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Corporate Purpose

Law Working Paper N° 711/2023
June 2023

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Abstract

This chapter examines the duality of corporate purpose. First, corporate purpose can be understood at the level of the individual corporation. Enabling corporate law allows for customization and corporate organizers can specify their choice of purpose. Second, by contrast, corporate purpose is viewed as a generalizable and monolithic concept across companies. It is an abstract debate at the heart of corporate law, which ramifies deeper issues such as the role of corporations in society and in whose interest they should be run. We explore these two sides of corporate purpose and argue that while each aspect of corporate purpose is a commonly understood way of thinking about the topic, they operate in tension with each other. The flexibility provided under law is effectively modified or constrained by the cultural, legal, and institutional environment that fiduciaries operate in, which has been and continues to be shaped by the great debate about corporate purpose.

Keywords: corporate purpose, corporate law, corporate governance, corporate social responsibility, CSR, fiduciary duties, corporate charter, shareholder primacy, shareholder value maximization, ESG, benefit corporations, stakeholders

JEL Classifications: G30, G38, K10, K20, K22

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CORPORATE PURPOSE

Dorothy Lund* & Elizabeth Pollman**

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1. INTRODUCTION

In this chapter, we explore the duality of corporate purpose, which reflects two sides of corporate law and governance. First, because each corporation must specify a purpose in its charter, corporate purpose can be understood at the level of the individual corporation. Corporate law is generally enabling and the law of corporate purpose is no different: Corporate organizers can specify their own choice of purpose, which allows for customization. Second, by contrast, as a great debate at the heart of corporate law, corporate purpose is viewed in the abstract as a generalizable and monolithic concept across corporations, particularly for paradigmatic large public corporations. In the context of these debates, corporate purpose ramifies deeper issues such as the role of corporations in society and in whose interest they should be run.

This chapter examines these two sides of corporate purpose and their relationship. Is corporate purpose a choice for an individual firm to determine for itself? Or is it a norm or doctrine that applies to business corporations generally? What can be learned by considering these corporate law principles and areas of debate in tandem?

We begin with an examination of the law of corporate purpose at the individual corporation level. We trace the historical evolution from detailed statements of corporate purpose in special acts chartering corporations to general incorporation statutes that allowed for broad statements of purpose such as engaging in any lawful activity. We observe that through this historical shift, the baseline requirement that incorporators specify a purpose has remained. Under modern law, however, the choice of purpose for any particular corporation is highly flexible and varied—business organizers can craft a purpose clause to be broad or narrow, customize their own specific ends, and select forms of business corporations that allow for or even require consideration of diverse constituencies.

Subsequently, we turn to the great corporate purpose debate in which this flexibility disappears and the focus becomes a question of whether "the corporation" should be managed for the shareholders' financial benefit. We start by exploring how the most famous corporate law debate of corporate purpose, between Adolf Berle, Jr. and E. Merrick Dodd, Jr. in the early twentieth century, focused discourse around two competing views, both of which eschewed a purely enabling and firm-specific view of the corporation's purpose in society. Instead, the paradigm for debate became the large public corporation, abstracted and

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spared the details of firm-specific missions or objectives. In this era, the foundation was laid for an extra-legal corporate purpose overlay that would direct fiduciaries of all companies to discharge their duties with certain goals in mind.

We then explore how in the century that followed, through the twists and turns of managerialism to an era of shareholder primacy, scholarly debate and views evolved, as did market conditions, but the framing between notions of duties to shareholders versus social responsibilities was sticky. By the end of the twentieth century, intellectual and market environments generally adhered to the idea that companies of all sizes and across all industries should focus on shareholder value maximization. Amid the rising power of large asset managers and institutional shareholders, the twenty-first century has witnessed a renaissance of thinking about corporate purpose and a willingness to look anew at the interests of shareholders and stakeholders and the extent to which they can be made to align through enlightened shareholders, shareholder welfare, ESG, or some other concept. Nonetheless, the legacy of a shareholder-oriented purpose overlay remains, with proponents of these relatively enlightened approaches purporting that they should bind all companies, no matter their composition, size, or business strategy.

Finally, we reflect on this duality of corporate purpose and argue that while each side is a commonly understood way of thinking about the topic, they operate in tension with each other. The flexibility provided under law is effectively modified or constrained by the cultural, legal, and institutional environment that fiduciaries operate in, which has been and continues to be shaped by the great debate about corporate purpose.

2. CORPORATE PURPOSE IN CORPORATIONS

The law provides incorporators an extraordinary degree of flexibility to create corporations that serve a wide variety of purposes. From municipal corporations, nonprofits, and business corporations (in both traditional and benefit varieties), much human activity is carried on through the corporate form. The law of corporate purpose, embodied in state corporate codes, facilitates this diversity. All corporations must specify a purpose, but such purpose might be broadly or narrowed stated, it may be generic or unique. All in all, the possibilities for incorporators are nearly endless.

This section explores corporate history and the enabling nature of modern corporate law and how it manifests in a highly flexible and customizable corporate purpose at the level of the individual corporation. While open questions and gray areas remain regarding the limits of contracting in corporate charters and debates about their contractual nature,[1] one of the

[1] *See, e.g.*, Michael Klausner, *The "Corporate Contract" Today*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds.) (discussing contractarian theory of the corporation and related debate and empirical developments); David G. Yosifon, *Opting Out of Shareholder Primacy: Is Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 479 (2017) ("The Delaware common law has established shareholder primacy as the default governance rule for business corporations neither states nor implies any public policy indicating that the rule should be unalterable by charter provision. Neither does there seem to be a clearly implied polity of the General Corporation law to prohibit alteration of the shareholder primacy rule in firm governance."); Joan MacLeod Heminway, *Shareholder Wealth Maximization As a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 957 (2017) (discussing legal validity

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oldest and most important characteristics of the corporation is the ability of its organizers to craft its specific purpose.

2.1 Historical Origins and Approaches to Corporate Purpose

Properly granted or filed, the corporate charter brings a corporation to life. Throughout the history of corporations, charters have included a provision or set of provisions specifying the activity contemplated by the corporation's organizers.[2]

Even the oldest European charters in the historical record contain reference to the corporation's purpose.[3] Under the bygone system of special chartering, corporate charters were granted through a special act by a sovereign power.[4] Incorporation provided for separate legal personality and also enabled, or necessitated, a self-governance framework composed of mechanisms for determining how the corporation was to operate and who could take actions on its behalf.[5] Critical to governance is purpose: it serves as a coordinating mechanism for long-term ventures and associations.[6] As the human participants involved in churches, guilds, charitable organizations, and trading companies continually changed, the purpose of these corporations did not need to; the charter conveyed essential information about the ends to which the corporation would be operated.[7]

In early business corporations in the United States, the charter provisions setting out the corporation's privileges and powers often functioned as an articulation of the corporation's purpose, which investors could enforce through the *ultra vires* doctrine.[8] And in return for the grant of a charter, corporations were expected to carry out their "special action franchises," using private funds to provide public goods in the community or create infrastructure.[9] As states shifted from special chartering to general incorporation statutes in

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of a provision in a corporation's charter establishing a purpose that is inconsistent with shareholder wealth maximization).

[2] Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1426 (2021). On the function of purpose restrictions in early corporations, see Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 989–90 (2014).

[3] *Id.* at 1429; David Ciepley, *Corporate Directors as Purpose Fiduciaries: Reclaiming the Corporate Law We Need*, 2 (July 25, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426747.

[4] *Id.*

[5] *Id.* at 1428; *see also* Margaret M. Blair, *Corporate Personhood & the Corporate Persona*, 2013 U. ILL. L. REV. 785, 787–88 (2013) ("[S]elf-governance was one of the earliest purposes of incorporation."); Paul B. Miller, *Corporate Personality, Purpose, and Liability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds. 2021) (discussing how corporate legal personality implies fiduciary representation and requires the law to enable attribution of legal agency and liability).

[6] Pollman, *supra* note 2, at 1428–29.

[7] *Id.* at 1429.

[8] *Id.* at 1433; Hansmann & Pargendler, *supra* note 2; 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, 1302–13 (2001).

[9] J.W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 22– 24 (1970); *see also* OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861, at 74 (1947) (explaining that under special chartering practices in the early United Sates, "no grant was forthcoming without justification in terms of the interests of the state as a whole"); Herbert Hovenkamp, *The Classical Corporation in*

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the late 19th century, a similar trend occurred away from requiring specific state-articulated purpose provisions to allowing for generic or privately articulated purpose clauses, as will be discussed in the next sub-section.[10]

2.2 Flexibility of Corporate Purpose

Under modern general corporation statutes, business organizers are typically allowed to incorporate for the pursuit of "any lawful activity."[11] The Delaware General Corporate Law provides, for example, that "[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes."[12] Corporate law is thus largely enabling as to purpose—the minimal threshold of a lawful purpose provides wide leeway. Broadly stated purpose clauses allow flexibility to pivot a business or expand in response to changing markets and technological advances. The vast majority of corporations have adopted broad purpose clauses or use the "any lawful purpose" language, taking advantage of the flexibility allowed.[13]

Notably, this enabling statutory language does not expressly require that corporations adopt shareholder value maximization—or anything else—as part of the corporation's purpose.[14] The outer constraint is "lawful activity," in reference to external laws.[15] As Tamara Belinfanti and Lynn Stout observed, "[the current legal requirement] seems to reflect a contractarian perspective that presumes that, absent external costs to third parties, social welfare is best served by granting those who form enterprises the freedom to structure their affairs as they wish and to pursue the goals they desire."[16] And so, particularly once one thinks about purpose beyond the four corners of the corporate charter, "[d]ifferent corporations can have different sets of purposes, and perceptions of purpose can vary depending on the perspective of the participant in the system and on the level of analysis."[17] Businesses might also adopt "mission statements" to facilitate the articulation of specific

American Legal Thought, 76 GEO. L.J. 1593, 1659–62 (1988) (discussing quo warranto actions by the government for "refusal to undertake the investment and business for which the corporation was designed").

[10] Pollman, *supra* note 2, at 1435.

[11] Greenfield, *supra* note 8, at 1281; Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 711 (2019).

[12] DEL. CODE ANN. tit. 8, §101(b) (2022).

[13] Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN'S L. REV. 476, 483 (1984).

[14] Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 597, 621 (2018); *see also* Paul B. Miller, *Corporate Personality, Purpose, and Liability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 235 (Elizabeth Pollman & Robert B. Thompson eds. 2021) (contrasting a positive account of corporate purpose as "generally enabling of wide freedom of association" with a normative claim such as shareholder wealth maximization "about the social purpose of a particular kind of corporation (the business corporation)").

[15] Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 649–50 (2010) ("[S]ociety's willingness to generally charter for-profit corporations has been subject to an essential bottom-line requirement: corporations may only engage in lawful business."); *see also* Greenfield, *supra* note 8, at 1360; Pollman, *supra* note 11, at 719–20.

[16] Belinfanti & Stout, *supra* note 14.

[17] *Id.* at 610.

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business objectives, whether they seek to be "mission-driven" companies or to simply follow notions of best practices for leading organizations with a strategic management process.[18]

As additional evidence of the degree of flexibility awarded to incorporators, consider that in response to the wave of hostile takeovers in the 1980s a number of states adopted corporate constituency statutes.[19] For corporations incorporated in states with constituency statutes, their directors may consider the interests of a variety of corporate stakeholders even when the company is contemplating a sale, without any requirement that doing so will increase value for shareholders.[20] Further, even in states such as Delaware with case law imposing a shareholder value maximization norm, such as in the sale of control context,[21] it may be possible for corporations to opt out of such a default through customization of their charters.[22]

Moreover, the twenty-first century has witnessed the rise of new forms of business corporations with the benefit corporation or public benefit corporation (PBC) that explicitly provide for the pursuit of social enterprise through customization of purpose.[23] A vast array of purposes are possible beyond providing a "general public benefit"—a more specific benefit might including "improving human health," "promoting economic opportunities for individuals or communities beyond the creation of jobs," and "promoting the arts, sciences, or advancement of knowledge."[24] Delaware's PBC statute requires corporations to identify one or more specific public benefits to pursue, meaning "a positive effect (or reduction of negative effects)" of "an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[25]

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[18] Pollman, *supra* note 2, at 1444–45 (discussing the role of mission statements and business literature theorizing and advising companies to develop them).

[19] Brett McDonnell, *Purpose in Business Association Statutes: Much Ado About Something (But Not Much)*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 149 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[20] *Id.*; Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

[21] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). Scholars have contested whether cases such as *Revlon* should be read as a broad legal requirement of shareholder primacy or value maximization in corporate law. Other cases frequently cited in the debate include *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919) and *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). *See, e.g.*, Jill Fisch & Steven Davidoff Solomon, *Should a Corporation Have a Purpose*?, 99 TEX. L. REV. 1309, 1323–26, 1332 (2021) ("We believe that reading these cases to incorporate a broad requirement of shareholder primacy in corporate law goes too far."); STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 57–72, 78 (2023) ("*Dodge* is the logical culmination of the entirety of corporate law. As such, when we say that shareholder value maximization is the law, we mean the law writ large."); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) ("[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.").

[22] McDonnell, *supra* note 19, at 149-50; Yosifon, *supra* note 1; Heminway, *supra* note 1; Fisch & Solomon, *supra* note 21, at 1333..

[23] FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2017).

[24] Model Benefit Corporation Legislation §§ 102, 201 (B LAB 2017), https://benefitcorp.net/attorneys-model-legislation.

[25] DEL. CODE ANN. tit. 8 § 362 (2022).

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Although the typical for-profit corporation usually chooses to maintain flexibility in their stated corporate purpose, those that wish to articulate a more specific corporate purpose may likewise do so. For some corporations such as nonprofits, such a constraint in purpose can serve an important function to protect the interests of the organization's patrons from those who control the corporation.[26] But even for-profit business corporations might prefer to customize their charters for a number of reasons, including the expression of commitments to particular values or activities.[27]

In sum, corporate law requires each corporation to specify a purpose in its charter—and thus corporate purpose can be viewed through the lens of the individual firm. Through this vantage point, corporate purpose is highly flexible and varied. It is self-determined by the business organizers. Whether broadly stated as any lawful activity or narrowly focused on specific pursuits, corporations have myriad choices in choosing their purpose as well as their state of incorporation and form of business entity. This freedom contributes to the social utility of the corporate form and the spectrum of corporations in existence.[28]

3. THE GREAT CORPORATE PURPOSE DEBATE

The previous section discussed how law provides flexibility to create corporations that serve a wide variety of purposes. This section provides an overview of the great corporate purpose debate, in which participants on both sides abandon this flexibility in favor of generalizable precepts about the purpose and role of business corporations in society. It first provides a historical analysis, and in so doing, highlights the conceptual underpinnings that underlie this debate. It also describes how these concepts have influenced law, culture, and extra-legal institutions. It concludes with a discussion of the current debate over corporate purpose, in which these conceptual underpinnings continue to shape the conversation.

3.1 The Historical Debate and Key Concepts

The normative question of what role corporations ought to play in society has been subject to fierce debate since corporations came into existence. This section, however, focuses on the debates that took place in the U.S. from the dawn of the 20th century, an era characterized by modern industrial corporations financed by diffuse investors and run by powerful professional managers. The conceptual underpinnings of this debate pit powerful corporations' obligations to society against the desire to check management opportunism

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[26] Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 845 (1980); *see also* Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 578 (2015).

[27] *See* Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845 (2008) (examining "freedom of contract" in Delaware corporation law); Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1090 (2017) (discussing "primordial" corporate opportunity waivers that "cabin the breadth of the doctrine by narrowing the purpose articulated in [a] charter to specified lines of business"); Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) (discussing customizing of corporate organic documents for religious purposes). For a discussion of the asymmetrical treatment of profit-making institutions and other organizations, see James D. Nelson, *Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015).

[28] *See, e.g.*, COLIN MAYER, FIRM COMMITMENT 188 (2013) ("The balancing of commitments and control is a delicate activity that will be highly specific to the particular nature and context of the corporation.").

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and facilitate efficient corporate growth and profit. The sections that follow chart the emergence and reemergence of these concepts from the turn of the 20th century to the present.

3.1.1 The Turn of the 20th Century: Enabling State Corporation Laws, the Industrial Revolution, and the Foundations of the Modern Purpose Debate

As we described in section 1, before the early 1900s, a corporation's purpose was specifically fixed by legislative statute, and states generally granted charters to businesses that would serve a quasi-public purpose.[29] Once general incorporation statutes started to spread across the states, however, specifically-stated purpose clauses began to disappear and many statutes allowed businesses to be formed for any lawful activity; likewise, many of the legal restrictions that constrained management and protected investors vanished as well.[30] During this same time, the structure of the corporation was changing dramatically. Businesses of the nineteenth century were generally managed by their owners and structured as partnerships or closely-held corporations.[31] As the industrial revolution took hold, however, large industrial firms began to be run by professional management teams and financed by small and diffuse investors. National stock exchanges arose to facilitate this activity.[32] By the 1920s, corporations had grown in size, power, and concentration, and a small number of large industrial enterprises dominated every industry.[33]

This growth in corporate power and the erosion of the earlier established legal safeguards for investors set the stage for the corporate purpose debate that followed, and as we will see, the concepts underlying this debate have recurred in the decades since. In particular, the vulnerability of diffuse and rationally apathetic investors, whose investments are managed by a professional management class, became a chief concern for both scholars and policymakers alike.[34] Not only that, the advent of large modern corporations with significant social and political power, spanning greater geographic dimensions beyond local communities,[35] laid

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[29] Pollman, *supra* note 2, at 1434–35.

[30] As a few examples, state corporation law began to permit "large-scale stock-watering" or "the issuance of stock for property or services worth far less than the stock itself," as well as the transfer of control via management issuance of "blank stock" at this time. C.A. Harwell Wells, *The Cycles of Corporate Responsibility Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KAN. L. REV. 77, 84–85 (2002).

[31] *Id.* at 84.

[32] GEORGE LEFFLER, THE STOCK MARKET 101 (1957) (discussing the creation of the NYSE in the late 19th century).

[33] ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 345–76 (1977).

[34] *See, e.g.*, ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATION FINANCE v–vi (1928) (arguing that "questions of stockholders' rights" had become the most important corporate law and finance issues); *see also* Wells, *supra* note 30, at 86–87. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 308–09 (1998) (describing the development of the shareholder primacy norm and the trust metaphor for protection of shareholders). Relatedly, concerns about investor protection and market integrity also led to the creation of the SEC. *See* Joel Seligman, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (1982).

[35] *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Rights*, 56 WM. & MARY L. REV. 1673, 1709–12 (2015) (describing the rise of giant modern corporations in the late nineteenth century, traded on public markets, with national or global reach, branded corporate identities, professional management, hundreds or thousands of employees, and the concomitant shifts in public attitudes toward corporations).

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the foundation for a general re-thinking of the corporation's role in society. Did corporations continue to exist for the public's benefit, consistent with the practices of the previous era? Or did the shift toward general incorporation free incorporators to pursue profit or some other purpose entirely, no matter the impact on society at large?

In the years that followed, leading academic thinkers generally clustered around two competing views, both of which eschewed a purely enabling and firm-specific view of the corporation's purpose in society. In other words, in this era, the foundation was laid for an extra-legal corporate purpose overlay that would direct fiduciaries of all companies, no matter their industry, size, or structure, to discharge their duties with certain goals in mind—and the paradigm became the large public corporation.

The famous debate between Adolf Berle, Jr. and E. Merrick Dodd, Jr. captured the arguments wielded by these two competing groups.[36] In "For Whom are Corporate Managers Trustees?," Dodd advocated for a trustee managerialism approach, in which he suggested that this powerful management class should have the responsibility to benefit not only shareholders, but also society.[37] Dodd began by noting the problem of separated ownership and control and the threat that management would divert profit for their own gain. This threat had led leading academics, including Berle, to emphasize that management should serve shareholders as sole beneficiaries of the corporate enterprise.[38] Dodd concluded that such an orientation was undesirable, and that instead, the "view of the business corporation as an economic institution which has a social service as well as a profit-making function" was rightfully gaining traction.[39] The modern industrial environment had given management ample power not just over a corporation's shareholders, but also its employees and consumers, and Dodd theorized that this power would create a sense of responsibility.[40] Such consideration was not incompatible with the breadth of fiduciary discretion awarded to management, Dodd believed, and the law should and would adjust to solidify this view.[41]

In sum, Dodd saw the growth of managerial and corporate power as warranting a broader orientation for management—one that would privilege not just the company's shareholders, but also its stakeholders and society. In a powerful response, Berle argued against Dodd's proposed orientation. He began by recognizing the dynamics that had shaped Dodd's position—the growth of a small number of powerful corporations, managed by business professionals, who function "more as princes and ministers than as promoters or merchants."[42] Nonetheless, these managers had not assumed responsibilities to their

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[36] For an examination of how historical accounts of the Berle-Dodd debate have largely overlooked "consideration of the status of women and people of color within America at the time these arguments were made," see Veronica Root Martinez, *Toward a More Equitable Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 52 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[37] E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–48 (1932). For a discussion of the Berle-Dodd debate with attention to its historic context, see William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 101 (2008) (explaining that attributing shareholder primacy to Berle and corporate social responsibility to Dodd is "failing to understand the texts within their original context").

[38] A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049–50 (1931).

[39] Dodd, *supra* note 37, at 1148.

[40] *Id.* at 1156–63

[41] *See id.* at 1162–63.

[42] A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1366–76 (1932).

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community; even more problematically, there was no mechanism in place to enforce such a function.[43] The result, therefore, of characterizing management's duties broadly and weakening shareholder control, would be to give management unsurpassed power, with no guarantee that it would be used for investor or societal benefit.

In this moment, the contours of the debate were forged.[44] On one side stood those who believed that management of powerful corporations should be asked to adhere to a broad concept of purpose, one that served the interests of stakeholders and society. On the other stood those who believed such guidance would lead to management expropriation of vulnerable shareholders and the inefficient operation of firms. Since that time, these arguments have taken different forms and been wielded by different champions (indeed, at various points in their careers, Berle and Dodd even switched sides in the face of changing economic conditions),[45] but the concepts at play in modern debates can be traced to these early academic ideas. Notably, these debates have largely ignored the possibility of firm-specific customization, in stark contrast to the open-ended legal requirements facing incorporators. Instead, "corporate purpose" has become a rhetorical site for contesting ideas about the allocation of power within corporations and the role of large public corporations in society.

Important intellectual moves followed this early debate. Although we lack space to address all of the nuance that came in to this conversation in the years that followed, we will now focus on key contributions that influenced and sharpened these early positions.

3.1.2 1970s: "The Social Responsibility of Business is to Increase its Profits"

The previous section discussed Berle and Dodd's debate, which encompassed many of the key concepts that have recurred in the scholarly debates over corporate purpose. Interestingly, although Berle's shareholder-centric view is more familiar to modern readers, Dodd and his rosy perception of management control predominated for years.[46] More specifically, in the decades that followed their debate, many observers advanced the view that management could generally be trusted to discharge their responsibilities to shareholders and society more broadly, and that shareholder interference should be limited.

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[43] *Id.* at 1367.

[44] *See* Bratton & Wachter, *supra* note 37, at 134 (describing changing conditions regarding government management of the economy and political consensus that catalyzed a shift in Berle's views).

[45] *See id.*; Wells, *supra* note 30, at 98, 101–104 (discussing Berle and Dodd's changes of heart and refinement of their positions in the years that followed); Dorothy Lund, *Corporate Purpose in a Second-Best World*, manuscript on file with authors (noting the recurrence of corporate purpose arguments throughout the 20th century and arguing that the intellectual support for these arguments depended on the conditions of the time).

[46] Decades later, amid evolving legal, economic, and social conditions, Berle acknowledged the strength of Dodd's position. *See, e.g.*, ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954) ("Twenty years ago, the writer had a controversy with the late Professor E. Merrick Dodd … [who] held that corporate powers were powers in trust for shareholders while Professor Dodd argued that these powers were held in trust for the entire community. The argument has been settled . . . squarely in favor of Professor Dodd's contention."). Around this same time, Berle himself embraced the concept of the large industrial corporation as a "quasi-political institution" with social obligations. BERLE, JR., CAPITALIST REVOLUTION, *supra* note 46, at 5.

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This era of managerialism came under pressure in the 1970s, a period characterized by social unrest, environmental concerns, economic challenges, and the Vietnam War. During this time, consumers, employees, and activists pushed management to use their power and discretion to address these social problems, and some did.[47] In this environment, Milton Friedman penned one of the most famous opinion pieces of the 20th century—"The Social Responsibility of Business is to Increase its Profits," published in the New York Times Magazine in 1970.[48] In this piece, Friedman noted that a business could not have social responsibilities; instead, the individuals who ran the business would ultimately discharge the amorphous task of benefitting society.[49] And if the task meant anything at all, it would be inconsistent with profit-maximization, and as such, a violation of management's responsibility to their employers – the shareholder "owners."[50] Moreover, the business executive would be unlikely to succeed in discharging "social responsibilities"—his expertise in running a company is unlikely to transfer to expertise in fighting inflation, to take a prominent example of the time, and it would be "spending the stockholders' or customers' or employee's money" without the procedures of democratic election. Friedman concluded that in a free society, "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . . ."[51]

Legal and economic scholars soon echoed and built on his point of view. In particular, in 1976, Michael Jensen and William Meckling penned "Theory of the Firm: Managerial behavior, Agency Costs, and Ownership Structure," which characterized the firm as a nexus of contracts plagued by agency costs.[52] Their vision provided a blueprint for corporate law and governance—minimize those agency costs—which accordingly shifted focus away from the firm's social obligations.[53] These economic arguments were also endorsed by legal scholars, including Frank Easterbrook and Daniel Fischel, who emphasized that minimizing managerial costs would lead to the efficient operation of firms.[54] According to Easterbrook and Fischel, because shareholders are the residual claimants in a corporation, maximizing shareholder value would have the effect of maximizing firm value. Other constituents could protect themselves by contract, in contrast to shareholders who lacked a fixed claim on the firm's returns and therefore took on the most risk.[55] As such, shareholder primacy would be the most efficient operating principle because the residual claimants would have the right incentives to use their control to push management to maximize profits.[56]

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[47] *Id.*
[48] Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES (Sept. 13, 1970).
[49] *See id.*
[50] *See id.*
[51] *Id.*
[52] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 357 (1976).
[53] *See id.*
[54] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36 (1996).
[55] *Id.*
[56] *Id.*

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As these intellectual ideas were coming to life, a series of corporate scandals resulting from managerial misconduct heightened the skeptical environment and solidified the case for using corporate governance to police managerial slack and self-dealing. Proponents of stakeholderism also sought accountability and oversight, but toward a different end. For example, activists in the 1960s sought to force corporate management to consider social issues using the shareholder proposal mechanism.[57] More ambitiously, legal scholars and activists sought federal government intervention that would direct corporate management to serve constituents other than shareholders. One popular idea was a federal chartering requirement, proposed by Ralph Nader in 1971, to both disrupt management's influence over corporate law and improve accountability to employees and other constituents.[58] Another was the concept of public-interest directors who would provide an impetus for corporate management to consider the social impact of the company's activities.[59] These ideas failed to capture the academic and public consciousness, however, and were soon drowned out by the economic arguments raised by shareholder primacy advocates.

3.1.3 The Hostile Takeover Wave of the 1980s and the Agency Cost Model for Corporate Governance

As the idea that management should be corralled with an inflexible obligation to maximize shareholder value gained adherents, the economic environment solidified that orientation as U.S. corporations became subject to a record number of hostile takeovers.[60] During the 1980s, corporate managers that failed to heed Friedman's admonition to focus on shareholder value found themselves vulnerable to takeover bids. This threat "dramatically reoriented priorities in America's boardrooms."[61] Corporations began to focus on their shareholders and their share price with renewed vigor;[62] academics chimed in with embraces of the acquisitive activity as a response to the inefficiencies that came from the unfettered discretion wielded by management in the previous era.[63]

All in all, during this period, the intellectual and market environment became especially receptive to the idea that corporate management of companies of all sizes and across all industries should focus on shareholder value maximization. In particular, the threat of unfettered corporate power no longer captured the public imagination in an environment where corporate management was under attack from hostile bidders fueled by new financial

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[57] *See* Wells, *supra* note 30, at 114; Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of* Peck v. Greyhound, 45 SEATTLE L. REV. 1 (2021); Lisa Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129 (2019).

[58] Ralph Nader, *The Case for Federal Chartering, in* CORPORATE POWER IN AMERICA 79, 85–89 (Mark J. Green & Ralph Nader eds. 1973). This proposal gained traction after a series of large corporate scandals in the early 1970s. *See* Wells, *supra* note 30, at 120.

[59] *See* Wells, *supra* note 30, at 120–21 (citing RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1976)).

[60] Ronald J. Gilson, *Catalyzing Corporate Governance: The Evolution of the United States System in the 1980s and 1990s*, 24 CO. & SEC. L.J. 143, 150 (2006); Brian R. Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH L. REV. 1607, 1631 (2021).

[61] Cheffins, *supra* note 60, at 1631.

[62] *See id.* at 1631–32.

[63] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1183–84 (1981); Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23, 49–50 (1982).

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instruments.[64] During this time, shareholder value maximization became not just a hypothetical mechanism to efficiently allocate resources, but also a real-world mantra as takeover markets focused corporate management.

Even as shareholder value maximization thinking became ascendent in both theory and practice, dissenters from this view honed their arguments. In particular, not everyone believed that the relentless threat of a takeover was in the corporation's or economy's best interest; in particular, critics decried the pirating of great American companies by takeover artists, the resulting unemployment and shuttered factories, and the introduction of short-termism into the American board room.[65] Fueled by this evidence, lawyers peppered corporate charters with anti-takeover defenses, and states developed the corporate constituency statutes discussed above that allowed corporate management to consider constituencies other than shareholders when evaluating a takeover bid.[66]

A new intellectual movement under the label of "progressive corporate law" defended these moves and in so doing, became the chief challenger of shareholder primacy during this time.[67] In particular, a small group of legal academics sought to legitimize state constituency statutes as embodying the corporation's responsibility to the creditors, directors, managers, employees, consumers, and broader community that made up the corporation.[68] These arguments echoed those that came before, and in particular, Berle's later conception of the large, powerful corporation as a socio-political institution, with directors tasked with mediating the interests of the corporate polity.[69] Other critics took a different intellectual approach by pointing to the corporation's origins as a state created entity. In particular, concession theorists argued that the privilege of incorporation—once explicitly granted in exchange for a public interested purpose—remained linked with an obligation to advance the public good and welfare.[70] Each of these positions sought to reorient corporate law and governance away from shareholders and toward the broader community, largely by protecting management from shareholder interference and granting broader discretion to consider a multitude of constituents when running the business.

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[64] *See* Lund, *supra* note 45.

[65] *See generally* CONNIE BRUCK, THE PREDATORS' BALL: THE JUNK-BOND RAIDERS AND THE MAN WHO STAKED THEM (1988); BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990).

[66] *See* Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 113–117 (1987).

[67] *See* David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1377–90 (1993). *See generally* PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (A collection of essays criticizing the maximization of shareholder value as corporate purpose in favor of communitarianism.).

[68] *See, e.g.*, Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16 (1992).

[69] *See* Wells, *supra* note 30, at 82–83.

[70] Marty Lipton & Steven Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187 (1990); *see also* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985) (discussing historical view of corporation as an artificial being created by the state). For a contemporary view of the corporation as a "public-private franchise," see Saule T. Omarova, *The "Franchise" View of the Corporation: Purpose, Personality, Public Policy*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 52 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

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3.1.4 1990–2020: Shareholder Primacy and the End of History for Corporate Law

Nonetheless, in the wake of the hostile takeover wave, shareholder primacy challengers were relegated to the margins,[71] and academics continued to promote a vision of corporate purpose that emphasized shareholders, in the service of minimized agency costs. The dominance of this view was embodied in the provocatively titled paper "The End of History for Corporate Law," which announced in 2000 the "widespread normative consensus that shareholders alone are the parties to whom corporate managers should be accountable."[72] Practically speaking, the rise of institutional shareholders after the passage of ERISA in 1974 sharpened a focus on shareholders.[73] In total, the intellectual support for a shareholder welfare maximization norm (and increased shareholder control over the "means" of corporate governance that went along with it)[74] was reinforced by powerful institutional shareholders, which led to an evolution in corporate governance "best practices." In particular, academics and shareholders alike clamored for performance-based pay, director independence, unified boards, and greater shareholder control over the corporate ballot,[75] to take just a few examples, winning victories through private engagements and via the use of shareholder proposals.[76] These ideas also influenced legislation that followed periods of crisis: both Sarbanes Oxley and Dodd Frank included corporate governance reforms designed to protect shareholders and increase their control over the corporate ballot.[77]

3.2 Contemporary Debate

As the previous section revealed, the modern debate over corporate purpose emerged after the industrial revolution, when corporations and their management began to wield greater power over individuals and productive assets in the United States. As managerial power increased and state and investor control receded, observers sought to devise an orientation for management that would protect investors, promote efficient corporate decision-making and profitability, and also ensure that the corporation did not unduly burden society. Since that time, scholars have advanced different arguments about the best way to accomplish these goals, and in so doing, offered new theories of the corporation and its purpose. In general, these visions have oscillated between models that embrace management control and discretion in the service of social obligations or stakeholder interests, and those that instead focus on managerial accountability to shareholders in the service of minimized agency costs.

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[71] Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2575–76 (2021).

[72] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

[73] *See, e.g.*, Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 820–830 (1992).

[74] *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850–70 (2005). *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) (discussing the ends and means of corporate governance).

[75] Not everyone welcomed these changes, however. In particular, Lynn Stout offered powerful critiques of shareholder primacy, shareholder control, and the academic arguments that supported it. In particular, although Stout recognized that a directive to pursue shareholder wealth promoted accountability, she concluded that the rule could also lead to inefficient decision-making, such as short-term thinking and the failure to invest in important constituent groups. *See, e.g.*, LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH 4–6 (2013).

[76] *See* Lund & Pollman, *supra* note 71, at 2609–18.

[77] *Id.* at 2582.

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But note how in each iteration of the discussion, the focus has been on advocating for a general purpose for corporations and their management that would bind all regardless of their differences. In other words, the historic corporate purpose debate has proceeded under the assumption that corporate governance should promote a single purpose that would direct all firms toward a certain goal, such as maximized shareholder value.

And as the last sub-section explained, the dominant view over the past few decades has promoted a shareholderist orientation, although what exactly that means has evolved. In particular, fears that a relentless focus on a company's stock price would promote short-term thinking has led to an emphasis on value creation over the long-term.[78] Some scholars such as Colin Mayer have taken a step further to argue that purpose can be harnessed to reform business to promote the interests of society and the natural world.[79] His work has influenced the British Academy's Future of the Corporation programme which has asserted that "[t]he purpose of corporations is to produce profitable solutions for the problems of people and planet."[80] Under this view, profits are a byproduct of problem solving operations, "not the *per se* purpose of corporations."[81] Toward this vision, the British Academy has proposed a set of principles to guide business reform, including the tenet that "[c]orporate law should place purpose at the heart of the corporation and require directors to state their purposes and demonstrate their commitment to them."[82] As before, these conversations harness purpose to direct incorporators toward a common goal: benefitting society. Nonetheless, other scholars such as Paul Davies have expressed skepticism that re-tooled corporate purpose statements could effectuate significant business change without a fundamental change in the shareholder-centric orientation of corporate law and how investors conceive of their goals.[83] In the last Section, we return to discuss the way in which the dominant view of a shareholder-oriented purpose limits the effectiveness of attempts at customization or redirection toward a different goal.

Notably, in contemporary debate, many scholars who seek to promote broader consideration of corporate constituents other than shareholders have shifted their focus onto evolving understandings of shareholders and their interests. One line of inquiry attempts to

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[78] Dorothy S. Lund, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, 91 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[79] *See* MAYER, *supra* note 28; Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 J. MGMT. STUDS. 887 (2021).

[80] British Academy, A Framework for Business in the 21st Century (2018), https://www.thebritishacademy.ac.uk/publications/reforming-business-21st-century-framework-future-corporation/.

[81] *Id.*

[82] British Academy, Principles for Purposeful Business (2019), https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/.

[83] Paul L. Davies, *Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements*, Eur. Corp. Governance Inst., Law Working Paper No. 666/2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4285770; *see also* Fisch & Solomon, *supra* note 21, at 1335 (arguing that "trying to use corporate purpose statements as a legally binding mechanism for effecting operational change" is inherently difficult because "they are neither concrete nor enforceable"). For a response, see Colin Mayer, *The Purpose of Corporate Purpose Statements, A Response to 'Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements' by Paul Davies*, Eur. Corp. Governance Inst., Law Working Paper No. 694/2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4397435.

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thread the needle by emphasizing that a focus on stakeholders is often the best way to benefit *shareholders* (reversing the logic underlying the classic model).[84] Some have even defined shareholder value broadly enough to encompass the values that individual investors hold, arguing that management has an obligation to consider these values, or "shareholder welfare," alongside financial value.[85] Practically speaking, these various "enlightened" shareholder value and welfare perspectives offer a path forward for proponents of stakeholderism in a world of law, institutions, and culture that orients fiduciaries toward shareholders.[86] At the same time, this renaissance of interest in stakeholders and related notions such as ESG ("environmental, social, governance") has not portended a paradigm shift away from shareholders' interests.[87]

Nonetheless, these academic conversations have accompanied a changed tenor from investors and corporate management alike. For example, Larry Fink, the CEO of BlackRock, stated in 2018 his belief that "every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[88] In 2019, the Business Roundtable revised their statement of the purpose of the corporation, noting that "While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders."[89] In other words, the Business Roundtable recognized that corporate management should not just be bound to the firm-specific purpose set by the company's charter or business objectives, but also a commitment to use management discretion to consider and benefit the company's stakeholders.

Although these statements were celebrated as representing a turning point in the corporate purpose conversation away from shareholders and toward a broader vision, the reality is that they represent little more than evidence of increased willingness to adhere to an "enlightened" shareholder value approach.[90] Nonetheless, even these limited embraces of stakeholderism generated criticism from defenders of the classic view. For example, Lucian Bebchuk and Roberto Tallarita responded with "The Illusory Benefits of Stakeholder Capitalism," which contended that even semantic embraces of stakeholders were

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[84] *See e.g.*, Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59 (2010); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1472–74 (2020); ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (2020); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy, A Reply to Professor Rock*, 76 BUS. LAW. 397, 423–35 (2021); Robert P. Bartlett & Ryan Bubb, *Corporate Social Responsibility through Shareholder Governance*, Eur. Corp. Governance Inst., Law Working Paper No. 682/2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354220.

[85] *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare not Market Value* 28–29, Eur. Corp. Governance Inst., Fin. Working Paper No. 521/2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004794.

[86] Lund & Pollman, *supra* note 71, at 2590–91.

[87] *See id.*; Elizabeth Pollman, *The Making and Meaning of ESG*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 (discussing the origins of ESG, its various usages or meanings, and evolving debate).

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

[89] *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE: OUR COMMITMENT (last visited Feb. 16, 2023), https://opportunity.businessroundtable.org/ourcommitment.

[90] Lund & Pollman, *supra* note 71, at 2590–91.

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misguided.[91] Relying on a study of the impact of constituency statutes in the states that adopted them, Bebchuk and Tallarita concluded that allowing management to focus on stakeholders would likely hurt shareholders and stakeholders alike, because management would have additional leeway to serve their private interests.[92]

A key issue in this version of the debate is the complex relationship between corporate purpose and externality regulation. Would a perception of managerial attention to stakeholder interests reduce the public's appetite for externality regulation, by weakening the public will for it?[93] Alongside Bebchuk and Tallarita, Edward Rock has theorized that the Business Roundtable Statement was designed to improve the perception of business in an effort to forestall regulation.[94] But, Rock also argued that government dysfunction—i.e., the failure to appropriately regulate corporate externalities—has fueled the public appetite for stakeholderism.[95] If government is not willing or able to address pressing social issues, like climate change and inequality, can corporations be brought along to help?[96] Can broadly diversified institutional shareholders, which hold a portfolio that resembles "the market," be trusted to push companies to take action that would reduce systematic risk?[97] Can purpose be harnessed to push companies to respond to these issues?[98] These issues remain in play as debate continues and jurisdictions around the world take a fresh look at their approaches to corporate purpose and stakeholder-related legislation.[99]

At bottom, however, the issues that spurred Berle and Dodd's early debate—the existence of powerful corporations and management, the interests of individuals who invest, and the desire to control corporate externalities while promoting corporate growth and the efficient allocation of resources—continue to shape the conversation today. And these concerns underlie the impulse to specify a universal vision for purpose that would sweep in all firms, regardless of their size, management, investor base, and business operations.

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[91] Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance,* 106 CORNELL L. REV. 91, 176–77 (2020). For related papers, see Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 U.S. CAL. L. REV. 1467 (2021); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031 (2022).

[92] Bebchuk & Tallarita, *Illusory Promise*, *supra* note 91.

[93] *Id.* at 71–73; *but see* Aneil Kovvali, *Stark Choices for Corporate Reform*, COLUM. L. REV. (forthcoming 2023) (arguing that the choice between external regulation and stakeholder governance is not binary).

[94] Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 363–67 (2021).

[95] *Id.* at 5–6.

[96] *Id.* For an argument that they should, see COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 34–35 (2019).

[97] *See* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 80–81 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 673 (2022). *But see* Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. (forthcoming 2022) (casting doubt on the idea that broadly diversified shareholders will push companies to reduce systematic risk).

[98] *See* MAYER, *supra* note 96.

[99] For a discussion of the French Loi Pacte of 2019, the German Value Chain Diligence Law of 2021, and the European Directive on Corporate Sustainability Due Diligence, see Klaus J. Hopt, *Corporate Purpose and Stakeholder Value: Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems*, European Corp. Gov. Inst. – Law Working Paper No. 690, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390119.

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4. THE DUALITY OF CORPORATE PURPOSE

As this chapter has explored, corporate purpose has meaning in the specific corporate context as well as in general debate about the broader values at stake with corporations and their impact in society. The purpose of a particular firm is customizable and potentially unique. Accordingly, corporations generally adopt the broadest language allowable under law in their charters, and often tout a specific purpose or mission statement as a guide for management and stakeholders alike. By contrast, the discussion about the role of corporations in society is abstract and takes on larger questions of how power is allocated and constrained, and in whose interests corporations should be managed. What is the relationship between these two aspects of corporate purpose?

The flexibility of purpose awarded to incorporators encourages them to pursue their unique business strengths and benefit their stakeholders in a firm-specific way. For example, General Motors might not be well situated to respond effectively to global poverty, but can aspire to make great products, which is ultimately to their customers' and society's benefit.[100] Within corporate law and governance, there is ample room for business leaders to adopt a specific purpose and develop business practices that follow it.[101] Indeed, the adoption of a firm-specific purpose is thought to help with alignment between management and stakeholders toward the company's goals. At the same time, enabling corporate law allows corporations that wish to pivot from one purpose to another to freely do so.[102] It additionally offers options such as the PBC form for those who wish to add structural support for pursuing a purpose beyond profit.

However, to the extent the debate about corporate purpose has shaped norms and understandings of corporate purpose as generalizable and constraining on individual fiduciaries and firms, it is in tension with the idea of a diversity of firm-specific corporate purposes.[103] For many scholars, this limit is the point of shareholder primacy—the risk that wayward agents will use discretion to benefit themselves or slack is a key reason why many believe that corporate governance should encourage fiduciaries to focus on maximizing shareholder value. As such, the legal breadth of purpose is modified, practically speaking, by the directive embodied by the consensus view of the corporation's role in society.

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[100] The company embodies this aspiration in its mission statement: "We stand together to drive the world forward. Everybody in. Our goal is to deliver world-class customer experiences at every touchpoint and do so on a foundation of trust and transparency." *See* GM, About Us, https://www.gm.com/company/about-us#:~:text=About%20Us,foundation%20of%20trust%20and%20transparency.

[101] Delaware law does direct fiduciaries to benefit the corporation and its shareholders, but provides ample discretion in how that goal is achieved. *See* Einer Elhauge, *Sacrificing Profits in the Public Interest*, 80 NYU L. REV. 733 (2005). As a result, corporations often announce lofty purposes that benefit not only their shareholders, but stakeholders as well. *See* Fisch & Solomon, *supra* note 21, at 1311, 1317 (citing 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.")).

[102] As just one example, consider how Etsy changed its mission statement from "to reimagine commerce in ways that build a more fulfilling and lasting world" to "keep commerce human" alongside other changes aimed at improving profitability. *See* David Gelles, *Inside the Revolution at Etsy,* N.Y. TIMES (Nov. 25, 2017).

[103] *See* Brett McDonnell, *Purpose in Business Association Statutes: Much Ado About Something (But Not Much)*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 151–52 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (discussing lack of legal clarity regarding whether corporations can opt out of the shareholder wealth maximization norm in their certificate or articles of incorporation).

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But how does the great corporate purpose debate, which as discussed, takes place at the level of academic conversations and ideas, become translated into guidance for corporate management? These views go on to shape the workings of the corporate governance machine, which is composed of not only law, but also extra-legal institutions and cultural sentiment.[104] And as academic arguments congealed on the idea that corporations should exist to benefit their shareholders, this precept shaped the powerful players that constitute the machine. As a result, corporate governance practices (enforced by a powerful class of institutional shareholders and their allies) have shifted to enshrine a shareholderist orientation for management.

We might imagine, for instance, the management of GM declaring a corporate purpose that privileges customers and the environment, but that would not change the fact that powerful shareholders would be positioned to remind management that they must reconcile the execution of such interests with the broader goal of long-term shareholder value maximization. Or to take a real-world example, a company such as Cadbury might carry on for nearly two centuries as a beloved UK confectionery, but this did not stop shareholders from approving Kraft's takeover bid, despite widespread public objection to an English icon being sold to an American company that makes boxed macaroni and cheese and that quickly shuttered some of the Cadbury factories in the UK.[105]

Certain ownership structures or defensive tactics such as the PBC form, dual-class stock, or poison pills might insulate management and help to protect an idiosyncratic or socially-driven purpose, but ultimately shareholders and capital market discipline operate as a powerful enforcement mechanism for shareholder primacy on a day-to-day basis. In this way, the modern notion that corporations exist to serve their shareholders has become effectively locked in for the typical corporation and its management, particularly in the public markets. Even benefit corporations, which offer a modified legal duty for management that requires pursuing stakeholder interests, are subject to many of these same pressures: the power structure under state law continues to give shareholders and only shareholders and the ability to vote and sue to enforce fiduciary breaches.[106] Durable commitment and enforcement mechanisms to objectives beyond profit have proven difficult to achieve.[107]

In sum, the flexibility provided under law to self-determine a particular corporation's purpose is effectively modified or constrained by the cultural, legal, and institutional environment that fiduciaries operate in. The benefit, of course, is that limiting managerial discretion is thought to reduce agency costs, because fiduciaries may use their broader discretion to benefit themselves or slack. The other side of this coin, however, is that corporations may not fully achieve the purposes that they set out to fulfill and that might serve or balance the interests of a wider array of stakeholders. And even those fiduciaries that take steps to incorporate as benefit corporations may still find themselves subject to the

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[104] Lund & Pollman, *supra* note 71, at 2578–2609.
[105] Strine, *supra* note 21, at 157–64; Jenny Wiggins, *Kraft to Close Cadbury Factory*, FIN. TIMES (Feb. 9, 2010), https://www.ft.com/content/f6df83ce-15b3-11df-ad7e-00144feab49a.
[106] *Id.* at 2615–18.
[107] *See* Emilie Aguirre, *Beyond Profit*, 54 UC DAVIS L. REV. 2077, 2084 (2021) ("[B]usiness law lacks a durable commitment mechanism to enable long-term pursuit of multiple objectives beyond profit.").

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shareholderist pressures that make up the corporate governance machine. And as shareholders have become more powerful, questions remain about a new set of agency costs between institutional shareholders and their beneficiaries and how they will use their power. Beyond these issues, it is uncertain whether and how law could change to allow corporations to make and enforce commitments to goals beyond the pursuit of economic value.

5. CONCLUSION

This chapter has brought together two sides of corporate purpose in corporate law and governance. First, on the individual firm level, corporate purpose reflects the enabling nature of modern corporate law that is highly flexible and customizable. Second, on the level of broader debate about corporations generally, corporate purpose reflects an inquiry about how best to orient corporations in the aggregate to protect investors, promote efficient corporate decision-making and profitability, and also ensure that corporations do not unduly burden society. Viewed together, these two sides of corporate purpose operate in tension with each other. The great debate about corporate purpose has shaped the legal, institutional, and cultural environment in which fiduciaries operate, which in turn puts the individual firm's self-determination of its purpose in new light.

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