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# A Necessary Shift from Shareholder Primacy toward Stakeholder-Conscious Governance in Light of Corporate Social and Environmental Responsibility

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## ABSTRACT

As concerns over climate change continue to loom large in global economic policy, increasing pressure is being mounted on corporate directors to counteract the rapid environmental degradation that is occurring all across the world. The traditional shareholder primacy model of corporate governance, however, fetters the decision-making power of company directors to profit-maximising activities at the expense of other stakeholders, such as customers, employees, and the environment. This inevitably gives rise to a tension between corporate governance norms and sustainable, socially responsible governance. This article argues that, at the level of doctrine, corporate purpose is undergoing a paradigm shift from strictly shareholderist to stakeholder-conscious governance, prompted by a growing number of social and environmental exigencies. The origins and normative legitimacy of shareholder primacy will be explored, along with the extent to which shareholderist governance can be reconciled with activities of corporate social responsibility. It will be submitted that ultimately, shareholder primacy is teetering on the brink of collapse, as the climate crisis demands corporate purpose to evolve toward a much more holistic, stakeholder-conscious model of governance.

*Keywords: Corporate Governance; Environmental Social Governance; Corporate Social Responsibility; shareholder primacy; climate change*

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# I. INTRODUCTION

Is the role of the corporation in society to do *well*, or to do *good*? This question neatly encapsulates the ethical quandary that resides at the heart of one of the most enduring and spirited debates in corporate law theory. Despite being the subject of a remarkable body of academic literature produced by generations of leading corporate scholars, the question of what purpose the corporation should serve in society has yet to be met with a definitive answer. In the absence of a sound overarching teleology in respect of corporate purpose, a substantial amount of resulting confusion has permeated corporate law theory. Differing perspectives on whom corporations should fundamentally serve, whether that be its shareholders or wider society, bear a direct impact on how corporations are governed, including the extent to which company directors strive toward more socially responsible governance at the expense of straightforward shareholder profit-maximisation. How the interests of shareholders, stakeholders and wider society are reconciled within company operations never remains static but rather oscillates between shareholderist and stakeholderist orientated paradigms, often spurred on by scandals in corporate governance or times of crisis. Thus, the shareholder primacy norm that is currently said to dominate corporate governance in the United States and United Kingdom is highly susceptible to change. This article argues that the current model of shareholder primacy in corporate governance is on the brink of collapse and is no longer sustainable as the climate emergency, along with many other societal factors, move to the centre of the economic and political agenda. In light of this, it suggests that a shift toward a more "stakeholder-conscious" model of governance could draw corporate law theory into line with reality. Section II profiles the rise of the shareholder primacy norm within corporate governance and draws on empirical studies to demonstrate that whilst it does permit a degree of strategic and profitable endeavours of corporate social responsibility (CSR), it ultimately limits its full implementation. Section III questions the normative power of shareholder primacy in present day corporate governance and examines how greater consideration of stakeholder interests would widen the scope for company directors to engage with CSR. Following from this analysis, it will be submitted that pure shareholder profit maximisation is growing progressively out of touch with corporate governance practice at a time when it is increasingly unacceptable for corporations to simply do well on behalf of their shareholders. They must do good also.

# II. THE RISE OF SHAREHOLDER PRIMACY AND ITS IMPLICATIONS FOR CORPORATE SOCIAL RESPONSIBILITY

## A. SHAREHOLDER PRIMACY: AN ANSWER TO THE AGENCY PROBLEM

In their seminal work, *The Modern Corporation and Private Property,* authors Berle and Means identify the emergence of a separation of ownership and control when it comes to how quasi-public corporations are governed.[1] This phenomenon has led to an inevitable problem of agency, as the directors entrusted with the corporation's affairs may have different agendas to that of the shareholders on behalf of whom they act.[2] When ownership and management are "not housed in the same person,"[3] this raises the spectre of a conflict of interest as company directors are endowed with "wide powers"[4] to engage in activities that may ultimately reduce shareholder value.[5] As Bebchuk highlights, without sufficient safeguards, this agency paradigm opens the door to directorial mismanagement of corporate assets, such as self-dealing, excessive pay or the rejection of beneficial acquisitions.[6] The separation of ownership and control places company directors in the driving seat of the corporation, with shareholders sitting passively in the backseat as mere "suppliers of capital,"[7] which gives rise to a significant problem of agency. In response to the centralisation of corporate power around company managers, the concept of corporate governance has presented a solution by fettering the discretion of directors by ascribing to them a plethora of fiduciary obligations in discharging their duties. To this end, corporate governance has been described as "a system to curb the excesses and follies of despotic company bosses,"[8] as it prevents managers from acting in their own interests at the expense of the corporation and its shareholders.[9] Corporate governance rules generally ascribe a number of duties to company directors that work to ringfence their actions around the interests

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1 Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932) 110.
2 Robert Monks and Nell Minow, *Corporate Governance* (4th edn, Wiley India 2010) 94.
3 Harold Demsetz, 'The Structure of Ownership and the Theory of the Firm' (1983) 26 Journal of Law and Economics 375.
4 Blanaid Clarke, 'Corporate Responsibility in Light of the Separation of Ownership and Control' (1997) 19 Dublin University Law Journal 50.
5 Lucian Arye Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118 Harvard Law Review 833, 843.
6 ibid 843.
7 Hadiye Aslan, 'Shareholders Versus Stakeholders in Investor Activism: Value for Whom?' (2020) Journal of Corporate Finance Volume 60.
8 John Holland, 'The Corporate Governance role of Financial Institutions in their Investee Companies' ACCCA Research Report No 46.
9 Anne Tucker, 'The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market' (2012) 35 Seattle University Law Review 1299.

of the company and the shareholders who hold "ultimate authority over its business,"[10] due to the otherwise powerless position of shareholders under the agency paradigm.[11]

When it comes to ascertaining whether or not managerial action accords with the best interests of the company and its shareholders, profit maximisation has emerged as a helpful litmus test for corporate directors to employ.[12] Indeed, many commentators have come to treat the maximisation of shareholder profit as synonymous with the exercise of good governance. Robert Clark has conflated the director's fiduciary duty to act in the best interests of the corporation with the maximisation of shareholder wealth,[13] whilst Bainbridge submits that directors should be "obliged to make decisions based solely on the basis of long-term shareholder gain."[14] Such a model of corporate governance that hinges so exclusively on shareholder return can trace its doctrinal foundations back to the decision of the Michigan Supreme Court in *Dodge v. Ford Motor Co.*,[15] where it was noted that corporate activities are conducted "primarily for the profit of the stockholders."[16] As Berger notes, however, the concept of profit maximisation as the cornerstone of the shareholder primacy norm within governance theory was primarily fleshed out in the context of academic discussion.[17] The rise of shareholder profit maximisation as the prevailing norm in company administration can be attributed to the separation of ownership and control within corporations, which necessitates that the wide discretion afforded to company directors be somewhat restrained.

## B. Implementing Corporate Social Responsibility Under the Shareholder Primacy Paradigm

In accordance with the shareholder primacy norm currently embedded in corporate governance practice in the United States and United Kingdom, it necessarily follows that as a general rule, directors must discharge their duties in a way that maximises shareholder wealth.

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[10] Joseph Bower and Lynn Paine, 'The Error at the Heart of Corporate Leadership' (2017) Harvard Business Review 50.

[11] David Yosifon, *Corporate Friction: How Corporate Law Impedes American Progress and What to Do About It* (Cambridge University Press 2018) 10.

[12] Tucker (n 9) 1300.

[13] Robert Clark, *Corporate Law* (Little Brown US 1986) 678.

[14] Stephen Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97(2) Northwestern University Law Review 547, 573.

[15] [1919] 170 NW 668, 684.

[16] ibid 499.

[17] David Berger, 'In Search of Lost Time: What If Delaware Had Not Adopted Shareholder Primacy?' in Steven Davidoff Solomon and Randall Stuart Thomas, *The Corporate Contract In Changing Times: Is the Law Keeping Up?* (The University of Chicago Press 2019) 48.

Whilst activities of corporate social responsibility have historically been portrayed as a natural adversary to the pursuit of company profit, a number of empirical studies in recent years have demonstrated that company value maximisation and engagement with CSR are not always mutually exclusive.[18] Indeed, if there is a legitimate "business case"[19] for CSR as a valuable corporate activity in terms of shareholder return, this renders it part and parcel of managerial duties in accordance with the shareholder primacy norm inherent in corporate governance.[20] Such a "business case"[21] for CSR was a prominent feature of the 2005 United Nations Conference, 'Who Cares Wins,' where the concept of Environmental Social Governance (ESG) was first developed, denoting a set of criteria through which socially and environmentally conscious investors can screen the governance standards within corporations.[22] In recent years, the implementation of ESG measures within corporations has been gaining increasing momentum in the minds of institutional investors. This has had an inevitable knock-on effect in terms of how company directors calibrate governance strategies that will result in long-term shareholder value.[23] The causative effect between ESG compliance and corporate revenue has been subject to a number of conflicting hypotheses in terms of the extent to which ESG impacts shareholder return.[24] Nonetheless, there is a strong argument arising from the literature in this area which suggests that the implementation of corporate social responsibility through ESG measures is in fact conducive to long-term wealth maximisation, the ultimate goal of company directors pursuant to shareholder primacy. Before the advent of ESG, Waddock and Graves reported a "significant positive relationship"[25] between the realisation of corporate social responsibility and several key financial performance indicators. More recently, Busch and Bassen have conducted a meta-analysis of over 60 empirical examinations into the nexus between ESG and corporate financial performance, concluding that there is a "clear"[26] positive

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18 Pierre Allegaert 'Codetermination and ESG: Viable Alternatives To Shareholder Primacy?' (2020) 52 International Law and Politics 641.

19 Dorothy Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563.

20 ibid 2613.

21 ibid 2613.

22 Gordan Scott 'Environmental, Social, and Governance (ESG) Criteria' <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp> accessed 1 April 2022.

23 Alexander Kraik, 'Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm' (2020) 44 Vermont Law Review 493.

24 Stuart Gillan, Andrew Koch and Laura Starks, 'Firms and Social Responsibility: A Review of CSR and ESG Research in Corporate Finance' (2021) 66 Journal of Corporate Finance 101889.

25 Sandra Waddock and Samuel Graves, 'The Corporate Social Performance-Financial Performance Link' (1997) 18(4) Strategic Management Journal 303.

26 Gunnar Friede, Timo Busch and Alexander Bassen, 'ESG and Financial Performance: Aggregated Evidence From More Than 2000 Empirical Studies' (2015) 5(4) Journal of Sustainable Finance & Investment 210.

correlation between the two. A slightly less definitive conclusion was reached in a second-level review produced by Halbritter and Dorfleitner, who noted a "mostly positive connection"[27] between a company's financial performance and its compliance with environmental and social governance standards. Another meta-study conducted by Deutsche Bank found that corporations with higher ESG ratings outpaced their peers in terms of financial performance.[28] In terms of a single corporation analysis, Ekatah *et al* have investigated the link between corporate social responsibility and company profit based on the annual reports of mega-corporation Royal Dutch Shell Plc, concluding that that CSR is positively related to profitability.[29] Although many commentators have argued that the causative link between corporate social responsibility and the maximisation of shareholder return is "in need of more research"[30] and that the empirical results are often "ambiguous, inconclusive, or contradictory,"[31] the literature in this area certainly debunks any contention that corporate social responsibility and profit maximisation are always at odds with one another.

It is not difficult to identify the reasons why ESG compliance might result in improved shareholder return. For one, several commentators have suggested that directors of companies with good ESG credentials display an overall better quality of management, which is vital to shareholder value.[32] It has also been noted that corporate social responsibility is "highly associated"[33] with good corporate governance and socially responsible firms tend to be the ones with the most efficient management structures, which translates into improved financial output more generally.[34] Moreover, as investor demand for more sustainable business is quickly becoming a "firmly entrenched market reality,"[35] socially and environmentally conscious governance is becoming "critical"[36] if company directors wish to attract new investment. As Williams notes, the investment community is becoming increasingly concerned with whether corporations are implementing environmental stewardship among other socially responsible

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27 Gerhard Halbritter and Gregor Dorfleitner, 'The Wages of Social Responsibility - Where Are They? A Critical Review of ESG Investing' (2015) 26 Review of Financial Economics 25, 26.

28 Mark Fulton *et al.,* 'Deutsche Bank, Sustainable Investing: Establishing Long-Term Value and Performance' (2012) SSRN Electronic Journal.

29 Innocent Ekatah *et al* 'The Relationship Between Corporate Social Responsibility and Profitability: The Case of Royal Dutch Shell PLC' (2014) 14(4) Corporate Reputation Review 249.

30 Gillan (n 24) 7.

31 Christophe, Revelli and Jean-Laurent Viviani, 'Financial Performance of Socially Responsible Investing (SRI): What Have We Learned? A Meta-Analysis' (2015) 24(2) Business Ethics: A European Review 158.

32 Oliver Williams, *Corporate Social Responsibility* (Routledge 2014) iv.

33 Yasemin Zengin, 'Corporate social responsibility in times of financial crisis' (2010) 4(4) African Journal of Business Management 382.

34 Theodore Syriopoulos, 'Corporate Social Responsibility and Shareholder Effects: The Greek Paradigm' (2007) 8(1) Journal of International Business and Economy 161.

35 Allegaert (n 18) 672.

36 Lund and Pollman (n 19) 2613.

measures when choosing how to invest.[37] This leaves corporate directors with ample opportunity to attract new socially responsible investments by engaging with ESG initiatives, resulting in business growth and ultimate shareholder return. Furthermore, a number of studies have reported the positive effect of CSR in terms of enhancing broader operational drivers of business value, including reputational capital,[38] employee pride,[39] brand differentiation,[40] customer loyalty[41] and improved recruitment[42] to name but a few. One study conducted in collaboration between New York University and the University of Texas investigated the casual effect between corporate philanthropy and company value, reporting a resulting revenue growth in corporations that are sensitive to consumer perception.[43] This reflects the fact that corporations do not operate in isolation from the society around them, but rather in a world of knowledge-based competition, where socially responsible management can yield real effects in terms of the company's bottom line.[44] As Porter and Kramer report, the competitive marketplace within which companies today operate necessitates that they acquire a workforce that is "educated, safe, healthy, decently housed, and motivated by a sense of opportunity."[45] This would suggest that companies have a vested financial interest in improving the communities within which they function, leading to a "convergence of interests"[46] between corporations and wider society. As Galbreath notes, "more than half" of a corporation's assets today are intangible in nature, such as good will, reputation, and human capital.[47] This forces corporate directors to revaluate any position that presents social and economic objectives as distinct and competing, given the wealth of empirical evidence that demonstrates how socially-minded endeavours can also yield economic improvements. Although it is difficult to systematically measure the business benefits of social activity,[48] there is a strong case to be

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37 Williams (n 32) iv.

38 ibid iv.

39 Arthur Gautier and Anne-Claire Pache, 'Research on Corporate Philanthropy: A Review and Assessment' (2015) 126(3) Journal of Business Ethics 343.

40 Dwane Hal Dean, 'Consumer Perception of Corporate Donations: Effects of Company Reputation for Social Responsibility and Type of Donation' (2004) 32(4) Journal of Advertising 91.

41 ibid 102.

42 Valentinas Navickas and Rima Kontautiene, 'Influence Of Corporate Philanthropy On Economic Performance' (2011) 12(1) Business: Theory and Practice 15.

43 Terence Lim 'Measuring the Value of Corporate Philanthropy: Social Impact, Business Benefits and Investor Returns' (2010) Committee Encouraging Corporate Philanthropy.

44 Michael Porter and Mark Kramer 'The Competitive Advantage of Corporate Philanthropy' (2002) Harvard Business Review <https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy> accessed 1 April 2022.

45 ibid.

46 ibid.

47 Jeremy Galbreath, 'Twenty-First Century Management Rules: The Management of Relationships as Intangible Assets' (2002) 4(2) Management Decision 116.

48 Lim (n 43) 1.

made for an "enlightened self-interest perspective"[49] in terms of how directors, who are fiduciarily mandated to increase shareholder return, implement the requirements of CSR.

It is clear that it is possible for directorial engagement with ESG to result in shareholder profit maximisation, particularly in the context of corporations that rely on reputational capital, institutional investment or strong employee networks. From this perspective, CSR and the fiduciary duties of company administrators to maximise shareholder wealth often appear to go hand in hand, as it appears that "good business is better business."[50] This narrative, however, does not present a fully accurate depiction of how CSR is reconciled with the shareholder primacy norm. As Rampal notes, there is an important distinction to be drawn between ethical and strategic CSR.[51] Whilst the former seeks to implement socially responsible governance policies in the genuine interests of the wider community, the latter only seeks to do so in so far as they advance an overall agenda of capital accumulation. In circumstances where is not possible to frame CSR engagement as a vehicle for ultimate economic gain, the shareholder primacy model of governance does not allow for it. This amounts to a very significant limitation on the implementation of CSR under a regime of shareholder focused governance. Thus, as Post has argued, a shareholderist model of governance can be said to remove ethical reasoning from the picture of company administration because if a decision is legal and profitable, it is ethical so far as shareholder primacy is concerned.[52] The "powerful shareholderist orientation"[53] of corporate governance causes the "marginalisation of corporate social responsibility"[54] in business administration to the same extent that it supports it. Shareholder primacy forces company directors to adopt a blinkered focus on capital accumulation, thereby limiting companies to "profit-seeking units"[55] which only endorse CSR to the extent that it is economically strategic to do so. The idea that corporations should embody a "narrowly self-interested homo economicus"[56] certainly does not sit comfortably with the idea of companies embodying a "corporate conscience"[57] and contributing to the overall quality of life of their workforce, their communities and society at large, even when such a practice that might not

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49 Gautier and Pache (n 39) 7.
50 David Jones, *Who Cares Wins: Why Good Business Is Better Business* (Financial Times Publishing 2011).
51 Anuj Rampal, *Corporate Social Responsibility* (Creative Impact Publishing 2017) 13.
52 Frederick Post, 'The Social Responsibility of Management: A Critique of the Shareholder Paradigm and Defense of Stakeholder Primacy' (2003) 18(2) American Journal of Business 57.
53 Lund and Pollman (n 19) 2562.
54 ibid 2613.
55 Adolph Berle, 'The Impact of the Corporation on Classical Economic Theory' (1965) 79(1) Quarterly Journal of Economics 25.
56 Gary Becker, 'Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology' (1976) 14(3) Journal of Economic Literature 817.
57 Berle (n 55) 36.

necessarily result in improved shareholder return. David Yosifon has commented that this gives rise to a fundamentally uneasy relationship between shareholder focused governance and CSR, as the shareholder primacy paradigm "forces a grinding, rough relationship between corporations and the society they are meant to serve."[58] The concept of shareholder profit maximisation cuts against any managerial endeavour that uses corporate assets for broader social purposes that are not strategically linked to wealth maximisation,[59] which amounts to a very significant limitation on the implementation of CSR under the paradigm of shareholder primacy.

The "profit-maximizing norm"[60] infused in the duties of corporate directors legitimately arose in response to the great discretion that they are afforded by the separation of ownership and control in company administration. This model of corporate governance has permitted managers to adopt a blinkered focus on capital accumulation and "ignore the interests of the other constituencies."[61] Although a number of empirical studies have advanced compelling evidence in support of a "business case" for CSR, pointing to the many effects it can yield in terms of long-term economic value, genuine and ethical CSR cannot be truly implemented so long as business decisions are conducted in an "amoral vacuum"[62] induced by shareholder primacy. As Sjåfell and Bruner note, the most that can be achieved under shareholder primacy in terms of CSR is a degree of "weak sustainability,"[63] in contrast the kind of "actual sustainability" that is achieved by the genuine ethically-driven socially responsible behaviour of company directors. Corporate administration that is focused solely on profit-maximisation might not completely inhibit CSR, but it does significantly limit how widely it can be implemented by fettering it to endeavours that translate into long-term profit. At a time when society is increasingly demanding that "companies serve a social purpose"[64] beyond mere capital accumulation, it is time to seriously question the dominance of the shareholder primacy norm and the continuing legitimacy of it ringfencing socially responsible governance to that which manifests in shareholder return.

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58 Yosifon (n 11) 4.
59 Berle (n 55) 25.
60 Allegaert (n 18) 642.
61 Post (n 52) 57.
62 ibid 57.
63 Beate Sjåfell and Christopher Bruner, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2020).
64 Larry Fink, 'Larry Fink's 2018 Letter to CEOs: A Sense of Purpose' <https://www.blackrock.com/corporate/investor-relations/2018-larry- fink-ceo-letter> accessed 1 April 2022.

# III. The Fall of Shareholder Primacy and its Implications for Corporate Social Responsibility

## A. The Decline of Shareholder Primacy in the Face of the Climate Crisis

Due to the pervasiveness of shareholder primacy within corporate governance, it has often been taken for granted in corporate law.[65] It is important to note, however, that such a system is by no means inevitable.[66] In fact, its position as the jewel in the crown of corporate governance theory was hard won over alternative governance paradigms through some of the most influential academic debates in the history of corporate law. In 1932, the infamous Berle-Dodd debate panned out over the pages of the Harvard Law Review, wherein Adolph Berle contended that corporate powers are "at all times exercisable only for the ratable benefit of the shareholders"[67] in contrast with the position of Merrick Dodd, who argued that corporations are "economic institutions which have a social service as well as a profit-making function."[68] This dialogue between Berle and Dodd, which occurred almost a century ago, crystallises the inherent tension between the dominant shareholderist versus stakeholderist governance ideologies that continues to loom large in the present day. Whilst both positions depart from the starting point of restraining managerial power in the face of the agency problem, they quickly reach a fork in the road when it comes to whose interests directorial discretion should be accountable to. The focus on shareholder return as the prevailing norm in corporate governance only secured its definitive status during the 1970s, when it received a series of highly influential endorsements by members of the Chicago School of economists.[69] Milton Freidman's infamous 1970 article, aptly entitled 'The Social Responsibility of Business is to Increase its Profits,'[70] is often credited with carving out the central place for shareholder profit maximisation that currently amounts to the core objective of corporate enterprise.[71] Before the pursuit of shareholder wealth gained such significant traction toward the latter half of the

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65 David Millon, 'Shareholder Primacy in the Classroom after the Financial Crisis' (2013) 8 Journal of Business and Technology Law 191.

66 Lund and Pollman (n 19) 2628.

67 Adolph Berle, 'Corporate Powers as Powers in Trust' (1932) 45 Harvard Law Review 1049.

68 E Merrick Dodd, 'For Whom are Our Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1144, 1148.

69 Lynn Stout, 'New Thinking on "Shareholder Primacy' (2012) 2(2) Accounting, Economics, and Law, article 4.

70 Milton Freidman, 'The Social Responsibility of Business is to Increase its Profits' (*New York Times*, 1970).

71 Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

twentieth century,[72] standard corporate governance practice often entailed taking into account a broader pool of stakeholders, including employees, customers and the wider community.[73] Thus, as Bower and Paine highlight, the prominent status afforded to shareholders within corporate law theory is a "relatively recent development"[74] and is by no means the only intellectually respectable theory of corporate governance.[75] Indeed, the highly shareholder oriented fiduciary duties of directors in the United States and United Kingdom contrasts with countries in mainland Europe,[76] such as the corporate governance systems of Germany and France, which adopt a more multi-stakeholder approach.[77] This is encapsulated by a recent report of the European Commission, which notes that the managerial role within companies entails balancing the interests of "multiple constituencies."[78] As Yosifon notes, deviations from exclusively shareholder focused governance are "alive and kicking in wealthy, free parts of the world,"[79] demonstrating that purely shareholderist governance only dominates company law theory because we chose to allow it and not because it is the only viable option. Based on the fact that the shareholder primacy norm emerged against the backdrop of much academic debate and is not unanimously applied across the globe, it is clear that it is not the only legitimate governance theory that can be implemented to overcome the agency problem. Rather, the emergence of the shareholder primacy model of corporate governance came about at the expense of an alternative, more stakeholder focused alternative.

Due to the fact that shareholder primacy is not the only feasible solution in terms of transcending the agency problem within corporate governance, its dominance should only persist so long as it can be considered the optimal approach in comparison with other, more stakeholder-centric models of company administration. It is submitted that since the turn of the century, the primacy of straightforward profit-driven governance has begun to erode with increasing vigour. As society is faced with navigating the climate crisis in particular, the tide seems to be turning against the view that shareholder primacy represents the optimal approach to corporate governance. Although in the year 2000, Hansmann and Kraakman famously declared that the rise of shareholder primacy in company administration signalled "the end of

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72 Allegaert (n 18) 642.
73 Elizabeth Warren, 'Companies Shouldn't Be Accountable Only to Shareholders' (*Wall Street Journal*, 2018).
74 Bower and Paine (n 10) 50.
75 Jensen and Meckling (n 71) 305.
76 John Armour, Simon Deakin and Suzanna Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) CBR Working Paper Series 1.
77 Martin Gelter, 'Centros, the Freedom of Establishment for Companies and the Court's Accidental Vision for Corporate Law' in Fernanda Nicola and Bill Davies, EU Law Stories (2015) 74.
78 ibid 74.
79 Yosifon (n 11) 171.

history for corporate law,"[80] recent trends in corporate governance indicate that we are on the brink of yet another paradigm shift in corporate law theory when it comes to how shareholder profit maximisation and CSR are reconciled. As Kaul and Luo observe, public appetite for social responsibility within companies is at an all-time high, as consumers grow increasingly dissatisfied with corporate purpose that is solely devoted to capital accumulation.[81] There is a distinct sentiment emerging from the public sphere that the purpose of business is not only to make a profit, but to foster development and sustainability in wider society,[82] a concept that is gaining increasing amplification across jurisdictions where shareholder primacy has traditionally reigned supreme. Lund and Pollman have recently argued that the "cultural conversation" within society is calling for a "reorientation of corporate purpose away from shareholder primacy"[83] in order to take greater account of broader interests of stakeholders. Stout has detected a "rapid undermining"[84] of the shareholder primacy paradigm in recent years, whilst Hill has characterised shareholder oriented governance as a "one-dimensional model of the past."[85] Such palpable hostility toward traditional shareholderist corporate governance is unsurprising, given that it coincides with a time when the climate crisis represents the defining challenge of our generation.[86] With CSR being lauded as having the potential to drive sustainable development within corporations,[87] the fact that purely profit driven governance partially stifles the implementation of CSR has attracted extensive criticism.

The growing dissatisfaction with traditional shareholderist governance recently came to a head at the American Business Roundtable in 2019, which saw the CEO's of the largest and most influential corporations in the United States renounce blinked shareholderism and commit to "leading their companies for the benefit of all stakeholders."[88] This express endorsement of stakeholder-conscious governance has been heralded as marking a definitive departure from

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80 Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2000) Harvard Law School Discussion Paper No 280.

81 Aseem Kaul and Jiao Luo, 'An Economic Case for CSR: The Comparative Efficiency of For-Profit Firms in Meeting Consumer Demand for Social Goods' (2018) 39 Strategic Management Journal 1650.

82 Williams (n 32) 1.

83 Lund and Pollman (n 19) 2634.

84 Stout (n 69) 3.

85 Jennifer Hill, 'Visions and Revisions of the Shareholder' (2000) 48(1) American Journal of Comparative Law 39.

86 Jacob Poushter and Christine Huang, 'Despite Pandemic, Many Europeans Still See Climate Change as Greatest Threat to Their Countries' (2020) Pew Research Center.

87 Kristina Herrmann, 'Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study' (2004) 11 Indiana Journal of Global Legal Studies 205.

88 Business Roundtable, 'Statement on the Purpose of a Corporation' (2019) <https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on- the-Purpose-of-a-Corporation-with-Signatures.pdf> accessed 1 April 2022.

shareholder value maximisation toward more stakeholderist-oriented governance.[89] News reports at the time of the Roundtable describe it as a "turning point"[90] in corporate governance doctrine, which succeeds in overriding "decades of long-held corporate orthodoxy."[91] Indeed, soon after the publication of the Business Roundtable statement on the endorsement of stakeholder-conscious governance, the World Economic Forum published a manifesto urging companies to move from "shareholder capitalism to stakeholder capitalism."[92] Larry Fink, the leader of the BlackRock, has recently called all company CEOs to embrace a corporate purpose that serves not only shareholders, but a wide pool of stakeholders, in what he calls "a fundamental reshaping of finance."[93] The resounding message from the Business Roundtable and World Economic Forum is that, as the climate emergency displays no signs of subsiding any time soon, a purely profit driven model of corporate governance teeters on the brink of intellectual collapse.[94] The challenge of climate change forces us to rethink the paradigm that defines the governance norms of the corporations that are causing the greatest amount of environmental harm in our society today, indicating that the time has finally come to dethrone shareholder primacy.[95]

## B. Implementing Corporate Social Responsibility under a "Stakeholder-conscious" Paradigm

It was clear back when the Berle-Dodd debate[96] took place over a century ago that there exists a number of legitimate alternatives to shareholder focused governance that better facilitate the implementation of CSR. Different models of company administration to that of pure profit-maximisation tend to reside on a spectrum depending on much weight they afford to the interests of wider stakeholders including customers, suppliers, local communities and the

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89 Lucian Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106(1) Cornell Law Review 91.

90 David Ignatius, 'Corporate Panic About Capitalism Could Be a Turning Point' (*Washington Post*, 2019) <https://www.washingtonpost.com/opinions/even-the-business-moguls-know-its-time-to- reform-capitalism/2019/08/20/95e4de74-c388-11e9-9986-1fb3e4397be4_story.html> accessed 1 April 2022.

91 David Gelles and David Yaffe-Befany, 'Feeling Heat, C.E.O.s Pledge New Priorities' (*New York Times*, 2019) A1.

92 Jason Karanian, 'And the Winner of the 2020 World Economic Forum is... Stakeholders' (*Quartz*, 2020) <https://qz.com/1791153/winner-of-2020-world-economic-forum- in-davos-stakeholders> accessed 1 April 2022.

93 Larry Fink, 'A Fundamental Reshaping of Finance' (2020) Harvard Law School Forum on Corporate Governance <https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/> accessed 1 April 2022.

94 Stout (n 69) i.

95 Lund and Pollman (n 19) 2631.

96 See Berle (n 67) and Dodd (n 68).

environment.[97] The greater the significance afforded to the wider pool of stakeholders in directorial decision-making, the greater the scope afforded to company managers in terms of engaging in initiatives that implement CSR requirements. Whilst many commentators have called for reform to the shareholderist model of governance, there has been great deal of discrepancy within the academic literature in terms of the degree to which broader stakeholder interests should encroach upon shareholder primacy. Carl Liao has advocated for a radical "sweeping overhaul"[98] of the shareholder primacy norm, arguing that it should be replaced with a governance model that takes equal account of all stakeholder interests. Yosifon has also supported an move toward a general "system of multi-stakeholder corporate governance."[99] The majority of commentators, however, have been more conservative in their approaches when suggesting how the shareholder primacy model should evolve in order to pave the way for greater CSR within companies in the age of the climate crisis. David Millon has advanced a theoretical governance framework which appears to be somewhat of a shareholderist-stakeholderist hybrid, which he terms "enlightened shareholder value."[100] This governance model entails corporate directors continuing to pursue shareholder return, but with a more "long-run orientation"[101] that seeks sustainable profits, whilst paying attention to a "full range of relevant stakeholder interests."[102] A similar suggestion has been proposed by Lund and Pollman, who argue for a "reshaping"[103] of shareholder primacy such that it encompasses wider stakeholder interests. They predict that such a paradigm shift is already on the horizon, noting that company administration is increasingly filtered through a more "stakeholder-oriented"[104] lens. Adams and Matheson also seem to have also endorsed a stakeholderist spin on the shareholder primacy norm to allow for greater implementation of CSR, but framed it in the inverse, arguing that company managers should begin with abiding by a stakeholder oriented governance model and then focus on shareholder return later down the road.[105] What certainly emerges from the various suggestions as to how shareholderist governance should evolve to

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97 Amanda Wise, 'Corporate Law and the Business Roundtable: Adding to the Debate on Shareholder Primacy vs. Stakeholder Theory' (2021) Corporate Law and the Business Roundtable.

98 Carol Liao, 'Corporate Governance Reform for the 21st Century: A Critical Reassessment of the Shareholder Primacy Model' (2011) 43(2) Ottawa Law Review 187.

99 Yosifon (n 11) 171.

100 David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' (2010) Washington and Lee Public Legal Studies Research Paper Series.

101 ibid 1.

102 ibid 1.

103 Lund and Pollman (n 19) 2615.

104 ibid 2567.

105 Edward Adams and John Matheson, 'A Statutory Model for Corporate Constituency Concerns' (2000) 49 Emroy Law Journal 1085, 1086.

meet CSR-induced demands is that the gap between stakeholder and shareholder governance, which amounted to the great divide borne out in the Berle-Dodd debate, is growing ever smaller.

It is submitted that in the wake of the climate emergency, corporate governance has no choice but to evolve past its current paradigm of straightforward profit maximisation toward a more pluralist management model that allows greater engagement with CSR through taking into account a broader pool of stakeholders.[106] It appears that the route beyond the narrow conception of shareholder primacy, however, does not lie in a sudden radical paradigm shift toward a multi-stakeholder focused approach. [107] For starters, instituting such a profound and encompassing shift within deeply entrenched corporate governance practice seems highly unrealistic.[108] Rather, it is submitted that company managers should continue operating pursuant to their fiduciary duty to shareholders, but also move incrementally toward governance practices that are "stakeholder-conscious." This would entail directors paying more heed to the interests of stakeholders and the natural environment when discharging their duties in tandem with striving for shareholder wealth accumulation, thereby blurring the line between shareholder and stakeholder oriented governance.[109] Such gradual inclusion of "stakeholder-consciousness" in corporate governance would work to pave the way for the more genuine and holistic implementation of CSR, beyond the "weak sustainability"[110] that is, at best, achieved under the shareholder primacy paradigm. Indeed, this appears to be what is already happening in many global corporations. Writing in the same journal that produced the Berle-Dodd debate, Joly has recently reported that in the present day, "most company leaders believe that their firms' larger purpose is to make a positive difference in the world"[111] beyond simple shareholder wealth maximisation. Indeed, several international mega-corporations have recently released statements that strongly imply the emergence of a more "stakeholder-conscious" and socially aware corporate purpose driving the administration of their businesses. For instance, Google has stated that its purpose is to "organise the world's information"[112] whilst Netflix has claimed that its purpose is to "entertain the world."[113] By framing their corporate around the interests of the "world," it is evident that these leading international

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[106] Millon (n 100) 3.
[107] ibid 21.
[108] Lund and Pollman (n 19) 2562.
[109] Stout (n 69) 16.
[110] Sjåfell and Bruner (n 63) 2.
[111] Hubert Joly, 'Creating a Meaningful Corporate Purpose' (2021) Harvard Business Review.
[112] Google, 'Our Mission' <https://www.google.com/search/howsearchworks/mission/#:~:text=Maximize%20access%20to%20information,it%20universally%20accessible%20and%20useful> accessed 1 April 2021.
[113] Netflix, 'About Netflix' <https://about.netflix.com/en> accessed 1 April 2021.

companies are moving toward a more outward-looking model of corporate purpose beyond mere profit accumulation. It is clear that the shareholder primacy norm no longer provides a sufficient explanation for why corporations are governed in the manner that they are. The traditional distinction between shareholder and stakeholder focused governance is collapsing at an accelerating rate which can be attributed in particular to the climate emergency that has brought the importance of CSR into sharp focus on the international economic stage. The limitation that shareholder primacy places on the implementation of CSR is no longer acceptable at a time when the climate situation has never been more perilous. It is therefore critical that company law quickly departs from its profit-focused model of corporate governance toward a new, more nuanced and holistic "stakeholder-conscious" paradigm of corporate governance.

## IV. Conclusion

As climate change continues to raise international alarm, we must demand more from the corporations that are contributing to environmental degradation. The shareholder primacy paradigm, which once appeared to be the optimum governance solution in response to the agency problem, now seems to be a root cause of environmental destruction. By incentivising a blinkered focus on profit maximisation, the shareholder primacy norm removes other stakeholders, such as the wider community and the natural environment, from the picture of corporate decision-making. To this end, it works to stifle the full implementation of CSR by limiting such endeavours to that which ultimately results in shareholder profit. Although there is an increasing body of empirical evidence that demonstrates how CSR and ESG measures can in many instances coincide with capital accumulation, it is no longer sufficient to limit the implementation of CSR to profit-maximising ventures in the face of the climate crisis. Strict shareholder primacy is on the brink of collapse, as market players from institutional investors to consumers are demanding more socially responsible corporate enterprise. Fortunately, as the Berle-Dodd debate highlighted several decades ago, there are many alternatives to the shareholder focused governance model. It is submitted that in the absence of a major paradigm shift within corporate governance, company directors should increasingly integrate a "stakeholder-conscious" mindset when discharging their fiduciary duties to shareholders. Afterall, for corporate directors, it is no longer a question of simply doing well; the time has come for companies to do good.