THE ENDURING LEGACY OF *SMITH V. VAN GORKOM*

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ABSTRACT

Smith v. Van Gorkom (Van Gorkom) *is possibly the most famous corporate law case ever decided by the Delaware Supreme Court. The enduring legacy of* Van Gorkom *is the understanding that corporate directors should not be held financially liable for corporate board decisions that lack due care. Of course, it was not the holding of* Van Gorkom *that established this, but the chain of events that occurred in its wake.*

The challenge for teachers of Van Gorkom *is to explain why shareholders were correct in approving exculpation clauses, even as our thinking about corporate law evolves and corporate scandals (Enron, Tyco, WorldCom, etc.) continue to influence our perspective on the correct level of corporate accountability. As this article demonstrates, applying the innovative approaches taken by legal scholars such as Michael P. Dooley, who introduced Kenneth Arrow's understanding of the value of centralized authority into the study of corporate law, and Stephen M. Bainbridge, who has so aptly applied Professor Dooley's work in the development of his director primacy model, and Margaret M. Blair and Lynn A. Stout, who introduced the concept of the board of directors as a "mediating hierarchy," gives* Van Gorkom *new and greater meaning and reaffirms the correctness of insulating directors from duty of care liability.*

The basic premise underlying this article is that the real value of the corporate form is its hierarchical nature as reflected in the centralized authority of the corporate board. This value is manifested by the corporate board's ability to (1) efficiently filter information in its decision-making process and (2) act as a mediating hierarchy. Such organizational efficiencies create a strong presumption that the laws of corporate governance should not interfere with the corporate board's decision-making process.

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In contrast to the approach taken by both Dooley and Bainbridge, this article does not utilize a contractarian framework. More importantly, this article does not require that shareholder wealth maximization be a norm underlying the laws of corporate governance. By relaxing this standard assumption, we can, for the first time, utilize the efficiency arguments of Dooley and Bainbridge on the one hand and those of Blair and Stout on the other, as two complementary, instead of competing, arguments supporting the position that corporate board decisions need to be protected from judicial review.

I. INTRODUCTION

It is hard to envision an introductory corporate law course that does not devote at least one or two classes to the study of *Van Gorkom*,[1] possibly the most famous corporate law case decided by the Delaware Supreme Court.[2] It has become such a fundamental case for the beginning study of corporate law that one prominent corporate law commentator has likened the failure to teach *Van Gorkom* to the omission of *Brown v. Board of Education* in a first year constitutional law course.[3]

In *Van Gorkom*, the court established that a board of directors could be found liable for monetary damages when making a business decision if it did not comply with the "informed" element of the *Aronson v. Lewis* (*Aronson*)[4] formulation of the business judgment rule (BJR).[5] The court made clear that not being informed is a breach of a director's fiduciary duty of care owed to shareholders.[6] To establish that directors have made an informed business judgment, the court must determine "whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'"[7] Gross negligence is the standard used to determine if there has been a breach of the directors' duty of care in becoming informed.[8]

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[1]Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[2]This article focuses exclusively on Delaware corporate law.

[3]Lawrence A. Hamermesh, *A Kinder, Gentler Critique of* Van Gorkom *and Its Less Celebrated Legacies*, 96 NW. U. L. REV. 595, 595 n.4 (2002) (referring to comments made by John Olson).

[4]473 A.2d 805 (Del. 1984).

[5]*See infra* text accompanying notes 64-69.

[6]*Van Gorkom*, 488 A.2d at 872-73, 893.

[7]*Id.* at 872 (quoting *Aronson*, 473 A.2d at 812).

[8]*Id.* at 873.

From the beginning, *Van Gorkom* has been heavily criticized. The dissent in the opinion called the decision a "comedy of errors."[9] One leading commentator called it "surely one of the worst decisions in the history of corporate law."[10] Bayless Manning reported that the corporate bar considered the decision "atrocious."[11] More recently, Professor Hamermesh stated that "damages actions premised solely upon an alleged lack of director care are a poor, even destructive, corporate governance tool."[12] In sum, "[t]he Delaware Supreme Court in *Van Gorkom* exploded a bomb."[13]

Soon after *Van Gorkom*, the Delaware General Assembly enacted Delaware General Corporation Law section 102(b)(7),[14] a statutory provision that protects directors from monetary liability for any actions arising from a breach of their duty of care if a corporation's shareholders approve the inclusion of an exculpatory provision in the certificate of incorporation.[15] In essence, Delaware lawmakers gave shareholders of Delaware corporations the opportunity to veto the *Van Gorkom* decision if they found it was not in their best interests.

And veto they did. Professor Hamermesh reported that out of a sample of one hundred Fortune 500 companies, ninety-eight had adopted an exculpatory provision.[16] Furthermore, each of the fifty-nine Delaware corporations in the sample had such a provision in their corporate charters.[17]

The enduring legacy of *Van Gorkom* is the understanding that corporate directors should not be held financially liable for corporate board

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[9]*Id.* at 894 (McNeilly, J., dissenting).

[10]Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1455 (1985).

[11]Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After* Van Gorkom, 41 BUS. LAW. 1, 1 (1985).

[12]Hamermesh, *supra* note 3, at 595.

[13]Manning, *supra* note 11, at 1.

[14]DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

[15]Under section 102(b)(7), shareholders are allowed to incorporate into their certificate of incorporation:

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit . . . .

Id.

[16]Lawrence A. Hamermesh, *Why I Do Not Teach* Van Gorkom, 34 GA. L. REV. 477, 490 (2000).

[17]*Id.* at 497-503 app. A. For a critique of exculpation clauses, see Lloyd L. Drury, III, *What's the Cost of a Free Pass? A Call for the Re-assessment of Statutes That Allow for the Elimination of Personal Liability for Directors*, 9 TRANSACTIONS: TENN. J. BUS. L. 99 (2007).

decisions that lack due care. Of course, it was not the holding of *Van Gorkom* that established this understanding (a holding that found such liability to exist), rather, it was created by the chain of events that occurred in its wake.

The challenge for teachers of *Van Gorkom* is to explain why shareholders were correct in approving exculpation clauses, even as our thinking about corporate law evolves and corporate scandals (Enron, Tyco, WorldCom, etc.) continue to influence our perspective on the correct level of corporate accountability. As this article demonstrates, applying the innovative approaches taken by legal scholars such as Michael P. Dooley, who introduced Kenneth Arrow's understanding of the value of centralized authority[18] into the study of corporate law, and Stephen M. Bainbridge, who has so aptly applied Professor Dooley's work in the development of his director primacy model,[19] and Margaret M. Blair and Lynn A. Stout, who introduced the concept of the board of directors as a "mediating hierarchy," gives *Van Gorkom* new and greater meaning and reaffirms the correctness of insulating directors from duty of care liability.[20]

The basic premise underlying this article is that the real value of the corporate form is its hierarchical nature as reflected in the centralized authority of the corporate board. This value is manifested by the corporate board's ability to (1) efficiently filter information in its decision-making process and (2) act as a mediating hierarchy. Such organizational efficiencies create a strong presumption that the laws of corporate governance should not interfere with the corporate board's decision-making process.

In contrast to the approach taken by both Dooley and Bainbridge, this article does not utilize a contractarian framework.[21] More importantly, this

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[18]Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 467 (1992) (citing KENNETH J. ARROW, THE LIMITS OF ORGANIZATION (W.W. Norton & Co. 1974)). Professor Dooley was the first to make the connection between the work of Kenneth Arrow and the structure of Delaware corporate law. Like Arrow, Dooley uses the term "responsibility" instead of the term "accountability" in his article. *Id.* at 468. However, this article uses the term accountability to conform to the terminology used by Stephen Bainbridge, the developer and leading proponent of the director primacy model of corporate governance. Despite this subtle discrepancy, Professor Bainbridge readily acknowledges the contribution Professor Dooley has made in the development of his work. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 85 n.11 (2004).

[19]Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 574 (2003).

[20]Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250-51 (1999).

[21]A non-contractarian approach allows for greater focus on the corporate form's hierarchical nature and its resulting efficiencies. *See* Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999) (emphasizing the point that the contractarian approach to corporate law does not capture the

article does not require that shareholder wealth maximization be a norm underlying the laws of corporate governance. By relaxing this standard assumption, we can, for the first time, utilize the efficiency arguments of Dooley and Bainbridge on one hand and those of Blair and Stout on the other, as two complementary, instead of competing, arguments supporting the position that corporate board decisions need to be protected from judicial review.

This article proceeds as follows: Part II provides an overview of the facts of *Van Gorkom*; Part III discusses the value of centralized authority and how the protection of such authority is reflected in Delaware corporate law; Part IV discusses the board of directors as a mediating hierarchy; Part V points out how fiduciary duties must be reevaluated in light of the need to protect the value of centralized authority; Part VI briefly discusses how the findings of this article are applicable to a corporation with significant concentrations of share ownership; and Part VII concludes with a short summary of this article's findings.

II. THE FACTS OF *VAN GORKOM*

In *Van Gorkom*, shareholders of the Trans Union Corporation (Trans Union), a publicly held firm, filed a class action suit seeking damages from its directors for agreeing to a cash-out merger.[22] The Delaware Court of Chancery found that the board deserved the protection of the BJR because the directors were informed when they made the decision to approve the merger agreement and to recommend it for approval by the shareholders.[23] The Delaware Supreme Court reversed the decision, finding the directors were not fully informed when they made the decision.[24] The court held the directors liable for the difference between the share price, based on the "fair value" of the corporation, and the merger price of fifty-five dollars per share.[25]

While it is not necessary to discuss all of the facts that led to the court's finding of gross negligence, the following points demonstrate why the court believed the directors were not sufficiently informed when they approved the merger agreement, even though the merger price of fifty-five dollars per share was approximately forty-eight percent above the previous day's market price at closing:

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corporation as a bureaucratic hierarchy). See also Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779 (2007), for an excellent critique of the contractarian approach.

[22] Smith v. Van Gorkom, 488 A.2d 858, 863 (Del. 1985).

[23] *Id.* at 864.

[24] *Id.* at 893.

[25] *Id.*

1. The board approved the merger proposal following a two-hour special board meeting without having been presented with the written merger agreement prior to or during the meeting.[26] Though there was some urgency in making a decision, it appears there was nothing to prevent the board from delaying the decision until the next day.[27]

2. With the exception of two members, the board was not informed about the purpose of the meeting until it was in session.[28]

3. The board's decision to merge was based primarily on a twenty minute oral presentation by Van Gorkom, the chief executive officer and chairman of Trans Union.[29] The oral presentation was based on a merger agreement that Van Gorkom had not reviewed and the essential provisions of which he was not informed.[30]

4. Van Gorkom generated the merger proposal in relative secrecy and never disclosed to the board how he came up with the fifty-five dollars per share merger price.[31]

5. The board never inquired into how the fifty-five dollars per share merger price was generated.[32]

6. The board was not informed of the "intrinsic value" of the corporation.[33] The board did not use any type of analysis, such as a fair value opinion from an investment bank, or an internally generated valuation study, as a means to determine that the fifty-five dollars per share merger price was acceptable. In essence, there was no evidence that the board had the proper information to determine whether fifty-five dollars per share was a fair value.[34]

7. "Neither [Van Gorkom] nor any other director read the [merger] agreement prior to its signing . . . ."[35]

8. At a subsequent board meeting, the directors approved Van Gorkom's proposed amendments to the merger agreement without reviewing them.[36]

9. The actual amendments were prepared by the purchaser and did not correspond with Van Gorkom's description of them at the board meeting.[37]

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[26] *Van Gorkom*, 488 A.2d at 868.
[27] *Id.* at 867.
[28] *Id.*
[29] *Id.* at 864-65, 869.
[30] *Van Gorkom*, 488 A.2d at 875.
[31] *Id.* at 868.
[32] *Id.* at 874.
[33] *Id.*
[34] *Van Gorkom*, 488 A.2d at 876.
[35] *Id.* at 869.
[36] *Id.*
[37] *Id.* at 870.

These amendments inhibited the ability of Trans Union to withdraw from the existing agreement and to negotiate a better deal if presented with the opportunity.[38]

For the purposes of this article, the most interesting aspect concerning the facts of *Van Gorkom* is that they were only applied in the context of a duty to be informed owed to shareholders (for which a breach could result in director liability) and not to the corporation. This makes sense as the facts of the case involved the board approval and recommendation of a merger agreement, which at that point appeared only to implicate shareholder, not corporate, interests. As the court said, "In the specific context of a proposed merger of domestic corporations, a director has a duty under . . . [section] 251(b), along with his fellow directors, to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders."[39] The court's holding reiterated its focus on shareholder interests to the exclusion of the corporation's:

> [W]e hold that the directors of Trans Union breached their fiduciary duty to their *stockholders* (1) by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger; and (2) by their failure to disclose all material information such as a reasonable *stockholder* would consider important in deciding whether to approve the Pritzker offer.[40]

Clearly, the facts of *Van Gorkom* did not present the court with the opportunity to apply the duty to be informed as owed to the corporation. But curiously, even in its dicta, the court did not speak of such a duty that could result in director liability. The court's exclusive focus on shareholder interests made shareholder approved exculpation clauses a clever and perfect (political) solution to the perceived problems caused by the *Van Gorkom* decision.

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[38] *Van Gorkom*, 488 A.2d at 870.

[39] *Id.* at 873 (citing DEL. CODE ANN. tit. 8, § 251(b) (2001)).

[40] *Id.* at 893 (emphasis added). For authority that *Van Gorkom* applies outside the world of mergers and acquisitions, see *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006), for an evaluation of whether the compensation committee of the board was adequately informed when it approved an employment agreement with the company's president.

III. CORPORATE (CENTRALIZED) AUTHORITY AND ACCOUNTABILITY

At first glance, shareholders' overwhelming support of exculpation clauses would appear counterintuitive and counterproductive to their interests.[41] Directors, like everyone else, have limited cognitive abilities and live in a world of imperfect information where errors of judgment can be made. Shirking in their board responsibilities by failing to make informed decisions increases the possibility of such errors. Therefore, it would seem reasonable that shareholders would want directors to be informed when making business decisions, and indeed, it is hard to believe that this is not the case. Perhaps shareholders, like the directors who proposed and recommended exculpation clauses for shareholder approval, did not want the Delaware courts to monitor or enforce whether directors are properly informed when making business decisions. Or, perhaps, shareholders simply followed the recommendations of their corporate boards in voting their support. At any rate, for the purposes of this article, it is not necessary to explain why shareholders provided overwhelming support for exculpation clauses, only that they were correct in doing so.

One approach to understanding why shareholders were correct in responding as they did requires acceptance of the idea that corporate law must protect centralized authority in order for the corporate form to facilitate the organization of corporate resources in the most efficient manner.[42] *Van Gorkom*, and the events that occurred in its wake, provide an excellent example of why the fiduciary duty of care must yield to corporate law's protection of centralized authority.

A. *The Value of Centralized Authority*

Understanding the value of centralized authority begins with an understanding of Professor Arrow's theory of organizational authority.[43] Arrow's discussion of authority starts out with the basic proposition that "authority is needed to achieve a coordination of the activities of the

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[41] *See supra* text accompanying notes 16-17.

[42] *See* Lucian A. Bebchuk, *Reply: Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1792 (2006) ("Shareholders in public companies generally lack the information and incentives to make adequate business decisions and choose business strategies. Therefore, it is widely accepted that ceding authority to the board is in shareholders' interest and is part of a public company's optimal structure."); Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261, 276 (2001) ("Such centralization promotes efficiency and facilitates an enterprise that can easily adapt to changing circumstances.").

[43] *See* ARROW, *supra* note 18.

members of the organization."[44] But, more importantly, centralized authority enhances organizational efficiency. According to Arrow, efficiency is created in a large organization because "the centralization of decision-making serves to economize on the transmission and handling of information."[45] Arrow's theory on how centralized authority creates value is based on four propositions:

1. Since the activities of individuals interact with each other, being sometimes substitutes, sometimes complements, and frequently compete for limited resources, joint decision on the choice of individuals' activities will be superior to separate decisions.

2. The optimum joint decision depends on information which is dispersed among the individuals in the society.

3. Since transmission of information is costly, in the sense of using resources, especially the time of the individuals, it is cheaper and more efficient to transmit all the pieces of information once to a central place than to disseminate each of them to everyone.

4. For the same reasons of efficiency, it may be cheaper for a central individual or office to make the collective decision and transmit it rather than retransmit all the information on which the decision is based.[46]

For an organization to be successful in its decision making, its decisions must be based on adequate information and made in a timely manner. This requires the organization "to facilitate the flow of information to the greatest extent possible."[47] Such facilitation requires "the reduction of the volume of information while preserving as much of its value as possible."[48] Centralized authority allows for "superior efficiency" by minimizing the number of communication channels required in a large organization.[49]

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[44] *Id.* at 68.
[45] *Id.* at 69.
[46] *Id.* at 68.
[47] ARROW, *supra* note 18, at 70.
[48] *Id.*
[49] *Id.*

This is not to say that centralized authority can only be found at the very top of an organization, such as the board of directors of a large corporation. Arrow offers as an example the military, where "[u]nder conditions of widely dispersed information and the need for speed in decisions, authoritative control at the tactical level is essential for success."[50]

B. *Delaware Corporate Law and the Value of Centralized Authority*

The "heart" of corporate authority lies with the board of directors, who have statutory authority to manage the corporation.[51] Delaware General Corporation Law section 141(a) provides that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[52]

Operational authority may be delegated to officers,[53] but the board hires and fires those officers.[54] Officers may propose corporate policy, but ultimate approval rests with the directors.[55] Shareholders may ratify a board's action, but the board must first approve the decision.[56] Ultimate corporate authority rests with the board.[57]

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[50] *Id.* at 69.

[51] Dooley, *supra* note 18, at 467.

[52] DEL. CODE ANN. tit. 8, § 141(a) (2001).

[53] The delegation of authority to officers brings up an interesting issue. If board authority is delegated to corporate officers, should not the decisions of these officers also be granted the protections of the BJR? Theoretically, a board of directors can make all of the important corporate decisions. But, as a corporation grows and becomes more complex, more and more of the operational decisions that could theoretically be made by the board (centralized authority) must be delegated downward to officers (similar to Professor Arrow's military example) or else the corporation would become dysfunctional. This provides a strong argument that the decisions made by officers, where authority is granted through board delegation (non-board centralized authority), deserve just as much protection as decisions made by the board. If not, corporate law would diminish the value of what it is designed to protect.

For a discussion of whether or not the BJR should apply to the decisions of corporate officers, see Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 440 (2005), which argues against providing directors with such protections. *But see* Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 865 (2005) (arguing that the BJR should protect corporate officers); A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 230 (1992) (arguing for providing officers with such protections).

[54] Dooley, *supra* note 18, at 468.

[55] *Id.*

[56] *Id.*

[57] *Id.* Professor D. Gordon Smith offers the following rationale for the board's ultimate authority:

[D]irectors delegate much of their management authority to executive officers, but

By providing managerial authority to a small centralized group of individuals, and by making it very difficult for stockholders or the courts to second-guess board decisions through judicial creations such as the BJR and demand futility, Delaware corporate law promotes the value of centralized authority.[58] This is consistent with Professor Arrow's theory.

According to Professor Dooley, the value of centralized authority to a corporation is magnified as the knowledge and interests of its members diverge. This is especially true of the publicly held firm. The publicly held firm is an "economic organization[ ] in which (i) management and residual claimant status (shareholding) are separable and separated functions; (ii) the residual claims (shares) are held by a number of persons; and (iii) the residual claims are freely transferable and neither entry to nor exit from the firm is restricted."[59] In publicly held firms, information and interests differ between management and shareholders.[60] Especially where there are a large number of shareholders, it is much more efficient for a centralized authority with an overwhelming information advantage, such as the board of directors, to make corporate decisions rather than shareholders.[61]

C. *The BJR as a Tool to Protect Centralized Authority*

The BJR is a common law rule used by the courts to minimize the number of shareholder complaints that receive judicial review.[62] By protecting board authority, the BJR necessarily protects the value of centralized authority. Its current formulation under Delaware corporate law first appeared in *Aronson*:

> retain the responsibility of hiring, monitoring, and firing executive officers . . . . [T]he exercise of this responsibility by the board of directors rather than shareholders is justified by the fact that the board functions as a centralized decisionmaker in a corporation and in that role improves the efficiency and quality of decisions that otherwise would be made by shareholders.

D. Gordon Smith, *Corporate Governance and Managerial Incompetence: Lessons from Kmart*, 74 N.C. L. REV. 1037, 1046 (1996).

[58]Dooley, *supra* note 18, at 467, 471.

[59]*Id.* at 463 n.9.

[60]*Id.* at 467. The value of centralized authority is not as great in general partnerships and closely-held corporations because the same persons perform both the managerial and risk-taking (investment) functions. Management and partners or shareholders are essentially one and the same. *Id.* at 466-67.

[61]*Id.* The value of such specialization of function is quite clear. The best managers can be selected without regard to their ability to finance the company. On the other end of the spectrum, the shareholder pool is greatly increased as shareholders are not required to bring decision-making expertise along with their equity capital. Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 301 (1986).

[62]Dooley, *supra* note 18, at 469-70.

> [The BJR] is a presumption that in making a business decision the directors of a corporation acted on an *informed* basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.[63]

The BJR protects a corporate board decision from judicial review if four conditions are met.[64] First, the board must make a decision.[65] A decision not to act meets this requirement.[66] Second, the board must have engaged in a process to become adequately informed of all material information reasonably available to make its decision.[67] Third, the board must have made its decision in good faith.[68] Fourth, the decision must have been made by disinterested directors of the board.[69]

D. *The BJR as a Doctrine of Abstention*

The BJR works primarily by precluding the courts from reviewing duty of care claims.[70] When used for that purpose, it has been referred to by Professor Bainbridge as a "doctrine of abstention."[71] Of course, the exception to this preclusionary approach is found in *Van Gorkom*. There, the approach was to establish a standard of review where a finding that directors breached their procedural due care could be established through a showing of gross negligence.[72]

One must pause for a moment, however, to let the implications of a preclusionary or doctrine of abstention approach sink in. In essence, the courts are giving directors free reign to commit negligent acts without risk of

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[63]Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citations omitted) (emphasis added).

[64]Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 441 (1993). The BJR does not protect a board decision, however, if it is shown to be irrational. *See id.* at 442.

[65]*Id.* at 441.

[66]*Id.*

[67]*Id.*

[68]Eisenberg, *supra* note 64, at 441.

[69]*Id.*

[70]Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 271 (1967) (stating that the BJR "preclude[s] the courts from any consideration of honest if inept business decisions, and that seems to be the purpose of the rule.").

[71]Bainbridge, *supra* note 18, at 87.

[72]Smith v. Van Gorkom, 488 A.2d 858, 881 (Del. 1985).

punishment.[73] Even so, over the years, many good reasons have been given for why the BJR protects the corporate decisions of the board from duty of care claims, including: (1) ensuring that directors are not held liable for honest mistakes of judgment;[74] (2) encouraging individuals to become directors by protecting them from liability for decisions that turn out badly;[75] (3) the desire, from a policy perspective, "[t]o avoid undesirable judicial intervention" in the affairs of a corporation;[76] and (4) the concern that courts will find more negligence than really exists because of hindsight bias.[77]

However, we can also think of the BJR as a critical tool used by the courts to protect the value of centralized authority through its protection of board authority.[78] In *Zapata Corp. v. Maldonado*,[79] the Delaware Supreme Court acknowledged the value of centralized authority and the need for the BJR to protect it:

> The "business judgment" rule is a judicial creation that presumes propriety, under certain circumstances, in a board's decision. Viewed defensively, it does not create authority. In this sense the "business judgment" rule is not relevant in corporate decision making until after a decision is made. It is generally used as a defense to an attack on the decision's soundness. The board's managerial decision making power, however, comes from § 141(a). The judicial creation and legislative grant are related because the "business judgment" rule evolved to give recognition and deference to directors' business

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[73]For an in-depth discussion of the BJR as a means to preclude duty of care claims, see Bernard S. Sharfman, *Being Informed Does Matter: Fine Tuning Gross Negligence Twenty Plus Years After* Van Gorkom, 62 BUS. LAW. 135, 141-45 (2006).

[74]Bodell v. Gen. Gas & Elec. Corp., 140 A. 264, 267 (Del. 1927) ("[A]n honest mistake of business judgment should not be reviewable by the Court.").

[75]S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97 (1979) (citing Percy v. Millaudon, 8 Mart. (n.s.) 68, 77-78 (La. 1829)).

[76]Manne, *supra* note 70, at 270-71.

[77]Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 591 (1994). As a result of hindsight bias, a particular outcome becomes more probable in hindsight as opposed to the same outcome made with foresight. *Id.* at 592. *See also* Bainbridge, *supra* note 18, at 114 ("Decision makers tend to assign an erroneously high probability of occurrence to a probabilistic event simply because it ended up occurring.") (citation omitted).

[78]Dooley, *supra* note 18, at 470 ("The business judgment rule can only be understood as intended to protect the authority of the board and thus promote the value of Authority.").

[79]430 A.2d 779 (Del. 1981).

expertise when exercising their managerial power under § 141(a).[80]

The court's dicta in *Zapata* went further than just acknowledging that the BJR was necessary to enforce section 141(a); it also provided the perspective that the board of directors offered something special to the decision-making process of the corporation, which the court described as "business expertise."[81] Such business expertise, of course, is developed by being a member of a centralized authority, which has access to the highest value-added information concerning the corporation.

E. *The Value of Accountability*

The discussion thus far is not meant to suggest that the board of directors, as the ultimate centralized authority in a corporation, should be allowed to run amok without any oversight. The corporate board needs to be held accountable for its decisions. According to Professor Arrow, "Irresponsible authority" creates the "likelihood of unnecessary error."[82] More specifically, "unaccountable authority may be exercised opportunistically."[83] Therefore, it is legitimate to criticize such authority and put into place some sort of "corrective mechanism."[84]

An example of a corrective mechanism is the marketplace for a company's goods "[i]f the customers of an organization are considered to be among its members."[85] Whether or not centralized authority has made good decisions regarding the product offered, its price, distribution, and promotion will be determined by the reactions of the marketplace. Another example of a corrective mechanism is the enforcement of fiduciary duties through a shareholder lawsuit, such as the class action suit utilized in *Van Gorkom*.[86]

According to Professor Arrow, however, in order for a corrective mechanism, whatever its form, to be of value to the organization, it must be

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[80] *Id.* at 782 (citation omitted).

[81] *Id.*

[82] ARROW, *supra* note 18, at 73-74.

[83] Bainbridge, *supra* note 18, at 107.

[84] ARROW, *supra* note 18, at 75.

[85] *Id.* at 76.

[86] A complementary correcting mechanism is the potential harm to a director's reputation if a lawsuit is filed. *See* Bernard S. Black, Brian R. Cheffins & Michael D. Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055 (2006). Another example of a corrective mechanism, especially for a publicly held firm, is the capital markets. For the seminal work on how equity ownership can be used as a corrective mechanism, see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

applied intermittently.[87] The fear is that in the process of trying to correct errors resulting from irresponsible decisions, "the genuine values of authority" will be destroyed.[88] Such "a sufficiently strict and continuous organ of responsibility can easily amount to a denial of authority."[89] Arrow suggests, "[I]f every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B and hence no solution to the original problem."[90]

F. Van Gorkom *and the Value of Accountability*

Shareholder lawsuits, whether they are class or derivative actions, are a corrective mechanism by which corporate law applies fiduciary duties to hold directors accountable to the corporation and shareholders. *Van Gorkom* is an example of such an application. However, the concern is that this mechanism may turn out to be an overcorrection. As stated by Professors Easterbrook and Fischel:

> The ultimate issue is who should decide how much information to acquire in advance of a business decision. Allowing shareholders to challenge business decisions that they say were not "informed" has the effect of substituting the business judgment of some shareholders, their attorneys, and a court for that of the managers.[91]

From this author's perspective, it is hard to disagree with the *Van Gorkom* court in concluding that the directors of Trans Union were not informed and that they shirked their duties when they approved and recommended the Pritzker buyout. That should not, however, have been the court's focus when making its decision. Rather, its focus should have been on how its holding would affect centralized authority (in the form of board authority) and whether giving teeth to being informed was an overcorrection.

The decision in *Van Gorkom* was clearly an overcorrection. For example, it was reported that in response to the decision some directors were resigning from their board positions and that others would not even consider

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[87] ARROW, *supra* note 18, at 78.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 108 (Harvard Univ. Press 1991).

board service for fear of the potential personal liability for being uninformed when making a corporate decision.[92] It was also reported that the price of directors' and officers' insurance coverage had increased substantially and that some boards could not get proper coverage at any price.[93]

Certainly, it is also not hard to imagine that director reaction to *Van Gorkom* also included the following:

- Overprecaution in decision making;
- Director demands for increased liability insurance;
- Director demands for indemnification rights;
- A greater need by directors to justify past decisions and stick to them, even if it takes the corporation down the wrong path, for fear that an admission of error may lead to a lawsuit.[94]

In essence, we can view the laws that make up corporate governance as a competition between two essential values: authority and accountability.[95] These values, however, are diametrically opposed; an increase in one necessitates a decrease in the other.[96] When moving away from the value of authority and toward the value of accountability, courts must be careful not to overcorrect. Such an overcorrection occurred in *Van Gorkom*. The court's decision negatively impacted the operations of corporate boards and their ability to make decisions. Therefore, based on the understanding of the value of centralized authority as presented so far, shareholders were correct in adopting exculpation clauses to reduce the potential for shareholder interference in the affairs of the corporate board.[97]

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[92]Drury, *supra* note 17, at 109 (citing R. Franklin Balotti & Mark J. Gentile, *Elimination or Limitation of Director Liability for Delaware Corporations*, 12 DEL. J. CORP. L. 5, 9 (1987); Thomas C. Lee, Comment, *Limiting Corporate Directors' Liability: Delaware's Section 102(b)(7) and the Erosion of the Directors' Duty of Care*, 136 U. PA. L. REV. 239, 241, 256-57 (1987)); Balotti & Gentile, *supra* at 9.

[93]Drury, *supra* note 17, at 109 (citing Dennis R. Honabach, Smith v. Van Gorkom: *Managerial Liability and Exculpation Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 324 (2006); Lee, *supra* note 92, at 252-54).

[94]Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 818, 826-27 (2001).

[95]Dooley, *supra* note 18, at 464.

[96]*Id.*

[97]But exculpation clauses do not move the balance between authority and accountability back to where it was prior to *Van Gorkom*, because they do not apply to injunctive relief and because they are in the nature of an affirmative defense. *See* Sharfman, *supra* note 73, at 137. Most importantly, exculpation clauses do not modify the BJR formulation. Being informed is still a precondition for applying the BJR. Gross negligence is still the standard of review for determining whether or not directors had breached their duty of being informed before making a business decision.

IV. THE BOARD OF DIRECTORS AS A MEDIATING HIERARCHY

In applying Arrow's theory of centralized authority to the laws of corporate governance, both Dooley and Bainbridge utilized an analytical framework that incorporated the norm of shareholder wealth maximization.[98] Yet, the analysis presented so far has not required such a norm to make a strong efficiency argument that shareholders were correct in approving exculpation clauses. Furthermore, as described below, Blair and Stout's team production theory of corporate law provides a compelling argument for why such a norm is not correct. By relaxing the assumption of shareholder wealth maximization, we can understand the ability and freedom of the board to act as a mediating hierarchy as another value of corporate board (centralized) authority that needs protection from judicial review, making the centralized authority argument for exculpation clauses that much stronger.

A. *Shareholders and the Corporation*

The biggest hurdle in understanding corporate law is accepting the reality that the law does not provide ownership rights to shareholders. Although shareholders do own interests in the corporation by owning company stock, they do not have ownership of the corporate entity. For example, title to corporate assets is in the name of the corporation, not its shareholders.[99] Furthermore, and perhaps most importantly, corporate assets are controlled by the corporation's board of directors, not its shareholders.[100] Control, of course, is a key element of ownership.[101] Without control, shareholders become merely the "recipient[s] of the wages of capital."[102]

Furthermore, while shareholders do have potential claims to the residual profits of the corporation, it is the board of directors that decides if a dividend will be paid, and how much the dividend will be. Moreover, corporate law clearly does not require the corporate board to follow the

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[98]This is based on a model of corporate governance, typically referred to as shareholder primacy, that takes the "perspective that . . . directors of public corporations ought to be accountable only to the shareholders, and ought to be accountable only for maximizing the value of the shareholders' shares." Margaret M. Blair & Lynn A. Stout, *Corporate Accountability: Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 404 (2001).

[99]Blair & Stout, *supra* note 20, at 269.

[100]*Id.* at 260-61 ("If 'control' is the economically important feature of 'ownership,' then to build a theory of corporations on the premise that ownership (and, hence, control) lies with shareholders grossly mischaracterizes the legal realities of most public corporations.").

[101]*Id.* at 260.

[102]*Id.* at 265 n.32 (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 3 (1932)).

commands of its shareholders.[103] As previously stated, shareholders may ratify a board's action, but the board must first approve the action.[104] Even if shareholders pass a unanimous resolution requesting the board to act in some specific matter, the board has the legal right to ignore such a resolution.[105] Finally, corporate law does not require the board to maximize shareholder wealth.[106]

B. *The Value of the Corporate Board as a Mediating Hierarchy*

Based on the above discussion, it is easy to conclude that corporate law does not incorporate the norm of shareholder wealth maximization. Blair and Stout argue "that public corporation law can be best explained in terms of a mediating hierarchy model."[107] From their perspective, it is more realistic to think of the publicly held firm[108] as a team of members who make firm-specific investments in the corporation with the goal of producing goods and services as a team (team production)[109] with the board of directors acting as a "mediating hierarchy."[110] Team members include executive officers, workers, managers, researchers, creditors, the local community, marketers, and vendors who provide specialized products and services to the firm and shareholders, among others.[111] Any person or entity that makes a firm-specific investment is a member of the team. The result is "that no one team member is a 'principal' who enjoys a right of control over the team."[112]

In this approach to understanding the publicly held firm, the board of directors, composed primarily of outside members who are also independent of the firm, provides a unique mediating function. Not only does it have the

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[103]Blair & Stout, *supra* note 20, at 291.

[104]Dooley, *supra* note 18, at 468.

[105]Blair & Stout, *supra* note 20, at 291 ("American law in fact grants directors tremendous discretion to sacrifice shareholders' interests in favor of management, employees, and creditors, in deciding what is best for 'the firm.'").

[106]Blair & Stout, *supra* note 98, at 406.

[107]Blair & Stout, *supra* note 20, at 287.

[108]*See supra* text accompanying notes 59-61.

[109]For the seminal work on team production as a theory of economic organization, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972). According to Alchian and Demsetz, "[W]ith team production it is difficult, solely by observing total output, to either define or determine *each* individual's contribution to this output of the cooperating inputs. The output is yielded by a team, by definition, and it is not a *sum* of separable outputs of each of its members." *Id.* at 779.

[110]Blair & Stout, *supra* note 20, at 271-76. The mediating hierarchy model of the firm does not work where the firm is subject to the control of one shareholder or a group of shareholders. Under those conditions, the lack of independence impedes the ability of directors to act as mediating hierarchs. *Id.* at 309.

[111]*Id.* at 271-76 & n.61.

[112]*Id.* at 277 (emphasis omitted).

final authority on hiring and firing corporate officers, approving corporate policy, recommending major transactions for shareholder approval, approving executive compensation packages and the like, but it also acts "as an internal 'court of appeals' to resolve disputes that may arise among the team members."[113]

Consistent with the board as a mediating hierarchy, corporate law requires boards to act primarily as legal agents of their respective corporations, not the shareholders.[114] This does not mean that corporate boards will not act in the best interests of the shareholders when they make decisions, but it does mean that they will not necessarily do so.[115]

The rationale for why shareholders would accept such an arrangement is that team members, including shareholders, "understand they would be far less likely to elicit the full cooperation and firm-specific investment of other members [for fear of shirking and rent-seeking] if they did not [all agree to] give up control rights" to a mediating hierarchy (the board of directors), which has the responsibility of allocating "duties and rewards."[116] Therefore, the corporate board, not the shareholders, is at the top of the hierarchical pyramid.[117]

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[113] *Id.* at 276-77.

[114] Blair & Stout, *supra* note 20, at 290. Of course, there are exceptions to this general rule besides the duty to be informed when approving a merger agreement. For example, the *Van Gorkom* court also found that the directors' breached their fiduciary duty of candor to shareholders by not disclosing all material information necessary to make an informed decision on the merger transaction. Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985).

[115] As a side note, shareholder expectations for board decisions that do not maximize shareholder wealth is one variable putting downward pressure on the publicly held firm's stock price. On the other hand, shareholders can counter this downward pressure by being strong advocates for their own interests in a company's corporate governance. Of course, a low stock price should put pressure on the board to do something to enhance the stock price. However, to what degree a board will try to respond to a low stock price is firm specific, depending on how insulated the board is from shareholder pressure and how much need the corporation has in financing its operations with equity capital.

[116] Blair & Stout, *supra* note 20, at 277-78. Furthermore, the team production theory of corporate law suggests that, "a legal rule requiring corporate directors to maximize shareholder wealth ex post might well have the perverse effect of reducing shareholder wealth over time by discouraging non-shareholder groups from making specific investments in corporations ex ante." Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 173-74 (2008).

[117] Blair & Stout, *supra* note 20, at 279. A key element in making this arrangement work is trust. The duty of loyalty is a means for creating trust in the board to do the right thing for all team members, including shareholders. Such a duty deters directors from using their corporate authority to line their own pockets to the detriment of all the other team members. *Id.* at 316.

C. Van Gorkom *and the Board as a Mediating Hierarchy*

According to Blair and Stout:

> The mediating hierarchy model we propose . . . suggests that the business judgment rule may serve an important economic function. In particular, the rule may help prevent coalition members (and especially shareholders) from using lawsuits as strategic devices to extract rents from the coalition. This is because the business judgment rule works to ensure that directors can only be found liable for beach of the duty of care in circumstances where a finding of liability serves the collective interests of all the firm's members.[118]

The modifications made to the BJR in the *Van Gorkom* decision, however, do not serve the collective interests of corporate team members. Director liability for not being informed, and the enhanced ability by shareholders to file suit, impedes the ability of the board to act as a mediating hierarchy. Not because the board must place greater weight on shareholder interests in its decision-making process, but because the board's ability to optimally balance the interests of all team members is handicapped by the uncertainty of how much personal liability each board member may face when the board acts in its mediating capacity. Knowing that it only takes one shareholder to file suit and only one successful suit to potentially wipe out the net worth of each and every board member, there is great pressure on the board to abdicate its mediating function and only consider shareholder interests when making its decisions.

As described above, the board as a mediating hierarchy provides value to shareholders. It encourages other team members to fully cooperate in the corporate mission and to maintain their firm-specific investments in the corporation. Therefore, harming the ability of the board to act as a mediating hierarchy is not in the best interests of shareholders. While other coalition members may view the cost of the *Van Gorkom* decision in terms of creating an increased opportunity for shareholders to be rent-seeking, shareholders should look upon the *Van Gorkom* decision as creating costs (the inability of the board to act as a mediating hierarchy) that they themselves would have to bear that significantly outweigh the benefits. Shareholders were correct in voting their strong support for exculpation clauses.

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[118]Blair & Stout, *supra* note 20, at 300.

V. CORPORATE LAW AND THE ROLE OF FIDUCIARY DUTIES

According to the *Van Gorkom* court, "In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders."[119] Professor Clark, in his celebrated text on corporate law, identified fiduciary duties as the key component in holding directors accountable:

> Most of corporate law is concerned with the array of substantive rules and procedural devices that are aimed at controlling managerial slack and diversion while preserving adequate discretion to carry out business operations efficiently. Put in other words, the law displays a constant tension, and a constant striving for a good balance, between the fiduciary duties of care and loyalty on the one hand and the business judgment rule on the other . . . .
>
> Seen in this light, the study of corporate law is a study of the legal system's attempts to control managerial discretion in an important class of large, complex, formal organizations . . . . The central problem of corporate law [is] the optimal control of managerial discretion . . . . Corporate law's major conceptual contribution to solution of the problem (the fiduciary principle), the major substantive rules it deploys to implement that concept, and its distinctive set of enforcement mechanisms . . . should be of great interest as a source of more general reflections about the allocation and control of power in highly organized societies.[120]

There is truth in acknowledging that fiduciary duties are an important tool used by the courts to control irresponsible behavior on the part of corporate management. It is clear that fiduciary duties help to minimize irresponsible behavior and unnecessary error.

However, from the perspective that centralized authority creates value and that Delaware corporate law is structured to protect such authority in order to create organizational efficiencies, Professor Clark's identification of the fundamental problem of corporate law—controlling managerial

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[119]Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (citing Loft, Inc. v. Guth, 2 A.2d 225 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939)).

[120]ROBERT CHARLES CLARK, CORPORATE LAW, at xxiii (Francis A. Allen et al. eds., 1986).

discretion—seems incorrect.[121] The focus is wrong. Rather, the central problem of corporate law is ensuring that fiduciary duties are applied intermittently so that they do not jeopardize the value of centralized authority that statutory corporate law was structured to protect.[122] Indeed, to protect centralized authority, the central thesis of Professor Bainbridge's director primacy model of corporate governance "is that preservation of the board's power of fiat should always be the null hypothesis."[123]

VI. THE PUBLICLY HELD FIRM

The insights of Dooley, Bainbridge, Blair, and Stout apply most forcefully to the publicly held firm. The conclusions of this article, however, also apply to many corporations that do not exactly meet the definition of a publicly held firm. Up to a certain point, perhaps to the point where a single shareholder, or a group of shareholders, takes control of the corporation, the definition can be relaxed to allow for significant concentrations of share ownership.[124] For example, it is not unusual for large public corporations to have one investor, or a group of investors, holding from one to ten percent of a large corporation's common stock. From the viewpoint of maintaining the value of centralized authority, if these investors do not try to interfere with the decision-making process of the firm, then the value of centralized authority is maintained. From the viewpoint of the corporate board as a mediating hierarchy, what these large investors create is an environment where the corporate board must give greater weight to the concerns of these shareholders as compared to other team members.[125]

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[121] *Id.*

[122] Professor Bainbridge appears to concur with Professor Clark when he states that "Establishing the proper mix of discretion and accountability thus emerges as the central concern of corporate governance." *See* Bainbridge, *supra* note 19, at 573. It is important to note, however, that he also modifies the previous quote with the following sentence, "Given the significant virtues of fiat, however, one must not lightly interfere with the board's decisionmaking authority in the name of accountability." *Id.*

[123] *Id.*

[124] According to Blair and Stout, "In a public corporation where no single shareholder or group of shareholders owns a controlling block of shares, the role of the mediating hierarch can be played by the board of directors." Blair & Stout, *supra* note 98, at 422.

[125] Blair & Stout, *supra* note 20, at 325. According to Blair and Stout, "[T]he rise in the 1980s of institutional shareholders such as investment companies and pension funds (which control sizeable blocks of shares in many firms) has tipped the political balance of power toward shareholders by reducing obstacles to collective investor action." *Id.* More recently, hedge funds have had success in tipping the balance even further. *See* April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors* 45-47 (NYU Law & Econ. Research Paper No. 06-41, 2006), *available at* http://ssrn.com/abstract=913362.

VII. CONCLUSION

Organizational efficiencies flow from the hierarchical structure of the corporation. The laws of corporate governance should facilitate and promote such efficiencies. The corporate board's ability to (1) efficiently filter information in its decision-making process and (2) act as a mediating hierarchy provides two distinct but complementary rationales for why corporate board authority needs to be protected. This approach leads to the conclusion that the central problem of corporate law is not the optimal control of managerial discretion, but instead, the maintaining of a tight rein on fiduciary duties so they do not end up negating the benefits of the corporate form. In hindsight, if the *Van Gorkom* court had considered this, it is reasonable to conclude that the court would not have reduced the effectiveness of the BJR to preclude duty of care claims by finding an enforceable duty to be informed.

Protecting the value of centralized authority provides a powerful rationale for courts to take a hands-off approach to corporate governance, even if this means that directors are not to be held accountable for being uninformed when making corporate decisions. Such an approach will not only benefit directors, but shareholders and other interested team members as well.

Of course, this insight into corporate governance is nothing new. The courts have been applying a hands-off policy to corporate governance for many generations. It is arguably the reason why the courts created the BJR in the first place.[126] Here, the author simply attempts to update the reasons why this is so in a specific area of corporate law. The insights of Dooley, Bainbridge, Blair, and Stout have allowed for the conclusion that insulating directors from financial liability for not being informed when making corporate decisions is still correct, despite pressures from recent corporate scandals that have increased court involvement in corporate affairs.

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[126]Professor Manne believed that the primary drive behind the creation of the BJR was not to encourage qualified individuals to become directors but the need "[t]o avoid undesirable judicial intervention" in the affairs of the corporation. *See* Manne, *supra* note 70, at 270-71.