

COMMENT ON PADFIELD'S AN INTRODUCTION TO VIEWPOINT DIVERSITY SHAREHOLDER PROPOSALS

*Anne Claire Batcheller**

INTRODUCTION

I found Professor Padfield's article, *An Introduction to Viewpoint Diversity Shareholder Proposals*, timely given the current political climate and thought provoking on the roles and expectations of modern corporate governance. Professor Padfield's discussion of viewpoint proposals led me to ask myself what type of "value" the modern shareholder expects. In this comment, I will offer three thoughts on this question: (1) shareholders no longer demand solely profit maximization from corporations; (2) shareholders are justified in placing great value in the composition of the board of directors; and (3) the future implications for corporations attempting to balance intangible and tangible aspects of value may be troublesome.

WHAT IS SHAREHOLDER VALUE?

Shareholder value is traditionally defined as the financial value that shareholders enjoy in the company.¹ This definition of shareholder value supports the idea that a corporation is organized primarily for the profit of the shareholders.² Shareholder Primacy Theory reflects the idea that shareholders "own" the corporation and, consequently, the goal of

* Annie Batcheller is a third-year student at The University of Tennessee College of Law. She is scheduled to graduate in May 2021.

¹ Coryanne Hicks, *What is Shareholder Value?*, US NEWS (Nov. 23, 2020), <https://money.usnews.com/investing/investing-101/articles/what-is-shareholder-value>.

² *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). In *Dodge*, plaintiff shareholders sued to reestablish shareholder dividends after Ford had announced that it would cease dividends to divert these funds to lower the price of motor vehicles and grow the company. *Id.* at 683–84. The court found that corporations exist to conduct business on behalf of the shareholders and reinstated the dividends. *Id.* at 684–85.

corporations is to maximize returns for shareholders.³ However, recent economic and social movements, including the 2008 “Great Recession,” have revealed changing attitudes regarding corporate governance which challenge the long-held Shareholder Primacy Theory.⁴

Contemporary interpretations share a broader and more robust view of shareholder value. In *Burwell v. Hobby Lobby*, the Supreme Court stated, “modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else”⁵ Additionally, current scholars describe shareholders as “‘prosocial,’ meaning they are willing to sacrifice at least some profits to allow the company to act in an ethical and socially responsible fashion.”⁶ This type of prosocial behavior is evidenced by shareholder votes to reduce or sacrifice profits in exchange for desirable social or political benefits.⁷

Accordingly, current attitudes suggest that profit maximization is no longer the only factor in the shareholder value formula and hint that shareholder value has morphed into an inclusive concept encompassing financial, social, and political elements. Many shareholders not only want to receive some sort of economic value from their stake in the company, but also want to receive more intangible measures of value—such as pride in ownership. Thus, Professor Padfield’s call for more diverse ideological representation on corporate boards is consistent with current decisions and scholarships that suggest shareholders place value not only on the financial decisions of the board but also the social and political decisions.

³ See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. of Chicago Press 2002).

⁴ Faith Stevelman, *Myths About Shareholder Value*, 3 ACCOUNT. ECON. LAW 1, 6–7 (2013).

⁵ 573 U.S. 682, 711–12 (2014).

⁶ Lynn A. Stout, *The Shareholder Value Myth*, HARV. L. SCH. F. CORP. GOVERNANCE (June 26, 2012), <https://corpgov.law.harvard.edu/2012/06/26/the-shareholder-value-myth/>.

⁷ Recently, Chevron shareholders approved a proposal to hold the company to climate change objectives in the Paris Climate Accord, which would undoubtedly impose added costs on Chevron’s operations. See generally Kellie Mejdrieh, *Chevron Shareholders Approve Climate Change Lobbying Proposal*, POLITICO (June 20, 2020), <https://www.politico.com/news/2020/06/02/chevron-shareholders-approve-climate-change-lobbying-proposal-297520>.

SHAREHOLDER INTEREST IN THE COMPOSITION
OF A BOARD OF DIRECTORS

If shareholder value goes beyond profit maximization, then shareholders are justified in using viewpoint diversity proposals to demand a board of directors that protects their intangible aspects of shareholder value. A 2019 study conducted by Michigan State University researchers found that political leanings affect the way people make group decisions, and this leaning is especially strong when any discussion involves politically charged decisions.⁸ The study also found that groups of solely Democrats or Republicans were likely to arrive at a decision consistent with the ideals of their political party.⁹ With corporations making more decisions that seem political, the political makeup of the board of directors could greatly affect the outcome of board decisions and either directly increase or decrease the shareholder value to a prosocial shareholder depending on whether their political ideology matches the ideology of the board.¹⁰ Thus, if modern shareholders expect companies to provide value beyond profit maximization, the sociological studies behind group decision making evidence that companies should take Professor Padfield's advice and concern themselves with the political make-up of their boards.

FUTURE IMPLICATIONS

As Professor Padfield mentions, ideologically uniform boards may have broad future implications on corporate governance. Whether one subscribes to the idea that a corporation increases shareholder value through profit maximization or by promoting other intangible aspects of "value" may be inconsequential in today's political climate. Boards of directors are increasingly finding themselves making tough decisions

⁸ See generally Brian Mantana et al., *Assessing the Effects of Partisan Bias at the Group Level of Analysis: A Hidden Profile Experiment*, 47 AM. POL. RSCH. 1283 (2019).

⁹ *Id.*

¹⁰ See Matthew Scott, *Investors Push For More Politics in the Boardroom*, CORP. BD. MEMBER, <https://boardmember.com/investors-push-for-more-politics-in-the-boardroom/> (last visited Mar. 7, 2021). See generally Abhinav Gupta & Adam J. Wowak, *The Elephant (or Donkey) in the Boardroom: How Political Ideology Affects CEO Pay*, ADMINISTRATIVE SCIENCE Q., Mar. 2017 (surveying the effects of conservative and liberal political ideology of directors on pay of CEOs and suggesting wider ranging implications).

regarding social or political issues.¹¹ Businesses who do not take certain political stances run the risk of reduced profits, outcry from shareholders, boycotts, or worse, as Professor Padfield points out, being “cancelled” from constituents on both sides of the aisle.¹² Navigating the current environment between tangible and intangible aspects of shareholder value could prove troublesome for corporate governance.

Corporations likely will not face any legal consequences due to increased political action. Most corporate actions by boards, including political spending, are protected under the business judgment rule.¹³ However, increasing polarization and growing disconnect between US political ideologies could possibly lead investors, shareholders, and customers shunning businesses because they question the “reasonableness” of political decisions from all one-viewpoint boards.¹⁴

This begs the question: should the boardroom be so politicized? This is likely not a fault of corporate governance, but one of societal influences

¹¹ Steven M. Hass & Meghan Garrett, *Political and Social Issues in the Boardroom: Examples from the Gun Industry*, HARV. L. SCH. F. CORP. GOVERNANCE (June 26, 2018), <https://corp.gov.law.harvard.edu/2018/06/26/political-and-social-issues-in-the-boardroom-examples-from-the-gun-industry>; see also *Our Commitment*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://opportunity.businessroundtable.org/ourcommitment/> (stating that corporations are shifting their focus from shareholders to other constituents, such as customers and employees).

¹² Alison Moody, *Risky Business: Do Companies Pay a Price for Expressing Political Views*, GUARDIAN (Mar. 14, 2017, 8:00 AM), <https://www.theguardian.com/sustainable-business/2017/mar/14/business-politics-trump-travel-ban-yahoo-apple>; Todd Lido, *Boycott Trump: Companies to Avoid Updated for 2020*, DONEGOOD (June 4, 2020), <https://donegood.co/blogs/news/boycott-trump-companies-to-avoid>; *The Definitive List of Liberal, Progressive and/or Anti-Trump Agenda Driven Companies that You Should Boycott*, INVESTING ADVICE WATCHDOG, <https://www.investingadvicewatchdog.com/Liberal-Companies-Boycott.html> (last visited Mar. 8, 2021).

¹³ See Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1147–48 (2013); David Rosenberg, *Goodwill and the Excess of Corporate Political Spending*, 11 HASTINGS BUS. L.J. 29, 31–32 (2015).

¹⁴ See Arthur C. Brooks, *You're Probably Making Incorrect Assumptions About Your Opposing Political Party*, WASHINGTON POST (July 26, 2019, 4:27 PM), https://www.washingtonpost.com/opinions/youre-probably-making-incorrect-assumptions-about-your-opposing-political-party/2019/07/26/9f888f0a-a995-11e9-86dd-d7f0e60391e9_story.html (“Today, more than 90 percent of both Republicans and Democrats describe people in their own party as ‘honest,’ ‘reasonable’ and ‘caring.’ Meanwhile, more than 80 percent in each party describe the other side as ‘brainwashed’ and ‘hateful.’”); see also B. C., *Study Finds Intractable Conflicts Stem from Misunderstanding of Motivation*, SCIENCEDAILY (Nov. 4, 2014), www.sciencedaily.com/releases/2014/11/141104083946.htm.

and implores us to ask ourselves how we got here and whether it is a good thing. On one hand, we now seem to hold corporations to a higher social responsibility standard. There has undoubtedly been good associated with this—membership of women and minorities on boards is at an all-time high.¹⁵ On the other, we should ask: what standard do we hold corporations to and who gets to set it?¹⁶

CONCLUSION

In conclusion, the changing landscape on corporate law, the science behind group decision making, and the potential future implications of the changing definition of shareholder value should caution corporations to heed Professor Padfield's advice and consider the ideological composition of their boards.

¹⁵ *Alliance for Board Diversity Report*, LEAP, <https://www.leap.org/alliance-for-board-diversity-report> (last visited Mar. 9, 2021).

¹⁶ See David Gelles & David Yaffe-Bellany, *Shareholder Value is No Longer Everything*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html>; see also Steve Denning, *Making Sense of Shareholder Value: 'The World's Dumbest Idea'*, FORBES (Jul. 17, 2017, 7:29 PM) <https://www.forbes.com/sites/stvedenning/2017/07/17/making-sense-of-shareholder-value-the-worlds-dumbest-idea/?sh=5eecaf082a7e> (quoting former GE CEO Jack Welch's declaration that shareholder value is "the dumbest idea in the world. Shareholder value is a result, not a strategy . . . your main constituencies are your employees, your customers and your products."); BUS. ROUNDTABLE, *supra* note 11.