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Should Corporations Have a Purpose?

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Abstract

Corporate purpose is the hot topic in corporate governance. Critics are calling for corporations to shift their purpose away from shareholder value as a means of addressing climate change, equity and inclusion, and other social values. We argue that this debate has overlooked the critical predicate questions of whether a corporation should have a purpose at all and, if so, what role it serves.

We start by exploring and rejecting historical, doctrinal, and theoretical bases for corporate purpose. We challenge the premise that purpose can serve a useful function either as a legal constraint on managerial discretion or as a tool to promote the interests of stakeholders over those of shareholders.

Instead, we identify an instrumental function for corporate purpose. Because a corporation consists of a variety of constituencies with differing interests and objectives, an articulated, measurable, and enforceable corporate purpose enables those constituencies both to select those corporations with which they wish to identify and to navigate the terms of that association through contract or regulation. We highlight the role of purpose in enabling a corporation to commit to core policies of its business model and for which the corporation has a comparative advantage. Critically, our instrumental view highlights the role of purpose as a voluntary tool to facilitate the goals of corporate participants rather than a regulatory instrument to promote specific public policies.

Keywords: Corporations law, corporate governance, charters, constituency statutes, social responsibility, CSR, shareholder primacy, value & profit maximization, stakeholders, environmental, social & governance purpose, ESG, public benefit corporations

JEL Classifications: G30, G38, K20, L21, P120

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Introduction

Purpose is the hot topic in corporate governance. Not only are commentators demanding that corporations formally articulate a purpose, they are insisting that corporate purpose encompass the interests of nonshareholder stakeholders or society more generally.[1] In August 2019, the

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1. *See, e.g.*, COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 22, 24 (2018) (proposing that corporations be legally required to articulate a purpose).

Business Roundtable made international headlines[2] when it replaced its support for shareholder primacy with the proposition that corporations be run for the "benefit of all stakeholders[—]customers, employees, suppliers, communities and shareholders."[3] BlackRock CEO Larry Fink has stated that, "Without a sense of purpose, no company, either public or private, can achieve its full potential."[4]

The shift is more than semantic.[5] The debate over corporate purpose is part of a broader effort to reorient corporate decision-making away from economic value maximization in favor of broader societal objectives, not simply as a choice, but as an affirmative obligation.[6] Senator Elizabeth Warren introduced legislation that would require corporations to be run for the benefit of constituencies with mandatory employee representation on the board.[7] Corporations themselves are increasingly laying claim to

2. *E.g.*, Richard Henderson & Patrick Temple-West, *Group of US Corporate Leaders Ditch Shareholder-First Mantra*, FIN. TIMES (Aug. 19, 2019), https://www.ft.com/content/e21a9fac-c1f5-11e9-a8e9-296ca66511c9 [https://perma.cc/Y8H4-CTZE]; Jim Ludema & Amber Johnson, *The Purpose of the Corporation? Business Roundtable Advances the Conversation, Now We All Need to Contribute*, FORBES, (Aug. 20, 2019, 4:42 PM), https://www.forbes.com/sites/amberjohnson-jimludema/2019/08/20/the-purpose-of-the-corporation/#25c6fd5b3846 [https://perma.cc/7F4H-SJSC].

3. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/RJW6-ZBHW].

4. Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/E5UX-JLB2].

5. *Cf.* David Kershaw & Edmund-Philip Schuster, *The Purposive Transformation of Company Law*, 68 AM. J. COMP. L. (forthcoming) (manuscript at 5–11), https://ssrn.com/abstract=3363267 [https://perma.cc/V6LX-ASFF] (discussing various meanings of "purpose" possible under UK corporate law).

6. Not all commentators support this shift. *See, e.g.*, Sanjai Bhagat & Glenn Hubbard, *Should the Modern Corporation Maximize Shareholder Value?*, 2020 AEI ECON. PERSPECTIVES 1, https://www.aei.org/wp-content/uploads/2020/09/Should-the-Modern-Corporation-Maximize-Shareholder-Value.pdf [https://perma.cc/H2DU-QXHA] (arguing that the modern corporation should maximize shareholder value).

7. Accountable Capitalism Act, S. 3348, 115th Cong. § 6 (2018). *See also* Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687 [https://perma.cc/2BKW-PDJM] (outlining the parameters of her legislative proposal and stating it would "require[] corporate directors to consider the interests of all major corporate stakeholders—not only shareholders—in company decisions"). Other countries including the UK and those within the European Union are moving to stewardship models that explicitly specify social as well as economic objectives. *See Consults on UK Stewardship Code Updates*, FCLTGLOBAL (Apr. 3, 2019), https://fcltglobal.org/resource/fcltglobal-consults-on-uk-stewardship-code-updates/ [https://perma.cc/V5E5-QMNY] ("[S]tewardship codes now exist in over 20 countries worldwide . . . .").

constituency-minded or social purposes.[8] At the extreme, some commentators suggest that corporations should be encouraged to make decisions that deliberately sacrifice economic value in favor of the public interest.[9]

These arguments run counter to the traditional view that corporations should be managed with the primary goal of pursuing economic value for shareholders, often referred to as "shareholder primacy." Although commentators widely agree that shareholder primacy affords managers substantial latitude to consider the interests of nonshareholder constituencies—a principle formalized in many areas of corporate law such as the business judgment rule, statutes authorizing corporations to donate money to charity, and, in many states, constituency statutes—the new discussion calls for corporations to shift their primary objective to incorporate a public purpose. Critics justify this shift by citing corporations' excessive focus on short-term profits, the negative externalities imposed by corporations on nonshareholder groups, and the need to address societal problems such as wealth inequality and climate change.

In this Article, we address the fundamental issue of corporate purpose. We do so by reframing the argument. The current debate does not address key predicate questions: what it means for a corporation to have a purpose, whether corporations should have a purpose at all and, if so, what role corporate purpose can serve? We note that these questions are, to a degree, independent of the normative question about what a corporation's purpose should be.[10]

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8. *See, e.g.*, David Gelles, *Marc Benioff of Salesforce: 'Are We Not All Connected?'*, N.Y. TIMES (June 15, 2018), https://www.nytimes.com/2018/06/15/business/marc-benioff-salesforce-corner-office.html [https://perma.cc/38AH-7C8H] ("When I went to U.S.C., it was all about maximizing value for shareholders. But we're moving into a world of stakeholders."); *About Us*, NESTLÉ, https://www.nestle.com/aboutus [https://perma.cc/MRH5-ED49] ("Unlocking the power of food to enhance quality of life for everyone, today and for generations to come. That is our purpose."). *See generally* Omar Rodríguez-Vilá & Sundar Bharadwaj, *Competing on Social Purpose*, HARV. BUS. REV., Sept.–Oct. 2017, at 94, https://hbr.org/2017/09/competing-on-social-purpose [https://perma.cc/SE7A-B7MW] ("Consumers increasingly expect brands to have not just functional benefits but a social purpose. As a result, companies are taking social stands in very visible ways.").

9. *See, e.g.*, Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3511631 [https://perma.cc/7HSA-4DHR] (introducing proposal designed to induce corporations to "sacrifice profits in pursuit of social goals"). *See also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) ("Corporate managers have never had an enforceable legal duty to maximize corporate profits. Rather, they have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interest.").

10. *See* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 183 (2013) (highlighting that corporate law scholars differ both on the positive question and the normative dimensions of corporate purpose).

We believe that careful attention to these questions and the issues that they raise about the structure and use of the corporate form are critical. We start in Part I by considering and rejecting traditional sources of corporate purpose—including the historical requirement that corporations formally articulate a purpose in their charters, efficiency arguments from law and economics, and claims that purpose is necessary to overcome doctrinally mandated profit maximization. We argue that, under existing law, both the mutability of the corporate charter and the flexibility of the business judgment rule give corporate managers ample discretion to consider stakeholder and societal interests irrespective of a broad reformulation of corporate purpose.

Next in Part II we interrogate the effect of repurposing the corporation. We observe that few corporations have sought to implement legally binding constraints through charter provisions. The alternative—non-charter statements of corporate purpose and mission—are largely vague and aspirational. We argue that these statements provide neither direction nor legal cover to corporate decision makers, particularly if purpose is understood as constraining the pursuit of shareholder value. Similarly, the structural framework of the corporation renders purpose statements, standing alone, impotent as a tool for enlisting corporations in broad-based social change—no purpose statement can eliminate Chevron's carbon footprint or make Philip Morris's cigarettes healthy.

We then seek in Part III to salvage the role of corporate purpose. We articulate an instrumental role for purpose derived from the foundational justification for the corporate form—a tool that facilitates the pursuit of an agreed-upon set of business objectives. Purpose enables corporate participants to formalize their goals and priorities, which can include not just the pursuit of profits, but the incorporation of operational constraints, stakeholder values, and social impact. As with purely economic goals, the extent to which a particular corporate purpose is desirable or effective depends on the comparative advantage of the corporate form in pursuing those goals. Critically and distinctively, under our framing, purpose is a means not an end; a means that allows corporate participants to signal, monitor, and manage their expectancy interests. Purpose identifies the metrics by which managers are to be held accountable. Purpose also informs stakeholders as to the degree to which they must seek alternative mechanisms to protect their claims through contract or regulation. Notably, in our instrumental account, corporate purpose need not operate as a formal legal

constraint,[11] but it provides coherence, transparency, and coordination to corporate decisions.[12]

We conclude in Part IV by considering the necessary conditions for corporate purpose to serve this instrumental function. We argue that although existing statements of purpose indicate a market-based need, they are largely ineffective. To be functional, a corporate purpose must both provide concrete guidance for the corporation's operations, priorities, or goals and meaningfully constrain corporate action. Many, if not most, of the statements of corporate purpose today lack such content. Instead, we view these statements more as mission statements rather than binding statements of corporate purpose.[13]

Ultimately, our analysis adds rigor to the current debate about corporate purpose. The world is in flux, but a sustainable and workable vision of the corporation requires a theoretical foundation, which we provide.

I. The Origins of Corporate Purpose

In this Part, we begin by examining the origins of corporate purpose. We outline the history of corporate purpose. We then turn to examine the meaning and usage of corporate purpose in the modern charter. We conclude the section by outlining various, prior theoretical bases for corporate purpose and its role in light of the expansive corporate purpose of today's modern corporation.

A. The History of Purpose

Corporate purpose has its origins in 16th and 17th century England, in which corporations were required to obtain Royal or Parliamentary sanction to operate in the corporate form.[14] Although the scope of powers such

11. A corporation may commit to prioritize stakeholder or societal values in its charter in the same manner as a public benefit corporation. We posit that such a commitment would be legally enforceable in the same manner as any other charter provision. *See* RICHARDS, LAYTON & FINGER, PA, REPORT TO THE GOVERNANCE AND NOMINATING COMMITTEE OF THE BOARD OF DIRECTORS OF WELLS FARGO & COMPANY REGARDING PUBLIC BENEFIT CORPORATIONS 4 (2020), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/harringtonwellsfargo021220-14a8.pdf [https://perma.cc/JD92-DHH5] (observing that "a corporation may amend the purpose clause of its certificate of incorporation to add a public benefit purpose").

12. *See generally* Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 941 (2020) (discussing the use of incentives and organization structure for corporations to pursue social mission).

13. There is a vast literature in organizational behavior about corporate purpose and the role of mission. We view this literature as distinct from the issue of a corporation's legal purpose, the topic of this article.

14. *See* David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 10 (2019) ("In the early 1600s, the English Crown and Parliament began granting corporate charters to joint-stock companies.").

corporations could exercise was unclear, the idea that "the powers of the corporation were limited by the purposes for which the corporation was created" was recognized as a limiting principle.[15] Notably, the earliest corporate charters were not utilized by for-profit businesses but by churches, municipalities, and universities.[16] By the 18th century, Parliament extended the use of corporate charters to trading companies such as the infamous South Sea Company.[17] Also in the 18th century, legal scholars began distinguishing between types of corporations and looked to purpose as an element.[18]

The practice of corporate chartering was transferred to America. Until the late 1800s, chartering was subject to state legislative approval.[19] Legislative mistrust of corporate entities—a legacy of Jeffersonian ideals—often led to limited grants of authority and purpose for commercial corporations.[20] In addition, "[t]he size and level of business activity had not yet evolved to a point of needing the legal benefits provided by the corporate form."[21] As a result, most early U.S. corporate charters were issued for public purposes—religious organizations, cemeteries, and charities.[22]

The specification of corporate purpose had legal ramifications. State law required corporations to confine their operations to the purpose identified in their charters, and activities outside the scope of that specification were *ultra vires* or beyond the corporation's legal power.[23] The *ultra vires* doctrine

15. W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 396 (1922) (acknowledging that "though the law was accepted in this sense in the sixteenth and seventeenth centuries, it rested on somewhat slender authority").

16. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 789 (2013).

17. L.W. HANSON, CONTEMPORARY PRINTED SOURCES FOR BRITISH AND IRISH ECONOMIC HISTORY 1701–1750, at 145 (1963).

18. Guenther, *supra* note 14 at 13–14.

19. Blair, *supra* note 16 at 793. Early use of the corporate form in the United States was also limited to entities organized for a public purpose. *See id.* at 793 n.47 (citing Andrew Lamont Creighton, The Emergence of Incorporation as a Legal Form for Organizations (July 1990) (unpublished Ph.D. dissertation, Stanford University) (on file with author)) (reporting that prior to the American Revolution, only seven corporations in the U.S. colonies were chartered for businesses other than public works, banking, or insurance).

20. *See* CORPORATIONS AND AMERICAN DEMOCRACY 8 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (describing how states in the late eighteenth century awarded corporate charters with certain privileges to commercial businesses and also limited the privileges due to "fears of inequality, monopoly, and corruption").

21. Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 92 (1999).

22. *Id.*

23. The *ultra vires* doctrine came from England. A classic example is the English case of *Introductions Ltd. v. National Provincial Bank, Ltd.*, [1969] 1 All ER 887, in which the court held that it was *ultra vires* for a company with a purpose of organizing the Festival of Britain to breed pigs. In the U.S., the doctrine is illustrated by *Thomas v. R.R. Co.*, 101 U.S. 71 (1879), in which the Supreme Court held that a railroad company lacked the power to lease its property to the plaintiffs

protected the expectancy interests of the corporation's investors, who understood the enterprise into which their money was being placed and the potential risks and rewards associated with that enterprise. The doctrine limited the scope of business discretion afforded to corporate management. Finally, the doctrine protected the public by placing limits on the scale and range of corporate operations. As the Supreme Court explained, corporate actions beyond its articulated purpose were contrary to "the relations which the charter has arranged between the corporation and the community."[24]

The industrial revolution eroded the operation of charter purpose provisions as legal constraints on corporate behavior.[25] Increased demand for the corporate form to facilitate the aggregation of the substantial amounts of capital necessary for the growing scale of business activity led to growing acceptance of the corporate form for general commercial operations. This led states to shift from special charters to general charters that allowed corporations to define their purpose as engaging in any lawful purpose or business activity.[26] This legislative transition enabled corporations to define their purpose as engaging in any action permitted by law.[27] As a result, the *ultra vires* doctrine fell into disrepair.[28] The consequence was that corporate purpose became undefined and effectively meaningless, a matter we take up in the next subsection.

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in exchange for a receipt of half the plaintiffs' profits. *See generally* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186 (1985) ("Before the Civil War . . . the ultra vires doctrine was strictly applied by American courts . . . .").

24. *Thomas*, 101 U.S. at 84.

25. *See* JOHN STEELE GORDON, THE GREAT GAME: THE EMERGENCE OF WALL STREET AS A WORLD POWER 1653–2000, at 49 (1999) (describing how the accelerating industrial revolution pressured states to pass general incorporation laws).

26. *See* Hamill, *supra* note 21, at 101 (chronicling the nationwide trend in enacting general incorporation statutes in the mid-eighteenth century). A similar development occurred in England, although it was not formalized until the adoption of the Companies Act of 1948. Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience over Logic*, 5 DEPAUL BUS. & COM. L.J. 67, 81 (2006).

27. *See* Andrew G. T. Moore II, *A Brief History of the General Corporation Law of the State of Delaware and the Amendatory Process*, *in* 1 DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS H-1, H-3 (3rd ed., 2020–1 supplement) (noting the change to general incorporation law and stating that a corporation's charter should be approved if the judge "found [the purpose] to be lawful and not injurious to the community").

28. *But see* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1282 (2001) (arguing that *ultra vires* doctrine can be used to make "compliance with the law an enforceable obligation within corporate law").

B. The Purpose Requirement in the Modern Charter

Today, most corporate charters contain a generic statement that the purpose of the corporation is to engage in any lawful activity.[29] The DowDuPont charter illustrates the typical formulation:

> The purpose of the Company is to engage in any lawful act or activity for which a corporation may now or hereafter be organized under the General Corporation Law of the State of Delaware.[30]

Some purpose provisions are more expansive. The purpose provision in PepsiCo's corporate charter spans two pages and explains that the corporation's purposes include, *inter alia*, manufacturing and distributing beverages; acquiring factories, warehouses, and stores; acquiring property; and applying for patents and trademarks.[31] Similarly, Ford Motor Company, which incorporated under the name Eastern Holding Company in 1919, has a detailed corporate purpose that includes the manufacture of airplanes as well as automobiles.[32] Even these more specific charters avoid specifying a corporate purpose akin to that which existed in the early 1800s.

Notably, the typical charter provision neither identifies a purpose of maximizing profit nor articulates a broader societal mission. Even the charter of Salesforce, which promotes a commitment to pursue broad societal value, provides that "[t]he purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General

29. *See, e.g.*, *Amended and Restated Articles of Incorporation*, PHILIP MORRIS INT'L INC. 1 (Jan. 29, 2008), https://www.pmi.com/resources/docs/default-source/our_company/articles-of-incorporation.pdf?sfvrsn=dfe2b0b5_0 [https://perma.cc/648U-4R8F] ("The purpose for which the Corporation is organized is the transaction of any or all lawful business not required to be specifically stated in these Articles of Incorporation."); *Amended and Restated Certificate of Incorporation of Tesla Motors, Inc.*, SEC 1, https://www.sec.gov/Archives/edgar/data/1318605/000119312510017054/dex31.htm [https://perma.cc/9UFF-LVT6] ("The nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the DGCL.").

30. *Second Amended and Restated Certificate of Incorporation*, DOWDUPONT INC. 1 (June 1, 2019), https://s23.q4cdn.com/116192123/files/doc_governance/2019/05/DD_-_Certificate_of_Incorporation-(003).pdf [https://perma.cc/X997-25PY].

31. *Amended and Restated Articles of Incorporation of Pepsico, Inc.*, PEPSICO 1–2 (May 1, 2019), https://www.pepsico.com/docs/album/corporate-governance/amendedandrestatedarticlesofincorporation.pdf?sfvrsn=e84ce4e_12 [https://perma.cc/NV4N-QDEG].

32. *Ford Motor Company Restated Certificate of Incorporation*, SEC 5 (Aug. 2, 2000), https://www.sec.gov/Archives/edgar/data/37996/000003799601000014/0000037996-01-000014-0002.txt [https://perma.cc/JS9A-GY9C].

Corporation Law of Delaware."[33] A few corporations go further.[34] Nestlé, a Swiss corporation, articulates its purpose in its Articles of Association as:

> Article 2 Purpose
> 1. The purpose of Nestlé is to participate in industrial, service, commercial and financial enterprises in Switzerland and abroad, in particular in the food, nutrition, health, wellness and related industries.
> 2. Nestlé may itself establish such undertakings or participate in, finance and promote the development of undertakings already in existence.
> 3. Nestlé may enter into any transaction which the business purpose may entail. Nestlé shall, in pursuing its business purpose, aim for long-term, sustainable value creation.[35]

The language about long-term sustainable value creation was added through amendments adopted in 2008 and supported by 99% of shareholders.[36]

Novo Nordisk, a Danish company, describes itself as "one of only four companies in the world who have incorporated our philosophy into our company bylaws.[37] As a result, the three pillars of TBL[—]Social Impact, Environmental Responsibility, and Financial Performance inform everything we do and guide every decision we make."[38] Novo Nordisk's Articles of Association are more modest, stating:

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33. *Amended and Restated Certificate of Incorporation of Salesforce.com*, SEC 1 (Apr. 20, 2004), https://sec.report/Document/0001193125-04-065496/dex32.htm [https://perma.cc/Y5D3-NKTN].

34. The Supreme Court quoted Hobby Lobby's statement of purpose as "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 703 (2014). The Court did not specify how this statement was incorporated into the company's governing documents or address whether it was legally binding.

35. *Articles of Association of Nestlé S.A.*, NESTLÉ 1 (June 2020), https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_governance/articles-of-association-of-nestle-en.pdf [https://perma.cc/E8MK-UBDU].

36. *See Nestlé: Articles of Association to Be Thoroughly Amended*, ETHOS (June 4, 2006), https://ethosfund.ch/en/news/nestle-articles-of-association-to-be-thoroughly-amended [https://perma.cc/3TFW-RBMK] (announcing that 98.12% of Nestlé shareholders approved a global revision of the company's Articles of Association); *see also* David Frick, *Refocusing Governance on Value Creation*, *in* ICGN YEARBOOK 36, 37 (2018), http://icgn.flpbks.com/icgn-yearbook-2018/ [https://perma.cc/6BE2-DEGG] (describing how in 2008, 99% of Nestlé shareholders supported revising the Articles of Incorporation to include a new "purpose clause" that would prioritize long-term, sustainable value creation).

37. We note that Novo Nordisk, a company that has been cited for its commitment to social value, is somewhat distinctive in that its controlling stockholder is the Novo Nordisk Foundation, a nonprofit. *See* Holdings, NOVO HOLDINGS, https://www.novoholdings.dk/about/holdings/#:~:text=The%20Novo%20Group%20is%20a%20group%20of%20independent,Novozymes%20A%2FS%2C%20both%20of%20which%20are%20publicly%20listed [https://perma.cc/WD9K-4YH2] (explaining that the Novo Foundation owns 25% of the shares and controls 70% of the vote at Novo Nordisk).

38. *Triple Bottom Line*, NOVO NORDISK, https://www.novonordisk-us.com/whoweare/about-novo-nordisk/triple-bottom-line.html [https://perma.cc/VMU2-CPRR].

> The Company's objects are to carry out research and development and to manufacture and commercialize pharmaceutical, medical and technical products and services as well as any other activity related thereto as determined by the Board of Directors. The Company strives to conduct its activities in a financially, environmentally, and socially responsible way.[39]

Even these articulations of broader social purpose are vague and do not reflect actual commitments. Significantly, Philip Morris, which manufactures cigarettes, articulates a similar commitment to societal value on its website,[40] explaining "[w]e strive to continuously improve the sustainability of our business and to contribute to the global sustainability agenda."[41] The impact of these purpose statements on corporate operations and the extent to which they are subject to meaningful enforcement are unclear.

We see little evidence that the contemporary effort to repurpose the corporation contemplates amending corporate charters along the lines of Nestlé or Novo Nordisk, either to incorporate aspirational sustainability language or more concrete objectives such as gender equality, environmental responsibility, or restraint in the production of hazardous products. Although we believe that charter provisions would be a legally effective method of constraining corporate operations, embedding stakeholder or societal values in a corporation's governing documents requires consideration by the board (which must propose such a charter provision) of the precise role that those constraints should play, as well as communicating accurately to shareholders (who must approve such an amendment) the impact of the changes on the corporate actions. It is therefore productive to consider more carefully the potential value of articulating a corporate purpose. We turn to that question in the next Part. First, however, we consider the two major theoretical arguments about corporate purpose.

C. Theoretical Arguments About Corporate Purpose

Both economic theory and the personhood theory of the corporation have been cited as sources for corporate purpose. In contrast to our historical analysis, these theoretical accounts also support specific normative visions. In the case of economic theory, the normative vision is one of shareholder

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39. *Articles of Association of Novo Nordisk A/S*, NOVO NORDISK 3 (Sept. 15, 2020), https://novonordiskfonden.dk/en/about-the-foundation/articles-of-association/ [https://perma.cc/CM4Y-2EY3].

40. The charter provides that: "The purpose for which the Corporation is organized is the transaction of any or all lawful business not required to be specifically stated in these Articles of Incorporation." PHILIP MORRIS INT'L INC., *supra* note 29.

41. *Sustainable Future*, PHILIP MORRIS INT'L, https://web.archive.org/web/20200227225457/https://www.pmi.com/sustainability/ [https://perma.cc/QU7P-8EEK].

primacy. Milton Friedman's widely-cited statement that the purpose of the corporation is to maximize profits,[42] a statement subsequently embraced by a host of academics and business leaders,[43] is based on principles of economic efficiency.

Economic theory defends shareholder primacy as the most efficient operating principle, reasoning that, because shareholders are the residual claimants in a corporation,[44] maximizing shareholder value has the effect of maximizing firm value.[45] This argument directly supports shareholder primacy but as a means not an end, in that the ultimate economic objective is maximizing the value of the firm itself. Under a utilitarian perspective and, assuming no negative externalities, maximizing firm value is consistent with maximizing social welfare.[46] Maximizing shareholder value as an operational principle need not dictate allocational issues. At least some of those who advocate shareholder primacy do so not out of a normative conviction that shareholder interests should dominate but out of the expectation that operating a corporation to maximize profits will result in value creation for all firm stakeholders.[47] In addition, tax and transfer systems can be used to redistribute economic value to nonshareholders.

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42. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/5GYL-XA8L] (theorizing that the only social responsibility of business is to increase its profits).

43. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (1991) (rejecting the concept of "social contracts" in the context of corporate law); Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) ("The efficiency goal of maximizing the company's value to investors remains, in our view, the principal function of corporate law."); Michael Bradley, Cindy A. Schipani, Anant K. Sundaram & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, L. & CONTEMP. PROBS., Summer 1999, at 9, 11 (describing how the dominant view is that corporate governance should be focused solely on the relationship between a corporation and its shareholders); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (contending that corporate managers should be held accountable only to shareholders).

44. *See* DEL. CODE ANN. tit. 8, § 281 (West) (providing for distribution of all remaining assets of a dissolved corporation to its shareholders).

45. *See, e.g.*, Michael Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function* 11 (Amos Tuck Sch. of Bus. at Dartmouth Coll., Working Paper No. 01-09; Negotiation, Org. and Mkts. Unit, Harvard Bus. Sch., Working Paper No. 01-01, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=220671 [https://perma.cc/G6XF-HW5W] ("[Two hundred] years' worth of work in economics and finance indicate that social welfare is maximized when all firms in an economy attempt to maximize their own total firm value.").

46. *See* Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27, 62 (1996) ("Therefore, maximizing the present value of the corporation's earnings stream maximizes the total value of the corporation and, thus, maximizes the corporation's contribution to social wealth.").

47. *See* Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 537–38 (2006) (noting some proponents argue that "whatever non-shareholders

Three subsidiary efficiency considerations support shareholder primacy. First, shareholder economic value is a particularly transparent metric, especially in the context of public corporations where it can be measured, albeit imperfectly and noisily, by observing stock prices. Second, there are reasons to think that shareholder interests are "largely unitary" in the sense that "[m]anagers maximizing the wealth of shareholders as a group generally help all shareholders pro rata."[48] Third, because corporate law vests shareholders with some decision-making authority, through their power to elect directors and vote on certain structural issues such as mergers and bylaw and charter amendments, shareholders have the legal power to hold officers and directors accountable.[49]

Scholars have challenged the economic rationale for shareholder primacy. Modern commentators typically reject the view that shareholders are the sole residual claimants in the firm.[50] Importantly, to the extent that other stakeholders are not fully protected by contract, regulation, or otherwise, maximizing shareholder value may result in transfers to shareholders from those other claimants rather than increasing overall firm value.[51] Summer Kim has also uncovered evidence that, as historical matter, a variety of stakeholders have been treated as the residual claimants of the corporation.[52] Other commentators have attacked the norm as creating wealth-destroying externalities.[53] Moreover, the principle itself has been

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forego in accepting shareholder primacy is more than compensable out of the enhanced value of the arrangement for the shareholders").

48. Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1352 (2007).

49. *See* Memorandum from Edward B. Rock to the Advisers and Members of Consultative Group 8 (Jan. 13, 2020) (on file with author) (arguing that corporations have a purpose to maximize shareholder profits in part due to the structure of Delaware law which provides shareholders control over the corporation). These attributes are likely overstated. For example, nonshareholder stakeholders can obtain control and accountability through contractual mechanisms. *See, e.g.*, Michael Ohlrogge, Bankruptcy Claim Dischargeability and Public Externalities: Evidence from a Natural Experiment (Feb. 14, 2020) (unpublished manuscript), https://ssrn.com/abstract=3273486 [https://perma.cc/SMC5-4L9M] (describing environmental covenants in lending agreements).

50. *See* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 652 (2004) ("The traditional law and economics perspective holds that in determining the maximands of the corporation, exclusive priority should be given to its residual claimants. . . . This position, however, does not, in reality, hold true.").

51. *See, e.g.*, Van Der Weide, *supra* note 46, at 62 (noting the tensions between relatively short-term interests of employees and creditors and the long-term, value-maximizing interests of shareholders).

52. *See* Summer Kim, A Multi-Criteria Assessment of Corporate Residual Claimants 6 (Mar. 30, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816061 [https://perma.cc/N7F2-G354] ("Depending on which of the theories of rent, interest, wages, or profit was adopted, each of landlord, capitalist, laborer, and entrepreneur have been the residual claimants of the corporation over time.").

53. *See, e.g.*, Lee, *supra* note 47, at 539–62 (discussing academic arguments that shareholder primacy creates wealth-destroying externalities).

attacked head-on for creating short-termism in corporations.[54] In this regard, scholars have noted that shareholders themselves have heterogeneous interests, making it difficult to decide exactly to whom, among a group of shareholders, directors and the firm should cater.[55]

More problematically, even if shareholder value is correlated with firm value, some societal interests do not fall within the contours of the firm. To the extent that maximizing shareholder (or firm) value sacrifices these interests, that operating policy creates negative externalities. Economic theory does not supply an answer to the normative question of how corporate law or individual operational decisions should weigh these costs, but any broad-based efficiency theory must grapple with them.

Corporate personhood theory takes the opposite approach; it is generally used to justify a corporate purpose that is altruistic or concerned with increasing societal welfare. Personhood theory treats the corporation as a person and argues that, as a result, corporations should have the legal, moral, and ethical obligations of people.[56] The corporate social responsibility movement[57] was premised on the position that economic entities have moral obligations and offered various rationales for these obligations.[58]

The personhood theory of the corporation is articulated most frequently in connection with cases concerning the legal rights of the corporation.[59] Although some scholars draw upon these cases for the principle that a corporation should be recognized as a legal person to attribute to the corporation moral or ethical obligations of personhood, such a reading

54. *See* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1284 (2002) (arguing that shareholder value maximization has in part meant "obsession with short-term performance numbers").

55. *See, e.g.*, Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1283 (2008) (noting that investors may not share "a common economic goal").

56. *See, e.g.*, Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 117 (2009) ("If the corporation is a real person in society, it should have the same sorts of moral and social responsibilities that individuals have.").

57. *See, e.g.*, John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 1–5 (2005) (chronicling the development of the CSR movement).

58. *See, e.g.*, Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591, 606 (2008) (describing alternative justifications for the moral obligations of corporate entities, including, for example, a Catholic social thought and contemporary socio-economic theory).

59. *See* STEPHEN WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 400–401 (2018) (describing cases granting corporations the right to sue, due process rights, and contract rights). More recently, the Court has granted corporations the right to engage in political speech and religious rights. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707-08 (2014) (holding that corporations have the right to free exercise of religion); Citizens United v. Federal Election Commission, 558 U.S. 310, 343, 365 (2010) (holding that corporations have the right to make political donations).

misconstrues the rationale behind the decisions.[60] The Supreme Court's jurisprudence in these cases does not extend constitutional rights on the basis that corporations are like natural persons but instead provides rights to corporations to protect shareholder individuals.[61] As Professor Elizabeth Pollman has argued, "the so-called doctrine of corporate personhood does not provide guidance for determining the scope of corporate rights."[62] It instead is a theory of the expression of these rights, based on an associational view of the corporation.

The personhood theory could generate a corporate purpose grounded in the purpose of individual corporate participants. The challenge with this is that corporations are comprised of a variety of stakeholders with widely varying objectives. Even if the inquiry is limited to shareholders, a corporation's shareholders vary as to their timeframe, their liquidity needs, their tax situation, the ESG issues that they consider important, and their willingness to prioritize those interests over economic value.[63] Personhood theory can serve as a basis for imputing a corporate purpose only under the misguided assumption that shareholders either have homogenous interests or that the tools of corporate decision-making—such as majority shareholder voting or delegation to corporate directors—are a basis for resolving intra-shareholder differences, an issue that we consider in further detail below.

More broadly, even if a corporation had the legal or ethical obligations of a natural person, imputing such obligations provides little guidance in identifying a particular corporate purpose. Natural persons have varying purposes, objectives, and self-imposed constraints on their pursuit of those objectives. These constraints may be social, moral, ethical, political, religious, or philosophical in origin. Even among individuals, there is widespread disagreement on what constitutes ethical behavior, limiting the potential for personhood theory to answer that question for the corporation. Thus, we find no rationale for corporate purpose in economic theory or the corporate personhood literature. In the next section we examine legal justifications for corporate purpose based on shareholder primacy.

II. Purpose and Legal Arguments about Shareholder Primacy

Repurposing the corporation is most frequently an attempt to address the argument that corporations are legally required to focus exclusively or primarily on maximizing shareholder economic value. The extent to which existing law mandates shareholder primacy is hotly contested, and we

60. *See* Blair, *supra* note 16, at 797 ("[L]egal decisions that make reference to the idea [of corporate personhood] have often been sources of confusion.").

61. Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 51 (2014).

62. *Id.*

63. *See, e.g.*, Anabtawi & Stout, *supra* note 55 ("[T]he belief that minority shareholders share a common economic goal has also become inaccurate.").

therefore explore that claim in some detail. Ultimately, we reject the proposition that existing law prohibits corporate decision makers from considering and incorporating the interests of stakeholders and society; we conclude that corporations currently have the power—and indeed the obligation—to consider those interests irrespective of their articulated purpose.

Purpose advocates send mixed messages about the relationship of corporate purpose to shareholder value.[64] On the one hand, they justify repurposing by claiming that shareholder primacy has enabled corporations to ignore or affirmatively harm the interests of other stakeholders and society at large. They further describe the existing legal doctrine as essentially requiring corporations to do so. On the other, they claim that considering stakeholder interests in fact promotes greater long-term economic value for investors, suggesting that stakeholder value is entirely consistent with shareholder primacy.[65]

As early as 1901, one court observed that "[t]he real object and purpose of a corporation for profit is to make a profit and to make dividends for the stockholders, and a person who holds the stock of a company has a right to have the business of the company conducted, as far as practicable at least, so that it will make profits and pay dividends."[66] The view that corporations should be managed with the objective of maximizing shareholder economic value found perhaps its most explicit articulation in the 1919 case of *Dodge v. Ford*.[67] In *Dodge v. Ford*, the Michigan Supreme Court stated "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[68]

64. *See*, *e.g.*, Adam B. Badawi & Frank Partnoy, Measuring How Corporations Impact Society: The Relationship Between ESD Metrics and Securities Litigation 11 (unpublished manuscript), https://insights.truvaluelabs.com/hubfs/Academic%20Research%20Network/ARN_Partnoy_ESGandLitigation.pdf [https://perma.cc/S2XP-KFNX] (explaining that ESG metrics can be understood as "capturing ways in which a focus on ESG is consistent with maximizing shareholder returns" or alternatively "measur[ing] deviations from shareholder returns that inure to the benefit of stakeholders").

65. For example, in describing its decision to convert to a PBC and formally adopt a public benefit in its charter, Veeva explained, "We believe social and economic benefits go hand in hand and have always operated with the long-term view that doing the right thing for our customers, employees, and communities ultimately allows us to deliver the best results for investors." Peter Gassner, *Veeva*: *A Public Benefit Corporation*, VEEVA, https://www.veeva.com/pbc/ [https://perma.cc/8637-6XTF]. *See also* ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 3–4 (2020) (claiming that the pie-growing mentality advocated by the book, in which a company's purpose is based on increasing social value, "typically ends up *more* profitable than if profits were the end goal").

66. Arbuckle v. Woolson Spice Co., 1901 WL 708, at *2 (Ohio Cir. Dec. Jan. 12, 1901).

67. 170 N.W. 668 (Mich. 1919).

68. *Id.* at 684.

The case forms the central foundation of the argument that the purpose of the for-profit corporation is to maximize value for shareholders.[69]

The strongest legal authority that corporate managers are legally obligated to focus exclusively on maximizing shareholder profits comes from Delaware. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[70] the court held that a board facing a change of control was required to obtain the "highest price for the benefit of the stockholders."[71] *Revlon* explicitly rejected the argument that, at least in the context of a case sale, a corporate board could prioritize the interests of a nonshareholder constituency (noteholders) over the interests of the shareholders.[72] *Revlon* is widely cited for the principle that a board's sole duty is to maximize economic value for shareholders regardless of the impact of its decision on nonshareholder constituencies.

More recently, the Delaware Chancery Court sent a similar message in its rejection of craigslist's adoption of a poison pill against its own shareholder, eBay. In *eBay Domestic Holdings, Inc. v. Newmark*,[73] the court criticized the board's justification for adopting the pill, namely that eBay was attempting to force the company to earn more profit.[74] The court explained that "[t]he corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment."[75]

We believe that reading these cases to incorporate a broad requirement of shareholder primacy in corporate law goes too far. First, other Delaware takeover cases expressly recognize the potential power of corporate decision makers to consider stakeholder interests. In *Unocal v. Mesa Petroleum Co.*,[76] the Delaware Supreme Court held that when a board took defensive action in response to a takeover threat, it must have "reasonable grounds for believing that a danger to corporate policy and effectiveness existed."[77] Notably, however, *Unocal* did not identify shareholders as the only constituency

69. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW 141 (2d ed. 2009) ("It is well-settled that directors have a duty to maximize shareholder wealth.") (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 776–77 (2015) ("*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.").

70. 506 A.2d 173 (Del. 1985).

71. *Id.* at 182.

72. *Id.*

73. 16 A.3d 1 (Del. Ch. 2010).

74. *Id.* at 34.

75. *Id.* at 34.

76. 493 A.2d 946 (Del. 1985).

77. *Id.* at 955.

relevant to the board's assessment. Instead, the court described the board's obligation as evaluating the effect of the takeover bid "on the corporate enterprise."[78] Indeed, the board's analysis could include, *inter alia*, "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."[79] Similarly, in *Paramount Communications, Inc. v. Time, Inc.*,[80] the Delaware Supreme Court noted that the board is "not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover."[81] The court noted, without criticism, that the primary objective of Time's outside directors—in pursuing a transaction with Warner rather than Paramount—was to preserve Time's culture, more specifically "the editorial integrity and journalistic focus of Time."[82]

Second, *Revlon* and *eBay* involve the takeover context. Takeovers differ from traditional operational decisions for a number of reasons, including last-period problems and questions about the scope of authority delegated to the board. As such, takeover law provides a variety of distinctive legal rules—including heightened fiduciary duties, greater disclosure obligations, and enhanced shareholder decision-making and exit rights—that are not present in day-to-day corporate decisions.

Even if the Delaware case law is properly understood as conveying a strong commitment to shareholder primacy in the takeover context, we question its relevance to the day-to-day operational decisions that are the focus of the current purpose debate. The *eBay* decision itself provides support for this distinction; the court's holding was limited to prohibiting craigslist from implementing a poison pill.[83] The decision expressly observed that the craigslist board provided "a website for online classifieds that is largely devoid of monetized elements," and it observed that the craigslist founders and controlling shareholders are "perfectly able to ensure the continuation of craigslist's 'culture' so long as they remain majority stockholders."[84] Nowhere did it suggest that the decision to do so was inconsistent with their fiduciary obligations.

78. *Id.*

79. *Id.*

80. 571 A.2d 1140 (Del. 1989).

81. *Id.* at 1150.

82. *Id.* at 1143, 1152.

83. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("I cannot accept as valid *for the purposes of implementing the Rights Plan* a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders." (emphasis added)).

84. *Id.* at 34–35. We view the *eBay* case as consistent with the Delaware courts' holdings that fiduciaries cannot take inequitable conduct. The court in *eBay* cited *Schnell v. Chris–Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) for this proposition. *Id.* at 38.

Third, decisions such as *Dodge* and *Revlon* can perhaps better be understood as implicating the duty of loyalty rather than mandating shareholder primacy. Professor Lynn Stout observed that *Dodge* is consistent with the obligation that controlling shareholders have "not to oppress minority shareholders."[85] Similarly, *eBay* can be read as a limitation on the ability of controlling shareholders to pursue their idiosyncratic objectives at the expense of minority shareholders, a concern that fits better within the duty of loyalty framework than within the scope of corporate purpose.[86] More broadly, the "animating principle" behind *Revlon* and the other Delaware takeover cases is regulating inherent conflicts of interest, based both on the concern that conflicts of interest are ubiquitous in takeover cases and that, in that context, the costs of inadequately policed conflicts are particularly high.[87]

The argument that these cases are about managerial loyalty rather than shareholder primacy is reinforced by recent developments in the Delaware courts' *Caremark*[88] jurisprudence. *Caremark* requires a board to undertake a good faith effort to "'to exercise oversight' and to monitor the corporation's operational viability, legal compliance, and financial performance."[89] Although *Caremark* duties were originally articulated as a component of the duty of care,[90] the Delaware courts subsequently incorporated oversight failures into the duty of loyalty.[91]

At the same time, recent Delaware *Caremark* decisions suggest that insufficient attention to stakeholder interests may itself be legally actionable. In *Marchand v. Barnhill*, the Delaware Supreme Court refused to grant a motion to dismiss a claim that Blue Bell's board failed to implement a board-level food safety program despite the presence of both "red" and "yellow" flags.[92] The court specifically highlighted the importance of customer interests to Blue Bell's continued operational success. The court stated that "[a]s a monoline company that makes a single product—ice cream—Blue Bell can only thrive if its consumers enjoyed its products and were confident

85. Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 168 (2008).

86. *See eBay*, 16 A.3d at 34 (observing that the craigslist founders were acting "because of their own personal preferences").

87. Zachary J. Gubler, What's the Deal with Revlon? 10, 13 (Feb. 24, 2020) (unpublished manuscript) (on file with author).

88. 698 A.2d. 959 (Del. Ch. 1996).

89. Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019) (citing Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006)).

90. *E.g.*, Peter D. Bordonaro, Comment, *Good Faith: Set In Stone?*, 82 TUL. L. REV. 1119, 1135 (2008) ("Caremark liability was originally based on a violation of the duty of care.").

91. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("It follows that because a showing of bad faith conduct, in the sense described in *Disney* and *Caremark*, is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty.").

92. *Marchand*, 212 A.3d at 809.

that its products were safe to eat."[93] In the wake of *Marchand*, Delaware courts have seen an uptick in *Caremark* claims,[94] and corporations have increased their focus on risk assessment and compliance.[95]

Outside Delaware, legal support for shareholder primacy is even more limited. In *Burwell v. Hobby Lobby Stores, Inc.*,[96] the U.S. Supreme Court read the statutory right of a corporation to be organized for any lawful purpose as providing corporations with the legal authority to further humanitarian objectives, at least in addition to furthering economic value.[97] As the Court explained:

> Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act . . . While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.[98]

To be sure, *Hobby Lobby* was based in part on the fact that the corporation had such a small number of shareholders that its idiosyncratic purpose was discernable and expressed. Nonetheless, *Hobby Lobby* appears to stand for the proposition that a corporation can have an alternative purpose from profit maximization.[99]

Moreover, many states have explicitly rejected *Revlon*. A majority of U.S. states have adopted so-called constituency statutes that expressly authorize corporate officials to consider a range of stakeholder interests in addition to shareholder interests.[100] The Wisconsin constituency statute, for

93. *Id.*

94. *See, e.g.*, Hughes v. Xiaoming Hu, No. 2019-0112-JTL, 2020 WL 1987029, at *12 (Del. Ch. Apr. 27, 2020) (denying motion to dismiss where complaint "alleges facts that support an inference that the Company's Audit Committee met sporadically, devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation"); *In re* Clovis Oncology, No. 2017-0222-JRS, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019) (refusing to dismiss Caremark claim when complaint alleged board ignored "red flags that Clovis was not adhering to the clinical trial protocols, thereby placing FDA approval of the drug in jeopardy").

95. *See* John Mark Zeberkiewicz & Robert B. Greco, *In re* Clovis: *Considering* Caremark *Claims after* Marchand, INSIGHTS: CORP. & SEC. L. ADVISOR, Nov. 2019, at 36, 38 ("The *Clovis* opinion signals that, post-*Marchand*, the Delaware courts, in assessing *Caremark* claims at the pleading stage, may hold boards operating in highly regulated industries to a somewhat elevated standard for monitoring and assessing compliance with mission-critical regulatory regimes.").

96. 573 U.S. 682 (2014).

97. *Id.* at 712–13.

98. *Id.* at 711–12 (citations omitted).

99. Notably, the Court did not identify the formal manner in which Hobby Lobby articulated or committed to its purpose.

100. *See* Matthew D. Cain, Stephen D. McKeon & Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from Five Decades of Hostile Takeovers*, 124 J. FIN. ECON. 464, 471 (2017)

example, provides that, in discharging their duties, corporate officers and directors may consider the effect of their actions on "employees, suppliers and customers of the corporation," the "communities in which the corporation operates," and "[a]ny other factors that the director or officer considers pertinent."[101] Although Delaware has not adopted such a statute, a few Delaware corporations have adopted equivalent positions in their charters.[102] We are unaware of any Delaware case exploring the validity or legal significance of such a charter provision. Although these statutes do not specify how corporate decision makers should prioritize different stakeholder interests, they clearly authorize decisions that do not focus exclusively on maximizing economic value for shareholders.[103]

III. The Functional Role of Corporate Purpose

Having considered legal, historical, and theoretical justifications and found them unsatisfying, we turn to consider the potential functional role of corporate purpose. As we understand it, commentators advocate that corporations articulate their purpose as a mechanism for controlling corporate behavior and, in particular, to further a stakeholder or public orientation for corporate decisions. Concededly, a corporation could articulate its purpose as making cigarettes attractive to children to get them addicted at an early age and ensure long-term demand for its product, but we do not think that is what purpose advocates have in mind. Rather, they view the articulation of purpose as facilitating a shift away from shareholder primacy in favor of the stakeholder or public interests.

Although we have highlighted the limited basis for treating shareholder primacy as a legal mandate, one response is that the decisions we discuss, coupled with a supportive academic literature, have influenced managerial decision-making and that corporate officials are likely to focus on

(documenting the adoption of constituency laws); Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 95 (2015) (reporting that 33 states currently have constituency statutes).

101. WIS. STAT. § 180.0827 (2021).

102. *See, e.g.*, *Restated Certificate of Incorporation of the McClatchy Company*, SEC 4, https://www.sec.gov/Archives/edgar/data/1056087/000119312506154574/dex31.htm [https://perma.cc/7TP8-PAZV] ("In the consideration and approval of all policies and actions of the Corporation, the Board of Directors shall have the right to consider all relevant factors which are in the best interests of the Corporation and its stockholders, including and in addition to the financial interests of stockholders, community standards and values, the welfare of employees, and the quality and independence of the Corporation and its publishing enterprise."). *See also* Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, 1 COLUM. BUS. L. REV. 92, 189 (2017) (discussing the use of charter provisions for companies to pursue social purpose).

103. *See* Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders, and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 403 (1993) (noting that constituency statutes change the focus from the welfare of shareholders to the welfare of both shareholder and nonshareholder constituencies).

shareholder value and, even more problematically, on short-term stock price, in making operational decisions.[104] An explicit revision of corporate purpose to include other stakeholders is the proposed solution, and it is a solution that is gathering momentum. On the manager side, the Business Roundtable revised its statement of corporate purpose and replaced shareholder primacy with a commitment to further the interests of all stakeholders, and 181 corporate CEOs endorsed that statement.[105] On the shareholder side, several investors have introduced shareholder proposals encouraging corporations either to modify the purpose statements in their charters or to convert to Public Benefit Corporations (PBCs), which are required to adopt a public purpose. Most recently, Veeva became the first publicly traded corporation to convert to a PBC[106] and, as part of that conversion, to adopt the following public benefit purpose:

> Public Benefit Purpose. The specific public benefits to be promoted by the corporation are to provide products and services that are intended to help make the industries we serve more productive, and to create high-quality employment opportunities in the communities in which we operate.[107]

The function of these statements of purpose is unclear and, we argue, problematic.[108] Defending corporate purpose based on its capacity to function as an operational constraint comingles several distinct concepts as highlighted in the table below:[109]

104. *See, e.g.*, Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2020 (2013) (arguing that shareholder primacy can, by focusing managers on short-term stock price, have the effect of "harm[ing] public corporations' abilities to generate future products and profits, to the collective detriment of creditors, employees, consumers, suppliers, and long-term shareholders alike").

105. BUS. ROUNDTABLE, *supra* note 3.

106. *Veeva Becomes First Public Company to Convert to a Public Benefit Corporation*, BUSINESSWIRE (Jan. 14, 2021, 8:03 AM), https://markets.businessinsider.com/news/stocks/veeva-becomes-first-public-company-to-convert-to-a-public-benefit-corporation-1029967097 [https://perma.cc/2UXA-4VSN].

107. Veeva Systems Inc., *Proxy Statement for Special Meeting*, VEEVA 1 (Jan. 13, 2021), https://s2.q4cdn.com/456805372/files/doc_financials/2021/ar/20.12.04-Proxy-Statement-for-Special-Meeting.pdf [https://perma.cc/GS24-5TM3].

108. Some commentators have described the Business Roundtable's statement as ineffective or greenwashing. *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 98 (2020) (characterizing the statement as "largely representing a rhetorical public relations move"). We take no position here on whether the statement truly reflects the intentionality of its signatories.

109. We use the term stakeholder here as shorthand to capture nonshareholder interests generally, including the public interest. *See id.* at 116–19 (exploring variation in the use of the term stakeholder).

	Long-Term Shareholder Value Purpose	**Long-Term Stakeholder Value Purpose**
Legal Obligation	Q1: Legal obligation to consider non-shareholder interests but only to the extent they promote long-term shareholder value	Q2: Legal obligation to consider non-shareholder interests irrespective of their effect on long-term shareholder value
Legal Consideration	Q3: Power but not obligation to consider non-shareholder interests but only to the extent they promote long-term shareholder value	Q4: Power but not obligation to consider non-shareholder interests irrespective of their effect on long-term shareholder value

The table demonstrates that purpose can have positive legal bite by creating an affirmative obligation for corporate decision makers to consider particular interests, or it can be merely aspirational. Constituency statutes are examples of the latter in that they authorize but do not compel corporate officials to consider nonshareholder constituencies. In addition, a theory of corporate purpose could both identify specified objectives as normatively desirable and authorize or compel corporate decision makers to prioritize those interests. Shareholder primacy, as traditionally understood, prioritizes the interests of shareholders over those of other stakeholders.

Consider the options presented by the table. We argue that if purpose is understood to play the role described in quadrants 1 and 3, it does not depart from traditional shareholder primacy. If corporate officials are charged with maximizing shareholder value, and the consideration of stakeholder interests enhances shareholder value,[110] then properly informed corporate officials will do so regardless of whether the corporate purpose statement identifies the consideration of such interests as a distinct obligation, and their broad

110. The empirical evidence in support of this claim is mixed. *See, e.g.*, TENSIE WHELAN, ULRICH ATZ, TRACY VAN HOLT & CASEY CLARK, NYU STERN CTR. FOR SUSTAINABLE BUS., ESG AND FINANCIAL PERFORMANCE: UNCOVERING THE RELATIONSHIP BY AGGREGATING EVIDENCE FROM 1,000 PLUS STUDIES PUBLISHED BETWEEN 2015 – 2020, at 2 (2021), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf [https://perma.cc/H7MK-U2M5] (reporting, based on an analysis of more than 1000 empirical studies, "a positive relationship between ESG and financial performance for 58% of the 'corporate' studies focused on operational metrics such as ROE, ROA, or stock price with 13% showing neutral impact, 21% mixed results (the same study finding a positive, neutral or negative results) and only 8% showing a negative relationship").

discretion to do so will be protected by the business judgment rule.[111] Indeed, if consideration of stakeholder interests is necessary to maximize shareholder value, corporate officials would be remiss for failing to afford sufficient consideration to those interests. That corporate officials face meaningful liability exposure for such failures is reflected in cases like *Marchand*.[112]

Concededly, the relationship between stakeholder interests and shareholder value may be unknown or unknowable to a corporate manager at the time of an initial decision, making it difficult for a manager to determine the effect of a decision on shareholder value with certainty. Professor Dorothy Lund observes that the effect may depend on considerations such as the impact of a stakeholder-oriented decision on a corporation's reputation and subsequent sales, the possibility that competitors will adopt similar policies (resulting in a level playing field), the prospect of averting more burdensome obligations imposed through regulation, the possible changes in supply chain practices, and more.[113] Thus, a range of business decisions that might appear to sacrifice short-term profitability may be rationally related to long-term corporate value and within the scope of managerial discretion. The fact that managers cannot reliably predict the economic consequences of their operational decisions is not a characteristic unique to stakeholder-oriented decisions, however. Indeed, it is the rationale behind the business judgment rule.

The decision by Dick's Sporting Goods to stop selling guns in some of its stores following the school shooting in Parkland, Florida, illustrates this potential uncertainty.[114] Initially, the media characterized the decision as "at the expense of revenue."[115] Dick's CEO Edward Stack believed the company

111. Although a cynic might argue that the business judgment rule encourages corporate officials to defend stakeholder-oriented decisions disingenuously in terms of shareholder value, we believe for the reasons discussed *infra* at notes 129 through 134 and accompanying text, that deliberate decisions to sacrifice shareholder value in the interests of other stakeholders are unlikely.

112. Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019).

113. *See* Lund, *supra* note 9, at 5, 14–15 (giving examples of the potential effects of companies' socially responsible decisions on their competitors, suppliers and the market as a whole). Melvin Eisenberg observed more than twenty years ago that seemingly purely altruistic corporate behavior might nonetheless provide a benefit to the corporation. Melvin Aron Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure*, 28 STETSON L. REV. 1, 19–20 (1998).

114. Nathaniel Meyersohn, *Dick's Sporting Goods Removes Guns and Ammo from 125 Stores*, CNN BUS. (Mar. 14, 2019, 11:27 AM), https://www.cnn.com/2019/03/14/investing/dicks-sporting-goods-guns [https://perma.cc/Z8LH-7D6T].

115. Sarah Nassauer, *How Dick's Sporting Goods Decided to Change Its Gun Policy*, WALL ST. J. (Dec. 4, 2018), https://www.wsj.com/articles/how-dicks-sporting-goods-decided-to-change-its-gun-policy-1543955262 [https://perma.cc/LG3G-PC79].

would lose a quarter of a billion dollars from the decision.[116] Dick's also faced the prospect of boycotts and protests from gun owners.[117] Stack defended the decision as the right thing to do, saying "I don't really care what the financial implication is."[118] Despite this statement, no shareholder challenged Dick's decision, and we are skeptical that any shareholder could do so successfully. Subsequently, it became less clear that the decision involved a tradeoff between societal and shareholder value. Sales grew at the stores where the company discontinued gun sales, and Dick's removed guns from more stores.[119] A year after its initial announcement, Dick's reported a jump in same-store sales, and its stock price increased by more than four percent.[120] In March 2020, Dick's announced that it would remove guns from an additional 440 stores, and its stock price increased by thirteen percent.[121]

The approaches in quadrants 2 and 4, in contrast, reflect a shift from shareholder primacy. Quadrant 4—"Power but not obligation to consider nonshareholder interests irrespective of their effect on long-term shareholder value"—presents the formulation of corporate purpose that is, we think, most consistent with the view espoused by purpose advocates and is embodied in the Business Roundtable statement. It takes the position that the consideration of stakeholder interests is normatively desirable and legally permissible when those interests are unrelated to or even inconsistent with shareholder value but that this consideration is not mandatory. It further posits that consideration of stakeholder interests may, but need not, trump shareholder interests or the pursuit of economic value.

As noted in Part II, *supra*, we challenge the claim that existing corporate law imposes a binding obligation of shareholder primacy, at least outside the context of takeovers and self-dealing transactions. Moreover, existing black letter law authorizes corporate officials, at least in some cases, to consider

116. Terry Nguyen, *Dick's Sporting Goods Destroyed $5 Million Worth of Guns It Pulled from Its Stores*, VOX (Oct. 8, 2019, 11:50 AM), https://www.vox.com/the-goods/2019/10/8/20904713/dicks-destroyed-guns-5-million-dollars [https://perma.cc/U9AF-9HXQ]. Not only did Dick's stop selling the guns, it destroyed more than $5 million worth of guns in its inventory rather than returning the weapons to the manufacturers. *Id.*

117. Rich Duprey, *Will Dick's Sporting Goods Be Hurt by a Gun Owners' Boycott?*, THE MOTLEY FOOL (May 17, 2018, 7:12 PM), https://www.usatoday.com/story/money/retail/2018/05/17/dicks-sporting-goods-hurt-by-gun-owners-boycott/34999931/ [https://perma.cc/QXJ5-YGMF]; Rachel Siegel, *Dick's Sporting Goods Reports Strong Earnings as It Experiments with Reducing Gun Sales*, WASH. POST (Aug. 22, 2019, 10:30 AM), https://www.washingtonpost.com/business/2019/08/22/dicks-sporting-goods-stock-surges-strong-nd-quarter-earnings/ [https://perma.cc/G257-YBGL] (reporting that the decision sparked customer boycotts and employee resignations).

118. Nassauer, *supra* note 115.

119. Meyersohn, *supra* note 114.

120. Siegel, *supra* note 117.

121. *Dick's Sporting Goods to Stop Selling Guns at 440 Additional Stores*, CBS PITTSBURGH (Mar. 10, 2020, 12:01 PM), https://pittsburgh.cbslocal.com/2020/03/10/dicks-sporting-goods-440-store-gun-sales/ [https://perma.cc/3UHB-CCRD].

nonshareholder interests regardless of whether those interests have a relationship to firm value. Many state statutes explicitly authorize charitable donations, for example, irrespective of their relationship to firm economic value.[122] Similarly, constituency statutes empower but do not compel corporate officials to consider stakeholder interests without requiring those interests to be aligned with shareholder interests.[123] Accordingly, we believe there is a plausible argument that the version of corporate purpose reflected in quadrant 4 is consistent with existing law as well as with the aspirations of many purpose advocates.

The version of corporate purpose reflected in quadrant 2 goes further.[124] We acknowledge that existing law does not support framing the approach in quadrant 2 as an obligation.[125] We believe, however, that corporations can voluntarily commit in their charters to prioritize stakeholder or societal interests and that such commitments would be legally enforceable. We have found no examples of corporations that have done so, and, as we observed above, the corporate purpose movement does not seem to be advocating the widespread amendment of corporate charters.

Two additional aspects of quadrants 2 and 4 cause us concern. The first is the vagueness of the term "consider." The term might reflect a process-based obligation, requiring advisors to analyze stakeholder interests and present that analysis to the board. We view such a process as potentially valuable in that it can broaden the information available to the board. At the same time, the obligation does not provide guidance as to how those interests are to be weighed or prioritized. Veeva's revised statement of purpose, for

122. Every state corporate law statute authorizes corporations to make charitable donations, and none limits such donations to those that explicitly increase firm value. *See* R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 970 (1999) ("These statutes are generally unrestrictive as to amount of the contribution and its beneficiaries."). In six states, including New York and California, the statutes explicitly authorize such donations "irrespective of corporate benefit." *Id.* at 971.

123. Indeed, several constituency statutes explicitly provide that no particular interest, including that of the shareholders, "is to be considered 'dominant' or 'controlling.'" Eric Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 73–74 (1992) (citing statutes of Iowa, Indiana, and Pennsylvania).

124. We believe this is the version of purpose articulated in the Davos Manifesto, which seeks to mandate that all corporations have the purpose of creating value for the benefit of all their stakeholders. *See* Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. FORUM (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ [https://perma.cc/695E-PHQS] ("The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders–employees, customers, suppliers, local communities and society at large.").

125. We leave for future work whether it would be normatively desirable to amend state corporation statutes to mandate such an approach.

example, identifies the interests of customers and employees.[126] But if those interests conflict, who wins?[127]

Consider again the example of Dick's. The purpose approach reflected in these quadrants would seemingly authorize Dick's to stop selling guns even if gun sales were profitable.[128] But requiring Dick's to consider or even prioritize stakeholder interests does not identify which interest should dominate. Should Dick's prioritize the interests of its customers who want to buy guns or those who favor a ban? Should it prefer the interests of local communities in reducing the likelihood of school shootings or consider the interests of its employees who object to the ban?

These concerns may be why constituency statutes, which expressly allow boards to consider other constituencies, do not appear to have a tangible impact on corporate operations.[129] First, there is no guidance on how these constituencies should be considered.[130] Second, the extent to which

126. Veeva Systems Inc., *supra* note 107.

127. We note that the pandemic has highlighted potential conflicts, not merely between shareholders and stakeholders but among stakeholders. *See, e.g.*, John Herrman, *Amazon's Big Breakdown*, N.Y. TIMES (May 27, 2020), https://www.nytimes.com/interactive/2020/05/27/magazine/amazon-coronavirus.html?auth=login-email&login=email [https://perma.cc/U829-ZV9J] (observing that Amazon's "single-minded focus on [its] customers" imposes risks on its employees). Conflicts can occur within a single stakeholder group as well. Robert Mundheim offers a compelling hypothetical illustrating the potential conflicts. *See* Robert H. Mundheim, *Robert H. Mundheim - What Is the Significance of the Business Roundtable Statement on the Purpose of a Corporation?*, SALZBERG GLOB. SEMINAR NEWSLETTER (Oct. 22, 2019), https://www.salzburgglobal.org/news/impact/article/robert-h-mundheim-what-is-the-significance-of-the-business-roundtable-statement-on-the-purpose-of-a-corporation [https://perma.cc/M864-F76P] (posing a thought experiment centered around a board's decision to outsource production to a foreign country and examining the factors the board should consider when allocating burdens within stakeholder groups).

128. Professor Madison Condon offers a similar example, involving decisions by Exxon and Chevron to curtail production with a resulting negative impact on the firms' profitability and share price. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 45–47 (2020).

129. *See* Brian Quinn, *Constituency Provisions and Intermediate Scrutiny Outside of Delaware*, M&A LAW PROF BLOG (Nov. 23, 2009), https://lawprofessors.typepad.com/mergers/2009/11/unocal-duties-outside-of-delaware.html [https://perma.cc/4466-7SW2] ("These constituency statutes don't exactly do the work that legislators probably hoped they'd do when they were originally passed."). *See also* K.J. Martijn Cremers, Scott B. Guernsey & Simone M. Sepe, Stakeholder Orientation and Firm Value 3 (Dec. 27, 2019) (unpublished manuscript), https://ssrn.com/abstract=3299889 [https://perma.cc/2UKL-4U3Z] (finding that constituency statutes generate significant increases in shareholder value, particularly in "firms where stakeholder investments are more relevant . . . or firms that are more innovative").

130. *See* Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 794 (2009) ("Constituency statutes do not provide any guidance as to the relevant weight directors should afford to nonshareholder interests."). The same criticism can be leveled at PBC statutes. *See, e.g.*, Roxanne Thorelli, Note, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 MINN. L. REV. 1749, 1765 (2017) (observing that the Model PBC Act "does not delineate how the director should 'consider' the interests of stakeholder groups or otherwise prioritize them").

most operational decisions implicate trade-offs among multiple constituencies is often unknown and unknowable. Third, they do not modify the fact that shareholders ultimately control corporate decisions through their voting power and the capital market discipline. Critically, the term "consider" does not mean prioritize, and, unless corporate officials are compelled to prioritize nonshareholder interests, we are skeptical that they will do so.[131]

This system is not immutable. Corporate law could be revised, as per Senator Elizabeth Warren's proposal or the two-tiered board structure used in Germany to require labor representation on corporate boards, thereby increasing manager accountability to workers.[132] Executive compensation could be structured in a way that creates incentives for managers to pursue identified stakeholder or societal objectives such as reducing a company's carbon footprint.[133] And stakeholders could impose constraints by contract, such as provisions in a credit agreement that restrict pollution.[134]

Alternative business forms such as the nonprofit and the PBC offer greater structural support for the consideration and prioritization of nonshareholder constituencies.[135] The Sierra Club's original purpose, for example, as set forth in its articles of incorporation was "[t]o explore, enjoy and render accessible the mountain regions of the Pacific Coast."[136] This purpose was legally enforceable and involved an environmental interest.[137]

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131. *See* Bebchuk & Tallarita, *supra* note 108, at 98 (observing that signatories to the Business Roundtable statement do not appear to have incorporated it into their operating behavior).

132. *See generally* Rudolf Buschmann, *Worker Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993) (discussing the two-tiered structure of German corporate boards); Carol D. Rasnic, *Germany's Statutory Works Councils and Employee Codetermination: A Model for the United States?*, 14 LOY. L.A. INT'L & COMP. L.J. 275 (1992) (describing German codetermination and evaluating its potential use in the United States).

133. *See* Bebchuk & Tallarita, *supra* note 108, at 147–53 (providing evidence that corporate signatories to the BRT statement are not seeking to align management compensation with stakeholder interests through their compensation structures).

134. *See* Ohlrogge, *supra* note 49, at 52–53 (describing credit agreements that impose environmental constraints on borrowers such as inspections or insurance).

135. Corporate governance in the nonprofit context raises a variety of issues concerning the nonprofit's public benefit purpose and its effect on officer and director fiduciary duties. *See* Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 362–63 (2012) (exploring the question of whether current nonprofit law is adequate in addressing nonprofit directors' accountability).

136. *Articles of Incorporation (Original Version)*, SIERRA CLUB 1 (June 4, 1892), https://www.sierraclub.org/articles-incorporation [https://perma.cc/AXH8-W3N4].

137. Compare this to the current purpose which is akin to the statements of corporate purpose in for-profit charters. It reads in full:

> The purposes of the Sierra Club are to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the

The stakeholders of the Sierra Club were its members, but the board of directors was and is self-elected, replacing itself. To the extent there is an enforcement mechanism of the Sierra Club's mission, it comes from the California State Attorney General which acts as an oversight mechanism for the Sierra Club.[138] But even then the well-known slack in charitable compensation and mission creep for nonprofits limit the efficacy of this enforcement mechanism.[139] Similarly, the public benefit corporation offers corporate participants a structure in which they can credibly commit to a multi-stakeholder corporate purpose.[140] Notably, most PBC statutes rely exclusively on shareholders to enforce the interests of nonshareholder stakeholders.[141]

We also note that even the most explicit charter-based language about stakeholder value is framed in aspirational terms. These formulations seem to be deliberately structured to limit their potential as legal constraints, thereby limiting the accountability of corporate decision makers.[142] For example, Nestlé commits to "aim[ing] for long-term sustainable value

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> natural and human environment; and to use all lawful means to carry out these objectives.

Articles of Incorporation (Sixth Version; Complete restatement of Articles of Incorporation), SIERRA CLUB 3 (June 20, 1981), https://www.sierraclub.org/articles-incorporation [https://perma.cc/W8UV-TZER].

138. The Sierra Club is organized as a nonprofit corporation under the laws of the state of California and as such is subject to oversight by the state attorney general. *See* CAL. CORP. CODE § 5250 (1978) ("A corporation is subject at all times to examination by the Attorney General, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, it fails to comply with trusts which it has assumed or has departed from the purposes for which it is formed.").

139. *See generally* James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303 (2006) (describing limits to oversight of nonprofits through public enforcement).

140. *See, e.g.*, Lyman P.Q. Johnson, *Managerial Duties in Social Enterprise: The Public Benefit Corporation*, *in* THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 341, 345 (Benjamin Means & Joseph W. Yockey eds., 2018) (explaining that public benefit corporation statutes enable a corporation's purpose to "include the dual purposes of pursuing pecuniary gain for investors and pursuing a public benefit").

141. *See* DEL. CODE ANN. tit. 8, § 367 (vesting shareholders with exclusive authority to enforce PBC directors' fiduciary duties); Julian Velasco, *Shareholder Primacy in Benefit Corporations* (Dec. 19, 2019), *in* FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby & Jacob Hale Russell eds.) (forthcoming 2021) (manuscript at 3–4), https://ssrn.com/abstract=3506824 [https://perma.cc/JV8F-UBLM] (explaining that PBCs do not overcome shareholder primacy effectively because they rely on shareholders to enforce their altruistic objectives).

142. Plaintiffs have attempted, in a few cases, to hold corporations accountable for such statements under misrepresentation theories, but such efforts have been largely unsuccessful. *See, e.g.*, *In re* Sanofi Sec. Litig., 155 F. Supp. 3d 386, 401 (S.D.N.Y. 2016) (holding that statements in Sanofi's Corporate Social Responsibility Report about "Sanofi's maintenance of an 'effective compliance organization'" and "Sanofi's 'efforts toward transparency, accountability, and disclosure' are too general to cause a reasonable investor to rely on them"); Ruiz v. Darigold, Inc., No. C14-1283RSL, 2014 U.S. Dist. LEXIS 155384, at *2 (W.D. Wash. Oct. 31, 2014) (dismissing claim by customers that they "relied on false assurances of ethical treatment for cows and workers when they chose to purchase Darigold products").

creation."[143] The charter of Clif Bar & Co., which goes further than most, describes its purpose as "to engage in any lawful act or activity . . . except as its acts and activities are limited by its business model of aspiring to sustain the viability of its brands; sustain the viability of its business; sustain the working and living morale of its employees; sustain the community; and sustain the planet."[144] At most, these charters commit corporations to aspire or strive to act in a sustainable manner, but not actually to so act.

We find a similar limitation in corporations' publicly-announced purpose or mission statements. For example, Mastercard's purpose manifesto is "Connecting Everyone to Priceless Possibilities."[145] Bank of America's "clear purpose" is "to help make financial lives better through the power of every connection."[146] Target's purpose is "[t]o help all families discover the joy of everyday life."[147] Not only is it unclear what these commitments mean, but it is almost impossible to determine whether they are being met.

These problems highlight two difficulties inherent with trying to use corporate purpose statements as a legally binding mechanism for effecting operational change—they are neither concrete nor enforceable. A purpose statement saying that a corporation will promote the interests of its workers, unlike a minimum wage law, neither identifies the way in which worker interests will be protected nor allows workers or a regulator to enforce those interests.[148] Moreover, the malleability of such a purpose statement increases the enforcement challenge. This does not mean that the statement could not result in the reallocation of resources among corporate constituencies, but we question their potential effectiveness in doing so.

This view is consistent with observed practice. The Business Roundtable statement "supersedes" its prior commitment to shareholder primacy in favor of a "commitment to continue to push for an economy that

143. NESTLÉ S.A., *supra* note 35.

144. *Amended and Restated Articles of Incorporation of Clif Bar & Co.*, CALIFORNIA SECRETARY OF STATE 1 (May 3, 2010), https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=01756107-12491996 [https://perma.cc/U7PN-6FJS]. Clif Bar was advised on this clause by Professor Richard Buxbaum, and this Article has been informed by his observations on that process.

145. *Mastercard's Purpose Manifesto: Connecting Everyone to Priceless Possibilities*, MASTERCARD, https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/purpose-manifesto.pdf [https://perma.cc/Z88S-B7MK].

146. *Who We Are: A Global Company with a Local Focus*, BANK OF AMERICA, https://about.bankofamerica.com/en-us/who-we-are.html#fbid=828BJJVoHIe [https://perma.cc/XSJ9-VYM9].

147. *Our Purpose & History*, TARGET, https://corporate.target.com/about/purpose-history [https://perma.cc/7N2E-3MNG].

148. It is for this reason, among others, that we believe that issues regarding risk and externalities of the corporate form should be dealt with primarily through regulation. *But see* Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 5 (2016) (arguing that systemically important firms should have a "public governance duty").

serves all Americans."[149] The signatories to this commitment include the CEOs of Amazon, Cigna, and Chevron.[150] The operations of each of these companies appears, at least on some dimensions, to fall short of this commitment.[151] Amazon has been criticized for taking advantage of loopholes to pay a miniscule amount of federal income taxes.[152] Cigna has been criticized for bribing insurance brokers with luxury vacations to sway their recommendations to the employer-providers they advise.[153] And according to one source, Chevron's ESG rating lags slightly behind the extraction industry's average rating.[154]

What, then, do these statements mean? A cynical view would characterize them as virtue signaling, designed either as marketing tools or to reduce the firm's political exposure or vulnerability to regulation. Alternatively, a corporation's articulation of its purpose could be something akin to a corporate New Year's resolution—identifying an area in which the corporation hopes to do better. Unfortunately, the analogy is likely to prove

149. BUS. ROUNDTABLE, *supra* note 3.

150. *Our Commitment*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment [https://perma.cc/32XN-QT34]. Cigna's company profile states that it is "dedicated to improving the health, well-being, and peace of mind of those we serve." *Company Profile*, CIGNA, https://www.cigna.com/about-us/company-profile/ [https://perma.cc/85FN-9HKT]. "Amazon's mission statement is[,] 'We strive to offer our customers the lowest possible prices, the best available selection, and the utmost convenience.'" Lawrence Gregory, *Amazon.com Inc.'s Mission Statement & Vision Statement (An Analysis)*, PANMORE INST. (Feb. 13, 2019), http://panmore.com/amazon-com-inc-vision-statement-mission-statement-analysis [https://perma.cc/QA7N-ATQE]. Chevron's "vision" is "to be *the* global energy company most admired for its people, partnership and performance." *The Chevron Way*, CHEVRON, https://www.chevron.com/about/the-chevron-way [https://perma.cc/D4M4-AKAP] (emphasis added).

151. Some commentators advocate purpose as a tool to reduce or eliminate all corporate activity that is socially harmful or even to go further and address broad-based societal problems. For example, the British Academy states, "The purpose of business is to profitably solve the problems of people and planet, and not profit from causing problems." BRITISH ACAD., PRINCIPLES FOR PURPOSEFUL BUSINESS 16 (2019), https://www.eticanews.it/wp-content/uploads/2019/12/future-of-the-corporation-principles-purposeful-business.pdf [https://perma.cc/8N3Z-SEUL]. Although we are sympathetic to these objectives, we question the efficacy of achieving these ends through a commitment to consider stakeholder interests.

152. *See* Matthew Gardner, *From 0% to 1.2%: Amazon Lauds Its Minuscule Effective Federal Income Tax Rate*, INST. ON TAXATION & ECON. POLICY (Jan. 31, 2020), https://itep.org/from-0-to-1-2-amazon-lauds-its-minuscule-effective-federal-income-tax-rate/ [https://perma.cc/W5AL-567D] (criticizing Amazon for "beating the federal income tax code like a piñata" after its 2019 annual financial report revealed that it paid just 1.2 percent of its $13 billion in U.S. profits in federal income taxes).

153. *See* ProPublica, *Behind the Scenes, Health Insurers Use Cash and Gifts to Sway Which Benefits Employers Choose*, HEALTHLEADERS (Feb. 20, 2019), https://www.healthleadersmedia.com/behind-scenes-health-insurers-use-cash-and-gifts-sway-which-benefits-employers-choose [https://perma.cc/U56K-B59Z] (reporting that Cigna offered top-selling brokers five days at a luxury resort in Bermuda).

154. *See Chevron Corp. CSR / ESG Ranking*, CSRHUB, https://www.csrhub.com/CSR_and_sustainability_information/Chevron-Corp [https://perma.cc/TX8U-S65A] (stating that Chevron has lagged behind the average ESG ranking within the oil and gas extraction industry).

true in the sense that, absent some form of legal compulsion, a corporation's commitment to pursue societal value is, like a New Year's resolution, easily made, but also easily broken.[155]

One response is that purpose statements are not intended to be legally enforceable. Our analysis, however, suggests that in addition to being more concrete, corporate purpose requires buy-in to affect operations in a meaningful way. This highlights a critical limitation in the corporate purpose movement. Advocates of repurposing the corporation argue that purpose has transformative value. Indeed, some shareholder proposals, following that argument, seek to have corporations adopt a social-minded purpose or convert to a PBC.[156] But thrusting a high-minded purpose upon a corporation is unlikely to change behavior with which its critics disagree. Aspiring to promote societal value will not make Philip Morris's cigarettes safe, Chevron's emissions net-zero, or McDonald's hamburgers healthy.

IV. An Instrumental View of Corporate Purpose

One might conclude, from the foregoing discussion, that we are corporate purpose skeptics. To an extent, we are. We do not believe that corporate purpose can be used to compel corporations to act as benevolent social planners. Nor do we think that, by pledging their commitment to the Business Roundtable statement, corporate CEOs will change their behavior and pay workers higher wages, reduce their carbon footprint, or stop manufacturing and selling hazardous products.

We do, however, believe that there is value in corporations articulating their purpose. We argue for understanding corporate purpose from an instrumental perspective. Corporate purpose, we claim, can be used to direct and manage the expectancy interests of the corporation's stakeholders. Because a corporation is a collective enterprise, individuals and entities that interact with it and make decisions on its behalf have different interests and goals. Purpose allows a corporation to signal its priorities to its stakeholders, enabling them to sort (identify interactions that are likely to further their individual goals) and to negotiate (determine the regulatory or contractual protections necessary to constrain corporate decisions that are inconsistent

155. Studies show that New Year's resolutions have a failure rate of 80%, and most are broken by February. Marla Tabaka, *Most People Fail to Achieve Their New Year's Resolution. For Success, Choose a Word of the Year Instead*, INC. (Jan. 7, 2019), https://www.inc.com/marla-tabaka/why-set-yourself-up-for-failure-ditch-new-years-resolution-do-this-instead.html [https://perma.cc/RJ9N-VD9C].

156. *See* Wells Fargo & Co., SEC No-Action Letter, 2019 SEC NO-ACT. LEXIS 584 (Dec. 27, 2019) (reporting that the board of directors commissioned an independent study to assess the feasibility of becoming a PBC or otherwise implementing public purpose measures "to protect the interests of our Company's critical stakeholders"); Tractor Supply Company, SEC No-Action Letter, 2020 SEC NO-ACT. LEXIS 581 (Dec. 31, 2020) (requesting board take the necessary steps to convert the corporation to a PBC).

with those goals). In addition, purpose can be used to leverage a corporation's comparative advantage in achieving those goals over the ability of individual corporate participants. In short, purpose is an internal tool rather than an external constraint like regulation. We do not argue in this Article for a particular normative vision of corporate purpose.[157]

A. Corporate Purpose as a Coordinating Device

The starting point for our instrumental approach is the recognition that the corporation is a collective enterprise. Multiple constituencies interact with the corporation and each has objectives that it seeks to implement through its association with the corporation. Employees seek to maximize their wages and improve their working conditions. Customers want a low-cost and high-quality product. Creditors want repayment of their loans with minimal risk. The local community wants the corporation to refrain from polluting. Society as a whole wants the corporation to operate in a sustainable manner and to avoid exhausting the planet's natural resources.

The interests of these constituencies may vary and even conflict. Notably, however, the interests and preferences of individuals within each constituency group vary as well. Some shareholders prefer short-term profit maximization; others favor the creation of long-term sustainable value. Some customers prioritize cost, while others care about product quality. Some employees prefer the potential rewards of fast-paced corporate growth, while others care about long-term job stability.

As the Supreme Court recognized, "A corporation is simply a form of organization used by human beings to achieve desired ends."[158] People use corporations in situations in which the corporate form offers them a comparative advantage over individual action.[159] The contractual theory conceptualizes the corporation as a series of contracts that serve to accommodate and coordinate the interests of corporate participants.[160] We argue that corporate purpose can serve as an implicit term within these contracts. As such, it both enables corporate participants to have a shared understanding among corporate participants about their rights and provides them with clarity about those rights. As *Citizens United* recognized, "the procedures of corporate democracy" allow corporate participants to

157. Similarly, we leave for future work the procedure by which a corporation should select or modify its chosen purpose.

158. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014).

159. The economic literature frames this in terms of the firm/market decision. *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 J.L. ECON. & ORG. pts 1–3, at 3, 19, 33 (1988) (explaining the role of the firm as lowering transaction costs over market-based exchanges).

160. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 229–31 (1990) (providing a background on the "nexus of contracts" theory of corporations).

coordinate their expectations and impose those expectations on corporate decision makers.[161]

The scope served by an articulation of purpose can vary. A corporation's purpose can simply be the products or services it seeks to provide, such as Home Depot's purpose to supply home-improvement products. Purpose can go further, however, and identify the values to which the corporation will adhere, the limits on its operating practices, and the constituencies that the corporation will consider or prioritize in its operations. It is purpose in this sense that the Business Roundtable and Larry Fink are promoting, distinguishing the purpose they advocate from mere mission statements.

Within this framework, maximizing shareholder economic value is one possible purpose, and the corporate framework is, for a variety of reasons, an efficient tool for accomplishing this objective, but it need not be the only corporate goal. As the Supreme Court explained:

> For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires.[162]

The rationale for an expansive conception of purpose is that, notwithstanding Milton Friedman's reasoning, corporations may offer their participants a comparative advantage in pursuing both economic and non-economic objectives.[163]

Purpose has several advantages over traditional contracting. First, it reduces the transaction costs of allocating rights and responsibilities among a wide range of stakeholders, including stakeholders like society at large that are not parties to explicit contracts nor represented in the corporation's decision-making structure. Second, contracts are private and are typically accessible only by their signatories. Purpose provides a public-facing mechanism that expands the scope of those who can hold the corporation accountable. Thus, customers, in choosing to support corporations with fair-pay practices, can learn about the corporation's commitment to those practices from its purpose statement. Third, a corporation's commitment to

161. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010).

162. *Hobby Lobby*, 573 U.S. at 712.

163. In seeking to understand why a corporation might have an advantage in pursuing a noneconomic objective, participants in our seminar at Harvard asked why a corporation should seek to save penguins as opposed to maximizing profits, distributing those profits to its shareholders, and letting those shareholders save the penguins. If the corporation's manufacturing processes are killing penguins, however, it is likely more efficient for the corporation to change those processes than for shareholders to attempt to resurrect the dead penguins.

its purpose is enforceable through market forces and by market participants, in contrast to a contract that typically does not provide third-party beneficiaries with a cause of action for breach.[164] Finally, purpose can serve as a background or standard term that does not need to be negotiated in each individual employment, credit, and supply contract, thereby reducing transaction costs.[165]

Corporate statements about purpose or values can thus be explained as aligning and regulating stakeholder goals. Nike's recent campaign with Colin Kaepernick is a way of reaching out to its consumer base to signal that its values align with its consumers.[166] Similarly, Ben & Jerry's has pursued stakeholder values even as a subsidiary of Unilever, the giant food conglomerate.[167]

Multiple stakeholders may share similar objectives with respect to corporate purpose, thereby deriving value from a mechanism that enables both signaling and commitment. In addition, a stakeholder group may benefit indirectly from the corporation's ability to make itself more attractive to other stakeholders. For example, statements about corporate purpose that attract customers who share that purpose may result in higher sales, increasing value for shareholders. In addition, a corporation's articulated purpose of serving customers may attract shareholders who value that objective independently of its effect on economic value. These congruencies extend to other stakeholder groups. Corporations publicly express their values as a method to attract and retain the best talent for positions, particularly as the percentage of millennial and socially conscious employees in the workforce increases.

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164. *See, e.g.*, Kishanthi Parella, *Protecting Contract's Hidden Parties*, AM. BUS. L.J. (forthcoming Jan. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697273 [https://perma.cc/QK5Q-AT2M] (identifying problems in enforcing corporate contracts addressing externalities in global supply chains).

165. There is some empirical support that this instrumental use of corporate purpose is value-enhancing. A recent study found that, although corporate purpose was not itself related to firm financial performance, firms with a high clarity of purpose had higher stock market performance and accounting returns. Claudine Gartenberg, Andrea Prat & George Serafeim, *Corporate Purpose and Financial Performance*, 30 ORG. SCI. 1, 2 (2019).

166. *See* Joshua Hunt, *Colin Kaepernick, Nike, and the Myth of Good and Bad Companies*, THE ATLANTIC (Sept. 5, 2018), https://www.theatlantic.com/business/archive/2018/09/nike-kaepernick/569371/ [https://perma.cc/JR94-MB78] ("For Nike, Kaepernick's cause is simply good business—if it were anything other than a cynical branding exercise, the company would surely not be simultaneously doing business with the NFL, which has done its best to stifle Kaepernick's protest movement.").

167. *See Our History*, BEN & JERRY'S, https://www.benjerry.com/about-us#4timeline [https://perma.cc/4C2P-LQZC] (explaining that the company's structure has enabled it to retain a separate progressive identity); *Our Values*, BEN & JERRY'S, https://www.benjerry.com/values [https://perma.cc/GT6D-SFGX] (explaining that its mission is "[t]o make, distribute and sell the finest quality ice cream and euphoric concoctions with a continued commitment to incorporating wholesome, natural ingredients and promoting business practices that respect the Earth and the Environment").

Similarly, Professors Barzuza, Curtis, and Weber have theorized corporate social activism as an effort to recruit socially conscious millennial investors.[168]

Our instrumental conception of purpose serves two distinct functions. First, it serves a signaling function, allowing those who deal with the corporation to identify its objectives and determine the degree of fit with their individual goals. It enables shareholders and creditors to contribute capital according to a set of terms that governs their rights with respect to that contribution. It allows officers and directors to make operational decisions, protected by settled principles of authority and process. It protects employees with the existence of a legally responsible entity that stands behind the decisions of individual managers. It offers customers, suppliers, and others who deal with the corporation guidance about the history, stability, and financial condition of the counterparty to their dealings. In short, corporate purpose provides a framework that allocates the rights and responsibilities of the participants in the collective enterprise that constitutes the corporation's business. As such, it offers a way of managing expectancy interests relevant to the decision whether to associate with the corporation.

Second, purpose enables those who interact with the corporation to identify the ways in which the corporation's purpose may create a tension with their individual goals and to navigate that tension by contract, by regulation, or by exit. For example, a bank may want to lend money only to businesses that are carbon neutral. If a corporation's primary purpose is to pursue economic value, it may not make costly operational changes that reduce its carbon footprint. However, the lender can both demand those changes through conditions in the loan agreement and create incentives through the terms of the loan to induce the corporation's agreement to those conditions. Alternatively, the bank can refuse to lend to businesses that refuse to meet its environmental standards.

Corporate purpose not only sets expectations; it provides measurable standards for monitoring. ExxonMobil for example posts on its website that its mission is "[f]ueling the world safely and responsibly."[169] The mission statement continues for a paragraph and concludes "[we] explore for oil and natural gas on six continents. . . . [W]hile addressing the risks of climate change." Regardless of the views of specific shareholders on the importance of responding to climate change, they should reasonably demand that ExxonMobil corporate officials report more tangible efforts to address

168. Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1249–50 (2020).

169. *Who We Are*, EXXONMOBIL, https://corporate.exxonmobil.com/About-us/Who-we-are [https://perma.cc/8VYP-NUX2].

climate change than Chevron whose "vision" is being "the global energy company most admired for its people, partnership and performance."[170]

B. Principles for an Effective Purpose

Our instrumental conception of corporate purpose offers guidance on how to make corporate purpose more effective. Specifically, for purpose to provide constituents with a meaningful signal and coordinating device, purpose must reflect a meaningful commitment. We believe that this requires two components. First, a corporation's purpose statement must be sufficiently concrete that stakeholders can ascertain whether the corporation is operating in a manner that is consistent with that purpose. We challenge the value of corporate purpose statements that are vague, aspirational, or cannot be evaluated by reference to publicly-available metrics.[171]

Second, a corporation's purpose must be enforceable. We do not mean to suggest that purpose statements be generally enforceable through tools such as *ultra vires* or fiduciary duty litigation.[172] Concrete and transparent purpose statements are increasingly enforceable, however, through market-based mechanisms. Customers who are attracted by a corporation's commitment to the welfare of its workers can sanction the corporation's lack of attention to working conditions in its supply chain by refusing to buy its products. Employees can sanction corporations that do not adhere to their environmental or social policies by working elsewhere.[173] Purpose thus extends the potential for discipline beyond the capital markets to the product and labor markets.

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170. *The Chevron Way*, CHEVRON, https://www.chevron.com/about/the-chevron-way [https://perma.cc/D4M4-AKAP].

171. For an example of how this can be done, see *An Update on Our Work to Serve All Stakeholders*, AIRBNB (Jan. 17, 2020), https://news.airbnb.com/serving-all-stakeholders/ [https://perma.cc/CR4A-2ETL] (identifying five of the company's stakeholders and releasing metrics reporting on its success in pursing their interests).

172. *Cf.* Kevin M. LaCroix, *Oracle Directors Hit with Derivative Suit on Board Diversity Issues*, D&O DIARY (July 6, 2020), https://www.dandodiary.com/2020/07/articles/shareholders-derivative-litigation/oracle-directors-hit-with-derivative-suit-on-board-diversity-issues/ [https://perma.cc/JSP6-W9BB] (quoting the complaint's allegations that Oracle "consciously failed to carry out Oracle's written proclamations about increasing diversity in its ranks").

173. *See, e.g.*, *Half of Employees Won't Work for Companies That Don't Have Strong CSR Commitments*, SUSTAINABLE BRANDS (June 1, 2016), https://sustainablebrands.com/read/organizational-change/half-of-employees-won-t-work-for-companies-that-don-t-have-strong-csr-commitments [https://perma.cc/9WUT-7SLJ] (noting that "51 percent [of employees] won't work for a company that doesn't have strong social or environmental commitments" and that retention of highly-transient millennials without such commitments is particularly difficult).

Accordingly, we believe that a corporate purpose can be implemented through structural and governance mechanisms rather than legal rules.[174] A corporation can commit to a purpose and incentivize its officials to adhere to its contract terms,[175] board composition, and structure of executive compensation. A corporation's identification and disclosure of tangible metrics both reinforces its commitment to the objectives identified in its purpose and renders its statement of purpose enforceable. We view, for example, the pursuit of metrics to assess compliance with corporate ESG goals as an attempt to monitor and measure corporate performance in line with corporate purpose.[176]

In this regard, purpose provides a guide star and guardrails. Legal enforcement might be rare but could police the outer limits. Within the guardrails, purpose would be, and increasingly is, enforced through market forces and structural and governance mechanisms.[177]

We recognize that corporations have yet to adopt the type of corporate purpose we advocate. Nonetheless, we believe that if corporate purpose is to be effective, it must be more than a mission statement, and that structural sources can provide a source of effectiveness. Our instrumental approach thus provides a foundation in a world where purpose is currently everywhere, but commitment is lacking.

Conclusion

Our instrumental conception views corporate purpose as serving a modest role—functioning to manage expectations, coordinate interests, and

174. *See* Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose* 4 (European Corp. Governance Inst., Law Working Paper No. 515, 2020), https://ssrn.com/abstract=3589951 [https://perma.cc/LL2Y-XE8X] (explaining that the corporation's traditional focus on shareholder primacy can be explained, in part, by the statutory structure and the control rights that it affords to shareholders).

175. *See* Annie Palmer, *WeWork CEO Adam Neumann Has Incentives Tied to the Company's Stock Value and His Charitable Donations*, CNBC (Aug. 14, 2019, 1:42 PM), https://www.cnbc.com/2019/08/14/wework-ceo-adam-neumann-has-incentives-tied-to-stock-value-giving.html [https://perma.cc/SDD6-9Y26] (reporting that WeWork founder Adam Neumann's voting rights were tied to a requirement that he make a billion dollars' worth of charitable contributions over a 10-year period).

176. *See generally* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923 (2019) (advocating that the SEC sustainability mandate reporting). Lynn LoPucki argues that the development of an ESG information system with standardized metrics will enable the corporations' stakeholders to "repurpose" the corporation to service stakeholders, the environment, and the public. Lynn M. LoPucki, Repurposing the Corporation 3 (Feb. 10, 2021) (unpublished manuscript) (on file with author).

177. A recent paper by Mark Roe highlights how the degree of competition to which a corporation is subject affects its ability to incorporate nonshareholder dimensions of purpose. Mark Roe, Corporate Purpose and Corporate Competition 4 (Mar. 8, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788 [https://perma.cc/SVM3-BZVV] (arguing that expanded purpose has "has greater potential to succeed if competition has declined").

enhance transparency and accountability. We believe that, by articulating their purpose, corporations can identify priorities and strategic choices that are core to their business model as well as identifying their commitment to those choices to their stakeholders. We also view purpose as enabling stakeholders to accomplish objectives in which operating through the corporation is more efficient than acting in an individual capacity. The instrumental role thus enables them to capitalize on contexts in which corporate action offers a comparative advantage.

We argue, however, that the role of purpose is currently under-realized. For corporate purposes to meet the objectives that we identify, they should be articulable and enforceable. Aspirational mission statements that lack specificity and enforcement may be useful for branding, virtue signaling, or public relations, but they are not pragmatic tools for accomplishing the instrumental function of corporate purpose. One solution is to specify corporate purpose more concretely in charters. Alternatively, a corporation can implement its purpose through structural mechanisms, including reporting standards, compensation metrics, and board composition.

Critically, given the shareholder-centric nature of the corporation, purpose will largely remain a structural and market construct. Within this market, we see growing efforts to reshape corporate purpose through increasing attention to ESG and through the use of PBCs. Notably, these efforts are largely the product of shareholder-driven initiatives. We view these efforts as evidence that purpose is (and can be) enforceable through market forces. We believe that these forces are consistent with the economic mission of the corporation by defining purpose in a manner which sets the expectations of the corporation's stakeholders and commits them to the enterprise.

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