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The “Franchise” View of the Corporation: Purpose, Personality, Public Policy

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THE "FRANCHISE" VIEW OF THE CORPORATION: PURPOSE, PERSONALITY, PUBLIC POLICY

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INTRODUCTION

In a canonic 1970 essay, Milton Friedman famously argued that the only "social responsibility" of a business corporation was to make profit for its shareholders.[1] Friedman's intentionally blunt statement effectively encapsulated the core normative principle that fundamentally shaped the development of the American corporate law and practice in subsequent decades. For over half a century, the legal doctrine and the institutional structure of corporate governance and action have been thoroughly and systematically defined—or *re*-defined—in terms of "shareholder primacy" and pursuit of private profit. The business corporation came to be seen as a creature of private contract among individuals who "owned" it by virtue of their capital contributions. "Maximizing shareholder returns" took on a powerful normative spin as the most effective way of achieving broader social welfare. Protecting non-shareholders from harm caused by profit-seeking corporations was effectively excluded from the proper scope of corporate law and doctrine, as a matter of government regulation and private litigation. By the start of the 21st century, this shareholder-centric view of the corporation reached such a near-complete intellectual and practical dominance that it seemed to justify announcing "the end of history for corporate law."[2] To be sure, some academics continued to challenge the corporate law's single-minded obsession with "shareholder primacy" as descriptively inaccurate and normatively misguided.[3] Nevertheless, it is

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[1] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf.

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

[3] *See, e.g.,* LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012); Kent Greenfeld, *Defending Stakeholder Governance*, 58 CASE WESTERN L. REV. 1043 (2008); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995); Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713 (1993); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

Friedman's concept of the corporation and its purpose that lies at the heart of today's corporate law and governance.[4]

Recently, however, this deeply entrenched worldview came under an increasingly vocal criticism from the very center of the corporate establishment. In August 2019, the Business Roundtable, an association of CEOs of the largest U.S. companies, issued a new Statement on the Purpose of a Corporation, pledging to the notion of running private companies "for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders."[5] The World Economic Forum's Davos Manifesto 2020 proclaimed that a company's performance "must be measured not only on the return to shareholders, but also on how it achieves its environmental, social, and good governance objectives."[6] Larry Fink, the CEO and Chairman of BlackRock, wrote that a company's purpose is not reducible solely to profits but encompasses "what it does every day to create value for its stakeholders."[7] Martin Lipton, a legendary corporate lawyer, called for each company to "articulate its purpose and the ways in which it aims to make a positive contribution to society."[8] And the British Academy's recent report set forth general principles for "a purposeful business" that seeks "to solve the problems of people and planet profitably, and not profit from causing problems."[9] In short, 2019 became a "watershed year" for "stakeholder governance."[10]

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[4] *See, e.g.*, Hansmann and Kraakman, *supra* note 2, at 468 (declaring "the triumph of the shareholder-oriented model of the corporation over its principal competitors"); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (asserting the intellectual victory of the law and economics movement in the corporate legal academy).

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

[6] Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution (Dec. 19, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/.

[7] BlackRock, *Larry Fink's 2019 Letter to CEOs: Purpose and Profit*, https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter.

[8] Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019).

[9] The British Academy, *Future of the Corporation: Principles for Purposeful Business* (2019), https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf. The lead author of the report, a prominent Oxford economist Colin Mayer, became the leading academic voice for a doctrinal shift toward the goal of maximizing a company's socially beneficial "purpose," rather than its shareholders' profits. *See* COLIN MAYER, PROSPERITY (2018).

[10] Martin Lipton, Steven A. Rosenblum, & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2019).

Yet, despite this flurry of high-profile endorsements and commitments, it remains unclear how this new purpose- or stakeholder-centered view of the corporation would—or should—work in practice. Operationalizing corporations' "social responsibility" and "stakeholder governance" is a complex and highly contestable undertaking. The main criticisms of the emerging "stakeholderism" view focus on its failure to articulate a clear principled basis for choosing among competing objectives and interests of different stakeholders, which casts serious doubt on its ultimate ability to deliver the promised societal benefits.[11] While not denying the importance of incorporating public interest into corporate decision-making, critics point to various conceptual gaps and implementation challenges associated with an effort to reorder modern corporations' governance around largely aspirational or symbolic claims.[12]

To scholars of banking law, however, the notion of a "purposeful business" is nothing new. In the United States, for example, banks' corporate charters are explicitly defined by reference to a specific business purpose: engaging exclusively in the "business of banking."[13] Banks are prohibited, by the terms of their charters, from conducting any other business, however profitable it might be for their shareholders. They are subject to extensive regulation and supervision, which constraints their managers' ability to focus solely on shareholder profit maximization. This unusually restrictive incorporation and oversight regime reflects the fact that banks perform a critically important public function: they provide a payments infrastructure and allocate credit in the nation's economy. In essence, the banking system is best described as a public-private franchise arrangement, pursuant to which the sovereign public (as franchisor) licenses private banks (as franchisees) to dispense the critical public good—the nation's monetized full faith and credit.[14] The bank charter is simply the license, or franchise contract, dictating the terms of this special partnership.

But banks were not always quite as "special" as they are today. Until the late nineteenth century, all American business corporations enjoyed similarly

[11] For an insightful analysis of the broader institutional factors that hamper the efforts to reform corporate governance, see Dorothy S. Lund and Elizabeth Pollman, *The Corporate Governance Machine*, 122 COLUM. L. REV. (forthcoming 2021).

[12] *See, e.g.,* Lucian A. Bebchuk and Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 105 CORNELL L. REV. (forthcoming 2020); Jill E. Fisch and Steven Davidoff Solomon, *Should Corporations Have a Purpose?* (2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3165&context=faculty_scholarship; Edward Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, ECGI Working Paper No. 515/2020 (2020), https://ecgi.global/working-paper/whom-corporation-managed-2020-debate-over-corporate-purpose.

[13] 12 U.S.C. § 24 (Seventh).

[14] *See infra* notes 71-76 and accompanying text.

limited powers enumerated in their charters and faced penalties for exceeding those powers in the course of their daily operations.[15] Incorporation was a matter of conditional privilege, publicly bestowed on a private business enterprise in exchange for a promise to deliver specified public benefits. It was this "public-oriented service" that justified the grant of legal personhood, limited liability, and other extraordinary corporate privileges to privately-owned business entities.[16] In this sense, the American business corporation came into being as a "purposeful" entity: a private franchisee to whom the sovereign public outsourced the critical task of large-scale investment and economic development.[17]

The steady demise of this original public-private "bargain"—or the American corporate settlement—began with the mass adoption of "free incorporation" statutes in the late nineteenth century. Free and unconditional access to corporate privileges helped to unlock new channels for financing the rapidly industrializing American economy. Over time, however, it made the corporation appear and act increasingly as a purely private creation, a profit-making vehicle "owned" by shareholders and dedicated to maximizing their returns. The governmental provenance of its powers and privileges was gradually forgotten.[18]

This pervasive privatization of the corporate form is what ultimately enables and legitimates modern-day corporations' relentless pursuit of profit without regard for potentially harmful societal consequences of their actions. To correct this fundamental dysfunction, therefore, it is necessary to restore a healthy public-private balance *within* the corporate form.

Taking an initial step toward that goal, this chapter seeks to recover the original conception of the business corporation as a publicly-created franchise.[19] This updated "franchise" view explicitly recognizes the public's fundamental right to define certain basic parameters of corporate activity as conditions for the public granting of extraordinary corporate privileges, which must be justified on public policy grounds.

Accordingly, the chapter reframes the current debate on corporate

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[15] *See, generally,* Robert C. Hockett and Saule T. Omarova, *"Special," Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation – and Vice Versa*, 39 SEATTLE U. L. REV. 453 (2016).

[16] Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefits Corps.*, 25 REGENT U. L. REV. 269, 277 (2013).

[17] *See infra* Part I.

[18] For an insightful theoretical account of the business corporation as a fundamentally political institution, a "franchise government" that transcends the public-private dichotomy, see David A. Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013).

[19] In developing this argument, the chapter updates and builds on Hockett and Omarova, *supra* note 15.

purpose in *macro-systemic* terms, as a matter of balancing (1) the generalized private interest in pursuing profitable business opportunities, built into the corporate form; and (2) the overarching public interest in promoting sustainable economic development by supporting socially beneficial enterprise. This approach deliberately pivots the discussion away from the current preoccupation with the *micro-level* balancing of competing—inherently fluid and frequently incommensurable—interests of multiple stakeholders in the same entity. Taking the inquiry to a different level, it introduces *public policy* as the key factor that should determine the scope and substance of corporate social responsibility and purpose requirements.

The chapter proceeds as follows. Part I briefly examines the origins and functional evolution of the corporate form in the United States. Part II discusses the system of chartering and regulating U.S. banks as a surviving form of the original public-private franchise. Building on that analysis, Part III explores potential ways of reviving the franchise view of the corporation by reintroducing "corporate purpose" requirements into the incorporation process.

I. CORPORATION AS A PUBLIC-PRIVATE FRANCHISE: PURPOSE AND PERSONALITY

Corporate purpose and corporate personality are two sides of the same coin: one defines and implies the other. What constitutes a legitimate and socially desirable corporate "purpose"—maximizing shareholder returns or achieving broader public goals—depends in large part on whether the corporation is viewed as a creature of private contract or an agent of the public. It is the former view that unquestionably dominates the field. It is extremely common, for example, to refer to shareholders as "owners" of the corporation.[20] In the mainstream legal discourse, heavily influenced by principles imported from microeconomics, a corporation is routinely characterized as a "nexus of contracts."[21] While there are many variants of this general approach, the fundamental factor common to them all is their unequivocal assertion of the primacy of the *private* in defining the genesis and nature of the corporation. This conceptual framing, in turn, legitimizes corporations' pursuit of shareholder profits—that is, benefitting those who "own" it—as their essential, constitutive purpose. Whatever concrete objectives a particular corporate entity chooses to pursue, its essence remains

[20] *See, e.g.,* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996) (describing shareholders' voting rights and entitlement to the corporation's residual earnings as the indicia of ownership).

[21] This influential theory originates with Michael Jensen and William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). *See also,* HANSMANN, *supra* note 20 at 18-19.

that of a private vehicle for pursuit of private economic interests.

Defining the corporation as a creature of private contract, however, is both descriptively inaccurate and normatively skewed. To start with the obvious, a business corporation is not "owned" by its shareholders, just like a family is not "owned" by the family members, or a state is not "owned" by its citizens. Shareholders merely own their shares, or financial claims on the corporation's cash flows. As a legally separate person, the corporation "owns" itself: it controls its own assets, incurs its own liabilities, and keeps its own profits.[22] It also governs itself, under its own "constitutional" order.[23]

In a deeper sense, the core characteristics of the corporate form—separate and perpetual firm existence, asset segregation in general, and limited liability in particular—cannot be derived from private individuals' exercise of traditional property or contractual rights.[24] These are extraordinary privileges that can only be bestowed on a business entity by law. What makes the shareholder-centric narrative particularly damaging is that fact that it obscures the extraordinary nature of these privileges. Our collective blindness to the role of the sovereign public as the principal source of corporate privilege, in effect, deprives the public of its power to enforce the terms of the original bargain.

Limited liability, the hallmark of the corporate form of business organization, is particularly instructive in this respect. Today, it is taken for granted. We forget that the basic notion of shielding individuals from liability to third parties harmed by their business activities is a sharp departure from the basic legal norm of accountability. Thus, both contract and tort law are predicated on liability, enabling people to hold one another responsible for violating certain shared norms of conduct.[25] Legal liability also attaches to those who facilitate, including by funding, the wrongful action. Against this backdrop, limiting corporate shareholders' liability to the amount of their initial investment appears as nothing less than an extraordinary exemption from the fundamental operative logic of law, "an institutionalization of individual economic irresponsibility."[26]

The standard explanation for limited liability is that it enables wealthy individuals to invest more of their money in a wider range of risky ventures.[27]

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[22] For a canonic version of this argument, see STOUT, *supra* note 3.

[23] For a full account of the fundamentally political nature of the corporation, see Ciepley, *supra* note 18.

[24] *See, e.g.,* Henry Hansmann and Reinier Kraakman, *Organizational Law as Asset Partitioning*, 44 EUR. ECON. REV. 807 (2000).

[25] *See, e.g.*, JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 7–32 (2006).

[26] Ciepley, *supra* note 18, at 147.

[27] *See, e.g.,* William J. Carney, *Limited Liability*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 659, 670–671 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

That, however, does not explain why it is a good public policy to encourage the flow of privately accumulated capital toward risky investments. In other words, why would the sovereign deem this a worthy—indeed, critically important—goal to pursue? Answering this deeper question requires us to look beyond the interests of individual investors and examine the broader public rationale for conferring limited liability.

From this broader perspective, the core—though by no means sole or exhaustive—explanation appears to be rooted in the needs of the nation's economic development.[28] When scarce private capital is the primary source of funding large-scale public infrastructural and industrial projects, giving private suppliers of such scarce capital special rights and protections becomes a publicly beneficial and pragmatic solution. It is an obvious method of encouraging the private capitalization of projects that bear public significance in the absence of public capacity to undertake such projects directly. In this sense, the corporation can be viewed as a means of outsourcing to private parties the task of critical *public* investment.[29] That is the essence of the public-private "bargain," or what may be called the original American corporate settlement.[30]

This admittedly stylized functional explanation appears to be consistent with the broad historical trajectory of the American corporations and corporate law.[31] During the colonial and early national periods, when both

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[28] *See, e.g.*, Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1153–1154 (2012) (arguing that, in nineteenth-century America, a for-profit corporation was viewed as an ideal legal and business vehicle for promoting industrial growth).

[29] *See, e.g.,* Johnson, *supra* note 16, at 277 (arguing that, in early nineteenth-century America, "there appears to have been a special correlating of corporateness with public-oriented service of a sort that did not exist with business activity more generally"); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945) ("At its origin in Massachusetts the corporation was conceived as an agency of government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state.").

[30] *See* Hockett and Omarova, *supra* note 15, at 455.

[31] The following discussion briefly traces the core structural thread in the historical development of the American corporation, building on Hockett and Omarova, *supra* note 15, at 467-474. For in-depth historical analyses, see Robert E. Wright, *Rise of the Corporation Nation*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S (Douglas A. Irwin & Richard Sylla eds., 2011); RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION (1982); Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30 (1978); JOHN WILLIAM CADMAN, THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS, 1791–1875 (1949); EDWARD MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, WITH SPECIAL REFERENCE TO MASSACHUSETTS (1954). For similar interpretations of the development of the corporate form in the U.K., see RONALD RALPH FORMOY, THE HISTORICAL

deployable private wealth and public organizational resources were in very short supply, legislatures granted corporate charters on a case-by-case basis to municipalities, "benevolent" (mainly, charitable and educational) associations, and certain partnerships operating commercially salient public infrastructure.[32] Next came the widespread enactment of "general" incorporation statutes that delegated the task of chartering the same institutions from lawmakers to bureaucrats.[33] As a result of incorporation, these nonbusiness entities received an explicit recognition of their legal right to own land and to assert their property and contractual rights in court.

The next critical development in this process was the adoption of "general" *regulatory* statutes that enumerated all of the powers and limitations of specific categories of corporations, while still requiring legislatures to authorize individual charters on a firm-by-firm basis.[34] These statutes applied primarily to business entities that engaged in the construction of commercially critical public infrastructures—or "internal improvements" —and were labeled "franchise corporations."[35] To facilitate the construction of much-needed roads and canals, the state typically granted these franchise corporations toll-collecting and eminent domain powers, which vividly underscored their role as public instrumentalities. In recognition of this link, legislatures chartered them only after public hearings at which the public need and desirability of any such firm could be thoroughly vetted.[36]

Later, however, legislatures began delegating the chartering of "franchise corporations" to administrative functionaries, as they had previously done in the case of religious and charitable corporations.[37] At the same time, the list of statutorily recognized "public service" functions gradually grew to include more overtly profitable business undertakings that

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FOUNDATIONS OF MODERN COMPANY LAW (1923); BISHOP CARLETON HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800–1867 (1936).

[32] *See* SEAVOY, *supra* note 31, at 3–4, 9–38; CADMAN, *supra* note 31, at 3–8; DODD, *supra* note 31, at 44–45, 158–163, 226–265, 349–354.

[33] *See* SEAVOY, *supra* note 31, at 9–38; CADMAN, *supra* note 31, at 3–83; DODD, *supra* note 31, at 265–266, 354–361.

[34] *See* SEAVOY, *supra* note 31, at 5, 39–52; CADMAN, *supra* note 31, at 3–83; DODD, *supra* note 31, at 265–266, 354–361.

[35] *See* sources cited *supra* note 34.

[36] *Id.* Of course, not every incorporated business during this period was a full-blown "franchise corporation" of this kind. For an account emphasizing legal personhood, resource commitment, and institutional governance as key factors explaining the appeal of the corporate form to a broader range of business organizers in the early nineteenth-century America, see Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

[37] *See* SEAVOY, *supra* note 31, at 6, 53–236; CADMAN, *supra* note 31, at 3–201; DODD, *supra* note 31, at 265–266, 354–361.

offered clear public benefits: telegraph, railroad, gas and electric lighting companies, banks, insurance companies, and mutual loan firms.[38]

Predictably, this expanded list of recipients of corporate privileges generated intense political controversies.[39] By the end of the nineteenth century, these political pressures led to the proliferation of modern incorporation statutes that permitted incorporation for any lawful purpose.[40] By the early twentieth century, these statutes effectively rendered the corporate form easily, unconditionally, and universally available. This principle of "free incorporation" continues to define the nature and operation of the U.S. corporate law as it exists today.

As this cursory overview reveals, throughout most of American corporate evolution, grants of limited liability and other corporate privileges to private business entities were subject to strict publicly imposed conditions. Until the late nineteenth or early twentieth century, firms were required to state their particular *public* purposes in their charters and adhere to those purposes in pursuit of their business activities. Government chartered firms on an individual basis and was tasked with ensuring—through public hearings and reporting requirements—that particular incorporated firms were publicly necessary and complied with the terms of their charters. Corporations had to maintain capital buffers, to protect creditors from opportunistic behavior by the shareholders shielded from personal liability. In essence, each special charter was "a private bill creating the particular corporation," which "outlined the corporation's terms and conditions, such as authorized capital and permitted activities, applicable to that individual corporation."[41] Violations of these conditions were deemed abuses of the corporate form, or deeds ultra vires (i.e., outside of the firms' legitimate powers), resulting in forfeiture of the limited liability shield and other corporate privileges enjoyed by the firm and its shareholders.[42]

These core characteristics of the corporation law regime, as it existed until the late nineteenth century, explain why many corporations were called "franchises" throughout this period. These business entities were privately financed but publicly empowered to act, in large part, on behalf of the

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[38] *See* SEAVOY, *supra* note 31, at 5, 39–52; CADMAN, *supra* note 31, at 3–201; DODD, *supra* note 31, at 364–437.

[39] *See* Eric Hilt, *Early American Corporation and the State,* in CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak, eds., 2017).

[40] *See* SEAVOY, *supra* note 31, at 6–7, 177–230, 266–274; CADMAN, *supra* note 31, at 3–201; DODD, *supra* note 31, at 364–437.

[41] Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 85 (1999).

[42] The ultra vires doctrine generally prohibits corporations from acting outside of their legally enumerated powers, on pain of forfeiting the corporate privileges. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1662 (1988).

sovereign public as its agents. They were neither fully public nor purely private: they were public-private hybrids.[43]

The mass adoption of modern "free incorporation" statutes in the late nineteenth century began the process of gradual erosion of the franchise character of the corporation—and, with it, the conditionality of corporate privileges. Historical explanations for this shift are multi-faceted and weave together many strands, including the political mobilization against state corruption and an ideological push for the democratization of access to economic opportunity.[44] The fundamental economic impetus for the change in the incorporation regime came from the need of industrialization under conditions of capital scarcity in the nineteenth-century America.[45] The growth of large, capital-intensive domestic industries created an unprecedented demand for new financing channels.[46] Making long-term equity investing easier and less risky was a readily available means of satisfying this demand and encouraging the accumulation of capital on a more massive scale.[47] It also relieved the pressure on the still limited administrative capacities of individual states. In short, simplifying the process of incorporation was a rational response on the part of state governments to the needs of the rapidly industrializing American economy.

The long-term societal cost of this policy response, however, was the systematic retreat of the state, and hence of the public, as the sovereign franchisor of the "hybrid" corporate form. Over time, the status and understanding of the corporation underwent a radical change: corporate charters came to be seen as a matter of right, the ultra vires doctrine accordingly lost its original meaning, and capital regulation disappeared.[48]

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[43] For more on corporate hybridity as a governance matter, see Ciepley, *supra* note 18.

[44] *See* Hilt, *supra* note 39; Eric Hilt, *History of American Corporate Governance: Law, Institutions, and Politics* (Nat'l Bureau of Econ. Research, Working Paper No. 20356, 2014); Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stockholding, Wealth and Politics in New York, 1791–1826* (Nat'l Bureau of Econ. Research, Working Paper No. 17147, 2011); Howard Bodenhorn, *Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 231 (Edward L. Glaeser & Claudia Goldin eds., 2006).

[45] *See* Johnson, *supra* note 28.

[46] *See* SEAVOY, *supra* note 31, at 6–7, 177–230, 255–274; CADMAN, *supra* note 31, at 111–201; DODD, *supra* note 31, at 364–437.

[47] Importantly, the corporate form made it possible to segregate and lock in productive assets necessary to undertake large-scale projects with lifespans beyond those of single generations of investors. *See* Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015); Blair, *supra* note 36.

[48] *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186-187 (1985) ("By 1930, the ultra vires doctrine was, if not dead, substantially eroded in practice, reflecting the triumphant view that corporate organization was a normal and natural form of business activity."); Hovenkamp, *supra* note 42, at 1663–

The business corporation was no longer a franchisee of the state but a purely private creation, an instrument of private profit-seeking, "owned" by shareholders and seeking to maximize their returns.[49]

It is not surprising, therefore, that the original public-private hybridity of the corporate form is routinely overlooked in contemporary discussions of corporate personhood and purpose. The notion of corporate purpose as a manifestation of public policy has been largely relegated to the dustbin of intellectual and legal history, as part of an outdated "concession" theory of the corporation.[50] Importantly, the recently reinvigorated debate on corporate social responsibility, "purposeful business," and "stakeholder governance" does not go as far as resurrecting the forgotten concept of the corporation as an inherently hybrid entity, a franchisee of the public. While advocating the expansion of corporate responsibilities beyond mere "shareholder profit maximization," the key voices in this debate frame their arguments in instrumental or moral terms, as something that firms should ultimately do for their own good—but not as a condition of their corporate existence.[51] Even self-consciously radical political proposals, seeking to mandate labor representation on corporate boards and introduce other "progressive" corporate governance reforms, are typically framed by reference to the long-term interests of "all stakeholders" in the affected corporations.[52] In other words, despite the great diversity of views and ideas debated in this space, the underlying concept of the corporation as a privately constituted entity is not being questioned in a serious way.[53]

But the broader economic, political, and ideological forces that prompted this debate in the first place may necessitate a deeper, more probing and open-minded, reassessment of the current corporation law and governance regime. Under today's conditions of capital abundance and mature systems of national government, it is potentially feasible to reestablish some updated version of the original corporate settlement that explicitly reflects a mutually beneficial public–private bargain. In the long run, moreover, it may be the

1664.

[49] *See supra* notes 1-2 and accompanying text.

[50] The "concession" theory of the corporation emphasized the fact that corporations derived their powers from the state. *See*, ERIK W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 12–14 (2013); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 433–435 (1989); Horwitz, *supra* note 48, at 181-182.

[51] *See supra* notes 5-10 and accompanying text.

[52] *See, e.g.,* The Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018), https://www.wsj.com/articles/companies-shouldnt-be-accountable-onlyto-shareholders-1534287687.

[53] *See* Lund and Pollman, *supra* note 11.

most rational and desirable policy response to our present needs. Serious societal harms caused by contemporary corporations' pursuit of their perfectly lawful business activities—rising inequality, exploitative labor practices, environmental degradation, erosion of democratic process, to name a few—demand resolution that rests on a more solid ground than aspirational rhetoric.[54]

To overcome the inherent indeterminacy of making corporate decisions by balancing competing—and often incommensurable—interests of multiple stakeholders in the same entity, it may be necessary to shift the decision to the macro-level plane. The most effective way to reintroduce a meaningful notion of corporate purpose into corporate governance may involve balancing a firm-level private interest (pursuing profitable business opportunities) and the system-level public interest (promoting sustainable nation-wide economic development). This balancing act would establish the new corporate settlement, defining the boundary between public and private interests in the management of productive economic enterprise.[55]

A significant departure from the current regime, this approach is bound to raise difficult normative, legal, and administrative questions. It may ultimately prove unworkable, for political reasons, among others things. It is, however, important to remind ourselves of at least one surviving vestige of the old corporate order: the bank charter. A closer look at the key features of the bank charter offers a helpful perspective on potentially restoring public purpose as a constitutive element of the corporate form.

II. BANKS AS FRANCHISE CORPORATIONS: PRIVATE PROFIT AND PUBLIC PURPOSE

By today's standards, U.S. banks are highly unusual business corporations. At its core, the current system of bank incorporation and subsequent regulation continues to embody the original American corporate settlement, described above. Access to bank charters remains subject to strict public control. Anyone seeking to conduct banking business is required to obtain a bank charter granted by specialized government regulators on a case-by case basis.[56] Under the co-called "dual banking" system, created with the passage of the National Bank Acts in 1863 and 1864, both individual states and the federal government can incorporate banks.[57] The Office of the

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[54] To translate aspirations into practice, general principles must be operationalized in sufficient detail and with sufficient clarity to guide corporate decisions. For pointed criticisms of the inefficacy of "stakeholderism" as the basis of corporate decision-making, see Bebchuk and Tallarita, *supra* note 12.

[55] *See infra* Part III.

[56] *See, e.g.,* 12 U.S.C. § 27 (2018).

[57] *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 39-41 (2d ed. 2018).

Comptroller of the Currency (OCC) is the chartering authority and primary federal regulator of national, or federally-chartered, banks. Accordingly, most of the rules governing banks' corporate affairs are promulgated by regulators.[58]

The process of obtaining a bank charter, whether state or federal, is notoriously difficult and lengthy.[59] Each individual bank charter application undergoes a thorough regulatory review.[60] The applicants are required to submit detailed personal information that establishes not only their competence and experience but also their "history of responsibility, personal honesty and integrity."[61] The charter application must also contain extensive financial information, business plans, and performance projections, necessary to convince chartering authorities of their ability to provide banking services in a safe and sound manner.[62] The rules specifically require proof that proposed banks will have sufficient initial capital.[63] Critically, the chartering process involves an explicit determination of whether a newly proposed bank will respond to the needs of its relevant community—a direct reference to the public interest that the bank is expected to serve.[64]

Unlike regular corporations allowed to operate for any lawful purpose, bank charters are available only to entities seeking to engage in the "business of banking," defined in the statute as including deposit-taking, lending, and certain other enumerated activities.[65] In this sense, banks are inherently and explicitly "purposeful" businesses. As an express condition of their charter, banks are prohibited from pursuing any business activities that fall outside the scope of this statutory grant of authority. Nearly all commercial, and even most financial, activities and investments are beyond the scope of their permissible powers.[66] Banks that violate these conditions and limitations effectively act ultra vires and can lose their chartered status. In contrast to other modern-day corporations, banks are also continuously subject to strict regulatory requirements to maintain certain minimal equity cushions on their balance sheets.[67] Failure to comply with capital requirements can trigger a

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[58] *See* Lev Menand and Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. (forthcoming 2021).

[59] *See* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1400-1401 (2020).

[60] For the OCC's licensing rules, see 12 C.F.R. § 5.20 (2019).

[61] 12 C.F.R. § 5.20(g).

[62] 12 C.F.R. § 5.20(g)-(h).

[63] 12 C.F.R. § 5.20(h)(4).

[64] 12 C.F.R. § 5.20(h)(5).

[65] *See* 12 U.S.C. § 24 (Seventh) (2018).

[66] For a discussion of the general prohibition on U.S. banking organizations' commercial activities, see Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 273–292 (2013).

[67] For more on the U.S. bank capital adequacy regulation, see BARR ET AL., *supra* note

progressively harsh sequence of regulatory punishment, including liquidation and criminal penalties.[68]

Bank regulatory and supervisory agencies closely monitor each individual bank's compliance with the applicable rules and regulations. In addition to extensive reporting requirements, supervisors routinely conduct on-site examinations for the purpose of assessing the bank's financial condition and regulatory compliance. Failure to meet supervisors' standards can result in regulatory enforcement and, in certain egregious cases, revocation of the bank's charter, or "forfeiture of franchise."[69]

In sum, contemporary U.S. banks are startlingly "special" corporate entities. In key respects, they operate as a vestigial form of the prior-era's "franchise" corporation.[70] It is, of course, not a coincidence. By providing a payments infrastructure and allocating credit in the nation's economy, banks perform essential public functions. It has been traditionally recognized that banks' role as de facto public utilities, as well as their vulnerability to runs, warrant both heavy regulatory oversight and extraordinary public support.

What is less widely understood is that banks are also public "franchisees" in a much more literal sense. On a systemic scale, banks' principal function is the distribution and allocation of a uniform national currency and its credit equivalent, dollar-denominated debt. The sovereign public, acting though its central bank and fiscal authorities, is the ultimate creator of this critical public resource—the nation's monetized full faith and credit—that private banks are licensed to dispense, for a profit.[71]

This "franchise" view of the banking system stands in sharp contrast to the standard narrative of "financial intermediation," which describes banks' main business model as aggregating private depositors' money and then lending it to businesses and households.[72] In practice, the causal relationship is inverted: banks create new deposit money by extending new loans. In a typical bank lending transaction, the bank decides to extend credit to a worthy borrower and then simply credits that borrower's deposit account with the full amount of the loan. The bank books the transaction as an asset (because it holds a claim on the borrower) and a matching liability (because it must honor all drafts on the borrower's account up to the loan amount). Similarly, the borrower now has a liability (because they must repay the loan) and a matching asset (because they can now freely use the money deposited in their account). As a result of this lending transaction, there is now more money at

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57, at 265-339.

[68] For an overview of this "prompt corrective action" regime, see id. at 284-290.

[69] 12 U.S.C. § 93 (2018).

[70] *See supra* notes 34-42 and accompanying text.

[71] The following discussion builds on the in-depth account of the U.S. financial system in Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. R. 1143 (2017).

[72] *See id*. at 1144-1145.

work in the economy—money that the bank effectively created seemingly "out of thin air."[73]

But private banks do not really create money out of thin air. Their deposit liabilities function as money because the central bank *accommodates* their act of money-creation. This is an inevitable result of the fact that the central bank—in the U.S. context, the Federal Reserve System (the Federal Reserve)—administers a payments infrastructure on which privately drawn checks clear at par.[74] It does so by crediting the relevant bank's reserve account, which ensures that checks drawn on the new account by the borrower from the bank to clear. In effect, the Federal Reserve publicly monetizes privately-created liabilities, placing the full faith and credit of the United States behind them.

This process is part of the well-known structural arrangement between the central bank, privately owned banks, and the banks' borrowers. Commonly viewed as a mundane part of the financial market's "plumbing," this arrangement exposes the core logic of our hybrid system, in which private banks distribute an indefinitely extensible public resource: sovereign credit-money. Presumed to have significant informational advantages and superior economic incentives, banks are authorized to decide which private borrowers' illiquid liabilities turn into uniform, perfectly liquid, and fully safe money instruments—and to do so for a steady and handsome profit. From this perspective, the bank charter can be seen as a franchise contract, whose terms include extensive restrictions on banks' activities, mandatory capital requirements, and other familiar elements of modern bank regulation, discussed above.[75] These "quality control" measures are designed to maintain the stability of the franchisee-banks, minimize the moral hazard built into this arrangement, and prevent over-issuance of sovereign money.[76]

Historically, these systemic dynamics became particularly visible with the creation of the national bank charter in 1863-64. In the midst of the Civil War, national banks were established as monetary institutions to whom the federal government outsourced the task of distributing a sound and uniform national currency, to replace the patchwork of banknotes of vastly different

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[73] *See* Michael McLeay et al., *Money in the Modern Economy*, 54 BANK OF ENGLAND Q. BULL. 4 (2014), https://www.bankofengland.co.uk/quarterly-bulletin/2014/q1/money-creation-in-the-modern-economy; PETER L. BERNSTEIN, A PRIMER ON MONEY, BANKING, AND GOLD 49–65 (John Wiley & Sons, 2008) (1965).

[74] *See* BD. OF GOV. OF FED. RES. SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS (10th ed. 2016).

[75] *See supra* notes 65-69 and accompanying text. This does not mean, of course, that these conditions are explicitly written into the document officially granting an individual bank charter. Thus, the OCC's practice is to approve charter applications "in a pro forma letter, without many conditions" and without an extensive legal or policy argumentation. Zaring, *supra* note 59, at 1404. This regularized administrative procedure, however, does not change the fundamental policy-driven character of the system.

[76] Hockett and Omarova, *supra* note 71, at 1161.

quality issued by state-chartered banks.[77] From the start, the national banking system was designed not as "a series of private ventures,' but as "a unitary piece of public infrastructure."[78] It was, in other words, a deliberately constructed public-private franchise for the creation and circulation of sovereign money and credit. As banking law scholars have noted, enlisting private banks' help was meant, among other things, to minimize the danger of corrupt politicians creating inflation and instability.[79] But it was the federal government, acting through the newly created OCC, that was firmly at the center of this partnership as the ultimate repository of monetary sovereignty and regulatory power. The establishment of the Federal Reserve System in 1913 and the sweeping reforms of the New Deal era further solidified this public-private franchise arrangement, effectively giving it its present shape.[80]

Analyzing the complex history of U.S. bank regulation is beyond the scope of this chapter. For present purposes, the key is to emphasize the constitutive role of public policy considerations in defining the essence and evolution of the current regime of bank chartering and oversight. Just as the American states embraced the principle of "free" and unconditional general incorporation, discussed above, the U.S. banking system was deliberately rebuilt around the fundamentally *public* function—and public *purpose*—of privately-owned banking firms. Importantly, both of these trends responded to the developmental needs of the rapidly industrializing American nation: private capital formation was made easier for commercial firms, while stricter public control of entry into the banking sector ensured the safety and soundness of the nation's money.

For decades, this status of chartered banks as "purposeful" corporations was well understood and accepted. Since the 1980s, however, various conditions traditionally attached to bank charters have been steadily loosened, and many regulatory tasks have been delegated to banks' internal management. The U.S. banking industry's successful push for legislative and regulatory expansions of bank-permissible activities and affiliations has been a well-documented driver of this trend.[81] As the traditional understanding of

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[77] For in-depth historical analyses, see, generally, HOWARD BODENHORN, STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY (2001); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1991).

[78] Menand and Ricks, *supra* note 58, at 20.

[79] *Id.* at 20-21; Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFFALO L. REV. 1011 (2001) (examining history of U.S. banks through the prism of corporate governance and politics).

[80] For a succinct summary of the key developments during this period, see BARR et al., *supra* note 57, at 44-53.

[81] *See, e.g.,* Omarova, *supra* note 66; ERIK F. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION (2013); Saule T. Omarova, *From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act*, 89 N.C. L. REV. 1683 (2011);

the banking "franchise" faded away, banks gradually redefined their corporate priorities in terms of shareholder profit maximization, relegating their constitutive public duties to the realm of standard "regulatory compliance." Notably, even the post-2008 Congressional efforts to strengthen regulatory oversight of banking entities were not able to reverse this perceptional shift.[82]

In recent years, the rise of new "financial technologies," or fintech, created new pressures on the old banking franchise and reignited the policy debate on the nature of, and conditionality attached to, the bank charter.[83] Thus, one of the core issues in this debate concerns the fundamental "business purpose" of a chartered U.S. bank. This issue became particularly salient in the context of technology companies' efforts to expand their financial product offerings—and the regulators' attempts to accommodate and oversee these activities.

The OCC's controversial plan to start granting "special purpose" national bank charters to fintech firms exemplifies these dynamics.[84] Under the OCC's scheme, recipients of this special fintech charter would be subject to the same regulatory and supervisory requirements as similarly situated national banks but, critically, would not be required to accept deposits and obtain federal deposit insurance.[85] The OCC's decision to charter non-

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Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking*,*"* 63 U. MIAMI L. REV. 1041 (2009); Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215 (2002). On the gradual decline of bank supervisors' discretionary powers, see Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527 (2018).

[82] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[83] For detailed analyses of fintech as a systemic challenge, see Saule T. Omarova, *New Tech v. New Deal: Fintech as a Systemic Phenomenon,* 36 YALE J. ON REG. 735 (2019); Saule T. Omarova, *Technology v. Technocracy: Fintech as a Regulatory Challenge*, 6 J. FIN. REG. 75 (2020).

[84] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, SUPPORTING RESPONSIBLE INNOVATION IN THE FEDERAL BANKING SYSTEM: AN OCC PERSPECTIVE, (2016). The OCC announced its readiness to accept fintech charter applications in 2018. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (2018).

[85] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 3 (2018). As non-depository institutions, OCC-chartered fintech firms would not be deemed "banks" for purposes of the Bank Holding Company Act of 1956 (BHC Act), which generally prohibits companies controlling or affiliated with federally-insured banks from conducting non-financial activities. 12 U.S.C. §§ 1841-1852 (2018). The ability to avoid onerous provisions of the BHC Act, intended to separate banking from commerce, is of particular significance to "Big Tech" firms—Amazon, Facebook, Google, to name a few

depository "banks" was promptly challenged in court.[86] The opponents of the fintech charter argue that allowing the OCC to incorporate non-depository firms would eliminate the essential activity condition—and principal *purpose*—built into the national bank charter under the statute.[87] Under this argument, a seemingly incremental decision to charter online lenders and payments processors as national banks would directly undermine the core public-private "settlement" in the banking sector. It would give a wide range of commercial businesses direct access to many special privileges traditionally reserved for deposit-taking banks, without subjecting them to the full suite of activity limitations and other "quality control" measures that define the modern banking franchise.

The fintech charter debate brought into sharp relief the inherent fragility of that franchise. This fragility, however, is itself instructive. It underscores the dynamism, malleability, and fundamentally political essence of the bank charter. And, by highlighting the complex interaction between public policy and corporate purpose, it invites broader reflections on the social functions and significance of the corporate form in modern times. Thus, if the core premises of an explicitly "purposeful" bank chartering regime are potentially open to renegotiation in response to outside pressures, why shouldn't the same hold true for the core premises of the general corporate chartering regime? Rather than treating the latter as an immutably "natural" state of affairs, we can view it more clearly as a *political choice*, a matter of striking the most socially optimal public-private balance under the circumstances.

Today, the circumstances clearly demand change. Modern corporations' largely unrestrained pursuit of private profits is increasingly at odds with the society's most fundamental interests and needs. From this perspective, even a brief overview of the basic dynamics of the banking franchise—and emerging challenges to its continuing existence—offers a new intellectual perspective on some of the hotly debated issues in today's corporate law and practice. Instead of making banks more like the "ordinary" corporations with no special purpose other than making money for its shareholders, a more socially beneficial approach could be to reverse that logic and make all business corporations more like banks. The question then becomes, whether it is possible to re-introduce some form of publicly imposed conditions on all private business entities that enjoy publicly granted corporate privileges.

—running large-scale commercial empires. *See* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J. L. & POL. 25, 44 (2020).

[86] *See* Vullo v. Office of the Comptroller of the Currency, 378 F.Supp.3d (S.D.N.Y. 2019), appealed sub nom., Lacewell v. Office of the Comptroller of the Currency, No. 19-4271 (2d Cir. 2020). As of this writing, no fintech company has received a special purpose national bank charter.

[87] *See* Menand and Ricks, *supra* note 58, at 44-47.

In other words, can we make modern corporations "purposeful" in a way that reflects their hybrid nature and serves the interests of the public?

III. Reinventing the Franchise: Corporate Purpose as Public Policy

As discussed above, corporate form offers critical publicly-conferred privileges to private actors. Originally reserved for certain publicly beneficial ventures, these special privileges are now available easily and unconditionally to any private business. The principal justifications for the emergence and continuing existence of this "free" incorporation regime ultimately recognize and reflect the imperative of capitalization. When scarce private capital is the primary source of funding large-scale public infrastructural and industrial projects, giving private suppliers of such scarce capital special rights and protections is an obvious "win-win" method of enabling economic growth.[88]

While this was true of the nineteenth-century America, in recent decades, both the U.S. and the global financial markets have been awash in finance capital searching for investment opportunities.[89] In fact, as argued elsewhere, it is the persistent over-abundance—rather than scarcity—of private capital that continuously fuels financial speculation, undermines systemic stability, and results in long-term misallocation of economic resources.[90] In these circumstances, continuing to dispense unconditional special privileges to private buyers of corporate shares seems not only unnecessary but also fundamentally misguided.

In a sense, the current resurgence of the debate over certain dysfunctional dynamics in the practice of contemporary corporate finance and corporate governance reflects the growing awareness, if not conscious recognition, of this underlying tension. Today's discussions of the proper role and limits of corporate social responsibility, stakeholder governance, and related phenomena are driven by the desire to find a new "win-win" equilibrium in corporate law and practice.[91] So far, however, these efforts have not produced clear and workable standards for prioritizing or reconciling competing—and often directly conflicting—interests of specific corporate stakeholders. And, without operationalizing such an alternative standard, it is difficult to displace shareholder profit maximization as the core purpose of, and the basis for decisions made by, individual corporations.[92]

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[88] *See supra* Part II.

[89] *See, e.g.,* Ben S. Bernanke, Governor, Fed. Reserve Bd., Remarks at the Sandridge Lecture, Virginia Association of Economists: The Global Saving Glut and the U.S. Current Account Deficit (Mar. 10, 2005), http://www.federalreserve.gov/boarddocs/speeches/2005/200503102/.

[90] *See* Saule T. Omarova, *What Kind of Finance Should There Be?* 83 L. & CONTEMP. PROB. 195 (2020).

[91] *See supra* notes 5-10 and accompanying text.

[92] *See* sources cited *supra* note 12; Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. (forthcoming 2021).

Even the recent emergence of benefit corporations—for-profit corporate entities formally committed to pursuing socially beneficial objectives—does little to solve this fundamental problem.[93] Thus, Delaware law currently authorizes any for-profit company that chooses to incorporate as a public benefit corporation (PBC) to pursue three separate objectives: (1) "the stockholders' pecuniary interests," (2) "the best interests of those materially affected by the corporation's conduct," and (3) "the public benefit or public benefits identified in its certificate of incorporation."[94] On the one hand, this law helps to legitimize social enterprise and to shield PBCs' managers from shareholder suits.[95] On the other hand, however, the statute gives no concrete guidance on how firms are supposed to prioritize and make difficult choices among PBCs' multiple objectives.[96] By leaving these crucial normative decisions to corporate managers, operating within the familiar constraints of financial performance and commercial profitability, the benefit corporation form remains more of an expressive victory than a substantive shift in the dominant understanding of corporate purpose.[97]

By contrast, rediscovering the old view of the corporation as a hybrid entity that represents an institutionalized bargain—or settlement—between the sovereign public and smaller groups of private entrepreneurs helps to

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[93] The benefit corporation concept was initially developed and popularized by B Lab, a nonprofit organization that also certifies companies under its "B Corporation" standards. *See* B Lab, Corporations & Certified B Corps, https://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps. As of 2020, thirty-seven U.S. jurisdictions had legislation authorizing the creation of benefit corporations. *See* B Lab, Benefit Corporation: State by State Status of Legislation, https://benefitcorp.net/policymakers/state-by-state-status?state=delaware. For more on benefit corporations, see, e.g., Michael B. Dorff, James Hicks, Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113 (2021), https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3433772#; Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681 (2013); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012).

[94] DEL. CODE ANN. tit. 8, § 362 (2013).

[95] *See* Dana Brakman Reiser and Steven A. Dean, *Financing the Benefit Corporation*, 40 SEATTLE U. L. REV. 793 (2017); Kristin A, Neubauer, *Benefit Corporations: Providing A New Shield for Corporations with Ideas Beyond Profits*, 11 J. BUS. & TECH. L. 109 (2016).

[96] *See, e.g.,* Johnson, *supra* note 16, at 290-291 (criticizing benefit corporations for adopting "a multi-stakeholder focus, not a truly 'corporate' focus").

[97] In fact, as many observers note, the traditional corporate form does not strictly preclude firms from pursuing purposes other than pure shareholder profits. *See* Dorff et al., *supra* note 93, at 115; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763-776 (2005). This gives rise to legitimate concerns about the practical usefulness of the benefit corporation form for purposes other than (potentially exploitative) corporate branding. Weak "public benefit" enforcement mechanisms further magnify these concerns. *See* Kennan El Khatib, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151 (2015).

approach the problem from a different angle. Rather than trying to re-prioritize the interests of various entity-level constituencies, it calls for redefining the terms of the public-private corporate settlement on a *systemic* level. From this perspective, the principal justification for reintroducing policy-driven conditionality into corporate charter grants is not reducible to mere externality regulation or "enlightened shareholder value"—it is rooted in the nation's evolving developmental needs. The dissipation of the original public policy reasons for "free" incorporation, discussed above, creates a potential opening for once again conditioning access to corporate privileges on the firm's commitment to some form of a publicly beneficial purpose.[98]

Without claiming to offer a detailed reform blueprint, it is nevertheless helpful to explore some of the key options involved in the process of reviving and updating the original "corporate franchise" regime.[99]

U.S. bank regulation is a valuable source of guidance in this respect. As a starting point, it might make sense to replicate certain features of bank chartering process by requiring each firm seeking incorporation to provide to chartering authorities two separate documents: (1) a statement of "business purpose" (Business Purpose Statement); and (2) a statement of "public purpose" (Public Purpose Statement). An applicant-firm's Business Purpose Statement would contain a specific description of the business activities it plans to conduct.[100] Its Public Purpose Statement would contain a description of specific ways in which the firm's profit-seeking business activities would benefit the national, regional, or local economy or community.[101]

By including these submissions in the charter application, firms would be making public commitments to a particular conception of what they seek to accomplish and why it would benefit both their shareholders and the rest of us. As a practical matter, publicly articulating their collective economic and organizational priorities would be a valuable exercise for the firm's organizers and managers. It would facilitate their firms' efforts to attract the right investors and employees, form business partnerships, and signal their organizational values to their relevant communities.[102]

From the public's perspective, formally conditioning incorporation on the firm's articulation of both its core business purpose and its role in the broader economy would create an important procedural mechanism for rationalizing corporations' organizational structures and increasing corporate transparency. Among other things, it would help to curb the proliferation of

[98] *See supra* Part I.

[99] The following discussion builds on Hockett and Omarova, *supra* note 15, at 488-494.

[100] The North American Industry Classifications System (NAICS) can serve as the basis for defining individual firms' "business purposes." *North American Industry Classification System*, U. S. CENSUS BUREAU, http://www.census.gov/eos/www/naics.

[101] This would mimic the bank charter requirement to demonstrate that the proposed bank would help to meet the community's needs. *See supra* note 64.

[102] For an argument emphasizing the instrumental value to firms of articulating their "corporate purpose," see Fisch and Davidoff Solomon, *supra* note 12.

domestic "shell" corporations that are often used for tax evasion and money laundering.[103] More broadly, it would create an independent legal and jurisdictional basis for holding individual corporations publicly accountable for socially undesirable actions, even where such actions do not constitute crimes or violate specific regulatory schemes. This structural shift in the public-private balance of power would fundamentally alter the context in which corporate managers make their daily decisions.

Of course, the criteria for satisfying both the "business purpose" and "public purpose" requirements should be flexible enough to accommodate the wide variety of differences in the size and potential economic footprint of individual firms, industry-specific dynamics, and other relevant factors. The requirement to submit a Public Purpose Statement raises particularly complex issues in this respect. On the one hand, "public purpose" must be understood as a capacious and context-specific concept. On the other hand, it would have to require a sufficiently specific showing of some positive externality in exchange for the receipt of corporate privileges.

Such specificity is critical in order to allow the chartering authorities to conduct a more thorough and meaningful review of individual applications in light of concrete public policy objectives. For example, one particularly significant positive externality, which could be given special consideration in the process, is the impact of incorporating a specific business entity on sustainable domestic employment levels. There are compelling public policy

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[103] While many shell companies are incorporated offshore, chains of empty corporate "shells" can also be easily formed under the laws of many U.S. states, including Delaware, Nevada, and Wyoming. *See, e.g.,* Steven M. D'Antuono, *Combatting Illicit Financing by Anonymous Shell Companies,* Statement Before the Senate Banking, Housing, and Urban Affairs Committee (May 21, 2019), https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies; Malia Wollan, *How to Set Up A Shell Company,* N.Y. TIMES MAG. (Nov.7, 2019), https://www.nytimes.com/2019/11/07/magazine/how-to-set-up-a-shell-company.html; Shima Baradaran Baughman, *U.S. Shell Companies Are Just as Common as Panamanian Ones*, THE NEW REPUBLIC (Apr. 12, 2016), https://newrepublic.com/article/132600/us-shell-companies-just-common-panamanian-ones.

Extending the proposed requirement to file mandatory statements of business and public purpose to limited liability companies (LLCs) would greatly amplify the effectiveness of this procedural tool in combatting tax evasion, money-laundering, and other socially undesirable activities frequently conducted through LLCs. More generally, there is a strong argument that, as a "hybrid" organizational form that bestows corporate privileges on partnership-like entities, an LLC presents a particularly compelling case for exacting greater public benefits in exchange for the public grant of such an extraordinary degree of private freedom and flexibility. Express conditioning of the LLC status on firms' compliance with the requirements proposed in this chapter would be a more meaningful step in this direction than, for example, proliferation of so-called Public Benefit LLCs (PBLLCs). Pioneered in 2018 by Delaware, the PBLLC form displays all of the key weaknesses of the benefit corporation model, discussed above, but seems even more likely to be misused as a pure "branding" or "purpose-washing" tool. *See* Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. *Rev*. 603 (2019). *See also, infra* note 105 and accompanying text.

reasons for doing so. The massive outsourcing of manufacturing and other jobs abroad is one of the most pressing economic policy problems the U.S. is facing today. Conditioning charters on private firms' commitment to maintain some minimum level of domestic production and employment could serve as a direct regulatory mechanism for counteracting firms' incentives to maximize short-term private gains at the expense of long-term public interest.[104]

To magnify the impact of a corporation's Business and Public Purpose Statements, it would make sense to incorporate them by reference in its charter. Any significant change in the corporation's business model would then require filing an official charter amendment. This would introduce a procedural point of potential review of proposed corporate actions by the chartering authority. The law could also require that all amended statements of business or public purpose be accompanied by documentation explaining the nature of the proposed change, the primary reasons for it, and the steps the corporation took or plans to take to alleviate any potentially significant negative impact of the contemplated change on the economy or community.

This requirement would have significant corporate governance implications, especially in terms of encouraging meaningful participation of employees and other external stakeholders in corporate decision-making. To convince the regulators that a particular change in the firm's basic business strategy would not cause serious public harm, the firm's managers would be well-advised to consult with the constituencies likely to be directly affected by such change. In this sense, the introduction of basic purpose-related conditionality in the chartering process would potentially create an important opening for the emergence of meaningful workplace democracy and a more generally inclusive form of corporate governance.

This by no means precludes or supplants other types of reform aiming to strengthen stakeholder rights or worker participation in corporate management. The key here is to emphasize how, despite the relatively modest scope of the proposed conditions on corporate charters, their adoption would critically alter the broader context in which private and public actors interact—and potentially reshape the outcomes of such interaction.

Thus, simply making the Public Purpose Statement mandatory for all corporations would help to overcome one of the principal weaknesses of the existing benefit corporation model: its inherent vulnerability to strategic use

[104] To operationalize this mechanism, the official chartering criteria could require every U.S. corporation to maintain a "predominantly domestic employer" status, tied to a specified threshold of the firm's operations being conducted in the U.S. (or by U.S. citizens paying U.S. taxes). To accommodate certain legitimate contingencies, individual firms may be allowed to shut down or outsource to other countries a greater proportion of their operations, if they take steps to alleviate the negative impact of their actions. These might include, for example, a commitment to provide job retraining for its former workers or a pledge of a certain percentage of the corporation's revenues to a public fund set up for such purposes. This is, of course, merely a brief sketch of one potential approach to the problem.

as an empty "branding" device.[105] Restoring the notion of public purpose to the very foundation of the corporate form removes the element of voluntariness and thus provides a stronger basis for institutionalizing corporate social responsibility. Under the proposed regime, corporations acting in contravention of their own stated purposes would be deemed to have violated the explicit provisions of their corporate charters. The range of potential penalties for such violations could include, in egregious cases, termination of the corporate charter. Corporations would also risk having their charters revoked if they commit serious violations of legal or administrative rules.[106] Explicitly conditioning the continuation of corporate status on the firm's legal and regulatory compliance record would effectively reframe the notion of corporate purpose in negative terms: it would state what the public franchisor affirmatively does *not* want corporations to do, in view of potential public harms such actions would cause. One can imagine a wide range of commercial, environmental, and financial misdeeds this type of incorporation regime would help to prevent.

As this brief sketch shows, rediscovering and operationalizing the concept of "corporate franchise" would involve a paradigmatic shift in the way modern business corporations are viewed and managed. It would reverse the key presumption underlying the existing regime of corporate law and governance: the presumption that incorporation is a "natural right" of private individuals. By contrast, the proposed approach is fundamentally premised on the view of the corporation as a hybrid public–private entity to which the state grants extraordinary privileges, in exchange for promises to deliver certain public benefits. Rather than advocate a return to the pre-modern era of "special" corporate charters, however, this exploratory exercise envisions the next phase in the evolution of the modern business corporation. It paints a system in which the inherent hybridity of the corporate form is explicitly recognized and actively embraced as a tool of public policy.

There is, of course, a long way from articulating a bold vision to implementing it in practice. Any attempt to reintroduce conditionality into the process of general incorporation would invite fierce criticism and political opposition. Ideological and political disagreements aside, the sheer centrality of corporations as domestic and transnational economic actors makes it extremely difficult to map out in advance the full implications of this move. At the very least, it would generate significant new demands on states' regulatory and administrative resources and may even necessitate federalization of corporate law.[107]

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[105] *See* Dorff et al., *supra* note 93, at 115; Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?* 46 WAKE FOREST L. REV. 591, 621-623 (2011); El Khatib, *supra* note 97, at 181-182; Manesh, *supra* note 103, at 668-669.

[106] This would be similar to a bank forfeiting its "franchise." *See supra* note 69 and accompanying text.

[107] For a discussion of some of these challenges, see Hockett and Omarova, *supra* note 15, at 495-499.

This chapter does not claim to solve or preempt these problems. Nor does it seek to displace or diminish the value of alternative approaches to solving present dysfunctions in the governance and business conduct of U.S. corporations. Optimizing corporate taxation, imposing more meaningful disclosure standards, mandating board-level employee representation, and many other public interest-oriented measures offer potentially effective means of advancing this overarching objective. The argument presented in this chapter supplements these regulatory proposals by problematizing and reframing the organizational context in which they are meant to work. In the spirit of an intellectual experiment, it seeks to nudge the ongoing debate on corporate purpose and social responsibility toward a greater recognition of public policy not merely as an exogenous constraint on, but as the core constitutive element of, the corporate form.

CONCLUSION

As noted earlier, the nature and purpose of a business corporation are among the most intensely debated issues in today's corporate law. In recent years, a growing number of business leaders and academics began calling for a move away from the "shareholder primacy" model of corporate governance toward a broader stakeholder-oriented approach. The principal challenge in this respect, however, is the absence of a robust framework for effective balancing of divergent interests of individual corporate stakeholders. Until that challenge is met, the notion of a stakeholder-oriented, purpose-driven corporation remains more of an aspiration than a solution.

This chapter seeks to expand the scope—and change the direction—of the debate by applying an explicitly macro-systemic perspective to issues of corporate personality and purpose. It argues that the modern business corporation is an inherently hybrid public-private entity, an institutional device for conditional outsourcing to private parties of certain essentially public functions. In this view, the corporate form is best described as a franchise arrangement, in which the public is franchisor and private parties collectively serve as franchisees.

The franchise view of the corporation has potentially significant normative implications. Among other things, it suggests that corporate purpose should be analyzed not in terms of prioritizing certain firm-level stakeholder-constituencies but in terms of maintaining the system-level balance of public and private powers. Focusing the inquiry on the role of public policy as a constitutive element of the corporate form, this chapter takes an important step toward a fuller understanding of the nature and functions of the business corporation in today's world.