin, *supra* note 69, at 120.

[187] Elaine Sternberg, *Stakeholder Theory: The Defective State It's In, in* STAKEHOLDING AND ITS CRITICS 70, 71–72 (Will Hutton ed., 1997).

like Z might have thousands of stakeholders who are indirectly (perhaps very indirectly) affected by its actions.

Andrew Campbell, a stakeholder theorist, has effectively said that one cannot identify stakeholders in the abstract; it will depend on the corporation's purpose.[188] The commentator has noted that most corporations will have four active stakeholders, namely: shareholders, employees, suppliers, and customers.[189] These clearly fit within the primary category mentioned earlier. They are also clearly interdependent, one of the main tenets of the theory. Where a broad approach is taken to defining stakeholders, some stakeholders are not able to be regarded as part of the interdependence.[190] In this light, one thinks of pressure groups and terrorists where there is no real relationship with the corporation and its stakeholders, as is presumed with interdependence.[191] According to Fassin, there is unanimity with respect to only three stakeholders: financiers, employees, and customers.[192] It is assumed that shareholders are not included because the research undertaken by Fassin did not concentrate solely on corporations but took into account other forms of business. It is patent that nearly all commentators will include shareholders as stakeholders when addressing corporations. An added problem is that once one has identified who are stakeholders, some stakeholder groups are large and not homogenous. This creates further difficulties, as we will see shortly, for directors seeking to balance interests.

A way of responding to this criticism might be to follow a suggestion by John Parkinson, that "stakeholder" should be restricted to people and groups who enter long-term cooperative relationships with the corporation.[193] This has the advantage of permitting the managers to have a better idea of knowing who are the stakeholders of the corporation, and moving away from reliance on legal rights and toward developing trust.[194] The problem might be in determining what a long-term cooperative relationship entails.

It has not yet been determined, and may be impossible to determine, the nature and extent of the responsibility that directors have to each stakeholder. In a similar vein, John Argenti has pointed out that it is not clear what stakeholders should expect to get out of a corporation with which they are involved.[195] The response typically is that

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[188] Campbell, *supra* note 101, at 448.
[189] *Id*.
[190] Fassin, *supra* note 69, at 120.
[191] *Id.*
[192] Fassin, *supra* note 69, at 120.
[193] Parkinson, *supra* note 178, at 149.
[194] *Id.*
[195] Campbell, *supra* note 101, at 446.

this cannot be outlined in the general as it is matter for the board to specify and convey it to the stakeholders.[196] As far as the earnings of the corporation are concerned, there is no indication which groups will receive any benefits. Shareholder primacy theorists indicate that they are concerned that if stakeholder theory applies then directors, because they have no objective guidelines, will act in a self-interested fashion.

C. Problem of Balancing

The theory presupposes the fact that directors will, when making decisions and running the corporation, balance the interests of all stakeholders. This is necessary as stakeholders will often have conflicting interests, so balancing is a critical aspect of the theory. The idea of balancing interests appears to be an attractive and reasonable way of dealing with constituencies with conflicting interests. But, in fact, stakeholder management involves, in the words of adherents to the theory, "a neverending task of balancing and integrating multiple relationships and multiple objectives."[197] Thus, the primary argument mounted against the stakeholder approach is that the requirement that directors have to balance the interests of all stakeholders means they are faced with an impossible task.[198] Even Evan and Freeman have said that the task of the managers is "akin to that of King Solomon."[199] Also, and this is the concern of many, the process of balancing might lead directors to opportunism, namely benefiting themselves at the expense of others; or shirking, failing to do their job well, because directors end up accountable to no one but an amorphous group.

There are several problems directors encounter when engaging in balancing. As we have seen, potentially there are a huge number of stakeholders. The first problem for managers is ascertaining who are stakeholders that can be considered in a fair balancing of interests and claims. The second is to determine how the directors are to address the needs of divergent groups.[200] This is akin to comparing apples and oranges. Further, directors are not always aware of what stakeholders will consider a benefit, and this is exacerbated by the fact that even within a particular stakeholder group there may be different views

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[196] *Id*. at 448.

[197] R. Edward Freeman & J. McVea, *A Stakeholder Approach to Strategic Management, in* HANDBOOK OF STRATEGIC MANAGEMENT, 194 (M. Hitt, R. Edward Freeman & J. Harrison eds., 2001).

[198] *See generally* B. SHENFIELD, COMPANY BOARDS, Ch. 7 (George Allen & Unwin, London 1971).

[199] Evan & Freeman, *supra* note 39, at 314.

[200] Leung, *supra* note 110, at 621.

and attitudes.[201] How can managers know what stakeholders consider a benefit or what they see as within their interests?[202] As mentioned above, groups are not marked by homogeneity, so this creates further difficulties for directors seeking to balance.

Not only is the board balancing different stakeholder groups, it may also have to balance within groups. Take creditors as an example. Corporations might have all or any of the following creditors: secured creditors, suppliers with the benefit of a retention of title clause in their supply contracts, suppliers without the benefit of such a clause, general trade creditors, suppliers under long-term contracts, lessors, holders of unexpired intellectual property licences, employees owed wages, tax authorities, tort victims with claims, and customers who have paid deposits for goods or services not yet supplied by the corporation. There is, for instance, likely to be a significant difference between the interests of a bank who is a creditor with a security interest over corporation assets, compared with an unsecured trade creditor. In considering creditor interests, what does a director do if the interests of different groups do not accord? There is going to be conflict within groups themselves, and this internecine conflict can be as difficult to resolve as the group versus group conflict.

Returning to the problem of a lack of homogeneity within the same group, we can note that often members of sub-groups might not even have the same interests. For instance, let us take the broad subgrouping of trade creditors. These creditors are generally treated in the same way by the law, and certainly they are when it comes to a liquidation of an insolvent corporation. This sub-group might include, at one extreme, large corporations that supply significant quantities of goods to the corporation, and, at the other end of the spectrum, self-employed tradespersons, like plumbers, who do the occasional job for the corporation when it is necessary. The former type of creditors might have a turnover of many millions of dollars/pounds/euro/yen per annum and are likely to be more willing to accept the directors embracing ventures and actions that involve a greater amount of risk. The reason is that large corporation suppliers are probably not as reliant as the tradespersons, whose turnover is likely to be only in the region of thousands of dollars/pounds/euro/yen, on being paid the debt owed. While the large corporation can, in effect, gamble with its debt, tradespersons cannot. The latter would prefer to be assured of receiving, say half of what is owed, rather than seeing corporation funds used in such a way that *might* lead to full payment of the debt but could just as likely lead to no funds being left to pay creditors on liquidation. In contrast, the large corporation might be ready to approve of

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[201] Letza et al., *supra* note 35, at 255

[202] Sternberg, *supra* note 131, at 4.

directors engaging in what is, effectively, gambling because if it does not get paid, it can still survive.

Stakeholder theorists assert that corporations need to engage with stakeholders to ascertain their interests and needs, but the practical concern is: how is this to be done, especially as managers are not going to be aware of the existence of some stakeholders when the stakeholding category is defined widely?

A third issue is: What does balancing actually entail? Does it mean embracing compromise or taking such action that enables the interests of stakeholders to coincide?[203] The former might not be acceptable to many, and might leave some disenchanted, and the latter does not, for the most part, appear to be possible. In this respect, a concern for directors is to know the basis on which they are to balance interests. How do directors deal with the case where several constituencies are deserving, but it is impossible to favor them all equally? One particular problem identified by many scholars is that it is often not possible to advance the interests of non-shareholder stakeholders in conjunction with those of the shareholders.[204] There is no specification, or even guidance, given to managers permitting them to identify the values relied on in with the stakeholding approach, and there is no indication how these are to inform their decision-making.[205] There are no standards devised for assigning relative weight to the interests of the constituencies involved and no criteria for solving problems.[206] Effectively, directors are presented with "standardless discretion."[207] This is emphasised by Ronald Mitchell who stated that the extent to which priority is given by managers to particular stakeholders whose claims are in conflict with others cannot be explained by the stakeholder framework as complex issues are involved.[208] Michael Jensen has stated, in the context of directors having to consider all interests and to balance them: "It is logically impossible to maximize in more than one dimension at the same time."[209] Jensen's concern is that there is no objective on which a manager can focus, thus leading to confusion.[210] In response to Jensen's criticism of the theory as confus-

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[203] *See generally* BARBRA SHENFIELD, COMPANY BOARD 149 (George Allen & Unwin Ltd, 1971).

[204] *See* Amir Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 686 n. 126 (2004).

[205] Sundaram & Inkpen, *supra* note 171, at 353; Michael Jensen, *Value Maximisation, Stakeholder Theory, and the Corporate Objective Function*, 7 EUROPEAN FINANCIAL MANAGEMENT 297, 305 (2001).

[206] DONALDSON, *supra* note 135, at 45.

[207] Mitchell, *supra* note 1, at 589.

[208] Mitchell, et al., *supra* note 56, at 854.

[209] Jensen, *supra* note 205, at 300–301.

[210] *Id*. at 301.

ing for managers, Professor Amir Licht takes the view that Jensen is depicting managers as being unable to "walk and chew gum at the same time."[211] But, in fairness to Jensen's point, there is little guidance, as we have seen, and even experienced managers might ask where they should start in balancing interests when difficult decisions have to be made.

John Parkinson's view on this point is that:

> There seems no reason in principle why management performance cannot be effectively evaluated by reference to multiple standards. What is required is an independent process of review that is capable of discriminating between management actions that result from incompetence or the pursuit of self-interest on the one hand, and those motivated by attempts to accommodate the legitimate interests of affected parties on the other.[212]

However, the response from shareholder primacists would likely be that directors might be able to muddy the waters in such a way as to leave a reviewer, possibly a judge, unable to come to the view that the directors have not at least attempted to benefit one stakeholder.

The lack of direction is further exemplified by what the Supreme Court of Canada said in the recent case of *BCE Inc v 1976 Debentureholders.*[213] It said that there is no legal principle that one set of interests should prevail over another.[214] Then the Court said that which set prevails depends on the situation that is before the directors, and they have to use their business judgment.[215] Again, no guidance whatsoever is provided, especially concerning what weight is to be given to particular interests. Some scholars would say that judges are envisaged as the reviewers of what directors do, and it is not possible for judges to be involved in passing judgment on what directors have done, in using their commercial judgment, as judges lack, *inter alia*, competence. But this is an overly restricted opinion of the caliber of modern common law judges, many of whom specialised in commercial and/or corporate law while in practice, and, arguably, are able to grasp

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[211] Licht*, supra* note 204, at 731.

[212] John Parkinson, *Models of the Company and the Employment Relationship* 41 BRIT. J.INDUS. REL. 481, 499 (2003). *See also* John Kay & Aubrey Silberston, *Corporate Governance* (1995) NAT'L INST. ECON. REV. 84, 93–95.

[213] *BCE Inc v 1976 Debentureholders,* [2008] 3 S.C.R. 560 (Can.).

[214] *Id.* at ¶ 84.

[215] *Id.*

managerial issues if assisted by suitable oral and documentary evidence.[216]

It is argued that arriving at a set of values that accounts for the concerns across a heterogeneous group of stakeholders requires managers to fulfil unrealistic expectations.[217] Furthermore, as mentioned above, it is contended by many scholars that it is not in fact possible to advance the interests of non-shareholding stakeholders in conjunction with those of the shareholders.[218] To adapt what Michael Jensen has said, one cannot possibly seek to develop benefits for more than one constituent at the same time.[219] Balancing is made difficult by the fact that contracts are incomplete the constituencies of a corporation will usually have conflicting claims, and each constituency will be subject to the opportunistic actions of other constituencies.[220] This complicates any decisions that the directors are to make in balancing interests.

The challenge for stakeholder theory is to specify how managers are to balance between stakeholders. A critical element for stakeholder theory is the need to satisfy legitimate expectations of all stakeholders. A vague requirement that such expectations are to be taken into account does not provide guidance, but leaves the managers none-the-wiser and, perhaps, even more confused.[221] Even with the best of intentions, it would be very difficult for directors to know the best interests of individual stakeholders. This is exacerbated by the fact that stakeholders in a corporation will be continually changing, and the expectations of existing ones could be revised. Added to this is the fact that a long-term approach is championed by stakeholder theory, requiring managers to look not to present interests, but to the future. This is not an easy task, particularly when one accepts that

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[216] *See* Keay, *supra* note 89. A good example of judges who specialise are the judges of the Companies Court in the Chancery Division of the High Court of England. Another is the judges of the Chancery Court in the State of Delaware.

[217] Sundaram & Inkpen, *supra* note 171, at 353.

[218] Licht, *supra* note 204, at 686 n.126.

[219] Jensen, *supra* note 205, at 301.

[220] Blair & Stout, *supra* note 43, at 276–287. The answer, according to the commentators pursuant to what they call "the team production theory," is that the board must make the ultimate decisions in reconciling competing interests and disputes. *Id.* at 276–277.

[221] Jensen, *supra* note 205, at 301. Judges who have to consider this issue in relation to claims made that a company's affairs have been conducted oppressively or in an unfairly prejudicial manner often find it onerous. *See, e.g.* Companies Act, 2006, 46 § 994 (U.K.); Canada Business Corporations Act, R.S.C., ch. C-44 (1985); Corporations Act, 2001, § 232 (Austral.).

stakeholders themselves are likely not to be able to articulate their long-term interests.[222]

The fact is that during the life of a corporation some stakeholders will be more important to a corporation than others. If this is so, are directors to take this into account in balancing interests? If they do they might be subject to claims of unethical conduct, but if they do not they might hamper the success of the corporation. Of course, the more stakeholder groups there are in a corporation, the more difficult it is, potentially, for directors to take all interests into account in what they propose to do.

The danger is that in some circumstances the directors are in a "no win situation" and might feel that the preferable thing to do is nothing. Kenneth Goodpaster is concerned that the stakeholder approach is likely to push "decision-making towards paralysis because of the dilemmas posed by divided loyalties and, in the final analysis, represents nothing less than the conversion of the modern private corporation into a public institution . . . ."[223] Ultimately, this could prejudice all stakeholders.

As noted earlier, it is quite possible that a person can be a constituent of more than one stakeholder group, for instance an employee might also be a customer, and the theory fails to determine in which capacity he or she is to be included in the managers' balancing calculation.[224] Members of the same group might not agree on what is a benefit for that group,[225] so how are managers in fact to make a determination? Further, directors have the dual responsibility of deciding who is a stakeholder and then implementing their decision, which leaves room for self-dealing.

It might be argued that the need to engage in balancing can exacerbate the transaction costs of corporations. However, stakeholder theorists might counter that the trust engendered between corporations and their stakeholders can reduce costs as stakeholders will not feel the need to require the same checks and balances as they would if management were pursuing a different approach.

One specific concern that writers have with balancing is where the managers are identified as stakeholders, for it is the managers

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[222] SANDRA S. BERNS, COMPANY LAW AND GOVERNANCE: AN AUSTRALIAN PERSPECTIVE 149 (Oxford Univ. P. 1998).

[223] Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis, in* THE CORPORATION AND ITS STAKEHOLDERS: CLASSIC AND CONTEMPORARY READINGS 115 (M. Clarkson ed., 1998).

[224] Sternberg, *supra* note 131, at 4.

[225] *Id*. at 5.

who will usually be required to do the balancing.[226] If they have a stakeholder role, are they then not judges in their own cause? But many will regard managers as a mediating body between the stakeholder groups, rather than stakeholders per se.[227] This latter approach is certainly to be preferred because they cannot take their interests into account in balancing. Of course, the sceptic might say that the managers would take their interests into account first before doing any balancing whatsoever.

While balancing seems meritorious, in practice it would be very difficult for a director, in many situations, to know what to do. The main problem is that balancing is a nebulous idea unless there is a goal that has been set for the balancing exercise. To what end is the balancing to be directed? To be effective any balancing must be done in the context of achieving an aim. The problem is that "[a]dvocates of traditional stakeholder theory . . . hand managers a theory that makes purposeful decisions impossible. And, with no way to keep score, stakeholder theory forces managers to be unaccountable for the very actions through which they were to be evaluated."[228]

Another leading argument against the theory, and based on the notion that directors have to consider many interests, is that directors are given licence to do whatever they like, and that state of affairs is likely to lead to directors, as rational actors, engaging in either or both of two kinds of behavior. The first is opportunistic activity: directors taking the opportunity to benefit themselves at the expense of others. The second is shirking: not devoting their best efforts to the tasks at hand. These kinds of activity are possible because directors end up accountable to no one (known as the "too many masters" problem). Judge Frank Easterbrook and Professor Daniel Fischel have stated that "[a] manager who is told to serve two masters (a little for the equity holders, a little for the community) has been freed of both

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[226] *See* Philip Coelho et al., *The Social Responsibility of Management: A Reprise* 18 MID-AMERICAN J. OF BUS. 51, 53 (2003).

[227] Lawrence. Mitchell, *A Critical Look at Corporate Governance,* 45 VAND. L. REV. 1263, 1272 (1992); *see* Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance,* 97 NW. U. L. REV. 547 (2003); *see also* Ronald Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership,* 34 J. CORP. L. 247, 249 (2008).

[228] Thomas Donaldson, *The Stakeholder Revolution and the Clarkson Principles,* 12 BUS. ETHICS Q. 107 (2002); *see also* F. Robins, *Why Corporate Social Responsibility Should be Popularised but not Imposed,* 8 CORP. GOVERNANCE 330, 333 (2007).

and is answerable to neither. . . . Agency costs rise and social wealth falls."[229]

It is likely that "[a]ll but the most egregious self-serving managerial behavior will doubtless serve the interests of *some* stakeholder constituencies and work against the interests of others . . . ."[230] Hence, directors can mount a credible defence in relation to what they have done and can play off one group against another. They can claim that after balancing interests they made a decision to benefit stakeholders X and Y, and this decision just happened to benefit or protect themselves. It is difficult to impugn the decision. Professor Oliver Hart says that requiring managers to consider the interests of all constituencies "is essentially vacuous, because it allows management to justify almost any action on the grounds that it benefits some group."[231] In such a system the directors are arguably given unfettered discretion that cannot be monitored. The concern is that directors will pay lip-service to the need to consider the interests of stakeholders, and then make the decision that they want, possibly based on self-interest. There is the general point that directors should not be permitted to decide what to do with corporation assets and its business based on caprice because they should be accountable for what they do with other people's property. While it has been said that managers will be more accountable and subjected to greater monitoring if they have to take into account all stakeholders,[232] it makes sense to say that if they have a responsibility to a lot of stakeholders they virtually become accountable to no one.[233] Consequently, one of the problems is to ascertain how one can make directors sufficiently accountable.

The riposte from the adherents of stakeholder theory might be that the view expressed in the last paragraph is too cynical, and managers, as professionals, will be concerned about their reputation and integrity and will refrain from acting opportunistically or shirking. Stakeholderism states that we have to rely upon the trustworthiness of the directors. Professors Margaret Blair and Lynn Stout, amongst others, point out there is ample evidence from behavioral theory of people acting altruistically and sacrificing selfish interests to achieve a result that benefits others, and this is consistent with ethical behav-

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[229] FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (Harv. Univ. Press, 1991); *see also* Jensen, *supra* note 205, at 305.
[230] Alexei M. Marcoux, *Balancing Act,* CONTEMPORARY ISSUES IN BUSINESS ETHICS 97 (J. DesJardins & J. McCall eds., 2000).
[231] Oliver Hart, *An Economist's View of Fiduciary Duty*, 43 U. TORONTO L.J.299, 303 (1993).
[232] Kent Greenfield, *A New Era for Corporate Law*, *in* PAPER SERIES ON CORPORATE DESIGN, 19, 23 (Allen White & Marjorie Kelly, eds. 2007), *available at* http://www.corporation2020.org/pdfs/SummitPaperSeries.pdf (last visited Mar. 1, 2010).
[233] Blair, *supra* note 26, at 225.

ior.[234] Under the stewardship theory, embraced by many favoring stakeholder theory or something akin to it, there is a focus on directors' need for achievement, responsibility, recognition, altruism, and respect for authority. As a result, they can be seen not as opportunistic, but as good stewards who will act in the best interests of the stakeholders.

The issue boils down to a philosophical debate. The shareholder primacy school says that you cannot trust directors because human nature is such that it will want to seek benefits at every possible turn (and you must have tight monitoring measures in place), whereas the stakeholder theory school states that while there will be some improper actions by directors, generally they will be fair, can be trusted, and will act in good faith, making them good stewards of the corporation. The latter view asserts that directors have other motives beyond self-interest including professionalism, satisfaction in performing well, and respect for authority.

Another concern is that in the United States and some other jurisdictions, such as Australia,[235] directors are protected by the business judgment rule.[236] In the United States the business judgments of directors are only reviewed in extraordinary circumstances[237] because of the business judgment rule which might be regarded as U.S. corporate law's central doctrine,[238] and pervades every aspect of corporate law in the United States.[239] The rule takes the focus of the court from whether the director made the correct decision to whether the director adhered to adequate and appropriate processes that led to the decision. Consequently, it is said to provide a "safe harbor" for directors. So, American directors are entitled to rely on the business judgment rule if they can establish, in relation to the particular judgment in question, that: they exercised a business judgment (including a decision to refrain from taking action); the judgment was made in good faith for a proper purpose; they did not have a material personal interest in the subject matter of the judgment, so that there was no conflict of interest; they informed themselves about the subject matter of the judgment to the extent that they reasonably believed to be appropri-

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[234] Margaret Blair & Lynn. Stout, *Director Accountability and the Mediating Role of the Corporate Board*,79 WASH U. L.Q. 403, 438–39 (2001).

[235] Corporations Act, 2001, c. 180(2) (Austl.).

[236] *See, e.g., In re Healthco Int'l Inc.* 208 B.R. 288, 306 (Mass. 1997). *See also* PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS § 4.01 (Am. Law Inst., Tentative draft No. 1 1982).

[237] David Rosenberg, *Galactic Stupidity and the Business Judgment Rule*, 32 J. CORP. L. 301, 301–02 (2007).

[238] *See generally* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 241 (Foundation Press 2002).

[239] *Id.* at 301.

ate;[240] and they rationally believed that the judgment was in the best interests of the corporation.[241] The presumption is that the director had acted properly and it is the job of the plaintiff to rebut this presumption.[242] If the plaintiff can do so, then the director has to establish the fairness of the transaction that is impugned.[243]

The rule is designed to preserve directors' discretion and to protect the directors from courts using hindsight to find them liable. The rule provides, in a nutshell, that courts will not substitute their business judgment for that of the informed, reasonable director who acts bona fide in the best interests of the corporation,[244] and an action will fail even if the claimant can demonstrate that the action of the directors has caused loss to the corporation, unless the director's actions do not meet the aforementioned qualities.[245] So, a U.S. director cannot be held liable if he or she makes a bad judgment or a decision which he or she makes is unsuccessful, provided the above factors can be established on his or her behalf.[246] In the context of our discussion, it means that in the United States if a director has acted in good faith then it will not matter whose interests have been enhanced.

While the business judgment rule does not apply in the United Kingdom, a derivation of it arguably does.[247] The courts do not second guess what directors have done. In fact, U.K. judges have consistently

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240 *See* Cede & Co. v. Technicolor, Inc. 634 A.2d 345, 369–70 (Del. 1993) (holding that the directors failed to reach an informed decision).

241 PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: ANALYSIS AND RECOMMENDATIONS § 4.01 (Am. Law Inst., Tentative draft No. 1 1982). *See, e.g*, Parnes v. Bally Entm't, 722 A.2d 1243, 1246 (Del. 1999) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)); *see also* BAINBRIDGE, *supra* note 238, at 274–75.

242 BAINBRIDGE, *supra* note 238, at 269–70 (asserting that the Business Judgment Rule is really an assumption and not a presumption in the "strict evidentiary sense" of presumption).

243 Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625, 628 (2000).

244 *See, e.g.*, Spiegel v. Buntrock, 571 A.2d 767, 774 (Del. 1990); Moran v. Household Int'l Inc. 500 A. 2d 1346, 1356 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Richard Cieri et al., *The Fiduciary Duties of Directors of Financially Troubled Companies*, 3 J. BANKR. L. & PRAC. 405, 408 (1994).

245 David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?,* 70 GEO. WASH. L. REV. 890, 903–04 (2002).

246 Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982).

247 THE LAW COMMISSION, COMPANY DIRECTORS: REGULATING CONFLICTS OF INTEREST AND FORMULATING A STATEMENT OF DUTIES, 1999, LC261, at 286. *See also* Company Law Review, Modern Company Law for a Competitive Economy: Developing the Framework (DTI, 2000) at ¶ 3.69–3.70 (determining statutory statement rule would add complexity by being overly harsh in some cases and giving too much leeway in others).

refrained from reviewing business judgments made by directors,[248] and thus they have protected directors from the use of judicial hindsight. In the United Kingdom, directors are required under section 172 of the Companies Act 2006 to act in the way that they consider, in good faith, would be most likely to promote the success of their company for the benefit of the members as a whole and in doing so they are to have regard for:

> (a) The likely consequences of any decision in the long term;
>
> (b) the interests of the company's employees;
>
> (c) the need to foster the company's business relationships with suppliers, customers and others;
>
> (d) the impact of the company's operations on the community and the environment;
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct; and
>
> (f) the need to act fairly between the members of the company.[249]

The fact of the matter is that while the provision seems to be stakeholder-oriented, it is up to the directors, and not the courts, to decide what should benefit the shareholders and which of the factors listed, if any, should affect what they decide to do, provided that the directors act in good faith.[250] Except for cases of egregiously bad behavior, it is likely to be very difficult to demonstrate that the directors have breached their duty of good faith.[251] It is very difficult, in most cases, to impugn the actions of someone who is able to state clearly that he or she believed that what was done was in the corporation's best interest. Directors normally assert that their motives were pure. Courts will be reluctant to decline to accept oral evidence from directors concerning their motives, especially because finding the existence of improper motives is relatively serious.[252]

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[248] Rupert Reed, *Company Directors – Collective or Functional Responsibility*, 27 CO. LAW. 170, 170 n.2 (2006).

[249] Companies Act, 2006, 46 § 172(1) (U.K.).

[250] Andrew Keay, *Enlightened Shareholder Value, the Reform of the Duties of Corporation Directors and the Corporate Objective*, LLOYDS MAR. & COM. L.Q. 335, 336 (2006); *see generally* ANDREW KEAY, DIRECTORS' DUTIES (Jordan Publishing 2009).

[251] PAUL DAVIES, GOWER AND DAVIES' PRINCIPLES OF COMPANY LAW 389 (Sweet & Maxwell 2003). *See also* Richard Nolan, *The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report*, 6 THEORETICAL INQUIRIES IN LAW 413, 424 (2005).

[252] ROBIN HOLLINGTON, SHAREHOLDERS' RIGHTS 51 (Sweet & Maxwell 2007).

Before closing this part of the article we must acknowledge the fact that there are responses to the concern over the issue of balancing those constituents with conflicting interests. First, it might be said that balancing is part and parcel of being a director. Some management specialists have even said that managing competing interests is a primary function of management.[253] The fact that balancing diverse interests is within directors' abilities and skills is something that has been recognised as far back as 1973 by a U.K. Department of Trade and Industry Report,[254] and by some American courts.[255] It is not unmanageable or unreasonable for persons occupying positions like directors to make allocative decisions. Directors have been classified as fiduciaries, and society regularly requires those who are fiduciaries to make balanced decisions that can be quite difficult.[256] Proponents of this view might point to another kind of fiduciary: the trustee. Trustees have to make investment decisions sometimes with various categories of beneficiaries in mind. This can involve weighing risk in a similar manner that is required by a director under a duty to consider creditor interests when his or her corporation is insolvent.[257] It usually involves the steering of a middle course, whatever that might entail in a given case.

Second, although balancing might be demanding, there is evidence that directors are often seeking to balance interests in the decisions they make.[258] A corporate reputation survey of Fortune 500 corporations (the largest listed corporations in the United States) found that satisfying the interests of one stakeholder does not automatically mean it is at the expense of other stakeholders.[259] It might

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[253] H. IGOR ANSOFF, IMPLANTING STRATEGIC MANAGEMENT (Prentice-Hall 1984); *see also* Jeffrey Harrison & R. Edward Freeman, *Stakeholders, Social Responsibility and Performance: Empirical Evidence and Theoretical Perspectives,* 42 ACAD. OF MGMT. J. 479, 479 (1999). Management commentators have asserted that directors are in effect to act as referees between two stakeholder groups; *see also* MASAHIKO. AOKI, THE CO-OPERATIVE GAME THEORY OF THE FIRM (1984).

[254] *Company Law Reform*, (London DTI) Cmnd. 5391 at [55]–[59].

[255] See, *e.g.,* Unocal Corp. v. Mesa Petroleum Corp., 493 A.2d 946 (Del. 1985).

[256] Rutheford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. UNIV. L. REV. 561, 593 (1996).

[257] It might be asserted, with some merit, that directors and trustees are regarded differently in a number of ways. For example, a trustee is not permitted to engage in the same amount of risk-taking as directors, whose role is partly entrepreneurial. *See* ANDREW KEAY, DIRECTORS' DUTIES, *supra* note 250, at 18–21.

[258] It has been noted that directors do already consider the interests of various constituents. *See* Janet Dine, *Implementation of European Initiatives in the UK: The Role of Fiduciary Duties*, 3 COMPANY. FIN. & INSOLVENCY L. REV. 28, 223 (1999).

[259] *See generally* Lee E. Preston & Harry J. Sapienza, *Stakeholder Management and Corporate Performance*, 19 J. BEHAV. ECON. 361 (1990).

be concluded that considering the interests of non-shareholding stakeholders are considered does not necessarily mean that shareholders' interests will be prejudiced. It has been found empirically, in a study of U.K. private water companies, that the requirement that directors consider customer interests as well as that of shareholders can result in "mutual benefits for different stakeholder groups with apparently conflicting economic interests."[260] For instance, if directors take into account stakeholder interests by reviewing all available material information relating to the corporation before embarking on any actions, shareholders might well benefit in that the corporation might be spared from pursuing an inappropriate strategy. Further, in undertaking the necessary monitoring to protect stakeholder interests, directors could identify improvements in the corporation's affairs, thereby promoting overall benefits for the corporation.[261]

Third, even with shareholder primacy it is necessary for directors to engage in some balancing. Shares come in different shapes and sizes, and corporations often have different kinds of shares, such as ordinary (common) and preferred, and it is incumbent on directors to balance the interests of different kinds of shareholders, so that they act fairly between them[262] as, on occasions, these different classes of shareholders have opposing interests.[263] Some preferred shareholders may have interests that resemble those of fixed claimants, such as creditors, more than those associated with ordinary (common) shareholders.[264] Some shareholders intend only to retain shares for a short term, while others are in for the long haul. Other shareholders hold a diversified portfolio, with their investment spread around a number of corporations, and still others might have all their investment concen-

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[260] Stuart Ogden & Robert Watson, *Corporate Performance and Stakeholder Management: Balancing Shareholder and Customer Interests in the UK Privatized Water Industry*, 42 ACAD. MGMT. J. 526, 536 (1999).

[261] Empirical evidence, obtained in a study by the Financial Times of Europe's most respected companies, found that chief executive officers were of the view that one of the features of a good company was the ability to balance the interests of stakeholder groups. Of course, most of the non-UK companies surveyed would favor a stakeholder approach to corporate governance. Eileen Scholes & David Clutterbuck, *Communication with Stakeholders: An Integrated Approach*, 31 LONG RANGE PLAN. 227, 230 (1998).

[262] *See* Mills v. Mills, 60 C.L.R. 150, 164 (1938); Re BSB Holdings Ltd. (No. 2), [1996] 1 B.C.L.C. 155, 246–49.

[263] *See* Morey W. McDaniel, *Bondholders and Stockholders*, 13 J. CORP. L. 205, 273 (1998); s*ee also* Campbell, *supra* note 256, at 593; Royce de R. Barondes, *Fiduciary Duties of Officers and Directors of Distressed Corporations*, 7 GEO. MASON L. REV. 45, 78 (1998).

[264] *See* Jonathan R. Macey & Geoffery P. Miller, *Corporate Stakeholders: A Contractual Perspective,* 43 U. TORONTO L.J. 401, 433 (1993).

trated in the one corporation. Notwithstanding this, no concerns are voiced about the stresses of decision-making for directors in undertaking a balancing of the interests of the various types of shareholders, nor is it argued that directors, in balancing those interests, are too burdened.

D. Unworkable

The problem that exists when there is a large and apparently untrammelled stakeholder grouping, something that underlies the material considered in the previous two sections of the article, is that the concept is unworkable. There are a huge number of potential stakeholders where large corporations are concerned, and the problem for a board is to determine how they are to address the needs of divergent groups.[265]

It has always been perceived that one of the strengths of the shareholder primacy position, certainly when compared with stakeholder theory, has been that it provides greater certainty and it is workable.[266] In fact, one of the main arguments against the stakeholder theory is that it has problems when it comes to application—it is indecisive and imprecise. Elaine Sternberg has said that the "essential principle of stakeholder theory that corporations are accountable to *all* their stakeholders" is something that is "unworkable."[267]

The Hampel Report, delivered in 1998 as part of the development of a corporate governance code in the United Kingdom, stated that having directors' duties defined in:

> [T]erms of the stakeholders would mean identifying all the various stakeholder groups; and deciding the extent and nature of the directors' responsibility to each. The result would be that the directors were not effectively accountable to anyone since there would be no clear yardstick by which to judge their performance. This is a recipe neither for good governance nor for corporate success.[268]

The approach in stakeholder theory is to incorporate values as a critical aspect of the strategic management process, but the riposte from shareholder primacy advocates is: how do managers identify these values and how are they to inform decision-making?[269] They argue that arriving at a set of values that accounts for the concerns that

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265 Leung, *supra* note 110, at 621.
266 This is debatable. *See* Keay, *supra* note 32.
267 Sternberg, *supra* note 131, at 5.
268 ROBERT HAMPEL, FINAL REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (1998), ¶ 1.17.
269 Sundaram & Inkpen, *supra* note 171, at 353.

exist across a heterogeneous group of stakeholders requires managers to fulfil unrealistic expectations.[270]

The Company Law Review Steering Group ("CLRSG"), established in 1998 to examine U.K. company law and recommend reform measures, was against stakeholder theory (it referred to it as "pluralism")[271] because:

> [I]n particular that this would impose a distributive economic role on directors in allocating the benefits and burdens of management of the company's resources; that this role would be uncontrolled if left to directors in the form of a power or discretion; and that a similarly broad role would be imposed on the judges if the new arrangement took the form of an enforceable obligation conferring rights on all the interested parties to argue for their interests in court.[272]

Frederick, Davis, and Post have sought to make stakeholder theory work, and they have proposed several stages in conducting stakeholder analysis, namely: mapping stakeholder relationships, mapping stakeholder coalitions, assessing the nature of each stakeholder interest, assessing the nature of each stakeholder's power, constructing a matrix of stakeholder priorities, and monitoring shifting coalitions.[273] The problem is that this involves an extremely complicated and time-consuming enterprise which is, arguably, not an approach managers can adopt when faced with the rigours of decision-making and managing of complex corporations. Even if one can carry out what these scholars recommend, it is highly debatable whether it would facilitate the decision-making of the directors. The theory provides that directors are to be accountable to all stakeholders, but that is not possible. As we have seen earlier, what happens with large corporations which have many stakeholders is that the managers become accountable to no one;[274] managers are able to defend allegations that they have failed to act properly by asserting that they have sought to balance stakeholder interests.

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[270] *Id.* at 353.

[271] *See* DEAN, *supra* note 37, at 93. Arguably pluralism differs in some respects from stakeholder theory. Dr Janice Dean states that the former implies diversity and conflict while the latter emphasises inclusivity. Nevertheless, there are many similarities.

[272] Company Law Review Steering Group, *Modern Company Law for a Competitive Economy*: *Developing the Framework*, ¶ 2.12 (2000).

[273] Gerald Vinten, *Shareholder v. Stakeholder—Is There A Governance Dilemma?,* 9 CORP. GOVERNANCE: AN INT'L REV. 36, 41 (2001) (*citing* W. FREDERICK ET AL., BUSINESS AND SOCIETY (McGraw-Hill 1988)).

[274] Sternberg, *supra* note 131, at 4.

Many stakeholder theorists argue that to make stakeholder theory work it is necessary to have stakeholders represented on the board of directors, thereby providing, *inter alia*, procedural justice.[275] As with corporations in some European states and elsewhere, it is said that employees should have director representatives on boards or works councils that have a part to play in the decision-making process. But how could one possibly have some form of representation from all stakeholders on one board? Assuming one can determine who the stakeholders in the corporation are, a difficult task as already noted, there is likely to be too many stakeholder groups, even if one applies the narrow approach to the definition of stakeholder, for all of them to be represented. In the 1970s Ralph Nader recognized the fact that it seemed to be "impossible to design a general 'interest group' formula which will assure all affected constituencies of large industrial corporations will be represented . . . ."[276] In European corporations where representation occurs, many of the corporations have a two-tier board system, and representation is on the supervisory board alone, and not the management board. The supervisory board can be large and does not have to be as flexible as the management board or the one tier board used elsewhere, most notably in Anglo-American jurisdictions.

E. Stakeholders are Protected by Contract and/or Regulation

Shareholder primacy scholars argue that non-shareholding stakeholders, such as creditors and employees are, unlike shareholders, adequately protected by contract and/or statutory provisions, so managers should not manage for the benefit of these stakeholders.[277] For instance, stakeholders can provide in the terms of the contracts which they make with the corporation that they are granted safeguards in the nature of governance rights.[278] All of this leads to the argument that if directors are required to take the interests of such constituencies into account, the constituencies are receiving very special, preferential treatment, or "having a second bite of the apple." Critics compare this to shareholders who have no such benefits.

Stakeholder theorists usually take issue with the general assertion that constituencies are able to protect themselves by the terms of the contracts that they make. It is acknowledged that some groups,

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[275] *See, e.g.*, Phillips, Freeman & Wicks, *supra* note 49.

[276] D. Gordon Smith, *The Dystopian Potential of Corporate Law*, 56 EMORY L.J. 985, 996 (2008) (*citing* RALPH NADER ET AL., TAMING THE GIANT CORPORATION 124 (1976)).

[277] Hansmann, *supra* note 9, at 442.

[278] G. Kelly & J. Parkinson, *The Conceptual Foundations of the Corporation: a Pluralist Approach*, *in* THE POLITICAL ECONOMY OF THE CORPORATION 118, 118 (J. Parkinson et al. eds., 2000); *see also* Fisch, *supra* note 32.

such as powerful creditors like banks, might acquire protection via contract, but most constituencies do not obtain protection for a number of reasons, such as lack of bargaining power, ignorance, or insufficient funds to pay necessary professional costs. In the real world it is infrequent to find contractual arrangements made by equals, and many contracts allow little room for negotiation. The result is that costs are imposed on third parties with whom the corporation does business.[279] Stakeholder adherents point to the fact that when making contracts, many stakeholders often suffer from informational asymmetry in that the managers of corporations know far more than they do, particularly about the performance and systems of the corporation. Also, it is widely reported that the kinds of contracts we are considering are incomplete.[280] This means that there are gaps in the terms and the parties have not envisioned future events.

Besides being protected by contract, shareholder primacists submit that non-shareholding stakeholders are also safeguarded by regulatory law, such as employment and consumer laws.[281] Stakeholder theorists usually respond that this is too broad an assertion, as many laws are of limited or no benefit to stakeholders.[282] Even if they are, stakeholders have to take the initiative to inform regulatory authorities, or take civil action themselves. This involves a significant time/cost factor.

F. Enforcement

Adolf Berle observed that if one abandons the focus on shareholder primacy there needs to be a clear and reasonably enforceable scheme put in its place.[283] Enforcing the stakeholder approach has, as recognised as far back as the 1930s, significant problems in implementation.[284] Berle was of the view that running corporations for many constituencies was attractive, but he could not determine how it could be done.[285] He could not see how corporations could be run for stakeholders, and so that is why he regarded shareholder primacy as the way forward.[286] It was a scheme that allowed for the control of directors and shareholders.[287] Even E. Merrick Dodd, a proponent of an

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[279] Easterbrook & Fischel, *supra* note 126, at 1156.
[280] Fisch, *supra* note 32.
[281] Dodd, *supra* note 111, at 195.
[282] *Id*. at 194.
[283] A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).
[284] *E.g.*, Dodd, *supra* note 111, at 199.
[285] *See* Berle, *supra* note 283, at 1368.
[286] *Id.*
[287] *Id.*

early version of stakeholder theory, acknowledged that there were significant problems in implementation of a stakeholder approach to corporate governance.[288]

Another major problem is enforcing any breach of a stakeholder approach.[289] Do you give the power to anyone who is a stakeholder to bring proceedings where there is a breach of duty? Are legal proceedings appropriate? The leading problem in this area is that the breach will usually be perpetrated by one or more directors and it will hurt the corporation.[290] It is trite law across jurisdictions that only the corporation can enforce any harm done to it.[291] As the directors manage the corporation and have the power to decide whether or not legal proceedings should be initiated on the part of the corporation, if they have breached their duties they are unlikely to sanction proceeding against themselves. In most Anglo-American jurisdictions there is legislative[292] and/or judicial authority that permits shareholders to take derivative proceedings against the directors and/or other miscreants who have damaged the corporation in order to obtain a judgment in favour of the corporation.[293] But, derivative proceedings will not help most stakeholders as the only ones who can bring such proceedings, for the most part, are the shareholders.[294] Except where they can see some benefit for them in due course, or they are members of other stakeholder groups, shareholders, as rational economic actors, are not likely to be inclined to embark on litigation (which opens them up to a costs order in most jurisdictions).[295]

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[288] Dodd, *supra* note 111, at 205.

[289] *Id.* at 197.

[290] *Id.*

[291] *Id.*

[292] *See, e.g.*, Canada Business Corporations Act, R.S.C., ch. 239 (1985); Corporations Act, 2001, c. 236 (Austl.); Singapore Companies Act, § 216A; New Zealand Companies Act 1993, No. 105, § 165; Hong Kong Companies Ordinance, (2005) Cap. 32, § 168BC. (H.K.).

[293] For examples from the United States, see, e.g., Kusner v. First Pa. Corp., 395 F. Supp. 276, 280–81 (E.D. Pa. 1975); Dorfman v. Chem. Bank, 56 F.R.D. 363, 364–65 (S.D. N.Y. 1972).

[294] *But see* Canada Business Corporations Act, R.S.C., ch. 238(d) (1985) (including, amongst those who may make applications, "any other person who, in the discretion of a court, is a proper person to make an application."); Singapore Companies Act, § 216A(1)(c) (providing that the range of persons who can apply for a derivative action includes "any other person who, in the discretion of the Court, is a proper person."). For further discussion of this issue, see Keay, *supra* note 89.

[295] Shareholders are rarely going to take action to protect other stakeholders. It is rare to see activist shareholders succeeding with large corporations. But recently some BP shareholders have done this in relation to the company's investment in Canada's oil sands. *See* Robin Pagnamenta, *BP Faces Protest at Oil Sands Devel-*

John Parkinson recognized the enforcement problem when he said that placing a duty on directors to balance conflicting interests would:

> [P]resent the courts with a near-impossible task . . . not only would the court need to assess the likely impact on each group of a contested business policy, in both the short and the long term, but also it would have to evaluate the policy in accordance with a theory which stipulated when one set of interests should prevail over the others.[296]

Even if there were proceedings that could be taken by a stakeholder, it would be hard to assess if the interests of some stakeholders have been prejudiced, and then it may well be difficult to quantify the extent of the loss, so any proceedings could, arguably, only lead to an award for the corporation, as at present.[297]

G. Wrong View on Accountability

Elaine Sternberg argues that the stakeholder theory is confused when it comes to the issue of accountability.[298] She asserts that a corporation cannot be accountable to all people, groups, or things that are related in some way, even if obscurely; and while it may be said that a corporation should respond to so-called stakeholders such as employees or suppliers, this does not mean that it is accountable to them, except where there is some contractual (or legislative) provision requiring it in some form or another.[299] Further, those whose cooperation is sought by a corporation cannot expect the corporation to account to them.[300] If they are not content with what the managers are doing then they have the option of withdrawing their cooperation.[301]

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opment, THE TIMES, Feb. 7, 2010, *available at* http://business.timesonline.co.uk/tol/business/industry_sectors/natural_resources/article7018483.ece.

296 J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY 86 (1993).

297 Gregory Scott Crespi, *Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance*, 36 CREIGHTON L. REV. 623, 637–41(2003) (attempting to explain how a court might go about determining whether a stakeholder had been injured by the decision-making of the directors, and, if so, to what extent. But, with respect, the process with which a court would be faced, if the learned commentator's explanation were applied, is extremely complex. Crespi seemed to acknowledge this problem later in the article in which his views were asserted as he states that any obligation on a director in relation to stakeholder interests would have to be an aspirational norm rather than a legal directive.).

298 STERNBERG, *supra* note 82, at 50.

299 Sternberg, *supra* note 131, at 7.

300 *Id.*

301 *Id.*

One response might be that most stakeholders will not be in a position to withdraw their involvement in the corporation. For instance, employees whose skills are inextricably related to what the corporation does and not easily transferable elsewhere, and suppliers who are bound to provide goods or services for a prescribed period of time are instances of stakeholders who cannot end their cooperation in the short term.

H. Fairness

The value of fairness is often highlighted as an element of stakeholder theory.[302] But, it is argued by some contractarians that favoring non-shareholding stakeholders when they do not have contractual rights to warrant such favor involves an unfair and illegitimate transfer of value and comes at the expense of the shareholders.[303] It is contended that employing stakeholder theory ignores the free choice that was made to set up the corporation;[304] the establishment of the corporation was engineered by the shareholders, and they expected the corporation to be their investment. When contracting, stakeholders are able to "price up" their provision of resources and so protect themselves while shareholders cannot do so.[305]

It has also been argued that stakeholders are not as vulnerable as they are often painted to be, so taking into account their interests means that they are unfairly advantaged.[306] It is asserted that non-shareholding stakeholders do not invest all of their resources in the corporation at the one time, but incrementally, so if their expectations are not met or the bargain they struck is not honored, they can withdraw their investment without substantial loss.[307]

Another issue of fairness that is relevant is that it is contended that corporations who wish to engage in stakeholderism are not able to treat all stakeholders equally.[308] It is acknowledged by stakeholder theory that there will have to be, on occasions, partiality shown. It might be said that this, therefore, constitutes unfairness, given that many regard the theory to be based on Kantian notions of equality.[309]

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[302] Millon, *supra* note 97, at 1.
[303] *Id.*
[304] Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 187 (1998).
[305] Alexei M. Marcoux, *A Fiduciary Argument Against Stakeholder Theory*, 13 BUS. ETHICS Q. 1, 17 (2003).
[306] *Id.*
[307] *Id.*
[308] *Id.* at 5 and 19.
[309] Fort, *supra* note 304, at 184.

It is always possible that managers could, in purporting to implement stakeholder theory, choose to favor constituencies which have the best bargaining strength or political clout, thus furthering their own interests, and if they did so it would clearly be a breach of the value of fairness.

I. Inefficient

It has been submitted that if those (the shareholders) who do not receive the marginal gains from the corporation's endeavor are not influencing decision-making, the corporation's wealth will not be maximized and, therefore, those involved in the corporation will not benefit.[310] The reason for this is that if stakeholders' interests are to be taken into account then the directors will have to enter into only those ventures which will satisfy these interests. It is likely that these sorts of ventures will be, generally, low risk as it is not in the interests of creditors, employees, and others with fixed interests that the corporation embarks on projects that might produce huge benefits, but are of high risk.[311] This is because most non-shareholding stakeholders will not benefit from any great successes of the corporation, but will lose significantly if the risky action fails and the corporation becomes insolvent. It might be contended that limiting the corporation to low risk activity could stifle the corporation's opportunities for higher returns, and the corporation's resources are not being used efficiently. This might curtail social wealth.

J. Vagueness in Promises to Stakeholders

Some assert that directors are obliged to consider stakeholder interests in order to fulfil implied promises made to stakeholders.[312] This assertion suffers from the same or similar problems as it does in relation to shareholder primacy theory.[313] No such promises are generally ever made to stakeholders, and no contract exists between the managers and the stakeholders; any contracts are between the corporation and the stakeholders.[314] There is no indication as to the sub-

[310] EASTERBROOK & FISCHEL, *supra* note 229, at 69.
[311] *See* Jensen & Meckling, *supra* note 84, at 348–49 (discussing how shareholders at times may support the taking of excessive risk at the direct expense of other stakeholders, particularly creditors, in the hope of realising higher returns, and in the process running the risk of betting the company away (i.e. the asset substitution problem)); *see also* Clifford W. Smith & Jerold B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 119 (1979).
[312] *See* Keay, *supra* note 32, at 27–28.
[313] *Id.* at 44.
[314] Of course, the directors could make a contract with stakeholders on behalf of the company.

stance of the promise. For many stakeholders it would be impossible to establish what directors are to do in relation to them and their interests, and what interests they are to consider and favor. Take the community for instance. As Eugene Schlossberger has stated, "[T]he ways in which a company should be sensitive to the needs of its community are complex, flexible, subtle and changing characteristics ill-suited to a contract."[315] The body of creditors is one of the few stakeholder groups that might secure promises from management. In agreeing to provide funds or credit, creditors might elicit a promise that directors will engage in certain kinds of contact or refrain from engaging in others.

Finally, rather than relying on particular promises, some theorists rely upon the fact that managers should consider stakeholder interests out of benevolence.[316]

VI. CONCLUSION

Stakeholder theory is a theory that determines what should be the aim of the large public corporation. After explaining what the theory is, this article has sought to analyze the reasons given for theory, as well as the arguments that have been raised against it. Stakeholder theory purports to bring economics and ethics together, and to ensure that the interests of all stakeholders are taken into account by managers when deciding what action should be taken by the corporation. Importantly, stakeholders are not to be seen as the means by which managers maximize the wealth of shareholders; considering stakeholder interests and benefiting such groups should be seen as an end in itself.

One of the major disagreements between the two leading theories that seek to determine what the corporate objective is relates to the issue of whether the managers can or cannot be trusted. Can they be trusted to seek the betterment of the constituencies notwithstanding a lack of certainty in how they are to operate? The stakeholder theory relies on the professionalism and trustworthiness of the directors, while the shareholder primacy theory does not accept this as a relevant element as it assumes that directors will act opportunistically or shirk.

It might be argued that implementation is a problem for stakeholder theory even leaving director opportunism and shirking aside. Directors who want to act honorably and properly would have difficulty in some situations knowing what to do. For instance, what if a course of action will benefit constituencies A, B, and C, but not D and

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315 Eugene Schlossberger, *A New Model of Business: Dual-Investor Theory,* 4 BUS. ETHICS Q. 459, 463 (1994).

316 *Id*. at 462.

E? Another equally efficient course of action will benefit constituencies A, D and E, but not B and C. What does the director do? How do the directors decide which of the two actions should be taken? They cannot benefit all groups, and they have no real guidance as to which action they should take. Should they, therefore, take no action at all? Conceivably, inertia could damage all constituencies.

The stakeholder model is attractive to many people and groups. It emphasises values like trust and fairness, but it has, recognised as far back as the 1930s,[317] significant problems regarding clarity and implementation. Adolf Berle was of the view that running corporations for many constituencies was appealing, but he could not determine how it could be done.

The fact is, stakeholder theory has a lot of adherents and continues to have influence outside of stakeholder oriented jurisdictions, but, as with many models, it has substantial difficulties. Chief among these are: its failure to define who are stakeholders of a corporation; an inability to explain critical aspects of the theory, such as how directors are to balance the interests of stakeholders; its lack of clarity; a failure to articulate how the theory would work; the fact that it struggles to provide a normative basis; and it has not laid down a convincing answer to how the theory can be enforced. Arguably, shareholder primacy is not as attractive from a normative perspective, although it might be regarded as more pragmatic and workable. While stakeholder theory has attractions, normatively speaking, it is not practical, and it has been argued[318] that stakeholder theory, while solving the problem of shareholder opportunism,[319] leads to a more serious problem of stakeholder opportunism, which can cause corporations to pay a higher cost for public equity capital,[320] because investors are concerned about protecting their investment from rent-seeking by stakeholders.

So, there are significant points that favor the idea that directors should balance the interests of all stakeholders. However, it is submitted that they are outweighed by the many problems that are caused by endeavoring to strike a balance between interests. Clearly, most commentators, whatever view they take, accept that the balancing of stakeholder interests is a tricky issue. It means that directors

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[317] Dodd, *supra* note 111, at 199.

[318] Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1440 (2006).

[319] *See* Jensen & Meckling, *supra* note 84, at 348 (discussing how shareholders choose to take excessive risk at the direct expense of creditors in the hope of realising higher returns, and in the process run the risk of betting the company away (i.e. the asset substitution problem)).

[320] Smith, *supra* note 276, at 1008.

have to solve what some commentators see as impossible conflicts of interests.[321] The conclusion of this article is that stakeholder theory does not have what it takes to be the objective of public corporations. So, if stakeholder theory is lacking, what is the alternative? Many would say that it is shareholder primacy, but there are clearly some convincing arguments that can be mounted against its employment,[322] and consequently there needs to be some further thinking about other viable alternatives.[323]

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[321] There are many American commentators who take this view. *See, e.g.*, Jonathon R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 31 (1991); Vladimir Jelisavcic, *A Safe Harbour Proposal to Define the Limits of Directors' Fiduciary Duty to Creditors in the "Vicinity of Insolvency:" Credit Lyonnais V. Pathe*, 17 J. CORP. LAW 145, 148 (1992); Norwood P. Beveridge, Jr., *Does a Corporation's Board of Directors Owe a Fiduciary Duty to its Creditors?*, 25 ST MARY'S L.J. 589, 621 (1994); *see also* Royal Bank of Canada v. First Pioneer Inv. Ltd., [1979] 27 O.R.2d 352, 354 (Can.).

[322] *See* Keay, *supra* note 32.

[323] *See* Andrew Keay, *Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model*, 71 MOD. L. REV. 663 (2008) (describing one such alternative).