University of St. Thomas Law Journal

Volume 17
Issue 4 *Special 20th Anniversary Edition*

Article 7

February 2022

Why Corporate Purpose Will Always Matter

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ARTICLE

WHY CORPORATE PURPOSE WILL ALWAYS MATTER

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"If you don't know where you are going, any road will get you there."[1]
Lewis Carroll, Alice's Adventures in Wonderland (1865)

I. INTRODUCTION

Individuals setting out on a journey—whether long or short, and whether to conduct business, run errands, make visits, or seek pleasure—generally have a destination and purpose in mind. Likewise, when people act in groups—whether in teams, churches, clubs, unions, schools, societies, or other groupings—such collective endeavor typically is purposeful and seeks to achieve one or more shared goals. Although advancing the group's purpose may also serve the interests of the various participants (whose individual motivations for involvement may differ greatly), group goals often are distinct from individual goals and are attainable only by the cooperative, sacrificial effort of many people.[2] This is true in business as well, whether the business is formed as a corporation, partnership, or limited liability company (LLC). All but one-person firms require teamwork in aid of mutual business goals.

Oddly, however, businesspersons and lawyers (and law professors) perennially struggle over the question of whether a business (say a corporation) does, or should, have a purpose other than advancing the interests of one subset of participants, the shareholders. By way of contrast, this question is rarely asked of churches, schools, or other voluntary associations

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1. This is not an exact quote, but the common paraphrasing is a good summary of a somewhat longer exchange between Alice and the Cheshire Cat.

2. An excellent example is the New York Yankees' Mission Statement: "The New York Yankees ultimate goal every year is to win the World Series; anything less is a failure." Notice that the goal does not seek the well-being of any particular person or group, such as players, fans, staff, or owners. Rather, these persons all contribute to and benefit from an overarching, shared team goal.

pursuing overarching, shared institutional goals. But it persists in the business and corporate realm.

This short article, written to celebrate the twentieth anniversary of the School of Law at the University of St. Thomas (Minneapolis), will address one aspect of this vexing and unendingly contentious subject. The article will *not*, however, follow the usual path of taking sides in the debate over corporate purpose, beyond arguing that to advance discussions about corporate purpose, the focus should be on the *corporation* itself, not one or more constituencies. After briefly setting the stage by describing the ongoing dispute over what the positive law of corporate purpose really *is* and the always-hot normative argument over what corporate purpose *should be*, this piece takes a different turn. It addresses why, in a dynamic, democratic, pluralist society, the foundational issue of corporate purpose remains so important and will not (and should not) go away. However adamantly divergent descriptive and prescriptive positions are held, it is to be expected—and is healthy—that, periodically at least, the debate will be revisited, and disagreements aired. Critically, different businesses will continue to answer the corporate purpose question differently.

Part II provides a summary of where we stand today on corporate purpose in the United States. The state of positive law—and, remarkably, controversy about that—is discussed, as is the continued normative discord on corporate purpose among scholars, practicing lawyers, and businesspersons. For the most part, the debate has unhelpfully narrowed to a "stakeholder vs. stockholder" framing, to the neglect of a more affirmative and productive emphasis on the pursuit of diverse, overarching goals by the corporate enterprise itself.[3]

Part III lays out several reasons why the issue of corporate purpose will always be important. No doubt, other reasons exist, but the aim is to argue that we should settle in for an ongoing conversation, not shut one down in the vain hope we can achieve some "once and for all" resolution. It is highly unlikely that the normative dispute will be definitively settled in the near future, even though the long-predominant shareholder primacy position is under broad assault. Moreover, neither corporate law nor business practice demands an unequivocal or uniform resolution. Rather, periodic reexamination of this baseline issue reflects a healthy business culture and will, in turn, contribute to it as new participants arrive at their own provisional and diverse reckonings.

3. *See supra* note 2 and accompanying text.

II. Past And Present Debates on Corporate Purpose

A. A Brief History

Modern businesses face numerous novel challenges. These include growing concerns about cybersecurity, data and personal privacy, climate change, humane supply chains, and burdensome regulations, as well as a host of issues raised by the COVID-19 pandemic, some of which portend dramatic change in business practices. These challenges have prompted, yet again, renewed calls for businesses to act in more "socially responsible" ways. American business history, however, is replete with such calls and with forceful counterarguments that profit-making and shareholder wealth enhancement should be the primary focus of business.

When business corporations first emerged in early America, for example, they were expected to advance a public-serving purpose.[4] Throughout the nineteenth century, however, an emphasis on private gain became common.[5] As the number, size, reach, and vast influence of corporations grew, periodic debates arose over corporate purpose. The most famous debate was the 1932 Depression-era exchange between E. Merrick Dodd, who championed a multi-stakeholder approach, and Adolf Berle, who despite grave concerns about concentrated managerial power, advocated a shareholder primacy focus.[6] Berle later believed Dodd's view had prevailed, but that concession was premature, as numerous resurgences of the debate have plainly revealed.

The economic growth of the mid-twentieth century brought continued debate. Although economist Milton Friedman famously argued in favor of a profit-maximizing business purpose in 1962 and 1970,[7] other well-regarded management scholars and economists rejected that position. For example, renowned management theorist Peter Drucker and Harvard Business School Professor Robert Anthony opposed an exclusive focus on shareholders in 1954 and 1960, respectively.[8]

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4. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 Seattle U. L. Rev. 1135, 1144–48 (2012).

5. *Id.* at 1138–40.

6. E. Merrick Dodd, *For Whom Are Corporate Managers Trustees*, 45 Harv. L. Rev. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 Harv. L. Rev. 1365 (1932).

7. Milton Friedman, Capitalism And Freedom 133 (1962); Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. Times (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

8. Peter F. Drucker, The Practice of Management 37 (HarperCollins 2006) (1954); Robert Anthony, *The Trouble with Profit Maximization*, Harv. Bus. Rev., Nov.–Dec. 1960, at 127.

The emphasis on shareholder wealth maximization was greatly bolstered in the 1970s by a handful of financial theorists.[9] Ignoring positive law, their models disaggregated the complex corporate socioeconomic institution into a simplistic, privately ordered "nexus of contracts" and "principal-agent" construct.[10] The corporation itself was ignored.

During the ensuing 1980s, the shareholder wealth maximization view deepened its hold on corporate America as an ironic outcome of the frenetic corporate takeover activity of that decade. Target company management routinely resisted hostile efforts and, in the end, prevailed on the law front as state legislatures and the Delaware Supreme Court granted managers strong protections in resisting unwanted overtures.[11] But the norm of shareholder wealth maximization nonetheless was widely internalized in boardrooms and management suites.

Not only did the shareholder primacy norm sweep through financial theory scholarship and influence corporate leaders, but it was also transplanted into legal theory,[12] and took hold in business school and law school teaching.[13] This formative educational influence shaped elite corporate manager and corporate lawyer thinking about corporate purpose, unduly narrowing its scope, despite valiant efforts by business ethicists to resist the wholesale monetization of business practices. The influential Business Roundtable joined in embracing shareholder primacy in 1997, adopting a shareholder wealth emphasis it abandoned only in August 2019.[14] Yet, after apparently achieving hegemony in the business and legal communities in the late twentieth and early twenty-first centuries, the tide once again turned against the thin reductionism of shareholder wealth.

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9. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Organizational Structure*, 3 J. FIN. ECON. 305, 312–13, 329–30 (1976).

10. FRANK W. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

11. State legislatures enacted a host of statutes permitting target company management to resist hostile bids. Over thirty states included in their corporate statutes a provision permitting directors of corporations to consider the interests of various stakeholders, such as employees, suppliers, local communities, and others, along with the interests of shareholders. *See* Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989). The Delaware Supreme Court upheld strong defensive measures by target company management in *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

12. An excellent recounting of this phenomenon is provided by Professor David Millon. David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

13. As documented by a 2011 Brookings Institute study, the top 20 law schools and business schools overwhelmingly taught a shareholder primacy approach to corporate purpose. Darrell M. West, *The Purpose of the Corporation in Business and Law School Curricula*, BROOKINGS INST. (July 19, 2011), https://www.brookings.edu/research/the-purpose-of-the-corporation-in-business-and-law-school-curricula.

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

Thirty years after the decline of hostile takeovers so rampant in the 1980s, the debate over corporate purpose continues with no signs of abating. It involves not only a sharp normative aspect, but it also features pointed, if unexpected, disagreement about what positive law requires (or permits) with respect to corporate purpose, as described below.

B. Current Law

A recent exchange between two prominent Wall Street law firms highlights existing controversy about the state of positive law on corporate purpose. In a brief May 2020 essay titled "On the Purpose of the Corporation," famed lawyer Martin Lipton and others at his law firm reached back to the 1980s takeover era to assert their long-held, Merrick Dodd-like view that corporations and their boards may "manage for the benefit of all stakeholders over the long term."[15] In a June 2020 response, several lawyers at the prestigious Skadden Arps law firm countered that Delaware law imposes a fiduciary responsibility on directors to measure their actions by "what is in the best interests of *shareholders*. . . ."[16]

No corporate statute requires profit or shareholder wealth maximization. Numerous corporate law scholars, including this author, have argued as well that most states clearly permit, but do not require, a multi-stakeholder focus and that Delaware law is agnostic on corporate purpose.[17] Many such scholars, joined by lawyer Martin Lipton, also signed a four-page position paper to this effect in October 2016 called "The Modern Corporation Statement on Company Law."[18] It states, among other things: "Contrary to widespread belief, corporate directors generally are not under a legal obligation to maximize profits for their shareholders."[19]

Many prominent scholars and jurists disagree with these views, arguing that Delaware law is not permissive or agnostic, but requires a shareholder wealth emphasis. For example, former Delaware Supreme Court

15. Martin Lipton et al., *On the Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 27, 2020), https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation.

16. Peter A. Atkins et al., *An Alternative Paradigm to "On the Purpose of the Corporation,"* HARV. L. SCH. F. ON CORP. GOVERNANCE (June 4, 2020), https://corpgov.law.harvard.edu/2020/06/04/an-alternative-paradigm-to-on-the-purpose-of-the-corporation.

17. Lyman Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 260, 266 & nn.27–28 (A. Gold & G. Smith eds., 2018) (collecting representative scholarship). Over thirty states, but not Delaware, enacted "constituency" statutes in the late 1980s which permit, but do not require, directors to consider an array of stakeholders (and stockholders) in making decisions. *See supra* note 11. Since 2010, thirty-six states, including Delaware, have enacted statutes authorizing the use of a "benefit corporation" to conduct business. The directors of these companies must balance or consider stakeholder interests along with stockholder interests.

18. Lynn A. Stout et al., *The Modern Corporation Statement on Company Law* (Oct. 6, 2016), https://ssrn.com/abstract=2848833.

19. *Id.*

Chief Justice Leo Strine and Vice-Chancellor Travis Laster have repeatedly insisted that directors must maximize value for stockholders over the long term.[20] Scholars such as Stephen Bainbridge, David Yosifon, and others likewise have argued that this, in fact, is the state of Delaware law.[21]

The very fact of the debate, reflecting good faith disagreement among knowledgeable experts, reveals that the law is far from crystal clear. Indeed, the Delaware Supreme Court itself has spoken only of "enhancing" corporate profits and seeking "benefits" for shareholders—not "maximizing" either of those, at least outside the narrow sale of control context addressed in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*.[22] This restraint by our nation's highest corporate law tribunal is striking. It also seems deliberate, and wise, in the face of longstanding, significant normative disagreement over corporate purpose, described below.

C. The Normative Debate

Just as prominent practicing lawyers and legal scholars disagree on the state of Delaware's law of corporate purpose in 2020, legal scholars still disagree on the proper normative dimension of the corporate purpose issue. Lucian Bebchuk and Roberto Tallarita, for example, recently argued that stakeholder governance is simply a form of enlightened shareholder value (i.e., good for shareholders) and that it imposes unwieldy management tradeoffs on directors.[23] Oxford professor, Colin Mayer, has responded to these objections, finding them unconvincing and arguing for permitting a multiplicity of corporate purposes, not a stark "either/or" approach of stakeholders vs. stockholders.[24]

The various normative arguments for and against forms of stakeholderism or shareholder primacy are well known and will not be repeated here.[25]

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20. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015); In re Trados Inc. S'holder Litig., 73 A.3d 17, 48 (Del. Ch. 2013) (opinion by Vice-Chancellor Laster).

21. STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS 422 (2010); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2014). Professor Bainbridge returned to the subject in 2020, continuing to press a shareholder primacy reading of Delaware law in response to a 2020 piece arguing otherwise by Professor Jeffrey Lipshaw. Stephen Bainbridge, *Making Sense of The Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285 (2020); Jeffrey Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345 (2020).

22. 506 A.2d 173 (Del. 1986).

23. Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

24. Colin Mayer, *Shareholderism Versus Stakeholderism - A Misconceived Contradiction* (June 4, 2020), https://ssrn.com/abstract=3617847.

25. *See* Johnson, *supra* note 17, at nn. 27–30 (collecting representative scholarship). For a recent political science approach to the corporate form, critiquing a purely economic and contractual conception and offering a broader "relational" approach, see ABRAHAM SINGER, THE FORM OF THE FIRM: A NORMATIVE POLITICAL THEORY OF THE CORPORATION (2018).

Instead, two points that can advance the corporate purpose discussion will be made.

First, former Chief Justice Leo Strine turned to the corporate governance structure—i.e., the corporate "power structure"—to bolster his shareholder primacy position.[26] He argued that only shareholders have the right to vote for directors and on other significant matters, and only they can sue to enforce fiduciary duties. Thus, realistically, Strine argues, directors are accountable only to stockholders. It is true that the stockholder franchise gives equity holders a powerful voice and role that other constituencies lack. But it does not follow that corporations therefore are exclusively "of the stockholders, by the stockholders, and for the stockholders."

In the political arena, representatives elected by voting citizens do not typically ignore the interests of those who cannot vote, such as minors, released felons, lawful immigrants, or prior to the ratification of the 19th Amendment in 1920, women. And to be an elected representative raises the perennial question of whether one is to act as a Madisonian "delegate" who seeks simply to discern and adhere to the views of a majority of the voters—a view rejected by the Delaware Supreme Court in the seminal *Time* decision[27]—or as a Burkean "trustee" who exercises independent judgment. Directors, like all elected representatives must be held accountable (ultimately, via removal from office) but they also need sufficient autonomy to exercise independent judgment. Directors, moreover, are charged by statute with governing "corporate" affairs,[28] not those of stockholders, the latter of which are, to a degree at least, likely heterogeneous in their welfare preferences. And the business judgment rule in Delaware, besides conferring broad discretion on directors, is expressed as a presumption that directors act in the best interests of the "corporation."[29]

Second, stakeholder-oriented theories of the corporation err as surely as do pure stockholder primacy theories.[30] Both theories, in opposite directions, focus on the corporation as existing to serve one or more constituencies, and ignore the overarching organizational mission to which those constituencies contribute and from which they benefit, but which is distinct from their individual goals and interests. Professor Dodd touched on this long ago in arguing that if the "corporate body is real . . . managers of the unit are fiduciaries for it and not merely for its individual members . . . ."[31] Moreover, although various associated persons stand, in different ways, in a

26. Strine, Jr., *supra* note 20.

27. *See* Paramount Commc'n, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

28. *See* DEL. CODE ANN. tit. 8, § 141(a) (2020).

29. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by*, Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000).

30. For a good description of stakeholderism by a business ethicist, see Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUSINESS ETHICS Q. 53 (1991).

31. Dodd, *supra* note 6. The "corporate body," however, should retain significance and not be dissolved into an amalgam of stakeholders.

contractual relationship *to* the corporation as they provide critical resources,[32] the corporation itself is not simply some ephemeral "nexus" *of* those contracts. Instead, it is a distinct business entity and recognized socio-legal person, separate and apart from its associated participants, that seeks to advance a collective purpose that may differ from and transcend the individual goals of those participants, even as its success depends on their joint efforts.[33] Appreciating this can serve to combat both the simplifying and misleading orthodoxy of shareholder primacy theories of corporateness—which ignore the legal and institutional reality of corporate separateness—and unhelpful rival stakeholder theories. The corporation itself must be the focal point of productive discussions about *corporate* purpose, in business and legal scholarship and education as well as in business practice.

III. Why Corporate Purpose Matters

There are many reasons why the question of corporate purpose remains a lively and, often, a controversial subject in the United States. This signifies the importance of the issue, the failure of any one conception of the corporation to forever vanquish competing views, the surprising range of activities where the issue arises, and the recognition that the quest for greater institutional diversity extends to corporate endeavor. Of course, recent high-profile United States Supreme Court opinions catalyzed long-simmering debates.

In 2010, the Court in *Citizens United v. Federal Election Commission* upheld the First Amendment right of corporations to use corporate funds to support or oppose political candidates.[34] In 2014, the Court held that a corporation has the religious freedom to refuse to provide employees with government-mandated contraceptive methods thought to be morally objectionable.[35] These and other cases sparked controversy over whether corporations should have certain rights—such as First Amendment rights—and the extent to which corporate rights should be the same as those of human persons.

This part will not revisit in detail the various legal, political, and social theories and arguments invoked in the ongoing grappling over corporate personality and purpose. Rather, it will highlight several reasons why, notwithstanding the desire of certain commentators to end the debate and pro-

32. D. Gordon Smith, *A Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399 (2002).

33. Peter Drucker captured the social institution aspect of the corporation in his view of corporate purpose as lying outside the company itself: "If we want to know what a business is we have to start with its *purpose*. And its purpose must lie outside of the business itself. In fact, it must lie in society since a business enterprise is an organ of society." Peter F. Drucker, The Practice of Management 31 (HarperCollins 2006) (1954).

34. Citizens United v. FEC, 558 U.S. 310 (2010).

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

nounce a victor,[36] the subject of corporate purpose will (and should) endure as a topic of ongoing importance. The COVID-19 pandemic certainly spotlighted the issue as numerous self-sacrificing workers continued to provide vital goods and services to customers—and did not do so to make shareholders more money—but, unlike what we hope will happen to the pandemic itself, the corporate purpose issue has never gone away.

A. Corporations are Separate Legal and Cultural Persons, Distinct from Stockholders and Stakeholders

Positive law firmly establishes that corporations are distinct legal persons.[37] They may exercise a wide array of functions and rights in their own stead, as the *Citizens United* and *Hobby Lobby* cases reveal, and do not simply enjoy rights derived from human persons. Setting aside the intriguing metaphysical issue of identity,[38] in law, language, and cultural practice, corporations are not regarded as coextensive with stockholders or any constituency. Consequently, if a shareholder sells or buys stock in a company, or an employee leaves employment, or a customer stops patronizing a business, that change has no bearing on the company's still-stable legal personality.

In language and cultural practice, moreover, the "corporation" is not equated with stockholders or other intra-corporate groups. In both law and social discourse, the term "corporation" is used to refer to particular businesses and to the business institution itself more generally. We can meaningfully speak of "Facebook" and "Exxon" and countless other specific companies. In doing so, we are not speaking about stockholders or other groups.

When critics assail the extension of certain "corporate" rights, moreover, they are not attacking rights for shareholders or employees or customers. Nor is one corporation legally and socially the same as another corporation, any more than one human, while sharing many features with others, is the same "person" as the other. We treat each person, corporate and human, as unique. Having a distinctive, unique personality, it is imperative that each individual corporation determine its particular purpose.

B. Corporate Purpose is Not the Same as Shareholder or Stakeholder Purpose

The legal and cultural recognition of distinctive corporate personality opens up, facilitates, and poses the question, "What are the purposes of

36. *See* Stephen Bainbridge, *Making Sense of The Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285 (2020); Bebchuk & Tallarita, *supra* note 23.

37. For a recent, full treatment, see SUSANNA KIM RIPKEN, CORPORATE PERSONHOOD (2019).

38. For example, the Ship of Theseus thought experiment raises the question of whether an object that has had all of its component parts replaced remains the same object. Numerous philosophers have grappled with this identity issue over the centuries and offered various solutions.

these distinctive corporate persons?" Corporations would not have come to be recognized as distinctive persons, nor would their separate legal personhood have endured, had it not been important to differentiate them from investors and other stakeholders involved in them. That very socio-legal differentiation of corporateness means that a shareholder's (or the collective shareholders') purpose, or an employee's (or the collective employees') purpose in participating in a business does not automatically equate to the corporation's purpose, any more than the departure or arrival of a shareholder or employee alters corporate existence.

To be sure, the contributions of investors, employees, and customers are essential to corporate well-being, and those groups benefit from corporate success and suffer from failure. But they all have their own personal reasons and motivations for being involved as they are, none of which means that their individual goals are the same as the corporation's.

Business corporations provide products and/or services. That is their purpose. Google provides a range of services, just as Apple provides various products, and so on. Investors in those companies do not provide those goods and services; they play very little role in corporate governance and none in carrying out business activity itself. Shareholders in Google and Apple over the years have watched the share price of the corporate stock rise, to their financial gain, and large numbers of persons come and go as shareholders in those two companies every day, for reasons of their own. Shareholder motivations, purposes, and stock trading activities, however, have little if any necessary connection to the service delivery, product enhancement, and sales goals of Google and Apple as distinct companies.

Concerns about consumer privacy and cybersecurity, moreover, do not target shareholders or call on them to fix problems; they center on companies themselves. There are similar company-focused concerns about environmental impact and employee well-being. Here, the law's and larger culture's distinction between the corporate person and various stakeholders is exceedingly useful, and rightly sharpens the proper focus of concern: corporate activity at the business enterprise level.

Corporate social responsibility emerged and remains a concern because the conferral of distinctive legal personhood and associated rights carried with it a corresponding social demand that the corporation itself conduct its activities responsibly. This means that what a corporation does, and how it does it, are important and wholly separate from what one or more shareholders or other stakeholders do. Corporate purpose is just that—*corporate* purpose, not stockholder or stakeholder purpose.

C. Corporate Law Remains Agnostic About Corporate Purpose

As noted in Part II, knowledgeable corporate lawyers and scholars disagree as to whether Delaware law currently mandates shareholder wealth

maximization as the default purpose of corporations chartered in that state.[39] That very fact—that, in the eyes of many, Delaware law is and remains unclear on that point—is important. The Delaware Supreme Court has refrained from definitively settling the issue. The late 1980s brought an unprecedented opportunity to lay down a broad, pervasive shareholder wealth maximization mandate,[40] but the Court refused to do so. Instead, it underscored managerial prerogative to rebuff high premium share price takeover bids in the seminal *Paramount Communications, Inc. v. Time Inc.* decision,[41] and left the wealth maximization holding of *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.* in the sale of corporate control context as a special case of dwindling importance.[42]

The Delaware Supreme Court's steadfast refusal to "settle" the corporate purpose issue means, first, that the Court believes the issue is best left unsettled or that it is not the proper body to do so—at least, so far. Second, it means that corporate purpose, being open, may be handled by different companies in different ways, permitting diverse approaches under Delaware law.

D. Pluralism in Corporate Purpose is Essential to a Healthy Business Ecosystem

Ecological monocultures are unhealthy and unsustainable, particularly when exposed to abrupt shock. Likewise, a business ecosystem in which all companies have a single purpose—simply to maximize profits or shareholder wealth—would expose all companies to great risk from a systemic shock centered around that purpose. Conversely, if different companies pursue different purposes, shocks to some sectors or businesses are not shocks to all, reducing systemic risk.

In fact, different companies do pursue different purposes because they provide different types of goods and services, their main goal. Success at that goal rewards shareholders and others and failure harms them. But the outcomes for shareholders and others are the *result* and outcome of corporate endeavor, not the *purpose* of it.

To cite just one of many possible examples, online furniture retailer Wayfair has seen its sales and earnings skyrocket during COVID-19 because consumers turned to contact-free furniture purchases over traditional in-store buying. Wayfair's stock rose from $24 in March 2020 to $300 in

39. *See supra* notes 15–16, 23–24. In the thirty-plus states with constituency statutes, as described in footnote 17 *supra*, directors clearly need not maximize shareholder wealth.

40. *See* Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865 (1990) (tracing Delaware case law development).

41. 571 A.2d 1140 (Del. 1989).

42. 506 A.2d 173 (Del. 1986); *see* Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167 (2014) (arguing that *Revlon* is of diminished significance).

August 2020. Because Wayfair had a more appealing approach to the purpose of selling furniture, investors benefited.

At a more general level, this exemplifies the well-known benefits of a pluralistic approach to most endeavors, termed "structural pluralism" by the late Professor Stephen Monsma, a political scientist.[43] Writing in the specific context of faith-based organizations, Monsma notes how, today, these organizations provide an array of social services of a type the government might typically supply, thereby blurring somewhat an overly dichotomous understanding of the "public" and "private" spheres of action.[44] Similarly, certain traditional for-profit entities deliver government-like prison, foster care, and welfare services.[45]

Structural pluralism, Monsma observes, insists on the unavoidable existence and crucial importance in all human societies of a diversity of social institutions and structures. Human beings do not exist purely as autonomous, discrete individuals nor as individuals united only by belonging to a national political community. All human societies are marked by a multiplicity of intermediate social structures that lie between individuals and the nation state: families, religious congregations, neighborhood groups, social clubs, nonprofit social service organizations, universities, businesses, labor unions, athletic leagues, and a host of other such social structures.[46]

A variety of scholars, including John Dewey, Robert Nisbet, and several communitarian thinkers, have noted that numerous and quite diverse social groups and voluntary associations "mediate" between the individual and the state.[47] In essence, structural pluralism places great "weight on the social nature of human beings"[48] and "emphasizes the existence of a plurality of social structures in society."[49] There is no reason why, with respect to business corporations, there cannot be a pluralism of market-oriented entities designed to advance different purposes. Here, it is useful to recall sociologist Robert Nisbet's emphasis on how mediating social structures grow out of shared "communities of purpose," and how the free market itself is dependent on such social structures and has never "rested upon purely individualistic drives."[50]

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43. STEPHEN MONSMA, PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY 117 (2012).

44. *Id.* at 42–43.

45. *See* Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking To Deliver Profits and Public Services*, 9 STAN. J.L. BUS. & FIN. 199, 200, 207 (2004).

46. MONSMA, *supra* note 43, at 124. There are others as well, of course, such as producer and consumer co-operatives and private schools.

47. *See, e.g.*, Robert Nisbet, *The Present Age and the State of Community*, CHRONICLES (June 1988), https://www.chroniclesmagazine.org/article/the-present-age-and-the-state-of-community.

48. MONSMA, *supra* note 43, at 123.

49. *Id.* at 127.

50. *Id.* at 126–27.

Corporations, of course, should clearly announce their goals in relation to providing returns to investors in their capital-raising efforts. They can position themselves along a broad spectrum ranging from zealous profit-maximizers to profit enhancers to profit pursuers and so on, all while they seek to succeed in the product and service markets. Investors can invest or refrain as they choose.

E. Many Business Leaders and Workers See Business as a Calling

Theologian Michael Novak wrote an important book titled, *Business as a Calling*.[51] He argued that business is a morally serious enterprise in which one can act morally or immorally, and that business requires moral conduct. Making a lot of money immorally, he observed, is widely condemned, just as a sports winner who cheats is dishonored. Moreover, at the personal level, Novak argued that many entrepreneurs, leaders, and workers seek—and to a varying degree, find—fulfillment in doing work that benefits others. People are not simply self-serving, materialistic, acquisitive, atomistic individuals; they often are self-sacrificing, and seek spiritual and emotional fulfillment as whole persons.

Altruism plays a role in the business setting, to some degree, as elsewhere, and we should permit the full range of human anthropology to find expression in business.[52] Business history, moreover, is replete with how much better, healthier, longer, and pleasurable our lives are in this country because those working in business sought more than a paycheck or high returns to investors. We see this today in the corporate effort to produce a safe, effective vaccine and treatment for COVID-19. Money alone does not motivate those efforts, nor has money-making alone motivated many business visionaries and faithful, day-to-day workers.

F. All Stakeholders Should Be Treated With Dignity

Human workers are not simply one-dimensional "inputs" into the productive process, as economics terminology so coldly describes them. They are humans with needs, hopes, fears, expectations, and goals (for themselves and their loved ones). Many business leaders provide employees with protection and benefits exceeding those mandated by law and treat their workers with compassion, respect, and dignity. Some do so not simply out of a utilitarian calculus that generosity will somehow "pay off," but for religious reasons or out of moral conviction. Christians, for example, are cautioned not to do evil so that some good may result.[53] Business leaders should not be permitted to "do good" only when doing so is a "rationally

51. MICHAEL NOVAK, BUSINESS AS A CALLING (1996).

52. These ideas are developed more fully in Lyman Johnson, *Law, Agape, and the Corporation*, *in* AGAPE, JUSTICE, AND LAW 248, 262–66 (Zachary Calo et al. eds., 2017).

53. *Romans* 3:8 (NIV).

related" means to the end of shareholder wealth.[54] Workers and other stakeholders should be humanely treated by those with power over them because doing so is good in and of itself, even if detrimental to profits.

Of course, businesses need not do so. Companies need only comply with legal mandates. But many corporations do exceed legal minimums and social norms increasingly demand it. A June 2020 article in the *Harvard Business Review* noted that while many companies lay off or furlough workers when financial pressures arise—legally proper, of course—others reject doing so and treat employees like partners.[55] Corporate purpose must remain open-ended so that businesses may, if they choose, advance the well-being of persons other than just investors. Treating stakeholders, who after all are human persons, with dignity should not be foreclosed on the ground that it must be linked to enhancing shareholder wealth. As observed by Pope John Paul II, a company's financial accounts may be in good order and yet people within the business may be humiliated and have their dignity offended.[56]

G. Stockholders Are Heterogeneous and Many Prefer Social Responsibility

In 2005, Professor Einar Elhauge argued that, to varying degrees, many shareholders desire the companies they invest in to act in socially responsible ways.[57] Moreover, various meta-studies reveal that companies so acting do not suffer financially.[58] Many investment vehicles, such as mutual funds, offer investment opportunities that screen out certain industries and focus on others thought to be more responsible based on one or more metrics. Increasingly, many large investors, including Black Rock, express a focus on environment, social, and governance (ESG) factors, with others adding employees to their measurement index (EESG).[59] The Department of Labor in October 2020 adopted a rule amendment that would permit 401(k) types of retirement plans to include certain ESG considerations when a fiduciary selects plan investments, rather than focusing *solely* on maximizing fund financial returns, although financial return must remain paramount.[60] Under the Biden Administration, this rule may well be re-

54. Delaware's formulation of the business judgment rule includes a substantive "rational purpose" element. *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 264, n.66 (Del. 2000).

55. Dennis Campbell et al., *Run Your Business So You'll Never Need Layoffs*, HARV. BUS. REV. (June 9, 2020), https://hbr.org/2020/06/run-your-business-so-youll-never-need-layoffs.

56. POPE JOHN PAUL II, CENTESIMUS ANNUS (1991).

57. Einer Elhange, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

58. *See, e.g.*, Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. OF SUSTAINABLE FIN. & INV. 210 (2015).

59. Leo E. Strine et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy* (July 30, 2020), http://scholarship.law.upenn.edu/faculty_scholarship/2196.

60. 29 C.F.R. § 2550.404a-1 (2021) (investment duties of plan managers).

laxed, further permitting investment funds to factor in non-pecuniary considerations when making plan investments. Moreover, the Securities and Exchange Commission, under new leadership, may augment required corporate disclosures about company ESG efforts.

A diverse, market-provided array of investing opportunities would be impossible if corporations had to focus only on shareholder wealth maximization, except insofar as socially responsible action is disingenuously rationalized as a means to the end of shareholder wealth. These opportunities respond to investor appetites for putting their money where their values are. Today, in various ways and to various degrees, companies can and do emphasize employee benefits and well-being, environmentally benign activities, and other non-investor pursuits, all while making sufficient profits to draw strong individual and institutional investor interest.

H. Company-Specific Considerations

Every corporation may have unique reasons and ways to factor non-pecuniary considerations into business strategy and practices. For some, there may be little margin to do so, given tight finances. For others, there may be greater latitude. As the business norm of weighing non-financial aspects takes deeper root, individual companies can determine whether there are additional reasons, beyond those listed here, for broadening the interests they consider.

IV. Conclusion

This article, written to celebrate the twentieth anniversary of the University of St. Thomas (Minneapolis) School of Law, argues that the foundational issue of corporate purpose will always matter. Controversy over the normative dimension of corporate purpose has raged for decades, joined in recent years by debate over the uncertain state of positive law. That such fundamental disagreement endures is a salient fact in itself: there are diverse opinions on the subject, and rightly so in a diverse society.

The goals business companies pursue carry enormous stakes for all citizens given the vast economic, social, political, environmental, and cultural influence of corporations. This article has not sought to, it cannot, settle the debate, but it has identified several reasons why this important discussion will and should continue. This article contributes to that conversation, one unlikely to go away, with the hope that others besides lawyers and professors will join in. We need social justice—a subject, to be sure, understood and pursued differently by different persons of influence within the business community—in the business sector, not a legally mandated, single-minded pursuit of profits unmindful of the consequences within and without the corporate sector. American businesses have historically brought remarkable ingenuity to improving lives in countless ways. Today, the cor-

porate institution should be encouraged and permitted to explore other ways to continue making numerous groups in society better off. Let each company, enabled by law not constrained by it, be free to decide for itself where it is going and what road it will take.[61]

61. *See supra* note 1 and accompanying text.