

A BLAST FROM THE PAST??

Some Inconvenient Questions

1. **The goal.** Is it common ground (between the director-centric traditionalists and the new shareholder-centric governistas) that the **over-arching goal should be optimal long-term value appreciation of the firm?**
2. **The evidence.** Is there **sufficient evidence** that “good” governance of the sort championed by the governistas results in enhanced performance of the firm – especially given the fact that U.S. corporations have the best long-run performance record in the world?
3. **The stockholders.** Is it reasonable to treat the “stockholders” as a monolithic abstraction, or isn’t it necessary to **unpack the abstraction** and recognize that the group includes parts that are subject to exterior (to the firm) incentives and disincentives that may misalign that part’s interests with those of the firm and other parts of the group – as shown in Profs. Iman Anabtawi’s and Lynn Stout’s recent work showing, for example, that short-term horizon shareholders will support **foregoing R&D development or accepting any immediate premium bid**, and that increased stockholder power is inconsistent with the commitments of all constituencies necessary for firm success?

Isn’t there as much of an “agency” problem with funds managers and others on the “stockholder” side as with industrial managers/directors?

E.g., hedge funds fixated on showing quarterly returns.

E.g., undiversified holders versus diversified holders, with the latter having an interest in both potential sides of a deal even as the former is likely to have a greater stake and voice in the opposite direction.

E.g., union and public pension funds with interests in the firm not related to corporate performance.

E.g., institutions chiefly motivated to avoid legal risk for fiduciary decisions that wish to rely on purchased decision-makers (ISS, etc.) who have their own profit-making agendas.

4. Isn’t there a **structural conflict** between individuals charged with maximizing the value of a particular firm in particular circumstances, and those interested in value maximization across the entire universe of firms?

E.g., in a sale, directors of firm A may act to optimize the price received by A stockholders, but a system’s allowance of such actions may be argued to diminish the likelihood of such transactions as a whole, or result in a legal regime that provides deference to director decision-making.

5. Isn't there a structural conflict in a system in which one group (stockholders) vying for control power (a) owes no legal duty to anyone and (b) is an ever-changing group that is free at any moment to exit?
6. **The “principal/agent” premise.** Is the essential premise of the stockholder-centric proponents – the principal-owner/agent view of the corporate firm – accurate or reasonable, including given that the legal system gives legal immunity to the “owners” and imposes multiform liabilities on the “agents”?
7. The **governistas’ assumption that directors on corporate boards cannot be trusted** – is that based on any actual evidence, on observed anecdotal information, or just the skepticism of a group that has never (or rarely) been in the boardroom or been charged with overseeing a for-profit enterprise?
8. Why are participants in corporation’s earnings calls/analyst meetings never the **governistas**?
9. A recent report claimed that U.S. CEO’s spend **something like 33% of their time on governance-type issues**: is that desirable?

E.g., hasn't the governance-rather-than-performance-centric debate resulted in the new breed of lawyer-CEO?
10. What part of the recent PE privatization wave is fairly attributable to increased costs imposed by the governistas? Is that good or bad?
11. How do the stockholder-centric governistas take account of the fact that a diverse stockholder body is certainly unlikely to have the information and expertise about the firm on a par with the directors and managers?
12. **The political theory.** At bottom, doesn't the governistas’ stockholder-centric theory hark back to the crudest 19th century aspects of laissez-faire capitalism – pressing for the legal system to recognize a single social good (maximizing rentiers’ portfolio returns) while ignoring or slighting the interests of labor, communities and societal welfare?

Is there a parallel between the governistas and Lochnerism?
13. Doesn't the current debate recall the pre-Enron academic and activist obsession with takeover defense and the like, **when all the while the real problems were elsewhere**?