It’s no “Thrilla in Manila,” but a rematch between two governance heavyweights could wind up looking nothing less than the prototype of corporate governance. Martin Lipton, a professor at Harvard Law School, last week slammed as “illusory” the notion that top executives would stop favoring shareholders over workers, customers or other stakeholders – despite promises to do so. 

That position makes some sense. After all, the corporate form arose from the English notion that only entities that benefited the public – like water suppliers – deserved its most important attribute: limited liability for owners. By the 1920s, though, the prevailing legal wisdom was that managers’ primary duty was to shareholders, the people who elected directors and essentially owned the company. Views began to shift in the aftermath of the 2008 financial crisis and corporate scandals like Boeing’s botched development of the 737 MAX aircraft, which exposed flaws in the theory that serving investors necessarily created long-term value.

At first sight it is surprising that Belchuk, a persistent boardroom watchdog, would oppose broadening management accountability – or that Lipton, defender-in-chief of boards and managers, would embrace it. Yet the argument Lipton presents in his article is more nuanced than that. He sees a need to protect stakeholders, but he doesn’t trust companies, or the market, to do it.

For starters, he argues, that the extent serving a wider group of stakeholders increases a company’s value by, say, allowing a company to attract productivity-boosting employees, managers will do it anyway. That not only makes it superfluous but creates the possibility misleading impression that actual changes to business practices aren’t necessary. What’s more, the difficulty of deciding who counts as a stakeholder and how to balance conflicting interests leaves, in Belchuk’s view, too much discretion to management.

And managers often have powerful incentives to favor shareholders over everyone else. Directors and top executives at companies from Oracle to Johnson & Johnson are paid largely in equity, aligning their interests with those of shareholders. Their job security also typically depends on keeping their companies’ stock prices high. As evidence of what happens in practice, Belchuk cites the 10 largest private-equity acquisitions to show that target companies consistently bargain to protect management and shareholders but not workers, suppliers or local communities – even when state laws explicitly allow them to take account of constituents other than investors.

The upshot, according to Belchuk, is that making corporate leaders accountable to more people makes them less clearly accountable to anyone. They can use supposed obligations to non-shareholders as a shield against takeovers, activist investors and lawmakers – important forces for disciplining companies. As a result, he says, both shareholders and other stakeholders end up weakened. A possible solution: regulations and laws that enshrine duties to workers, suppliers or local entities – even when state laws explicitly allow them to take account of constituents other than investors.

In a testy memo, Lipton and his partners responded to Belchuk by citing more than a dozen articles that make the case for stakeholder-based governance. The law, they argued, not only permits it, but “practical business, political and social imperatives require it.”

They say new laws might sweep too broadly, destroy corporate value and hinder long-term value.

The biggest hole in Lipton et al’s thesis may be their belief that corporate leaders should be left to serve their stakeholders without being told how. The law may already be changing. In several recent cases, Delaware courts have, for example, issued similar proclamations, and Lipton and his firm declared 2019 a “watershed year” in corporate governance. The shareholder, they said, should no longer be king.

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