What is wrong with corporate law? The purpose of law and the law of purpose

C. Mayer

Saïd Business School and Blavatnik School of Government, University of Oxford, Oxford, United Kingdom; email: colin.mayer@sbs.ox.ac.uk

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Colin Mayer

Saïd Business School and Blavatnik School of Government, University of Oxford, Oxford, United Kingdom; email: colin.mayer@sbs.ox.ac.uk

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Abstract

Corporate purpose should be at the heart of corporate law. This article addresses objections that corporate law already permits firms to determine their purposes, and companies would not in any event do more than at present in formulating their purposes. It argues, first, that critics of the law of corporate purpose have failed to recognize that purpose can address divergences of private interests of corporations from public interests of society and the natural world. Second, the law provides a means of commitment to delivery of long-term prosperity. At present, the law fails to protect companies seeking to create long-term prosperity through committing to other parties' interests. It can and should ensure alignment of corporations' incentives with individual, societal, and planetary interests and enable firms to commit credibly to resolution of their problems.

1. INTRODUCTION

What is the purpose of business, why does it exist, why is it created, and what is its reason for being? What is the relevance of law to the determination and nature of business, and how does it define what its purpose should be? These age-old questions date back to the emergence of enterprises and partnerships in the reign of Hammurabi in Babylonia and the corporation in Ancient Rome. But they remain very relevant to today's discourse and debates about business and its role in contemporary society.

In September 2021, the British Academy, the UK Academy of the Humanities and Social Sciences, published a report on the future of the corporation (Br. Acad. 2021). It suggested that the purposes of businesses should be reassessed in the context of the challenges and problems they face and the remarkable opportunities that scientific advances and new technologies offer them. It proposed that the purposes of businesses should be considered in relation to solving the major problems we encounter as individuals, societies, and the natural world; that businesses have a major role to play in solving such problems; and that they should do so in ways that are commercially viable and profitable for those who invest in them. The report went on to describe how public policy could promote the implementation of corporate purposes and how law has a particularly important role to play in that regard.

This article sets out the origins and background to this proposal. Section 2 describes the emergence of modern concepts of the nature and purpose of business. It then looks at the role of law and debates about the relevance of corporate law to defining the purposes of business. As Section 3 describes, the current formulation of corporate law relates to the fiduciary duties of directors to promote the success of the company. In some countries and states, corporate law specifies little more than that. In others, such as the United Kingdom, a company's success is specified as being for the benefit of its shareholders (what are termed its members).

It is widely thought that the generality and permissiveness of corporate law are sufficiently great as to accommodate virtually any formulation of a corporate purpose and that nothing further must or should be done in relation to law to facilitate the adoption of purposes (Rock 2021, Vos 2020). Nevertheless, the British Academy program suggested that corporate purpose should be put at the heart of corporate law and that the current formulation of fiduciary duties of directors of companies to promote the success of the company (for the benefit of their shareholders) should be replaced with one that relates the duties of directors to the determination and delivery of their corporate purposes.

Section 4 describes why this is the case. It suggests that there are two fundamental deficiencies of corporate law as currently constituted. The first is in determining the legitimate source of corporate profits, and the second is in establishing how firms can commit to their achievement through the delivery of human, social, and natural world prosperity and flourishing. Section 5 concludes.

2. CORPORATE PURPOSE

The currently prevailing notion of corporate purpose is what is termed shareholder primacy: Businesses exist first and foremost to promote the interests of their shareholders and the financial returns they earn on their investments (Clark 1986, Fisch 2006).

The association of corporate purpose with profit is a recent phenomenon, certainly in the context of the 2,000-year evolution of the corporation since Roman Law (Mayer 2018), and arguably in relation to modern corporate history. Shareholder primacy has its roots in Adam Smith's [1937 (1776)] assertion that individuals are led by an invisible hand to further the interests of society, that individual owners are entitled to the profit of their property, and that they use their property and labor efficiently to accumulate profits for themselves.

There were three phases to the origination of the corporation in the United States (Guenther 2020). The first was in the pre-1780 period, when corporations served multiple purposes in relation to religious, educational, and municipal activities, among others. The second, from the 1780s to the 1830s, was the rise of the corporation in relation to the provision of much-needed infrastructure—bridges, canals, railroads, and turnpikes. The third phase, from the 1820s to the 1860s and thereafter, was associated with the expansion of manufacturing, railroads, and banking corporations, whose purposes were predominantly financial in nature.

During this period, the understanding of the purpose of the corporation transitioned from the statement in the 1805 case of the *Trustees of the University of Carolina v. Foy* (1805) that "it seems difficult to conceive of a corporation established for merely private purposes" to one in the *Dodge v. Ford Motor Company* (1919) case brought in the Michigan Supreme Court in 1919, which concluded that "a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end." *Dodge v. Ford Motor Company* (1919) has been presented as a demonstration that the "theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time" (Bainbridge 2012).

In contrast to shareholder primacy, stakeholder theory suggests that businesses should take account of the interests of all their stakeholders in promoting the success of their companies (Freeman 1984). According to stakeholder theory, a company should seek to create value for those contributing to and affected by the firm—its customers, employees, suppliers, communities, environment, creditors, and shareholders. All those who affect or are affected by the firm play a role in the success of the company and should be regarded as an end, not just a means to an end. So, management should seek to balance the interests of all of its stakeholders (Keay 2011).[1]

The Constituency Statute introduced in several US states in the 1980s and 1990s was the legal manifestation of stakeholder theory (Davids 1995). It allowed, and in some states required, directors to take account of the interests of stakeholders beyond their shareholders, in part as a response to the takeover wave in the United States of the 1980s (Springer 1999). In practice, there is much skepticism as to the degree of protection that constituency statutes afforded stakeholders. Part of the problem appears to have been a reluctance on the part of courts to interpret statutes in anything other than a shareholder primacy context (Bisconti 2009). Another problem was that stakeholders had no means of seeking redress if directors failed to take their interests into account (Springer 1999). Combined with concerns about the practicality or desirability of businesses adopting stakeholder practices (Bebchuk & Tallarita 2020a), some observers concluded that "constituency statutes failed to deliver their promise" (Bebchuk et al. 2021, p. 1530).

Meanwhile, in the United Kingdom, a different approach was taken. A Company Law Review Group assembled at the end of the twentieth century to reevaluate company law in the United Kingdom

> expressed the opinion that the law ought to be revised to bring it into line with existing best practice, encouraging directors to look beyond maximising short term returns to institutional shareholders towards the longer term and to recognise the roles that relationships with other stakeholders, such as employees, suppliers, customers and others affected by the company's commercial activities, play in the success of the company. (House of Commons 2003, section 3, paragraph 10)

[1]This recent literature comes against the backdrop of a long debate on the subject among scholars like Dodd (1932) and Berle (1932).

However, it rejected a stakeholder approach, namely, that directors should consider the interests of stakeholders and regard shareholders as just one of the parties whose interests must be taken into consideration on the grounds that

> it would confuse the issue of directors' duties, giving directors little in the way of guidance in decision-making. It also ran the risk of creating a litigious climate for business where those parties who felt they had not been treated as they would have liked by a company's directors sought recompense through the courts. (House of Commons 2003, section 3, paragraph 16)

Instead, it proposed what is known as an enlightened shareholder value (ESV) approach. This maintains that the primary duty of directors is to maximize shareholder value but that in realizing this objective, particularly in promoting the success of the company for the long-term benefit of shareholders, a company must recognize the importance of its relationships with other parties—employees, customers, suppliers, communities, and the environment. ESV therefore represented not a fundamental change in law but instead a codification of what was involved in promoting shareholder interests.

Another legal form originated in the United States, which lies somewhere between a stakeholder and ESV approach in promoting stakeholder interests beyond shareholders, is the benefit corporation, also known as the public benefit corporation. Benefit corporations are formally established under state statutes that require for-profit entities to pursue a dual mission of profits and social purpose (Vaughan & Arsneault 2018). Maryland was the first state to adopt a benefit corporation law in 2010, and 38 states (including the District of Columbia) have now passed one.

Critics claim new legislation is unnecessary, as existing legislation permits directors sufficient latitude (Heminway 2018), and that benefit corporations will be used for "purpose washing" (Khatib 2015). Some studies of benefit corporations have attempted to evaluate these claims. One finds that there is much inactivity among benefit corporations, and many are not delivering any social or environmental benefits (Berrey 2018) Another concludes that, contrary to concerns that benefit corporations will fail to attract investors, they are receiving significant amounts of investments largely because they are concentrated in consumer-facing sectors in which their benefit status acts as a driver of enhanced financial returns for investors (Dorff et al. 2021).

If this is the case, then benefit corporations are in effect enlightened shareholder value companies, conferring superior financial returns as well as public benefits. Attempts to promote stakeholder interests in their own regard through either enlightened shareholder value or stakeholder-oriented legislation have therefore arguably failed to deliver much variation from conventional shareholder primacy. Empowering directors to adopt practices that incorporate the interests of parties beyond shareholders appears insufficient on its own.

The last decade has witnessed a refocusing of the debate around corporate purpose.[2] This has been motivated by a realization and concern about the problems created, as well as addressed, by a preoccupation of business with corporate profits. These problems relate particularly to the environment, inequality, social exclusion, and the spate of corporate failures and scandals that have blighted business over the past two decades. The response has been a shift of corporate purpose away from its raw shareholder primacy form to in essence ESV, pursuing the potential for

[2] Rock (2020, abstract) distinguishes between what he terms "business purpose" and "corporate objective":

> "Business purpose" should be understood to be a property of business enterprises, however they are organized. "Corporate objective," by contrast, is best understood as a characteristic of a particular enterprise form (the general corporation) and not as a description of what actual businesses do on a day-to-day basis.

environmental and social benefits to enhance financial performance and firm resilience (Business Roundtable 2019).[3] However, as we have just seen, there are limitations to the extent to which ESV differs from conventional profit maximization and therefore avoids and solves problems created by it.

Instead, the British Academy program suggests that corporate purpose should be considered in the context of the problems that individuals and societies face at different points in time. The historical evolution of corporate purpose reveals that nothing in the origin or development of the corporation intrinsically or necessarily associates it with maximizing profits. Purpose has been dictated by need, and that is sometimes predominantly private and profitable in nature and at other times public and social, and frequently a combination of the two. A focus on profits might have been appropriate for an era of manufacturing and the large-scale financial requirements that imposed, but it may be less suited to an age in which the predominant challenges that confront humanity are environmental and social in nature. What is required is a notion of purpose that allows accommodation of the different requirements of people, place, and time.

This suggests that corporations should employ their distinctive advantages of separate legal form, perpetual existence, limited liability, and capital raising to help address the problems we face as individuals, societies, and the nature world, and do so in a form that is commercially viable, financially sustainable, and profitable. So, the British Academy Future of the Corporation program defines the purpose of business as being "to produce profitable solutions to the problems of people and planet" (Br. Acad. 2021). However, a second part to the definition, which is particularly critical to this article, is that companies should "not profit from producing problems."

This highlights the issue of the definition of a profit. At present, the economic notion of a profit is simply the net financial earnings of a company over and above the variable operating and fixed capital costs it incurs. It takes no account of whether in the process a company profits at the expense of other parties through, for example, making employees or suppliers redundant or imposing negative externalities on third parties, such as communities and the natural world.

The importance of the assertion of not profiting from producing problems is that it provides a natural way of addressing the deficiencies of accountability and enforcement that underpin the limitations of ESV and stakeholder theories mentioned above. So long as accountability and enforceability relate to assessments of the benefits and detriments suffered by different parties, they involve making largely incalculable interpersonal comparisons. How, for example, does one weigh the employment benefits that derive from expansion of a company's activities against the environmental detriments that might be incurred in the process? Answering this involves undertaking incomparable and incommensurable measurements.

On the other hand, considering the extent to which the company has profited from not avoiding or offsetting the environmental damage it has created provides the basis for determining the extent to which it is profiting from producing problems. In other words, the emphasis shifts from highly subjective valuations of benefits and detriments incurred by different parties to the costs of remedying problems. As described in Section 4, this strengthens the degree to which the firm can be held accountable for its activities and the enforceability of remedies by courts of law.

[3] According to Edmans (2020) and Gartenberg (2022), clarity and commitment to a corporate purpose enhance commercial performance and profitability. According to Gartenberg et al. (2019), Gartenberg & Serafeim (2021), Gartenberg (2021), and Henderson (2020, 2021a,b), although corporate purposes are not always win-win, particularly in the short term, they promote stakeholder interests in a form that yields superior financial performance in the long term.

3. CORPORATE LAW

Corporate law in the United Kingdom and United States and many other jurisdictions around the world is permissive in allowing companies to adopt any purpose that promotes the success of the company for the benefit of its shareholders (Kershaw 2018, Kraakman et al. 2017). For example, UK company law states that "[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole" (UK Companies Act of 2006). Under the General Incorporation Law of the State of Delaware,

> the directors of a Delaware corporation entrusted with management responsibility must protect the interests of the corporation and effectively serve as 'trustees' for the stockholders with respect to the interests of the stockholders in the corporation… [and] directors of Delaware corporations…owe a duty of loyalty to the corporation and its stockholders. (Lafferty et al. 2012, pp. 841, 844)

So, company and corporate law appear to be permissive and supportive of the adoption of any of the first three interpretations of corporate purpose and exclude only the fourth, where stakeholder interests are promoted at the expense of shareholder interests and, even then, only in the context of "the likely consequences of any decision in the long-term" (UK Companies Act of 2006). Many academic and practicing lawyers therefore believe that promotion of corporate purpose does not require a change in corporate law. However, some recognize the complexity that confronts corporate lawyers. For example, in the final chapter of the third edition of the *Introduction to Company Law*, Davies (2020, p. 340) concludes by lamenting,

> When this author first began the study of company law, many decades ago, company law was a relatively simple business. The purpose of company law, broadly, was to align the incentives of those who run large companies with those of investors (both those who had actually invested in the company as shareholders and those who might do so in the future) and to protect corporate creditors from exploitation arising out of limited liability. To be sure, this was not as simple an exercise as this bald statement might suggest…. But the underlying objective could be simply stated, despite the considerable array of legal techniques needed to achieve it successfully, taking account of the vast complexity of corporate experience. It is sometimes thought that those who viewed the goal of corporate law in this way knew nothing of the costs thrown by corporate activities upon those who were neither investors nor creditors. This, of course, is nonsense. The solutions to these costs, as this chapter has suggested, were thought to lie in contract (for those in contractual relations with the company) and in regulation (for those without). Faith in both these extracorporate legal mechanisms seems to have waned over the past decade or so. In respect of regulation, the financial crisis beginning in 2007 seems to have been a major turning point.

The world has indeed become more complex, and faith in extracorporate legal mechanisms has waned. Nevertheless, there is a marked reluctance to act and a strong belief that, even if there were a will to act, it is not an obvious there is a way:

> While company law can do a lot, it is doubtful it can do everything. It is unlikely it can provide a panacea for all the regulatory and contractual problems which beset the corporation. And we would be unwise to try to make it do that: the risk is that it would perform less well the objective it already discharges effectively. (Davies 2020, p. 341)

Davies (2022) argues that any straightforward attempt to require companies to adopt purposes is destined to fail. To illustrate, he cites the unsuccessful attempts in early UK Companies Acts (e.g., the UK Companies Act of 1862) to require companies to adopt object clauses in response to the granting of limited liability and the ultra vires doctrine, which established that companies that strayed outside their stated object clauses were acting beyond their designated powers (Nyombi 2014).

Object clauses and their imposition through the ultra vires doctrine presented three difficulties. The first was the liability directors potentially incurred from acting ultra vires. The second was the limitation it imposed on the activities in which companies could engage and the ability of companies to modify their objectives. The third was the inability of parties to enforce contracts that were deemed to be ultra vires.

In response, companies specified progressively more general and less meaningful object clauses that served no useful function of clarifying or restricting corporate activities. Attempts by courts to sustain substantive interpretations of the ultra vires doctrine became clouded in confusion and obscurity, and progressively the doctrine was weakened until its death knell was sounded in the 2006 Companies Act.

Davies (2022) therefore regards the introduction of meaningful corporate purposes as "not simple." To the extent that corporate purpose is pursued, he believes that its enforcement mechanisms should avoid imposing limitations on the validity of corporate transactions; be solely in the hands of shareholders and not third parties, civil society, or public authorities (such as regulators); and limited to court orders to observe purpose statements (Davies 2022). In other words, the law should do no more than encourage shareholders to nudge companies in the direction of promoting their corporate purposes.

The limited role for corporate law in promoting corporate purpose statements reflects a belief that investors and companies will adopt them only to the extent that they are perceived to assist in delivering corporate and financial success. Anything beyond that will require the intervention of government and regulators to uphold a broader public interest. There is little prospect of companies being created or operated of their own volition with purposes of promoting the interests of society beyond their customers and shareholders.

It is therefore unrealistic to expect that companies will make meaningful statements of why they are created or exist beyond the interests of their shareholders without governments or regulators forcing them to do so. This takes one down the dangerous path of politically determined corporate purposes. Far from inspiring a plurality of corporate purposes that reflect a multiplicity of interests beyond those of the members of a corporation, the adoption of purpose statements risks the imposition of politically inspired and bureaucratically managed corporate objectives.

In essence, Davies is seeking to bring an element of realism and practicality to what he perceives as a worthy but unworldly view of business and law. Law's power to ensure that companies do what they state they will do may be limited, but its ability to require them to state anything other than what they want to do is even more so. The difficulty to which Davies points, and the conclusion to which he comes, is that companies will not of their own volition state or adopt meaningful purposes for which they are legally liable. Because corporate purpose is the reason a company is created and exists, a business will not voluntarily set out its reason for being beyond promoting its own and its members' success for fear of being held accountable for doing it.

What this points to is an inherent problem in the way in which business has been conceived, namely, that private interest does not correspond to the public except in very particular circumstances where the functioning of competitive markets and contracts is so complete and efficient that perfect competition and contracts prevail everywhere.[4] Without this, the failure of markets results in the failure of business and a reliance on regulation that has proven increasingly incapable of meeting the challenge. This imposes an intolerable strain on government and our democratic systems to bridge the divide between those who advocate for the unrestrained

[4]See Roe (2021) for a discussion of the relation between market competition and corporate purpose.

operation of markets and businesses and those who seek to tie them down with the heavy hand of regulation and enforcement (Admati 2021).

One resolution lies in business itself, not in reliance on external parties to constrain it. At the heart of the notion of the corporation is the benefit that is derived from the pursuit of profits. As Smith [1937 (1776), p. 249] stated, "It is the stock that is employed for the sake of profit, which puts into motion the greater part of the useful labor of every society." But as Rosenberg (1974, p. 1181) noted, Smith had a very ambivalent attitude to profit:

> The rate of profit does not, like rent and wages, rise with the prosperity, and fall with the declension, of the society. On the contrary, it is naturally low in rich, and high in poor countries, and it is always highest in the countries which are going fastest to ruin. The interest of this third order [i.e., capitalists], therefore, has not the same connection with the general interest of the society as that of the other two [i.e., landlord and worker].

Profits are not derived exclusively or solely from the delivery of human and natural world benefits. They can also come from the exploitation of human and planetary well-being, and as we reach natural and social environmental boundaries, the impact of that exploitation intensifies.

This potential conflict between the financial inducement of profit and the delivery of human, social, and environmental benefits lies at the heart of the division between the private and public purpose of business. The role of a purpose statement is to address this problem in two ways: first, to establish what is out of bounds in determining legitimate sources of profit for companies, and second, to provide a means for companies to commit to the delivery of public as well as private benefits that drive the legitimate earning of profits. The purpose statement describes how a business will seek to avoid profiting from producing problems (for example, in not paying below a fair wage in its supply chains or degrading natural assets in its possession) and what problems it will solve for whom and over what period (for example, in relation to soil erosion, deforestation, and obesity caused by the food products it sources and sells). In both cases, these are statements of purpose beyond what regulation explicitly requires of business and to which companies are at present incapable of committing.

The current problem of commitment is most starkly illustrated by the market for corporate control—the takeover market. Existing law implies that directors have a duty to prioritize shareholder over other party interests in determining the validity of a takeover, or at least to demonstrate that the takeover is in the long-term if not short-term interests of shareholders. Directors are therefore unable to commit to uphold the interests of other stakeholders.

In contrast, a law specifying that companies must refrain from profiting from creating detriments for others requires a target firm to decline an offer that does not compensate affected parties and requires the acquiring firm to ensure that compensation is paid. This means that target management must reject and acquiring firms must refrain from proposing bids that do not respect the interests of all parties, including, but not exclusively, shareholders. Bids that are profitable solutions not profiting from producing detriments are then "Pareto improving" in providing a firm lock on the interests of all parties, including shareholders, in contrast to existing law, which provides a firm lock on the interests of shareholders alone, potentially to the detriment of others.[5]

[5]This addresses the concern that Bebchuk et al. (2023) raise about the preservation of stakeholder interests in takeovers under existing corporate law, and their concerns about the apparent failure of constituency statutes in the United States to protect stakeholder interests despite their purported ability to do so.

4. PROFIT AND PROSPERITY

The British Academy Future of the Corporation program definition of corporate purpose—"producing profitable solutions for the problems of people and planet, not profiting from producing problems for either"—is a statement not just of the object of the firm but also of what is deemed to be a legitimate source of profits, namely, profiting from solving, not creating, problems for people or the natural world. This is critical because it resolves the conflict that arises between the pursuit of objectives that are in the corporate interest of its members in financial terms and those of society or the natural world more generally in social and environmental well-being.[6]

Where the company has effects on others that are not reflected in market prices, there will be externalities that are not internalized in its financial performance. Because they are not priced, they are not included in a company's revenues or costs and therefore not relevant to the management of its profitability. The reformulation of the company's purpose requires a firm to take account of the effects of its activities on others, irrespective of whether they are priced.

It expects a company to identify where its activities as a producer, employer, purchaser, neighbor, or consumer of public goods and ecosystem services are having a detrimental effect on the interests and well-being of others. It must then determine the ways it can best mitigate, remedy, rectify, or compensate for the detriments it is causing. If the costs of so doing are too great for it to profit from those activities, then it should desist from undertaking them because, as the first part of the purpose statement says, a company should not undertake activities from which it does not profit (Brest et al. 2019, Broccardo et al. 2020, Hart & Zingales 2017).

This concept of purpose aligns social and environmental interests with those of a company's members. Companies profit only where they create positive societal and environmental benefit, not where they have a negative impact on either.[7] It is no longer an empirical matter of whether there is a positive relationship between profits and problem solving but definitionally true in at least an ex ante sense of anticipated profits, if not ex post in terms of unanticipated outcomes.

The purpose of a business clarifies what the board of a company and its shareholders together regard as the legitimate source of its profits, and therefore the return on shareholders' capital. It establishes where together they understand the company as contributing to enhancing the well-being of its customers, employees, suppliers, societies, and the environment, and where investors are therefore appropriately rewarded for their investments. This avoids the current situation in which any profits not earned illegally by violating regulatory rules or at the expense of the value of a firm by undermining its reputation are regarded as legitimate. It diminishes reliance on regulation to stop companies from damaging society and the environment.

Corporate law's significance in incorporating corporate purpose in the fiduciary responsibilities of directors is twofold. First, it establishes a principle of not profiting from detriments, and second, it provides a means by which companies can commit to upholding the interests of other parties (Fisch & Solomon 2021). It extends directors' duties of loyalty from the members of a company to those whose problems it is seeking to solve and introduces a duty of care not to profit from creating detriments for them.

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[6]For a view of the "psychopathic" nature of business, see Babiak et al. (2010), Bakan (2004), and Brueckner (2013).

[7]There are reasons beyond profit why they may wish to confer benefits on other parties. See, for example, Bénabou & Tirole (2010) and Armour et al. (2020).

The firm exists to assist others, not just itself and its owners, directors, and executives.[8] It is there to serve individuals, communities, nations, the natural world, and its environment; to do so in a way that allows it to access the human, natural, social, material, and financial resources it requires to achieve that; and to reward them appropriately. It must therefore respect the rights of its shareholders and those on whom it depends and impacts. The firm establishes for whom it exists, why, for what purpose, and how it should engage with them to deliver what they require in a form that respects their interests. The objective of the firm is no longer merely to promote the success of the company but instead to promote the success of all those whom the company seeks to serve and avoid adversely affecting others. The firm embodies the resolution of individual and collective needs and desires and realizes them through devoting itself to this purpose.[9]

Law's significance in providing a means of committing to parties other than the shareholders is twofold, first in establishing that the direction of causation runs from solving other parties' problems to yielding benefits for shareholders, not the converse, and second in thereby determining the company's trustworthiness in upholding other party interests. At present, in making the duty of the board to promote the success of the company for the benefit of its shareholders, the interests of shareholders are primary, and those of other parties are derivative of shareholders'. Contrary to conventional wisdom, the residual claimants in a firm are therefore not the shareholders. The profits of the firm are its target, and the interests of other parties are subsumed in those so that, in reporting on its performance, primary emphasis is on whether profits have fulfilled expectations, and if not, how the company will address the failure by cutting costs.

Profits are a classic example of Goodhart's law—"when a measure becomes a target it ceases to be a good measure"—because they have the unintended consequence of making other parties (redundant employees, discarded suppliers, abandoned communities) the victims. Reversing causality correctly restores shareholders as the risk bearers and, in the process, establishes the firm's trustworthiness to earn the trust of others as a supplier, purchaser, employer, partner, debtor, neighbor, and citizen.

Why was this not incorporated in the original design of the corporation? The answer is that it was regarded as being neither necessary nor desirable. It was not necessary because private companies at the time of freedom of incorporation were for the most part relatively small, generally family businesses whose primary requirement was access to finance to invest in the newly emerging manufacturing industries. The imposition of objectives beyond their financial survival was thought to be a distraction and impediment to their success. Furthermore, the growing influence of economic thought pointed to the role that competitive markets could play in promoting the alignment of the private interests of firms and their owners with those of society more generally.

It was not desirable because concepts of property suggested that the rights of shareholders over firms were and should be equivalent to those over any form of property.[10] The risks of this for at least one party, namely creditors, were recognized and the basis of the unsuccessful attempts to restrain firms through objective clauses and the ultra vires doctrine described above. What was not anticipated is what has happened since, namely, that corporations have grown to global scale and significance, straining the operation of markets to their limit, and demanding interventions to restrain firms that impose intolerable burdens on legal and political systems. We have therefore

[8]For contending theories of the purpose of the corporation, see Bebchuk & Tallarita (2020b), Friedman (1962, 1970), Mayer (2022), and Stout (2012).
[9]For discussions of the political theory of corporations, see Ciepley (2013), Culpepper (2011), Ferreras (2017), Neron (2010), and Singer (2017).
[10]For discussions of property views of the firm, see Anderson (2020), Harris (2006), Honoré (1961), Millon (1990), Orts (2013), Pistor (2019), Pollman (2021), and Raz (2020).

moved to and beyond the limits of the original conception of the firm and must recognize the need now for it to embrace its potential to promote local, national, and international prosperity as well as profits.

5. CONCLUSIONS

The corporation is a product of the law, and the law can fashion it in its preferred form. That is what it did when the corporation was constrained to be publicly chartered and then released to be freely incorporated. To assert now that there is nothing wrong with the law, and nothing to be done even if there is something wrong, is complacent and complicit in its failings (Mayer 2013, 2018).

What this article has sought to do is to take seriously the objection that the purpose of business is not the fundamental defect of corporate law. That objection centers on two claims: first, that there is little or nothing that existing corporate law prevents firms from doing in determining their corporate purposes, and second, that if given greater latitude in formulating purposes, companies would do little more than they do at present.

The claim of the article is twofold. The first is that critics of the law of corporate purpose have failed to recognize the role that purpose can play in addressing the primary defect of the current system, namely, the divergence of the private interests of the corporation from the public interests of society and the natural world. That derives from the disconnect that currently exists between the private incentives of the pursuit of profit from the public interest in human and natural world flourishing and prosperity.

The second is that the law can not only address that defect through requiring the adoption of appropriately formulated corporate purposes but also provide an essential means of commitment to the delivery of long-term prosperity. Law's permissiveness is part of its problem. In being permissive, it is inadequately enabling in allowing firms to commit to anything other than that which is permitted. It does not enable commitments to objectives beyond the pursuit of the success of the company for the benefit of its members and thereby fails to protect companies seeking to promote wider prosperity through preserving and protecting the interests of others.

The law can and should ensure the alignment of the corporation's incentives with individual, societal, and planetary interests and promote the resolution of their problems by enabling the most powerful institutional entity that we have created to date alongside governments, namely, corporations, to commit credibly to their resolution. Its failings on both counts have been the source of our intensifying crises. Instead of being in denial, we need to acknowledge this and recognize our power to provide a remedy for the cause—namely, the laws that create the corporation.

DISCLOSURE STATEMENT

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