8 Taming the Corporate Leviathan

How to Properly Politicise Corporate Purpose?

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Corporations are increasingly asked to specify a 'purpose.' Instead of focusing on profits, a company should adopt a substantive purpose for the good of society. In the words of an influential report by the British Academy: 'The purpose of corporations is not to produce profits. The purpose of corporations is to produce profitable solutions for the problems of people and planet. In the process it produces profits, but profits are not per se the purpose of corporations' (British Academy 2019, 16). High-profile books (Mayer 2018; Edmans 2020; Henderson 2020), policy-oriented reports (Veldman, Gregor, and Morrow 2016; British Academy 2019; 2020), and academic articles (Levillain and Segrestin 2019; Bebchuk and Tallarita 2020; Rock 2020) have discussed this emerging 'purpose paradigm.'

This chapter analyses, historicises, and radicalises this call for purpose. We schematise the history of the corporation into two main *purpose/power regimes*, each combining a way of thinking about corporate purpose with specific institutions to hold corporate power to account. Under the *special charter regime* of the seventeenth to mid-nineteenth centuries, governments chartered companies to pursue specific public purposes. Under criticism for corruption and lack of competition, the special charter regime gave way to the contemporary *general incorporation regime*. No particular purposes are demanded of corporations, and profit-seeking has become the norm. This regime has come under criticism in turn, and the purpose paradigm has the potential to become a new third purpose/power regime, the *social purpose regime*.

Our analysis of these three regimes focuses on politicisation. We argue that orienting companies to substantive social purposes requires politicising the business corporation, creating meaningful accountability mechanisms to align companies with the goals of the public. The purpose paradigm must overcome its political timorousness and be more institutionally radical. The difficulty is doing this without unacceptable corruption and inefficiency. We need a form of 'proper politicisation.' At the end of the chapter, we discuss some directions for reform which may deliver on that desideratum.

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Contemporary ideas about government and society are dominated by a liberal division of labour between an economy of free private contractors on the one hand and a state which regulates them in the public interest on the other. The clearest and most important expression of the contemporary breakdown of this division is the big multinational business corporation. Corporations are the locus of non-state power in the economy, and a major force behind the influence of wealth in the state. The proposals discussed at the end of the chapter import democratic mechanisms familiar from politics to help govern large corporations. In this way, we can attempt to preserve democratic values in our messy, mixed-up reality rather than trying to enforce a neat division between economic and political realms.

We begin by reviewing the current general incorporation regime (Section 1) and the emerging social purpose paradigm (Section 2). We argue that to transform into a new regime the paradigm must politicise corporate purpose (Section 3). In Section 4, we review the special charter regime, which did treat corporate purpose politically. However, in Section 5, we argue that by putting each charter directly in the discretion of the legislature, this regime also invited inefficiency and corruption. Drawing on the historical experience, we put forward desiderata for a better purpose/power regime. Section 6 introduces several directions for reform, which may fulfil these desiderata, extending the social purpose paradigm and giving it potential as an effectual new regime. These rely on either empowering stakeholders through stakeholder boards, dispersing share-ownership amongst citizens, or introducing citizens' juries and citizen assemblies to assess corporate performance on social purpose.

1 Where We Are Now: The General Incorporation Regime

Since the new purpose paradigm emerges as a critique of the current general incorporation regime, it is first necessary to say something about that regime and the purpose paradigm's critique of it.

Four features of the general incorporation regime are particularly salient (for summary, see Table 1). First, incorporation is generally available, to the extent of being little more than a formality. Anyone can start a business; incorporation is part of the open-access orders of modern liberal societies (North, Wallis, and Weingast 2009). Second, as a mere formality, incorporators need not have any particular purpose, with charters often stating that a corporation is for 'any lawful purpose.' This means that most corporate charters have a fairly generic character, allowing businesses to adopt and relinquish purposes as they go. Third, consequently, companies are regulated not according to their particular charters, but according to general rules that apply to any relevant firms. General regulation (such as consumer or environmental regulation) by

government applies to specific products or business activities, not to the legal person itself. Regulation operates as an external constraint on the decision-making process proscribed by the corporate governance structure. Fourth, while the law is formally agnostic about corporate purposes, the market context in which businesses operate steers them towards a goal of profit maximisation (more accurately, shareholder value maximisation). This has been justified on the theory that profit-seekers will be led to advance the general welfare by the invisible hand of market competition (Friedman 1970). Since the 1970s, this has been the dominant interpretation of the corporate objective in English-speaking countries. Therefore the general incorporation paradigm is now associated with 'shareholder primacy' as the dominant norm in corporate governance (Hansmann and Kraakman 2001).

The general incorporation regime relies on a liberal division of labour wherein corporations compete and focus on their private interest, while states govern and make rules which embody the public interest (Scherer and Palazzo 2007, 1111). Freedom of incorporation was part of a wider movement to put in place a stricter private/public distinction and understand corporations as firmly on the private side of this dichotomy (Ciepley 2013). However, this should not be understood as licensing corporations to do as they like. Rather, corporate power is subjected to two disciplining forces: market competition and a regulating state.

In the last two decades, increasing doubts have been raised about the tenability of this regime. In particular, globalisation has facilitated the re-emergence of corporations as political actors. Multinationals often operate at a global level which escapes nation-state regulation and in developing countries with weak governance capacities (Scherer and Palazzo 2011). They engage today not only in the 'old' political activities of lobbying and influencing state decisions, but also in 'new' political activities of self-regulation, standards-setting, and public goods provision which effectively bypass states altogether (Hussain and Moriarty 2014; Saunders-Hastings 2022, in this volume). At the same time, many markets have become less competitive and dominated by a small number of big firms. A new technology sector with strong monopolistic tendencies has become more important. Traditional countervailing powers such as labour unions have been weakened. Regulations have been relaxed. As corporations have grown in power, they have burst the banks of market competition and state regulation which were meant to channel their pursuit of profit towards the general welfare.

Consequently, many authors have concluded that we cannot expect companies motivated purely by profits to act in a way that advances the public good. Instead of relying on the invisible hand, companies this powerful should directly pursue the public good and orient themselves towards substantive social purposes. Of course, this reaction has

not been universal: some continue to insist that alternatives to the liberal division of labour are specious and that concerned citizens should instead focus on shoring up competition and state regulation (Bebchuk and Tallarita 2020). Rather than engaging in this debate here, we will take the social purpose paradigm's critique of the general incorporation regime as given and ask where it leads us.

2 Proposals for a Social Purpose Regime

In terms of concrete legal reforms, the core of the social purpose paradigm is that a substantive purpose expressing the company's contribution to society should be written into the corporate charter. This purpose does not require state approval. Instead, authorship lies with those mandated to change the charter within the corporate governance structure: directors and/or shareholders in most jurisdictions today. How this core demand is articulated, however, makes a significant difference. We look at three different dimensions, on each of which there are more minimal (reformist) and more demanding (radical) versions of the paradigm.

First, what's the nature of the social purpose, and how far does it stray from the traditional economic purpose of profit-maximisation? While critical of profit-maximisation, social purpose advocates do not envision the supersession of market discipline entirely. These authors still accept profit-seeking as part of, or a means to the realisation of, a corporation's purpose. Exactly how substantive purpose and market discipline should be combined, however, remains disputed. Some purpose advocates prefer to think in terms of win-win situations.[1] Others recognise there may be trade-offs (Mayer 2020, 227). In these cases, the respective weights of social purpose and economic purpose can be conceptualised in a variety of different ways (Lankoski and Smith 2018). At the minimum, one could take profit-maximisation as the goal, and a certain baseline level of social purpose as a constraint in its pursuit. This is often expressed in terms of internalising negative externalities. A more radical version is to take the substantive social purpose as the goal, with a net positive profit balance as a constraint. This can be expressed in terms of creating positive externalities. Between these two extremes there is a continuum of possible trade-offs between purpose and profit.

A second dimension relates to how exactly companies should be incentivised to take on an orientation to purpose. The minimum is an open invitation in law. For example, the 2019 French law (the *Loi Pacte*) makes the adoption of a purpose (*raison d'être*) optional for corporations (Segrestin, Hatchuel, and Levillain 2020). Since nothing has so far actually prohibited corporations from stating a social purpose, such an invitation is above all a symbolic act to emphasise the desirability of doing so. Once a company has a purpose written into its charter, this can have a real impact by changing the content of

directors' fiduciary duties and ultimately their legal liabilities. Several jurisdictions have created optional legal forms for the use of corporations with a social purpose. These include the *société à mission* in France, the *Benefit Corporation* in the United States, and the *Special Purpose Company* in the UK. We will say more about some of these forms below (Section 6).

The obvious alternative to these purely optional forms, is to make them mandatory. Colin Mayer, Leo Strine, and Jaap Winter (2020) have argued that something like benefit-corporation status should be required for all firms. Between the purely optional and fully mandatory there is again a continuum of ways states could incentivise companies in the direction of something like the benefit corporation. Such firms could be given preferment in public procurement, tax advantages or other perks.

This brings us to the third dimension, that of corporate governance. Minimally, purpose advocates maintain that directors' fiduciary duty needs to be re-oriented towards the corporation and its purpose rather than towards shareholders. Given that in many jurisdictions this is already the law and shareholder primacy is 'only' a cultural norm, one can question how much of a difference this will make. The strong position of shareholders in the governance structure will remain an obstacle to real change (Strine 2017, 179). At best, investors can be encouraged to put their ethics before their returns (Edmans 2020, 52; Henderson 2020, 124). Along this path, accounting can be reformed so that shareholders get better information about the non-financial performance of their corporations.

More radical proposals aim to change the underlying power structure by empowering other stakeholders in corporate governance. We will discuss some of these proposals further below (Section 6). However, calls for radical institutional reform are still fairly marginal within the purpose paradigm movement. The reason for this, we will argue, is that purpose advocates have generally not yet fully understood that the logical conclusion of the purpose paradigm is to politicise the corporation.

3 Purpose: Politicisation or De-Politicisation?

The potentially unique nature of the social purpose paradigm as a theory of corporate governance can be captured through the analytical lens of 'politicisation.'

To start, consider an argument recently made by Kevin Levillain and Blanche Segrestin (2019). They argue that the emerging attention to 'profit-with-purpose' corporations reflects a re-orientation in corporate governance models from 'primacy' to 'commitment to purpose.' The familiar stalemate in corporate governance discussions, they argue, is between two primacy views: the primacy of shareholders versus the

primacy of stakeholders. These two camps have been dominating corporate governance debates for decades. What both models have in common is that they are both 'political': they lead to 'boiling corporate governance down to the questions of "who elects whom?" and "who monitors whom?".' (Levillain and Segrestin 2019, 642) In contrast, they argue, purpose-driven corporate governance provides something new:

> The existence of a common purpose, explicitly stated in publicly available legal documents, enables derivation of objective and stable criteria for controlling executives' action – for instance through the definition of common standards – independently from the party that is supposed to exert this control.
>
> (Levillain and Segrestin 2019, 642)

Because of this radical priority of purpose over any constituents' interests, they argue, purpose-driven governance is truly different from both classical antagonists, which each defend and prioritise a particular constituency and its interests, shareholders or wider stakeholders.[2] We think the political nature of the purpose paradigm is a promising line of inquiry, but our analysis is in many respects the polar opposite of Levillain and Segrestin's.

On our analysis, a decision is politicised to the extent that:

1 All members of a group are subject to the decision.
2 Members of the group disagree about what should be done.
3 All members of the group participate in the decision.

This analysis is framed in terms of a single decision, but can easily be generalised to classes of decisions (e.g., corporate strategy) or to decision-making bodies or offices (e.g., the corporate board). As we show below, it can also be reversed to provide an analysis of de-politicisation. We start by taking the three elements of our analysis in turn.

Our first two elements mirror the two parts of Jeremy Waldron's (1999, 101), account of the 'circumstances of politics.' First, the subject matter of politics are common rules or decisions which apply to a whole group of people ('the polity'). Because common rules are imposed and binding for all members, coercion is a central element of politics. When there is no need for a common rule, decision-making about an issue can be 'privatised,' left to group members to decide for themselves. Which issues to politicise (to decide in common) is itself a political question. For example, a topic for local politics might be which colour residents should paint their houses; alternatively, they might decide that there is no need to make house colours a political decision. The 'need' for a common decision is not a feature of the external world, but depends on the interests and preferences of the members of the political community. Our first condition for politicisation is that decisions are collectivised rather than privatised.

The second element is disagreement. Common decisions do not necessarily give rise to politics if everyone is in agreement. In a society of

millions, almost every common decision is subject to at least some disagreement. However, some issues are much more controversial than others. Even more than simple disagreement, on our account politicisation implies that decisions are a matter of judgement. The decision cannot be simply reduced to the correct application of a known set of rules, using an established body of technical knowledge. Politicisation in this sense is opposed not to privatisation but to technocracy. A major reason political decisions require judgement is that they depend on disagreements about values as well as facts. Of course, very often authorities make political decisions to create frameworks of rules within which civil servants make more technical decisions. For example, central banking often operates by governments setting an inflation target and then giving civil servants the job of choosing interest rates to hit that target. (De-)politicisation in this sense is a matter of how far decisions can be characterised as a technical question about the correct application of rules, or a matter of judgement on which people disagree.

These two elements can be used to diagnose where politics is present, independently of how we think politics should be organised. Our third element, on the other hand, is a normative statement about how politics should be conducted: those who will be affected by decisions should participate in them. This is the conclusion Waldron (1999) reaches about how to respond to political situations in the first two senses. There are many possible normative foundations for this basic democratic norm. Democratic procedures might be favoured for reasons of procedural fairness and respecting citizens as equals (e.g., Waldron 1999; Christiano 2010). Democracy might be favoured as a way of enhancing the epistemic quality of the decisions (e.g., Landemore 2013; Goodin and Spiekermann 2018). Here, we attempt to stay agnostic on how the basic democratic norm is grounded.

Our account of the three elements of politicisation can be summarised by thinking in terms of the three different ways they can be negated: issues can be de-politicalised by privatising them, by turning them into a technical exercise, and by reserving them to an elite. With this in mind, let's now return to the corporation.

The general incorporation regime is an attempt to depoliticise corporate purpose. In the first sense, it privatises corporate purpose, turning it into a subject on which no collective decision-making is needed. Stakeholders are put in the position of contractors, who, in a competitive economy, can find alternative companies to work with if they disagree with the corporation's decisions. Part of what justified this privatisation is the metaphor of the corporation as a production function quasi-mechanistically obeying market forces. This brings us to the second sense of de-politicisation: genuine disagreement about corporate purpose is denied because market competition is imagined to apply so tightly that companies have no discretion about what to do. All that remains is the technical question of

how managers can steer the company to stay in tune with market signals. Finally, de-politicisation in the first two senses justifies de-politicisation in the third. Given that stakeholders are free to work with whomever they like, and given that companies are must bow to the winds of the market, decisions about a company's direction are best taken behind closed doors by board members representing the interests of shareholders.

This extreme version of the liberal division of labour has its attractions as an ideal. However, when used to describe an actual economy in which corporations wield significant power, it is ideological in the pejorative, Marxist sense of obscuring conflicts and power relations, making them harder to contest (cf. Shoikhedbrod 2022, in this volume). The fact that public protests against corporate power have time and again re-emerged over the period covered by the general incorporation regime (Lamoreaux and Novak 2017) is evidence that the general incorporation regime has not successfully depoliticised corporate power. Disagreement about corporate power persists, and without an outlet in regular corporate governance processes, it is taken to the street.

Of course, one might maintain that this disagreement is unfortunate and that we should aim for a more complete de-politicisation of corporate power. However, we do not think this stance would be compatible with the purpose paradigm. This brings us back to Levillain and Segrestin (2019). The corporate purpose statement is the ultimate common rule of the corporation as a polity. Different stakeholders will be advantaged at the expense of other stakeholders depending on which purpose a company commits to and on whether or not that company is judged to be fulfilling that commitment. If anything, then, one would expect the social purpose paradigm to represent a move to politicisation, not – as Levillain and Segrestin argue – de-politicisation. For instead of the one simple goal of profit maximisation, now corporations have to choose between a potentially endless variety of substantive purposes. Of course, Levillain and Segrestin are right that, once adopted, a purpose provides a legal anchor on which corporate constituencies need to focus their actions. But, we contend, both the process of adoption (and periodic revision) and, once adopted, the continual processes of interpretation of that (by its nature rather abstract) purpose cannot avoid politicisation. This suggests a pure idea of purpose-primacy is doomed to failure. The shareholder/stakeholder debate cannot be transcended by a common commitment of all participants to purpose.

We claim that the politicisation of corporate purpose is the logical conclusion of the purpose paradigm. If we want businesses to better serve society, it is important that businesses devote themselves to goals that society values rather than exclusively to the preferences of shareholders and board members. Once we admit the existence of a politics of corporate purpose, we cannot justify restricting decisions to shareholders and board members which clearly concern the general public.

The leading question for the social purpose paradigm should therefore be: how to *properly* politicise corporate purpose? To answer this question, it is important not to repeat historical errors. We will therefore first return to the era before general incorporation, when purpose was at the heart of corporate governance. What can we learn from that previous episode in politicisation of corporate purpose?[3]

4 Back to History: The Special Charter Regime

This section presents the main features of the special charter regime, which began with the first business corporations, the Dutch and English East India Companies, created through special charters from their governments in the seventeenth century. These were a novel adaptation of the general corporate form, which until then had been used only for non-profit purposes (towns, universities, monasteries, etc.). Business corporations remained a relatively rare species until general laws permitting incorporation for business purposes were passed in the nineteenth century. Until then, most commercial enterprises were conducted using unincorporated legal forms such as sole proprietorships or partnerships. Here, we focus on the practice of chartering corporations in the United States, from its independence in 1776 until the advent of general incorporation in the 1850s/1860s. The chartering practice in other countries had similar features, but the United States made more extensive use of the chartering device. We highlight five elements of the chartering practice.

First, in the United States, like other countries, businesses corporations could only be created by a *grant from the state*. This remains formally true today. However, these grants were not administered through a regular bureaucratic process. Instead, each individual charter had to be created by a separate piece of legislation. In the United States, this was handled by State legislatures.

Second, charters required corporations to fulfil a substantive *public purpose*. However, this should not be understood as excluding a private, commercial purpose on the part of the incorporators. According to Pauline Maier (referring, in particular, to Massachusetts), 'that a particular venture would benefit the private estates of individuals seems to have been of no concern – or to have been a positive consideration – as long as the public welfare was also served' (Maier 1993, 56; see also Handlin and Handlin 1947, 130, 132; Seavoy 1982, 6). This is not a surprise given that the initiative for incorporation almost always came from private individuals, not from the state.[4] Incorporation for manufacturing businesses was rare in the first decades of the nineteenth century but became more prevalent in the second half (Hurst 1970, 17; Roy 1997, 49). At first, corporations were approved for public works like canals, bridges, and turnpikes, and services like banking and insurance. In this and other respects, the breakthrough for the business corporation came with railroads in the mid-century.

Third, charters gave corporations a *monopoly position* in their sector and geographic area. It was widely recognised that corporations were 'franchises' of the state, with states giving privileges to specified parties. But we need to carefully distinguish two senses of this term. All corporations are franchises in the sense of having been granted the legal privilege to act as a unified legal person in law. But corporations were also, in this era, 'special-action franchises' (Hurst 1970, 20), chartered to get a specific task done, to the exclusion of others. Only the franchisee had the right to build the bridge or canal or to provide banking and insurance services in a certain area. Such a monopoly position was obviously attractive to investors. As we shall see, it was also a target of criticism.

Fourth, state approval often went hand-in-hand with *charter-based regulation* in the public interest (Handlin and Handlin 1945, 17). A variety of provisions were inserted into corporate charters with the goal of ensuring that companies adequately fulfilled the public purpose for which they had been chartered. One of the most common types of provision were duration limits, limiting the life span of corporations to a specified time period such as ten or thirty years (Hartz 1948, 239). Another example were 'reservation clauses,' giving the legislature the right to alter or revoke charters at will (Hartz 1948, 238). Requirements of rotation for directors and prohibitions on interlocking directorates served as guarantees to prevent private concentrations of power. Charters mentioned production limits for manufacturing companies, gave states the right to purchase public works after they were finished, and covered all kinds of granular local issues. Charter-based regulation needs to be understood against the background of the courts interpreting the power of corporations narrowly. Any powers not expressly granted in the charter were declared beyond the corporation's authority (*ultra vires*) (Hartz 1948, 243; Hovenkamp 1988, 1663).

A fifth feature is less well-known. US states held *visitorial power* over corporations. The idea originated with Catholic church corporations which were visited by their superiors in the hierarchy, who would hold them to account. According to William Blackstone, every corporation was to be held to account by a visitor, because corporations, 'being composed of individuals, subject to human frailties,' were liable 'to deviate from the end of their institution' (Blackstone 2016, 311). In cases of conflict, the visitor would hear the grievances, and 'administer justice impartially' (Holdsworth 1922, 395). Applied to lay corporations, Blackstone held that their visitor was their founder. In a general sense, he claimed, the King was the founder of all such foundations, hence the right would accrue to him (Blackstone 2016, 312).[5] It was this Blackstonian idea which US state courts transplanted to their own context when, in the early nineteenth century, they began to declare that they had visitatorial power over corporations (Glock 2017, 219). Later in the century, the power was ascribed not just to courts, but also to legislatures, as

a general right 'to control and superintend corporations' (Glock 2017, 225). According to Glock, this visitatorial power later became the basis for the powers of the regulatory state. Although the origins have been largely forgotten, US state attorneys still hold these powers to inspect corporations (Ciepley 2019, 1005).

These were the main features of the special charter regime. Let's now see which lessons can be drawn from this regime, for the contemporary discussions about the politicisation of corporate purpose.

5 Lessons from History: Properly Politicising Corporate Purpose

In this section, we argue that the special charter regime did politicise purpose. However, it did so in a way with significant drawbacks and should therefore not be directly imitated. Through a discussion of these drawbacks, we derive three desiderata for the proper politicisation of corporate purpose.

We left off our examination of the social purpose regime with Levillain and Segrestin's (2019) argument for moving beyond a 'political,' 'primacy' view towards a 'commitment to purpose' view. Following the logic of this argument, we would expect the special charter regime to be a neat illustration of how purpose-driven organisations function. After all, corporations in that era were legally obliged to pursue only their corporate purpose. These limits were enforced (through *ultra vires* actions, as we saw above) and provided a real sense in which the corporation's mission was more limited and focused than that of companies in the general incorporation regime that venture into any line of business they see fit. However, none of this prevented the special charter corporations from being thoroughly politicised: quite the contrary.

In the nineteenth-century United States, strong opposition arose against corporations, characterised as the 'anticharter doctrine' (Maier 1993, 58) or 'anticharter philosophy' (Roy 1997, 53). Several arguments played a role. One locus of criticism was that corporations in this period were granted *monopolies*. Critics focused not so much on the inefficiency of monopoly as on its inegalitarian distributive tendency, attacking corporations as giving rise to a new aristocratic class. This argument had already been made by Adam Smith, to which anticharter critics readily referred (Maier 1993, 59). A second critique was that corporate privileges were not being allocated fairly because of *political favouritism and corruption*. Access to state legislatures was easier for those with financial means and political connections. Even if it did not involve explicitly bribing legislators, it was objected that unequal access violated the egalitarian spirit of the republic (Mark 1987, 1453; Maier 1993, 72).[6]

Together, these arguments provided a case for general incorporation laws.[7] The monopoly argument is the key one in this respect, since the

restriction of privileges to the few can by definition only be resolved by opening up incorporation to all. However, for our purposes, the argument about political favouritism is more instructive. Placing charter decisions directly in the hands of the legislature was an open invitation to corruption and political favouritism. In a recent historical study of incorporation in the state of New York, Eric Hilt writes:

> Although it was the case that the earliest American corporations were seen as public instrumentalities, whether or not they served the public interest was a vigorously contested issue at the time… political discretion over access to charters and their contents often served the interests of incumbent firms and powerful political factions, rather than the public.
>
> (2017, 39–40)

From this point of view, there is no reason for nostalgically putting up the special charter regime as a model to remedy today's discontents with the general incorporation regime. From this history, we suggest, we can pick out three desiderata for a proper politicisation of corporate purpose, under a new social purpose regime (relating to the three senses of politicisation defined in Section 3).

First, such a regime should respect the three elements of politicisation identified earlier in the chapter. It should provide a process for making a common decision about corporate purpose rather than privatising it. It should allow for disagreement and judgement rather than presenting the choice as a technical exercise. It should include all those affected in the decision-making process. On this score, the special charter regime comes out relatively positively, at least compared to the general incorporation regime. Certainly, requiring approval of charters from state legislatures ensured the decision was a collective one that made space for disagreement and judgement. On popular participation there is more room for doubt. In theory, one might expect that elected legislators were appropriately representative of the people. However, anticharter critics lamented the disproportionate political influence of elites.

This brings us to the second desideratum for a corporate purpose regime: the avoidance of corruption. In the eyes of anticharter critics, corruption during the special charter regime reached a level where it harmed the democratic character of that regime. Corruption is not only a problem in democratic terms, but also for its inefficiency and incompatibility with the rule of law. The system should therefore be designed to minimise the incentives and opportunities for an exchange of favours between companies and political decision-makers – an exchange benefiting both parties at the expense of the public. It can be helpful to think of this in terms of the incentives on the supply (companies) and demand (public decision-makers) sides of this corrupt exchange.

On the supply-side, the fact that each company was subject to an individual decision by the legislature meant that there were very strong rewards for shareholders and managers who could corrupt the process. As chapters in this volume by Brian Kogelmann (2022) and Phil (2022) discuss in more detail, the fact that most laws apply to many different companies normally provides a certain degree of security against corruption, because any individual seeking to corrupt the process would be unable to capture all the benefits of doing so. As Kogelmann points out, this is why a prominent theme in normative public choice theory has been the importance of *generality*: ensuring that laws apply to everyone in a diffuse way rather than to a concentrated group in particular. It should be acknowledged that the general incorporation regime essentially brought generality to corporate law, and the consequence was indeed to cut out a whole category of corruption that had flourished in the previous era.

On the demand-side, the special charter regime also encouraged corruption by putting the decision in the hands of elected politicians. Facing regular elections, legislators are in a precarious position, and if extra money for campaigning makes a difference, then politicians who refuse it will in the long run tend to be replaced with politicians who accept it. In addition, campaign donations or offers of employment after leaving office provide relatively sanitised mechanisms of bribery.

Our third desideratum for proper politicisation is that the process should have sufficient administrative capacity. This may seem too trivial to be worth stating, but the lack of administrative capacity was a major weakness of the special charter regime and one which compounded its vulnerability to corruption. As the volume of corporations increased it became impossible for legislators to even attempt proper scrutiny of each charter. Charter-based regulation was often inadequate, and visitorial power was not exercised proactively but only by courts in response to third-party litigation.

With these desiderata in mind, we now move to today's social purpose regime. How can it fulfil these desiderata?

6 Options for Purpose-Driven Corporate Governance

As mentioned at the end of Section 2, the minimal option for corporate governance reform offered by others propagating the social purpose paradigm is to redirect directors' duties towards the corporate purpose. This continues to rely on a trustee model where those subject to corporate power do not have a voice. More radical proposals empower these other constituents, in one way or the other. We think moving in this direction is necessary, given our analysis pointing to the need for proper politisation. But what could this mean in practice? We see three main options.

The first option is to empower stakeholders. The authors of the *International Panel on Social Progress* report articulate the rationale behind this approach:

> Shareholders require some forum in which to make their views known, but so too do other stakeholders. A stakeholder board, which represented employees, shareholders, consumers, and creditors among others, would enable a diverse range of voices to influence the conduct of management. (…) The key concern is that a range of interests should be able to assert real power over the orientation of the company. To that end, devolving the legal powers possessed by shareholders to stakeholders in general would enable a more representative board to exercise such power.
>
> (Deakin et al. 2018, 246)

This position deserves serious discussion. There are obvious questions to be answered, such as who to include as stakeholders, and how to ensure that stakeholder board members act as faithful representatives of their constituencies. The proposal for stakeholder boards or committees builds on and generalises a longer tradition of thinking about workplace democracy (Malleson 2014; Ferreras 2017). Workplace democracy proposals have tended to originate from authors whose focus is on advancing the interests of labour rather than reconceiving corporate purpose (see Christiano 2022, in this volume). However, instead of representing workers only, a broader range of stakeholders could be empowered to influence corporate decision-making (Moriarty 2010). Some democratically minded authors have explicitly claimed that this is a bad idea, since the interest of non-employee stakeholders in the corporation is 'more tenuous' and their relations with it are 'relatively sporadic' (Hayden and Bodie 2020, 170). Adequately representing diffuse constituencies (such as the victims/beneficiaries of externalities) is likely to be difficult. Nonetheless, in the French context, the new law on purpose driven companies (*sociétés à mission*) has made creation of a stakeholder committee mandatory (Segrestin, Hatchuel, and Levillain 2020). These stakeholder committees are advisory bodies which lack real power, and indeed the *société à mission* form itself is optional rather than mandatory. However, it is easy to imagine how these arrangements could be made stronger, and the *société à mission* may provide valuable experience in the years to come.

A second reform option is to democratise shareholder ownership. For example, Lynn Stout, Sergio Gramitto, and Tamara Belinfanti have proposed a 'Blueprint for Citizen Capitalism' (2019). Under their plan, all citizens would receive shares in a new collective mutual fund. This citizens' fund would acquire shares in a wide variety of corporations, initially through donations from corporations and wealthy individuals. Citizen shares would revert to the fund upon their death. Citizens would not only get dividend payments,

but also political rights to direct administrators of the Fund on how to vote the Fund's shares (Stout, Gramitto, and Belinfanti 2019). Similarly, Giacomo Corneo has proposed the establishment of a sovereign wealth fund from which all citizens would receive a 'social dividend,' which would invest on an ethical basis. He also proposes a 'federal shareholder' acquiring a majority stake in key domestic firms to combat plutocratic tendencies (Corneo 2017). These proposals give citizens the power of property to protect their interests in corporate governance. They share some affinities with strategies of dispersing wealth associated with Property-Owning Democracy (on which see Brouwer 2022, in this volume), such as Universal Basic Income, and with certain market socialist proposals (Roemer 1994). They do not reform corporate governance itself and maintain the shareholder-oriented nature characteristic of the general incorporation regime. However, by changing *who* owns shares, they change the power structure within the economy.

The previous suggestions focus on the internal governance of individual corporations. A third option would be to try enhancing external control mechanisms over companies by the political community, yet in a way that reinforces commitment to purpose rather than the traditional liberal division of labour. Gordon Allen has recently proposed 'citizen tax juries': deliberative mini-publics scrutinising tax avoidance by multinational corporations and wealthy individuals (Arlen 2021). In work yet to be published (Bennett and Claassen 2022) we are exploring how this kind of scheme might be applied much more generally in a process we can call the 'Corporate Social Assessment.' Each large company would be assessed on its contributions to the public good every few years by a 'jury' of randomly selected citizens. The juries would apply a marks scheme developed and periodically revised by specially convened Citizen's Assemblies (a larger deliberative body, also composed of randomly selected citizens). Jury assessments would be given teeth by attaching financial consequences: a subsidy for the better-performing companies funded by a tax on the worse-performing companies. In a sense, the Assessment aims to provide an updated version of visitation, more proactive and consequential than the historical practice of the special charter era. It avoids the difficult task of finding people who can represent all the stakeholder groups affected by a company by instead using a representative sample of the citizenry as a whole. Instead of trying to set up a group of stakeholders such that the bargains they reach will constitute a fair compromise between relevant interests, an impartial group of citizens deliberates on the relative value and urgency of different stakeholders' claims.

Comparing these three reform options is beyond the bounds of this paper. We suggest that the choice between these options should be determined by the three desiderata identified earlier. How the purpose paradigm should manifest itself in public policy should depend on how each of these proposals would score on proper politicisation, avoidance of corruption and administrative feasibility.

7 Conclusion

This chapter has compared several purpose/power regimes in the history of the corporation. Table 1 summarises our schematisation of corporate purpose regimes.

Our starting point was the newly developing purpose paradigm, which argues firms should be oriented towards substantive (socially valuable) purposes beyond mere profit-seeking. We argued that this paradigm is too reticent about politicising corporate purpose and too institutionally conservative, and that this frustrates the realisation of its own ambitions. Reflecting on an earlier era in which corporations were very clearly oriented towards substantive purposes, we argued that such an approach cannot avoid politicising the corporation, nor should it. Yet, the manner in which the special charter regime politicised corporations had clear disadvantages. Companies' purposes, and the extent to which they are actually realised, should be meaningfully guided and scrutinised by representatives of the public. However, this should take place in a regular procedure that gives companies some degree of transparency and minimises opportunities for corrupt exchanges of favours. What is needed, is a 'proper politisation' of corporate governance.

Finally, we have put forward several directions for radical reform of corporate governance which may live up to these desiderata. Amongst them are proposals for creating stakeholder boards at corporations, dispersal of shareholder ownership amongst citizens and citizen juries

Table 1 Three corporate regimes compared.

	Special charter regime	*General incorporation regime*	*Social purpose regime*
Corporate creation	State charter as special franchise	State charter as administrative act	State charter as administrative act
Corporate purpose	Public purpose (from the point of view of the chartering authority)	Economic purpose: Profits (legally covered by charter indicating 'any lawful purpose')	Social purpose (with profits as precondition or secondary purpose)
Scope of chartering	Limited (monopoly)	Unlimited (open access)	Unlimited (open access)
Regulation	Charter-based regulation and visitation powers	General laws and market competition	General laws and market competition, plus radical reform of corporate governance

assessing corporate decision-making. Which of these proposals could (best) deliver the demand for a properly politicised corporate governance structure, remains to be debated.

Our reigning ideology today has attempted to depoliticise the corporation, with unpleasant results. If we want companies to pursue valuable social goals, we cannot avoid politicising the question of corporate purpose. Getting big companies to work towards the common good will require thinking of new and creative ways to make them democratically accountable.

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Notes

1 Here, there are overlaps with earlier proposals for 'enlightened shareholder maximization' (ESV) (Jensen 2002) and 'shared value creation' (Porter and Kramer 2011), although Edmans explicitly distances himself from ESV (Edmans 2020, 42).
2 This ties in with Miller and Gold (2015)'s notion of a fiduciary duty to a purpose rather than to persons.
3 For other analyses going to back to history to throw light on the current corporate purpose debate, (see Guenther 2019; Pollman 2021).
4 Many charters were for public works which allowed states to avoid raising taxes (Hurst 1970, 23; Roy 1997, 48). Toll roads were a common example.
5 In practice, however, Blackstone accepted that the King (acting through the court of king's bench) would visit one species of lay corporations, namely 'civil corporations,' while the other species, 'eleemosynary' (i.e., charitable) corporations, would be visited by their first donor or his heirs.
6 We omit a third argument from anticharter critics, that charters' grants of power posed a *danger to the sovereignty* of the state (Hartz 1948, 72; Maier 1993, 83). Pursued to its logical conclusion, this argument demanded the abolition of the corporate form.
7 However, an alternative faction in the US anticharter movement instead took these arguments as reasons to improve the existing practice, denying incorporation to unworthy candidates rather than expanding it to all (Creighton 1989, 1892; Maier 1993, 75; Roy 1997, 46).

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