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SHOULD CORPORATIONS HAVE A PURPOSE?

JILL E. FISCH & STEVEN DAVIDOFF SOLOMON*

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ABSTRACT

The hot topic in corporate governance is the debate over corporate purpose and, in particular, whether corporations should shift their purpose from the pursuit of shareholder wealth to pursuing a broader conception of stakeholder or societal value. We argue that this debate has overlooked the critical predicate questions of whether a corporation should have a purpose at all and, if so, why,

We address these questions by examining the historical, legal and theoretical justifications for corporate purpose. We find that none of the three provides a basis for requiring a corporation to articulate a particular purpose or for a given normative conception of what that purpose should be. We additionally challenge recent corporate commitments to stakeholder value as lacking both binding legal effect and operational significance. .

We nonetheless argue that articulating a corporate purpose can be valuable, and we justify a specification of corporate purpose on instrumental grounds. Because a corporation consists of a variety of constituencies with differing interests and objectives, an articulated 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. Our instrumental view of the corporation brings a new perspective to the purpose debate. Although we do not address competing normative claims about what a corporation's purpose should be, our instrumental argument leads us to conclude that, at least as a default matter, the purpose of a corporation should be understood as maximizing the economic value of the firm.

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There's a shift going on. When I went to U.S.C., it was all about maximizing value for shareholders. But we're moving into a world of stakeholders. It's not just about shareholders. Your employees are stakeholders, so are your customers, your partners, the communities that you're in, the homeless that are nearby, your public schools.

--Mark Benioff, CEO, Chairman of the Board, Salesforce, Inc.¹

Everyone else has a purpose. So what's mine?

-- Purpose, Avenue Q

INTRODUCTION

Purpose is currently the hottest 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 non-shareholder stakeholders or society more generally.² In August 2019, the Business Roundtable made international headlines³ when it issued a new statement on the purpose of the corporation which replaced its former support for shareholder primacy with the proposition that corporations be run for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders.⁴ In November 2019, the British Academy published a report proposing a new formula for corporate purpose – “the purpose of business is to profitably solve problems of people and planet, and not profit from causing problems.”⁵ Blackrock CEO Larry Fink has stated that “[w]ithout a sense of

¹ Interview with Mark Benioff, *USC Start-up News*, Jun. 15, 2018, available at <https://incubate.usc.edu/marc-benioff-of-salesforce-are-we-not-all-connected/>

² Commentators have used the term “stakeholder” in various ways. We distinguish in this Article between those who have direct relationships with a corporation, such as creditors, employees and suppliers, and others who are arguably affected by corporate decisions, referring to the latter interests as societal interests. See, e.g., Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, <https://ssrn.com/abstract-3544978> (2020) (exploring variation in the use of the term stakeholder).

³ See, e.g., Jim Ludema & Amber Johnson, *The Purpose Of The Corporation? Business Roundtable Advances The Conversation, Now We All Need To Contribute*, FORBES, Aug. 20, 2019, available at <https://www.forbes.com/sites/amberjohnson-jimludema/2019/08/20/the-purpose-of-the-corporation/#25c6fd5b3846>; *Group of US corporate leaders ditch shareholder first mantra*, THE FIN. TIMES, Aug. 19, 2019, available at <https://www.ft.com/content/e21a9fac-c1f5-11e9-a8e9-296ca66511c9>

⁴ See Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, Aug. 19, 2019, available at <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>;

⁵ *The British Academy proposes principles for the age of purposeful business*, Nov. 27, 2019, available at <https://www.thebritishacademy.ac.uk/news/british-academy-proposes-principles-age-purposeful-business>

purpose, no company, either public or private, can achieve its full potential.”⁶ And the new Restatement of Corporate Governance, a project of the American Law Institute, has proposed that the statement on the objectives of the corporation from predecessor Principles of Corporate Governance be “modified substantially.”⁷

The shift is more than semantic. 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. The Davos Manifesto seeks to mandate that all corporations have the purpose of creating value for the benefit of all their stakeholders.⁸ Senator Elizabeth Warren has introduced legislation which would require corporations to be run for the benefit of constituencies with mandatory employee representation on the board.⁹ Around the world, commentators are arguing that corporations should be redirected towards an environmental, social and governance (“ESG”) oriented purpose.¹⁰ And corporations themselves are increasingly laying claim to constituency-minded or social purposes.¹¹ At the extreme, some commentators suggest that

⁶ Larry Fink’s 2018 Letter to CEOs, *A Sense of Purpose*, available at <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter>

⁷ See Edward B. Rock, *Memorandum to The Advisers and Members of Consultative Group*, draft Jan. 13, 2020.

⁸ See World Economic Forum Davos Manifesto 2020 (“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.”).

⁹ Accountable Capitalism Act, 115th Congress (2017-2018) S. 3348. See also *Elizabeth Warren, Companies Shouldn’t be Accountable Only to Shareholders*, THE WALL ST. J., Aug. 14, 2018 (outlining the parameters of her legislative proposal and stating her act would “require corporate directors to consider the interests of all major corporate stakeholders—not only shareholders—in company decisions.”).

¹⁰ Other countries including the UK and the European Union have been even more aggressive and is moving toward a stewardship model with many stewardship codes explicitly specifying social as well as economic objectives. See FCLT Global, *Harnessing Stewardship Codes for Long Term Value Creation*, available at <https://www.fcltglobal.org/research/tools/stewardship-codes> (“Twenty-four stewardship codes have been introduced around the world, mostly since 2016.”).

¹¹ See, e.g., Benioff Interview, *supra* note 1; Nestle S.A., *Our Purpose* (“Our purpose Enhancing quality of life and contributing to a healthier future. Driven by our purpose we want to help shape a better world and inspire people to live healthier lives. This is how we contribute to society and ensure our long-term success.”), available at <https://www.nestle.com/aboutus>. See generally Omar Rodríguez ViláSundar Bharadwaj, *Competing on Social Purpose*, HARVARD BUS. REV. (Sept.-Oct. 2017) (“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.”)

corporations should be encouraged to make decisions that deliberately sacrifice economic value in favor of the public interest.¹²

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 officers and directors substantial latitude to consider the interests of non-shareholder constituencies, and indeed that principle is 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 a public purpose.¹³ In advocating this shift, commentators identify several justifications, including the claims that (a) by focusing on short-term profit maximization, corporations are inflicting substantial external harm on non-shareholder groups, (b) such behavior is a misuse of the state-conferred privileges associated with the use of the corporate form, and (c) repurposing large corporations offer the only practical solution to persistent regulatory failures in addressing 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. More specifically, arguments today about the purpose of the corporation do not address the key predicate questions: what it means for a corporation to have a purpose, whether corporations should have a purpose at all and, if so, why. We believe that only by answering these questions can we lay a theoretical framework for further defining the aims, goals and regulation of the corporation.

The technical concept of corporate purpose has its roots in the statutory requirement that corporations articulate in their charter the purpose for which they are formed. This requirement goes back to the time of special purpose charters, which were drafted to meet statutory limitations on the use of the corporate form.¹⁴ The specification of a corporation's purpose in its charter operated as a legally enforceable constraint on corporate operations. Actions by

¹² See, e.g., Dorothy S. Lund, *Making Corporate Social Responsibility Pay*, at 3. (“The difficult question, however, is how to encourage corporations to make public interested choices that are *bad* for business, or at least, not clearly good.”). See also Einer Elhauge *Sacrificing Corporate Profits In The Public Interest*, 80 N.Y.U. Law 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.”)

¹³ We discuss this further *infra* at notes []-[] and accompanying text.

¹⁴ See *infra* notes []-[] and accompanying text.

the corporation that exceeded the scope of its charter could be attacked as *ultra vires*.¹⁵

Modern corporation statutes eliminated the restrictions on the use of the corporate form. These statutes also did not specify or limit the permissible purposes for which a corporation may be formed so long as those purposes are “lawful.”¹⁶ As a result, most modern corporate charters contain a generic statement that the purpose of the corporation is to engage in any lawful activity. 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.¹⁷

This formulation neither explicitly endorses a for-profit purpose nor imposes any meaningful guidelines on managerial decision-making. At the same time, the statutes do not appear to restrict charter provisions that either endorse or reject a shareholder profit maximization norm. As such, the statutory requirement raises the first question implicated by the debate over corporate purpose – are those advocating a reform to corporate purpose proposing that corporations amend their charters and, if so how? Assuming that charter provisions articulating a purpose weighted towards societal interests are permitted by existing statutory law (and we believe they are), would they be prudent, and would they have any legal effect on corporate actions?

As we detail below, we doubt that proponents of a shift in corporate purpose are contemplating broad-based charter amendments. Among the concerns raised by such an approach is the manner by which a corporation would articulate a move away from shareholder primacy to stakeholder value through a charter provision, the process by which corporations would implement this new purpose and whether the corporation is structured appropriately under current statutory law to implement this purpose.¹⁸ Indeed, although we believe

¹⁵ We discuss this further *infra* at notes []-[] and accompanying text.

¹⁶ See Delaware General Corporate Law § 102(a) (“The certificate of incorporation shall set forth (3) The nature of the business or purposes to be conducted or pursued. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware”)

¹⁷ Second Amended and Restated Certificate of Incorporation of DowDupont Inc., available at [https://s23.q4cdn.com/116192123/files/doc_governance/2019/05/DD_-_Certificate_of_Incorporation-\(003\).pdf](https://s23.q4cdn.com/116192123/files/doc_governance/2019/05/DD_-_Certificate_of_Incorporation-(003).pdf)

¹⁸ There are also technical issues such as whether appraisal rights would be available to dissenting shareholders if a corporation amended its charter to shift from shareholder primacy to stakeholder value. Delaware, for example, provides dissenting shareholders with

that the pursuit of stakeholder and societal interest can be reflected in the purpose provisions of traditional for-profit corporations (as opposed to public benefit corporations), few corporations contain any language in their charters reflecting a commitment to societal value, and those that do so frame that commitment in such a way as to provide questionable legal impact.¹⁹

A revised corporate purpose, as put forth by its proponents, is more likely to function as a statement of the corporation's operational objectives or as a set of principles constraining the corporation's behavior. The challenge then, is to understand how such a statement fits within the existing framework of corporate law. First, does corporate law compel that corporations be operated with the primary objective of producing economic value for shareholders or is a corporation free to adopt an alternative corporate purpose? Second, how does a corporation decide what its purpose is, and who gets to make that decision? Third, what legal effect does a corporation's statement of purpose have? And finally, why might a statement of purpose be useful?

We note that these questions are all independent of the question that underpins much of the current debate over corporate purpose: the normative question of what a corporation's purpose should be – that is, the debate between shareholder primacy and some broader notion of societal value.²⁰ They are also independent of a range of process questions. One critical such question is whether shareholder profit maximization norm operates as a default such that, in the absence of an effective articulation of corporate purpose, a corporation should be operated with the goal of pursuing economic value for shareholders. A second is, to the extent that a corporation can and does identify its purpose, can that purpose be changed and how?

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 to evaluating the existing debate and determining corporate purpose. Our starting point, in Part I, is the history of formal corporate purpose as articulated in the corporate charter. We show that the idea of corporate purpose is one of accident – a product of historical forces rather than intention. In other words, the idea that corporations should have a corporate purpose of profit maximization, let

appraisal rights when a traditional corporation converts to a benefit corporation. D.G.C.L. § 363(b)) (appraisal rights available if a corporation amends its charter to convert from a corporation to a public benefit corporation or a public benefit corporation changes its purpose). This type of charter amendment would appear to raise the same issues and concerns leading to the applicability of appraisal rights in such an instance.

¹⁹ See *infra* Part [] and accompanying text.

²⁰ See David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181 (2014) (highlighting that corporate law scholars differ both on the positive question of what is a permissible corporate purpose and the normative question about what corporate purpose should be).

alone shareholder primacy is not one that has ever been explicitly reflected in the black letter law. And statutes have never required that corporations articulate or adhere to a purpose of profit maximization or shareholder primacy. We then consider in Part II arguments that a corporation is legally required to pursue shareholder value, and we reach the conclusion that there is limited support for this premise. At a minimum, we argue that the mutability of the corporate charter and the flexibility of the business judgment rule give corporate managers ample decision to consider stakeholder and societal interests.

In Part III we consider theoretical justifications for a corporate purpose. We explore the economic rationale for shareholder primacy and find it lacking. We analyze and reject the claim, grounded in the personhood theory of the corporation, that the corporation has ethical, moral or social obligations that generate an entity-level purpose independent of the objectives of its constituencies.²¹ In Part IV we consider and reject the argument that an articulation of corporate purpose in broader or more socially-oriented terms is likely to affect managers' operational choices. We argue that the highly-touted promises of a commitment to societal value are largely vague and aspirational. At the same time, we question the extent to which attention to stakeholder interests is inconsistent with the economic mission of the corporate enterprise.

That conclusion, however, does not lead us to reject the value of corporate purpose. Instead, in Part V we offer a new understanding of the debate over corporate purpose grounded in the instrumental nature of the corporate form itself. We argue that, as currently framed, the extensive debate over corporate purpose does not adequately reflect the nature of the corporation as a collective enterprise. Corporations involve a variety of corporate constituencies – including the corporation's officers, directors, shareholders, creditors, employees, customers and suppliers – each of which, through different mechanisms, has a stake in making a claim with respect to the corporation's priorities. We argue that corporate purpose manages these expectancy interests. Corporate purpose can serve to signal a corporation's priorities and to enable constituencies to determine their willingness to engage with the corporation based on the degree to which they share those priorities. Corporate purpose articulates the metrics by which managers are to be held accountable.

Finally, an articulated corporate purpose informs stakeholders as to the degree to which they must seek alternative mechanisms to protect their claims through contract or regulation. Notably, our instrumental account views corporate purpose as a mechanism to provide coherence, transparency and coordination of corporate decisions. We conclude, however, that the rationale

²¹ See, e.g., Gregory Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing conception of corporation as a person).

for corporate purpose is not, as a general matter, to operate as a legal constraint.²² Rather traditional contract and governance mechanisms enable corporate participants to hold managers accountable for adhering to the corporation's articulated purpose.

Having provided an instrumental justification for corporate purpose, we consider on a preliminary basis the extent to which this justification informs our analysis of the positive question – what is a corporation's purpose, at least in the absence of a formal articulation? We argue that our instrumental view of the corporation brings a new perspective to the debate and conclude that, as a default matter, the purpose of a corporation should be understood as maximizing the economic value of the firm. We argue that this default is the only position that adequately protects existing expectancy interests. We stress that a focus on economic value does not imply indifference to the interests of non-shareholder stakeholders; indeed, we maintain that, in pursuing long term economic value, corporate managers are not merely permitted but compelled to consider the effect of the corporation's operations on stakeholders and society at large. We leave for future work the normative questions of whether a corporation can or should modify this default as well as the pragmatic question of how it should do so.²³

Ultimately, our findings are designed to provide more rigor and a framework to the current debate about corporate purpose. The world is certainly in flux, as is the corporation. But a sustainable and workable vision of the corporation requires a theoretical foundation – one which we provide in this article and which we will further develop in future work.

I. The History of Corporate Purpose

A. The Accidental Corporate Purpose

In 16th century England, the mechanism of chartering was responsible for the requirement that early corporate firms explicitly specify a purpose. Because there was no form of self-chartering available, meaning that a business could not secure the right to operate in the corporate form simply by filing a

²² Under our view of corporate purpose, a corporation might commit to prioritize particular 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 that limited a corporation's power or operations. See generally Ofer Elder, *Designing Business Forms to Pursue Social Goals*, VA. L. REV. (forthcoming 2020) (discussing the use of incentivizes and organization structure for corporations to effectively pursue social mission).

²³ See Jill E. Fisch & Steven Davidoff Solomon, *Can a Corporation Change its Purpose?* (forthcoming 2021); Jill E. Fisch & Steven Davidoff Solomon, *Stakeholder vs. Stockholders: Competing Claims for Corporate Purpose* (forthcoming 2021).

charter, the first English corporate entities were required by law to receive Parliamentary sanction for a formation charter. Prospective firms sought to operate in the corporate form for a specified purpose and so by default Parliament placed this purpose in their charters. Notably, the earliest corporate charters were not utilized for for-profit businesses but for churches, municipalities and universities.²⁴

By the 17th century, Parliament began to issue corporate charters to trading companies.²⁵ Thus, the infamous South Sea Company²⁶ created to reduce the British national debt had a monopoly charter on trading in South America and the nearby seas (which due to lack of knowledge of geography was assumed to be the Pacific South Seas). Notably, however, the purpose reflected in these businesses could be called a public purpose to a very limited extent. Although the state's interests in trade and economic development (and from not having to fund that development through public debt) were served by these charters, the primary rationale for the corporate form (and its predecessor, the joint stock company) was to rationalize the role and interests of private suppliers of capital.²⁷

The practice of requiring corporations to specify a purpose in their charters was transferred to America. Until the late 1800s, chartering was subject to state legislative approval.²⁸ A corporation would be formed to operate trains, and its corporate purpose legislatively specified in its charter its right to do so. During the 1800s, legislative mistrust of corporate entities – a legacy of Jeffersonian ideals -- often led to limited grants of authority and purpose for commercial corporations.²⁹ In addition, “the size and level of business activity had not yet evolved to a point of needing the legal benefits provided by the

²⁴ Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 789.

²⁵ *Id.* at 791-92.

²⁶ The official name of the company was “The Governor and Company of the merchants of Great Britain, trading to the South Seas and other parts of America, and for the encouragement of fishing”. See L. W. HANSON, *CONTEMPORARY PRINTED SOURCES FOR BRITISH AND IRISH ECONOMIC HISTORY 1701-1750*, at 1712 (Cambridge Press 1963).

²⁷ See Dari-Mattiacci, Giuseppe, Oscar Gelderblom, Joost, Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J. LAW, ECON. & ORG. 193 (2017).

²⁸ Early use of the corporate form in the United States was also limited to entities organized for a public purpose. See Blair, *supra* note 24 at 793 n. 47 (citing research by Andrew Creighton reporting that prior to the American Revolution, only seven corporations in the U.S. colonies were chartered for businesses other than public works, banks or insurance). See also ANDREW LAMONT CREIGHTON, *THE EMERGENCE OF INCORPORATION AS A LEGAL FORM FOR ORGANIZATIONS* 39 (1990) (unpublished Ph.D. dissertation, Stanford University).

²⁹ NAOMI R. LAMOREAUX AND WILLIAM NOVAK, EDs., *CORPORATIONS AND AMERICAN DEMOCRACY* (Cambridge, Mass.: Harvard University Press, 2017).

corporate form.”³⁰ As a result, most early U.S. corporate charters were issued for public purposes – religious organizations, cemeteries and charities.³¹

Not only were early corporations required to identify a specific corporate purpose in their charters, but the requirement had legal ramifications. State law required that corporations confine their operations to the specific purpose identified in their charter, and activities outside the scope of that specification were beyond the corporation’s legal power or *ultra vires*.³² Such actions were either *void ab initio* or could be voided at the behest of the shareholders. The *ultra vires* doctrine served to protect 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.

A classic example of the *ultra vires* doctrine is the English case of *Introductions Ltd. v. National Provincial Bank, Ltd.*³³ In that case the court held that it was *ultra vires* for a company with a purpose to originally provide visiting facilities for the Festival of Britain and which subsequently operated a business providing deck chairs at a seaside resort to engage in pig breeding. As the court put it, “one cannot have an object to do every mortal thing one wants, because that is to have no object at all. There was one thing that this company could not do and that was to breed pigs.”³⁴

Similarly in the U.S., the historical application of the doctrine is illustrated by U.S. Supreme Court’s decision in *Thomas v. R.R. Co.*,³⁵ in which the Court rejected the view that a railroad company had the power to lease its property to the plaintiffs in exchange for a receipt of half the plaintiffs’ profits. As the court explained: “the powers of corporations organized under legislative statutes are such and such only as those statutes confer.”³⁶ The Court noted, in particular, that a corporation exercised its powers by virtue of a franchise granted by the state, a franchise that was “intended in large measure to be exercised for the public good.”³⁷ Engaging in actions beyond those authorized by the

³⁰ 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).

³¹ *Id.*

³² See generally Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186-87 (1985) (“Before the Civil War...the *ultra vires* doctrine was strictly applied by American courts...By 1930, the *ultra vires* doctrine was, if not dead, substantially eroded in practice...”)

³³ 1 All E.R. 887 (1969)

³⁴ *Id.*

³⁵ 101 U.S. 71 (1880).

³⁶ *Id.* at 82.

³⁷ *Id.* at 83.

franchise were, in the view of the Court, contrary to “the relations which the charter has arranged between the corporation and the community.”³⁸

This historical view and the legal guardrails of corporate purpose were transformed by two developments. One was the industrial revolution, which led to increased demand for the corporate form to facilitate the aggregation of the substantial amounts of capital necessary for the growing scale of business activity.³⁹ The other, prompted by a growing acceptance that it was appropriate to allow the use of the corporate form for general commercial operations, was a transition from special charters to general charters which allowed corporations to meet the statutory requirement by stating generally that they were intended to engage in any lawful purpose or business activity.⁴⁰ New York adopted a broadly available incorporation statute in 1811, and Connecticut followed in 1837 with a statute that allowed incorporation for any lawful purpose, but the general purpose corporation did not take off until 1894 when New Jersey transitioned to a self-chartering format which permitted general purpose statements.⁴¹ Other states, including Delaware followed.⁴² This legislative transition enabled corporations to define their purpose as engaging in any action permitted by law.⁴³ Corporations no longer had to adhere to a specific mission, one approved by a state legislature. Instead they could do anything within the bounds of the law.

Today, the *ultra vires* doctrine has fallen into disrepair.⁴⁴ In part, corporations began to use the doctrine in an opportunistic manner, avoiding

³⁸ *Id.* at 84.

³⁹ The origins of the capital markets in the United States grew out of the needs of railroads and other types of operations that required large scale capital. See JOHN STEELE GORDON, *THE GREAT GAME: THE EMERGENCE OF WALL STREET AS A WORLD POWER, 1653-2000* 76 (1999)

⁴⁰ See Hamill, *supra* note 30, at 101. A similar development occurred in England, although it was not formalized until the adoption of the 1985 Companies Act. See 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. & COMM. L.J. 67, 81 (2006).

⁴¹ Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. Econ. Hist. 677 (1989);

⁴² Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976).

⁴³ See R. Franklin Balotti & Jesse A. Finkelstein, *A Brief History Of The General Corporation Law Of The State Of Delaware And The Amendatory Process* in BALOTTI AND FINKELSTEIN'S *DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* (3rd Edition, 2020-1 Supplement). That the scope of corporate purpose can serve a role in protecting the expectancy interests of corporate participants is important, however, and a point to which we will return shortly.

⁴⁴ DGCL § 124 (“No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was

obligations to third parties when it was desirable to do so.⁴⁵ The court and statutory response was to limit the remedy available under the doctrine to injunctions of the act (to the extent it was not completed) rather than personal liability of the officers or directors involved.⁴⁶ In addition, the transformation of corporate charters to provide that a corporation could engage in any lawful business, severely limited the scope of actions that could be characterized as beyond the scope of a corporation's power.⁴⁷ In other words, today the corporate purpose of a corporation is frequently unconstrained by charter language that allows any action permitted by law. The consequence is that there is little left of corporate action which can be the grounds for an *ultra vires* action.

B. Modern Purpose Provisions in Charters

As a result of the developments described in the preceding section, the purpose of a corporation, as set out in its charter, has become an unspecified one. The modern corporate charter may have a general purpose provision such as that in the DowDupont charter described in the introduction⁴⁸ or a more expansive articulation of the scope of the corporation's operations. In either case, the language of the charter neither operates as a meaningful constraint on the corporation's business activity nor takes a position on the relative importance of shareholder versus stakeholder interests.

Although the vast majority of modern corporations appear to rely on general purpose provisions, some provide greater specification. For example, 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

without capacity or power to do such act or to make or receive such conveyance or transfer, . . .")

⁴⁵ See, e.g., 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, 1310 (explaining that creditors and suppliers "began to be the victims of the doctrine").

⁴⁶ DGCL § 124.

⁴⁷ But see, e.g., Greenfield, *supra* note 45, at 1282 (arguing that ultra vires doctrine can be used to make "compliance with the law an enforceable obligation within corporate law").

⁴⁸ See also Philip Morris Articles of Incorporation Article II ("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.") available at https://www.pmi.com/resources/docs/default-source/our_company/articles-of-incorporation.pdf?sfvrsn=dfe2b0b5_0; Tesla Charter Article III ("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") available at <https://www.sec.gov/Archives/edgar/data/1318605/000119312510017054/dex31.htm>

applying for patents and trademarks.⁴⁹ Similarly, Ford Motor Company incorporated under the name Eastern Holding Company in 1919 has a corporate purpose that spans a page and includes the manufacture of automobiles as well as airplanes.⁵⁰ Even these more specific charters avoid specifying a corporate purpose akin to that which existed in the early 1800s.

Notably, however, the typical corporate charter is silent with respect to the shareholder/stakeholder/society debate. It neither identifies a purpose of maximizing profit for the benefit of shareholders or otherwise nor articulates a broader societal mission. Indeed, although Salesforce is widely recognized for its public statements asserting its commitment to pursue broad societal value, the purpose provision in Salesforce's charter reads: "[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 Corporation Law of Delaware."⁵¹

A handful of corporations go further.⁵² For example, Nestlé, a Swiss Corporation, has the following articulation of purpose in its Articles of Association:

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.

⁴⁹ See Amended and Restated Articles of Incorporation of PepsiCo Inc., Art. 4, available at https://www.pepsico.com/docs/album/corporate-governance/amendedandrestatedarticlesofincorporation.pdf?sfvrsn=e84ce4e_12

⁵⁰ See Restated Certificate of Incorporation of Ford Motor Company, Art. Third, available at <https://www.sec.gov/Archives/edgar/data/37996/000003799601000014/0000037996-01-000014-0002.txt>

⁵¹ See Amended And Restated Certificate of Incorporation of Salesforce.Com, Inc., Art. Third, available at <https://sec.report/Document/0001193125-04-065496/dex32.htm>

⁵² We note that in *Hobby Lobby*, the US 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." See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 703 The Court did not specify how this statement was incorporated into the company's governing documents or address the question of whether it was legally binding.

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.⁵³

The language about long-term sustainable value creation was added through amendments adopted in 2008 and supported by 99% of shareholders.⁵⁴ Novo Nordisk a Danish company, states on its website that it is “one of only four companies in the world who have incorporated our philosophy into our company bylaws. 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.”⁵⁵ Novo Nordisk’s actual governing document is more modest. Its articles of association state that:

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.⁵⁶

Notably, these articulations are incredibly vague. They do not forswear the pursuit of shareholder economic value, even if it comes at the expense of stakeholder or societal interests. Nor do they reflect actual commitments, other than commitments to striving for sustainability. Significantly, Philip Morris International, which manufactures cigarettes and is hardly the poster child for pursuing long term societal value, for example, makes the same commitment, albeit not in its charter.⁵⁷ On its website, the company explains that “[w]e strive to continuously improve the sustainability of our business and to contribute to

⁵³ Articles of Association of Nestlé S.A., available at https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_governance/articles-of-association-of-nestle-en.pdf

⁵⁴ See *Nestlé: Articles Of Association To Be Thoroughly Amended*, ETHOS, available at <https://ethosfund.ch/en/news/nestle-articles-of-association-to-be-thoroughly-amended> (last accessed Feb. 26, 2020); David Frick, *Refocusing Governance on Value Creation*, ICGN Yearbook 2018.

⁵⁵ <https://www.novonordisk-us.com/whoweare/about-novo-nordisk/triple-bottom-line.html> See Novo Nordisk, *Triple Bottom Line*, available at (last accessed Feb. 20, 2020).

⁵⁶ See Articles of Association of Novo Nordisk A/S, available at <https://www.novonordisk.com/content/dam/Denmark/HQ/aboutus/documents/corporate-governance/articles-of-association-novo-nordisk.pdf> (last accessed Feb. 20, 2020).

⁵⁷ 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 International Inc. Amended and Restated Articles of Incorporation, Article I, available at <https://www.sec.gov/Archives/edgar/data/1413329/000119312508023093/dex31.htm> (last accessed Feb. 20, 2020).

the global sustainability agenda.”⁵⁸ To date, it is unclear how the statement in Nestlé’s charter has affected its operations or is any different than the broad, enabling statements of corporate purpose. Nor is it clear how these statements, in a charter or elsewhere, would be legally enforced.

Furthermore, we see no indication that the purpose movement contemplates an effort to revise corporate charters even 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 and sale of hazardous products. To be clear, we are not certain that the vague language in these two charters is constraining or enforceable in a meaningful way. However, we believe that more explicit charter provisions would be valid methods of constraining corporate operations, consistent with the historical role of the corporate purpose provision as managing the expectations of a corporation’s constituencies (as well as the state and the general public). The question then is, in the absence of such language, how should we understand the purpose of a corporation that is formed to engage in any lawful business? We turn to that question in the next Part.

II. Purpose and Shareholder Primacy

As the use of the corporation shifted to private commercial enterprises, the conception of corporate purpose in terms of shareholder economic value solidified. Despite the fact that neither value maximization nor shareholder primacy has ever been articulated as statutory requirements, a few courts began to incorporate these concepts into corporate purpose.⁵⁹ 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.”⁶⁰

The view that corporations should be managed with the objective of maximizing shareholder economic value found perhaps its most explicit articulation in the seminal 1919 case of *Dodge v. Ford*.⁶¹ In *Dodge v. Ford*, the Michigan Supreme Court held that a corporation’s purpose was to maximize shareholder profit. More specifically, the court in that case stated “[a] business corporation is organized and carried on primarily for the profit of the

⁵⁸ Philip Morris International, *Reporting on Sustainability*, available at <https://www.pmi.com/sustainability/sustainability-report> (last accessed Feb. 20, 2020).

⁵⁹ See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 169 (2008).

⁶⁰ *Arbuckle v. Woolson Spice Co.*, 1901 WL 708, at *2 (Ohio Cir. Ct. Jan. 12, 1901).

⁶¹ 204 Mich. 459 (MI 1919).

stockholders. The powers of the directors are to be employed for that end.”⁶² The case, which is widely discussed by commentators (but not widely cited by courts)⁶³ forms the central foundation of the argument that the purpose of the for-profit corporation is to maximize value for shareholders.⁶⁴ In the wake of *Dodge v. Ford* there have been a few other non-Delaware cases which have addressed the issue, but none as specifically as *Dodge*. The most notable of these is *Shlensky v. Wrigley* which upheld the decision of a board of directors to refuse to install night lights at the stadium for the Chicago Cubs citing the holding of *Dodge* and the discretion afforded directors to act in “the best interests of the corporation and the stockholders.”⁶⁵

This argument is buttressed by Delaware case law from the 1980s involving mergers and acquisitions. In *Revlon v. MacAndrews & Forbes Holdings, Inc.*,⁶⁶ the court held that a board facing a change of control was required to obtain the “highest price for the benefit of the stockholders.”⁶⁷ *Revlon* explicitly rejected the argument that, at least in the context of a case sale, a corporate board could prioritize the interests of a non-shareholder constituency (noteholders) over the interests of the shareholders.

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 non-shareholder constituencies. However, reading *Revlon* to incorporate a broad requirement of shareholder primacy into Delaware takeover law may be overly expansive. In *Unocal v. Mesa Petroleum Co.*,⁶⁸ the Delaware Supreme Court held that when a corporation took defensive action in response to a takeover threat, the board must show it had “reasonable grounds for believing that a danger to corporate policy and effectiveness existed”⁶⁹ Notably, however, unlike *Revlon*, *Unocal* did not explicitly identify

⁶² *Id.* at 507.

⁶³ According to a Westlaw search as of July 26, 2019, the case has been cited only in 71 opinions in 100 years.

⁶⁴ 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 (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.”). See generally David B. Guenther, *The Strange Case Of The Missing Doctrine And The “Odd Exercise” Of Ebay: Why Exactly Must Corporations Maximize Profits To Shareholders?*, 12 VIRG. L & BUS. REV. 427 (2018).

⁶⁵ *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. 1968).

⁶⁶ 506 A.2d 173 (Del. 1985).

⁶⁷ *Id.* at 182.

⁶⁸ 493 A.2d 946 (Del. 1985).

⁶⁹ *Id.* at 955.

shareholders as the only constituency 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."⁷⁰ The court went on to explain that 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)."⁷¹

Similarly, in the later case of *Time v. Paramount*,⁷² the Delaware Supreme Court provided more equivocal guidance on the importance of shareholder primacy.⁷³ As with *Revlon*, the court emphasized that the board's obligation in the takeover context ran to shareholders. In addition, the court described this obligation in terms of economic value, explaining that the board's "mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability."⁷⁴ The Court qualified this mandate however by noting 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." In addition, 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.

Beyond this handful of takeover cases in Delaware and non-takeover cases outside Delaware, support for the claim that corporate law requires shareholder value maximization has come largely from academic discourse. In the 1930s, Professors Berle and Dodd debated this point in the *Harvard Law Review*.⁷⁵ Dodd argued that corporations should be run to serve the public interest, believing that corporate managers, if they did so, would "use their corporations to resolve the economic and social problems of the Great Depression."⁷⁶ Although Berle's position is commonly characterized as defending shareholder primacy, Professors Bratton & Wachter read Berle as sympathizing with Dodd in terms of corporate purpose but viewing a more

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. Sup. 1990).

⁷³ See, e.g., *eBay Domestic Holdings, Inc. v. Newmark* 16 A.3d 1, 32 (Del. Ch. 2010) (describing *Time* decision as the court's "muted embrace" of the board's effort "to protect a specific corporate culture"); *id.* at 33 ("Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders").

⁷⁴ *Paramount Communications, Inc.*, 571 A.2 at 1150 (emphasis added).

⁷⁵ See Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARVARD L. REC. 1148 (1932) (asserting that "all powers granted to a corporation or to the management of the corporation . . . [are] at all times exercisable only for the ratable benefit of the shareholders."); E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARVARD L. REV. 1932 (1932) (arguing that the corporation is an "economic institution which has a social service as well as a profit-making function").

⁷⁶ *Id.* at [].

confined objective of maximizing shareholder value as necessary to limit managerial agency costs.⁷⁷

The shareholder primacy component of Berle's argument gained considerable traction in the post-war era. In 1970, Milton Friedman famously argued that corporations should focus on maximizing profits and that any conflicting social goal was illegitimate and inefficient.⁷⁸ A host of corporate leaders and academics embraced Friedman's arguments.⁷⁹ This was reinforced by the 1997 statement of the Business Roundtable that "the paramount duty of management and of boards of directors is to the corporation's stockholders."⁸⁰

We question, as have other commentators, whether the handful of cases and academic debate provide a sound legal foundation for the claim that corporations are obligated to focus on maximizing shareholder value.⁸¹ *Dodge* and *Shlensky* are old cases and neither involves a Delaware court applying Delaware corporate law. More significantly, *Revlon*, *Unocal* and *Time* all arose in the specialized takeover context. Takeover decisions 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. In addition, Delaware's approach to takeover differs from that of other states, many of which have explicitly declined to follow *Unocal*, *Revlon* or both. 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.

⁷⁷ William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle And The Modern Corporation*, 34 IOWA J. CORP. L. 99, 146-47 (2008).

⁷⁸ Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG. 32 (Sept. 13, 1970) (theorizing that the only "social responsibility of business is to increase its profits")

⁷⁹ See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15-22 (1991); HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* (1972); Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441, 449-51 (2001); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 Law & Contemp. Probs. 9, 11 (1999); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1023 (1996); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 113 (1987).

⁸⁰ The Business Roundtable, *Statement on Corporate Governance* (1997), available at <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf>

⁸¹ See Stout, *supra* note 59.

Perhaps the most difficult case to understand from the perspective of corporate purpose is *eBay Domestic Holdings, Inc. v. Newmark*.⁸² In *eBay*, the Delaware Chancery Court applied the *Unocal* test to assess craigslist's adoption of a poison pill against its own shareholder, eBay and found that it exceeded the board's authority.⁸³ The Court did so by criticizing the grounds the craigslist board asserted to justify invocation of the poison pill, namely that eBay was attempting to force the company to earn more profit.⁸⁴ The Court rejected this argument however stating 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."⁸⁵

Although this language, like that in *Time*, appears to contemplate that a corporation's purpose will include profit maximization, it neither characterizes profit maximization as the exclusive objective nor evaluates a corporation's potential tradeoff between the interests of shareholders and those of other constituencies. Instead, *eBay* can be understood 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 court's decision was limited to prohibiting craigslist from implementing a poison pill,⁸⁷ a decision that, again, is based on the special context of corporate takeovers. The decision does not conclude that the craigslist board acted improperly by "providing a website for online classifieds that is largely devoid of monetized elements" and in fact, the court observes 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."⁸⁸

A further concern is that all these decisions can arguably be understood as implicating the duty of loyalty rather than the duty of care. As Professor Lynn Stout has observed, *Dodge v. Ford* is perhaps better understood not for the

⁸² 16 A.3d 1 (Del. Ch. 2010).

⁸³ *Id.* at 28.

⁸⁴ *Id.*

⁸⁵ *Id.* at 34.

⁸⁶ *See id.* at 34 (observing that the craigslist founders were acting "because of their own personal preferences").

⁸⁷ *Id.* at 34 ("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).

⁸⁸ *Id.* We view the *eBay* case as consistent with the Delaware court's longstanding holdings that fiduciaries cannot take inequitable conduct. The court in *eBay* cited the case of *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del.1971) for this proposition. *eBay*, 16 A.3d at 39.

premise that corporations have a duty to prefer shareholder interests to those of other stakeholders but for the principle that controlling shareholders have a duty “not to oppress minority shareholders.”⁸⁹ Similarly, as Professor Zachery Gubler explains, an “animating principle” behind *Revlon* and the other Delaware takeover cases is regulating inherent conflicts of interest. This principle is based on the concern that conflicts of interest are both ubiquitous in takeover cases and that in the takeover context the costs of inadequately policed conflicts are particularly high.⁹⁰

The argument that these cases are about managerial loyalty rather than shareholder primacy is reinforced by recent developments in the Delaware courts’ *Caremark* jurisprudence. The *Caremark* doctrine 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.”⁹¹ Although *Caremark* duties were originally articulated as a component of the duty of care,⁹² the Delaware courts subsequently explained that the fiduciary duty violated by a lack of director oversight is, instead, the duty of loyalty.⁹³

At the same time, recent Delaware decisions have suggested 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 *Caremark* claim that Blue Bell ice cream’s board failed to implement a board level food safety program despite the presence of both “red” and “yellow” flags.⁹⁴ The Court specifically highlighted the importance of customer interests to Blue Bell’s continued operational success. The Court stated in this regard 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 that its products were safe to eat.”⁹⁵

⁸⁹ Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 Va. L. & Bus. Rev. 163, 168 (2008)

⁹⁰ Zachery J. Gubler, *What’s the Deal with Revlon?* (working paper, draft dated Feb. 24, 2020).

⁹¹ *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019) citing *Stone v Ritter*, 911 A.2d 362, 364 (Del. 2006).

⁹² See, 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”).

⁹³ 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.”).

⁹⁴ *Marchand v. Barnhill*, 212 A.3d 805, at 809.

⁹⁵ *Id.*

In the wake of *Marchand* there has been an uptick in *Caremark* claims in the Delaware courts.⁹⁶ There has also been a renewed focus by corporations on risk assessment and compliance.⁹⁷ While *Caremark* claims and the renewed interest in them do not directly raise purpose claims, they highlight the importance of a board's attention to ESG considerations rather than merely short term profit maximization, particularly in regulated industries.⁹⁸

Our analysis of the extent to which shareholder primacy is legally required has focused largely on Delaware law. Outside Delaware, the situation is more complicated. First, in the *Hobby Lobby* decision, the U.S. Supreme Court explicitly 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 economic value. 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.⁹⁹

To be sure, the *Hobby Lobby* decision was based in part on the fact that a 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,

⁹⁶ See, e.g., *In re Clovis Oncology*, 2019 WL 4850188, at *1 (Del Ch. 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.”)

⁹⁷ See, e.g., Cleary Gottlieb, *Not So Sweet: Delaware Supreme Court Revives Caremark Claim, Provides Guidance on Directors' Oversight Duties*, Jun 24, 2019 (outlining procedures board's should take in the wake of the *Marchand* decision), available at https://www.clearymawatch.com/2019/06/not-so-sweet-delaware-supreme-court-revives-caremark-claim-provides-guidance-on-directors-oversight-duties/#_ftn2 (last accessed Feb. 27, 2020).

⁹⁸ See John Mark Zeberkiewicz & Robert B. Greco, *In re Clovis: Considering Caremark Claims after Marchand*, 22 *INSIGHTS* (11), at 3 (Nov. 2019) (“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.”)

⁹⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770-2771 (citations omitted).

albeit one determined by the shareholders themselves, providing that purpose can be ascertained.¹⁰⁰

Second, 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.¹⁰¹ An example is the Wisconsin Constituency statute which 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.”¹⁰² These statutes were adopted in the 1980s and were principally designed to address takeovers.¹⁰³ Some specifically apply only in the case of takeovers.¹⁰⁴ Delaware has not adopted such a statute, but some Delaware corporations have adopted equivalent positions in their charters.¹⁰⁵ We are unaware of any Delaware case exploring the validity or legal significance of such a charter provision.

In no case though do these statutes specify how corporate decisionmakers are to weigh or prioritize the interests of different constituencies, though their text clearly authorizes corporate decisions that do not focus exclusively on maximizing economic value for shareholders.¹⁰⁶ Nonetheless,

¹⁰⁰ Notably, the Court did not identify the formal manner in which Hobby Lobby articulated or committed to its purpose.

¹⁰¹ See Matt D. Cain, Stephen McKeon & Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from 50 Years of Hostile Takeovers*, 124(3) J. FIN. ECON. 464 (2017) (documenting the adoption of constituency laws); Christopher Geczy, et al. *Institutional Investing When Shareholders are not Supreme*, 5 HARV. BUS. L. REV. 73, 95 (2015) (reporting that 33 states currently have constituency statutes).

¹⁰² Wis. §180.0827.

¹⁰³ See Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 399 (1993) (“The legislative history clearly shows that the Pennsylvania legislature designed the statute with takeovers in mind.”)

¹⁰⁴ See, e.g., CONN. GEN. STAT. ANN. § 33-313(e) (West Supp.1995) (applying constituency statute in the context of a takeover, consolidation or a sale of all or substantially all of the corporation's assets).

¹⁰⁵ See, e.g., Restated Certificate of Incorporation of the McClatchy Corp., Art. V (“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.”), available at <https://www.sec.gov/Archives/edgar/data/1056087/000119312506154574/dex31.htm>. 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).

¹⁰⁶ See generally Debow & Lee, *supra* note 103, at 403 (discussing the role of shareholder interests in constituency statutes).

both the *Hobby Lobby* case and constituency statutes provide some support for the claim that shareholder primacy is not legally compelled, at least as a matter of positive law.¹⁰⁷

III. Theories of Corporate Purpose

Having concluded that there is questionable support for any particular corporate purpose as a matter of positive law, we explore in this section theories of the corporation and the extent to which they provide guidance in identifying a particular corporate purpose. We first examine economic theories of the corporation; we then turn to personhood theories of the corporation. We conclude that neither of these theories in and of themselves provide a rationale for a corporation having a purpose.

A. Economic Theory and Corporate Purpose

For many years, economic theory has defended shareholder primacy on normative grounds, as the most efficient operating principle. The argument reasons that, because shareholders are the residual claimants in a corporation,¹⁰⁸ maximizing shareholder value has the effect of maximizing firm value.¹⁰⁹ 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.¹¹⁰

Three subsidiary efficiency considerations apply. First, shareholder economic value is a particularly transparent metric, especially in the context of public corporations in which it can be measured, albeit perhaps 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

¹⁰⁷ See also Geczy et al., *supra* note 101, at 115 (arguing that constituency statutes “signal a change in the law” and “expand director authority”).

¹⁰⁸ See Del. Gen. Corp. L. § 281 (providing for distribution of all remaining assets of a dissolved corporation to its shareholders).

¹⁰⁹ See, e.g., Michael Jensen, *Value Maximization and the Corporate Objective Function*, dated Jan. 2, 2000 (“200 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.”), available at https://www.hbs.edu/faculty/Publication%20Files/00-058_f2896ba9-f272-40ca-aa8d-a7645f43a3a9.pdf.

¹¹⁰ 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”).

pro rata.”¹¹¹ 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 legal powers by which to hold officers and directors accountable.¹¹²

More specifically, maximizing shareholder value as an overall operating 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 shareholders as governing agents will maximize profits, resulting in value creation for all firm stakeholders.¹¹³ But this is largely a governance argument, not one which mandates how boards of directors should operate the firm.

Scholars have also offered a number of challenges to the economic rationale for shareholder primacy. First, modern commentators typically reject the view that shareholders are the sole residual claimants in the firm.¹¹⁴ 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.¹¹⁵ Other commentators have attacked the norm as creating wealth destroying externalities.¹¹⁶ Moreover, the principle itself has been attacked head-on for creating short-termism in corporations.¹¹⁷ In this regard, scholars have noted that shareholders themselves have heterogenous interests,

¹¹¹ Henry T.C. Hu & Lay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1352 (2007).

¹¹² See Rock, *supra* note 7 (arguing that corporations have a purpose to maximize shareholder profits in part due to the structure of Delaware law which provides shareholders structural control over the corporation. These attributes are likely overstated. For example, non-shareholder stakeholders can control corporate decisions by contract and can use contractual remedies to hold decisionmakers accountable. See Penn/NYU paper on environmental covenants in lending agreements.

¹¹³ See Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 537-38 (2006).

¹¹⁴ See Amir 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.”)

¹¹⁵ See Van Der Weide, *supra* note 110, at 522; Lee, *supra* note 113, at 565. See also Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006).

¹¹⁶ See generally Lee, *supra* note 113, at 539-562 (discussing academic arguments that shareholder primacy creates wealth-destroying externalities).

¹¹⁷ See William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1284 (2002)

making it difficult to decide exactly to whom, among a group of shareholders, directors and the firm should cater.¹¹⁸

More problematically, even if shareholder value is correlated with firm value, the shareholder primacy view can be challenged by recognizing that, as a practical matter, some societal interests will 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.

Ultimately, we conclude that the debate over the economic foundations of the firm appears secondary to the fundamental issue at hand which is whether corporations should have a purpose. These theories instead take corporate purpose as a given and debate over how the firm should operate based on an economic theory of the firm. These theories do not at the end of the day do more than this by establishing a definitive belief – without legislative decision as to its superiority as a policy matter – that shareholder primacy or another ends should be that purpose. Ultimately, economic theory in these instances can provide an orientation for purpose, at best. But more commonly these theories provide a governance principle implying a corporate purpose without first establishing purpose. We thus need to look elsewhere if we are going to find a foundational basis for corporate purpose.

B. Personhood and Corporate Purpose

Commentators have looked to personhood theory and, in particular, the view that a corporation is a person and thereby has the obligations associated with personhood to identify a basis for corporate purpose. Notably, the personhood theory differs from economic theory in that it tends to be used to justify a corporate purpose that is altruistic or concerned with increasing societal welfare. Characterizing a corporation as a person opens the door to attributing to corporations the moral and ethical duties of regular people.¹¹⁹ The corporate

¹¹⁸ See Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1283 (2008) (investors may not share “a common economic goal”); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733,744-46 (2007); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 579-93 (2006) (describing conflicting shareholder interests).

¹¹⁹ See, e.g., Susannah Ripkin, *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. As a citizen of a larger community, it enjoys certain rights and privileges, but it should also bear the corresponding duties of a citizen ‘to be sensitive to the impact of its activities on others, including not just its

social responsibility movement¹²⁰ was premised on the position that economic entities have moral obligations and offered various rationales for these obligations.¹²¹

The personhood theory of the corporation is articulated most frequently in connection with cases concerning the legal rights of the corporation. In a series of decisions in the 1800s the Supreme Court granted a variety of legal protections to corporations, including the right to sue and be sued, due process rights and contract rights.¹²² More recently, the Supreme Court considered the political and religious rights of corporations. Thus, in *Citizens United v Federal Election Commission*,¹²³ the court revisited its 1970s decisions on political donations and found that corporations had rights to expression underlaid by their associational status.¹²⁴ In *Burwell v. Hobby Lobby Stores, Inc.*,¹²⁵ the Supreme Court held that corporations could have religious rights under the Religious Freedom Restoration Act.¹²⁶

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 misconstrues the rationale behind the decisions.¹²⁷ The Supreme Court's jurisprudence in these cases does not extend constitutional rights on the basis that corporations are like natural persons but instead relies on the provision of rights to corporations in the service of protecting shareholder individuals.¹²⁸ As Professor Elizabeth Pollman has argued, "the so-called doctrine of corporate personhood does not provide guidance for determining the scope of corporate rights."¹²⁹ It instead is a theory of the expression of these rights, based on an associational view of the corporation.

investors, but also employees, creditors, consumers, and the larger society in which it operates.'"). These arguments rely on the claim that individual persons have particular moral and social responsibilities, an issue that we do not address here.

¹²⁰ 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 (2005) (chronicling development of CSR movement).

¹²¹ 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).

¹²² See Stephen Winkler, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (Liveright 2018).

¹²³ 558 U.S. 310 (2010).

¹²⁴ *Id.* at 389-90 (Scalia, J., Concurring) (arguing that First Amendment protections apply to the speech of artificial legal entities).

¹²⁵ 573 U.S. 682 (2014).

¹²⁶ *Id.* at 719.

¹²⁷ See Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785 (2013).

¹²⁸ Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 51 (2014).

¹²⁹ *Id.*

The personhood theory could still serve as the basis for corporate purpose that is grounded in the purpose of individual corporate participants. The challenge with this approach is, as we discuss further below, 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 as well as the ESG issues that they consider important and their willingness to prioritize those interests over economic value.¹³⁰ 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 were to have the legal or ethical obligations of a natural person, imputing such obligations provides little guidance in identifying a particular corporate purpose. Natural persons have a wide variety of purposes, objectives and self-imposed constraints on their pursuit of those objectives. These constraint may be social, moral, ethical, political, religious or philosophical in origin. There is widespread disagreement on the appropriate scope of these constraints and therefore on what constitutes ethical behavior even among individuals. Thus personhood theory is not capable either of answering the question of whether a corporation should have a purpose or, if so, what that purpose should be.

If neither the shareholder primacy argument or the personhood theory provides a foundation for corporate purpose, what then is its rationale? In the next Part we examine current forward-looking theories of corporate governance and purpose in order to examine if these establish a theoretical framework for corporate purpose.

IV. Corporate Purpose as an Operational Constraint

In this Part we explore another potential source of purpose corporate purpose statements which seek to guide and/or constrain the scope of officer and director decision-making authority. In large part, this is the primary focus of corporate actors in the current purpose debate. We thus examine in this Part the

¹³⁰ See Anabtawi & Stout, *supra* note 118. See also Stephen Bainbridge, *The Implications of Investor Ideology for Delaware's Shareholder Ratification Doctrine*, ProfessorBainbridge.com (July 11, 2018), available at <http://www.professorbainbridge.com/professorbainbridgecom/2018/07/the-implications-of-investor-ideology-for-delawares-shareholder-ratification-doctrine.html> (noting that investors have heterogenous preferences and accordingly questioning the message sent by a shareholder vote).

extent to which corporate purpose statements, which do not take the form of charter, bylaw or contractual provisions, are likely to influence operational decisions and provide a basis for corporate purpose.

A. Corporate Purpose Statements

As noted in the introduction, corporate purpose statements largely follow the pattern of the Business Roundtable statement.¹³¹ The Business Roundtable statement reads more fully:

While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:

Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.

Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.

Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.

Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.

Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.

¹³¹ For purposes of this discussion, we assume that the Business Roundtable Statement is intended as a true statement of intentionality by its signatories. We note that others have characterized the statement as “largely a rhetorical public relations move”, a characterization that we neither accept nor reject here. See Bebchuk & Tallarita, *supra* note 2, at 3.

Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.¹³²

The Business Roundtable statement responds to the concern that the arguments for shareholder primacy that we describe above have unduly influenced the behavior of corporate decisionmakers. Whether or not these claims are sound, commentators reason that corporate officials are likely to accept them and therefore to focus on shareholder value and, even more problematically, on short term stock price, in making operational decisions.¹³³ We note that the rationale for corporate purpose described in this section is premised on the normative foundation that corporations should place greater weight on non-shareholder interests in their operating decisions. For purposes of this section, we accept that proposition as a given, while noting that a theory of corporate purpose need not identify any particular objective as normatively preferable.

A statement of corporate purpose thus could serve as an instruction, a signal or a legally binding mandate to corporate officers to temper that focus and, in operating the firm, to consider the long term sustainability of the firm, the economic and non-economic interests of non-shareholders and broader societal interests. It thus seeks to impose some form of operational constraint and direction on the corporate board. As this paragraph suggests, a theory of corporate purpose as an operational constraint comingles several of the conceptual distinctions that we highlighted in our introduction. The following table attempts to distinguish among the relevant animating principles:¹³⁴

¹³² See BUSINESS ROUNDTABLE STATEMENT, *supra* note 4.

¹³³ See *supra* notes []-[] and accompanying text.

¹³⁴ A number of commentators have highlighted the fact that defenses of stakeholder value are often unclear about the extent to which consideration of stakeholder interests is intended as a means to promote shareholder value or an end in itself. See, e.g., Bebchuk & Tallarita, *supra* note 2, at 3 (describing these as “two different versions of stakeholderism”); Adam B. Badawi & Frank Partnoy, *ESG and Litigation: Is there a Relationship between Being “Bad” and Getting Sued?*, working paper (2020), draft at 9 (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”). While we agree with this characterization, we argue that it captures only half the story.

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

As the table suggests, corporate purpose can have positive legal bite in the sense that it creates some obligation for corporate decisionmakers to consider particular interests or objectives in operational decisions, or it can be merely aspirational. Existing constituency statutes are examples of the latter in that they authorize but do not compel corporate officials to consider non-shareholder constituencies in the takeover context and, depending upon the statute, in other decisions. In addition, a theory of corporate purpose could both identify particular objectives as normatively desirable and privilege those objectives over alternatives. Traditional shareholder primacy privileges the interests of shareholder over those of other stakeholders.

Let us consider options presented by the table. It is somewhat unclear how the boxes in red and green change the corporation's purpose from shareholder primacy or add to the traditional constraints imposed by fiduciary principles. Presumably if the duty of corporate officials is to focus primarily on maximizing shareholder value, and a consideration of stakeholder interests contributes to shareholder value, then properly-informed corporate officials will do so and they will do so regardless of whether the consideration of such interests constitutes a distinct obligation. In addition, given the latitude afforded by the business judgment rule, it is difficult to expect these approaches to effect a meaningful change in corporate operations. We note in particular that the business judgment rule, particularly in the operational context, affords officers and directors broad discretion. In the overwhelming majority of cases, attention to stakeholder and societal interests can rationally be defended as consistent with the pursuit of long term shareholder value, and existing fiduciary principles.

Indeed, to the extent that ESG and shareholder interests are consistent with maximizing shareholder value, a claim supported in some measure (though not entirely) by empirical studies,¹³⁵ it would appear that corporate officials would be remiss if they failed to take those interests into account. As such, a case can be made that the approach set out in red box is required by existing law, and mild support for such a view can be found in cases like *Marchand*.¹³⁶

The brown and blue boxes indicate an attempt at an affirmative shift away from shareholder primacy and, perhaps, a modification of the scope of existing fiduciary obligations. The brown box – “Power but not obligation to consider non-shareholder interests irrespective of their effect on long term shareholder value” -- presents a 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 takes the view that consideration of stakeholder interests may but need not trump shareholder interests or the pursuit of economic value.

As noted above, we are skeptical of the claim that existing corporate law imposes a binding obligation of shareholder primacy, at least outside the context of takeovers and self-dealing transactions, although we note that the position in these boxes is in tension with some of the cases we discuss in Part III supra, particularly the *eBay* decision. As noted in Part III, however, existing black letter law authorizes corporate officials, at least in some cases, to consider non-shareholder 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.¹³⁷ Similarly,

¹³⁵ See *inter alia* Joshua D. Margolis, Hillary Anger Elfenbein & James P. Walsh, *Does It Pay to Be Good... and Does It Matter? A Meta-Analysis of the Relationship Between Corporate Social and Financial Performance* (March 1, 2009), available at SSRN: <https://ssrn.com/abstract=1866371> or <http://dx.doi.org/10.2139/ssrn.1866371>; Philipp Krüger, *Corporate Goodness and Shareholder Wealth*, J. FIN. ECON. (2015); Karl V. Lins, Henri Servaes, and Ane Tamayo, *Social Capital, Trust, and Firm Performance: The Value of Corporate Social Responsibility During the Financial Crisis*, J. OF FIN. (2017); Brandon Boze, et al., *The Business Case for ESG* (May 23, 2019). Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-77, available at SSRN: <https://ssrn.com/abstract=3393082>.

¹³⁶ See *supra* notes []-[] and accompany text.

¹³⁷ Every state corporate law statute authorizes corporations to make charitable donations and none limits such donations to those that increases firm value. See R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by*

constituency statutes empower but do not compel corporate officials to consider stakeholder interests without a requirement that those interests be aligned with shareholder interests.¹³⁸ Accordingly, we believe there is at least an arguable basis for believing that the theory of corporate purpose reflected in the brown box is consistent with existing law.

There are two substantial challenges with the brown box, however. One is the lack of enforceability. Unless corporate officials are compelled to consider and even to prioritize non-shareholder interests, there is little reason to believe they will do so.¹³⁹ As noted in Section III.A above, corporate law relies primarily on shareholder-based mechanisms such as capital markets pricing and director elections to hold managers accountable. 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.¹⁴⁰ 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.¹⁴¹ And stakeholders could impose constraints by contract, such as provisions in a credit agreement that restrict pollution.¹⁴²

In this regard, we note the availability of alternative forms which do have structures to accommodate singular constituencies, or alternative ones: the non-profit. 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 . . ."¹⁴³ This purpose was legally enforceable and

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.

¹³⁸ 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).

¹³⁹ See Bebchuk & Tallarita, *supra* note 2.

¹⁴⁰ See generally Rudolf Buschmann, *Worker Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993); Carol 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).

¹⁴¹ See Bebchuk & Tallarita, *supra* note 2 (providing evidence that corporate signatories to the BRT statement are not seeking to align management compensation with stakeholder interests through their compensation structures).

¹⁴² See Michael Ohlrogge, *Bankruptcy Claim Dischargeability and Public Externalities: Evidence from a Natural Experiment*, working paper dated Feb. 14, 2020 at 52-53 (describing credit agreements imposing environmental constraints on borrowers such as inspections or insurance).

¹⁴³ Sierra Club, Articles of Incorporation (Original Version), dated June 4, 1892, available at <https://www.sierraclub.org/articles-incorporation>

involved an environmental interest.¹⁴⁴ 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.¹⁴⁵ But even then the well-known slack in charitable compensation and mission creep for non-profits creates inefficiencies that this enforcement mechanism is not suitable for.¹⁴⁶

A more significant problem is determining when a particular operational decision involves a sacrifice of shareholder value in the interests of other stakeholders. Some commentators have argued that such trade-offs are ubiquitous.¹⁴⁷ We disagree. Indeed, for the reasons that Professor Dorothy Lund has identified, we believe that a variety of considerations affect the relationship between stakeholder interests and shareholder value and that these considerations are often unknown and unknowable to a corporate manager at the time of an initial decision.¹⁴⁸ These considerations include the effect 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. As a result, a range of business decisions that might appear to sacrifice

¹⁴⁴ Compare this to the current purpose which is akin to the statements of corporate purpose in for-profit charters. It reads in full:

[t]he 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 natural and human environment; and to use all lawful means to carry out these objectives."

Sierra Club, Sixth Version: Complete restatement of Articles of Incorporation, (June 20, 1981), available at <https://www.sierraclub.org/articles-incorporation> (last accessed Feb. 27, 2020).

¹⁴⁵ The Sierra Club is organized as a non-profit corporation under the laws of the state of California and as such is subject to oversight by the state attorney general. See California Non-Profit Corporation Law § 5250.

¹⁴⁶ See generally James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303 (2006).

¹⁴⁷ See Bebchuk & Tallarita, *supra* note 2, at 19 ("potential trade-offs between shareholders and stakeholders are ubiquitous").

¹⁴⁸ See Lund, *supra* note 12 (describing potential effects of one company's socially responsible decisions on its 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 (1998).

short term profitability may be rationally related to long term corporate value and, as a result, within the scope of managerial discretion afforded by the business judgment rule.

Consider the earlier example of Dick's Sporting Goods decision to stop selling guns in some of its stores following the school shooting in Parkland, Florida.¹⁴⁹ Initially, the media characterized the decision to ban some gun sales as "at the expense of revenue."¹⁵⁰ Dick's CEO Edward Stack believed the company would lose a quarter of a billion dollars from the decision.¹⁵¹ Dick's also faced the prospect of boycotts and protests from gun owners.¹⁵² Stack defended the decision as the right thing to do, and was quoted as saying "I don't really care what the financial implication is."¹⁵³ In hindsight, however, the tension between societal and shareholder value is less clear. Sales grew at the stores where the company discontinued gun sales, and Dick's removed guns from more stores.¹⁵⁴ A year after its initial announcement, Dick reported a jump in same-store sales, and its stock price increased by more than 4 percent.¹⁵⁵ In March 2020, Dick's announced that it would remove guns from an additional 440 stores, and its stock price increased by 13%.¹⁵⁶

The characterization in the blue box, which seems to be the position espoused in the Davos Manifesto, is similarly problematic, but raises additional concerns. The principal concern is that we find no support for the blue box in positive law. State corporation statutes could impose an obligation on corporations to act in the public interest – indeed, public benefit corporations

¹⁴⁹ See Nathaniel Meyersohn, *Dick's Sporting Goods removes Guns and Ammo from 125 Stores*, CNN BUSINESS, Mar. 14, 2019.

¹⁵⁰ 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>

¹⁵¹ Terry Nguyen, *Dick's Sporting Goods destroyed \$5 million worth of guns it pulled from its stores*, Vox, Oct. 8, 2019. 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.*

¹⁵² See, e.g., Rich Duprey, *Gun sales: Will Dick's Sporting Goods be hurt by a gun owners' boycott?*, THE MOTLEY FOOL, May 17, 2018, <https://www.usatoday.com/story/money/retail/2018/05/17/dicks-sporting-goods-hurt-by-gun-owners-boycott/34999931/>; Rachel Siegel, *Dick's Sporting Goods reports strong earnings as it experiments with reducing gun sales*, Wash. Post, Aug. 22, 2019, <https://www.washingtonpost.com/business/2019/08/22/dicks-sporting-goods-stock-surges-strong-nd-quarter-earnings/> (reporting that the decision sparked customer boycotts and employee resignations).

¹⁵³ Nassauer, *supra* note 150.

¹⁵⁴ Meyersohn, *supra* note 149.

¹⁵⁵ Siegel, *supra* note 152.

¹⁵⁶ *Dick's Sporting Goods To Stop Selling Guns At 440 Additional Stores*, CBS Pittsburgh, Mar. 10, 2020, <https://pittsburgh.cbslocal.com/2020/03/10/dicks-sporting-goods-440-store-gun-sales/>

adopt this approach – but there does not appear to be any basis for inferring such an obligation from the language of general corporation statutes or existing case law.¹⁵⁷ We believe (contrary to the view of some scholars),¹⁵⁸ that current law allows corporations voluntarily to commit in their charters to prioritize stakeholder or societal interests, and that such commitments would be legally enforceable, but 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 widescale amendment of corporate charters. The few existing corporate charters that contain a more expansive formulation of corporate purpose seem to be deliberately structured so as to limit their potential as legal constraints, for example, by stating that a corporation will “strive” to act in a sustainable manner.

Notably, although we observe that the blue box, unlike the three others, has the potential to impose a meaningful constraint on corporate operations, thereby offering the potential to address operational externalities and regulatory failures,¹⁵⁹ it is nonetheless problematic. For example, the approach reflected in the blue box, would seemingly provide a basis for requiring Dick’s Sporting Goods to stop selling guns even if gun sales were profitable or compelling energy companies to reduce their investment in oil and gas production.¹⁶⁰

But how would this be structured? If Dick’s had the obligation to consider or even prioritize stakeholder interests, which interests would it consider? Should it 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? This is akin to a corporate constituency statute without definition. Moreover, we note that, despite Ed Slack’s statement that Dick’s made its decision to reduce gun sales without regard to its financial effect, no shareholder has challenged Dick’s decision, and we are skeptical that any shareholder could do so successfully. It is thus questionable whether, even if the statement in the blue box reflects a change from positive law, it would effectuate a change in corporate practice.

¹⁵⁷ Whether amending state corporation statutes to mandate such an approach, we leave for future work.

¹⁵⁸ See Rock, *supra* note 7.

¹⁵⁹ See, e.g., Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

¹⁶⁰ Professor Madison Condon offers such an example, involving decisions by Exxon and Chevron to curtail production with a resulting negative impact on the firms’ profitability and share price. See Madison Condon, *Externalities and the Common Owner* at 35 (April 26, 2019). WASHINGTON LAW REVIEW, Forthcoming; NYU Law and Economics Research Paper No. 19-07. Available at SSRN: <https://ssrn.com/abstract=3378783>

B. The Proper Positioning of Purpose Statements

The foregoing analysis questions both claims that recent affirmations of social responsibility constitute shifts in corporate purpose and that they commit corporations to anything beyond the scope of their legally-enforceable obligations. While a corporation could align itself with a stakeholder or societal objective that imposes additional constraints on its operations, even within the framework of shareholder value maximization, purpose statements neither empower other stakeholders nor constrain managerial discretion. For example, a purpose statement concerning worker constituencies and worker representation on the board may result in higher wages and benefits for the represented workers, but it does not compel such a result. Indeed, workers' interests would arguably be better served by providing these terms through a traditional employment contract.

The primary reason for this is that a corporate purpose statement, unlike a traditional contract or a regulation (such as a minimum wage law), lacks an enforcement mechanism, either in legal form or as a structural form of the company.¹⁶¹ 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. To be sure, we believe it is likely to have such an effect. But purpose statements do not, by themselves, either change corporate operations.

This view is consistent with observed practice. The Business Roundtable statement, in its own words, "supersedes" the Roundtable's prior commitment to shareholder primacy in favor of a "commitment to a free market economy that serves all Americans."¹⁶² These signatories included the CEOs of Amazon, Cigna, and Chevron, each of whom now professes a commitment to pursue societal value.¹⁶³ Without taking a position on overall extent to which these

¹⁶¹ It is for this reason, among others, that we believe that issues regarding risk and externalities of the corporate form should not be dealt through corporate purpose but rather regulation of the company. The issues and judgements involved in such an assessment are better situated to be dealt with through legislation, the administration process and even courts such as through the *Caremark* line of cases. *But see* Steven L. Schwarcz *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1 (2016) (arguing that systemically important firms should have a "public governance duty").

¹⁶² BUSINESS ROUNDTABLE STATEMENT, *supra* note 4.

¹⁶³ *See, e.g., Cigna Company Profile*, available at <https://www.cigna.com/about-us/company-profile/> ("dedicated to improving the health, well-being, and peace of mind of those we serve.") (last accessed Feb. 26, 2020). Amazon's mission statement is "We strive to offer our customers the lowest possible prices, the best available selection, and the utmost convenience." *Amazon.com Inc.'s Mission Statement & Vision Statement (An Analysis)*, PANMORE INSTIT., dated Feb. 13, 2019, available at <http://panmore.com/amazon-com-inc-vision-statement-mission-statement-analysis>. Chevron's "vision" is "to be the global energy

companies are committed to stakeholder or societal welfare, it is worth observing that each has been subject to extensive criticism on precisely this point. Amazon has been criticized for taking advantage of loopholes to pay a miniscule amount of federal income taxes.¹⁶⁴ Cigna has been criticized for bribing insurance brokers with luxury vacations to sway their recommendations to the employer-providers they advise.¹⁶⁵ And according to one source, Chevron's ESG rating puts it exactly in the middle of companies in the extraction industry.¹⁶⁶

Perhaps the most robust statement along these lines is that recently issued by Airbnb. In 2018, the company released a statement in which it asserted that it wanted to be "a 21st-century company with two defining characteristics: We will have an infinite time horizon. We will serve all of our stakeholders."¹⁶⁷ On January 17, 2020, the company issued a second statement identifying five stakeholders "Guests," "Hosts," "Communities," "Shareholders" and "Employees."¹⁶⁸ The company then put forth principles to follow for each of these such as "We prioritize the safety of our community" for "Guests." Airbnb also released metrics reporting on its success in pursuing these objectives such as "Number of personal safety incidents . . ."¹⁶⁹

company most admired for its people, partnership and performance" *The Chevron Way*, available at <https://www.chevron.com/documents/pdf/chevronwayenglish.pdf> (last accessed Feb. 26, 2020).

¹⁶⁴ *From 0% to 1.2%: Amazon Lauds Its Minuscule Effective Federal Income Tax Rate*, INSTITUTE ON TAXATION AND ECONOMIC POLICY, Jan. 31, 2020, available at <https://itep.org/from-0-to-1-2-amazon-lauds-its-minuscule-effective-federal-income-tax-rate/> (last accessed Feb. 26, 2020).

¹⁶⁵ See *Behind The Scenes, Health Insurers Use Cash And Gifts To Sway Which Benefits Employers Choose*, PROPUBLICA, <https://www.healthleadersmedia.com/behind-scenes-health-insurers-use-cash-and-gifts-sway-which-benefits-employers-choose> (last accessed Feb. 26, 2020).

¹⁶⁶ *Chevron Corp. CSR / ESG Ranking*, CSRHUB, available at https://www.csrhub.com/CSR_and_sustainability_information/Chevron-Corp (last accessed Feb. 26, 2020).

¹⁶⁷ *Open Letter to the Airbnb Community About Building a 21st Century Company*, Jan. 25, 2018, available at <https://news.airbnb.com/brian-cheskys-open-letter-to-the-airbnb-community-about-building-a-21st-century-company/>

¹⁶⁸ *An Update on Our Work to Serve All Stakeholders*, Jan. 17, 2020, available at <https://news.airbnb.com/serving-all-stakeholders/>.

¹⁶⁹ *Id.* Along similar lines Shell, an oil company, has a compensation scheme which is designed to incentive executives to reduce carbon emissions by the company (but not presumably its product). See Radhakrishnan Gopalan, John Horn and Todd Milbourn, *Shell is tying executive pay to carbon emissions. Here's why it could create real impact*, CNN BUSINESS, Dec. 14, 2018, available at https://www.cnn.com/2018/12/14/perspectives/shell-executive-pay-carbon-emissions/index.html?utm_medium=social&utm_term=image&utm_source=twCNN&utm_content=2018-12-15T04%3A46%3A03

What then does it mean for these CEOs to pledge their commitment to social value or for a company to pledge to be run for its stakeholders? A cynical view would characterize the statements as virtue-signaling, designed either as marketing tools or to reduce the firm's political exposure or vulnerability to regulation.¹⁷⁰ Alternatively, we could view a corporation's articulation of its purpose in the terms set out in the brown box as something akin to a corporate New Year's resolution – the corporation's identification of an area in which, according to some baseline set of normative principles, it hopes to do better and an expression of its desire to do so. A company may even, like Airbnb, attempt to set employee compensation in accord with these principles. Unfortunately, the analogy is likely to prove true in the sense that, absent some form of legal compulsion, a corporation's commitment to pursue societal value rather than shareholder interests is, like a New Year's resolution, easily broken.¹⁷¹

In sum, our analysis suggests that existing statements of corporate purpose are largely aspirational rather than legally binding or constraining. As such, we question the potential for these statements to affect the purpose of the corporation in any meaningful way. Moreover, even if they do have an effect on corporate behavior through compensation or otherwise they do not establish a *raison d'etre* for corporate purpose. Instead, they put forth vague goals and principles that appear to jibe with the business purpose of the company. For example, Airbnb has an interest in ensuring that its guests are safe. Is this a corporate purpose or simply a sound business practice? It may result in a reallocation of resources towards visitor safety, but it does not appear to be possible to separate the two principles.

Arguably the same observation applies to corporate constituency statutes. These statutes purport to reposition the corporate purpose by allowing boards to consider other constituencies in decision-making involving takeovers. Yet, there is no guidance on how these constituencies should be considered.¹⁷² More importantly, there is no evidence that these statutes have actually led to any changed outcomes in takeovers where they primarily purport to comply. Instead, the bulk of the commentary has noted that these statutes are akin to corporate purpose statements which provide negotiating leverage to boards but have no legal foundation.¹⁷³ Constituency statutes themselves thus also do not

¹⁷⁰ Such motivations could potentially serve to promote long term shareholder value, taking us from the brown box to the green box.

¹⁷¹ Studies show that New Year's resolutions have a failure rate of 80%, and most are broken by February. See 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, available at <https://www.inc.com/marla-tabaka/why-set-yourself-up-for-failure-ditch-new-years-resolution-do-this-instead.html> (last accessed Feb. 26, 2020).

¹⁷² See *supra* note [] and accompanying text.

¹⁷³ See Brian Quinn, *Constituency Provisions and Intermediate Scrutiny Outside of Delaware*, M&A LAW PROF BLOG, Nov. 23, 2009, available at

provide a purpose but instead seek, perhaps unsuccessfully, to channel corporate behavior.

Ultimately, this discussion leads to the conclusion that not only do these corporate purpose statements lack constraint they lack foundation. More specifically, their inherent uncertainty and vagueness means that they are not equivalent to the legally enforceable corporate purpose statements of the 1800s requiring a corporation to build canals but not breed pigs. They thus do not provide a reason for corporate purpose nor do they provide a corporate purpose itself. If we are to identify a rationale for corporate purpose, we must thus look elsewhere.

V. An Instrumentalist View of Corporate Purpose

The foregoing discussion suggests that we are corporate purpose skeptics. To an extent, we are. We do not believe that corporate purpose is a tool that 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 a justification for corporate purpose. We argue in this Part V that corporate purpose has an instrumental value in articulating and managing the expectancy interests of its constituents. Because a corporation is a collective enterprise, individuals and entities that interact with it and made decisions on its behalf have different interests and goals. Corporate purpose allows a corporation to signal its priorities to its constituents, enabling them both to sort – identifying interactions that are likely to further their individual goals -- and to negotiate – determining the regulatory or contractual protections necessary to constrain corporate decisions that are inconsistent with those goals.

The instrumental justification does not provide a normative basis by which to select a specific corporate purpose or to resolve the shareholder versus stakeholder debate. As we noted above, however, few existing corporations have adopted a statement of purpose, at least in a format that we view as legally enforceable let alone definite. We therefore go on to consider the question of what we should understand a corporation's purpose should be, as a positive

<https://lawprofessors.typepad.com/mergers/2009/11/unocal-duties-outside-of-delaware.html> (last accessed Feb. 26, 2020). See also Martijn Cremers, Scott Guernsey and Simone M. Sepe, *Stakeholder Orientation and Firm Value* (December 27, 2019), available at SSRN: <https://ssrn.com/abstract=3299889> or <http://dx.doi.org/10.2139/ssrn.3299889> (finding that states with constituency statutes “result in significant increases in shareholder value, especially in more innovative firms and those with stronger stakeholder relationships.”)

matter, in the absence of such a statement. We term this a “default” purpose and argue that, for the reasons developed in this Part, a corporation’s default purpose should be pursuing economic value primarily for the benefit of the firm. We leave for future work both the question of whether this purpose is normatively desirable and the procedure by which a corporation could modify the default.¹⁷⁴

A. Corporate Purpose as Managing Expectancy Interests

Our starting point is to recognize that the corporation is a collective enterprise. A multiplicity of individuals and entities interact with the corporation, and each corporate constituency has plausible claims with respect to how the corporation is run – 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. Second, individuals within each constituency group may have different goals or interests. Some shareholder 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.

The modern contractual theory of the corporation recognizes that the terms of the corporate contract enable each of its participants to seek its objectives and to coordinate those efforts with those of other participants.¹⁷⁵ The nexus of contracts theory argues that a corporation consists of a series of contracts that serve to accommodate these interests.¹⁷⁶ 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.

¹⁷⁴ The debate over opt-out versus mandatory rules is a vigorous one in corporate law in part based on an economic view of the corporation. See John C. Coffee, Jr. *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1661-64, 1671-74, 1689 (1989); John C. Coffee, Jr., Lecture, *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919 (1988). For reasons we will delineate in future work we believe that a purpose can be modified, provided certain procedures and monitoring functions are in place.

¹⁷⁵ See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW*, ch. 1 (1991); Barry D. Baysinger & Henry N. Butler, *Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation*, 71 VA. L. REV. 1257 (1985); Lucian A. Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1408 (1989); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99, 110-20 (1990); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767 (1989).

¹⁷⁶ See generally David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201.

Notably, these interests need not be purely economic. As the Supreme Court explained in *Citizens United*, corporations serve as a vehicle for associations of citizens to band together, to formulate their views and objectives, and to communicate those views.¹⁷⁷ These objectives may include expressive, humanitarian and altruistic goals. As the Court explained in *Hobby Lobby*:

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.¹⁷⁸

Moreover, as *Citizens United* further recognized, “the procedures of corporate democracy” allow corporate participants to coordinate their expectations and impose those expectations on corporate decisionmakers.¹⁷⁹

In this light, corporate statements about purpose or values can be explained as aligning and regulating stakeholder goals. Nike’s recent campaign with Colin Kaepernick, for example, can be seen as reaching out to its consumer base to signal that its values align with its consumers.¹⁸⁰ Similarly Ben & Jerry’s made a business of pursuing stakeholder values even as a subsidiary of Unilever, the giant food conglomerate.¹⁸¹ Indeed Ben & Jerry’s structure within Unilever was designed to enable it to retain a separate progressive identity and “[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.”¹⁸²

¹⁷⁷ *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

¹⁷⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712 (2014).

¹⁷⁹ *Citizens United*, 558 U.S. at 362.

¹⁸⁰ See Joshua Hunt, *Colin Kaepernick, Nike, and the Myth of Good and Bad Companies*, THE ATLANTIC, Sept. 5, 2018 (“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.”)

¹⁸¹ See Simon Mainwaring, *Purpose At Work: How Ben & Jerry’s Combines Growth And Brand Activism*, FORBES, dated Feb. 26, 2020 (“In the last six years, our focus has been around activism. We’re doing that in the context of being a wholly owned subsidiary of Unilever. The actual governance agreement is that Unilever has operational control of our business. However, we have an independent board of directors that has legal oversight over our social mission and brand equity.”)

¹⁸² Ben & Jerry, *Our Values*, available at <https://www.benjerry.com/values> (last accessed Feb. 20, 2020).

The foregoing discussion demonstrates two potential congruencies. Statements about corporate purpose may attract customers who share that purpose, increasing corporate value for shareholders. In addition, a corporation's articulated purpose of serving customers may attract shareholders who value that objective independently of its effect of economic value. These congruencies are not limited to customers and shareholders. Corporations publicly express their values as a method to attract and retain the best talent for positions. In fact corporate managers are open in expressing that many of the value positions they take today because they are demanded by millennial and socially conscious employees. Professors Barzuza, Curtis and Weber have theorized that much of the social activism by investors is in order to recruit socially conscious millennial investors.¹⁸³

Purpose then serves two distinct functions. First, corporate purpose allows individuals to identify a corporation's objectives in order to determine the degree of fit between the corporation's operational goals and 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 foundation. 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. 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.

Corporate purpose not only sets expectations, it provides a standard for monitoring which can be measured and assessed. It offers a basis for prioritizing

¹⁸³ Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund Activism and the New Millennial Corporate Governance*, 93 SOUTHERN CAL. L. REV. (forthcoming 2020), available at SSRN: <https://ssrn.com/abstract=3439516> or <http://dx.doi.org/10.2139/ssrn.3439516>

among competing claims by reducing those claims to a common metric. For example, purpose enables a corporation to weigh interests in the environment with concerns about workplace safety. It also provides a basis for evaluating corporate decisions and holding corporate decisionmakers accountable. In part we view ESG and the pursuit of metrics to assess compliance with corporate ESG goals as a similar attempt to monitor and measure corporate performance in line with corporate purpose.¹⁸⁴

In this regard, purpose can be seen as an efficient economic default rule that complements rather than expanding the role of fiduciary duties.¹⁸⁵ Corporate purpose provides managers and other stakeholders with a natural touchstone by which to measure corporate performance. Purpose enables managers to identify priorities in the management of the firm within the discretion afforded to them by the business judgment rule. It also serves as a monitoring function, limiting self-dealing and rent seeking. Purpose thus serves to ensure that the interests of the firm do not need to be renegotiated in each iteration.

Importantly, a variety of individuals interact with corporations, and a standardized set of default rules creates efficiencies that guide their expectations in the absence of firm-specific tailoring by contract or otherwise. Purpose as a default rule that does not need to be negotiated every time not only sets expectations but creates networks of precedent and structure.¹⁸⁶

B. Enforceability and Purpose

If corporate purpose is an implicit term in the corporate contract, the question is when and if each of these constituencies can legally enforce that purpose. Legal enforcement was an available mechanism in the 1800s when corporate purpose is to provide visiting facilities and not breed pigs.¹⁸⁷ But in today's broadly-worded enabling statutes and open-ended corporate charters, the existence of purpose and the enforceability of purpose are not necessarily aligned.

¹⁸⁴ See generally Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEORGETOWN L. J. 923 (2019).

¹⁸⁵ See generally Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 29-30 (1990). See also Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OREGON L. REV. 1209, 1215-1231 (1995) (discussing the mandatory versus option nature of fiduciary duties in the corporate context).

¹⁸⁶ 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 Madras Gartenberg, Andrea Prat & George Serafeim, *Corporate Purpose and Financial Performance*, 30 ORG. SCI. 1 (2019).

¹⁸⁷ See *supra* notes []-[] and accompanying text.

As an initial matter, we do not think that our theory of corporate purpose requires broad-based enforceability. To the extent that corporate purpose informs the expectations of those who deal with the corporation, those individuals and entities have market-based tools to correct decisions that depart from the articulated purpose. Customers who are attracted by a corporation's commitment to the welfare of its workers will sanction the corporation's lack of attention to working conditions in its supply chain. Employees increasingly seek corporations with strong environmental and social policies, and corporations that do not adhere to their commitments will be unable to retain them.¹⁸⁸ Purpose thus enables discipline by a variety of market participants, and to the extent that purpose extends beyond share price, it expands the role of markets beyond the capital markets.

We also believe that a corporate purpose can be implemented through structural and governance mechanisms rather than legal rules. A corporation can both credibly commit to a particular purpose and incentivize its officials to act in accordance with that purpose through structural provisions including contract terms,¹⁸⁹ board composition and the structure of its executive compensation. Indeed, to the extent that a corporation's purpose today is shareholder primacy—this purpose is reinforced by a number of structural and governance mechanisms in the corporate form including the right of shareholders to elect directors, vote on charter and bylaw amendments and approve structural changes.¹⁹⁰ This does not mean that as an optional matter corporate purpose may be not more specific, but that as a default matter the current charter statements are sufficient, and enforcement will come through other means.

In this regard, default legal purpose provides a guidestar and guardrails. If a corporation deviates substantially, there can be legal enforcement, and the concepts like *Revlon*, entire fairness review for conflicts of interest and ultra

¹⁸⁸ See, e.g., Sustainable Brands, *Half of Employees Won't Work for Companies That Don't Have Strong CSR Commitments*, June 1, 2016,

<https://sustainablebrands.com/read/organizational-change/half-of-employees-won-t-work-for-companies-that-don-t-have-strong-csr-commitments> (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).

¹⁸⁹ For example, We's S-1 disclosed that 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. See Annie Palmer, *WeWork CEO Adam Neumann has incentives tied to the company's stock value and his charitable donations*, CNBC, Aug. 14, 2019,

<https://www.cnbc.com/2019/08/14/wework-ceo-adam-neumann-has-incentives-tied-to-stock-value-giving.html>

¹⁹⁰ See Rock, *supra* note 7, at []-[] (arguing that the structural nature of the corporation and shareholder favorable mechanisms dictate that the purpose of the corporation is to maximize the value of the firm for shareholders).

vires offer tools to police those outer limits. But within the guardrails, purpose is enforced through market forces, structural and governance mechanisms. Although the guardrails of corporate purpose can be very wide so as to limit the prospect of legal enforcement, that limit does not undermine its utility.

C. A Value Maximizing Corporate Purpose

The theory that corporate purpose serves to manage the expectancy interests of existing corporate constituencies offers a basis for identify a default corporate purpose. Putting aside for the moment, both the issue of how a corporation articulates its purpose and, to the extent it has done so, how it goes about changing that purpose, what should we identify as the purpose of a corporation that has made no such explicit choice?

We note that our analysis has powerful consequences. Outside the realm of close corporations and statutory benefit corporations, we find few corporations that have made any effort to articulate a corporate purpose in their governing documents. More importantly, even those corporations that have done so, appear to identify objectives that are consistent with maximizing long term economic value.

We argue that the history and structure of the corporation support extension of this choice more generally, and that the default view of corporate purpose should be understood as maximization of long term economic value. There are several reasons for selecting economic value as a default rule. Economic value is measurable, transparent and provides a common metric by which to evaluate, compare and prioritize competing claims. In addition, economic value provides consistency among corporations. There is a high cost to market participants of evaluating and pricing varying objectives. Profit maximization provides a common goal which reduces the economic costs of the firm.

Moreover, among the potential candidates for corporate purpose, only profit maximization serves the goal of reconciling the motivations and interests of the various corporate constituencies. It prevents gridlock in that, when the interests of two groups conflict, economic value provides a principled basis for deciding between those interests. It also provides a common metric that enables corporate constituencies to price and negotiate for protection of their conflicting interests. Perhaps most importantly, profit maximization limits the ability of corporate managers to trade off the interests of one group against another (consider Revlon and the potential for trading off the interests of shareholders vs. employees vs. creditors) and, perhaps more importantly, the ability of corporate managers to engage in self-dealing through the guise of promoting stakeholder value.

Importantly, corporate purpose is a mechanism for resolving conflict not merely between constituencies but also within constituencies. Indeed the corporation as currently constituted is set up to manage these constancies. Within any particular corporate constituency, individual members may have very different visions of the good. Trinity Wall Street may want Wal-Mart to sacrifice profits in favor of eliminating the sale of guns; a retired NRA member may disagree both with the willingness to sacrifice profits and the idea that stopping the sale of guns furthers societal interests.¹⁹¹

We note that the accountability provided by the purpose of economic value is a mixed bag. On the one hand, commentators argue that the pursuit of economic value leads managers to focus excessively on stock price and that, in turn, promotes short-termism.¹⁹² On the other hand, economic value addresses the potential that particular large and influential shareholders may seek to pursue idiosyncratic social agendas for private reasons or that do not reflect the interests of shareholders more generally. An example may be the efforts by some large asset managers such as BlackRock to cause corporations to focus more on ESG.¹⁹³

It is specifically the role of corporate purpose in addressing intra-shareholder conflicts that, in our view counsels in favor of economic value rather than the claim that corporations should maximize shareholder welfare put forth by Professors Hart & Zingales.¹⁹⁴ Professors Hart & Zingales claim that corporations should incorporate shareholders' noneconomic preferences such that, if shareholders take social values into account, corporations should do so as well. The challenge with this position is that shareholder non-economic preferences are fluid, unknowable and incommensurate. While it is possible to think rationally about an individual shareholders' willingness to trade-off between economic and non-economic value, it is impossible to order those preferences within a group of shareholders. As Professor Griffith has observed, even if social purposes are favored by some shareholders, they are unlikely to be favored by all of them.¹⁹⁵ As a result, shareholder wealth maximization may serve as a type of "least common denominator," enabling corporations to make operating decisions in the absence of shareholder agreement regarding other

¹⁹¹ This view is of course in direct conflict with recent stewardship initiatives which call upon institutional investors to engage in more effective monitoring of their portfolio companies not merely to increase profits or to reduce agency costs but to influence the social policies of those companies

¹⁹² See Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71 (2018).

¹⁹³ See Larry Fink Letter, <https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter>

¹⁹⁴ Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. LAW, FIN. & ACCT'ING 247 (2017)

¹⁹⁵ Sean Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority* (2019) (working paper at 24).

priorities or objectives.¹⁹⁶ Similarly framing corporate purpose in terms of economic value reduces the prospect that a majority of shareholders may, in effect, oppress the minority by imposing their idiosyncratic preferences concerning the corporation's objectives.

Although we argue here that corporate purpose should, by default, be the pursuit of economic value, we recognize that this proposition raises a variety of issues in terms of alternatives. We also recognize that the pursuit of economic value is fundamental to much of the corporate governance literature, and that a variety of questions from the role of shareholder voting to the appropriate composition of the board of directors may need to be rethought under alternative conceptions of corporate purpose. The complexity of these issues provides further support for our proposed default purpose and warrant further examination in connection with the normative question of what a corporation's purpose should be, a question that we explore in future work

CONCLUSION

The purpose of the corporation is currently a topic of fervent debate. As we highlight in this Article, however, the debate has raged in the absence of any theoretical work exploring whether a corporation should even have a purpose. We fill this gap. Although we examine and reject conventional theories of corporate purpose, including as well as the claim that corporations are required to maximize either shareholder or societal value as a matter of positive law, we identify an instrumental value to corporate purpose in mediating among the interests and expectancies of a corporation's stakeholders.

Our theory provides needed foundation for arguments over corporate purpose. We argue that, when placed in context, the current arguments that corporations can or do have the purpose of maximizing stakeholder or societal welfare are rhetorical. We reject the claim that the principles espoused by the Business Roundtable reflect legal constraints and challenge their potential impact on operational decisions as no more likely to be effective than New Years' resolutions. Instead, we offer both a theoretical frame for the existing debate and a principled basis for treating value maximization as a default rule. By putting forth these theories of corporate purpose we ultimately aim to better frame and clarify the debate over whether corporations should have a purpose, and if so, what that purpose is.

¹⁹⁶ *Id.*