Hohfeld in the Boardroom

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For nearly a century, debates over "corporate purpose" have framed the issue as a clash between two contested visions: should corporations maximize profits, or should they pursue broader social goals? This Article argues that this conventional framing obscures the true nature of the dispute. Using Wesley Hohfeld's map of rights, duties, privileges, and no-rights, I argue that the corporate-purpose debate is fundamentally about the scope and design of managerial privilege, rather than abstract commitments to shareholders or stakeholders. This Article offers a set of "critical questions" that any proposal for corporate-purpose reform should address to make itself legible, assessable, and comparable within a Hohfeldian framework, and employs these questions to examine three recent, influential proposals for stakeholderist reform. The analysis reveals that proposals for stakeholder-oriented reform often fail to constrain managerial privilege, while resting on risky empirical bets about corporate actors' benevolence.

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Introduction

Despite decades of debate and thousands of law-review articles,[1] no consensus has emerged around the fundamental question of what the corporation's purpose is or should be. In this Article, I argue that one of the main reasons for this lack of progress is the use of a language that treats "corporate purpose" as a primitive concept rather than shorthand for a complex web of legal relations. To have a more meaningful conversation, we need to shift the analysis from "lump concepts,"[2] such as corporate purpose, to their atomistic components.

The traditional characterization of the debate is a clash between two "contested visions": shareholder primacy v. stakeholder governance.[3] Should corporations "be managed . . . to maximize shareholder wealth"?[4] Or should they "prioritize the interests of other stakeholders"?[5] This way of framing the problem treats "corporate purpose" as a coherent "thing" that can be oriented or reoriented towards this or that normative goal. This approach has done more to obfuscate than to illuminate the problem.

The obfuscation is vividly illustrated by a curious fact. Under the banner of "stakeholder governance" we can find both Bernie Sanders, a

1. For a history of the corporate-purpose debate, see generally C. A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002). *See also infra* note 18 and accompanying text (describing the number of articles on the subject published in recent years).

2. William Twining, *Two Works of Karl Llewellyn*, 30 MODERN L. REV. 514, 525 (1967). Llewellyn warned against broad generalizations that lumped together disparate social situations ("lump concepts") and encouraged us to look for "narrower, more significant categories" as a first approach to a problem ("narrow issue thinking").

3. Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 591-92 (2018).

4. Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565 (2021); *see also* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1310 (2021) (seeing the proposals for a rethinking of corporate purpose as "part of a broader effort to reorient corporate decision-making away from economic value maximization in favor of broader societal objectives"); Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1176-77 (2022) ("On one side of the debate are those who subscribe to the more conventional 'shareholder primacy' view of the corporation and its purpose, contending that the corporation exists to maximize profits to its shareholders. On the other side of the debate are those who embrace the view that corporations should focus on the interests of all of [their] stakeholders.").

5. Lund & Pollman, *supra* note 4, at 2565.

self-styled democratic socialist,[6] and the Business Roundtable, a powerful business lobby.[7] Something is amiss.[8]

To get to the crux of the debate, we must break down the vague concepts found in the literature into basic legal relations. Beneath the surface of notions like "corporate purpose," there is a matrix of legal entitlements and disablements. The real disagreement lies in the specific design of this matrix, not in the vague holistic properties of the lump concept. But to talk about this legal matrix we need a sharper language—and a common one—so that we can constructively compare, assess, and discuss competing proposals. I argue that the work of Wesley Hohfeld provides the foundations for such a language.

Hohfeld—an early twentieth-century legal scholar well known among legal theorists but almost completely absent in modern corporate-law scholarship[9]—argued that the corporation is a mere fiction and that all legal concepts can be reduced to a few basic *relations* between individual *actors* with respect to specific *activities*. I use his framework to propose a sharper, clearer language to talk about corporate purpose.

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6. *See* Lenore Palladino, *How Bernie Sanders Plans to Bring Economic Democracy to the United States*, OPENDEMOCRACY (Oct. 30, 2019), https://www.opendemocracy.net/en/oureconomy/how-bernie-sanders-plans-bring-economic-democracy-united-states [https://perma.cc/Q96C-FYH2] ("[Sanders's] new 'Corporate Accountability and Democracy' plan unifies policies that are too often considered in isolation: moving corporations towards *stakeholder governance* and ownership; restricting market power by large corporations; and rebalancing corporate taxes." (emphasis added)). For Sanders's self-characterization as a democratic socialist, see, for example, Isaac Chotiner, *How Socialist Is Bernie Sanders?*, NEW YORKER (Mar. 2, 2020), https://www.newyorker.com/news/q-and-a/how-socialist-is-bernie-sanders [https://perma.cc/42VC-Z98E] ("Bernie Sanders . . . for decades has described himself as a democratic socialist . . . .").

7. *See Purpose of a Corporation*, BUS. ROUNDTABLE, https://www.businessroundtable.org/ourcommitment [https://perma.cc/SN82-BKBF] (expressing a commitment to "deliver value to all" stakeholders).

8. The complaint that the debate is afflicted by ambiguities and confusion is quite old. *See, e.g.*, David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 3 (1979) ("The people who say they are discussing corporate social responsibility are by no means all interested in the same questions, and they often seem to be talking past each other."). More recently, others have pointed out ambiguities and confusions in the corporate-purpose debate. *See, e.g.*, Lund & Pollman, *supra* note 4, at 2565-66; Fisch & Davidoff Solomon, *supra* note 4, at 1311-12; Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363, 367-68 (2021); Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions*, *in* CORPORATE PURPOSE, CSR, AND ESG: A TRANS-ATLANTIC PERSPECTIVE 55, 55, 81 (Jens-Hinrich Binder, Klaus J. Hopt, Thilo Kuntz eds., 2024).

9. A Westlaw search of law review articles on "Corporations" from 1990 onwards finds only twenty-four articles citing Hohfeld. Of these, only six mention Hohfeld in the body of the article (as opposed to a footnote), and most of them in just one sentence or paragraph. The only corporate-law author engaging with Hohfeld is Professor Asaf Raz, in two of those articles. *See* Asaf Raz, *Why Corporate Law Is Private Law*, 25 U. PA. J. BUS. L. 981, 988 (2023); Asaf Raz, *Taking Personhood Seriously*, 2023 COLUM. BUS. L. REV. 729, 758, 763. In the first article, Raz uses Hohfeld to argue that corporate law is private law because corporate-law jural relations are between private parties—not between a private party and the state. In the second article, Raz uses Hohfeld's theory of legal relations to argue that legal personhood is a real and indispensable structural feature of law, not a disposable metaphor or fiction. Interestingly, as explained in Section I.B.2, Hohfeld did not believe in the "reality" of corporate personhood.

Just like Hohfeld showed that the traditional concept of "property"—among others—hides a bundle of different interpersonal legal relations,[10] I hope to show that familiar concepts used in the corporate-purpose debate—including the notion of corporate purpose itself—are in fact complex bundles of legal relations among market players and between market players and the state. Similarly, just like Hohfeld showed that what we commonly call "rights" and "duties" can only be understood in relation to each other—in other words, that there is no "right" without a correlative "duty" and vice versa[11]—I hope to show that corporate governance cannot rely on entitlements without corresponding disablements or on disablements without corresponding entitlements. The Hohfeldian architecture of corporate purpose is adversarial in nature, meaning that the position of each actor can be understood only in contraposition to other actors limiting and constraining the former. This implies that we cannot speak of duties, obligations, purposes, or missions—as in the pervasive rhetoric of corporate purpose—without identifying adversarial rights, powers, and other entitlements that give full meaning and operational efficacy to those concepts.

The Article proceeds in three parts. Part I outlines the problems with the traditional language of corporate purpose and proposes a sharper language based on Wesley Hohfeld's theory of the corporation and theory of legal relations. Using Hohfeld's map of *rights*, *duties*, *privileges*, and *no-rights*, I show that the corporate-purpose problem is a legal-design problem, namely the problem of which legal relations should shape corporate decision-making. In particular, the main theories of corporate purpose that are found in the literature are generalizations of five different Hohfeldian permutations of legal relations regarding corporate decisions. Although some of these relations accurately describe specific facets of corporate decision-making, none of them captures a single principle or orientation of "corporate purpose." A realistic general model of corporate decision-making, I argue, must take the form of a broad sphere of managerial *privilege* limited by a complex matrix of adversarial legal relations.

Part II shows that the traditional characterization of the debate as a clash between shareholder primacy and stakeholder governance is woefully inadequate. These concepts, I argue, do not represent general Hohfeldian *duties* applicable in all circumstances. Indeed, any realistic model of corporate purpose inevitably contains *rights*, *duties*, *privileges*, and *no-rights* in favor of both shareholders and stakeholders. Furthermore, shareholder primacy and stakeholder governance do not seem to refer to a dividing line between pro-shareholder and pro-stakeholder normative positions, as these positions can be found both within and across the

10. *See* Smith, *infra* note 68, at 1695-96.
11. *See infra* Section I.B.1.

traditional camps. For example, authors traditionally associated with the shareholder-primacy camp have argued in favor of stricter (statutory and regulatory) restrictions on corporate power, whereas authors traditionally associated with the stakeholder-governance camp have at times opposed the expansion of corporate rights and powers for stakeholders or stricter regulations.[12]

The unsuccessful search for a persuasive criterion to distinguish shareholder primacy and stakeholder governance suggests that the disagreement in the corporate-purpose debate is in fact rich and multifaceted and cannot be reduced to two grand theories. Once we recognize this fact, we should abandon the suggestive but misleading trope of the "contested visions," and we should refocus the conversation on the more prosaic but more meaningful matrix of constraints on managerial *privilege*.

Part III proposes four critical questions that any analyst or advocate suggesting a corporate-purpose reform—that is, a significant change to the existing set of rules and practices that surround corporate decision-making on socially significant issues—should address to make such proposal legible, assessable, and comparable. The first question is a preliminary "benchmark check" to situate the proposed model in relation to the status quo. It asks whether the proposed model expands or restricts managers' *privilege* as compared to the existing set of rules and practices—what we could call the "current model." Indeed, I show that the major fault line in the debate since the 1930s has not been the one between shareholder-oriented and stakeholder-oriented models, as commonly assumed, but the one between models that seek to expand managerial privilege and models that seek to restrict it.

The second question requires the reform proponent to specify in detail which new or different legal *relations* should be established, between which *actors*, and with respect to which *activities*. If we take the Hohfeldian framework seriously, a proposal for corporate-purpose reform cannot be as simple as a "reorientation" of purpose from one goal to another, or the "abandonment" of a principle or theory, such as shareholder primacy. It must instead be a detailed and explicit specification of legal relations—that is, well-identified *actors* with specific *entitlements* and *disablements* with respect to well-specified *activities*. Any use of deontic language that does not translate into well-specified legal relations should be treated skeptically.

The third question concerns the interaction among different legal relations. This is particularly relevant for reform proposals that present themselves as "pro-stakeholder": how should we expect the various corporate actors to cooperate in executing stakeholder-favoring decisions?

12. *See infra* Section II.B.

In Hohfeld's framework, an important distinction is the one between *rights* and *privileges*. If *A* has a *right against B* with respect to an *activity*, it means that *B* has a *duty* to *A* with respect to the same *activity*. By contrast, if *A* has a *privilege against B* with respect to an *activity*, it does not follow that *B* has a *duty* but only an absence of *right*.

What this means with respect to stakeholder-favoring corporate decisions is that even if the corporate decision maker has a *privilege* vis-à-vis the shareholders, the shareholders do not necessarily have any *duty* to cooperate or even not to interfere with the stakeholder-favoring decision. Any stakeholder-oriented model of corporate purpose must address this problem and explain why shareholders should be expected to cooperate or at least not to interfere with decisions that favor stakeholders at their expense. (Pro-shareholder reformers will have a much easier job persuading their audience that shareholders will not interfere with pro-shareholder decisions.) Using a colorful thought experiment discussed by Hohfeld, I will call this problem the "shrimp salad" problem.

The fourth and last question concerns the motivational assumptions underlying the legal model. Hohfeld's scheme is an analytical not a predictive model. The fact that *A* has a *privilege* to do either α or β gives us no information on whether we should expect *A* to choose one or the other. But a policymaker or corporate planner wishing to design corporate legal relations in order to achieve certain normatively desirable goals must make precise assumptions on what *reasons* the various corporate actors may have to act upon their entitlements or disablements. This is what Llewellyn called the application of Hohfeld "from the standpoint of the cynic," meaning from the standpoint of one who believes that "a right is best measured by effects in life."[13]

To illustrate how these critical questions may illuminate actual reform proposals, I examine three recent influential pro-stakeholder reform proposals: (1) the plaintiff's proposal in *McRitchie v. Zuckerberg*, which argued that corporate directors have fiduciary duties to refrain from actions that harm the economy as a whole;[14] (2) the New Paradigm adopted by the International Business Council of the World Economic Forum as a corporate-governance framework to achieve sustainable growth;[15] and (3)

13. KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 83, 85 (1960). My cynicism is somewhat different from Llewellyn's. Llewellyn focused on courts: remedies, rules of adjudication, rules of evidence, and nonlegal factors influencing how the courts decide disputes. I am interested, by contrast, not only in the prediction of what the courts will do but also in the prediction of what the other corporate actors will do.

14. *See* Verified Amended Complaint at 2-3, McRitchie v. Zuckerberg, 315 A.3d 518 (Del. Ch. 2024) (No. 2022-0890-JTL), 2023 WL 1861619.

15. Martin Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, WORLD ECON. F. 1 (Sep. 2, 2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf [https://perma.cc/2R2P-MCKU].

the shareholder-welfare-maximization model proposed by economists Oliver Hart and Luigi Zingales.[16] I show that these reform proposals fail to identify Hohfeldian relations constraining managerial *privilege* and ultimately rely on a bet on the benevolence of corporate actors. The bet is quite risky because it calls for an expansion of corporate power in the hope that it will be used to the benefit of society. Part III concludes by proposing a simple but concrete principle for designing stakeholder-oriented reform: expand managerial privilege only when the benevolence of the relevant corporate actors is verifiable; otherwise, pair privilege with enforceable duties or countervailing powers.

This Article contributes to the corporate-purpose literature by proposing a systematic framework to understand, assess, and compare different models of corporate purpose, in the hope of fostering a more constructive conversation. In particular, it offers a concrete roadmap grounded in transparent conceptual premises that can be employed by defenders of the status quo as well as reformers, and it does so with an analytic legal language that can be used by both followers and critics of economic analysis, which is the approach most frequently employed in corporate-law scholarship. This framework shows that the debate is trapped in a suggestive but unhelpful contraposition between grand visions—shareholder primacy and stakeholder governance—and it urges scholars and practitioners to focus instead on the adversarial architecture of corporate decision-making.

This Article also contributes to Hohfeld scholarship by proposing a novel application of his theory to corporate and fiduciary law. There are not many applied uses of Hohfeld's scheme in the literature, and this is, to the best of my knowledge, the first attempt in corporate governance. Legal scholars often regard Hohfeld's scheme as being of mere theoretical interest and little practical use.[17] I hope to show that Hohfeld can in fact illuminate actual, high-stakes debates of law and policy.

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16. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 260-61 (2017) [hereinafter Hart & Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*]; Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 195, 207-16 (2022) [hereinafter Hart & Zingales, *The New Corporate Governance*]; Oliver Hart, Helene Landemore & Luigi Zingales, *How to Implement Shareholder Democracy* 9 (George J. Stigler Ctr. for the Stud. of the Econ. & the State Working Paper No. 350, 2025), https://ssrn.com/abstract=5039736 [https://perma.cc/2A5B-KZCE]; Oliver Hart & Luigi Zingales, Citizen Investors: How to Prevent Corporate Evil 51 (Dec. 2025) (unpublished manuscript) (on file with author) [hereinafter Hart & Zingales, Citizen Investors].

17. *See, e.g.*, Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 238 (2002) ("... Hohfeld provides answers to very few questions.").

I. A Hohfeldian Language for Corporate Purpose

A. The Conventional Language of Corporate Purpose

The topic of corporate purpose keeps getting a lot of attention. According to Westlaw, between 2017 and 2025, law reviews and journals published 1,364 articles on this topic, more than in the previous thirty years combined.[18] By April 2026, 295 of these articles have been cited more than ten times, and a dozen of them more than one-hundred times.[19]

The debate touches on several conflicting normative and descriptive issues. Some authors argue that we are experiencing a shift from the traditional conception of corporate purpose—so-called "shareholder primacy"—to an alternative, stakeholder-oriented conception—so-called "stakeholder governance";[20] others argue that such a shift is only a marketing ploy and that nothing is changing.[21] Some authors argue that shareholder primacy is bad[22] or simply illogical;[23] others argue that it is good;[24] others yet argue that abandoning shareholder primacy would be bad for both shareholders and stakeholders.[25] Some authors make the case that shareholder primacy and stakeholder governance are compatible;[26]

18. I searched Westlaw for articles published in law reviews and journals containing the terms "corporate purpose," "stakeholders," "social responsibility," or "ESG" (which stands for "environmental, social, and governance") while also mentioning "shareholder primacy" or "shareholder value." I used the first set of terms to select all potentially relevant articles in the corporate-purpose literature, and I used the second set of terms to exclude articles that are most likely irrelevant for our topic. The first search, from 2017 to 2025, found 1,364 articles. The second search, from 1987 to 2016, found 1,276 articles.

19. I counted Westlaw's "citing references," which include citations by law articles and other secondary sources, court citations, citations in administrative proceedings, etc.

20. *See, e.g.*, Belinfanti & Stout, *supra* note 3, at 630 ("[S]upport for [the shareholder primacy] approach . . . is eroding."); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405 (2020) (observing "an extraordinary reversal from the [profit-maximizing] mantra dominating corporate law theory for the last five decades"); Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2430 (2020) (arguing that "substantial cracks have appeared" in the foundational arguments for shareholder primacy).

21. *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1042 (2022) ("An alternative view is that the [Business Roundtable] Statement was merely a public-relations move . . . .").

22. *See, e.g.*, Einer Elhauge, *The Inevitability and Desirability of the Corporate Discretion to Advance Stakeholder Interests*, 106 CORN. L. REV. 1819, 1829-30 (2021) ("[A] corporate duty to maximize shareholder profits . . . . would not only allow, but require, all corporate leaders to behave like corporate sociopaths.").

23. *See generally* Frank Partnoy, *Shareholder Primacy Is Illogical*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 186 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (refuting arguments supporting shareholder primacy).

24. *See generally* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE (2023) (arguing that corporate objectives should center on maximizing shareholder value).

25. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 164 (2020).

26. *See* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 4 (2019); ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND

others object that such a win-win scenario is wishful thinking.[27] Some authors argue that shareholder value maximization is what the law requires;[28] others argue that it is not.[29] Some authors argue that investors should be expected to push corporations towards more socially oriented goals, either because of their moral and social preferences[30] or because of the effects of negative externalities on their portfolios;[31] others question the implicit assumptions behind these theories.[32] And many other authors discuss specific facets of or proposals for rethinking or reforming traditional corporate purpose, including by requiring corporations to prevent sexual harassment or other egregious breaches of public trust,[33] to

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PROFIT 4 (2020); Robert G. Eccles & George Serafeim, *The Performance Frontier: Innovating for a Sustainable Strategy*, HARV. BUS. REV., May 2013, at 51; Ioannis Ioannou & George Serafeim, *The Impact of Corporate Social Responsibility on Investment Recommendations: Analysts' Perceptions and Shifting Institutional Logics*, 36 STRATEGIC MGMT. J. 1053, 1054 (2015).

27. Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Does Enlightened Shareholder Value Add Value?*, 77 BUS. LAW. 731, 732-33 (2022).

28. *See, e.g.*, Stephen M. Bainbridge, *Why We Should Keep Teaching* Dodge v. Ford Motor Co., 48 J. CORP. L. 77, 79-80, 90 (2022) (*Dodge v. Ford*, which held that the corporation "is organized and carried on primarily for the profit of the stockholders" "was good law when handed down in 1919 and remains good law today." (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919)); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1954 (2018) ("The data show that courts have pervasively embraced the concept that corporate managers should maximize shareholder wealth.").

29. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 32 (2012) ("As far as the law is concerned, maximizing shareholder value is not a requirement; it is just one possible corporate objective out of many.").

30. Hart & Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, *supra* note 16, at 260-61; Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1294 (2020); Hart & Zingales, *The New Corporate Governance*, *supra* note 16, at 203.

31. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 6 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 635 (2022).

32. Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 452 (2020); Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511, 529 (2023) [hereinafter Tallarita, *The Limits of Portfolio Primacy*]; Roberto Tallarita, *Fiduciary Deadlock*, 171 U. PA. L. REV. ONLINE 1, 21-22 (2023); Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497, 505-08 (2023).

33. *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1591 (2018); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2016 (2019); Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1887 (2021).

disclose information on carbon emissions and workers,[34] or to adopt explicit social goals.[35]

These disputes are not new. Conventionally, the birth of the debate is traced back to the 1930s,[36] when Professor Merrick Dodd of Harvard and Professor Adolf Berle of Columbia presented competing views in the pages of the *Harvard Law Review*.[37] Berle defended the theory that corporate managers should be considered trustees of the shareholders; Dodd argued that the modern corporation has social responsibilities and that corporate managers should "manage it in such a way as to fulfill those responsibilities."[38]

The dispute resurfaced periodically after World War II. In the 1960s, corporate managers became more likely to publicly endorse corporate social responsibility,[39] and economist Milton Friedman criticized this trend in a famous essay.[40] In the following years, progressive academics waged an intellectual and practical campaign for corporate social responsibility,[41]

34. *See* Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 435-36 (2018); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 929 (2019); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 518-19 (2020); Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1829-32 (2021); George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 647 (2021).

35. *See* David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 465-66 (2017); Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 988-90 (2020); *see also* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 619-20 (2017) (describing benefit corporations, which are required to pursue defined public benefits).

36. *See, e.g.*, Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 647 (2006) ("The origins of the shareholder primacy norm can be found in the classic debate between Merrick Dodd and Adolf Berle in the 1930s . . . ."); Wells, *supra* note 1, at 82 ("Modern legal debates over corporate social responsibility date back to a 1930s debate between the legal scholars Adolf A. Berle and E. Merrick Dodd over whom directors should serve.").

37. *See* Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) [hereinafter Berle, *Corporate Powers as Powers in Trust*]; E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147-48 (1932); Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1366-69 (1932).

38. Berle, *Corporate Powers as Powers in Trust*, *supra* note 37, at 1049; Dodd, *supra* note 37, at 1153-54.

39. For example, a survey of corporate executives conducted by the *Harvard Business Review* in 1961 found that five out of every six respondents agreed that "for corporation executives to act in the interest of shareholders alone, and not also in the interest of employees and consumers, is unethical." Raymond C. Baumhart, *How Ethical Are Businessmen?*, HARV. BUS. REV., July-Aug. 1961, at 10.

40. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sep. 13, 1970, at 32-33.

41. *See infra* notes 185-191 and accompanying text.

while free-market advocates pushed for a more profit-oriented corporate governance.[42]

In the 1990s, "stakeholder theory" became a mainstream approach to management in business schools. R. Edward Freeman's seminal work in the field was published in 1984;[43] a decade later, the concept of "stakeholders" had become "commonplace" in the management literature.[44] Meanwhile, in the legal academy, Margaret Blair and Lynn Stout proposed an influential theory challenging shareholder primacy,[45] while Henry Hansmann and Reinier Kraakman argued that shareholder primacy had become the consensus around the world.[46] The dispute, as we have seen, continues to this day.

One might wonder why there has been so little progress after nearly one-hundred years of debating. My contention in this Article is that one of the major problems afflicting the corporate-purpose debate is the inadequacy of its conventional language.[47]

We talk about corporate purpose by using deontic language—the language of obligation and permission—but the way we use this language obfuscates the crux of the disagreement.[48] We are told, for example, that corporations *should* be managed in the exclusive interests of shareholders or—according to the opposite view—in the interests of all stakeholders; that companies "*ought to* have a diverse board";[49] that there is a "fiduciary *duty* to maximize shareholder wealth";[50] or that, according to the other view, there is "a *duty* of loyalty . . . to all those interested in or affected by

42. *See* Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 454-55 (1984). *See generally* Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481 (1972) (critiquing campaigns for social responsibility).

43. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

44. Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 65 (1995).

45. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999).

46. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001).

47. For some recent works addressing semantic indeterminacy in legal language in other areas, see generally Daniel J. Hemel, *Polysemy and the Law*, 76 VAND. L. REV. 1067 (2023), which describes instances where a single word may carry multiple meanings; Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367 (2015), which argues that "descriptive" and "suggestive" trademarks should not be subject to fundamentally different treatment because of the similarities between them; and Ronald J. Krotoszynski Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881 (2013), which describes the difficulties of deriving a specific set of rights from the word "privacy" alone.

48. By deontic language I mean, consistent with how linguists and philosophers use the term, linguistic expressions used "to talk, not about what is actually the case, but instead about what would be the case if the world accorded with some normative or evaluative standard." Jennifer Carr, *Deontic Modals*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS 194, 194 (Tristram McPherson & David Plunkett eds., 2018).

49. Barzuza et al., *supra* note 30, at 1279 (emphasis added).

50. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 561 (2003) (describing Berle's viewpoint) (emphasis added).

the corporation."[51] Yet, it is not always clear what kind of obligations these are, if they are obligations at all. Are they legal duties, nonlegal normative aspirations, rational expectations, or something else?

Moreover, concepts that ostensibly occupy a central place in the debate—such as "shareholder primacy," "stakeholders," "ESG," and even "corporate purpose" itself—are used in ambiguous ways, varying across time and authors. The "rise of shareholder primacy" is commonly said to have occurred in the 1970s or 1980s,[52] yet the idea that corporations must make profits for shareholders appears in law casebooks as early as the end of the nineteenth century.[53] The concept of "stakeholders" has been borrowed from the management literature, but management scholars have proposed seventy-five different definitions of this term over four decades;[54] and the term "ESG"—despite the explosive growth of funds using this label[55]—lacks definitional coherence.[56]

Even the very concept of "corporate purpose," once used in a technical legal sense, is now increasingly vague and fluid. Originally, "corporate purpose" referred to the limited business activities in which an

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51. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992) (emphasis added).

52. *See, e.g.*, Lund & Pollman, *supra* note 4, at 2574-75; Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1173 (2013); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1529-30 (2007); Timothy W. Guinnane, Ron Harris & Naomi R. Lamoreaux, *Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries*, 91 BUS. HIST. REV. 227, 227-28 (2017) ("Since the 1970s, the idea that corporations should be managed in the long-run interests of their shareholders has dominated the literature on corporate governance.").

53. *See* SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS 2912-13 (1st ed. 1895) (treating corporate directors as trustees or fiduciaries of the shareholders); HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 501 (1st ed. 1927) ("[T]he . . . purpose of a business corporation . . . . [is] to transact business . . . for the benefit of its stockholders."); HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 552-53 (rev. ed. 1946) (explaining that the purpose of a business corporation is to "earn profits for its shareholders").

54. *See* ANDREW L. FRIEDMAN & SAMANTHA MILES, STAKEHOLDERS: THEORY AND PRACTICE 5-8 (2006). For a discussion of the vagueness of the "stakeholders" concept in corporate law, see Bebchuk & Tallarita, *supra* note 25, at 116-19.

55. *See, e.g.*, Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) (observing that, in the past few years, ESG investing has been "growing explosively" and there has been a rapidly growing number of mutual funds "that purport to consider ESG factors in their investment and voting decisions"). For data on the spectacular growth of fund flows for "ESG funds," see also Jon Hale, *A Broken Record: Flows for U.S. Sustainable Funds Again Reach New Heights*, MORNINGSTAR (Jan. 28, 2021), https://www.morningstar.com/sustainable-investing/broken-record-flows-us-sustainable-funds-again-reach-new-heights [https://perma.cc/DY9V-YH5L]; Emma Boyde, *ESG Accounts for 65% of All Flows Into European ETFs in 2022*, FIN. TIMES (Jan. 13, 2023), https://www.ft.com/content/a3e9d87f-fa6f-4e5e-be6e-e95b42af2fec [https://perma.cc/924W-LQ44].

56. Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 406 (2024).

individual company could engage legally under its charter.[57] Once corporate charters were allowed to adopt general-purpose clauses authorizing directors to pursue any legal goals,[58] "corporate purpose" became shorthand for a legitimate interest of the corporation as opposed to a personal interest of its agents.[59] In the current debate, however, the meaning of "corporate purpose" seems to have shifted again, and it is not always consistent across different authors. Sometimes, it seems to refer to the overarching goal that should inform and guide managerial decisions in each and every corporation;[60] other times, it refers to a voluntary commitment made by some individual companies (but not by others).[61] Furthermore, near synonyms of "purpose" are used with different nuances, such as "goals,"[62] "mission,"[63] and "values."[64]

Despite all these confusing distinctions, there seems to be a basic idea on which the conventional language relies. This idea is that "corporate purpose" is a primitive concept, a coherent "thing" of which we can say whether it is (or should be) oriented towards this or that group—typically, shareholders or stakeholders. But, as I hope to show, this is a misleading characterization of the problem. Corporate purpose is not a coherent "thing" but mere shorthand for a complex matrix of legal relations.

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57. The first judicial occurrence of the term "corporate purpose" that I was able to find is *Kean v. Johnson*, 9 N.J. Eq. 401, 416 (Ch. 1853). In this 1853 case, the New Jersey Chancery Court, then the most important corporate-law court in the United States, held that it could interfere and block a sale of assets by a corporation, if made for purposes "other than corporate purposes." Shareholders, the court wrote, had a right that their money be devoted to the business enterprise for which the corporation was chartered. *Id.* at 416.

58. For the history of the purpose clause in corporate charters, see generally Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423 (2021).

59. *See, e.g.*, Gross v. Grimaldi, 166 A.2d 592, 596 (N.J. Super. Ct. App. Div. 1960) ("[E]ven if [an attorney] negligently gave [corporate] funds to [the president], if the latter in fact applied them for corporate purposes, there has been no improper diversion and no damage to the interest of the creditors, represented by plaintiff."); Essential Enters. Corp. v. Dorsey Corp., 40 Del. Ch. 343, 347 (1962) (considering the question whether the expenses incurred by corporate managers for defending themselves against shareholder activists should be borne by the corporation on the grounds that they were made for a proper "corporate purpose" rather than for the "personal purpose" of the managers).

60. *See, e.g.*, Lynn M. LoPucki, *The End of Shareholder Wealth Maximization*, 56 U.C. DAVIS L. REV. 2017, 2026-27 (2023) ("Courts in some states have stated in dicta that the corporation's purpose is to maximize shareholder wealth . . . .").

61. *See* Rebecca Henderson & George Serafeim, *Tackling Climate Change Requires Organizational Purpose*, 110 AM. ECON. ASS'N PAPERS & PROCS. 177, 178 (2020) ("[W]e define corporate purpose as 'a concrete goal or objective for the firm that reaches beyond profit maximization' and define such a purpose as authentic if the firm routinely makes costly investments in it at the expense of immediate profitability.").

62. *See* Belinfanti & Stout, *supra* note 3, at 609 (arguing that the corporation is a system with "overall . . . goals" that "should not be subordinated to the goals of [the shareholder] subsystem").

63. *See* Gadinis & Miazad, *supra* note 20, at 1459 (arguing that ESG should be "an essential part of boards' monitoring mission").

64. *See* Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 201 (2019) (arguing that corporate law "must grapple actively with environmental values").

To have a more constructive conversation, we need a sharper, clearer language that breaks down the apparent "thingness" of corporate purpose into its more basic components and does so without the vagueness and ambiguities of the conventional language. I will argue that Wesley Hohfeld's work provides the foundations of this language.

B. Hohfeld's Toolbox

Hohfeld's toolbox includes two analytical frameworks. The first and better known is his theory of legal relations.[65] In the early twentieth century, this theory gained a prominent place in mainstream legal education and legal analysis,[66] and it still is the most common analytical framework in the contemporary theory of rights.[67] Except for legal theorists, however, not many legal scholars today pay attention to Hohfeld's work.[68] And even in the past, there have not been many applied

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65. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld (1913)] (describing the theory of legal relations); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (same). Hohfeld talks about "jural" not "legal" relations, as these relations can derive from law or equity. For simplicity, I will use the most common term "legal."

66. *See* Arthur L. Corbin, *Foreword* to WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, at vii, xi-xii (Walter Wheeler Cook ed., 3d printing 1964). Indeed, Hohfeld himself intended his articles "more for law school students than for any other class of readers." Hohfeld (1913), *supra* note 65, at 20.

67. *See* Leif Wenar, *The Analysis of Rights*, *in* THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 251, 253 (Matthew H. Kramer, Claire Grant, Ben Colburn & Antony Hatzistavrou eds., 2008) ("The Hohfeldian framework is by far the most widely accepted analysis of the logical structure of rights, and it is used by the majority of contemporary rights theorists."). Students of Hohfeld have been debating for decades what the correct interpretation of Hohfeld's two articles is. For an example of these disagreements, see generally John M. Finnis, *Some Professorial Fallacies About Rights*, 4 ADEL. L. REV. 377 (1972). The adjudication of the long-standing dispute on the correct interpretation of the Hohfeldian system is well beyond the scope of this Article. Likewise, I am not interested here in discussing whether the Hohfeldian scheme adequately responds to the question of what rights and duties are. *See, e.g.*, A.K.W. Halpin, *Hohfeld's Conceptions: From Eight to Two*, 44 CAMBRIDGE L.J. 435, 435 (1985) (claiming that the "attempt by Hohfeld to provide a precise analysis of legal rights has itself fallen victim to misunderstanding and misrepresentation"). But, as I will try to show, regardless of its merits with respect to fundamental jurisprudential questions, Hohfeld's scheme is helpful to illuminate the problems discussed in this Article.

68. *See, e.g.*, Nyquist, *supra* note 17, at 238 (calling Hohfeld "the most important *obscure* figure in American legal thought" (emphasis added)). For the use of Hohfeld in critical legal studies, see, for example, Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058-59, which contrasts Hohfeld's work with liberal political theory; J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1123-25 (1990), which argues that Hohfeld's work was a key—though misunderstood—basis of legal realism; DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 82-92, 276 (1997), which argues that Hohfeld, among others, provided the groundwork for critical legal studies; and ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 6-7 (1986), which notes how Hohfeld provided the key insight for "the generic conception of" right's absorption of property. In analytical jurisprudence, the Hohfeldian framework is the dominant analysis of the structure of rights. Hohfeld is also usually credited for originating the theory of property as a "bundle of rights." Henry E. Smith, *Property*

uses of Hohfeld's scheme in the literature. This is, to the best of my knowledge, the first modern attempt in corporate governance.

The second framework is Hohfeld's theory of the corporation. Hohfeld wrote extensively on corporate-law issues. Indeed, of the eleven law-review articles published by Hohfeld during his short life, four are directly or indirectly about corporations.[69] Unlike his taxonomy of legal relations, however, these articles have been largely ignored by both legal theorists and corporate law scholars.[70] Here, I argue that the two frameworks are closely connected and, taken together, offer a powerful tool to illuminate the corporate-purpose debate.[71]

1. Hohfeld's Theory of Legal Relations

The first goal of Hohfeld's project was to disambiguate legal concepts. To do so, Hohfeld says, we must decompose these concepts into their "fundamental" components. A useful metaphor, used by Leif Wenar, comes from high-school science: complex legal situations have a "molecular" structure and Hohfeld breaks them down to isolate and study their "atom[s]."[72]

as the Law of Things, 125 HARV. L. REV. 1691, 1695-96 (2012). An important new volume on Hohfeld is WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyamkrishna Balganesh, Ted M. Sichelman & Henry E. Smith eds., 2022).

69. For Hohfeld's work directly touching on corporations, see generally Wesley Newcomb Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909); Wesley Newcomb Hohfeld, *Individual Liability of Stockholders and the Conflict of Laws*, 9 COLUM. L. REV. 492 (1909); Wesley Newcomb Hohfeld, *Individual Liability of Stockholders and the Conflict of Laws*, 10 COLUM. L. REV. 283 (1910); Wesley Newcomb Hohfeld, *Individual Liability of Stockholders and the Conflict of Laws*, 10 COLUM. L. REV. 520 (1910).

70. As of January 2025, the two articles on his theory of legal relations have 2,315 citations in legal publications indexed by Hein. Of these, 1,986 citations are in articles published after 1980. By contrast, the four articles on stockholder liability have only 142 citations, of which fifty-nine citations occurred after 1980.

71. In applying Hohfeld's theories, my aspiration is not to lock the debate into a formalistic grid but quite the opposite: to clarify the formal and substantive components of the concept of "corporate purpose" so that the debate can constructively focus on normative and empirical questions. This Article's approach to Hohfeld is similar to the one adopted by Pierre Schlag, *How to Do Things with Hohfeld*, 78 L. & CONTEMP. PROBS. 185, 190-91 (2015). Schlag distinguishes three different strands of literature on Hohfeld: (1) an "analytical strand," which tries to "ascertain whether Hohfeld's tables of fundamental jural conceptions are right or not"; (2) a "property strand," which views Hohfeld as the originator of the "'bundle of sticks' conception of property"; and (3) a "critical strand," which uses Hohfeld's system as an "analytical framework" to "dispel confusion" in legal reasoning and to "expose[] the inexorably practical, moral, policy, and political aspects of law." *Id.* The approach of this Article is closer to the third.

72. Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA PHIL. (Feb. 24, 2020), https://plato.stanford.edu/entries/rights [https://perma.cc/LB7Z-8H9H]. In reality, physicists now know that the fundamental particles of matter are not atoms but quarks. Borrowing from such a more accurate understanding, Ted Sichelman observes that, "Like the quarks that are the 'fundamental' building blocks of all matter, most legal relations are nearly always *very tightly* coupled with others, and rarely appear as singular, 'naked' objects. Contrary to Cook's thesis, chemists often treat complex chemical compounds—and judges often treat complex legal

In Hohfeld's theory of legal relations the "atoms" are eight: *rights*, *privileges*, *powers*, *immunities*, *duties*, *no-rights*, *liabilities*, and *disabilities*. The first four are what we usually call "rights," and I will call "entitlements"; the other four are what we usually call "duties," and I will call "disablements." All eight atoms together are commonly called legal "incidents."[73] *Rights* and *privileges* (and correlative disablements: *duties* and *no-rights*) are first-degree concepts, as they refer to real-world activities—for example, the lender has the *right* that the borrower pay her back by the maturity date. The other entitlements and disablements are second-degree concepts, as they refer to other legal relations—for example, the *power* to conclude a contract (thus creating *rights* and *duties*). For simplicity, we will focus on first-degree concepts, although what I will say is applicable to second-degree concepts as well.

Entitlements and disablements exist, for Hohfeld, in a necessary binary relation. Thus, *rights* are always connected to *duties*; *privileges* are always connected to *no-rights*; and so forth. In fact, we can understand what a *right* is only by understanding what a *duty* is. The two correlative concepts make sense of each other.[74]

If *A* has a *right* that *B* pay her $100 by next Tuesday, it must also be that *B* has a *duty* to pay *A* $100 by next Tuesday. The Hohfeldian *right* is a right in a very narrow sense, which has a necessary counterpart in another person's *duty* to act.[75] If *B* has no *duty* to pay *A* $100 by next Tuesday, it follows that *A* has no such *right* to receive payment. Similarly, if *C* has a *privilege* to enter Wiseacre, *D* has no legal entitlement to prevent *C* from entering Wiseacre. In Hohfeldian parlance, *D* has a *no-right* with respect to *C* entering Wiseacre.[76]

relations—as 'simple elements' for sound practical reasons." Ted M. Sichelman, *Very Tight "Bundles of Sticks": Hohfeld's Complex Jural Relations*, *in* WESLEY HOHFELD A CENTURY LATER, *supra* note 68, at 346. This idea of decomposing legal concepts into more basic components was enthusiastically taken up by the legal realists. *See infra* note 80.

73. *See, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1086 (2017) (referring to "Hohfeldian incidents"). Different authors have used different terms to refer to the Hohfeldian entitlements and disablements. *Rights* are sometimes called "claims" or "claim-rights." But the contemporary meaning of "claims" in litigation makes this use confusing. Ted M. Sichelman, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (Edited and Annotated)*, *in* WESLEY HOHFELD A CENTURY LATER, *supra* note 68, at 25-26. Furthermore, *privileges* are sometimes called "liberties." This is all, of course, a matter of convention and convenience, and I will follow the phraseology proposed in the text.

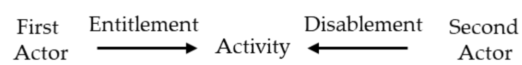
74. It has been said that the Hohfeldian system is a "semiotic" system because Hohfeld defines legal concepts by their "mutual[] self-defined relations." Balkin, supra note 68, at 1121-23.

75. Since the terms "rights," "duties," etc. have different meanings in plain English and in the Hohfeldian language, I will use the *italic* whenever I use a Hohfeldian concept (or a concept from the expanded Hohfeldian vocabulary proposed in this Article).

76. Hohfeld (1913), *supra* note 65, at 32. Similar observations apply to second-degree concepts. If *F* has the *power* toward *E* with respect to the creation of contract $\varkappa$, then *E* has a *liability* toward *F* with respect to the creation of contract $\varkappa$. Finally, the *immunity*/*disability* relation concerns the inability to create or change a legal relation. For example, the state cannot create a *duty* in *P* to publicly profess the Catholic faith. In Hohfeldian terms, *S* has a *disability* and *P* has an *immunity* with respect to the duty to profess the Catholic faith. For the application of the

The relational nature of entitlements and disablements is crucial for understanding Hohfeld's scheme. From a formal standpoint, Hohfeldian legal relations are always relations between two *actors* with respect to one *activity*.[77] Therefore, when analyzing a legal problem—including, as we will see, the problem of corporate purpose—we should always try to identify the *activity* at issue, the relevant *actors*, and the *relation* between these actors. This is an extremely powerful tool to clear up conceptual confusion.[78] From a substantive standpoint, this formal scheme reminds us that the ultimate roots of legal concepts are social relationships.[79] Despite its unmistakably formalistic flavor, Hohfeldian analysis helps reveal the substantive interests at play and clears the way for focusing more constructively on normative questions.[80]

Figure 1: The Legal Relation in Hohfeld



Hohfeldian scheme to the state, see generally Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008).

77. Finnis, *supra* note 67, at 377 n.1.

78. Relationality is the central Hohfeldian idea borrowed and developed by the legal realists after Hohfeld's death. For its application to property law, see Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 363 (1954) ("Property . . . is basically a set of relations among men, which may or may not involve external physical objects."). An effective illustration of Hohfeldian relationality can be found in MAX RADIN, THE LAW AND MR. SMITH 1 (1938), although Radin does not cite Hohfeld anywhere in the book. Radin quotes a William Cowper poem about the castaway Alexander Selkirk, who found himself alone on a desert island and declared himself to be a "monarch" with a right to everything around him. In fact, Radin observes, Selkirk had no right whatsoever because there was no other human being on the island and therefore no interpersonal relationship was possible. "Instead of everything on the island belonging to him, the truth was that nothing belonged to him. He had no rights, because there was no one against whom he could claim them. He had no privileges, because there was no one who disputed them." RADIN, *supra*. I should add that the existence of entitlements requires both other people—as Radin correctly observed—and a deontic system (in our case, a legal system). For this point, see generally Michael S. Green, *Permissions, Deontic Voids, and the Karamazov Argument*, 66 AM. J. JURIS. 291 (2021).

79. *See* Anna di Robilant & Talha Syed, *Property's Building Blocks: Hohfeld in Europe and Beyond*, *in* WESLEY HOHFELD A CENTURY LATER, *supra* note 68, at 224 ("[T]he 'social relations' claim is the fundamental platform of [Hohfeld's] analysis.").

80. Scholars disagree whether Hohfeld should be understood as a "legal realist" or "proto-realist" or a formalist. For the former view, see, for example, Brian H. Bix, *Ross and Olivecrona on Rights*, 34 AUSTL. J. LEG. PHIL. 103, 106-07 (2009), which refers to Hohfeld as an "American legal realist"; and Frederick Schauer, *The Generality of Rights*, 6 LEG. THEORY 323, 323 (2000), which connects Hohfeld's theory of legal relations with legal realism. For the latter view, see generally David Frydrych, *Hohfeld vs. the Legal Realists*, 24 LEG. THEORY 291 (2018), which argues that Hohfeld would have disapproved of the way the legal realists adapted and applied his schema.

A helpful way to capture Hohfeld's theory of "rights" and "duties" is to think of it as an adversarial structure.[81] For Hohfeld, every legal position is always and inevitably a position against someone else. Even a *privilege*, which refers to the privilege-holder's own activity—for example, the *privilege* to take a walk—is such insofar as other actors have no legal entitlements to prevent the privilege-holder from engaging in that activity. In other words, the boundaries of anyone's *privilege* are rivaling entitlements—for example, *A* has the *privilege* to take a walk down the street, but her walk must stop at the threshold of *B'*s property, because *B* has a *right* that A shall not trespass.[82] Thinking of legal relations as adversarial structures reminds us that the actual shape of one's entitlements and disablements depends on the relative position of the other actors against whom these entitlements and disablements exist. This insight will be extremely important, I will argue, to understand the problem of corporate purpose.

2. Hohfeld's Theory of the Corporation

Hohfeld's view of the corporation is also radically reductionist. For Hohfeld, a corporation is just another method through which people can enjoy property and transact business.[83] More importantly, for Hohfeld the legal relations within the corporation and between the corporation and third parties are ultimately relations between real people.

In a corporation, "the responsibility for all conduct and likewise the enjoyment of all benefits," Hohfeld writes, "must be traced to those who are capable of it, that is, to *real* or *natural* persons."[84] Calling the corporation a legal person is legitimate, as a linguistic convention, but it is unhelpful and confusing. It is like, he wrote, "calling a drove of horses a horse or a deck of cards a card."[85]

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81. I borrowed the term from Luca Fiorito & Massimiliano Vatiero, *Beyond Legal Relations: Wesley Newcomb Hohfeld's Influence on American Institutionalism*, 45 J. ECON. ISSUES 199, 217 (2011) ("Leading American institutionalists such as Commons, Hale and Clark … followed Hohfeld in recognizing the adversarial nature of legal rights."). The authors refer to the idea, perhaps most clearly expressed by John Commons, that Hohfeldian incidents *limit* each other. For example, Commons observed that "[l]iberty [another term for Hohfeld's *privilege*] and duty are limiting dimensions of the same transaction. At the limit of duty the limit of authorized liberty begins. To diminish one's duty is to increase one's liberty." JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 99 (1924).

82. My use of the term "adversarial" must be understood in a formal way, with no implications about the social and economic relations between the relevant actors. Therefore, it may very well be the case—and I believe that it is often the case—that these legally adversarial relations are, from a social and economic standpoint, positive-sum games, in which both actors are better off despite (or even by virtue of) the adversarial tension.

83. Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, *supra* note 69, at 288-89.

84. *Id.* at 289-90.

85. *Id.* at 290 n.14.

Hohfeld's theory denies any real content to the concept of legal personhood. I do not think this is a tenable position. For our purposes, however, the key methodological insight that we need is, in Hohfeld's words, that "all propositions relating to the law of corporations can be stated in terms of ultimate realities rather than in terms of the fictions more commonly employed."[86]

To be sure, restating all corporate relations in terms of "ultimate realities"—that is, in terms of relations between individuals—can be daunting. When Hohfeld mentioned the ultimate reality of the corporation he probably had in mind individual shareholders, who at the time owned most of public companies' stock.[87] Today, however, the reality of corporate ownership and governance is much more complex. Most shareholders are not individuals but financial institutions investing assets belonging to individuals (or assets belonging to institutions managing assets belonging to individuals).[88] These financial institutions are, in Hohfeldian terms, fictional too, and therefore we must deconstruct a second (and often a third and a fourth) layer of juridical fiction. Furthermore, many important decisions and contributions to the decision-making process come from middle managers and lower-level employees, who are actors in different legal relations.

However, while breaking down the entire law of corporate governance into its "ultimate realities" can be impracticable, even a partial deconstruction will prove useful. To study the corporate-purpose problem, I will leave some legal fictions in place and some legal aggregates unbundled. For example, I will treat the board of directors and the top executives as a single corporate decision maker and both asset managers and retail investors as individual shareholders.

86. Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, *supra* note 69, at 292. In the law-and-economics literature, a similar move is the characterization of the corporation as a "nexus of contracts," which is traced back to financial economists Michael Jensen and William Meckling. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976) ("It is important to recognize that most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals . . . . Viewed this way, it makes little or no sense to try to distinguish those things which are 'inside' the firm (or any other organization) from those things that are 'outside' of it. There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labor, material and capital inputs and the consumers of output."). Despite the similarities, there are a number of differences between the economic and the Hohfeldian theory of the corporation. The most obvious and important difference is that the Hohfeldian model is a model of *legal* relations (including non-contractual legal relations), whereas the economic model à la Jensen & Meckling is a model of economic, voluntary relations that simply assumes the existence of the legal system as an unquestioned background.

87. *See* H.T. Warshow, *The Distribution of Corporate Ownership in the United States*, 39 Q.J. ECON. 15, 28 (1924) (documenting the total number of stockholders growing from 4.4 million (1900) to 12 million (1920)).

88. Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 725-26 (2019) ("From 1950 to 2017, the institutional ownership of corporate equity increased tenfold, from 6.1% to 65%.").

3. The Standpoint of the Cynic

Hohfeld's scheme is an analytical model, not a predictive one. It describes formal legal relations, but it does not tell us anything about the real-world outcomes that those relations are likely to produce. The fact that, in the real world, *A* has a *privilege* to do either α or β gives us no information on whether we should expect *A* to choose one or the other.

However, a policymaker or corporate planner wishing to design corporate legal relations in order to achieve certain normatively desirable goals cannot ignore the question of how the various actors should be expected to act with respect to their entitlements and disablements. This is what Llewellyn called the application of Hohfeld "from the standpoint of the cynic," meaning from the standpoint of he who believes that "a right is best measured by effects in life."[89]

To describe the factors that prompt people to act upon their legal entitlements and disablements, I will use the concept of "reasons," which represent facts that induce someone to act upon a legal relation in a certain way.[90] Internal motivation, social sanctions, and economic costs are considered to be plausible *reasons* for acting upon entitlements and disablements because we share some widely accepted assumptions about what people typically consider good for themselves.

The framework presented here is agnostic about the question of which *reasons* motivate human behavior, but it requires that any coherent model of corporate purpose take a view, however tentative, on this question. Should we expect corporate actors to be driven exclusively by economic *reasons* or by other *reasons* as well? And if we expect them to be driven by other *reasons*, what specific facts give them good or decisive *reasons* to act in a certain way? I will return to these questions later.

C. The Hohfeldian Architecture of Corporate Purpose

1. Hohfeldian Permutations of a Corporate Decision

Now that we have a more precise language to describe corporate relations, we can try to translate the corporate-purpose problem into this language. To do so, we must start with the basic question that has been recurring in the corporate-purpose debate since at least the 1930s. Should the corporation act in the exclusive interests of the shareholders or also in the interests of other stakeholders?

89. LLEWELLYN, *supra* note 13.

90. The philosophical literature on what counts as a reason for action is extremely vast. For an instructive overview, see JONATHAN DANCY, PRACTICAL REALITY 1-25 (2000). Here, I will adopt a generic (and largely uncontroversial) definition, which I believe suffices for my purposes. In particular, by reasons, here and in the rest of the Article, I refer to *motivating* reasons, not *normative* reasons (except when normative reasons are also motivating reasons). *Id.* at 2-3.

This question, Hohfeld would probably say, is meaningless. As we have learned, there is no such thing as a corporation and, often, there is no such thing as a shareholder either. The "ultimate reality" that we should analyze is made of individuals in relation to each other. We also learned that a Hohfeldian relation is always a relation between two *actors* with respect to one *activity*. Hence, we need to identify first the relevant *activity* and then the individuals sitting at the two ends of a specific *relation* (an *entitlement* and a correlative *disablement*) with respect to that *activity*.

Let us start with the very first step. When we say "acting in the interests of" shareholders or stakeholders, to what concrete *activities* are we referring? The simplest answer is that we are referring to a business decision made by the relevant corporate decision maker. Should we build a highly polluting plant or a more expensive, greener facility? Should we stop selling assault rifles in our stores? Should we raise the salary of assembly-line workers? And so forth.

Once we have identified a specific *activity* (for example, building a new plant in an environmentally friendly way rather than in a cheaper but more polluting way), and one relevant *actor* (the corporate decision maker), we need to identify the *other actors* and the *relations* between the corporate decision maker and each other *actor*. Importantly, we do not know whether deontic terms such as "must" and "may," traditionally used in the debate, mean Hohfeldian *duties* and *privileges*, or something else. We need to find it out.

Framed in these terms, a Hohfeldian model of the business decision to build the "green" plant can take several different forms, as follows:

Table 1: Main Hohfeldian Permutations of "Building a Green Plant"

Model	First Actor	First Incident	Activity	Second Actor	Second Incident
I	D	***Duty***	Not build the "green" plant	**Shareholders**	***Right***
		Privilege		State	*No-right*
		Privilege		Stakeholders	*No-right*
II	D	***Privilege***	Build the "green" plant	**Shareholders**	***No-right***
		Privilege		State	*No-right*
		Privilege		Stakeholders	*No-right*
III	D	***Duty***	Build the "green" plant	**Shareholders**	***Right***
		Privilege		State	*No-right*
		Privilege		Stakeholders	*No-right*
IV	D	*Privilege*	Build the "green" plant	Shareholders	*No-right*
		Duty		**State**	***Right***
		Privilege		Stakeholders	*No-right*
V	D	*Privilege*	Build the "green" plant	Shareholders	*No-right*
		Privilege		State	*No-right*
		Duty		**Stakeholders**	***Right***

Table 1 specifies the relations of the corporate decision maker *D* with each of the main actors: shareholders, the state, and the interested stakeholders. For convenience, the table highlights the main relation of interest in bold. In Model I, shareholders have the *right* that the corporate decision maker *not* build the green plant at the expense of the shareholders and, therefore, *D* has a correlative *duty* not to. In Model II, *D* may choose to build the green plant but has no legal obligation to do so. In Models III, IV, and V, *D* has a *duty* to build the green plant, but the *actor* holding the correlative *right* is different in each specification: the shareholders in Model III, the state in Model IV, and the interested stakeholders in Model V. Variants of these main permutations may include hybrid combinations. For example, Models IV and V can be combined into one where *D*'s *duty* to choose the green plant is a *duty* towards both the state and the interested parties.[91]

91. It should be noted that when the stakeholder-favoring activity is the creation, modification, or termination of a legal relation, *privilege*/*no-right* relations will be replaced with *power*/*liability* relations, and *right*/*duty* relations will be replaced with *immunity*/*disability* relations (with respect to the negation of the stakeholder-favoring activity). For simplicity, I will assume that the activity is always a "physical" activity (such as releasing the pollutant), although in the real world most business decisions entail both "physical" activities and the creation of legal entitlements and disablements.

2. From Particular Relations to General Models

These five models represent concrete configurations of legal relations with respect to a very specific choice between two incompatible options—building a green plant or a more polluting plant. Of these two options, one is better for stakeholders and the other is better for shareholders. A very tempting—but, as I will argue, mistaken—analogical move is to generalize from these specific relations to fundamental conceptions of corporate purpose. If generalized, the five permutations reported in Table 1 would become specific applications of five different "theories of corporate purpose." In fact, the main theories of corporate purpose that are often discussed in the literature bear a very strong resemblance to the generalizations of these five permutations.

Thus, Model I would correspond to a hard version of shareholder value maximization, in which managers have an actual Hohfeldian *duty* to choose the value-maximizing option in any and all circumstances. Model II would be a permissive theory of managerial discretion, in which managers may always choose the stakeholder-favoring option but need not do so. In Model III, managers would have a *duty* towards shareholders, like in Model I, but this time the *duty* is to always choose the stakeholder-favoring option.[92] In Model IV, *D* would have a *duty* vis-à-vis the state to do the socially desirable thing, even when it comes at the expense of shareholders. In Model V, *D* would have a *duty* vis-à-vis the interested stakeholders. This could be a contractual duty but also a noncontractual duty, such as a duty imposed by statute or by the common law but, this time, directed at the interested third party (e.g., victims of pollution, employees, etc.).

However, while these five models represent typical Hohfeldian forms of corporate legal relations with respect to specific stakeholder-oriented activities, they do not necessarily describe general theories of "corporate purpose" valid in all scenarios. In real-world corporate decision-making, we find different types of relations—whether Model I, or Model IV, or

92. This may seem an odd theory of corporate purpose, in which the shareholders' *right* is disconnected from the shareholders' economic interests. However, in the corporate-purpose debate, there are at least two models that bear a strong resemblance to this Hohfeldian permutation. One is the view positing that shareholders (or at least the ultimate investors) do have altruistic preferences and should have tools to command directors to act in accordance with these altruistic preferences. *See supra* note 30. Such a theory does not necessarily presuppose a Hohfeldian *duty* to act but is consistent with it. The other is the statutory model of the so-called public-benefit corporation, in which a corporation explicitly identifies a public-regarding purpose (so-called public benefit) and "shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation." DEL. CODE ANN. tit. 8, § 362(a) (2025). One possible interpretation of the statute, at least on its face, is that shareholders of a public-benefit corporation have a strict *right* that directors and officers choose the stakeholder-favoring option when choosing the other option would be a clearly unbalanced decision. Indeed, it is only shareholders who may sue for breaches of the directors' duties to balance profit and "public benefit." *Id.* § 367.

Model II—in different types of situations. None of these relations, however, imply a general principle of the same form.

For example, it could be the case that *D* has a *duty* towards the state to build the green plant because of a federal statute mandating those specific pollution-reducing features. This would be a specific Model IV relation; however, from this relation we could not infer that there is a Model IV theory of corporate purpose according to which *D* has a general *duty* towards the state to choose the stakeholder-oriented option whenever it conflicts with profit maximization.

This fact is quite evident in the case of statutory *duties*, but, as I will try to show, it is also true for other types of legal relations. For example, under the *Revlon* doctrine in Delaware law, corporate directors who have decided to sell the company must choose the best offer for the shareholders.[93] This is a Model I *duty* towards the shareholders to choose shareholder wealth maximization. However, while this relation is what a general principle of shareholder value maximization would require, it does not necessarily follow from the presence of this particular relation that such a general principle exists. Particular shareholder-oriented relations can (and in fact do) coexist with stakeholder-oriented relations.

Furthermore, while Table 1 concerns one, and only one, well-specified activity and its negation—on the assumption that there are only two, incompatible options, such as building a cheaper but more polluting plant or building a more expensive but greener one—in the real world, corporate decision makers face a large number of options, not just two. In Hohfeldian terms, each of these options is a distinct *activity*, with respect to which the corporate decision maker has different *relations* with the other corporate *actors*: shareholders-investment managers, the state, and affected stakeholders. In other words, a Hohfeldian model of corporate decision-making is the complete specification of all the *relations* between the corporate decision maker and the other corporate actors with respect to the universe of all possible options.

3. The General Form of Corporate Decision-Making

Is there a way to capture the general form of this extremely intricate and particularistic model? Put differently, are there some high-level features of this Hohfeldian architecture that tell us something meaningful about its general structure without us having to examine its myriad particular relations?

Let us first consider two extreme possible "general forms" of corporate-purpose architecture. At one end of the spectrum, the choice of the decision maker *D* is maximally narrow: among the possible options one option is legally obligatory and all the others are prohibited. Therefore, *D*

93. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

may and must choose one pre-determined option. The business decision takes this form whenever a specific option is mandated and all the others are prohibited. The above-mentioned example of the sale of the company under the so-called *Revlon* doctrine is one such instance—the board has a *duty* to sell the company to the best offeror, and shareholders have the correlative *right* that the board do so.

In theory, all business decisions could take this maximally narrow form. However, a maximally narrow model is a very poor fit for the real world of corporate decision-making. In the real world, the most consequential business decisions require the exercise of significant judgment. If all important business decisions were or could be pre-determined *ex ante*, the job of a CEO would require very modest skills. The talent of a CEO is (or is believed to be) precisely the ability to make difficult choices among many permissible options, in law and in fact. Thus, the maximally narrow structure is not a realistic description of real-world corporate practice.

At the other end of the spectrum, business decisions can be modeled as maximally broad. In this model, *D* has unfettered discretion, in law and in fact, to choose any imaginable options. All the Hohfeldian *relations* in this model are *privilege/no-right* relations with *D* holding the *privilege* against all other actors: shareholders, stakeholders, and the state. This hypothesis, however, is even less plausible than the previous one. In any given real-world situation, many options are inevitably restricted, because they are legally prohibited (that is, *D* has a *duty* not to engage in those activities). For example, the CEO may not hire a top manager who does not have a valid U.S. work visa, regardless of her talent. Moreover, other options, although legally permissible, are discouraged by the presence of other, related legal relations. For example, the CEO may hire an incompetent head of sales, but she has strong reasons not to, because shareholders have the *power* to fire her if the company sales plummet. From the standpoint of the cynic, such a *privilege* is constrained by a distinct but related disablement (the *liability* vis-à-vis shareholders' *power* to remove directors). Corporate decision makers enjoy broad discretion, but their discretion is far from absolute.

A realistic model of corporate decision-making, at least with respect to the most consequential decisions, is therefore one in which large subsets of possible options are restricted but a substantial number of them are still permitted and available. In Hohfeldian terms, we could say that corporate decision makers have a relatively broad sphere of *privilege*, and the outer boundaries of this *privilege* are adversarial legal *relations*—in the sense that they are relations serving as counterweights and constraints on managers' *privilege*. Thus, an accurate way to describe the general Hohfeldian architecture of corporate decision-making is a broad managerial *privilege* constrained by adversarial legal relations.[94]

II. The Misleading Rhetoric of Shareholders v. Stakeholders

What does the Hohfeldian model discussed in Part I teach us about the corporate-purpose debate? In this Part, I will argue that one important insight delivered by this way of framing the problem of corporate purpose is the rejection of the rhetoric of the two "contested visions": "shareholder primacy" versus "stakeholder governance." This kind of rhetoric is premised on the idea that there is a central, fundamental criterion to distinguish between these two principal and rival views of corporate purpose. But when we try to translate "shareholder primacy" or "stakeholder governance" into the Hohfeldian language, we realize that there is no categorical difference between them, only different multi-faceted views on the optimal scope of managerial *privilege* and on the specific constraints that should limit this *privilege*. To show that this is the case, I will consider the most promising criteria to distinguish between shareholder primacy and stakeholder governance, and I will show that they are inadequate for the task.

A. Shareholder-Favoring v. Stakeholder-Favoring Constraints

A common criterion to distinguish the two opposing camps of shareholder primacy and stakeholder governance is the following: should managers "seek first and foremost to 'maximize shareholder value'" or should they pursue a plurality of equally "legitimate and beneficial" goals?[95] Should corporations "be managed . . . to maximize shareholder wealth" or may corporate fiduciaries "prioritize the interests of other stakeholders"?[96] Should corporate decision-making be oriented towards "economic value maximization" or towards "broader societal objectives"?[97]

However, this distinction, while apparently simple and clear, proves woefully inadequate once we realize that both "shareholder value maximization" and other "societal objectives" must necessarily coexist in

94. A different way of characterizing what I call the general Hohfeldian architecture of corporate purpose is the theory of "dynamic fiduciary duties" proposed by Professor Andrew Gold. *See generally* Andrew Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491 (2012). Gold recognizes the difficult challenge that the indeterminacy of corporate decision makers' duties poses to the very concept of fiduciary duties but tries to solve it by positing the existence of dynamic fiduciary duties: directors have fiduciary duties, but they will reach different conclusions about the content of these duties, and these interpretations will change from one director to another as well as over time. However, in Hohfeldian terms, a duty that has a changing content, based on the interpretation of the duty bearer, is nothing but a *privilege*.

95. Belinfanti & Stout, *supra* note 3, at 582, 605.

96. Lund & Pollman, *supra* note 4, at 2565.

97. Fisch & Davidoff Solomon, *supra* note 4, at 1310.

any realistic corporate-purpose model. The legal relations that limit managers' *privilege* include *duties* to shareholders but also *duties* to the state, to voluntary stakeholders, and to involuntary stakeholders. An environmental statute, for example, creates *duties* oriented not toward shareholder value maximization but toward other societal objectives. By contrast, the *Revlon* doctrine creates a *duty* oriented towards shareholder value maximization.[98] The coexistence of shareholder-favoring and stakeholder-favoring legal relations is practically inevitable. No sensible theory of corporate purpose could ever suggest that there is or should be only and exclusively one kind of constraint on managers' *privilege*, whether pro-shareholders or pro-stakeholders.

B. Systematic Bias

A refined version of the previous criterion could be the following. Although it is true that any realistic corporate-purpose model must contain both shareholder-favoring and stakeholder-favoring legal relations, there is disagreement about whether the current system is or should be biased in favor of shareholders. On this view of the debate, the "shareholder primacy" camp is the one that is content with the current pro-shareholder bias (or wants to increase it); by contrast, the "stakeholder governance" camp would want to reduce or correct the current bias or to create an opposite bias in favor of other stakeholders.

This refined criterion, however, does not accurately describe the ordinary use of these labels in the literature. Some prominent scholars and commentators commonly associated with the "stakeholder governance" camp have indeed advocated the introduction of new stakeholder-oriented *powers* (for example, giving employees the *power* to appoint some directors),[99] but many have been agnostic or outright hostile towards this kind of legal constraint.[100] At the same time, some scholars commonly associated with the "shareholder primacy" camp have explicitly called for pro-stakeholder statutory and regulatory constraints on managerial discretion,[101] while others have expressed skepticism about government intervention, including pro-shareholder regulation.[102] Therefore, whether someone is in favor of or against additional stakeholder-favoring

98. *Revlon*, 506 A.2d at 182.

99. *See* Hayden & Bodie, *supra* note 20, at 2473-74.

100. *See* Blair & Stout, *supra* note 45, at 253-54 (differentiating their position from that of scholars arguing for the granting of specific rights to stakeholders, such as the right to sue directors for harm to the corporation or the right to elect directors).

101. *See* Bebchuk & Tallarita, *supra* note 25, at 100, 158, 174-75.

102. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 419 (1983) ("Because federal regulation of voting is not the product of a competition between states to provide rules that maximize the welfare of investors, but rather displaces those rules, the presumption is that federal regulation is welfare decreasing. At the very least, there is no presumption of betterment.").

constraints does not align with the traditional distinction between the shareholder primacy and the stakeholder governance camps.

C. Duty to Maximize Shareholder Value

A third possible criterion for distinguishing the shareholder-primacy camp from the stakeholder-governance camp is whether there is or should be a residual legal duty to maximize shareholder value. Suppose that, with respect to the relevant decision, there are neither regulatory *duties* to the state nor contractual or noncontractual *duties* to the interested stakeholders to choose the stakeholder-favoring option. What should corporate managers do in those cases—should they choose the stakeholder-favoring option or the profit-maximizing one?

Law students learn that "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[103] They also learn that in a for-profit corporation, "directors are bound by . . . fiduciary duties and standards . . . includ[ing] acting to promote the value of the corporation for the benefit of its stockholders."[104] Aren't these explicit formulations of a *duty* to maximize shareholder value?

The answer to this question is contentious. Professor Lynn Stout argued that *Dodge v. Ford*—the case from which the first of the above quotations is taken—is "a doctrinal oddity largely irrelevant to corporate law and corporate practice."[105] Professor Jonathan Macey rejoined that "the case is not a doctrinal oddity . . . [but] has legal effect"[106] and accurately reflects the legal principle that "corporate fiduciaries are obligated to maximize profits for shareholders,"[107] although this principle is practically unenforceable.[108] More recently, Professor Stephen Bainbridge reiterated the traditional view that maximizing shareholder value is law,[109] although the business-judgment rule prevents the courts from reaching the question in most circumstances. As a former Delaware Chief Justice put it, Delaware law says that "directors must make

103. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

104. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010). The most recent case dealing with this question is *McRitchie v. Zuckerberg*, 315 A.3d 518 (Del. Ch. 2024). *See infra* Part III.E.

105. Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 166 (2008).

106. Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 178 (2008).

107. *Id.* at 181.

108. *Id.* ("Shareholder wealth maximization, however, is still at least the law on the books, if not in practice. It is the law, just as it is the law that cars should not drive more than fifty-five miles per hour on Connecticut's Merritt Parkway. The speed limit is clearly posted and well understood. In reality, however, it is extremely rare to locate a car traveling at less than seventy miles per hour, and eighty miles per hour is closer to the norm.").

109. *See* Bainbridge, *Why We Should Keep Teaching* Dodge, *supra* note 28, at 113.

stockholder welfare their sole end,"[110] even if this duty gets enforced only on the very rare occasions when directors explicitly confess their disregard for shareholder value.[111]

For the cynical Hohfeldian, however, these positions are practically indistinguishable. For Llewellyn's cynic, "absence of remedy is absence of right."[112] Hence, a nonexistent *duty* (as in Stout's reconstruction) and a virtually unenforceable one (as in the more traditional exposition) are one and the same.[113] An exceedingly cynical Hohfeldian could say that the real *duty* here is the *duty* not to declare any plans to reduce shareholder value.

The absence of an effective *duty* to maximize shareholder value in all situations follows directly from the analysis presented in Section I.C. As we saw there, maximally narrow models of corporate decision-making are impractical. In most real-world settings, the decisional complexity is such that any plausible model must rely on a broad sphere of managerial *privilege*. To be sure, there are exceptions—but only when the decisional space happens to be so confined that a narrow Hohfeldian structure becomes administrable.

The most common of these exceptional situations occurs when the board has decided to sell the company for cash. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court held that when "the company [is] for sale . . . [t]he directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[114] In practice, the so-called *Revlon* doctrine requires directors to: (1) organize a competitive, auction-like process in order to maximize the sale price and (2) pick the offer with the highest price (or the highest expected value, if there is significant uncertainty about the closing of the sale).[115]

110. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015).

111. *See id.* at 776-77 ("[I]f a fiduciary *admits* that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty." (emphasis added)).

112. Llewellyn, *supra* note 13, at 88.

113. Perhaps Hohfeld would have disagreed with this cynical restatement of his theory. *See* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions,* 31 HARV. J.L. & PUB. POL'Y 593, 608-610 (2008) (juxtaposing Hohfeld's model of legal relations, focused on the bare structure of entitlements, and the economic models, entirely focused on remedies). The peculiarity of corporate fiduciary duties, however, is that the standard of conduct they express does not correspond to the relevant standard of review courts must use to assess whether they have been violated. This is especially true when the applicable standard of review is the so-called "business judgment rule," which renders most breaches of duties incognizable by the court. Therefore, even setting aside the availability of specific remedies or any evidentiary difficulties in obtaining those remedies, the full legal valence of fiduciary duties depends on the permissiveness of the applicable standard of review.

114. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

115. *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) ("[D]irectors must engage actively in the sale process, and they must confirm that they have obtained the best

The traditional explanation for this doctrine is that the sale of the company creates a so-called last-period problem, in which managers will no longer be subject to shareholder monitoring and pressure, and therefore can more easily take advantage of them.[116] In this scenario, the theory goes, managers' duty to maximize shareholder value should be strictly enforced. But if we look at this question through the Hohfeldian lens, another explanation is that a competitive sale process provides a relatively small number of options and an easily verifiable criterion to choose among them. In other words, it can be easily patterned, unlike most other corporate decisions, into a maximally narrow Hohfeldian structure: a relatively small number of well-specified *activities* (setting-up and running an auction or market check, choosing the highest or best offer among the few received), which can be the object of a strict *right/duty* relation. In contrast, for many other circumstances, such a maximally narrow structure is extremely impractical, as there is no easily verifiable criterion to identify *the* value-maximizing option out of the countless available.

When the company receives an unsolicited acquisition offer, the possible futures are still innumerable. The board could negotiate the offer, accept it right away, or reject it and choose instead one of many possible courses of action for the future of the firm. The emergence of an acquisition offer does not restrict the decisional space but expands it. Management faces the same countless options that it faced before receiving the offer, plus the new options created by the offer. It is no surprise, then, that in this scenario courts tend to defer to the judgment of the board.[117] But when the board decides that the future of the company is a sale, the decisional space narrows dramatically. Now, the choice is simply whether to sell to this or that buyer. In such a narrow space, a specific *right/duty* relation becomes much more feasible.

available price either by conducting an auction, by conducting a market check, or by demonstrating an impeccable knowledge of the market." (quotations omitted)).

116. *See, e.g.*, McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) ("Whenever the board is deciding whether to approve a proposed 'all shares' tender offer that is to be followed by a cash-out merger, the decision constitutes a final-stage transaction for all shareholders."); In re Pennaco Energy, Inc., 787 A.2d 691, 704 (Del. Ch. 2001) (arguing that *Revlon* duties apply because the deal "is an end-game transaction"); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 458 (Del. Ch. 2011) ("Final stage transactions for stockholders provide another situation where enhanced scrutiny applies."). *See also* RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 720 (2d ed.1995) ("In a situation where parties expect to have repeated transactions, the recognition that a party who cheats in one transaction will be penalized by the other party in subsequent transactions reduces the incentive to cheat. However, when a transaction is the last (or only) in a series—that is, the final period—the incentive to cheat reappears because, by definition, the penalty for doing so has disappeared."); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L.REV. 1899, 1942-53 (2003) (describing divergence of interests resulting from last period problem).

117. *See* WACHTELL, LIPTON, ROSEN & KATZ, TAKEOVER LAW AND PRACTICE 159 (2024) ("Unless the target has otherwise subjected itself to Revlon duties . . . it seems clear that the target may, if it meets the relevant standard, 'just say no' to an acquisition proposal. Targets of unsolicited offers have been successful in rejecting such proposals in order to follow their own strategic plans.").

To be sure, statutes or courts could establish a rule whereby any acquisition offer should be put to a vote by the shareholders, or a rule whereby the board should be entitled to reject the offer only if it is able to prove, to the satisfaction of the court, that keeping the company independent is fair to shareholders. But while these would certainly be different Hohfeldian relations than those established by current Delaware doctrine, they would hardly be a *duty* to maximize shareholder value, just a different allocation of the *power* to accept or reject the offer. In the former case, the *power* would be assigned to the shareholders (or, more accurately, to a majority of them), who would have to make the substantive economic decision whether the offer is desirable; in the latter case, the *power* would be shared by the board and the court, which would have to determine (subject to certain constraints) whether the board's decision is "fair"—an open-ended inquiry, not qualitatively dissimilar from a substantive economic decision.[118]

By contrast, when the decisional space has been reduced to a choice between two or three competing offers, the narrow *right/duty* relation can operate effectively. The court will still have the *power* to second-guess the choice made by the board—indeed, any *right/duty* relation, when litigated, triggers such a *power* by the court—but this *power* can be accurately described as an instance of adjudication of a breach of *rights* rather than an open-ended inquiry into the "fairness" of a certain conduct.

Another exceptional situation is when the corporate decision maker blatantly harms shareholders. This is what happened in *Dodge v. Ford*, or, more recently, in *eBay Domestic Holdings, Inc. v. Newmark*, the two cases quoted at the beginning of this subsection. In these cases, the decision maker's blatant conduct collapsed the usual complexity of the decisional space into a binary choice between harming and not harming shareholders. In *Dodge*, Henry Ford himself framed the decision problem as a stark choice between distributing value to shareholders and to workers.[119] In *eBay*, craigslist's founders framed the choice as "monetization" (that is, profit-making) versus "public-service mission."[120] In these rare cases, as in the case of a *Revlon* auction, we get to observe an actual *duty* to choose the shareholder-oriented option because the decisional space has been

118. For a fuller discussion of why "fairness review" is, in fact, a shared exercise of power to make substantive economic decisions, see Roberto Tallarita, *The Logic of Shareholder Ratification*, NOTRE DAME L. REV. (forthcoming 2027).

119. *See Dodge*, *supra* note 103, at 671 ("'My ambition,' declared Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes' . . . Henry Ford stated to plaintiffs personally, in substance, that as all the stockholders had received back in dividends more than they had invested they were not entitled to receive anything additional to the regular dividend of 5 per cent. a month.").

120. *See eBay*, *supra* note 104, at 32 ("Jim and Craig contend that they identified a threat to craigslist and its corporate policies . . . including departing from [craigslist's] public-service mission in favor of increased monetization of craigslist.").

reduced to a stark choice, suitable for a very narrow Hohfeldian structure.[121]

Yet if the corporate-purpose debate were about the recognition or rejection of such a narrow *duty* in these exceptional cases, the stakes of the debate would be very modest and its centrality in the literature incomprehensible. Little or nothing would change in practice if the law further relaxed or even eliminated such a marginal shareholder-oriented *duty*. In fact, there is empirical evidence that in states where corporate law explicitly allows decision makers to consider the interests of stakeholders in the sale of a company, important corporate transactions such as mergers do not contain any meaningful stakeholder-friendly provisions.[122] Clearly, the attitude towards this specific *duty* cannot serve as a useful criterion to identify two "contested visions" clashing for a century.

D. Normative Aspiration

If the deontic language used by the participants in the "shareholder primacy" v. "stakeholder governance" debate does not refer to Hohfeldian *duties*, what does it refer to? One possibility is that the view that

121. The exceptional treatment of low-complexity decisional environments illustrates an important trend in the history of corporate law. In the early history of corporations, models of business decisions tended to be quite narrow (although not maximally narrow) to reduce the risk that corporate decision makers abused their power. The *ultra vires* doctrine, for example, invalidated any business decisions beyond a relatively coherent set of possible actions. *See* WM. L. CLARK, JR., HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS 202-04 (3d ed. 1916). But as corporations grew in importance and complexity, that doctrine proved impractical and was rapidly abandoned. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186-87 (1985). Today, as any student or practitioner of corporate law knows, directors and officers enjoy very broad legal discretion. A similar historical trend can be found in the law of trusts. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 640-42 (1995). The central concern of trust law is to prevent abuses of the trustee at the expense of the beneficiary. Originally, when the trust property consisted almost exclusively of land, this goal was achieved by constraining the trustee's sphere of *privilege* narrowly. In the nineteenth century, as a leading contemporary treatise observed, the trustee had very few powers with respect to the trust property. *See* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 978 (1836) ("[T]he trustee has no right (unless express power is given) to change the nature of the estate, as by converting land into money, or money into land."). But when the tasks of the trustees became much more complex, including difficult investment decisions, trust law progressively moved from a model of disempowerment to a model of maximum empowerment of the trustee. Traditionally, this move is described as a move towards "fiduciary law." *Langbein, supra*; *see also* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1042-43 (2011). For the Hohfeldian analyst, it is a move from a narrower to a broader sphere of *privilege*.

122. *See generally* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021) (finding that "corporate leaders generally did not use their discretion to negotiate for any stakeholder protections"). To be sure, it is theoretically possible that the interests of shareholders and stakeholders were generally aligned in the cases studied in this article, and that corporate decision makers in states without *Revlon* duties and with explicit powers to consider stakeholder interests have delivered value to stakeholders in other ways. However, the near complete absence of stakeholder protection in acquisition contracts raises significant doubts on the soundness of these objections. For a discussion of possible objections, *see id.* at 1527-34.

"corporations must maximize shareholder value" expresses a nonlegal normative statement.

In deontic logic, "*Must* α" means that α is true in all normatively desirable states of the world.[123] Does "shareholder primacy" posit that, whenever there is no legal *duty* to the contrary, it is always normatively desirable that managers pursue profits at the expense of any other goals or interests? Plausibly not. Although Professors Easterbrook and Fischel seem to hint at this radical conclusion in a footnote of one of their articles,[124] they do not repeat such a bold formulation of their view in their best-known works.[125] In fact, even Milton Friedman, who is often cited as the quintessential advocate of profit maximization, acknowledged that "the basic rules of the society . . . embodied in ethical custom" should be a constraint on profit maximization.[126] This is also the position taken by the American Law Institute in the 1994 Principles of Corporate Governance, as well as in the current Draft Restatement of Corporate Governance, which allow corporate decision makers to take into account "ethical considerations related to the responsible conduct of business."[127]

These mainstream positions are unsurprising. Indeed, as the philosopher Joseph Heath has argued, the view that law is or should be the only social tool constraining harmful market behavior is "fundamentally unserious."[128] Very few suggest that, in an ideal world, an individual businessperson should always pursue their own profit to the detriment of any other interests or considerations, so long as they do not break the law.[129] It is thus deeply implausible that mainstream theory would suggest corporations should do so.

A more modest hypothesis is that, for "shareholder primacy" advocates, profit-maximization is indeed a normative aspiration but not an absolute one. Therefore, to use once again the language of deontic logic,

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123. *See* Carr, *supra* note 48, at 195.

124. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) ("[M]anagers not only may but also should violate the rules when it is profitable to do so.").

125. That Easterbrook and Fischel do not repeat such an extreme thesis in their more famous works is also observed by Joseph Heath. *See* JOSEPH HEATH, ETHICS FOR CAPITALISTS 212 n.8 (2023).

126. Friedman, *supra* note 40, at 33.

127. *See* PRINCIPLES OF THE L. OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (A.L.I. 1994) ("Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business . . . . "); RESTATEMENT (FIRST) OF CORP. GOVERNANCE § 2.01 (A.L.I., Tentative Draft No. 1, 2022) ("[A] corporation may consider . . . ethical considerations related to the responsible conduct of business.").

128. HEATH, *supra* note 125, at 15.

129. The exceptions would be those theories commonly referred to as "ethical egoism," which is "the view that human conduct should be based exclusively on self-interest." PETER A. FACIONE, DONALD SCHERER & THOMAS ATTIG, VALUES AND SOCIETY 45 (1978). Ethical egoism, however, is a minority view in moral philosophy. *See* Keith Burgess-Jackson, *Taking Egoism Seriously*, 16 ETHICAL THEORY & MORAL PRAC. 529, 530 (2013).

for shareholder-primacy advocates profit maximization is true in some—perhaps even in most—but not in all normatively desirable states of the world. But if profit maximization is desirable in *some* normatively desirable states of the world, the question is then what these states of the world are. The disagreement hinges, once again, on the specific cases in which corporate decisions should favor this or that group—that is, on specific Hohfeldian *relations*.

E. Predictive Statements

A further possibility is that, despite the misguided use of deontic language, the crux of the dispute is not normative but predictive. Professors Blair and Stout, for example, expect corporate directors to act as "mediating hierarchs," who allocate the corporate surplus among various constituencies;[130] whereas Professor Bainbridge believes that if directors did deviate from profit maximization too much or too often, "shareholders would adjust their relationship with the firm";[131] therefore, directors should be expected to maximize profits in most circumstances.

For the cynical Hohfeldian, this is a disagreement about managers' *reasons* to exercise their *privilege* in one way or another and should be analyzed as such. Hence the question becomes: what *reasons* do corporate decision makers have to make more stakeholder-oriented decisions, and if they do not have strong or decisive *reasons* in the current system, what *reasons* can be provided to them and how? To use the economists' jargon, this becomes a problem of incentives and incentive design.[132]

Once we restate the question in these terms, it becomes clear that the answer can take (and indeed does take) many different forms. As briefly seen in Section I.A, some scholars have suggested that strong stakeholder-favoring *reasons* already exist and are based on cultural and moral motives of millennial investors and consumers;[133] others have argued that pro-stakeholder *reasons* are to be found in the asset managers' goal to maximize the value of their diversified portfolios;[134] others have argued that all shareholders have, to varying degrees, altruistic preferences, and therefore good *reasons* to push for stakeholder-favoring decisions;[135] others have argued that corporate managers themselves have strong reasons to depart from shareholder value maximization and make

130. *See* Blair & Stout, *supra* note 45, at 251 (arguing that the job of the board of directors is "to coordinate the activities of the team members, allocate the resulting production, and mediate disputes among team members over that allocation"). By "team members," Blair and Stout mean shareholders, bondholders, employees, managers, suppliers, and other corporate constituencies.

131. Bainbridge, *supra* note 50, at 600.

132. Lucian Bebchuk and I have put this question at the center of our analysis of "corporate purpose." *See* Bebchuk & Tallarita, *supra* note 25, at 134.

133. *See* Barzuza et al., *supra* note 30, at 1248-49.

134. *See* Condon, *supra* note 31, at 5.

135. *See* Hart & Zingales, *The New Corporate Governance*, *supra* note 16, at 211-12.

stakeholder-favoring decisions, whether based on economic motives, or on norms of business morality.[136] Once again, there is no noticeable fault line between "shareholder primacy" and "stakeholder governance," only a variety of empirical views on corporate actors' motivations.

F. Taking Stock

My unsuccessful search for a unitary criterion to distinguish the "shareholder primacy" camp from the "stakeholder governance" camp has shown that the disagreement in the corporate-purpose debate is in fact rich and multifaceted and cannot be reduced to two grand theories. Once we recognize this fact, we should abandon the suggestive but misleading trope of the "contested visions," and we should refocus the conversation on the more prosaic but more meaningful matrix of constraints on managerial *privilege*. Focusing on a big-picture "vision" of corporate governance is certainly suggestive, but it condemns the analyst to the hopeless quest of the monolithic orientation of corporate decisions—whether towards shareholders or society—which is an illusory abstraction that hinders a constructive conversation.

In Part III, I will show how a constructive conversation on corporate decision-making can occur without any misleading contraposition between shareholderism and stakeholderism. I will propose an analytic roadmap to discuss potential corporate-purpose reform, which is grounded in the Hohfeldian framework proposed so far and therefore focused on the detailed specification of legal relations between specific *actors* with respect to well-specified *activities*, on the basis of clear assumptions about market players' *reasons* to act upon those relations. This roadmap does not speak to a contrast between two grand rival views of corporate purpose. It does not even assume the existence of something called "corporate purpose." In each case, managerial *privilege* occupies the center of the model, and the problems to solve pertain to the nature and design of the boundaries of this *privilege*.

G. Coda: Is the Concept of Corporate Purpose Still Useful?

Before examining what design principles should guide corporate-purpose reform, I must address some potential challenges to my framework.[137] These challenges can be summarized with the critique that dispensing with the concept of "corporate purpose" altogether makes it difficult to understand the reality of corporate law. Although a full

136. *See* Blair & Stout, *supra* note 45, at 315.

137. This Section might seem exceedingly abstract (even more so than the rest of the Article) for those interested in more practical payoffs. I recommend that the more impatient and action-oriented readers who have made it this far jump directly to Part III.

discussion of this critique exceeds the scope of this work, I will briefly address the three best versions of it.

In one version, proposed by Professors Paul Miller and Andrew Gold, corporate fiduciary relations are purpose-based relations, in the sense that they are related to the administration for particular "purposes" rather than for particular individuals.[138] Although the authors do not explicitly frame their theory in contraposition to Hohfeld's (whom they never cite), the reader of this Article will be tempted to understand it as such. Indeed, Miller and Gold repeatedly juxtapose their theory (which they term "fiduciary governance") with an interpersonal theory of fiduciary relationships. According to the latter, the central feature of fiduciary duty is the relationship between fiduciary and beneficiary. By contrast, for Miller and Gold, "a significant subset of fiduciary mandates . . . arises in contexts in which the fiduciary is engaged to determine or advance certain *abstract purposes*."[139] In other words, for these purpose-oriented duties, there is no need to identify specific beneficiaries, let alone the interests or preferences of beneficiaries. What the fiduciary must do derives from the *purpose* she has agreed to pursue—not from the desires or interests of specific individuals.

However, there is a distinction to be made between the *activity* that is the object of one's *duties* (or other disablements) and the *actor* holding the correlative *rights* (or other entitlements). A "purpose" in this sense can be a common feature of a broad set of *activities* the fiduciary has a *duty* to perform; however, the question of who holds the correlative *right* remains open and cannot be replaced or dismissed by the existence of such common feature. Therefore, we can translate the suggestion made by Miller and Gold that some fiduciary relationships are purpose based into the observation that some bundles of Hohfeldian relations concern a broad set of *activities* with certain common features, which may be described as "aiming at certain objectives." Indeed, there is little doubt that many of the *duties* of corporate managers share the common feature of aiming at profit-making. This can be described, if we wish, as a "purpose." Yet, this does not mean that these *duties* lack a correlative *right*.

"Purpose," in the sense proposed by Miller and Gold, and Hohfeldian relationality can coexist—the former can exist at the "macro" level, whereas the latter exists at the "micro" level. However, Miller and Gold's framework reifies the concept of purpose in a way that could result in the conceptual confusion that I lament in Part I. The "purpose" they identify is the result of a complex matrix of individual relations between people, not an abstract commitment with no flesh or bones.

138. *See* Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 517-518 (2015).

139. *Id.* at 517.

A second version of this critique is that "purpose" is what allows us to attribute an act by a corporate representative to the corporation rather than to the representative in her individual capacity.[140] Thus, courts are required to determine "whether a given action manifests corporate purpose" in order to decide whether such action should result in personal liability or corporate liability.[141]

But what distinguishes an action that "manifests corporate purpose" from an action that does not? Typically, the corporate representative will follow standard formalities that identify an action as made on behalf of the corporation, and no further analysis will be needed. Since the scope of managers' *privilege* and *power* is very broad, the question of attribution will often be solved by such formal identification. In the past, when the scope of managerial *privilege* was tailored to specific business activities, sometimes courts had to determine whether the action exceeded such scope, and the question was often framed as a question of "corporate purpose." Today, similar questions arise in the field of agency law, when a court is asked to determine whether the agent acted within the scope of her "actual authority." In these cases, however, "purpose" is immanent in the bundle of the Hohfeldian relations: did the corporate fiduciary or agent have the *power* to create this specific legal relation with a third party? Did she have a *duty* not to engage in that specific activity? Sometimes, the inquiry is fact-intensive and requires the judge to reconstruct and connect a large number of declarations, statements, and acts, which form, when taken together, a somewhat consistent theme which we could call a "purpose," if we so wish. But this "purpose" exists, if it exists at all, only because certain underlying Hohfeldian relations exist.

A third version of this critique is that "purpose" is part of what makes a corporation an agent, in the moral sense of a (legal) person capable of making decisions and acting. If we get rid of the concept of "purpose," one could argue, we fail to understand the corporation as a distinct "person." In the philosophical literature, an important defense of this view is the one proposed by Philip Pettit in several works (some of which are coauthored with Christian List).[142] Pettit argues that while in some instances group

140. *See* Paul B. Miller, *Corporate Personality, Purpose, and Liability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 23, at 232-38.

141. *Id.* at 237.

142. *See, e.g.*, Philip Pettit, *Group Agents Are Not Expressive, Pragmatic or Theoretical Fictions*, 79 ERKENNTNIS 1641, 1645 (2014) (noting that "not only are the groups exemplified by [corporations] representable as holding certain purposes, forming certain representations, and acting for those purposes" but "[t]hey also actively represent themselves as having such purposes . . . and as performing corresponding actions"); Philip Pettit, *The Conversable, Responsible Corporation*, *in* THE MORAL RESPONSIBILITY OF FIRMS 15, 17 (Eric W. Orts & N. Craig Smith eds., 2017) ("[A] system is an agent when . . . it maintains certain purposes, forms reliable representations of its environment, and acts reliably so as to satisfy its purposes according to those representations."); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE

agency is purely metaphorical (for example, when we refer to "the market" as making decisions), in many other instances, such as corporations, churches, or the state, group agency is real and "purpose" is one of the features that makes the group a real agent. Unlike markets, Pettit argues, and like animals and people, "corporations are interpretable—and, by standard methodological criteria, best interpreted—as having certain purposes, forming certain representations, and acting so as to satisfy those purposes according to those representations."[143] What makes corporate agency possible, in my own reading of Pettit, is a "central, decision-making structure . . . operat[ing] via a widely distributed network of sub-structures."[144] Such a structure allows the corporation to designate a "spokesperson," who can "give an account of the corporation's goals . . . offer a . . . justification of its judgments about current market conditions and likely developments; and make sense of what the corporation does in the light of those imputed purposes and representations."[145]

One way to understand Pettit's thesis is that, just like individual human agency emerges from a biological substrate, group agency emerges from the complex interactions among various members of the group, mediated by decision-making processes and other organizational rules. It is, in other words, distinct from but nonetheless dependent on the individual substrate.[146] But this is not in conflict with what I have argued so far. Even if Pettit were right and we should recognize the emergent group agency of corporations as a useful concept, it would still be the case that such an agency would depend on the underlying substrate of individual relations and decision-making processes. If agency emerges from something—whether neurons or organizational relations and processes—it is this "something" that has theoretical and practical priority. Just like altering the brain may change people's behavior, altering decision-making processes and internal relations may change corporate behavior.

POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 35 (2011) ("If [a group agent] is a corporation, it means accepting its right to use the resources in which one owns shares for corporate purposes, as defined in the corporation's charter and the law."); Philip Pettit, *Groups with Minds of Their Own*, *in* SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY 167, 175 (Frederick F. Schmitt ed., 2003) ("Purposive groups . . . are associated with a characteristic goal, involving the outside world or the group's own members or perhaps a mix of both. Examples would include the political party, the trade union, and the business corporation . . . .").

143. Pettit, *The Conversable, Responsible Corporation*, *supra* note 142, at 19.

144. *Id.* at 18.

145. *Id.* at 19.

146. This interpretation is explicit in Pettit, *Groups with Minds of Their Own*, *supra* note 142, at 184 ("In arguing that a social integrate is an intentional subject that is distinct from its members—that exists over and beyond its members—I hasten to add that I am not postulating any ontological mystery . . . . Collective judgments and intentions may be discontinuous with what happens at the individual level but they cannot vary independently of what happens there; they do not constitute an ontologically emergent realm.").

My position with respect to these "holistic" theories is that the Hohfeldian relations come first and should be the main focus of any discussion of corporate-purpose reform. Even if we accept the existence of such a thing as a corporate "purpose"—and I am not sure we should—it is the substrate—the Hohfeldian relations, in my model—that should concern us first and foremost.[147]

III. Redesigning Corporate Purpose

How can we use the Hohfeldian language of adversarial legal relations and the framework proposed in Parts I and II to discuss reform proposals seeking to alter the way corporate decisions are made? In this Part, I propose a set of critical questions that any proponent of corporate-purpose reform should address to make their proposal legible, assessable, and comparable with alternative proposals. The first question is a preliminary "benchmark check" to situate the proposed model in relation to the status quo. It asks whether the proposed model expands or restricts managers' privilege as compared to the current, mainstream model. The second question requires the analyst to specify in detail which new or different legal *relations* should be established, between which *actors*, and with respect to what *activities*. The third question concerns the cooperation among the various corporate actors in executing stakeholder-favoring decisions. The fourth and last question concerns the motivational assumptions underlying the legal model. I conclude by suggesting a pragmatic principle for stakeholder-oriented corporate-purpose reform: expand managerial *privilege* only when the benevolence of the relevant corporate actors is verifiable; otherwise, pair privilege with enforceable *duties* or countervailing *powers*.

A. Question #1: Expansive and Restrictive Models

If the contrast between "shareholders" and "stakeholders" is misleading, and no important normative insight can be gathered from the concept of "purpose," are there other ways to make sense of the big picture of the corporate-purpose debate? While a constructive discussion indeed requires detailed specification of the various elements of the proposed

147. Pettit seems to suggest also that corporations can "commit" to a purpose. *See* Pettit, *Group Agents Are Not Expressive, Pragmatic or Theoretical Fictions*, *supra* note 142, at 1646 ("The spokespersons speak for the group with the authority to dictate what the group intends; they do not just venture a view how the members are likely to behave. In that sense they commit the group to the intention . . . . [W]e may say that spokespersons avowed the group's intention to act in a certain way rather than merely reporting the intention."). I am not sure whether this point has significant implications for our topic. It seems to me that what the corporate spokespersons do in Pettit's example is not to state or avow the corporation's "intention" but simply to describe the direction of action that the existing bundle of individual *relations*, *reasons*, and *motives* is likely to produce. Whether or not this should be understood as a collective "intention" does not alter the fact that it is a derivative product of individual *relations*.

Hohfeldian architecture, there are broad and revealing affinities and divergences among the most influential proposals in the corporate-purpose literature. If we truly want to look for a "fault line" in the debate, we will find it in the disagreement about the current scope of managerial *privilege*. Some theories of corporate purpose seek to expand (or at the very least preserve) the traditional scope of managerial *privilege*; others seek to restrict it. Here is where the crux of the disagreement lies.

Some of these views are traditionally associated with the "shareholder primacy" camp—others with the "stakeholderist" camp. But these labels do not predict whether the relevant theory will advocate the expansion or restriction of managers' *privilege*. For example, the influential "team production theory" proposed by Professors Blair and Stout argues that corporate directors should have a broad sphere of *privilege* in order to mediate among different, and sometimes conflicting, interests of different constituencies: shareholders, executives, employees, and so forth;[148] by contrast, some of Blair and Stout's "shareholderist" critics, such as Professor Bainbridge, reject the "mediating hierarchs" theory but, at the same time, agree that managerial discretion should not be further constrained.[149] Here, "stakeholderists" and "shareholderists" agree with respect to the Hohfeldian structure of corporate decision-making: managers' sphere of *privilege* should not be restricted further.

Other authors traditionally associated with the opposing camps of shareholderism and stakeholderism advocate the opposite thesis: that managers' *privilege* should be restricted. For example, Professor Lucian Bebchuk and I criticized recent proposals of "stakeholder governance" on the grounds that expanding managerial power would be bad for both shareholders and stakeholders,[150] and we argue that "the most effective way to [make capitalism work well for all corporate stakeholders] is by adopting laws, regulations and government policies . . . [which] would constrain and incentivize companies to act in ways that would improve the welfare of stakeholders."[151] Some of our "stakeholderist" critics, such as Professors Hayden and Bodie, have proposed giving employees voting rights to elect "a set of employee directors,"[152] thus incentivizing employee-favoring decisions, which are considered normatively desirable by the authors. Here, "stakeholderists" and "shareholderists" agree once again, but on a very different plan. In this case, what should be done is to restrict managers' *privilege* through new *disablements*, whether *duties* to the state (as in the Bebchuk-Tallarita proposal) or *liabilities* to employees (as in the Hayden-Bodie proposal). Although there are many important

148. *See generally* Blair & Stout, *supra* note 45 (arguing for corporate director privilege).

149. *See supra* notes 24, 28 & 50.

150. *See generally* Bebchuk & Tallarita, *supra* note 25 (arguing against stakeholder-governance proposals).

151. *Id.* at 94.

152. Hayden & Bodie, *supra* note 20, at 2473-74.

nuances and differences among these various proposals, the dividing line between expansive and restrictive models captures a more important dimension of the debate than the misleading contraposition between shareholder primacy and stakeholder governance.

Recentering the map of the corporate-purpose debate around the fault line between expansive and restrictive models also explains the most bizarre puzzle mentioned at the beginning of this Article. What does "stakeholder governance" mean if both Bernie Sanders and the Business Roundtable are in favor of it? The preliminary answer, given in the previous sections, was that "stakeholder governance" is a concept with little or no explanatory power. The richer answer, which we may now grasp based on the distinction between expansive and restrictive models, is that Bernie Sanders and the Business Roundtable are, in fact, on opposite sides of the main debate: Sanders wants a smaller sphere of managers' *privilege*, the Business Roundtable a broader one. What is similar is only their rhetorical strategy, centered on the very agreeable aspiration of benefiting not only one group (shareholders) but everyone (stakeholders). Thus, it becomes clear that the ambiguities of the traditional language of corporate purpose can be used (and perhaps exploited) for rhetorical purposes that muddle the actual contested issues and prevent a constructive conversation.

Thus, the big-picture critical question to keep in mind when examining and discussing a reform proposal should try to situate the proposed model with respect to this "fault line": *Does your proposal seek to expand managers' privilege, as compared to the status quo, or to restrict it?*

The answer to this question will inevitably depend on the answers to the other, more specific, critical questions. Indeed, as we will see in Section III.E, some proposals may use a restrictive language but, when translated into the Hohfeldian language, reveal an expanding architecture. Thus, the big-picture question should be kept in the background when addressing the other questions. It is a sort of "benchmark check" that revises and updates the relative position of the proposed reform as compared to the key question of the extent of managerial prerogatives.

B. Question #2: The Specification Problem

The second critical question concerns the specific details of the constraints on managerial *privilege* that should be added to or removed from the current model. As Karl Llewellyn once observed, sometimes we call law "the net effect of our legal institutions on a case or situation" rather than, more accurately, "some *rule* with official status and authority."[153] In this sense, "shareholder primacy," as found in positive law and practice,

153. KARL N. LLEWELLYN, THE THEORY OF RULES 37 (Frederick Schauer ed. 2011).

can be a way to describe such "net effect" of public and private legal *relations* but not any specific *rule*, despite the misleading deontic language used by courts and analysts. Similarly, "stakeholder governance" is a way to express dissatisfaction with the current "net effect" of corporate legal *relations* but not necessarily (or at least not obviously) with specific legal *relations*.

A corporate-purpose reformer wishing to alter the "net effect" of corporate institutions without being misled by the prevailing rhetoric cannot simply propose an amendment to one general principle. Instead, they need to identify which specific *entitlements* and *disablements* should be altered and how. In other words, any proposal for corporate-purpose reform cannot be as simple as a "reorientation" of purpose from one goal to another, or the "abandonment" of a principle or theory, such as shareholder primacy, but it must be a detailed and explicit specification of which new or different *relations* should be established.

The roadmap to specify the newly added or newly removed relations was discussed in Section I.C to describe the Hohfeldian architecture of corporate decision-making. As we learned there, a Hohfeldian relation is always a relation between two *actors* with respect to one *activity*. Hence, any reform proposal should explicitly and clearly identify the relevant *activity* and then the individuals sitting at the two ends of a specific *relation* (an *entitlement* and a correlative *disablement*) with respect to that *activity*.

Should managers have *duties* towards the state with respect to specific activities such as the pollution levels of industrial plants? Should *managers* have a *duty* towards specific stakeholders, and with respect to which *activities*? Should certain stakeholders, such as employees, have the *power* to appoint some directors? And so forth.

At this stage of the conversation, one should also abandon some of the simplifying abstractions employed in Section I.C—necessary to take a high-level view of corporate decision-making—and recognize greater degrees of complexity. For example, one should take account of the distinct legal relations existing between directors and top executives, and between top executives and lower-level managers, as well as the internal corporate relations within the asset managers' decision-making structure, and the relations of asset managing companies with their corporate, institutional, and retail customers. The key sub-question here is: *Who exactly bears a duty or other disablement in your model, and who holds the corresponding entitlement?*

Moreover, a well-specified Hohfeldian relation must concern a specific *activity*, with respect to which the relevant *actors* have *entitlements* and *disablements*. The *activity* must be an identifiable real-world behavior (or category of behaviors), such as releasing a certain pollutant or building a plant, or a legal act affecting real-world behaviors, such as terminating an employment relationship or selling a certain product. Furthermore, the newly revised relations may concern the final decision directly—for example, a *duty* of the final decision maker to choose a specific, environmentally friendly operational course of action—or may affect the final decision only indirectly by shaping the complex web of relations shaping the decisional environment—for example, a *power* of certain stakeholders to appoint or remove directors. Either way, it cannot be a vague normative goal such as societal welfare or stakeholder interests.

In Section I.C, we learned that maximally narrow models of corporate decision-making are practically unworkable: legal relations may not be designed in such a way as to identify the one right answer—that is, the one specific obligatory option—in every circumstance. Indeed, as discussed in Section II.C, there is no true, general Hohfeldian duty to maximize shareholder value in all circumstances, but only in narrow and exceptional ones.

A true, general Hohfeldian duty to maximize social welfare or stakeholder interests would be similarly unworkable. Therefore, even the boldest stakeholderist reform may not stop at the proposition that corporate decision makers should advance the interests of stakeholders; indeed, such a reform would prove impractical and therefore not bold at all. Rather, it must identify specific activities or categories of activities that are to become the predicate of *rights*, *duties*, *powers*, and so forth. The key sub-question here is: *For what specific activities or categories of activities, in your model, should corporate actors have a duty or other disablement?*

An important aspect of legal design is obviously the legal source of the relevant *entitlements* and *disablements*. New or modified corporate legal relations may find their source in statutes, regulations, judge-made law, corporate charters, by-laws, contracts, etc. Many discussions of "corporate purpose" reform remain surprisingly vague as to the specific sources of the new or modified legal relations. But legal sources are obviously a crucial aspect of any legal design. The key sub-question here is: *How exactly should these proposed legal relations be established: by statute, regulation, or private ordering?*[154]

154. I agree with the observation made by Professor Aneil Kovvali that reformers do not always or necessarily face a "stark choice between internal corporate governance reforms and external regulations" to achieve normatively desirable goals. *See* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 696 (2023). Interestingly, however, Kovvali frames his thesis in contraposition with the "shareholder primacy" camp, including an argument made by Lucian Bebchuk, Kobi Kastiel, and me in previous work. *See id.* at 694-95 (arguing against "shareholder primacy theorists" and citing some of my joint work with Lucian Bebchuk and Kobi Kastiel). To clarify things for the reader, the argument that Kovvali criticizes is the empirical hypothesis, advanced by us and others, that expanding managerial power to engage in pro-stakeholder decisions and the accompanying rhetoric of corporate social responsibility could weaken public support for regulatory interventions. The basic argument is that political capital is limited and using it to promote "stakeholderism" means not using it to lobby for regulatory interventions. Furthermore, voters could be falsely reassured by the promise of "stakeholderism" and therefore less willing to accept costly regulatory intervention (such as a carbon tax, which would increase the cost of energy for voters). This hypothesis is, of course, perfectly compatible

C. Question #3: The "Shrimp Salad" Problem

The third critical question concerns the interaction of different legal relations, and particularly the cooperation of various corporate *actors* towards the normative goals of the proposed reform. As discussed, corporate decision-making is shaped by a complex web of legal relations; therefore, when redesigning some of these relations, the policymaker or corporate planner must also consider how the other existing relations should be expected to interact with the redesigned ones. This problem is particularly important for stakeholder-oriented reform. I will call it, borrowing Hohfeld's own example, the "shrimp salad" problem.

A crucial analytical insight of the Hohfeldian theory of corporate purpose derives from the distinction between *rights* and *privileges*. This was one of the most important points that Hohfeld intended to make in his original article.[155] If *A* has a *right* with respect to an *activity*, it means that *B* has a *duty* with respect to the same *activity*. By contrast, if *A* has a *privilege* against *B* with respect to an *activity*, it does not follow that *B* has a *duty* but only an absence of *right.* What this means with respect to stakeholder-favoring corporate decisions is that even if the corporate decision maker has a *privilege* vis-à-vis the shareholders, the shareholders do not necessarily have any *duty* to cooperate or even not to interfere with the stakeholder-favoring decision.

In his article, Hohfeld made this point vivid with the example of John Chipman Gray's shrimp salad. Gray, a renowned legal scholar, had argued that "it is . . . a right of mine to eat shrimp salad which I have paid for."[156] Hohfeld took issue with Gray's way of framing the situation. For Hohfeld, what Gray was describing was a *privilege* not a *right.* Typically, a *privilege* to eat the salad one has paid for is accompanied by a *right* that third parties shall not interfere with the eating. For example, someone who physically prevented Gray from eating the salad would commit a tort. This outcome, however, is not a logical necessity derived from Gray's *privilege* to eat his salad; rather, it is the effect of a (common but not logically necessary) combination of a *privilege* and a *right*.

Suppose, says Hohfeld, that the owners of the salad tell Gray: "Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you." What's the legal relation between Gray and the

with the idea, defended by Kovvali, that internal governance constraints and external regulatory constraints may co-exist. For a study that correctly interprets our hypothesis and tests it empirically, finding no economically significant effects one way or another, see Hajin Kim, Joshua Macey & Kristen Underhill, *Does ESG Crowd In or Out Public Support for Regulation?*, 27 AM. L. & ECON. REV. (2025).

155. *See* Hohfeld (1913), *supra* note 65, at 33 ("[I]t is very common to use the term "right" indiscriminately, even when the relation designated is really that of "privilege."). Hohfeld then identifies "numberless judicial instances of this loose usage" and examples of conflations of *rights* and *privileges* even in the jurisprudence literature. *Id.* at 33 n.34.

156. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 20 (1909).

owners of the salad in this case? If Gray "succeeds in eating the salad," Hohfeld explains, "he has violated no *rights* of any of the parties."[157] However, if one of the owners "had succeeded in holding . . . fast to the dish," it is equally clear that no *right* of Gray would be violated.[158]

As others have observed, Hohfeld's example is odd because, typically, when the owner gives someone else a "license" to use or consume her property, she also assumes a *duty* not to interfere with such use or consumption.[159] The artificial agreement imagined by Hohfeld ("eat the salad if you can") is however less bizarre than Hohfeldian scholars think it is. In fact, in most common settings, stakeholder-favoring decisions are structurally similar to Gray's decision to eat the salad despite the owners' lack of *duty* not to interfere.

Corporate managers may typically make the stakeholder-favoring decision and, unless one of the narrowly patterned exceptions discussed in Section II.C occurs, shareholders have no *right* that managers shall not make such a decision. However, shareholders have no *duty* not to interfere and, if they are seriously or repeatedly displeased by managers' stakeholder-oriented decisions, they may try to prevent them from happening again. They may, for example, exercise their *power* to fire directors in order to interfere with corporate decision-making.

Therefore, finding that corporate managers have the *privilege* to make certain socially desirable choices does not entail that they will succeed in making them. In this regard, stakeholder governance proposals based on managerial *privilege* are just like Gray's shrimp salad—the outcome depends not only on managers' *privilege* but also on shareholders' lack of interference. Any such model should thus discuss this crucial assumption: *Should we expect shareholders not to interfere with costly stakeholder-oriented decisions, and why?*

In the literature, proponents of expansive models of managerial *privilege* have tried to solve the "shrimp salad" problem in two opposite ways. The first is the restriction or elimination of shareholders' *entitlements* to interfere with managerial *privilege*—for example, by making directors' terms of office longer.[160] The idea behind this strategy is straightforward: in Hohfeld's example, it would be akin to insulating Gray from the salad owners in the hope that he will be able to eat his salad undisturbed.

The second is to assume that shareholders, or at least some important subset of them, have strong *reasons* not to interfere with managers'

157. Hohfeld (1913), *supra* note 65, at 35 (emphasis added).

158. *Id.*

159. *See, e.g.*, Sichelman, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (Edited and Annotated)*, *in* WESLEY HOHFELD A CENTURY LATER, *supra* note 68, at 32 (analyzing the unconventional nature of Hohfeld's example).

160. *See, e.g.*, Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 225 (1991) (proposing that directors be elected for five-year terms).

stakeholder-friendly decision-making. This alternative strategy does not necessarily require an expansion of managerial *privilege* but is based on specific assumptions about shareholders' motivations. One version of this strategy is the theory positing that large, diversified asset managers have strong economic reasons to support stakeholder-friendly decisions, due to their incentive to maximize the overall value of their portfolio and therefore to mitigate the economy-wide costs of corporate activity.[161] Another version posits that many millennials as shareholders have strong reasons to cooperate based on moral or social *motives*—for example, investors' willingness to pay some cost, in terms of stakeholder-favoring corporate decisions, in order to express certain political or moral values or to satisfy certain prosocial preferences.[162]

D. Question #4: The Benevolence Assumption

1. Privileges and Reasons

The fourth and last critical question concerns the reform proposal's empirical assumptions on corporate actors' *reasons* to act upon their *entitlements* and *disablements*. *Privileges* are outcome indeterminate, meaning that knowing that someone has the *privilege* to do a certain activity does not guarantee that such an activity will occur. As previously discussed, from the standpoint of the cynic, to achieve certain specific "effects in life" we need to examine the *reasons* of the privilege-holder. This is, it turns out, an essential subterranean theme in the corporate-purpose debate and a crucial question for any policymaker or corporate planner wishing to redesign corporate purpose in a more stakeholder-oriented fashion.

Suppose that a policymaker or corporate planner proposing a stakeholder-oriented reform has solved the shrimp-salad problem. For example, shareholders' *entitlements* have been sufficiently weakened, or some or many shareholders have sufficiently strong *reasons* not to interfere with managers' stakeholder-oriented decisions. Now the question is: should we expect managers to exercise their *privilege* in a socially desirable way, and why?

161. *See generally* Condon, *supra* note 31, at 7 (examining portfolio primacy from an economic common-ownership framework); Gordon, *supra* note 31, at 629 (advocating for a portfolio-theory perspective to justify climate investment). For a critique of this theory, see Tallarita, *The Limits of Portfolio Primacy*, *supra* note 32, at 517, which argues that portfolio primacy has three major limits.

162. *See* Hart & Zingales, *The New Corporate Governance*, *supra* note 16, at 207 ("We suppose that, when making a decision, a shareholder puts weight . . . on the welfare of others affected by the decision . . . ."); Barzuza et al., *supra* note 30, at 1285 ("[Millennials] have a greater tendency to assess and even prioritize the social and other real world effects of their investments.").

In the original "shrimp salad" story, Gray began with a crucial premise. "The eating of shrimp salad is an interest of mine," he wrote.[163] By "interests," Gray meant "the things which [an individual] may desire."[164] Gray desires the shrimp salad, and, therefore, we can expect him to use his *privilege* to eat it. But do corporate managers desire to execute costly stakeholder-oriented decisions? And why do we think that they do or do not?

To the cynical Hohfeldian, this is a crucial question that any coherent model of corporate purpose should answer. Indeed, once put in these terms, the underlying theme in much of the recent and not-so-recent literature is revealed to be a disagreement about the psychology and sociology of managerial motives.

2. Revisiting the Berle-Dodd Debate

Consider the seminal corporate-purpose debate, fought on the pages of the *Harvard Law Review* between Adolf Berle and Merrick Dodd in 1931 and 1932.[165] Berle defended the view that corporate managers should be considered trustees of the shareholders; Dodd argued that the modern corporation had social responsibilities and corporate managers "should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities."[166] Dodd's 1932 article is generally considered the first defense of stakeholder governance in contraposition to Berle's advocacy of shareholder primacy.[167] On a closer look, however, both Berle and Dodd were concerned with corporate power and its potential threat for social welfare. Their main disagreement was about the scope of managerial *privilege* based on different assumptions of managers' *reasons* to exercise their *privilege*. Berle wanted to reaffirm and defend a narrow sphere of managerial *privilege* whereas Dodd wanted to expand it, on the assumption that corporate managers would use such privilege to improve society.

Dodd wrote that socially responsible corporate decision-making can happen only "if the managers of such corporations have some degree of legal freedom to act upon such an attitude without waiting for the unanimous consent of the stockholders."[168] The attitude Dodd is referring to is "a sense of social responsibility toward employees, consumers, and the general public."[169] Therefore, Dodd's proposal sought to expand managerial *privilege*, on the assumption that managers would have strong

163. GRAY, *supra* note 156, at 20.
164. *Id.* at 18.
165. *See supra* note 37.
166. Dodd, *supra* note 37, at 1153-54.
167. *See* Fisch, *Measuring Efficiency*, *supra* note 36, at 647; Wells, *supra* note 1, at 82.
168. Dodd, *supra* note 37, at 1161.
169. *Id.* at 1160.

moral and social *reasons* to use such an expansive *privilege* in a normatively desirable way. He thought that public opinion was abandoning the previous era's faith in *laissez faire* and competitive markets and increasingly supported more egalitarian values. Such a cultural change, coupled with expanded *privilege*, could lead to socially responsible management, Dodd thought.[170]

Dodd's thinking on this issue was influenced by Louis Brandeis's 1912 speech on business as a profession.[171] In that speech, Brandeis observed that business should no longer be considered a mere practical activity but a "learned profession" alongside the traditional professions of law, medicine, theology, and the newly emerged professions of engineering and scientific agriculture.[172] One crucial feature of modern business, according to Brandeis, was the rejection of profit making as the measure of success.[173] Just like in the other "recognized professions," Brandeis argued, success in modern business (by which he meant reputation and recognition among peers) derives from "excellence of performance," which manifests itself in a broader set of accomplishments than mere financial return. These accomplishments include "the advancing of methods and processes[,] . . . the improvement of products[,] . . . eliminating friction as well as waste[,] . . . bettering the condition of the workingmen, developing their faculties and promoting their happiness[,] . . . and [] the establishment of right relations with customers and with the community."[174]

Brandeis's theory of modern business, like Dodd's, was a sociological and psychological theory. Brandeis thought that "[r]eal success in business is to be found in achievements comparable rather with those of the artist or the scientist, of the inventor or the statesman"; therefore, "the joys sought in the profession of business must be like their joys and not the mere vulgar satisfaction which is experienced in the acquisition of money."[175] Using our vocabulary, we would say that in this new world of business as a learned profession corporate decision makers have strong *reasons* to exercise their *privilege* in a socially responsible way. From this premise arose Dodd's proposal to expand managers' sphere of *privilege* to give managers "some degree of legal freedom" to make such socially oriented decisions.[176]

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170. Dodd believed that, unlike managers, shareholders cannot "become imbued with a professional spirit of public service" because they "have no contact with business other than to derive dividends from it." Dodd, *supra* note 37, at 1153.

171. *See* LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 1-12 (1933).

172. *Id.* at 1.

173. *Id.* at 2-3.

174. *Id.* at 4.

175. *Id.* at 5.

176. In a characteristically pithy remark, the then-Chancellor of the Delaware Court of Chancery, Leo Strine, called Dodd's approach "the 'just trust the business leaders' approach." Leo

Berle, by contrast, was extremely wary of managerial power. His 1931 article wanted to "circumscribe the use of certain apparently absolute powers."[177] Berle's point was, in Hohfeldian parlance, that managerial *privilege* must be constrained. In his short 1932 follow-up, replying to Dodd, Berle expressed sympathy with Dodd's diagnosis that corporate leaders wield tremendous socioeconomic power.[178] Yet Berle thought that managerial *privilege* could not deliver on the promise of a more equitable and socially just economy. The expansion of managerial *privilege*, Berle thought, would create a "social-economic absolutism of corporate administrators," which would be "unsafe."[179] For Berle, it was clear that the corporate leader "does *not* now assume responsibilities to the community; his bankers do *not* now undertake to recognize social claims; his lawyers do *not* advise him in terms of social responsibility. Nor is there any mechanism now in sight enforcing accomplishment of his theoretical function."[180] Therefore, it would be unreasonable to expect that expanding managers' *privilege* would lead to more, rather than less, socially responsible behavior.

Despite the frequent characterization of the Berle-Dodd debate as a clash between the interests of shareholders and stakeholders, the crux of their disagreement is elsewhere.[181] The true dispute was about the sphere

E. Strine, Jr., *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 152 n.50 (2012).

177. Berle, *Corporate Powers*, *supra* note 37, at 1050.

178. Berle, *For Whom*, *supra* note 37. We know that Berle's views on political economy were skeptical of *laissez faire* and supportive of pervasive social and economic legislation and regulation. *See* Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 435-36 (1962) ("The theory is the classic, nineteenth century economic postulate that the free market under competitive conditions is the best, and in ultimate account the final, allocator of economic effort, of wealth devoted to capital use, and of capital application, as it is a like allocator of the distribution of goods and services . . . . [I]t is loosely termed the doctrine of *laissez-faire*. . . . I do not accept much of that theory."). *See generally* JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA (1987) (biographing Berle's life as a proponent of corporate liberalism). In a 1934 diary entry, Berle even wrote that his "real ambition in life [was] to be the American Karl Marx—a social prophet." SCHWARZ, *supra*, at 62.

179. Berle, *For Whom*, *supra* note 37, at 1372.

180. *Id.* at 1367.

181. The observation that the Berle-Dodd dispute was not truly about the contraposition between shareholders and stakeholders is not novel, although the "shareholders v. stakeholders" framing continues to be commonly used to describe this old debate. For an influential article on the nature of the disagreement between Berle and Dodd, see generally William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008), which argues that the historical context and political-economic views of Berle and Dodd, both adherents to some versions of corporatism, make the use of modern labels such as "shareholder primacy" and "corporate social responsibility" inappropriate and misleading. For Bratton and Wachter, the real disagreement between Berle and Dodd was a disagreement between progressive corporatism (favored by Berle) and business-commonwealth corporatism (favored by Dodd). This thesis is consistent with my reconstruction of Berle and Dodd's disagreement in Hohfeldian terms. Indeed, progressive corporatists distrusted business managers and wanted to restrict their discretion, whereas business-commonwealth corporatists believed that business managers should have a much broader role in the governance of society. *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF

of managerial *privilege* and the nature and strength of managerial social and cultural *reasons*. What Berle and Dodd really disagreed on was the psychology and sociology of power.[182]

3. Revisiting the Corporate Social Responsibility Debate of the 1970s

Other important developments in the history of the debate seem to have been driven by a similar disagreement on managers' *reasons*. For example, Milton Friedman's famous 1970 essay advocated a narrow sphere of managerial *privilege* based on his fear that managers could indeed use their *privilege* to pursue social-justice goals. "Businessmen who talk this way," wrote Friedman, referring to the rhetoric of corporate social responsibility, "are unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades."[183] Paradoxically, Friedman agreed with New Deal corporatist Dodd's empirical premise—that social and cultural norms would lead managers to make stakeholder-favoring decisions—but since Friedman's political views were very different from Dodd's, his policy proposal was accordingly different—to limit, rather than expand, managers' *privilege*.

Interestingly, in the years after Friedman's essay, many progressive scholars and activists also argued for restricting managerial *privilege*, though based on opposite assumptions about managerial motivations. One of the two main proposals of Campaign GM, the prototype of corporate-social-responsibility activism in 1970, requested the appointment of public-interest directors who would represent and defend stakeholder interests.[184] The other proposal requested the creation of a social-responsibility committee "to gather facts and make recommendations on some basic questions concerning the corporation, such as its role in modern society and its prospects for and possible means of achieving a proper balance

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MONOPOLY 43-44 (2015) (describing the disagreement between "the proponents of the business commonwealth" and the "planners" as primarily centered on whether national economic planning should be done by business leaders, by other economic groups, or by the state).

182. Berle was interested in the study of "power" his whole life. His last—and not very well-known—work (aptly titled *Power*) was an investigation of what he believed to be one of the two "oldest known phenomena of human emotions," alongside love. ADOLF A. BERLE, POWER 16 (1968). One of the arguments made by Berle in the book is that the acquisition of power has formidable consequences on the personality of the power holder, but these consequences are unpredictable. Berle wrote:

> If the power is great and demanding, it can strip [the power holder], layer by layer, of the fabric of his life. He may break under its pressures. . . . Or he may grow in tolerance and capacity, blossoming under the experience. The effect of power on its holder is unpredictable.

Id. at 65.

183. Friedman, *supra* note 40, at 33.

184. *See* Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 424 (1971).

between the interests of shareholders, employees, consumers, and the general public."[185] Furthermore, one of the most influential works of the "movement," by Ralph Nader, Mark Green, and Joel Seligman, called for a federal chartering of business corporations, which would reform corporate-governance mechanisms to "tame" excessive corporate power.[186] One of their proposals, for example, was to assign each corporate director the responsibility to represent a different public concern such as employee welfare, consumer protection, environmental protection, and so forth.[187]

That book, and many other representative works of the progressive corporate-law scholarship of the era, radiated outrage toward managers' power and advocated various restrictions to their *privilege*. Whereas Dodd approvingly quoted Chairman of General Electric, Owen Young, President of General Electric, Gerard Swope, and Dean of Harvard Business School, Wallace Donham,[188] Nader, Green, and Seligman attacked "management autocracy"[189] vigorously, lamented the lack of constraints on managerial power,[190] and proposed a plan to "strengthen the legal rights of each of the giant corporation's five principal constituencies."[191] The only plausible explanation for the different approaches in "stakeholderism" is a different assumption about the "benevolence" of corporate decision makers.

4. Stakeholder Theory

Finally, in the 1980s and 1990s, when management scholars coined the term "stakeholder theory" and explicitly argued that managers *should* take into account the interests of employees, consumers, policy activists and other constituents,[192] they were not assuming any motives other than the traditional ones: running a profitable business. Stakeholder theorists observed that, unlike in the past, managers were then subject to different internal demands (for example, investors want control and sometimes want to express their social views) that required a new framework. Stakeholder

185. *Id.*

186. *See* RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 70-71 (1976).

187. *Id.* at 124-26.

188. Dodd, *supra* note 37, at 1154-55.

189. *See* NADER ET AL., *supra* note 186, at 75.

190. *See id.* at 252 ("[S]tate chartering laws, downgraded by the Delaware syndrome, have failed to restrain corporate abuses[,] . . . the governing ethos of our giant firms more resembles an autocracy than a democracy[,] . . . [and] the officers of these corporations lack individual accountability for their actions . . . .").

191. *Id.* at 253-55.

192. The seminal work in this new line of research is R. Edward Freeman's book on stakeholder theory, published in 1984, FREEMAN, *supra* note 43. The book was so successful that, one decade later, the concept of "stakeholders" had already become "commonplace" in the management literature. Donaldson & Preston, *supra* note 44, at 77.

theory required managers to recognize, understand, and manage the relationships with all groups and individuals that "can affect or [are] affected by the achievement of the firm's objectives."[193] "[W]e must understand," writes Freeman, "how stakeholder groups and the issues of each are started, the importance of key issues and the willingness of groups to expend resources either helping or hurting the corporation on these issues."[194]

Thus, the most explicit and detailed theory of stakeholder governance was explicitly conservative in its understanding of managerial motivations. Caring about stakeholders was, according to Freeman, a mere means to the end of running a successful business. "[S]ome corporations," writes Freeman, "must count 'terrorist groups' as stakeholders. As unsavory as it is to admit that such 'illegitimate' groups have a stake in our business, from the standpoint of strategic management, it must be done. Strategies must be put in place to deal with terrorists if they can substantially affect the operations of the business."[195]

Unlike Dodd—who believed in managers' prosocial motives and therefore argued for an expansive *privilege* to achieve more progressive goals—or Friedman—who believed too in managers' prosocial motives and therefore argued for a restricted *privilege* to achieve more conservative goals—Freeman believes in managers' traditional profit motive, defends an expansive conception of their *privilege*, and aims to teach them how to use their *privilege* in a way that manages and appeases stakeholders' demands. In other words, Freeman tells us to trust the managers but for the opposite reasons provided by Merrick Dodd.[196]

193. FREEMAN, *supra* note 192, at 25. Freeman argues that the concept of stakeholders must be inclusive and that the identification of stakeholders varies from one firm to another. *Id.* at 53.

194. *Id.* at 26.

195. *Id.* at 53.

196. In later work, Freeman seems to have espoused a more "normative" version of stakeholder theory, arguing for "replacing the notion that managers have a duty to stockholders with the concept that managers bear a fiduciary relationship to stakeholders." R.E. Freeman & W.M. Evan, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, *in* ETHICAL THEORY AND BUSINESS 75, 76 (Tom L. Beauchamp & Norman E. Bowie eds., 1993). In this work, Freeman and his coauthor W.M. Evans argue that the instrumental approach (which is evident in Freeman's book) violates the precepts of Kantian ethics. Stakeholders can be treated as mere means to corporate ends only if they consent, the authors write. *See id.* at 78. This means that "management has a duty of safeguarding the welfare of the abstract entity that is the corporation . . . . [by] balancing the multiple claims of conflicting stakeholders." *Id.* at 81. What are the criteria to discharge such a difficult task? The proposal is short on detail. "The task of management in today's corporation is akin to that of King Solomon," the authors write. *Id.* To the cynical Hohfeldian, this seems an expansive view of managerial *privilege*. To be fair, the authors suggest a number of "structural mechanisms to make a stakeholder management conception practicable," including "a Board of Directors comprised of representatives of five stakeholder groups," although they accept the possibility that these directors may not have equal voting rights. *Id.* at 83. They also recommend legal changes: "We envision that a body of case law will emerge to give meaning to 'the proper claims of stakeholders,' and in effect that the 'wisdom of Solomon' necessary to make the stakeholder theory work will emerge naturally through the joint action of

5. Normative Premise and Benevolence Assumption

In short, theorists of "corporate purpose" may differ not only with respect to their normative assessment of the "net effect of our legal institutions" on corporate stakeholders—that is, whether corporate decision makers should make *more* or *fewer* stakeholder-oriented decisions—but also with respect to the "benevolence assumption"—that is, whether corporate decision makers are *more likely* to use their *privileges* to make *more* or *fewer* stakeholder-oriented decisions. These two beliefs—one normative and the other empirical—are distinct and may combine in different ways. Different combinations of these normative and empirical premises may support either an expansive or a restrictive reform of managerial *privilege*.

If we start from the normative premise that more stakeholder-oriented decisions are desirable, an expansion of managers' *privilege* is warranted only if we rely on the benevolence assumption—that is, on the prediction that managers will use the expanded *privilege* to pursue stakeholder-oriented goals rather than to enrich themselves or pursue other private benefits. By contrast, if we reject the benevolence assumption, the same normative premise will call for adversarial relations that constrain managers' *privilege* and shape the decision-making process in the direction of stakeholder-oriented goals. Similarly, if we start from the policy premise that more profit-oriented decisions are socially desirable, a restriction of *managers*' privilege is still supported by the benevolence assumption. In fact, a surprising result of this way of framing the problem is that both the free-market advocate Milton Friedman and the corporatist Merrick Dodd shared the belief that managers would use their *privilege* in a prosocial manner. In other words, they both accepted the benevolence assumption—although for Friedman it was an ill-founded form of benevolence. However, since they disagreed on the major normative premise, Friedman and Dodd reached opposite conclusions with respect to the optimal Hohfeldian design of corporate decision-making—a restrictive model for Friedman (with adversarial *entitlements* in the hands of investors) and an expansive model for Dodd.

In the corporate-purpose literature, the benevolence assumption is often understated or is otherwise given limited space. For the Hohfeldian analyst, however, it is a crucial element for the justification of any corporate-purpose model.

Consider, for example, Professors Blair and Stout's influential article on the team-production theory.[197] For seventy pages, Blair and Stout

the courts, stakeholders, and management." *Id.* at 84. All things considered, although the instrumental framing of the book has been largely abandoned, the Hohfeldian structure of Freeman's model remains underspecified, and the proposal ultimately relies on the "wisdom of Solomon," which, for the Hohfeldian analyst, is synonymous with broad *privilege*.

197. *See supra* note 45.

illustrate their expansive model of directors' *privilege* and explain why shareholders would support such a model—in a nutshell, in order to incentivize employees, managers, and creditors to invest in the firm. However, they devote only a few pages at the end of the article to what I call the benevolence assumption. "If directors are despots," they write, "why should they be benevolent?"[198] Unfortunately, the authors note that this crucial question is "beyond the scope of th[e] Article." However, they briefly sketch some preliminary answers, including directors' "interest in serving their corporate constituents well . . . [lest] the coalition . . . fall apart,"[199] the constraints on "self-dealing,"[200] and "corporate and cultural norms of fairness and trust."[201]

A similar theory of implicit promises to corporate stakeholders, proposed in the same years by economists Andrei Shleifer and Larry Summers, relies on a similar view of managerial benevolence.[202] The authors dispose of the problem very quickly, by positing that, just like "the rest of us, managers often fail to take advantage of others they deal with simply because it would violate an implicit trust."[203] More concisely, but with an equally conclusory tone, a recent defense of expansive models of managerial *privilege* argues that "the overwhelming majority of [corporate directors] are . . . decent, careful women and men . . . . [for whom] [n]orms matter[,] . . . [r]eputation matters[, and] . . . [d]oing the right thing matters."[204]

In all these articles, the attentive reader will find unmistakable echoes of Dodd and Brandeis. Indeed, many "stakeholder governance" models—which make up a substantial part of the corporate-reform literature—rely on an understated and sometimes unspoken bet on the benevolence of corporate actors. The bet is quite risky because it calls for an expansion of corporate power in the hope that it will be used to the benefit of society.

However, today, just like one-hundred years ago, the credibility of the benevolence assumption remains unproven. Any reform proposal relying on it should not only be transparent about its role in the overall policy argument but also do the much-needed work to assuage reasonable concerns about its empirical validity.

Meanwhile, skeptics of the benevolence assumption are justified in taking a cautious position and calling for adversarial constraints rather than benevolent *privileges*. This way of reframing the problem delivers a

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198. *Id.* at 315.

199. *Id.*

200. *Id.*

201. *Id.* at 316.

202. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach ed., 1988).

203. *Id.* at 39.

204. William Savitt & Aneil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORN. L. REV. 1881, 1892 (2021).

simple but concrete design principle for policymakers and corporate planners: expand managerial privilege only when the benevolence of the relevant corporate actors—whether managers themselves or the shareholders to whom they are effectively accountable—is grounded in persuasive and verifiable empirical evidence; otherwise, pair privilege with enforceable duties or countervailing powers. The adversarial nature of the Hohfeldian model can be relaxed only if we have strong reasons to believe that the crucial decision makers will act in the desired way regardless of the pressure of self-interest or the constraint of the legal system.

E. Three Brief Case Studies of Stakeholderist Reform

How can the analytical roadmap proposed in this Part be used to examine an actual reform proposal? In what follows, I briefly sketch a Hohfeldian analysis of three recent and influential proposals for stakeholder-oriented reform. I hope to show how these proposals, while displaying ambitious aspirations and often making extensive use of deontic language, have an extremely thin Hohfeldian structure and ultimately rely on empirical assumptions on the prosocial motivations of corporate actors.

1. The Three Proposals in a Nutshell

i. The McRitchie Proposal

In a 2022 lawsuit against Mark Zuckerberg and other executive directors of Meta Platforms, Inc., shareholder activist James McRitchie, supported by the nonprofit The Shareholder Commons, argued that Meta directors had breached their fiduciary duties by pursuing projects that were profitable for the company but harmful for the economy at large, such as maximizing social-media engagement while ignoring the spread of misinformation, mental-health problems among teenagers, and other negative externalities of social media.[205] McRitchie brought a lawsuit for violation of fiduciary duties. The plaintiff's theory was grounded in the recent literature on portfolio primacy and systematic stewardship, according to which highly diversified investors are more interested in economy-wide gains and losses than firm-level effects of corporate decisions; therefore, acting in the best interests of the shareholders means maximizing the value of a broad portfolio representative of the entire market—not the value of the individual company.[206]

205. *See* Verified Amended Complaint, *supra* note 14, at 79.

206. *See generally* Condon, *supra* note 31 (arguing that portfolio primacy is necessary to internalize corporate externalities); Gordon, *supra* note 31 (advocating systematic stewardship in accordance with portfolio primacy rather than firm-specific goals).

ii. The New Paradigm

In 2016, the International Business Council of the World Economic Forum—a cross-industry, cross-regional network of global CEOs who use the World Economic Forum as a platform for peer exchange and collective initiatives[207]—released a "corporate governance framework," ambitiously titled "The New Paradigm," which sought to address concerns about sustainability and the social cost of business by proposing "a collaboration among corporations, shareholders and other stakeholders working together to achieve long-term value and resist short-termism."[208] The document was prepared by senior attorneys of the law firm Wachtell, Lipton, Rosen & Katz in collaboration with the head of investors industries at the World Economic Forum.

iii. Shareholder Welfare Maximization and Investor Assemblies

In a series of academic articles (and an upcoming book),[209] economists Oliver Hart and Luigi Zingales, together with coauthors Eleonora Broccardo and Helene Landemore, have argued that empowering individual investors in the decision-making process would induce companies to act in a more socially responsible way. Hart and Zingales argue that investors are sufficiently altruistic to vote against corporate decisions that harm society. Accordingly, they propose the institution of "investor assemblies," modeled after the example of citizen assemblies, which would issue recommendations on major corporate decisions that present delicate tradeoffs between financial and moral consequences.

2. Deontic Language

All three proposals aim to reform the traditional model of corporate decision-making with a view to reducing negative externalities,[210] promoting sustainability,[211] or preventing "corporate evil."[212] To various degrees, they make extensive use of deontic language to signal the

207. *See* WORLD ECON. F., ANNUAL REPORT 2024-2025, at 51, https://www.weforum.org/publications/annual-report-2024-2025/our-organization-8c62dc3663 [https://perma.cc/8ARB-D68X] (explaining the role of the International Business Council).

208. Lipton, *supra* note 15.

209. *See* sources cited *supra* note 16; Eleanora Broccardo, Oliver Hart & Luigi Zingales, *Exit Versus Voice*, 130 J. POL. ECON. 3101, 3102-04 (2022).

210. *See* Verified Amended Complaint, *supra* note 14, at 91.

211. *See* INT'L BUS. COUNCIL, THE COMPACT FOR RESPONSIVE AND RESPONSIBLE LEADERSHIP: A ROADMAP FOR SUSTAINABLE LONG-TERM GROWTH AND OPPORTUNITY, WORLD ECON. F. (Nov. 30, 2016), https://www3.weforum.org/docs/Media/AM17/The_Compact_for_Responsive_and_Responsible_Leadership_09.01.2017.pdf [https://perma.cc/N288-46YM].

212. *See* Hart & Zingales, Citizen Investors, *supra* note 16.

aspiration to reshape corporate decision-making in a way that significantly deviates from the status quo.

The McRitchie Proposal seeks a court injunction to prevent corporate directors from continuing to disregard the financial "interests of [the company's] diversified stockholders"—that is, negative externalities—in corporate decisions.[213] The New Paradigm proposes a set of "key expectations and responsibilities for boards of directors and CEOs"[214] and is accompanied by a "Compact for Responsive and Responsible Leadership," framed as a solemn set of commitments undersigned by corporate leaders. Hart and Zingales's framework proposes the establishment of a new governance body—investor assemblies—with the goal of shaping corporate decisions. The first of these proposals explicitly appeals to *right*/*duty* relations; the latter two employ the language of duties and prohibitions, more or less extensively, even if they are based on voluntary adoption by corporations.

For the Hohfeldian analyst, however, deontic language must be translated into clearly identified legal relations: actors, entitlements, correlative disablements, and well-specified activities, based on verifiable assumptions about the motivation of corporate actors. On a closer analysis, all three proposals fail to establish clearly identified legal relations and ultimately rely on different, but equally contested, empirical assumptions on the prosocial motivation of corporate actors.

3. Critical Questions

The first critical question discussed in Section III.A concerns the overall effect of the proposed reform on managers' sphere of privilege. This operates as a "benchmark check" to situate the proposal in relation to the status quo. While all three proposals adopt the rhetoric of a reorientation of corporate activities from shareholder value maximization to a more holistic or expressly prosocial purpose, they propose vague, underspecified, or "soft" constraints on managerial *privilege*. Once translated into the Hohfeldian language, each of the three proposals relies on an intact (or perhaps expanded) sphere of *privilege* and on the assumption that corporate actors will use their *privilege* in a socially responsible way.

Let us start with what I called the "specification problem": what specific legal relations do these reform proposals seek to establish and how? On its face, the McRitchie Proposal is quite specific: it proposes that corporate directors have a *duty* not to make decisions that harm the economy as a whole and that shareholders have the correlative *right*. Indeed, the plaintiff in *McRitchie* seeks an injunction to stop Meta's board

213. *See* Verified Amended Complaint, *supra* note 14, at 91.
214. Lipton, *supra* note 15, at 3.

from pursuing socially harmful projects. However, as discussed in Section I.C.3 and again in Section III.B, Hohfeldian duties do not and could not take a maximally narrow form—that is, they may not operate as an extremely precise algorithm that identifies the appropriate course of action confidently in all circumstances. Therefore, a Hohfeldian analyst would worry that just like a general duty to maximize firm value is unworkable (and, for this reason, is typically confined to narrow and exceptional circumstances, as discussed in Section II.C), a general duty to maximize portfolio value would prove similarly empty.

As Vice Chancellor Laster correctly observed in the opinion granting the defendants' motion to dismiss, under the McRitchie Proposal "courts would have to adjudicate whether the directors could prove that their actions did not harm the economy as a whole."[215] This is, quite evidently, an unworkable program.

But an empty restriction is no restriction at all. In fact, it can easily turn into an expansion of managerial prerogatives if the new, portfolio-based formulation of fiduciary duties is used to erode specific Hohfeldian *duties* to shareholders grounded in company-specific value. In that case, the overall new configuration of legal relations would include weaker pro-shareholder constraints without proportionally stronger pro-stakeholder constraints.

The other two proposals do not even try to identify specific Hohfeldian relations. The New Paradigm uses very vague standards (for example, when it states that the corporation should implement "appropriate stock ownership requirements"[216] for its executives, or when it states that the corporation "should structure compensation . . . to avoid incentives that could encourage undue risks"[217]) or aspirational language (for example, when it states the board's and CEO's commitment to "cultivate a corporate culture that gives high priority to ethical standards, principles of fair dealing, professionalism, integrity, full compliance with legal requirements, ethically sound strategic goals and long-term sustainable value creation"[218]). Any attempt to translate these documents into Hohfeldian language would fail irremediably. Managers' sphere of *privilege* remains unchanged.

Hart and Zingales's proposal suggests a genuinely innovative institutional device—investor assemblies. However, it avoids the intricacies of actual institutional design. How should participants in the assembly be selected? What topics can be submitted to the assembly and by whom? How would the discussion be organized? Who would set the detailed agenda for the meetings? What kinds of experts may investors

215. McRitchie v. Zuckerberg, 315 A.3d 518, 528 (Del. Ch. 2024).
216. Lipton, *supra* note 15, at 8.
217. *Id.*
218. *Id.* at 3.

consult and with what procedure? How would the voting happen? Would corporate and financial managers have any *duties* to react to the investor recommendations, and in what way? The questions left unanswered are innumerable.

What is clear, though, is that, short of actual prescriptive investor recommendations, the whole system resembles a much more sophisticated version of the shareholder-proposal system currently in force. Hart and Zingales's bet is that such a system, thanks to its much more robust deliberative nature, would produce more credible and therefore more persuasive recommendations, which would give managers stronger *reasons* to act in a more socially responsible manner. But, from the standpoint of the cynical Hohfeldian, this means that their proposal, just like the other two, is not truly restrictive but leaves managers' sphere of *privilege* intact.

This leads us to the other two critical questions. Why should we expect that shareholders will not interfere with costly stakeholder-oriented decisions? And even assuming that shareholders will not interfere, why should we expect managers to use their unrestricted *privilege* to make socially responsible decisions?

Here, the three proposals offer different answers. The McRitchie Proposal relies on portfolio-primacy theory, which argues that highly diversified shareholders have no appetite for interfering in prosocial decisions because these decisions are conducive to portfolio value maximization. The New Paradigm does not address the motivational problem explicitly and seems to rely implicitly on the view that corporate managers care about doing the right thing and therefore, without the pressure of short-term value maximization, will spontaneously make socially responsible decisions. Hart and Zingales's proposal relies on the assumption that individual investors are moderately altruistic and therefore will be willing to pay the small financial cost of corporate social responsibility.

But the empirical validity of all these theories is disputed. In previous work, for example, I questioned the optimistic conclusions of portfolio primacy by examining the geographic imbalance, discount rates, and across-funds conflicts of large asset managers to argue that the claim that these powerful investors internalize negative externalities (especially global, intergenerational externalities such as climate change) is greatly exaggerated.[219] The New Paradigm's benevolence assumption has been debated since its endorsement by Merrick Dodd and the forceful criticism proposed by Adolf Berle in the 1930s. Hart and Zingales's view that individual investors care about the moral dimension of corporate behavior, whereas financial managers are not "chosen for their moral sensitivity,"[220] raises the question of why financial and corporate managers should be

219. *See* Tallarita, *The Limits of Portfolio Primacy*, *supra* note 32, at 518, 539-41, 554.

220. Hart & Zingales, Citizen Investors, *supra* note 16, at 7.

expected to be less moral than investors (which is, by the way, the exact opposite intuition of Dodd's). One of Hart and Zingales's arguments is that each individual investor owns (directly or indirectly) only a negligible fraction of the company's stock and therefore would have to pay only a negligible cost to bring about significant social benefit.[221] While this is probably true for a one-off decision made by an individual company, it becomes more doubtful in a system in which all companies make decisions that sacrifice profit for socially responsible goals. At scale, the cost for the individual investor would no longer be negligible and the theory would stand only if investors' altruism keeps up with the heightened cost.

Regardless of the validity of these various empirical assumptions, it is clear that they constitute the central premises of the three stakeholderist proposals discussed. In each proposal, the ostensible deontic framework, once translated into Hohfeldian language, reveals a thin, if not empty, adversarial structure; and in the absence of adversarial relations constraining managers' *privilege*, the normative aspiration relies entirely on the benevolence of corporate actors: benevolent investors (whether for moral reasons or as a byproduct of portfolio theory) or benevolent managers. The transformative force of the proposals, despite their reformist rhetoric, lies not in the innovative design but in the heterodox premises about what motivates market actors to act upon their *entitlements*.

Thus, for the skeptic of the benevolence assumption, the pragmatic principle enunciated in Section III.D continues to be relevant: stakeholder-oriented reforms should rely on managerial privilege only when the benevolence of the relevant corporate actors is verifiable; otherwise, it should pair *privilege* with enforceable *duties* or countervailing *powers*.

Conclusion

This Article has challenged the dominant framing of the corporate-purpose debate by shifting the focus from abstract and polarized notions of shareholder primacy and stakeholder governance toward the underlying legal architecture that shapes corporate decision-making. Employing Wesley Hohfeld's scheme of legal relations, the analysis reveals that the traditional contraposition between shareholder-focused and stakeholder-focused theories is not only analytically inadequate but also practically misleading. A constructive conversation on corporate purpose should abandon the suggestive but confusing rhetoric of shareholder primacy v. stakeholder governance and focus instead on the detailed structure of legal relations constraining managers' *privilege*.

221. *See, e.g.*, Hart & Zingales, *The New Corporate Governance*, *supra* note 16, at 209 ("[A] [shareholder] vote will lead to a socially efficient outcome as long as a majority of shareholders are socially responsible and have a small holding in the company.").

To this end, this Article has proposed a set of critical questions that any proponent of corporate-purpose reform should address to make their proposal legible, assessable, and comparable with alternative proposals. The first question is a preliminary “benchmark check” to situate the proposed model in relation to the status quo. It asks whether the proposal seeks to expand or restrict managers’ privilege as compared to the current, mainstream model. The second question requires the analyst to specify in detail which new or different legal *relations* should be established, between which *actors*, and with respect to what *activities*. The third question concerns the cooperation among the various corporate actors in executing stakeholder-favoring decisions. The fourth and last question concerns the motivational assumptions underlying the legal model.

Taken together, these questions try to shift the conversation from abstract principles to concrete legal design. To illustrate how this framework can be used to examine policy proposals, I have analyzed three recent, influential proposals for stakeholderist reform through the lens of the above critical questions. The analysis has shown that all three proposals, despite their significant differences, lack a well-specified Hohfeldian architecture and ultimately rely on disputed empirical assumptions about the benevolence of corporate actors. I concluded by suggesting a pragmatic principle for stakeholder-oriented corporate-purpose reform: expand managerial privilege only when the benevolence of the relevant corporate actors is verifiable; otherwise, pair privilege with enforceable *duties* or countervailing *powers*.