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For Whom is the Corporation Managed in 2020?: The debate over corporate purpose

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Abstract

A high profile public debate is taking place over one of the oldest questions in corporate law, namely, "For whom is the corporation managed?" In addition to legal academics and lawyers, high profile business leaders and business school professors have entered the fray and politicians have offered legislative "fixes" for the "problem of shareholder primacy." In this article, I take this debate to be an interesting development in corporate governance and try to understand and explain what is going on. I argue that, analytically and conceptually, there are four separate questions being asked. First, what is the best theory of the legal form we call "the corporation"? Second, how should academic finance understand the properties of the legal form when building models or engaging in empirical research? Third, what are good management strategies for building valuable firms? And, finally, what are the social roles and obligations of large publicly traded firms? I argue that populist pressures emerging from the financial crisis, combined with political dysfunction, has led to the confusion of these different questions, with regrettable results.

1. Introduction

One of the oldest corporate law issues – For Whom is the Corporation Managed? – has become one of the hottest public policy issues. Politicians, business leaders, judges, and law and business academics have all weighed in. A variety of proposals have been made. In this Essay, I try to make sense of this controversy.

The current debate can usefully be dated to BlackRock CEO Larry Fink's January 2018 letter to CEOs in which he called for companies to articulate and pursue a "purpose":

> Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.[2]

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[1] Martin Lipton Professor of Law, NYU School of Law. This essay began life as the inaugural Munich Lecture on Securities Regulation and Corporate Law, jointly organized by the Max Planck Institute for Tax Law and Public Finance, and the Munich Center for Capital Markets Law, Ludwig-Maximilians-Universitat, Munchen. I am grateful for the invitation to speak and for the enormously helpful questions and comments I received. Special thanks to my host, Prof. Dr. Dr. h.c. Wolfgang Schoen.

[2] https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter

In August 2019, the Business Roundtable, an organization of chief executive officers (CEOs) of America's leading companies, issued a "Statement on the Purpose of a Corporation." This statement, signed by 181 CEO members, set forth a broad and inclusive conception of the corporate purpose:

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

To understand why the Business Roundtable statement attracted so much attention, it must be compared to the Business Roundtable's September 1997 statement in which the BRT stated that "the principal objective of a business enterprise is to generate economic returns to its owners" and that:

> In The Business Roundtable's view, the paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders. The notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders fundamentally misconstrues the role of directors. It is, moreover, an unworkable notion because it would leave the board with no criterion for resolving conflicts between interests of stockholders and of other stakeholders or among different groups of stakeholders.

By contrast, the 2018 BRT statement omits any statement on the relative importance or primacy of any of the various stakeholders. Against the backdrop of the 1997 statement, this has been read as a departure from the principle of shareholder primacy.[3]

Even more recently, Klaus Schwab, founder and Executive Chairman of the World Economic Forum, the group that holds a high profile annual meeting of international business and political leaders in Davos,

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[3] See, e.g., Martin Lipton, The American Corporation in Crisis -- Let's Rethink It, Oct. 2, 2019 ("The Business Roundtable's recent abandonment of shareholder primacy is a step in this direction . . . ").

Switzerland, issued the "Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution" in which he stated that:

> 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. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.

These statements did not emerge in a vacuum. Over the last several years, the question of "corporate purpose" and "shareholder primacy" have become prominent issues in the public debate. Martin Lipton, a distinguished corporate counselor, has attacked "shareholder primacy" in a series of memos and articles. Colin Mayer, a distinguished Oxford finance economist and the former dean of the Oxford Said School of Business, has attacked it in two very prominent books, Prosperity (2019) and Firm Commitment (2013). At the same time, "shareholder primacy" has been attacked as inconsistent with an appropriate response by firms to the threat of climate change, as well as by those who believe that employees have lost out from the wealth gains of the last twenty years.

These critiques have resulted in various policy proposals. Elizabeth Warren, the senior senator from Massachusetts and a Democratic candidate for president, has introduced the "Accountable Capitalism Act," applicable to all firms with more than $1 billion in sales. The proposed Act would require boards to consider the interests of all stakeholders and not just the shareholders, and require that employees elect at least 40% of the directors.

Marco Rubio, the senior senator from Florida and a 2016 Republican candidate for president, issued a forty page study, "American Investment in the 21st Century: Project for Strong Labor Markets and National Development," in which he explicitly rejects "shareholder primacy theory":

> The argument of this section is that shareholder primacy theory presents an externality problem to the sustainability of the private enterprise system. Productive business firms are valuable to the U.S. to an extent far beyond their net present value to shareholders. Working properly, they are the centers of economic output upon which functioning markets depend, steady and constant workplaces for the American people, and the holders of tremendous institutional knowledge. It is in capital investment that these factors of production are combined together. The U.S. has historically had and expected a level of business investment in fixed assets that cannot be adequately explained by shareholder primacy theory. Shareholder primary theory provides a framework to reduce or ignore the longer-term, economy-and-society wide negative externalities that result, by placing them outside the realm of business decisions. These externalities in turn threaten the long-term health of the economy and even the individual businesses in question.[4]

[4] Marco Rubio, American Investment in the 21st Century at 22 (footnote omitted)(May 15, 2019), available at https://www.rubio.senate.gov/public/_cache/files/94fcb79e-eedd-4496-a262-7091647563e6/B68DE3EF858700E482305C9ED26AEC72.5.14.2019.-final-project-report-american-investment.pdf .

Colin Mayer has likewise called for a more "purposive" corporation, backed by explicit commitments and legal sanctions.[5]

What is going on? What accounts for this recent outpouring of commentary and policy initiatives? In this Essay, I seek to understand what this renewed attention to corporate purpose is all about. I argue that the focus on redefining corporate purpose is a result of political dysfunction stemming from the 2008 financial crisis and a related disruption of previously settled arrangements.

In this development, there are at least two related strands. First, there is a post-2008 upsurge of populism in the United States and elsewhere that has manifested itself in a variety of ways including a sense of alienation, Brexit and the election of Donald Trump. Second, and clearly related, the political polarization of our electoral politics has resulted in legislative deadlock. Many have ceased to believe in the possibility of legislation to address societal issues such as climate change, redistribution, stagnant wages, etc. At the same time, radical legislative solutions are being considered, even though they do not have much chance of being enacted at present.

The combination of frustration with legislative inaction and fear of radical future regulation has brought forth a plethora of ideas that can be implemented through private sector initiatives. These include Lipton's "New Paradigm," the Davos Manifesto, and "Commonsense Corporate Governance Principles,"[6] as well as new groups that are trying to forge a new consensus such as the "Investor Stewardship Group"[7] and "Coalition for Inclusive Capitalism."[8] The various efforts to bring greater attention to "ESG" or "Environmental Social and Governance" matters in the boardroom, including a board level focus on climate change, diversity and human capital, are of a piece with the effort to converge on a more sustainable system.

2. Understanding the Question or Questions

From the perspective of corporate law, this current debate marks a dramatic change from the traditional understanding of corporate law's role and the division of labor between corporate law and other regulation.

In the traditional view, the corporate form and corporate law are about solving a narrow and related set of problems. Developed in the 19th century, the corporate form has had the same key characteristics for the last 150 years: legal personality with indefinite life; limited liability; capital committed for the life of the enterprise; transferable shares; delegated management with a board structure; and investor ownership.[9] Much of corporate law revolves around filling in the details of this structure, and controlling three "agency costs" that emerge from the divergence of interests between: shareholders and managers; controlling shareholders and non-controlling shareholders; and shareholders and creditors.

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[5] See, generally, The British Academy, The Future of the Corporation: Principles for Purposeful Business (Nov. 2019)(Colin Mayer is the academic lead of the Future of the Corporation Programme). https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business

[6] https://www.governanceprinciples.org/

[7] https://isgframework.org/

[8] https://www.inc-cap.com/

[9] Kraakman, et al., The Anatomy of Corporate Law, Chapter 1 (3d edition DATE).

In the traditional view, other social problems have other solutions.[10] Environmental regulations control environmental externalities. Redistribution is carried out through the tax system. Labor law governs the relationship between employees and firms.

With other fields and regulations controlling these other problems, corporate managers face a constrained optimization problem: maximize the value of the company subject to socially imposed side constraints. With the other stakeholders protected by regulation and/or contracts and markets, managers' traditional focus on shareholders creates an incentive to create valuable firms, and, in doing so, benefit society as a whole.

Political dysfunction raises fundamental questions for the traditional view. If the legislature will not enact reasonable environmental regulation to control carbon, and we face imminent and irreversible environmental degradation, perhaps corporate law and governance should do more to control climate change, either by treating it as an additional risk factor that boards should consider, or as a direct object?[11] If labor law does not provide employees with adequate bargaining power to secure a fair share of productivity gains, and the resulting populist upsurge threatens damaging mandatory regulation, perhaps corporate law and governance should do more for employees?[12] If the tax system will not take even small steps towards redistribution of wealth in response to rising inequality, an increase that threatens social cohesion and possibly even democratic government, perhaps corporate law and governance should do more to reduce inequality? And if "shareholder primacy" stands in the way of pursuing these worthwhile goals, perhaps it should be swept aside?

Emerging out of this complex context, the contemporary debate over "corporate purpose" can usefully be separated into at least four separate debates. First, there is a legal debate over corporate objective and director duties. In exercising their discretion in managing or overseeing the management of the firm, whose interests does the law expect directors to take as primary, if any, and what limitations does this impose on directorial decision making?

Second, there is a debate within academic finance and economics: how should the "corporation" be modeled in developing a theory of the firm, in evaluating alternative governance arrangements, and in studying the effect of particular changes on firms. In this debate, "shareholder value", measured as stock price or market capitalization, is often understood to be a proxy for firm value and sometimes for economic efficiency.

Third, there is a debate about management strategy and how best to build valuable and sustainable firms. What is the best strategy for solving the key management challenge, namely, organizing the various participants in the firm (investors, employees, customers, and suppliers) to work together as a team to produce great products and services and thereby to build a great company?

Finally, there is a political debate over the social role of large corporations, over the obligations imposed on publicly traded (or all) corporations, and over whether current economic arrangements are politically legitimate and sustainable.

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[10] For an effective expression of this traditional view, see Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 110 Georgetown Law Journal 387 (2001).
[11] See, e.g., Madison Condon job talk.
[12] See, e.g., Leo Strine DC essay.

These are four very different questions that draw on different arguments and evidence. As a logical and conceptual matter, the four questions may well admit of different answers. There is no a priori reason to expect that the answer to the legal question will provide a useful strategy for building great firms, yet it may nevertheless be an entirely correct description of the law. Likewise, the overlap between good management strategy and good politics are unlikely to be complete. Similarly, how financial economists model the firm, and study firms empirically, will ultimately be a positive or descriptive issue – are firms, in fact, managed for shareholders? – rather than a normative or political issue.

Most confusingly, participants cannot be neatly separated into different silos: lawyers and economists have political views and sometimes make political arguments that draw on their professional expertise. Similarly, lawyers may have client interests that are served by particular sorts of management or political interventions. Finally, legal and finance arguments can be persuasive in the management or political context, whether because of law's expressive dimension, or finance's technical/quantitative basis. While these four debates intersect in a variety of important ways and for a variety of reasons, keeping them separate is useful at least at the beginning.

The Legal Debate: For Whom is the Corporation Managed?

What kind of legal question is the question "for whom is the corporation managed?" Is it a question about actual corporations of different sorts? Or is it rather a question about the enterprise form created by the statute and interpreted by the courts? I will argue that the most useful and tractable way of understanding the question is as a quest for the best "theory" of the corporate form.

The corporate form is a remarkably durable and useful invention. It emerged in the mid 19th century and takes essentially the same form in every developed jurisdiction, including the combination of its principal features:

- Legal personality with indefinite life
- Limited liability
- Transferable shares
- Delegated management with a board structure
- Investor ownership/shareholder voting
- Capital lock in

This enterprise form is used in a remarkable variety of contexts. It is used in economies marked by concentrated ownership and dispersed ownership. It is used in capital intensive industries and in service industries. It is used for large and small publicly held corporation, for closely held corporations, for wholly owned subsidiaries, for "special purpose vehicles" and for mutual enterprises.

Even more remarkably, it has been a successful framework for businesses for well over a century, despite changes in almost everything else. This durability is evidence of the corporate form's adaptability to changed circumstances, and testament to its remarkable wealth-generative capacity.

As a result of this heterogeneity, it is hard to imagine any consensus on the question "For whom are most corporations actually managed today and throughout history?" After all, the appropriate management strategy must depend on the conditions in which a firm operates, as well as the use to which the corporate form is applied. The market conditions in which a large publicly held firm operates in 2020 are different from what they were in 1970, 1920 or 1870, and are likewise different from the challenges facing closely held firms, not to mention wholly owned subsidiaries.

By contrast, there is at least a chance of consensus around a description of the characteristics of the corporate form that has been used, in more or less the same form, across all these times, places and contexts. The answer, of course, will have to be relatively modest to be consistent with this history and usage, and will have to be flexible enough to leave room for debates over appropriate management strategy and the social responsibility of large businesses.

Viewed as a quest for a description of the corporate form, the answer is quite straightforward, if somewhat modest and boring. The "objective" of the corporation, understood this way, is, as Chancellor William Chandler of the Delaware Chancery Court, put it, "to promote the value of the corporation for the benefit of its stockholders."[13] This is quite similar to the description in the American Law Institute's Principles of Corporate Governance, developed during the 1980s and completed in 1994: "a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[14]

There are at least three main arguments for why this "shareholder primacy" principle is the best description of the characteristics of the corporate form: the statutory structure; the case law; and the history of reform efforts in and out of Delaware.[15]

Under the Delaware General Corporation Law, absent a contrary provision in the certificate of incorporation, shareholders, and only shareholders, vote on bylaws (109), in director elections (211, 215), on charter amendments (242), on mergers (251), in the sale of all or substantially all the assets (271), and for dissolution (275). Similarly, in a solvent corporation, only shareholders can bring a derivative suit on behalf of the company. Finally, by statute, shareholders are the residual beneficiaries: "Any remaining assets shall be distributed to the stockholders of the dissolved corporation".[16] As a matter of *realpolitik*, you work for whomever can fire you; in the corporate republic, shareholders can fire directors.

The case law reinforces this allocation of power. Whenever courts have been confronted with an inescapable conflict between the interests of shareholders and the interests of other stakeholders, and have not been able to dodge the question by deference to board discretion under the business judgment rule, the courts have affirmed the primacy of shareholder interests. In this regard, consider three different situations.

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[13] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del Ch. 2010).
[14] ALI, PCG Section 2.01(a) (1994).
[15] For a similar view, see Leo E. Strine, Jr., Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit, 47 WAKE FOREST L. REV. 135 (2012).
[16] DGCL 281.

First, when a corporation is sold for cash, all of the shareholders will be cashed out, and will no longer have any long term interests in the corporation as shareholders. At that point, the conflict between shareholders' interests in securing the highest price for their shares, and the interests of other stakeholders such as employees (who may have an interest in avoiding layoffs), creditors (who may have an interest in retaining earnings and avoiding leverage), customers (who may have an interest in high quality products at low prices), and communities (who may have an interest in maintaining local production) becomes inescapable. In those circumstances, Delaware courts are crystal clear that the duty of the board is to secure the highest value reasonably available for shareholders, and may not balance the interests of shareholders against the interests of other stakeholders. This is the clear holding of *Revlon* and a long line of other cases.[17]

Second, in the cases addressing the relationship between a wholly owned subsidiary and the parent company, the cases fully embrace "shareholder primacy" in the sense of holding that the duty of the wholly owned (and solvent) subsidiary is to serve the parent/sole stockholder. Thus, in summarizing Delaware case law, then vice chancellor (and subsequently chancellor and chief justice) Leo Strine stated that:

> To the extent that Trenwick America was a wholly-owned solvent subsidiary of Trenwick, the fiduciary duties owed by the Trenwick America board ran to Trenwick. Our Supreme Court has made clear that, "in a parent and wholly-owned subsidiary context, directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders."[18]

The implications of this principle are far reaching. The director of a wholly owned subsidiary owes no duty "to second-guess the business judgment of its parent corporation when following and supporting the parent's strategy would not violate any legal obligation the subsidiary owes to another."[19] This is

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[17] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1958)("The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1264 (Del. 1989) ("Our decision in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173 (1986), requires the most scrupulous adherence to ordinary standards of fairness in the interest of promoting the highest values reasonably attainable for the stockholders' benefit."); Barkan v. Amsted Industries, Inc., 567 A.2d 1279, 1286 (Del. 1989)(" When it becomes clear that the auction will result in a change of corporate control, the board must act in a neutral manner to encourage the highest possible price for shareholders"); Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1994)(" Since the Paramount directors had already decided to sell control, they had an obligation to continue their search for the best value reasonably available to the stockholders.").

[18] Trenwick American Litigation Trust v. Ernst & Young, LLP, 906 A.2d 168, 201 (Del. Ch. 2006), citing Anadarko Petro. Corp., 545 A.2d at 1174 (citing Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)). See also Quadrant Structured Prods. Co. v. Vertin, 103 A.3d 155, 184 (Del. Ch. 2014) ("When a controller owns 100% of a corporation's equity and the subsidiary is solvent, the interests of the corporation and its fiduciaries are fully aligned with those of the controller. The fiduciary duties of the directors and officers require that the subsidiary be managed for the benefit of the controller, and the fiduciary duties imposed on the controller self-referentially require the same thing.")

[19] Id (Trenwick).

true even if the parent company board intentionally took actions that made the subsidiary less valuable as an entity.[20]

Similarly, when a company has a complex capital structure with common stock, preferred stock and debt, and the interests of the different classes of investors diverge, the duties of the board run to the common stockholders.[21] Once again, forced to choose between shareholders and other participants in the enterprise, the Delaware courts make it clear that the primary beneficiary of directors' duties are the shareholders.

Third, the history of reform efforts further demonstrate that "shareholder primacy", in the sense described above, is the legal standard. There are two separate reform efforts that bear on this. When, during the 1980s, Delaware first articulated the *Revlon* principle that established "shareholder primacy" in the sale of a company context, there was push back in other states. Many states passed statutes to make it clear that the board may consider the interests of other constituencies.[22] Indiana and Pennsylvania went further than most and made it clear that, in doing so, the board need *not* give any stakeholder's interests primacy.[23] These statutes were necessary because Delaware's holding in *Revlon* made it clear that, unless they changed their law, "shareholder primacy" was likely to control.

More recently, the proposals to enact "public benefit corporation" provisions were justified as necessary because the existing law was thought not to permit such a deviation from "shareholder primacy." Delaware's provision that explicitly permits the board of directors to "manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation"[24] would not have been necessary had directors of "regular" corporations been able to do so.

While "shareholder primacy" is the best description of the legal characteristics of the corporate form, one should not think that the answer to this fairly technical legal question will decide more than it decides. In particular, the "shareholder primacy" framework of Delaware corporate law simply does not answer many of the questions that partisans think it should. Does it mean that shareholders are the "owners" of the corporation and that, therefore, they should have the right to tender into a tender offer at a premium to the current market price? No. Does it mean that corporations must reduce wages to the minimum in order to maximize current share price? No. Indeed, at the end of the day, this specification of the objective of the corporation leaves nearly all the burning questions unanswered.

[20] Id.

[21] Katz v. Oak Industries, 508 A.2d 873 (Del. Ch. 1986); Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584 (Del. Ch. 1986); HB Korenvaes Inv., L.P. v. Marriott Corp., 1993 Del. Ch. LEXIS 90; Equity-Linked Investors L.P. v. Adams, 705 A.2d 1040 (Del. Ch. 1997); In re Trados Inc. S'holder Litig., 2009 Del. Ch. LEXIS 128; LC Capital Master Fund, Ltd. V. James, 990 A.2d 435 (del. Ch. 2010).

[22] Committee on Corporate Laws, Other Constituencies Statutes: Potential for Confusion, 45 Bus.Law. 2253 (1990).

[23] Pa. C. S. § 1715(b)(" The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor.")

[24] DGCL 365(a).

Importantly, Delaware, in addition to being a "shareholder primacy" state when it comes to the objective of the corporation, is deeply "board-centric" with regard to the management of the firm. The business and affairs of the corporation, the statute instructs, "are managed by or under the direction of the board of directors."[25] Moreover, through the "business judgment rule," courts give great discretion to the decisions of the board of directors so long as directors are disinterested and act in good faith.

This means that, outside of the "conflict" scenarios discussed above, a disinterested board acting in good faith may use its business judgment in determining the critical management decisions of the firm. Should the board seek to promote the value of the firm over the short term or the long term? Does it make sense to treat the firm's employees well in order to develop a high quality and loyal workforce? Should the firm invest additional resources in research and development or has the R & D program proved to be a failure? Should the firm move production abroad or retain it in the U.S.? Should the firm switch its energy sources away from fossil fuels and towards renewable sources? Or the opposite? All of these are questions for the board of directors and, outside the end-game situation discussed above, there is absolutely nothing in the Delaware conception of "shareholder primacy" that mandates that directors choose short term share price maximization over long term value creation or that mandates paying employees the minimum salary necessary or charging customers the highest price that the market will bear. In each of these cases, it is clear that disinterested directors seeking in good faith to promote the value of the corporation will have the discretion to the make the decisions that they believe are best for the corporation and its stakeholders. All, of course, subject to being replaced by shareholders acting through the governance structure of the firm.

There are, of course, lawyers and legal scholars who challenge this reading of Delaware corporate law. One prominent voice was the late Lynn Stout who, in a series of articles and a book, claimed that not only was "shareholder primacy" a bad strategy for firms that leads to poor returns for shareholders, but also argued that it is not a correct description of the legal characteristics of the corporate form.

In "debunking the shareholder value myth" as a matter of law, Prof. Stout made three principal arguments.[26] First, she pointed out that shareholders own their shares and do not own the corporation; on the contrary, she claims, corporations own themselves, just like other (legal) persons. Although the question whether shareholders are best thought of as the owners of the corporation plays some role in the public debate, it is largely beside the point when considering the "objective" of the corporation that is derived from its origins in the law of Agency and Trusts. Although it would be incorrect to say that the beneficiaries of a trust are the owners of the trust -- they are not and the usefulness of the trust as a legal form depends on that -- the law is still crystal clear that trustees are charged with managing the trust for the benefit of the beneficiaries. Whether the bundle of rights that shareholders have in the corporation can be concisely termed "ownership" is a separate questions from whether the best description of the corporate form is that it is managed for their benefit.

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[25] DGCL 141(a).

[26] Here I rely on her summary of her arguments in Lynn Stout, The Shareholder Value Myth, European Financial Review, April-May 2013, available at SSRN: https://ssrn.com/abstract=2277141 .

Second, Prof. Stout argues that, as a matter of law, it is incorrect to characterize directors and executives as the shareholders' "agents". While this is correct as a matter of law – directors and executives are the agents of the corporation – it too is rather beside the point. Trustees are agents of the trust and not of the beneficiaries, but they still have a duty to manage the trust for their benefit. More generally, the extent to which directors and officers can bind the corporation or owe fiduciary duties to the corporation (the two key questions answered by the legal relationship of agency) is unrelated to the objective of the exercise of discretion.

Third, Prof. Stout argues that the "business judgment rule ensures that, contrary to popular belief, the managers of public companies have no enforceable legal duty to maximize shareholder value." This is a complex and somewhat misleading claim. While it is true that, outside of the sale of company context in which the interests of shareholders and other stakeholders inescapably diverge, there is no general legal duty to *maximize* shareholder value, there *is* a general legal duty to *pursue* or *promote* shareholder value. It is thus incorrect to claim, as Professor Stout does, that managers of public companies, "can also choose to pursue any other objective that is not unlawful, including taking care of employees and suppliers, pleasing customers, benefiting the community and the broader society, and preserving and protecting the corporate entity itself." As the eBay case makes clear, that is not generally the case.

Martin Lipton's "corporation-centric" view of corporate "purpose" is largely consistent with what I am presenting here as the "traditional" view. In a series of memos and articles, culminating in the "New Paradigm" issued in cooperation with the World Economic Forum, Mr. Lipton and his colleagues at Wachtell Lipton have been promoting a "long term corporate value" view of both corporate purpose and fiduciary duties with the goal of reorienting the relationship between companies and their shareholders to support long term investment. As he summarized this position recently:

> The fiduciary duty of the board is to promote the value of the corporation. In fulfilling that duty, directors must exercise their business judgment in considering and reconciling the interests of various stakeholders-including shareholders, employees, customers, suppliers, the environment and communities-and the attendant risks and opportunities for the corporation. The board's ability to consider other stakeholder interests is not only uncontroversial, it is a matter of basic common sense and a fundamental component of both risk management and strategic planning.[27]

At the same time, Mr. Lipton fully recognizes the implications of the governance structure with its allocation of power to shareholders:

> And yet even if, as a doctrinal matter, shareholder primacy does not define the contours of the board's fiduciary duties so as to preclude consideration of other stakeholders, the practical reality is that the board's ability to embrace ESG principles and sustainable investment strategies depends on the support of long-term investors and asset managers. Shareholders are the only corporate stakeholders who have the right to elect directors, and in contrast to courts, they do not decline to second-guess the business judgment of boards. Furthermore, a number

[27] Martin Lipton, Forum Response: The American Corporation is in Crisis – Let's Rethink it (Oct. 2, 2019).

> of changes over the last several decades-including the remarkable consolidation of economic and voting power among a relatively small number of asset managers, as well as legal and "best practice" reforms-have strengthened the ability of shareholders to influence corporate decision-making.[28]

Mr. Lipton thus acknowledges, whether as a matter of "law" or "realpolitik", the core proposition of the traditional notion of "shareholder primacy": that boards promote the value of the corporation for the benefit of the shareholders. This is why Mr. Lipton's primary focus in the New Paradigm is to convince the largest asset managers to focus on long term value creation rather than short term stock price maximization.

Thus, Mr. Lipton points out,

> Nor does any rule of law mandate director obeisance to the ideology of share-price maximization. No statute anywhere enshrines or even endorses the objective of share-price maximization. Nor does case law require directors to manage the ongoing business and affairs of the corporation with the paramount goal of maximizing share price. Directors may be obligated to seek the highest price in the context of a corporate auction, and the market's perception of a corporation's future prospects, as reflected in the stock price, is no doubt a relevant factor in deciding how to manage the company to maximize its potential. But not even the most aggressive reading of precedent identifies share-price maximization as the polestar of director decision-making.
>
> Insightful commentators accurately emphasize that shareholders alone enjoy the corporate franchise, and with it the power to select directors. But that voting structure does not compel the conclusion that directors who are elected by shareholders must or should manage the corporation only in shareholder interests. Nor does it mean that directors, once impaneled as corporate stewards, cannot manage with the interests of society and people in view. To be sure, the vote makes directors accountable to shareholders, but it does not define or delimit the scope of directors' duties—which remain, first and foremost and in every U.S. jurisdiction, the preservation and promotion of long-term corporate health and value. [29]

This, I would submit, is actually a fairly clear statement of the traditional view, with just a slight difference in emphasis. As discussed above, although I view the directors' duties in the context of a corporate auction to be a revealing example in which courts have to confront the core question of "for whom is the corporation managed" and not the exceptional case, we agree that *Revlon* is clear. We also agree that, in the day to day management of the firm, the board is not under any obligation to maximize share price. Moreover, we agree that shareholders' power to elect directors means that directors will be accountable to shareholders. Finally, we agree that "directors, once impaneled as corporate stewards, [can] manage with the interests of society and people in view" when they believe that doing so is rationally related to shareholder value, as it generally will be. If we disagree, it is over the question whether directors can pursue the interests of society and people when they believe that doing so does

[28] Id.

[29] https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/

not benefit shareholders over any time frame or even injures the interests of shareholders. In the sale of company context, we agree they may not. In other contexts, we agree that shareholders will successfully resist such efforts, whether or not they are legally permissible.

The proper understanding of the legal characteristics of the corporate form, then, is "shareholder primacy" but, importantly, that legal notion of "shareholder primacy" should not be confused with "short term share-price maximization" during the day to day management of the company.[30] It would thus be an incorrect statement of Delaware law to claim that directors must maximize the short term stock price even when they believe that long term projects will be more valuable. On the contrary, a disinterested board that makes the good faith decision to invest heavily in research and development at the cost of short term stock price will be fully protected under the business judgment rule, even when the investments turn out badly.

Moreover, in managing the business, the board of directors may consider the interests of other stakeholders, so long as there is some "rational relation" to shareholder value. As the Delaware Supreme Court stated in *Revlon*, "Although such considerations [of non-stockholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."[31]

Revlon thus provides both the general rule and its limit precisely because the situation is so special: shareholders of a company being sold for cash have no long term interests. But the implication of *Revlon* is *not* that directors must always maximize short term stock price even when they believe that an alternative strategy is more valuable. Indeed, *Revlon* does not even stand for the proposition that, when a company is being sold, directors must conduct an auction. Rather, as is now clear, *Revlon* stands for the proposition that, when a company is being sold, the board must seek the "best price reasonably available," even though there is "no single blueprint that a board must follow to fulfill its duties."[32] Any director who believes that *Revlon* requires him or her generally to maximize short-term share value is simply mistaken about his or her legal duties.

The Finance Debate

Whatever the answer to the legal debate, there is a separate question of whether the Business Roundtable intervention, Larry Fink's letter or the rising chorus of public statements supporting a broader "stakeholder" conception should change the way that Finance scholars think about the corporation.

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[30] As the Delaware Supreme Court explained in Paramount v. Time, 571 A.2d 1140, 1150 (Del. 1989):

> Delaware law imposes on a board of directors the duty to manage the business and affairs of the corporation. 8 Del.C. § 141(a). This broad mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability. Thus, the question of "long-term" versus "short-term" values is largely irrelevant because directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon.

[31] Revlon at 183.

[32] Barkan at 1286.

Within both theoretical and empirical finance scholarship, and the standard finance textbooks, all conceptualize the corporation as run for the benefit of the shareholders. Thus, e.g., INSERT

More generally, finance scholarship that relies upon stock price as a proxy for firm value implicitly accepts a version of "shareholder primacy." Were the corporation not run for the ultimate benefit of shareholders, then an increase or decrease in stock price might be unrelated to firm value and might simply represent a shift of value from shareholders to other stakeholders. While this undoubtedly happens from time to time, the modeling and measurement conventions of Finance represent a maintained assumption that, at least most of the time, managers manage for the benefit of the shareholders. EXPAND.

For example, when a study finds a link between shareholder rights and equity prices, one interpretation is that stronger shareholder rights cause higher equity prices which, in turn, reflect higher firm value, a conclusion that can then be check by examining other measures of firm value and performance.[33] Similarly, evidence that a decline in stock price leads to takeovers provides evidence that managers of companies whose stock price drops face greater market discipline.[34] While both of these examples start from an assumption that stock price reflects firm value, they also use other more direct measure of firm value.

Should the current public discussion about "corporate purpose," and the efforts to expand how investors, boards and the general public think about "corporate purpose" change how finance scholars model the corporation or how informative they find stock prices? Probably not or at least not yet.

In essence, for finance scholars, the question is how firms are actually managed, rather than the normative or aspirational goals that are now being articulated. Although it is possible that the debate over corporate purpose will ultimately change how firms are managed, for now, two features of the current environment would counsel financial economists against changing their approach. First, as described above, the power structure of the business corporation gives substantial power to shareholders and no power to any other constituency. Most importantly, shareholders and only shareholders elect directors. This means that contests for control or influence of the board of directors, including proxy contests for control and short-slate proxy contests, will be fought on a shareholder value basis because shareholders are the only ones who vote.

Second, with the re-concentration of shareholding over the last twenty years, shareholders are more powerful than ever. Given shareholders' legal rights under the corporation statutes, and the current concentration of shareholding, so long as shareholders continue to expect firms to promote firm value for their benefit, that is likely to provide the best working model for how firms are, in fact, managed.

ADD: Discuss Colin Mayer; Hart & Zingales.

The Management Debate

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[33] Gompers, Ishii and Metrick, Corporate Governance and Equity Prices, Q.J.E. 118(1), 107-155 (Feb. 2003).

[34] Alex Edmans, Itay Goldstein and Wei Jiang, The Real Effects of Financial Markets: The Impact of Prices on Takeovers, J. Fin. 67(3), 933-971, June 2012.

The earlier discussion of the legal debate over "shareholder primacy" shows that, while the notion that the corporation is managed for the benefit of the shareholders is the best statement of the law, it is consistent with a variety of management practices. Whatever the nuances of the legal standard, a version of "shareholder primacy" became the de facto ideology of business schools and board rooms at some point in the 1990s.[35] It is this normative consensus that is reflected in the Business Roundtable's 1997 statement.

Whatever the outcome of the legal discussion, the link drawn between "shareholder primacy" and "short term share value maximization" is linked to a long-standing debate over the balance of power between shareholders and managers, and the extent to which shareholder pressure leads to better management and capital allocation or, rather, to excessive focus on quarterly profits, share price and other "short term" measures of performance. In the 1980s, this debate focused on hostile tender offers and their effect on firms that were targeted and those that were not. Since around 2005, this debate has focused on the role of "activist hedge funds" in corporate governance and whether the pressure by such funds, and the support they have received from institutional investors, has led to excessive "short termism."

In this debate, both sides have recruited statements of the law to their causes. In the 1980s version of the debate, the *Revlon* opinion, discussed above, marked a milestone in the "shareholder power" cause, and was presented as an authoritative statement of "shareholder value maximization." Other cases such as *Unocal*, *Moran* and *Paramount v. Time*, were deployed against such claims to make clear that, outside of the sale of the company context, boards of directors has very wide discretion to resist immediate demands to maximize share value in favor of long term strategy.

As the debate over the right balance of power between shareholders and managers continues, some now argue that this management ideology has led to an intense focus on short term share price maximization at the cost of long term firm value.[36] On the other hand, others argue that the discipline of managing to a single metric leads to better capital allocation and more focused firms.[37] This is an important debate and there are reasons to think that no single strategy will be best for all firms.

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[35] David Ronnegard and N. Craig Smith, Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools. J. Bus. Ethics Nov. 2014; Gentile, Mary. C. 2004. Corporate Governance and Accountability: What do we Know and what do we Teach Future Business Leaders? The Aspen Institute Business & Society Program; Ghoshal, S. 2005. Bad management theories are destroying good management practices. Academy of Management Learning & Education, 4(1): 75-91. Smith, N.C., and Van Wassenhove, L. 2010. How business schools lost their way, BusinessWeek, January 11(https://www.bloomberg.com/news/articles/2010-01-11/how-business-schools-lost-their-way); Gardiner, Beth. 2009. B-schools rethink curricula amid crisis. The Wall Street Journal Europe, March 27: 10; Holland, Kelley. 2009. Is it Time to Retrain B-Schools? The New York Times, March 15; West, D.M. 2011. The purpose of corporations in business and law school curricula. Governance Studies at Brookings.

[36] Joseph L. Bower & Lynn S. Paine, The Error at the Heart of Corporate Leadership, Harvard Business Review, May-June 2017, 50-60; Steven Pearlstein, Social Capital, Corporate Purpose and the Revival of American Capitalism, Brookings Center for Effective Public Management. Lipton; others.

[37] See discussion in the Aspen paper. Gentile, Mary. C. 2004. Corporate Governance and Accountability: What do we Know and what do we Teach Future Business Leaders? The Aspen Institute Business & Society Program.

On the one hand, as a strategy for running actual firms, “shareholder primacy” is not a particularly plausible candidate for how to motivate the various participants in the firm to work together to build a great company. As Jack Welch, retired CEO of GE, said in an interview in 2009, “On the face of it, shareholder value is the dumbest idea in the world . . . Shareholder value is a result, not a strategy . . . Your main constituencies are your employees, your customers and your products."[38]

On the other hand, private equity has demonstrated that a focus on the “bottom line,” combined with incentives that align management’s interests with those of the shareholders and close monitoring, can generate huge value.

At the level of anecdote, this is a hard debate to resolve: For each example of shareholder pressure leading to a sacrifice of long term value, someone will bring forward an example of managers who waste money on R & D while claiming to be pursuing long term value.

Ultimately, the management debate will continue to evolve against the backdrop of each of the key features that has influenced it in the past. These start with the current state of the product and capital markets which, in turn are driven by trade policy. The golden age of managerialism, when boards reigned supreme and shared the prosperity with employees, communities and other stakeholders, was underwritten by U.S. industry’s dominant position in the post-war period. Global market power and the “rents” that accompany it, can be wonderful things at least for those who have it. But those rents have disappeared with the rise of competitive global markets.

Another key factor that affects the evolution of management strategy is “technology.” As technology changes, the choice between “make v. buy” and the optimal boundaries of the firm also change. As the efficient boundaries of the firm changes, industry must readjust and it does so through mergers and acquisitions, as well as bankruptcy.

One, but only one, factor in how industry adjusts in a changing world is the basic governance structure created by the corporate form: the business and affairs of the corporation are managed by or under the direction of the board of directors; and only shareholders vote for directors.

If Delaware law’s “shareholder primacy” does not, in fact, require anything like “short term share value maximization,” then why the battle over the legal description of the corporate form, as discussed above, or the battle over whether the law mandates “shareholder primacy” in the management literature? Because law inevitably has an expressive aspect, and partisans in the debate over the balance between shareholder power and management discretion all want the law on their side. How better to convince executives, directors or MBA students than by telling them that the law requires that they do X?

Each side should, however, be disappointed. The best legal description of the corporate form, including the statutory provisions, and the cases interpreting them, must ultimately be agnostic on how to build great businesses. The corporate form is, after all, just one of a menu of enterprise forms, a form that

[38] Francesco Guerrera, Welch denounces corporate obsessions, Financial Times, March 13, 2009. Although it is ironic that this comes from Jack Welch, known for his focus on share value and ever increasing earnings as CEO of GE, and on the eve of GE losing its triple A rating from Standard & Poor’s, the point is still a sound one.

has been used for more than a century in structuring business activity though vastly different conditions. While "shareholder primacy" as a legal concept implies that, at some level, directors ultimately manage the corporation for the benefit of shareholders, it simply does not address the question whether hedge fund activist pressure leads to excessive "short termism" nor could it.

The fact that corporate law does not determine management strategy, however, is hardly surprising or problematic. All of the arguments made against "shareholder value maximization" as a business strategy apply however one interprets corporate law.

The Political Debate

The political version of the debate is, perhaps, the most ambiguous and interesting. Who would have thought that corporate governance would figure into political campaigns?

To get a sense of the politics of corporate governance today, consider Elizabeth Warren's concise diagnosis of where things have gone wrong:

> American corporations used to balance the interests of all of their stakeholders, including employees, customers, business partners, and shareholders. But in the 1980s, they decided their only legitimate and legal purpose was "maximizing shareholder value."
>
> This shift is a root cause of many of America's economic problems. In the early 1980s, America's biggest companies dedicated less than half of their profits to shareholders. More recently, they have sent 93% of their earnings to shareholders. That means trillions of dollars that might have otherwise gone to workers or long-term investments have gone to shareholders instead.
>
> The results have been predictable. In recent decades, worker productivity has risen steadily but real wages for the average worker have barely budged. The share of national income that goes to workers has dropped. Big American companies have under-invested, opening the door to foreign competitors.
>
> And because 84% of American-held shares are owned by the richest top 10% of families -- while more than 50% of American households own no stock at all -- corporate America's commitment to "maximizing shareholder return" is a commitment to making the richest Americans even richer at all costs.[39]

Lest one think that this diagnosis comes from only one side of the political spectrum, Senator Marco Rubio takes a very similar approach:

> It has been accepted as economic law since the 1970s that returning value to shareholders is the primary function of business activity. This theory, which we will call "shareholder primacy

[39] https://elizabethwarren.com/plans/accountable-capitalism. See also https://www.cnbc.com/2019/12/16/elizabeth-warren-challenges-jamie-dimon-over-accountable-capitalism.html?__source=iosappshare%7Ccom.apple.UIKit.activity.Mail

theory" in this section, is not a law of nature, but a system of preferences, or as William Lazonick has called it, an ideology. n51

51 This theory, also referred to as "maximizing shareholder value," has been well-covered by the academic literature for its effect on capital investment. See William Lazonick and Mary O'Sullivan, "Maximizing shareholder value: a new ideology for corporate governance," Economy and Society, February 2000. https://www.tandfonline.com/doi/abs/10.1080/030851400360541.

It is a theory based on a certain set of beliefs about what economic value is, how it is created, and who has what claims to it. Nothing about it guarantees that capital will be deployed to the productive ends described in the previous section as the institutional role of business enterprise. In fact, it disrupts the ability to constructively discuss any such a function at all, by making equity returns the sole criterion for business performance.

The argument of this section is that shareholder primacy theory presents an externality problem to the sustainability of the private enterprise system. Productive business firms are valuable to the U.S. to an extent far beyond their net present value to shareholders. Working properly, they are the centers of economic output upon which functioning markets depend, steady and constant workplaces for the American people, and the holders of tremendous institutional knowledge. It is in capital investment that these factors of production are combined together. The U.S. has historically had and expected a level of business investment in fixed assets that cannot be adequately explained by shareholder primacy theory. N. 52

52 J.W. Mason, "The Story of Q," June 26, 2012. https://jwmason.org/slackwire/story-of-q/

Shareholder primary theory provides a framework to reduce or ignore the longer-term, economy-and-society wide negative externalities that result, by placing them outside the realm of business decisions. These externalities in turn threaten the long-term health of the economy and even the individual businesses in question.[40]

For Senator Warren, the solution to the "problem" of "shareholder primacy" is the Accountable Capitalism Act which would mandate (a) a federal charter for all corporations with more than $1 billion per year in sales,[41] (b) election of at least 40% of the directors by the employees,[42] (c) affirmative duties to take the interests of all stakeholders into account,[43] and (d) a ban on sales of stock by directors and senior executives within five years of receiving them or within three years of a company stock buyback.[44]

As a historical matter, Senator Warren's analysis is incorrect. It is simply not true, as she said in a recent interview, that:

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[40] Marco Rubio, American Investment in the 21st Century: Project for Strong Labor Markets and National Development, at p. 22.

[41] Accountable Capitalism Act at Section 4.

[42] Id. at Section 6.

[43] Id. at Section 5(c).

[44] Id. at Section 7.

> You may remember that, for more than a century, American corporations owed multiple duties. They owed duties to their investors, but also to their employees, to their customers, to the communities where they were located, to our country. And then, in the late '70, an economist comes along and says, "Hey, here's a novel idea. How about if you only owe any kind of duty to your investors?" Which means, make it all about profitability. That means that American corporations today, these giant corporations, they have no loyalty to America or to American workers.[45]

In fact, it has never been the case that American corporations owed general legal duties to employees, customers and communities.

But leave that to one side. As a political intervention, the positions of Senators Warren and Rubio are powerful. Criticizing "big business" always has an audience, especially given the unequal recovery and distribution of gains over the last decade.

One way to understand the current public interventions by Larry Fink, the Business Roundtable and others is through the political lens: if corporate America does not reorient itself in a way that is more politically legitimate, mandatory legislation will not be far behind. Although enacting the Accountable Capitalism Act may be a long-shot, other legislation may be more likely. There are proposals floating around to prohibit stock buybacks, on the grounds that such buybacks, rather than being tax efficient means for returning unneeded capital to shareholders are, instead, depressing wages and investment.[46] There are also proposals to XYZ.

Understood as a political intervention, is the Business Roundtable statement a *good* political intervention? Is it likely to achieve the goals of its sponsor or, at least, not make things worse?

Here, it is worth noting that the Business Roundtable statement did not go unanswered. Within days, Senator Warren sent a (public) letter to Jamie Dimon, CEO of JPMorgan Chase and chair of the Business Roundtable. In her letter, Senator Warren wrote:

> I write in regard to the Business Roundtable's (BRT) new Statement on the Purpose of a Corporation issued on August 19, 2019. This new statement marked a potentially significant change. It reversed the Business Roundtable' s troubling position, held since 1997, that "corporations exist principally to serve shareholders," instead acknowledging that "each of [y]our stakeholders is essential" and committing to "deliver value to all of them, for the future success of our companies, our communities and our country." You signed the pledge to follow these principles on behalf of JPMorgan Chase. I write for information about the tangible actions you intend to take to implement the principles, including whether, to make good on your commitment, you will implement the steps laid out in the Accountable Capitalism Act I plan to reintroduce in the coming weeks.[47]

[45] https://www.cnbc.com/2019/12/16/elizabeth-warren-government-listens-to-rich-guys-who-dont-want-to-pay-taxes.html

[46] CITE.

[47] October 3, 2019 letter from Sen. Elizabeth Warren to Jamie Dimon (footnotes omitted).

This is a powerful response. Imagine, if you will, that two years from now, with a new administration in the White House, Senator Warren (either from the Senate or the White House) returns to the BRT statement. Looking back over the two plus years since the BRT's statement, she will ask how the reality on the ground has changed? Are workers getting a larger share? Is their voice being heard? Are firms taking into account all of their stakeholders' interests or still giving primacy to shareholder interests? And if, as is likely, not much will actually change over the next two years – if, for no other reason, than that it is and will continue to be the case that only shareholders vote for directors – Senator Warren could reasonably say, "Hey, we tried it your way but, as we see, the 'private ordering' approach doesn't work. It is time to enact my Accountable Capitalism Act or some other mandatory legislation that will require boards to manage corporations for the benefit of all their stakeholders."

Here, it is worth returning to Milton Friedman's 1970 New York Times magazine article that, for many, is the iconic statement of the evil "shareholder primacy" thesis. What people remember is that Mr. Friedman wrote that "there is one and only one social responsibility of business--to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[48]

Less remembered is the target of Mr. Friedman's article. Then, as now, there were loud calls for corporations to act in a more socially responsible manner. Then, the issue was wage and price restraints. The real target of Friedman's attack was the extent to which public statements by business leaders embracing notions of "social responsibility" undermined the political legitimacy of the market system:

> Whether blameworthy or not, the use of the cloak of social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society. I have been impressed time and again by the schizophrenic character of many businessmen. They are capable of being extremely far-sighted and clear-headed in matters that are internal to their businesses. They are incredibly short-sighted and muddle-headed in matters that are outside their businesses but affect the possible survival of business in general. This short-sightedness is strikingly exemplified in the calls from many businessmen for wage and price guidelines or controls or income policies. There is nothing that could do more in a brief period to destroy a market system and replace it by a centrally controlled system than effective governmental control of prices and wages.
>
> The short-sightedness is also exemplified in speeches by businessmen on social responsibility. This may gain them kudos in the short run. But it helps to strengthen the already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces. Once this view is adopted, the external forces that curb the market will not be the social consciences, however highly developed, of the pontificating executives; it will be the iron fist of Government bureaucrats. Here, as with price and wage controls, businessmen seem to me to reveal a suicidal impulse.

[48] Milton Friedman, The Social Responsibility of Business is to Increase its Profits, NYTimes Magazine Sept. 13, 1970.

Similarly, today, one should wonder whether the BRT's apparent embrace of a stakeholder approach to corporate governance will deprive it of the strongest arguments in favor of the current market system. Having conceded that a corporation should be managed for the benefit of all its stakeholders, without primacy owed to any, the BRT concedes it strongest argument against mandatory legislation.

Joining the Cause or Resisting the Temptation?

Assume that the pessimists are right. Assume that the current political dysfunction and legislative deadlock will continue indefinitely and that our Congress will not enact needed legislation to respond to pressing social needs. Assume further that the populist reaction that emerged post 2008 will likewise persist indefinitely. How should the law of corporate governance respond?

There is a constant temptation to use the law to fix social problems. Here, some are arguing, perhaps we should interpret or re-interpret corporate law to provide more guidance for the "socially responsible" governance of large public corporations. This can be motivated either by a sense that large public corporations have an important social role that they have not adequately fulfilled or by political pressure to act, backed by the threat of legislation. Perhaps we can harness corporate law's expressive dimension to encourage or require the directors of large public corporations to invest more surplus in their firms rather than paying it out to shareholders in dividends or stock buybacks, to provide employees with a greater share of the wealth generated, or to conduct business in a more sustainable way?

There are at least three problems with pursuing this strategy. First, it is unlikely to work without a wholesale restructuring of corporate law that goes well beyond reinterpreting directors' fiduciary duties away from "shareholder primacy" towards a stakeholder conception. So long as shareholders retain the sole voting rights, corporations will largely be managed for the benefit of the shareholders, whatever the interpretation of the weaker bonds of fiduciary obligation. Raw power prevails.

Second, as others have argued, the political legitimacy of corporate directors who are accountable only to shareholders making "distributional" choices without regard to a common metric of "shareholder value" is dubious. By what metric will shareholder interests be traded off against employee interests? How much profit may a board sacrifice in order to reduce its carbon footprint? A stakeholder conception almost necessarily will empower stakeholders to enforce their interests, either through social pressure or through a change in the law that allows them to sue. These issues are hard enough when a board allocates this much to employees and this much to shareholders with a single "objective function."

Finally, tinkering with the law of "corporate purpose" threatens to disrupt the coherence of the corporate form, a form that has been one of the great wealth generating innovations of the last 150 years. As discussed above, corporate law provides adequate flexibility for firms to adopt value enhancing business strategies and to behave in a politically sustainable way. Legal innovation is likely to be neither necessary nor sufficient to address the populist challenge. In any event, firms that wish to opt out of the default structure of Delaware corporate law have numerous alternatives.

Corporate law is both private law and public law. In its private law aspect, it provides a menu of enterprise forms and then allows parties to arrange their affairs in a way that accomplishes their goals. In this way, it can be useful to think of corporate law as providing a sort of standard form contract that parties can opt into. Although the contract analogy is imperfect – corporate law contains many mandatory terms such as a board of directors and the duty of loyalty – it usefully emphasizes the extent to which the corporate form is a tool that parties voluntarily choose to use or modify.

The public law aspects of corporate law, in the US at least, are primarily the domain of federal securities regulation. Investor protection, mandatory disclosure, board structure, regulation of material nonpublic information, and many other aspects of publicly traded corporations are regulated by, or under the supervision of, the Securities and Exchange Commission.

Finally, we should never forget that many of our problems require regulatory solutions and that we should not fool ourselves into thinking that tinkering with "corporate objective" can begin to substitute for regulation to control climate change, assure decent wages and working hours, and decent health care, as well as social insurance against the various downsides from competitive global markets.[49]

The private lawyer's worry, of course, is that using private law to solve social problems will destroy the value generating potential of private law while failing to solve the social problems, leaving all of us worse off.

[49] Strine, Our Continuing Struggle, supra.; Jeff Gordon, social insurance argument.