Bruner Book Club: The Relationship between the Corporation, Employees, and Social Welfare

PrawfsBlawg
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Many thanks to the participants in the club for a great set of responses. I'm coming in late, and given my location here on the employment side of the corporate governance/social welfare axis, I'm going to focus on the social welfare variable in Christopher's equation.

Corporate Governance in a Common-Law World does a great service in expanding and deepening the debate over the nature of corporate governance. Employees have been pretty much left out of the corporate-governance models in legal academia, going back at least to Easterbrook and Fischel, and perhaps as far as Berle and Means. That has changed somewhat, recently: for example, Bruner aptly provides some nice attention to the Gourevitch and Shinn book, which (among others, including John Cioffi) brings employees into the traditional manager/shareholder corporate-governance duality. But Bruner himself has gone a step further: he argues that corporate goverance policies are inextricably intertwined with employee-related social policies -- characterized in his book as "social welfare." By drawing a connection between corporate law and labor and employment law, Bruner has expanded the scope of "the law of the firm," for lack of a better term, to include not just shareholders, boards, and top-level executives, but rather all the participants in the firm, especially employees.

However, there are three issues I would like to raise in this post for further consideration. First, I want to question the definition of "social welfare" within Bruner's model. There has been a lot of focus on the scope of the "corporate governance" variable in his analysis, and I think Brett rightly brings up the roles of shareholder suits and executive compensation. But how about the social welfare side of the equation? I would have appreciated a greater effort by Bruner to develop his social welfare variable more rigorously, by explaining exactly what factors into it. The book does this for corporate governance, using a series of charts to compare differences between the common-law countries as to specific policies. However, his approach to social welfare is more anecdotal, and lumps in a rather large and somewhat amorphous set of policies.

To some extent, Bruner arguably simplifies "corporate governance" into takeover policy, and "social welfare" into unemployment protections. The easy correlation is that the risk of job loss from mergers and acquisitions would be balanced by national health insurance, unemployment insurance, and job retraining programs. But while his work is clearly not limited to that dynamic, it is unclear how far out it expands, particularly with respect to social welfare. He also relies on the work of the late, great David Charny, who set out a list of policies related to what he termed "the employee welfare state." But Bruner does not extensively develop Charny's list. He also focuses on the health care programs in the various countries, comparing the NHS in Britain (and similar systems in Australia and Canada) with the U.S.'s patchwork system of insurance and care. But social welfare policy cannot be limited to health insurance, can it? It would be interesting to see Bruner develop a sharper definition of this category in future work, with a more

nuanced approach to subcategories. Is all of "social welfare" correlated with corporate governance, or can we narrow it down to specific subcategories of employee protections?

I bring up the underdeveloped concept of social welfare especially since Bruner makes some very nice observations about the lack of nuance in existing comparative corporate governance models. His criticisms of LLSV, for example, for failing to account for differences between common-law countries make a nice point about the importance of going beyond rather chunky categorizations. But his social welfare category risks making the same mistake. Just as a very particularized example, Sam Estreicher and Jeff Hirsch have recently challenged the notion that U.S. unjust dismissal law is much less employee-friendly than that of other developed countries. And this challenge is on a particular aspect of social welfare policy that most commentators would have thought to be well-settled. So I think we need a sharper definition of the social welfare category, and more nuanced comparisons within that definition, if social welfare is to be a meaningful variable in Bruner's equation.

Second, and perhaps a more interesting question from my perspective, is: what forces drove the societal balancing act into these two sets of policy spheres? Why, in particular, did employees not demand more ownership of the enterprise, rather than simply pushing for beefed-up social welfare programs? Social welfare policy seems like a second-best set of ameliorative efforts to address the lack of power that employees have within their own firms. Labor law is the most direct "social welfare" effort to address that internal power imbalance. However, that set of laws has been very careful calibrated to avoid any infringement upon the so-called "core of entrepreneurial control." Labor law carves out a space for employee power, but that power falls outside the decision-making center of the firm. It's not inevitable that employees must look to generate power outside of the firm, is it? And if not, then why did employees and other members of society choose the social welfare policies at issue as their means of balancing out pro-shareholder corporate governance policies? Bruner mentions two minor aspects of British company law that protect employees: statutory authority to consider shareholder interests and a statutory mechanism for providing payments to employees in the face of bankruptcy or closure. But such protections are, in Bruner's words, still "fundamentally quite shareholder-centric" in their orientation (p. 158). Why didn't or haven't employees pressed for more within corporate law?

Third, Bruner's model implicitly assumes that a pro-shareholder approach is necessarily an anti-stakeholder, particularly anti-employee, approach, at least to the extent that it needs to be balanced out by pro-employee social welfare policies. However, some of the recent battles between shareholders and managers do not seem to fit this rubric. Lucian Bebchuk, for example, is perhaps the scholar most associated with shareholder primacy, but he has been excoriated by business groups for being a tool of not only activist shareholders but also public-employee pension funds. The late Larry Ribstein was deeply suspicious of pro-shareholder reforms such as proxy access and say-on-pay, as he believed they allowed unions to have an undue influence over corporate policy. Bruner is careful in places to acknowledge that pro-shareholder is not necessarily conservative or liberal, but I think his model implicitly assumes that pro-shareholder is anti-employee. To some extent, the efforts of union pension funds to increase shareholder rights seems to belie this notion. Australia's superannuation program, discussed by Bruner, is another interesting example of how this contrast is breaking down in some places and spaces.

I have all these questions because Christopher has written such a provocative, original, and thoughtful study of the relationship between corporations, shareholders, employees, and society. His contribution has significantly added to the extensive literature on these issues, and I'm sure that this book is just the beginning.