REVIEW ESSAY

Corporate Constitutionalism

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Abstract

The challenge for critical corporate law scholars is to provide an account of corporate law that accommodates responsiveness to the public interest. This involves defining a space for debate about both the public policy goals of corporate law and the regulatory mechanisms for achieving those goals. This task is a complex one because it involves recognising the insights of law and economics scholars, in particular, that corporations are at once important components of markets and constituted by those markets. A recent book and winner of the 2008 Hart Socio-Legal Book Prize, *The Constitutional Corporation* by Stephen Bottomley, provides just such an account of corporate law. This book provides a pragmatic account of corporate law which opens up corporate law to political concerns while acknowledging that corporate law is private in its orientation. This review of *The Constitutional Corporation* provides an overview of Bottomley's analysis, locates his approach in broader theoretical debates about corporate law and examines the potential of the approach to develop systems of corporate social responsibility in order to meet impending global challenges such as climate change.

1. Introduction: Corporate Law Theory — The State of Play

Since the rediscovery of the Coase Theorem by Jensen and Meckling in the late 1970s, corporate law theory has been dominated by economic analysis which posits that the corporation is a nexus of contracts.

Jensen and Meckling stated that the 'corporation … is simply a nexus for contracting relationships [that] … serves as a focus for a complex process in which the conflicting objectives of individuals … are brought into equilibrium within a framework of contractual relations'.[1] This conception of the corporation swept through the corporate law academy like a 'prairie fire',[2] causing Branson to bemoan in 2001 that, at least in the US, '[e]very book and journal article in the corporate law field [has] to take an economics of law perspective [in order] to

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1 Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305 at 311.

2 Douglas Branson, 'A Corporate Palaeontologist's Look at Law and Economics in the Seventh Circuit' (1989) 62 *Chicago-Kent Review* 745 at 745, quoted by Brian Cheffins, 'Corporations' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) at 493.

succeed in the marketplace of ideas'.[3] In Australia, the predominance of the economic analysis of law was institutionalised with the introduction of the Corporate Law Economic Reform Program (CLERP) in 1996. The aim of CLERP was to use an economic analysis of law as the primary lens through which to view corporate law reform.

The strength of the economic analysis was that it provided an institutional account of corporate law. It drew attention away from the traditional binary concern of balancing the power of managers and owners.[4] The economic analysis of law located corporate law within a matrix of markets, including securities markets, the market for corporate control, markets for managerial services, product markets and labour markets.[5] The economic analysis of corporate law thus brought into focus the significant insight that corporate law both supported and facilitated the operation of these markets and was, at the same time, the product of these markets. As a result, much (but not all) economic analysis of law argued that corporate law should be responsive to the needs of market and that there is a very limited role for governments seeking to shape corporate law to achieve public policy objectives.[6]

This individualist and market-oriented account of corporate law has been criticised from many different perspectives. Cheffins suggests that concerns about the polemical and uncaring nature of contractarian analysis have meant that the approach is 'unloved'.[7] Similarly, West argues that 'economic man' has a 'thin' subjective life which moves us away from sympathetic engagement with him.[8] The challenge for those seeking to provide a democratic or political analysis of corporate law is, therefore, to develop either alternative[9] or complementary[10] paradigms to the contractarian analysis. This challenge is a difficult one because it requires a political account of corporate law which integrates the insight that corporate law is, and should to some degree be, responsive to the markets which frame it. Corporate law has, in this sense, both public and private dimensions. The

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3 Douglas Branson, 'Corporate Governance "Reform" and the New Corporate Social Responsibility' (1989) 62 *University of Pittsburgh Law Review* 605 at 619.

4 See, for example, Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (rev ed, 1968).

5 See, for example, Michael Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (2001).

6 See, for example, Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (1991).

7 Cheffins, above n2 at 493.

8 Robin West, 'The Other Utilitarians' in Brian Bix, *Analyzing Law: New Essays in Legal Theory* (1998) at 211.

9 See, for example, John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1993); David Millon, 'Communitarians, Contractarians and the Crisis in Corporate Law' (1993) *Washington and Lee Law Review* 1373 at 1379 (this article forms part of a symposium on communitarian approaches to corporate law) and Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (2002).

10 For example, team production analysis. See Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247.

challenge is to provide an account of corporate law that creates a space for corporations to internalise broader concerns of public policy.

A recent book and winner of the 2008 Hart Socio-Legal Book Prize, *The Constitutional Corporation* by Stephen Bottomley,[11] provides just such a complementary account of corporate law. *The Constitutional Corporation* is a pragmatic account of corporate law which opens up corporate law to political concerns, while acknowledging that corporate law is also private in its orientation. This book acknowledges the private nature of corporations and the role of economic analysis of law in informing corporate law. It also develops a complementary account of corporate law based on a constitutional or political analysis. The great strength of this book is that it provides an account of corporate law that opens up a space in which it is possible for stakeholders and governments to make corporations responsive to political, as well as economic, concerns. This 'constitutional' account of corporate law is, therefore, relevant to anyone who is interested in understanding the ways in which corporations can, and should, be made responsive to political concerns.

This book shifts corporate law theory away from economic analysis and the nexus of contracts by reconceptualising the corporation as a body politic and applying a constitutionalist framework to corporate decisions. Within this framework, corporate systems must ensure that decision-makers are held accountable for their decisions and that those decisions are subject to deliberation and are contestable by members. The constitutionalist framework does not dislodge shareholder primacy. Instead, it incites shareholders to be actively involved in corporations as members rather than investors and to voice non-financial concerns. In this review, we examine the potential of this framework to provide a roadmap for corporations to develop systems of corporate social responsibility and stakeholder responsiveness, focusing, in particular, on the impending challenge of climate change.

2. *What Is Corporate Constitutionalism?*

Corporate constitutionalism presupposes that there are values and ideas in our public political life that provide useful insights when considering the legal regulation of corporate governance and decision-making. However, the 'corporate' adjective indicates that within the corporate context these values and ideas will have different formulations, applications and consequences than in political contexts.[12] The application of constitutionalism to corporations is germane because corporations are both social actors and polities in themselves.

Corporate constitutionalism provides a normative framework through which we can assess the legitimacy of corporate decision-making.[13] It relies on three principles:

11 Stephen Bottomley, *The Constitutional Corporation — Rethinking Corporate Governance* (2007).

12 Id at 12.

13 Ibid.

1. Accountability — corporate decision-making processes should be characterised by a separation of decision-making powers.
2. Deliberation — corporate decisions should be subject to deliberation.
3. Contestability — corporate decisions which do not track the interests of members should be readily contestable.[14]

This is not a clumsy imposition of constitutionalism upon corporate governance, and this book recognises that one cannot treat corporations as analogues of parliamentary systems.[15] Rather, the framework has many strands. It has 'elements of liberal constitutionalism (a regard for individual rights and interests), communitarianism (the idea that, in addition to individual members, the group has significance) and republicanism (stressing, in particular, the idea of governance according to the common good)'.[16]

The consequence of this framework is that the constitution replaces contract as the foundation of corporate governance. The company is not just a nexus of bilateral or multilateral agreements but is also a framework within which decisions are made. Although Bottomley's framework follows the contours of the standard legal model of the corporation adopted in many Western legal systems (consisting of the board of directors and the company's shareholders), the function of corporate law within this framework is to create deliberative spaces. Though the focus of corporate law has been upon decisions of the board and formal deliberation in the general meeting of shareholders, this book is a call to shareholders to be actively involved in deliberation and contestation beyond the formal general meeting. Bottomley regards corporate law as having a role in promoting shareholder action, as an antidote to passivity and exit. Thus, he urges a shift in perception from shareholders as investors to shareholders as members.[17]

Moreover, the framework is evaluative rather than explanatory and prefers description to prescription. The author states that 'this is an evaluative exercise: these principles provide benchmarks against which corporate practice and its legal regulation can be assessed'.[18]

The book discusses the contractarian model of the corporation and notes its domination of corporate law theory. Bottomley concludes that the contractual model has several limitations — it reduces complex relationships to bilateral agreements, it embraces economic analysis to the exclusion of other perspectives, its orientation is teleological rather than deontological and it invites a body of rules that facilitates private, voluntary, individual agreements rather than state regulation.[19]

Economic theorists denounce State interference, other than the minimum regulation required to establish default terms for the nexus of bilateral contracts

14 Ibid.
15 Id at 38.
16 Id at 55.
17 Id at 14.
18 Id at 69.
19 Id at 30–3.

which, they assert, constitutes the corporation. Therefore, regulators bear the burden of justifying interference. The intrusion of public law concepts is regarded with suspicion. In Bottomley's view, this is a fallacy, since 'state involvement in the corporate life has not withered away'.[20] The constitutionalist framework rejects the notion that economics is the only basis for recognition of the company, since corporate law is partly public and partly private.[21]

Notably, *The Constitutional Corporation* does not challenge the pivotal role of shareholder primacy in corporate law. While many corporate law commentators have urged a shift away from shareholder primacy to a model which recognises the interests of other stakeholders, in Bottomley's opinion a recognition of stakeholders in corporate law would depart too dramatically from the prevailing mindset of corporate managers and officers where the shareholder primacy norm exercises 'a powerful grip'.[22]

In fleshing out the operation of the three principles of corporate constitutionalism referred to above, the author asserts that a system of corporate *accountability* must provide a framework that protects against the improper exercise of power and makes corporate decision-making power subject to a 'plurality of checks and balances'.[23] This can be achieved through a division and separation of powers. The separation of powers concept is used in a broader and looser sense than the institutional separation of powers to which lawyers are accostomed. Since the concept is being applied in the private sector, one would expect that the taxonomies of power require different separations than the standard legal doctrine.[24] On the Bottomley model, separation of powers is a diffused institutionalised system of scrutiny where each site has sufficient independence and autonomy to do its job but also acts as an outside monitor.[25] Examples of sites which exercise some independent role in decision-making processes within the

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20 Id at 33.

21 Id at 29–3, 57–9.

22 Id at 8. Some commentators argue that the shareholder primacy model is an artefact of a very specific temporal and cultural context. It has been described by Singh et al as an 'Anglo-Saxon phenomenon'. They conclude that other countries have prospered considerably without the shareholder primacy norm. See Ajit Singh, Alaka Singh and Bruce Weisse, *Corporate Governance, Competition, the New International Financial Architecture, and Large Corporations in Emerging Markets: ESRC Centre for Business Research Working Paper No 250* (2002). Similarly, Deakin contends that '[t]he current focus on shareholder value is … the consequence not of the basic company law model, but of … institutional changes which have occurred in capital markets and securities law with increasing rapidity, … namely the rise of the hostile takeover bid, and the increasing use of share options and shareholder value metrics'. See Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance: An International Review* 11 at 14. These conclusions challenge Hansmann and Kraakman's convergence theory of shareholder primacy, which asserts that corporate law based on shareholder primacy has achieved a high degree of uniformity around the globe due to its superior efficiency. See Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439 at 450.

23 Bottomley, above n11 at 70.

24 John Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305 at 307.

25 Bottomley, above n11 at 92–3.

corporation include the independent Chair, other independent directors and auditors. Bottomley suggests that other sites may develop a degree of independence in the decision-making process — for example, whistleblowers, who are protected when disclosing relevant information.[26] Although it must be conceded that power is often fragmented and dispersed in ways that are not captured by the traditional 'three branches of power' model of separation of powers,[27] nevertheless, these reviewers were not entirely convinced by the 'plurality of checks and balances' argument. The processes of corporate governance that Bottomley describes are predominantly concerned with risk management and, in this sense, the system of accountability described by Bottomley conflates the rather grand and institutionally constitutive concept of separation of powers with its poor cousin, risk management.

The principle of *deliberation* requires us to determine the legitimacy of corporate decisions by assessing the extent to which the processes are subject to deliberative input, meaning that, as far as possible, there should be processes that are open, genuine and represent a collective judgment about the issue at hand.[28] Individual interests are subject to competing perspectives that are debated and transformed into a collective judgment about the corporate interest.[29] Bottomley again finds instances where this is already mandated in corporate law, for example, in the directors' duty of care and diligence, which requires collective decisions.

The author borrows from Habermas' description of deliberative politics[30] to portray corporate decision-making as a series of concentric 'spheres of influence', with the general meeting of shareholders at the centre. Deliberation may occur at formal and informal sites, such as shareholders bulletin boards and corporate interest groups which can monitor corporate issues to facilitate discussion and debate on the periphery though proxy voting.[31]

Finally, Pettit's concept of *contestability* — the permanent possibility that a decision that does not track the interests of the members can be effectively contested[32] — is embraced to promote voice, rather than building corporate law around the exit option.[33] In this respect Bottomley compares the derivative action,[34] which promotes loyalty and corporate-regarding behaviour with the oppression remedy, which is used to secure exit.[35] However, he argues that contestability options are not confined to the courtroom, and a system of corporate

26 Id at 107.

27 See Elizabeth Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 *University of Pennsylvania Law Review* 603 at 651.

28 Bottomley, above n11 at 112.

29 Id at 113.

30 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, 1996 ed).

31 Bottomley, above n11 at 137–9.

32 See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997).

33 Bottomley, above n11 at 144.

34 Id at 154.

35 Id at 157.

contestability could encourage shareholders to consider non-judicial options such as questioning directors and requisitioning a general meeting.[36]

The three principles are interrelated. Therefore, they should be read together and shortfalls in the operation of one might potentially be addressed by another.[37] In particular, effective deliberation has the potential to reduce needless contestation.

3. *What Is Distinctive About Corporate Constitutionalism?*

This book offers a richer conception of the corporation than the nexus of contracts. By characterising the corporation as a body politic, Bottomley offers a multi-dimensional model of the corporation as an institution and captures aspects of the corporation's role as social actor, as well as its internal organisational life.[38] Moreover, this lens allows us to evaluate corporate governance by political, as well as economic, criteria. The model is timely, coinciding with the United Nations' recent shift to monitoring transnational corporations for abuses of human rights, in addition to nation states.[39]

The framework of corporate constitutionalism is derived from republican political theory and, at times, the author makes claims that appear to give the framework substantive content. For example, he states that a system of corporate law should be 'concerned to enhance public values such as the avoidance of oppressive or unfair behaviour, the use of objective, rather than purely subjective, standards in the evaluation of corporate behaviour and the importance of accountability in the exercise of power within and by corporations'.[40] However, Bottomley's account of the operation of corporate constitutionalism is limited to procedures and structures and not substantive standards. This aspect of his argument is important. He frequently emphasises that the framework is concerned with *how* decisions are made and that accountability, deliberation and contestability are concerned with the processes by which decisions are made,

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36 Id at 151.

37 Id at 170.

38 Adopting Selznick's analysis, see Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1992) at 242.

39 See United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) UNHCR <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En> accessed 18 September 2008. In 2005, Kofi Annan appointed John Ruggie to the position of Special Representative of the Secretary-General on business and human rights. Ruggie's report was presented to the United Nations General Assembly Human Rights Council on 9 February 2007. See United Nations General Assembly Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council' — Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* Business — Human Rights <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> accessed 18 September 2008.

40 Bottomley, above n11 at 57.

rather than outcomes.[41] The evaluative framework does not require that certain outcomes should occur, but rather that corporate structure and processes should be assessed according to whether they embody and uphold the aforementioned principles.[42]

The Constitutional Corporation is a pragmatic account of corporate law. It does not engage in the debate about whether corporations are essentially public or private. It does not, in any universal way, argue that corporations should be regulated by private agreements or be subject to regulation that is based upon a conception of the public interest. It does provide an account of corporate law in which shareholders have a special role in the system of governance. It also provides an account of why shareholders are not entitled to fashion the corporation to their own expectations in ways that are inconsistent with public policy. In this sense, it emphasises that one definition of the public interest in corporate law is the role of law and regulation in enhancing the quality and integrity of decision-making processes within corporations.

4. Why a Republic of Shareholders Only?

Pettit argued that a system of government that meets constitutionalist considerations was necessary for the promotion of freedom as non-domination.[43] As stated above, Bottomley's model embraces republicanism, but one aspect of republicanism has been omitted — the common good. Pettit expressed this idea as follows:

> If the polity is deliberative, then there will be a basis for citizens to contest any public decision, be it legislative, administrative or judicial. And if the polity is inclusive then there will be a voice available to people in every part of the community for expressing their contestations.[44]

Bottomley has omitted the inclusiveness criterion to make way for shareholder primacy, thereby excluding stakeholders such as employees, tort creditors and communities from his corporate republic. This raises the question of the role of corporate social responsibility within the constitutionalist framework. There are many definitions of corporate social responsibility. One set of definitions emphasises the approach by which a business enterprise 'takes into account the impacts of its activities on interest groups (often referred to as stakeholders) including, but extending beyond, shareholders and balances longer-term societal interests against short-term financial gains'.[45]

Christine Parker has previously applied the model of deliberative democracy to corporations as an element of her framework for corporate self-regulation of

41 Id at 15.

42 Id at 16.

43 Pettit, above n32 at 51–109.

44 Id at 195.

45 Corporations and Markets Advisory Committee ('CAMAC'), *The Social Responsibility of Corporations: Report* (2006) at 13.

social and legal responsibilities.[46] In her study, Parker confined the content of the corporation's external responsibility to regulatory compliance, thereby avoiding the normative question of how far corporations must go to service the needs of stakeholders. Bottomley has also avoided this normative question by equating the deliberative spaces of the corporation with its legal model, confined to the board and various shareholder sites such as the general meeting. The decision to focus upon the existing model of the corporation with its emphasis on the interests of shareholders was pragmatic, since the challenge set by Bottomley was to work *with* the shareholder primacy model and look at corporations and shareholders in a way that opens up new possibilities for shareholder involvement, without necessarily shutting out other sets of interests and concerns.[47]

Stakeholders do not have access to these deliberative spaces, but Bottomley considers that deliberation 'does not necessarily require full and direct participation by all persons who are affected by the decision'.[48] The needs of the stakeholder constituents and the requirements of corporate social responsibility may, nevertheless, be voiced by shareholders, since the model permits attention to shareholders' non-financial concerns, such as the social and environmental impacts of the company's activities.[49] Notably, Bottomley urges that concerns about corporate social responsibility 'must be built on the revitalisation of the shareholder role'.[50]

This raises three questions. The first two questions are empirical and focus upon the efficacy of corporations' internal processes of deliberation to deliver socially responsible outcomes. First, are shareholders willing and able to fulfil the demands of corporate constitutionalism? Second, what is the role of initiatives, such as s 172 of the *Companies Act 2006* (UK), which allow for deliberation about stakeholder interests in the board of directors? The third question locates the corporation in a broader context and examines the permeation of demands for corporate social responsibility into the corporation's deliberative spaces. This formulation of the issue starts with the proposition that corporations are subject to demands from stakeholders and regulators, who are explicitly, or implicitly, calling for more effective systems of corporate social responsibility. In this context, we need to consider whether the model of governance proposed in this book will be effective in accommodating these demands; that is, in assisting the corporation to modify its internal operations in response to these external demands.

5. *Shareholders as the Conduit of Corporate Social Responsibility*

Bottomley's argument that shareholders may act as the conduit of corporate social responsibility is clever, but one might question whether shareholders are up to the modest collective demands made upon them by corporate constitutionalism. There

46 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

47 Bottomley, above n11 at 8.

48 Id at 72.

49 Id at 175.

50 Id at 178.

is evidence that points in both directions. Bottomley points to the rise of socially responsible investment as indicating the willingness and capacity of shareholders to assume a wider role.[51] Further, a recent empirical study indicates that 'human resource management' is commonly raised by shareholders who are in regular contact with company personnel, and in unlisted companies it is discussed more often than dividend policy or share prices.[52] Some institutional investors have independently established their own research organisations to investigate environmental, social and corporate governance, including the long term performance of companies and stakeholder relations.[53]

Conversely, commentators point to a share market which is dominated by institutional investors with a 'laser-beam focus on quarter-to-quarter earnings'[54] and a resolute indifference to any role other than that of investor. Bainbridge concluded in 2005 that rational apathy is prevalent among institutional shareholders and that voting, which Bottomley regards as integral to the shareholder voice, 'is properly understood not as an integral aspect of the corporate decision-making structure, but rather as an accountability device of last resort to be used sparingly, at best.'[55] Anecdotally, the ugly face of shareholder primacy was revealed by shareholder reaction to corporate donations to the relief fund for victims of the 2004 Boxing Day tsunami. According to news reports:

> [The Australian Shareholders Association] expressed disapproval of companies pledging money to the tsunami relief effort … saying they have no approval for their philanthropy. Association spokesman Stephen Matthews says firms should

51 Id at 176. A recent study of French institutional investors indicates that 61 per cent had ventured into socially responsible investment in 2007, compared with 48 per cent in 2006. See Novethic, Amadeis and BNP Paribas, *Investissement Socialement Responsable* (2007) Novethic <http://www.novethic.fr/novethic/upload/etudes/Etude_ISR_2007.pdf> accessed 18 September 2008.

52 Meredith Jones, Shelley Marshall, Richard Mitchell and Ian Ramsay, *Company Directors' Views Regarding Stakeholders: Research Report* (2007) at 44. Note, however, that financial performance was the most common issue raised when the information regarding listed and unlisted companies in the sample was aggregated.

53 For example, Regnan has been formed in Australia by a consortium of superannuation funds such as Hermes Investment Management Limited (owned by, and the principal fund manager for, the British Telecom Pension Scheme) and the NSW Local Government Superannuation Scheme. Its homepage states: 'Regnan represents institutional investors who recognise that environmental, social and corporate governance (ESG) factors affect long term shareholder returns. Regnan promotes strengthened ESG performance within the S&P/ASX200 companies in which these institutions invest'. See Regnan <http://www.regnan.com.au/index.php> accessed 18 September 2008.

54 Leo Strine, 'Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution For Improving Corporate America' (2006) 119 *Harvard Law Review* 1759 at 1764.

55 Stephen Bainbridge, *Shareholder Activism and Institutional Investors: UCLA School of Law Law-Econ Research Paper 05-20* (2005) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796227> accessed 18 September 2008. Although retail investors may express stakeholder concerns, there is evidence that their participation is dwindling in some key existing markets, and they are excluded entirely from some important new trading markets and asset classes. See Brian Cartwright, *The Future of Securities Regulation* (2007) US Securities and Exchange Commission <http://www.sec.gov/news/speech/2007/spch102407bgc.htm> accessed 18 September 2008.

not generally give without expecting something in return.[56]

This incident led to a call by Beerworth that directors have a defence to a complaint that they had acted improperly in circumstances where the directors considered the interests of stakeholders in their decision-making.[57]

Bottomley argues that shareholders can, and should, be encouraged to take responsibility 'in a moral sense' for the actions of the corporations whose shares they own.[58] However, one cannot be entirely confident that shareholders will champion the interests of the broader stakeholder community. While the framework posited by Bottomley excludes direct participation by stakeholders in corporate decision-making, can their interests nevertheless be promoted in the board?

6. The Board as a Deliberative Space

The capacity of the board to integrate the interests of stakeholders into corporate decision-making processes is an issue of general concern in corporate law. This debate sometimes takes the form of questioning whether directors are permitted to take into account the interests of stakeholders who are not shareholders.[59] Sometimes, this debate is framed with reference to the question of whether directors should be required to take into account the interests of other stakeholders.[60] Bottomley addresses this concern in a number of ways. He states that, *as far as possible*, the process of corporate decision-making should be open and genuine and convey a plurality of roles and discursive perspectives.[61] He considers that corporate law already constitutes the board as a deliberative space. Accordingly, corporate constitutionalism contemplates some regulation of deliberation by the board, albeit by the use of structures and procedures such as the independent Chair.

Against this background, one of the aims of this book is to identify a coherent rationale as to why boards should integrate the interests of stakeholders into corporate decision-making processes. Bottomley argues that corporate social

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56 ABC Radio, 'Shareholders Association Opposes Corporate Aid Donations', *AM*, 7 January 2005 <http://www.abc.net.au/am/content/2005/s1278328.htm> accessed 18 September 2008.

57 Bill Beerworth, 'A Modest Proposal: Recognise The Existence of Stakeholders' *Company Director* 20 (2004/2005) 13 at 13.

58 Bottomley, above n11 at 176.

59 Section 172 of the *Companies Act 2006* (UK) imposes a duty upon directors to promote the success of the company. A procedural component of the duty obliges UK directors to have regard, *inter alia*, to the interests of the company's employees, the company's business relationships with customers, the long term consequences of decisions and the impact of the company's operations on the community and the environment. The efficacy of such initiatives has been debated at length in Australia and the UK. See CAMAC, above n44; Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006). For an overview and history of the UK provisions, see Charles Wynn-Evans, 'The Companies Act 2006 and the Interests of Employees' (2007) 36 *Industrial Law Journal* 188.

60 Blair and Stout, above n10.

61 Bottomley, above n11 at 118–19.

responsibility is dependent upon the capacity of the board to develop an understanding of the corporation's interests that embodies the interests of stakeholders. In his view, however, board deliberations must take the interests of *shareholders* seriously before there can be any development of a broader approach.[62] In light of the current arguments about the potential role of corporate social responsibility, one issue raised by this book is whether this approach enhances the potential for directors to weave the interests of *stakeholders* into their deliberations.[63] It also raises the question of whether this approach will help to make board decision-making responsive to demands for the introduction of socially responsible practices into corporate decision-making practices. Arguably, the approach places too much weight upon the agency of shareholders and weakens the utility of the board as an independent site of deliberation.

7. The Constitutional Corporation, Corporate Social Responsibility and Climate Change

One issue which will test the capacity of shareholders and directors to integrate stakeholder interests into corporate decision-making processes is the challenge of responding to climate change. The particular issue for corporations, is the role of corporate social responsibility initiatives in facilitating the development of the capacity of corporations to modify their corporate practices in response to the challenges posed by climate change. Bottomley deals with this problem by drawing attention to the role of shareholders in corporate governance and to the nature of the deliberative space in which directors work and function. These two sets of concerns are of particular importance when we come to consider the relevance of organisations adopting programs of, and accommodating calls for, higher levels of corporate social responsibility. Arguably, the focus of this book — the decision-making processes within corporations — casts light on the capacity of corporations to develop effective systems of corporate social responsibility.

An effective system of corporate social responsibility is dependent on the capacity of an organisation to recognise the external interests of stakeholders and translate those interests into ones that its own internal decision-making processes can recognise and use to further the corporation's interests.[64] An organisation's internal decision-making processes must have the capacity to assess the relative importance of all these interests and concerns in the context of its particular business. The goal of corporate social responsibility, in this sense, is for an organisation to develop the capacity to orient its business in a multi-dimensional environment, where each dimension may impose competing demands.[65]

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62 Id at 178.

63 Blair and Stout, above n10.

64 See, for example, Michael Power, 'Risk Management and the Responsible Organisation' in Richard Ericson and Aaron Doyle, *Risk and Morality* (2003) at 145–64.

65 Angus Corbett, 'Corporate Social Responsibility: Do We Have Good Cause To Be Sceptical About It?' (2008) 17 *Griffith Law Review* 413.

The challenge of developing effective systems of corporate social responsibility takes on a sense of urgency when particular organisations face challenges to their continued survival. This could occur where an organisation faces the risk of becoming insolvent, or where the risk of harm associated with a catastrophe or disaster threatens the continued existence of the organisation. More immediately, there is an important question about the capacity of organisations to accommodate the need for change where the potential for disaster or catastrophe is one that confronts the broader community. For example, it is becoming increasingly clear that we as individuals and nations will need to make profound changes, in all aspects of our lives, in order to accommodate the hazards associated with climate change.[66]

There will be a broad range of responses to the problems associated with climate change. Generally, this will involve decisions about appropriate public policy at a governmental level and changes to our everyday lives as individuals. At the individual level, we will have to change patterns of consumption, transport and, more generally, communication. In between these two levels, business and other organisations will have simultaneously to accommodate policy changes from above and changes in the patterns of relationships with their stakeholders. Business organisations will need to develop the capacity to move to new patterns of relationships with customers,[67] creditors,[68] employees[69] and shareholders. Relationships with shareholders and stakeholders will need to be aligned and re-aligned to create new patterns of relationships that will support and sustain business organisations in the changed circumstances created by climate change.[70]

It is important to note that the challenge associated with climate change is new, in the sense that it is literally a challenge on a global level. Nonetheless, the process by which organisations transform their relationships with stakeholders is one that particular organisations and industries have actively engaged with for a very long time. For example, in the oil industry, particular organisations have responded to

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66 See Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis — Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at 1–18 (a review of natural and human drivers of climate change). See also Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability — Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at 7–22 (a review of the impacts of increasing temperatures on natural and social systems).

67 See, for example, the role of customers in encouraging the development of energy efficient buildings. Green Building Council of Australia <http://www.gbcaus.org/default.asp> accessed 18 September 2008.

68 See, for example, The Equator Principles <http://www.equator-principles.com/> accessed 18 September 2008.

69 See, for example, Australian Council of Trade Unions, *Principles and Policy on Global Warming: Position Paper* (2007) ACTU <http://www.actu.asn.au/Images/Dynamic/attachments/5351/Global%20Warming%20Policy%202007.pdf> accessed 18 September 2008.

70 For example, new relationships and arrangements will emerge as business organisations adapt to the development of emissions trading schemes or carbon taxes. For recent discussion, see Business Council of Australia, *Modelling Success: Designing an ETS that Works* (2008) BCA <http://www.bca.com.au/DisplayFile.aspx?FileID=469> accessed 18 September 2008.

the need to improve levels of safety over the last three decades. There are similar stories in the areas of aviation, health and nuclear power.[71]

This book makes an important contribution to our understanding of the role of corporate law and corporate governance in establishing a framework for organisations seeking to develop more effective systems of corporate social responsibility. In particular, it focuses attention on the role of shareholders and draws attention to the processes of decision-making through which organisations can engage their shareholders. By focusing on the role of shareholders, this book also focuses on the need for directors and shareholders to redefine the interests of the company so that they embody the interests of stakeholders. In this sense, the focus on the interests of shareholders in corporate decision-making processes may be an important vehicle for assisting directors and shareholders to respond to the interests of other stakeholders and to the challenges of climate change.

8. A Pragmatic Corporate Law

Bottomley's pragmatic approach to corporate law is a valuable one at this time. The focus on shareholders is useful because shareholders are the one group who will need to re-orient their expectations and interests around more dynamic and sophisticated systems of corporate social responsibility. Shareholders will also have an important role in corporate governance as organisations re-orient themselves in the emerging multi-dimensional matrix of relationships discussed above. Shareholders will both lead, and be led by, changes within this matrix. In both instances, shareholders will have to re-align their interests and expectations as they come to understand the forces affecting the organisations of which they are members. In particular, they will need to reorient their relationships with other stakeholders, who are themselves re-negotiating their relationships within particular business organisations.

The great strength of *The Constitutional Corporation* is that it outlines the basis for a decision-making structure which shareholders can use to re-assess their interests and expectations. It is precisely the elements of accountability, deliberation and contestability which give the decision-making processes within business organisations the degree of resilience and robustness that is needed to support this re-assessment of shareholder interests and expectations. In this sense, this book may provide a useful roadmap of the way that corporate law can respond to demands from within and without corporations, as they seek to introduce more effective systems of corporate social responsibility.

9. Conclusion

As with many good corporate law books, this book will both excite and disappoint readers. It is stimulating to read an account of corporate law which focuses on the

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71 See, for example, James Reason, *Managing the Risks of Organisational Accidents* (1997); Karl Weick and Kathleen Sutcliffe, *Managing the Unexpected: Resilient Performance in an Age of Uncertainty* (2nd ed, 2007).

role of the corporation as a body politic. This book is convincing because it integrates a concern with the quality of decision-making processes within the corporation with a more traditional economic understanding of corporations as a nexus of contracts. In brief, this book provides us with a principled account of why we should be concerned with the quality of decision-making within corporations.

At the same time, many readers will be troubled by the question of whether the decision-making processes outlined in this book are sufficiently full and intense to make a difference to the quality of decisions made within corporations. In this review, we have highlighted concerns about whether either shareholders or directors are capable of actively participating in these decision-making processes. Readers may be unconvinced about the potential of bulletin boards and other extended forms of shareholder participation to have any measurable impact on the level and quality of participation by shareholders in the governance of their companies.

This review argues that these particular concerns, about the capacities of shareholders and directors to integrate public policy concerns into corporate decision-making processes, may not give sufficient attention to the magnitude of the problems faced by corporations in responding to the challenges presented by climate change. In particular, we argue that these challenges will concentrate attention on the quality of decision-making processes within corporations. This will become apparent when corporations are called on to modify their decision-making processes and their practices in response to demands from stakeholders and governments. Often this will take the form of demands from stakeholders and governments for corporations to develop effective systems of corporate social responsibility.

One of the consequences of attempts to accommodate the impacts of climate change will be the need for corporations to develop more effective systems of accountability. This book, which aims to engage shareholders in the process of corporate governance, may help to create a space in which shareholders come to re-assess and re-negotiate their expectations and interests in companies, in the context of the impact of climate change. In this sense, the pragmatic account of corporate law in this book may actually mesh with the practical and pragmatic interests of shareholders who are engaged with the challenge of creating effective systems of corporate social responsibility.

In conclusion, this book provides a subtle account of corporate law, which has the capacity to challenge some of our basic conceptions about what we should expect of this area of law. There are reasons for being sceptical about whether the main propositions in this book will make a difference. There is, however, the possibility that this account of corporate law may be a roadmap that corporations and their shareholders will use to accommodate demands for developing effective systems of corporate governance. It is this possibility that should inspire people to read this book and engage with the arguments it develops.