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# The History and Revival of the Corporate Purpose Clause

Elizabeth Pollman\*

*The corporate purpose debate is experiencing a renaissance. The contours of the modern debate are relatively well developed and typically focus on whether corporations should pursue shareholder value maximization or broader social aims. A related subject that has received much less scholarly attention, however, is the formal legal mechanism by which a corporation expresses its purpose—the purpose clause of the corporate charter. This Article examines corporate purpose through the evolution of corporate charters. Starting with historical examples ranging from the Dutch East India Company to early American corporations and their modern twenty-first century parallels, the discussion illuminates how corporate purpose has been expressed within the charter in a changing series of practices.*

*Examining this evolution reveals that throughout history, the sovereign state has firmly held the reins on the legal statement of corporate purpose by determining it as a matter of special grant or by requiring its articulation in the constitutional document establishing the corporation. Early corporate charters included provisions for self-governance and purpose that served as a coordinating mechanism for long-term ventures and associations, often serving public and private interests. Over the nineteenth century, as state legislatures looked to solve their corruption problem and powerful business players pressed for greater operational freedom, the purpose clause of the corporate charter lost its specificity, and awareness of its public-tinged character diminished. Corporations increasingly relied on private documents and intangible, branded personas to create corporate identity, capture philosophies of corporate mission, and express social-minded aims. Throughout this long history, however, and despite waning attention paid to corporate purpose clauses at times, they have remained an important reflection of the public–private collaboration at the heart of the corporate enterprise. Further, the longstanding requirement of stating a purpose in the corporate charter has laid the groundwork for a contemporary revival in understanding its relevance to the corporate law doctrine of good faith and its utility as a mechanism for creating and coordinating commitments for the benefit corporation. The purpose clause has enduring relevance even as new*

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\* Professor of Law, University of Pennsylvania Law School. For valuable comments, I thank Albert Churella, David Ciepley, Mark Lebovitch, Mark Roe, Susan Salzstein, Leo E. Strine, Jr., Harwell Wells, and participants of the symposium hosted by the Institute for Law and Economic Policy and the *Texas Law Review*. I am especially grateful for the detailed comments and corporate charters shared by Eric Hilt.

*practices and understandings of corporate purpose have emerged in business and law.*

### Introduction

A great assortment of meanings has come to attach to the term “corporate purpose.” For many, it invokes the longstanding corporate law debate about whether directors should manage the corporation to maximize shareholders’ economic interests or whether directors instead ought to consider other social aims.<sup>1</sup> Over time this debate became a heated battle over “shareholder primacy” and “stakeholder governance,” with business leaders, judges, politicians, and academics weighing in.<sup>2</sup> And to others, corporate purpose is better thought of as a business issue, or perhaps a moral one, rather than a doctrinal legal question.<sup>3</sup> Corporate purpose broadly concerns the role of corporations in society.

This Article examines a related subject that has received much less scholarly attention—the corporate purpose clause of the charter. This clause, or set of provisions, is the formal legal mechanism by which a corporation expresses its purpose in its highest constitutive document that is filed with the state. As corporations often take advantage of broad enabling statutes that allow for an unspecified statement of pursuing “any lawful purpose,” many have come to view corporate purpose clauses as meaningless relics of a bygone era. Engaging in a deeper exploration of the corporate purpose clause, however, reveals that it would be a mistake to underestimate its historic role, contemporary relevance, and future potential.

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1. For classic work in this literature, see generally Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); and Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

2. See, e.g., Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 94 (2020) (arguing against “the flaws and dangers” of “stakeholder governance”); Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 1–4 (European Corp. Governance Inst., Law Working Paper No. 515, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3589951](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951) [<https://perma.cc/BQ9T-3546>] (summarizing the contemporary corporate purpose debate including statements and proposals from academics, business leaders, and politicians); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. (forthcoming 2021) (manuscript at 5–6), [https://scholarship.law.upenn.edu/faculty\\_scholarship/2238/](https://scholarship.law.upenn.edu/faculty_scholarship/2238/) [<https://perma.cc/UH23-U988>] (arguing that the American corporate governance system “needs an overhaul to fit a 21st century economy”).

3. See, e.g., COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 6 (2019) (discussing corporate purpose in terms of fulfilling business objectives rather than maximizing profits and noting related social and moral values in corporate purpose); The British Academy, *The Future of the Corporation: Principles for Purposeful Business* (Nov. 2019), <https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/> [<https://perma.cc/4PTA-H83H>] (examining the case for reforming business “around its purposes, trustworthiness, values and culture” and solving the problems of “people and planet”).

Part I begins with the early history of purpose clauses in corporate charters, from European churches and trading companies to colonial and early American municipalities and business corporations. Two main points emerge. First, incorporation often allowed, and indeed necessitated, a framework for self-governance given the separate legal personality of the corporation. The expression of specific corporate purposes in the corporate charter served as a coordinating mechanism for this governance of long-term ventures and associations. Second, the expression of purpose in corporate charters reflected collaboration between what we now think of as public and private spheres.

Part II continues this exploration by tracing the century-long shift from special chartering to general incorporation statutes and from granting specific state-articulated purpose provisions to allowing generic, privately articulated purpose clauses. During the period when special legislative acts were required to grant corporate charters, the purpose clause reflected the joining together of private actors seeking a charter for a specifically requested type of activity and a public grant approving such request and giving it legal effect—often with special privileges and expectations of specified quasi-public actions. Under a system of general incorporation, the state sets parameters of authorized activity, and within these parameters private participants may customize their use of the corporate form.

In the wake of these profound regulatory changes and the provision of greater operational freedom, corporations found new ways of expressing their values and purposes outside of the formal legal charter. From branded goods and corporate personas to corporate philanthropy, social initiatives, and mission statements, corporations continued to create mechanisms for coordinating participants' activity and navigating public expectations. The purpose clause of the corporate charter lost much of its specificity during the mid-to-late 1800s, and awareness of its public-tinged character declined but was not entirely lost.

Finally, Part III examines the enduring relevance of the purpose clause through the duty of good faith and the benefit corporation form. These examples echo the lessons from earlier times, demonstrating that the corporate purpose clause remains a tool for coordinating long-term ventures and associations, and it still reflects that the corporation is a collaboration between public and private spheres.

### I. The Early History of Purpose Clauses in Corporate Charters

A charter is “a written instrument that authorizes and limits a government [or corporation] and establishes its offices and procedures.”<sup>4</sup> The legal and social technology of chartering has existed for over a millennium, with roots in the ancient Roman state, and with practices evolving through “reciprocal modeling” between government and corporate charters over many centuries.<sup>5</sup> For most of this history, the grant of a corporate charter has required a special act by a sovereign power.<sup>6</sup> Under this system of special chartering, corporate charters were granted one by one, and each charter was tailored to the specific activity contemplated by the corporation’s organizers.<sup>7</sup> Particular corporate powers and privileges were explicitly enumerated in the charter.<sup>8</sup>

Ecclesiastical, educational, charitable, and municipal corporations were far more common than business corporations for most of corporate history.<sup>9</sup> In medieval Europe, the Church, the kingdom, and many towns were

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4. David Ciepley, *Corporate Directors as Purpose Fiduciaries: Reclaiming the Corporate Law We Need*, 2 (July 25, 2019) (unpublished manuscript) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3426747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426747) [<https://perma.cc/9U85-92VJ>]. See also RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855*, at 276 (1982) (defining a “charter of incorporation” as an “act of a legislature creating a corporation”).

5. Ciepley, *supra* note 4, at 1–2. See also Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502, 538–39 (2006) (tracing the origins of constitutional interpretation and judicial review to seventeenth-century practices of interpreting corporate charters); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *STAN. L. REV.* 1397, 1397, 1402, 1405–07 (2019) (describing how the corporate charter of the Massachusetts Bay Company, which governed most of New England from 1629 to 1686, evolved into a “Constitution” and subsequently “written words became a defining feature of American constitutionalism”); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *WM. & MARY Q.* 51, 79 (1993) (“[Corporate] charters and constitutions were understood as essentially the same. . . . The close relationship of charters with constitutions meant that debates over the internal structure of corporations and the management of power . . . could easily draw on precedents from state and federal constitutions.”); Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 *GEO. WASH. L. REV.* 1, 2–6 (2010) (describing parallel practices between the U.S. Constitution and corporate charters of the time).

6. Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations*, in 16 *HARVARD ECONOMIC STUDIES* 8 (1917). See also ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 130 (1932) (“As in the Eighteenth Century negotiations for these contracts were carried on with the crown, so in America they were carried on with the sovereign power of the various states as successors to the crown. In practice this meant the state legislature.”).

7. See J.W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 2–3 (1970) (describing early special chartering practices).

8. See *id.* at 2–3, 9, 15–16 (describing special privileges bestowed in corporate charters and that the charter “authoritatively fixed the scope and content of corporate organization”).

9. Maier, *supra* note 5, at 53.

corporations.<sup>10</sup> The sovereign granting charters was typically the Pope, King, or Parliament, directly or by delegated authority.<sup>11</sup>

Operating through the chartered corporation form provided several important benefits. To start, when a corporate charter is granted, “the law immediately recognizes the existence of a new legal entity that is separate from the organizers . . . that can carry out certain . . . activities as a ‘person.’”<sup>12</sup> The separate legal personality of a “corpus,” or corporate body, evolved out of laws and practices in Europe during the Middle Ages concerning churches and universities.<sup>13</sup> Separate legal personality enabled the corporation to hold property, contract, and sue and be sued in its own name.<sup>14</sup> Further, the legal personality of the corporation meant that it could have a potentially perpetual and separate existence from its participants.<sup>15</sup> For religious institutions, as an example, having these features of separate legal personality:

ensured that the property would not be handed down to heirs of individual persons who controlled and managed the property on behalf of the institutions (such as bishops or abbots), nor would the property revert to the estate of the lord or be heavily taxed when those controlling persons died or were replaced.<sup>16</sup>

Church property could be owned by a corporate body (or bodies), and it would “be managed *ad utilitatem ecclesiae*, ‘for the advantage of the Church,’” which was understood to be eternal.<sup>17</sup>

10. Ciepley, *supra* note 4, at 1; RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844*, at 16–17 (2000) (noting that by the sixteenth century, corporations were used for “the King himself, cities and boroughs, guilds, universities and colleges, hospitals and other charitables, bishops, deans and chapters, abbots and convents, and other ecclesiastical bodies”).

11. Margaret M. Blair, *Corporate Personhood & the Corporate Persona*, 2013 U. ILL. L. REV. 785, 788 (2013); Ciepley, *supra* note 4, at 1–2; HURST, *supra* note 7, at 3.

12. Blair, *supra* note 11, at 786.

13. *Id.* at 789; *see also* Ciepley, *supra* note 4, at 26 (“The recovery of the Roman law of corporations in the 11th century revitalized the Church’s use of the corporate form, which, after adaptation by canon lawyers, was deployed to reform, and create, a host of corporate bodies—monasteries, nunneries, cathedral chapters, bishoprics, confraternities, universities, and so on—which mushroomed across Europe.”).

14. Maier, *supra* note 5, at 54 (“[I]ncorporation allowed a group to make binding rules for its self-government, to function in law as a single person with the right to hold property and to sue and be sued—and so to protect its assets—and to persist after the lifetimes of its founding members.”).

15. HURST, *supra* note 7, at 19; Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 425 (2003). Additional benefits of incorporation, such as limited liability, developed over time. *See, e.g.*, STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, *LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS* 19–21 (2016) (describing the development of limited liability).

16. Blair, *supra* note 11, at 789.

17. Ciepley, *supra* note 4, at 26–27.

Incorporation also allowed, and indeed often necessitated, a framework for self-governance. A “corporation sole,” such as the King, had a natural capacity and a corporate capacity.<sup>18</sup> Such corporations sole might have required little in terms of governance, but for any corporation with more than one member or officeholder, some mechanism was required for determining who could take actions on the corporation’s behalf and how the corporation was to operate.<sup>19</sup>

Some corporate charters dating back to the Middle Ages, such as for municipalities, explicitly provided for self-governance.<sup>20</sup> Similarly, the famous seventeenth-century trading companies of England and the Netherlands were expressly created to allow a group of merchants to collectively use monopoly rights granted over certain shipping trade routes.<sup>21</sup> The “letters patent” of the Dutch East India Company (VOC), for instance, specified merchants from different regions who formed a “Council of Seventeen” and who served as a governing board that had prescribed governance duties.<sup>22</sup>

Critical to this self-governance function was the expression of specific corporate purposes. Even the oldest European charters that we have in the

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18. Ciepley, *supra* note 4, at 1 (citing SUSAN REYNOLDS, AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS 113–14 (1977)).

19. Blair, *supra* note 11, at 787–88 (“Although corporations are not often regarded primarily as units of governance, in fact, self-governance was one of the earliest purposes of incorporation.”). See also Paul B. Miller, *Corporate Personality, Purpose, and Liability*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds.) (forthcoming 2021) (manuscript at 4) (<https://ssrn.com/abstract=3707670>) (explaining that the personification of corporations implies fiduciary representation and requires the law to enable attribution of legal agency and liability); SEAVOY, *supra* note 4, at 4 (“[I]ncorporation provided a means of centralized management . . . .”); Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 126–29 (2004) (discussing early use of the corporate form by merchant guilds that used governing boards to determine trading rules for certain goods or regions).

20. Blair, *supra* note 11, at 790 (citing JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 37–40 (1832)).

21. Blair, *supra* note 11, at 791.

22. VERENIGDE OOSTINDISCHE COMPAIGNIE [VOC], CHARTER OF THE DUTCH EAST INDIA COMPANY 2 (Rupert Gerritsen ed., Peter Reynders trans., Australasian Hydrographic Society 2011) (1602) (describing the VOC board composition and indicating that “[w]hensoever the abovementioned Board meets, it shall determine when the equipping of ships will occur and how many, where they shall be sent and other matters relating to the trade”). See also STEPHEN R. BOWN, MERCHANT KINGS: WHEN COMPANIES RULED THE WORLD, 1600–1900, at 27–28 (2009) (describing the formation and governance of the Dutch East India Company); Daniel Gerstell, *Administrative Adaptability: The Dutch East India Company and Its Rise to Power*, EMORY UNIV. 51 (1991), <http://history.emory.edu/home/documents/endeavors/volume3/DanielGerstell.pdf> [<https://perma.cc/UW6L-TA6F>] (describing how the “1602 Charter was revolutionary in granting such relative sovereignty to a state-backed company, [and] drew heavily upon the political structures outlined by the United Provinces”). For a discussion of using the modern terminology of “charter” to refer to what was historically called “letters patent,” see Bowie, *supra* note 5, at 1410 n.60.

historical record contain “the kernel of a purpose clause”<sup>23</sup> and reference to a mode for governance. As political scientist David Ciepley has highlighted, the charter of the monastery of Rebas, from the year 625, refers to the purpose of a collective group of monks performing intercessory prayer, “living under the holy rule,” and in service “to God for the state of the church and the well-being of the King and the fatherland.”<sup>24</sup>

Although these points concerning the self-governance and purpose aspects of charters are not often connected in the literature,<sup>25</sup> we can understand that they were highly linked in their functional importance for early corporations as a coordinating mechanism. Further, the expression of purpose in corporate charters reflected collaboration between what we now think of as public and private spheres. It is worth expanding on each of these ideas as they are central to this Article’s observations.

First, in addition to frequently conveying special privileges or monopolies,<sup>26</sup> the stated purpose or purposes of the corporation in the charter also served as a coordinating mechanism for long-term ventures and associations. As the participants involved in guilds, towns, churches, eleemosynary organizations, and trading companies continually changed,<sup>27</sup> their purpose need not when it was established by charter and when a measure of self-governance toward fulfilling that purpose was explicitly or implicitly understood as part of the grant. Particularly during a time when corporations were not categorized by distinctions such as public and private, or for-profit and non-profit,<sup>28</sup> the charter conveyed essential information about the ends to which the corporation would be operated, property deployed, and so on. The charter organized and limited the powers of the institution, thereby creating commitments and limiting managerial discretion. Without a

23. Ciepley, *supra* note 4, at 29.

24. *Id.* at 30 (citing 2 J.M. PARDESSUS, *DIPLOMATA, CHARTAE, EPISTOLAE, LEGES* 39–41, no. 275 (1849) and crediting Albrecht Diem for translation).

25. An important exception is literature by scholars connecting these points to argue that fiduciary duties run to the corporation itself and its authorized purposes rather than to shareholders. See Ciepley, *supra* note 4, at 3 (arguing that corporate directors “have duties not to specific persons, such as the stockholders, but to the corporation and its purposes”). See also Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 536 (2015) (discussing “how different theories of the firm imply that corporations are administered on the basis of fiduciary service and fiduciary governance mandates respectively”).

26. HURST, *supra* note 7, at 17, 20.

27. Blair, *supra* note 11, at 792 (discussing the stability the corporate form offered amid changes in membership and investors).

28. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 457–58 (1765) (noting distinctions between corporations as either “sole” or “aggregate” and “ecclesiastical or “lay” with the latter including both “civil” and “eleemosynary” corporations). See also Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 213, 217–20 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (examining the development of the distinction between for-profit and non-profit corporations).



developed body of corporate law,<sup>29</sup> there would not be an external legal source to establish the default boundaries or paradigmatic expectations of a corporation's purpose.<sup>30</sup> As an "artificial" or "legal" being, the corporation did not have a purpose or operational imperative as a matter of natural law.

Second, we can understand that the purpose provisions in the charter reflected some measure of collaboration between public and private actors. During the period of special chartering, the starting point in the dynamic was a private actor or group petitioning for the corporate charter, and in so doing, advocating for certain desired grants. Their petition was an expression of entrepreneurial action. The sovereign actor would then decide whether to grant the requested charter, and if so, upon what terms and for what purposes. Evidence of this collaboration sometimes appeared in the charter through language justifying the grant of corporate privileges or explaining the public benefit the corporation would provide. And although modern commentators use the notion of a "purpose clause," historic examples often were not framed in terms of a standardized or singular provision and could appear as a preamble or grant of a monopoly or franchise for a particular activity.

Returning to the Dutch East India Company (VOC) to illustrate this public-private collaboration, its preamble contains several paragraphs explaining the importance of the shipping and trade commerce to the "prosperity of the United Netherlands" and the "great cost, effort and difficulties" incurred by the merchants founding companies to pursue these ventures.<sup>31</sup> It continues:

This was considered by us, the States General, and given due weight in recognising how much importance to the united provinces and the good residents thereof was thereto attached that this shipping trade and commerce be maintained and allowed to increase through application of an appropriate general organisation of its policy, our mutual relations and administration.<sup>32</sup>

Further:

The Directors of the abovementioned companies were thence invited to consult with us and propose that these companies be united . . . .

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29. HURST, *supra* note 7, at 7 ("[T]he first English treatise on corporations (Kyd 1794) has little to say, and scant authority to cite, concerning the use of the corporation for economic enterprise. . . . [and] to the end of the eighteenth century in the United States law had developed no separate policy or rules on business corporations . . .").

30. For a discussion of how corporate purpose could also serve as a mediating device to attribute corporate liability, see Miller, *supra* note 19, at 19; and as a mode of fiduciary governance, see Ciepley, *supra* note 4, at 3; and Miller & Gold, *supra* note 25, at 524–25.

31. VERENIGDE OOSTINDISCHE COMPAIGNIE [VOC], CHARTER OF THE DUTCH EAST INDIA COMPANY 1 (Rupert Gerritsen ed., Peter Reynders trans., Australasian Hydrographic Society 2011) (1602).

32. *Id.*

Through the creation of a fixed, secure and orderly entity they will be bonded together, managed and expanded for the good of all the residents of the united provinces who would like to participate in it.<sup>33</sup>

Following “various discussions, explanatory sessions, and reports,” and after having “conducted due deliberations taking into consideration the progress, service and welfare of the united provinces,” the States General approved “on the basis of [their] sovereign power and authority,” a grant of specified privileges.<sup>34</sup> Such privileges were articulated in the letters patent through a series of expressly described self-governance mechanisms and a “licence” of exclusive sailing and trading rights for a period of time.<sup>35</sup> In short, self-governance and purpose were intertwined to coordinate the corporation’s activity and participants, and the language of the grant evinced a connection between public and private spheres of activity and purposes.<sup>36</sup>

Turning to the North American colonies, the same chartering process, with articulated purposes, was used for the colonies themselves, cities such as New York (previously New Amsterdam), and other corporations in the colonies.<sup>37</sup> To take one example, The Philadelphia Contributionship for Insuring Houses from Loss by Fire was formed to serve as a mutual insurance company “for our own mutual security, as for the common security and advantage of our fellow-citizens and neighbors, and for the promoting of so great and publick a good as the insurance of houses from loss by fire,” and became the first American business corporation when it was granted a charter in 1768.<sup>38</sup>

After the American Revolution, state legislatures took over the task of chartering corporations and did so in greater numbers and for a greater

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33. *Id.*

34. *Id.*

35. *Id.* at 6. Notably, the VOC’s self-governance function expressly allowed for the appointment of extraordinary, state-like powers: “They may appoint governors, keep armed forces, install Judicial officers and officers for other essential services so to keep the establishments in good order, as well as jointly ensure enforcement of the law and justice, all combined so as to promote trade.” *Id.*

36. For a discussion of the transformation of the Dutch East India Company (VOC) to a “fully-fledged business corporation,” see David Ciepley, *The Anglo-American Misconception of Stockholders as ‘Owners’ and ‘Members’: Its Origins and Consequences*, 16 J. INSTITUTIONAL ECON. 623, 635 (2019).

37. David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 15–18 (2019). See also Bowie, *supra* note 5, at 1415–16 (describing the charter of the Massachusetts Bay Company, its “1,500-word recital of why it was created,” and “2,500 words [dedicated] to the corporation’s organization”).

38. Commonwealth *ex rel.* Todd v. Philadelphia Contributionship, 88 A. 929, 929 (Pa. 1913); Samuel Williston, *History of the Law of Business Corporations Before 1800, Part II*, 2 HARV. L. REV. 149, 165 (1888).

diversity of organizations than had the King or Parliament.<sup>39</sup> Although the corporate form was used for a wide variety of activity, ranging from what we might think of in modern terms as for-profit, non-profit, and governmental in nature, no legal distinctions were drawn among them at early American common law, and chartering continued on an individual basis done by special act.<sup>40</sup> Legislatures and their committees for corporate chartering handled petitions from municipal, ecclesiastical, charitable, and educational organizations, as well as transportation, banks, insurance, and manufacturing companies.<sup>41</sup> The privileges and powers granted varied from one charter to another, depending on the “vagaries of individual bill drafters.”<sup>42</sup> These charters typically listed “a relatively narrow and specific set of corporate purposes.”<sup>43</sup> Provisions setting forth powers, and explicit limitations on powers, further elucidated the scope of the grant for the specified purpose.

Charters, and specifically their purpose provisions, continued to serve as coordinating mechanisms for long-term ventures and associations, and reflected public–private collaboration. As to the first point, purpose clauses in early American charters often encompassed both an aspect of granting special privileges and expecting special action, around which the state and corporate participants organized their activity. States often provided monopoly privileges in charters, with an aim of engaging private investment in utility-like projects serving the public.<sup>44</sup> Business corporations also often

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39. Blair, *supra* note 11, at 793. While the concept of corporate chartering was well-known from European experience and transferred or imported into practice in the new nation, the corporate law that applied to business corporations developed largely after independence. HURST, *supra* note 7, at 8 (“[W]hen we began making important use of the corporation for business in the United States from about 1780, there was little relevant legal experience on which to draw. . . . [W]e built public policy toward the corporation almost wholly out of our own wants and concerns, shaped primarily by our own institutions.”); Maier, *supra* note 5, at 52 (“The precociousness of corporate development in the United States meant that legislators and jurists could not simply follow European models but were forced to innovate.”).

40. See, e.g., Samuel Williston, *History of the Law of Business Corporations Before 1800, Part I*, 2 HARV. L. REV. 105, 105 (1888) (“The most striking peculiarity found on first examination of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction, and, with few exceptions, as if the same rules were applicable to all alike.”); SEAVOY, *supra* note 4, at 5 (“The earliest method of creating a corporation was by granting an individual charter.”).

41. Davis, *supra* note 6, at 4; HURST, *supra* note 7, at 7. See also Maier, *supra* note 5, at 55 (“Nowhere were corporations more alike than in the requirement, based on English precedent, that they serve a public purpose, which the acts of incorporation often specified.”).

42. Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 14 (1945).

43. Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 987 (2014).

44. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 51 n.75 (2006) (quoting OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–

enjoyed delegations of governmental authority, such as eminent domain powers, authority to set toll rates, and the like.<sup>45</sup>

The charter provisions setting out these privileges and powers functioned as an articulation of the corporation's purpose, which investors relied upon and could enforce through the developing ultra vires doctrine.<sup>46</sup> Particularly for local merchants, farmers, and landholders who used services provided by a corporation, the specific nature of the purposes set out in the charter helped to determine their interests in investing in the corporation and ensuring that it did not fall into the hands of competitors or monopolists who would impact the price or availability of their local services.<sup>47</sup> Under the ultra vires doctrine, corporations had to confine their operations to the specific purpose identified in the charter, and actions outside the scope could be voided by shareholders or deemed void *ab initio*.<sup>48</sup>

In return for grant of a charter, corporations were expected to carry out their "special action franchises," using private funds to create infrastructure or supply essential public goods.<sup>49</sup> The remedy of *quo warranto* allowed a state to revoke a corporation's charter where the corporation abused or neglected its franchise—an imperfect remedy but a powerful last resort.<sup>50</sup>

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1861, at 105 (1947)) ("When neither the government nor any extant body politic was willing or able to execute a desirable but costly function, the state held out to a new corporation inducements in the shape of a promise of profits. Such a promise became credible and attractive if fortified by the grant of a valuable franchise."); Saule Omarova, *The "Franchise" View of the Corporation: Purpose, Personality, Public Policy*, in RESEARCH HANDBOOK OF CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds.) (forthcoming 2021) (manuscript at 7) ("When scarce private capital is the primary source of funding large-scale public infrastructural and industrial projects, giving private suppliers of such scarce capital special rights and protections becomes a publicly beneficial and pragmatic solution.").

45. HURST, *supra* note 7, at 20; Harry N. Scheiber, *Federalism and the American Economic Order, 1789–1910*, 10 L. & SOC'Y REV. 57, 95 (1975) (discussing the transfer of eminent domain powers to the private sector).

46. HURST, *supra* note 7, at 45–47 (discussing public policy objectives of restrictive provisions in charters including the balance of corporate power in society and protection for investors and creditors); Hansmann & Pargendler, *supra* note 43, at 987–90 (discussing the ultra vires doctrine).

47. See Hansmann & Pargendler, *supra* note 43, at 953–54, 959, 987–89 (discussing early U.S. business corporations as "private producers of public goods" and the importance of the ultra vires doctrine during this time as consumer protection for shareholders in corporations that were essentially "consumer cooperatives").

48. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302 (2001).

49. HURST, *supra* note 7, at 17, 22–24.

50. See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1659–62 (1988) (discussing *quo warranto* actions by the government against corporations for "refusal to undertake the investment and business for which the corporation was designed"). See also Eric Hilt, *Early American Corporations and the State*, in CORPORATIONS AND AMERICAN DEMOCRACY 37, 53 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (explaining the state's power to dissolve a corporation but noting the power was not frequently used because of its dire consequences).

As to the second point regarding public–private collaboration, all corporations during this period were generally understood, or at least justified, in terms of serving public or quasi-public purposes.<sup>51</sup> The vast majority of business corporations chartered before 1800 concerned activity that we now traditionally associate with government infrastructure, such as transportation companies (canals, turnpikes, bridges, aqueducts) and others that provided local public services.<sup>52</sup> Chartered banking and insurance corporations were fewer in number, but also relatively common, while manufacturing corporations were somewhat rare.<sup>53</sup>

According to Handlin and Handlin, “no grant was forthcoming without justification in terms of the interests of the state as a whole.”<sup>54</sup> Articulated purposes in corporate charters and related provisions often referred to the promotion of public welfare. For example, The Phoenix Insurance Company of New York was chartered in 1807, by petition presented to the legislature, “to carry on and extend the business of insurances.”<sup>55</sup> Its president and directors had the power on behalf of the company “to make all kinds of insurance against fire, all kinds of insurance upon the inland transportation of goods, wares and merchandize, all kinds of marine insurance, and insurance upon a life or lives, by way of tontine, or otherwise.”<sup>56</sup> Further, its charter explicitly provided “[t]hat this act shall be and is hereby declared to be a public act, and that the same be for the time herein before limited, construed in all courts and places benignly and favourably for every beneficial purpose herein intended.”<sup>57</sup> To take another example, the 1809 charter of the Albany Manufacturing Society states that the business was

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51. See SEAVOY, *supra* note 4, at 6 (“Most franchise and benevolent corporations had equal social utility. . . . A turnpike and church building were both visible and useful public improvements and all communities needed them.”); *id.* at 47 (“All communities were also familiar with the benefits that . . . these types of corporations [religious, benevolent, and business] contributed to public welfare. They performed functions that the state or local governments were unable or unwilling to do, and whether they built a church building, schoolhouse, or textile mill, the improvements they made were highly visible.”).

52. Davis, *supra* note 6, at 27; Hansmann & Pargendler, *supra* note 43, at 959.

53. Davis, *supra* note 6, at 27 tbl.3 (finding that by 1800, over three hundred business corporations had been chartered in the United States, with the greatest number related to transportation, and others including providers of local public services, bank and insurance, manufacturing and miscellaneous business). See also SEAVOY, *supra* note 4, at 50 (describing the categories of the earliest business charters in the United States).

54. HANDLIN & HANDLIN, *supra* note 44, at 74.

55. An Act to Incorporate the Phoenix Insurance Company of New York, 1807 N.Y. Laws 13–15 (on file with author). I thank Eric Hilt for these examples that are typical of the corporate charters of the period.

56. *Id.*

57. *Id.*

incorporated “for the laudable purposes of promoting and extending the manufactory of cotton and wood.”<sup>58</sup>

This point is not meant to suggest, however, that uniform belief existed about what was actually in the common interest or whether corporations served public purposes in practice—these topics were the subject of heated debate.<sup>59</sup> The state’s discretion over access to corporate charters and their contents gave rise to concerns about corruption as powerful political factions and elites were often the beneficiaries.<sup>60</sup> Concerns over corporate power indeed led to a variety of attempts through charter design itself to limit the powers granted and to design governance structures to promote accountability.<sup>61</sup> These concerns also eventually led to a transformation of the chartering process and the specification of corporate purposes, the subject we turn to next.

## II. From Special Privilege to General Incorporation and the Rise of Other Expressions of Purpose

It took nearly a century for a full shift to occur across all states from special chartering to general incorporation statutes, and from granting specific state-articulated purpose provisions to allowing generic, privately articulated purpose clauses. Although the corporate law literature often focuses on the late nineteenth-century liberalization of state corporate law resulting in the famous race to the top or the bottom, the move to allowing corporations to state their purpose as “any lawful business” started earlier through incremental changes in regulatory and chartering practices. Economic and legal historians have not fully traced the move to allowing “any lawful business,” but their work has left a trail of notable data points that this Part draws together to contribute to our understanding. Further, this Part also explores the rise of other means of expressing corporate mission,

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58. An Act to Incorporate the Stockholders of the Albany Manufacturing Society, 1809 N.Y. Laws 57–61 (on file with author). During the period leading up to the War of 1812 states chartered larger numbers of manufacturing corporations as part of strong efforts to build domestic manufacturing in the face of trade restrictions on imported foreign goods. *See, e.g.*, Eric Hilt, *Corporation Law and the Shift Toward Open Access in the Antebellum United States*, in ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT 147, 152 (Naomi R. Lamoreaux & John Joseph Wallis eds., 2017).

59. Hilt, *supra* note 50, at 39–40 (“Although it was the case that the earliest American corporations were seen as public instrumentalities, whether or not they served the public interest was a vigorously contested issue at the time.”). *See generally* Maier, *supra* note 5, at 58–73 (describing the “anticharter” movement’s concern about corruption, the “aristocratic” granting of exclusive privileges, and the creation of “a government within a government”).

60. Hilt, *supra* note 50, at 40.

61. *See* Maier, *supra* note 5, at 78 (describing “experimental innovations” in corporate charters and the inclusion of detailed governance provisions and “safeguards” that made for “increasingly complex charters”); Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL’Y 115, 155–56 (2012) (describing innovations in charter design).

branded personas, and social-minded aims that emerged in the wake of these changing charter practices, and considers what this tells us about the enduring relevance of corporate purpose clauses.

A. *The Evolution of Purpose Clauses from Specific to General*

The move from special chartering to general incorporation laws was at core a response to a political problem: state legislatures were manipulating the creation of valuable special privileges to corrupt the political process and economy.<sup>62</sup> For years, corporate critics had raised concerns that corporations counted politicians among their shareholders and could use their connections and economic power to curry favors, block competitors, and entrench political parties.<sup>63</sup> Over time, many citizens grew to see special chartering as a source of anti-democratic corruption.<sup>64</sup> Extending the same opportunity to incorporate on standard terms to all parties interested in obtaining a corporate charter solved the problem by eliminating the ability of politicians to distribute special privileges to the favored few.<sup>65</sup>

It took many years, however, for this idea to spread, and states began to experiment in standardizing charters while they were still special chartering corporations. This likely began as a means of simplifying the legislative process for creating corporations, which was burdensome on early state governments with limited administrative capacity.<sup>66</sup> Using relatively standardized boilerplate language in charters in some industries likely also reduced the burden on states to monitor and enforce the regulations written into charters.<sup>67</sup> To these ends, some states adopted standard forms of charters for certain types of businesses, such as turnpike corporations and manufacturing companies.<sup>68</sup>

From there, beginning in the early nineteenth century, some states adopted general regulating acts that restricted or eliminated legislative discretion over the contents of charters in certain industries.<sup>69</sup> As historian Eric Hilt explains, general regulating acts “prevented states from granting privileges to particular corporations that were not shared by other firms in

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62. Jessica L. Hennessey & John Joseph Wallis, *Corporations and Organizations in the United States After 1840*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 74, 90 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

63. Hilt, *supra* note 50, at 42.

64. *Id.*

65. Hennessey & Wallis, *supra* note 62, at 90.

66. Hilt, *supra* note 50, at 52–53.

67. *Id.* at 53.

68. William C. Kessler, *Incorporation in New England: A Statistical Study, 1800–1875*, 8 J. ECON. HIST. 43, 46–47 (1948); HURST, *supra* note 7, at 136, 146.

69. Hilt, *supra* note 50, at 53.

their industry.”<sup>70</sup> At that point, states were not only creating efficiencies by reducing their administrative burden, they were also limiting political discretion over the content of corporate charters in particular industries and thus starting to address the corruption problem. It was just one more leap from these acts to general incorporation statutes that not only standardized the contents of charters but also offered access to the corporate form without a special act of the legislature.<sup>71</sup>

These reforms, however, posed economic costs.<sup>72</sup> As historians Jessica Hennessey and John Wallis explain, “[a] single set of corporate rules could not possibly provide the best rules for each organization.”<sup>73</sup> And so, after the first wave of simple forms of general incorporation, states moved in the later nineteenth century to enable more sophisticated organizational forms to accommodate the needs of diverse organizations.<sup>74</sup>

Throughout this slow process of adopting waves of general incorporation statutes, the language of pursuing “any lawful business” started to seep into charters and regulatory discourse. For example, Connecticut’s 1837 act, one of the earliest general incorporation statutes, required specification in the charter of a corporate purpose and broadly allowed “for the purpose of engaging in and carrying on any kind of manufacturing or mechanical or mining or quarrying *or any other lawful business.*”<sup>75</sup> Given the context of the text and time, we might plausibly understand that the drafters intended this language to indicate a nonexclusive list of industries that could be pursued, while not authorizing general incorporation for activities that were limited by other statutes, such as banking, which required a special act for chartering.<sup>76</sup> Another early general incorporation statute from around this

70. *Id.*

71. *Id.* Access for all persons to use the corporate form was notably not available in all states, however. See Eric Hilt, *supra* note 58, at 155–156 (describing how some Southern states excluded particular groups, usually non-white persons, from access to their laws).

72. Hennessey & Wallis, *supra* note 62, at 76.

73. *Id.*

74. *Id.*

75. 1837 Connecticut General Incorporation Act, 1837 Conn. Pub. Acts 49 (on file with author) (emphasis added) (“The purpose for which every such corporation shall be established, shall be distinctly and definitely specified by the stockholders in their said articles of association, and it shall not be lawful for said corporation to direct its operations or appropriate its funds to any other purpose.”). See also Hilt, *supra* note 58, at 154 (“[I]n 1837, Connecticut passed a general incorporation act that was the first to not specifically enumerate the industries that could be pursued, or to limit the duration of the existence of the corporations it created.”).

76. Connecticut enacted a separate general incorporation statute for banks several years later. Connecticut Communities and Corporations, Chapt. XXIII, §§ 2–3 (1852). Notably, some current general incorporation statutes have language referring to “any lawful act” in combination with language that carves out industries subject to other statutory requirements. See, e.g., Cal. Corp. Code § 202(b)(1)(A) (West 2015) (“The purpose of the corporation is to engage in any lawful act or activity . . . other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code . . .”).



time, Pennsylvania's 1836 act, similarly began to ease the pathway to forming business corporations but did not contain this "any other lawful business" language.<sup>77</sup> It did, however, require the attorney general and the governor to scrutinize filed certificates of incorporation, and it empowered the governor to withhold approval if there was any doubt regarding the "lawfulness" of the proposed enterprise.<sup>78</sup>

Scholars have observed that the move to general incorporation started to erode the notion that public utility was the implicit purpose of the corporation.<sup>79</sup> Particularly with the great growth in the number of manufacturing corporations under general incorporation statutes, many businesses using the corporate form were no longer engaged in quasi-public, infrastructure-type projects.<sup>80</sup> And as the prevalence of purely investor-owned firms increased, some of the early functions of the purpose clause and *ultra vires* doctrine declined.<sup>81</sup>

Under general incorporation, corporate charters and their purpose provisions still reflected some measure of collaboration between public and private actors, but such collaboration was more attenuated than in the earlier period described above. The starting point in the dynamic was still a private actor or group, but they no longer needed to petition for a special legislative act and instead could file a corporate charter that they had privately drafted. If it met the specified requirements of the general incorporation act, the state approved the grant of the charter.<sup>82</sup> At least as a general matter for many corporate charters, evidence of the public-private collaboration no longer

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77. See Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 101 n.79 (1999) (authorizing corporate formation without a special charter for the purpose of "making or manufacturing iron from the raw material, with coke or mineral coal") (citing Act of June 16, 1836, ch. CCCLX, 1836 Pa. Laws 746).

78. Hilt, *supra* note 58, at 153. This statutory language could be interpreted as "merely enforcing compliance with its terms," but the discretion granted may have been broad enough to enable government officials to reject proposed incorporations for other reasons, and Pennsylvania substantially revised this law in 1849. *Id.* at 154.

79. See, e.g., Guenther, *supra* note 37, at 65 ("With general incorporation, the purpose of the corporation had arguably privatized."). See also Hovenkamp, *supra* note 50, at 1636 ("The rise of general incorporation acts in the 1840s and 1850s rested on the premise that the corporation was no longer a 'prerogative of the crown,' requiring special permission and dedication to public use.").

80. See Hansmann & Pargendler, *supra* note 43, at 985 ("Manufacturing firms, in contrast to other types of firms, appear to have been formed under the period's new free incorporation statutes in substantial numbers from an early stage [during the early 1800s]."); Hilt, *supra* note 58, at 152 (describing the rise in manufacturing corporations in the early 1800s and the first wave of general statutes to encourage domestic manufacturing).

81. Hansmann & Pargendler, *supra* note 43, at 990.

82. See Guenther, *supra* note 37, at 65-66 (explaining that the shift from special to general incorporation "constituted a sea change from the early years of the business corporation" as "[i]ncorporation became a routine and inexpensive procedure outside the realm of political influence").

explicitly appeared in language justifying the grant of corporate privileges or explaining the public benefit the corporation would provide.

Further, for many business organizers and their investors, the articulation of specific corporate purposes in a charter became less valuable as a coordinating mechanism and more of a hindrance to expanding into different business lines when opportunities arose. Ultra vires was a commonly litigated issue that required courts to finely parse charter provisions, often resulting in complicated and inconsistent applications.<sup>83</sup> And, as Henry Hansmann and Mariana Pargendler explain, the early prevalence of consumer cooperative-like business corporations, in which the shareholders were the consumers of local services, gave way to a new reality in which investor-owned firms dominated the corporate landscape.<sup>84</sup> As they observe, “If what a shareholder expects from the firm is not a specific product or service, but a profit—the fungible good par excellence—the precise purposes and activities specified in a corporate charter should be comparatively less important.”<sup>85</sup> Flexibility to pivot or expand the business in response to changing markets and technological advances became a greater priority, and businesses took advantage to craft more general purpose clauses when the law so allowed.<sup>86</sup>

Powerful business interests also actively pushed for greater flexibility of purpose in their charters. Most notably, local railroads were undergoing major transformations in the mid-nineteenth century and quickly bumped up against the constraints of their purpose clauses. According to one source, state legislatures could not keep up with railroad corporations’ demands for legislative amendments to special charters as routes changed and companies merged.<sup>87</sup> Some railroads used their political influence and resources to avoid constraints. For example, as the Pennsylvania Railroad grew to embrace a grand vision of connecting a nationwide railway system, its business leaders recognized that a major obstacle was navigating political and regulatory challenges that started with its narrow corporate charter, which specifically incorporated it only for railroad transportation within the state.<sup>88</sup> After

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83. Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1246–47 (2017).

84. Hansmann & Pargendler, *supra* note 43, at 990.

85. *Id.*

86. *Id.*

87. Guenther, *supra* note 37, at 56–57 (citing E. MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS* 134–45 (1954)). *See also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1790–1860*, at 137 (1977) (discussing the activity of railroad corporations and their rising influence).

88. TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 58 (2003); PENNSYLVANIA RAILROAD, *CHARTERS AND SUPPLEMENTS OF THE PENNSYLVANIA RAILROAD COMPANY, WITH THE ACTS OF ASSEMBLY AND MUNICIPAL*

investing many years and resources to become a “political juggernaut” in Pennsylvania, one of the railroad’s many efforts to work around its charter’s limitations involved convincing the legislature to grant it a charter for a holding corporation established for general business purposes, through which it bought up other railway lines outside the state.<sup>89</sup> Its expansion indeed relied upon a variety of holding companies and legislative approval for the issuance of additional stock.<sup>90</sup>

Around the time that the Pennsylvania Railroad started in these endeavors, many states began to follow the early adopters of general incorporation statutes, and some used broad statutory language referring to “any lawful business.”<sup>91</sup> Thus, “[a]lthough the earliest general incorporation laws sometimes provided a relatively narrow list of specific manufacturing enterprises permitted to use the statutes, by 1875, the statutes tended to allow all lawful businesses to incorporate under the general laws . . . .”<sup>92</sup> To the extent statutes listed exceptions, they tended to be for railroads and banks, which raised interstate commerce concerns, and for municipalities, which were perceived as purely public entities.<sup>93</sup>

Notably, the move toward general incorporation acts with only the minimal threshold of a lawful purpose coincided with the development of a new conceptual classification delineating corporations as either “for-profit”

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ORDINANCES AFFECTING THE COMPANY; TOGETHER WITH THE BY-LAWS OF THE BOARD OF DIRECTORS 7 (1859).

89. NACE, *supra* note 88, at 61, 63; ALBERT J. CHURELLA, *THE PENNSYLVANIA RAILROAD, VOLUME 1: BUILDING AN EMPIRE, 1846–1917*, at 439 (2013) (describing the railroad’s use of “influence in the Pennsylvania legislature to obtain a charter” for a holding company with a “bland and innocuous name,” which soon thereafter changed to the Southern Railway Security Company, and which served as a “necessity in order to operate across state lines and to coordinate the activities of railroads chartered by several different legislatures”).

90. CHURELLA, *supra* note 89, at 344–48, 380–82 (discussing the railroad’s need to raise its equity ceiling and the importance of holding companies such as the Continental Improvement Company and the Pennsylvania Company in expanding its operations outside the state, noting that “[e]ven for a company that was as politically well connected as the PRR, the process of obtaining charters was fraught with pitfalls, ranging from hostile amendments to gubernatorial vetoes”).

91. See Hamill, *supra* note 77, at 101 n.79, 102 nn.85–86, 104 n.94 (collecting first general incorporation statutes). Most notable for broad purpose language were Iowa’s 1847 act (allowing incorporation of “any business which may be the lawful subject of a general partnership, including the establishment of ferries, the construction of railroads, and other works of internal improvement”); Minnesota’s 1858 act (allowing incorporation for “transaction of any lawful business”); Nebraska’s 1864 act (allowing incorporation for “any lawful business”); Oregon’s 1862 act (allowing incorporation for “any lawful enterprise, business, pursuit, or occupation”); Arkansas’ 1869 act (authorizing incorporation “for . . . engaging in, or carrying on, any kind of manufacturing, mechanical, mining or other lawful business”); and Arizona’s 1866 act (providing incorporation for “any lawful enterprise, business, pursuit, or occupation”). *Id.* at 102 nn.85–86, 104 n.94.

92. *Id.* at 106 n.97. For example, New York’s 1875 act allowed incorporation of “any lawful business except banking, insurance, [and] the construction and operation of railroads” and New Jersey’s 1876 act allowed incorporation “to carry on any lawful business or purpose whatever.” *Id.*

93. *Id.* at 106.

or “not-for-profit.”<sup>94</sup> In 1874, Pennsylvania passed a general incorporation law that divided corporations into three categories: religious corporations, which were exempt from property taxes; for-profit corporations, which were taxable; and non-profit corporations, which were tax-exempt.<sup>95</sup> As historian Jonathan Levy has observed, “This was a new classification of corporate identity.”<sup>96</sup> While the utility of the purpose clause as a coordinating mechanism waned as broad and generic statements became permissible, this function was not altogether lost as new categories arose.

And thus by the late 1880s, when New Jersey famously passed groundbreaking legislation allowing corporations greater flexibility, such as to own stock in other corporations, the evolution to general purpose clauses was already largely underway.<sup>97</sup> Ultimately, to fully rid themselves of the corruption problem in special chartering, states adopted provisions in their constitutions that prohibited issuing corporate charters through special legislation.<sup>98</sup>

### B. *The Rise of Corporate Brands, Missions, and Purposes*

In the typical telling of the move to general incorporation and generic statements of corporate purpose, the story quickly moves along to the contemporary moment in which corporate law is perceived to be broadly enabling of private purposes and to impose a shareholder primacy norm.<sup>99</sup> In

94. Levy, *supra* note 28, at 218–19.

95. *Id.* at 218.

96. *Id.*

97. See Hamill, *supra* note 77, at 116 (explaining that “the New Jersey legislature removed many restrictions from its general incorporation statute” in the late nineteenth century). See also Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 109, 113 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (describing how, after the Civil War, “states began to liberalize their incorporation statutes, with an eye toward attracting firms to incorporate in their state”); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836–1937*, at 257–58 (1991) (describing New Jersey’s holding company statute, New York’s 1892 act, and states such as Delaware that followed in further liberalizing their general incorporation laws); Hennessey & Wallis, *supra* note 62, at 91–93 (describing how states in the 1880s and 1890s “began addressing the problem of narrow options by widening the choice of organizational forms available to businesses and municipalities, but doing so in a way that kept the solution to the corruption problem intact”).

98. Hilt, *supra* note 50, at 54. See also Hamill, *supra* note 77, at 87 (“For many states, the period between the enactment of the first general incorporation law and the prohibition of incorporation by special charter, often referred to as dual incorporation or dual period, extended for many years, sometimes exceeding fifty.”).

99. The latter notion, that corporate law imposes a shareholder primacy norm, is a matter of longstanding controversy and often framed as central to the corporate purpose debate. See, e.g., Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 *WAKE FOREST L. REV.* 135, 136, 155 (2012) (arguing that observers have struggled to accept that “corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders”). See also Joan MacLeod Heminway, *Shareholder Wealth*

between, however, there was a great flourishing of corporate brands, missions, and social aims. Taking a broad view, we might think of these developments as new ways that corporations began to communicate their values and purposes once the purpose clause in the corporate charter lost much of its specificity and public character.

Corporate brands and mass marketing began to emerge in the mid-nineteenth century, around the time that many states started to shift from special chartering to general incorporation laws. This was not happenstance. Margaret Blair has explained that “[a]s corporations emerged to organize large scale manufacturing, transportation, and wholesale and retail trade, business people working in these corporations devised ways to market their products to customers across great geographic, social, and economic distances.”<sup>100</sup> With railroads linking different regions, for example, markets for many types of goods became impersonal. Customers no longer knew the people who produced goods in the marketplace and so might have questioned the products’ quality and safety.<sup>101</sup> Branding solved this issue:

Where corporations make and sell mass produced branded products in many markets . . . the customer often comes to trust the branded product first, and soon develops confidence in the competence and ethics of individuals involved in making and selling the products without knowing them personally because they are employed by the corporation and identified with its brand.<sup>102</sup>

Branded goods—such as Heinz, Campbell Soup, Coca-Cola, and Quaker Oats—had the potential to communicate to customers, employees, and investors about the quality and values of the corporation that produced them. The intangible aspects of branded goods and the associations and expectations they create for a corporation are, of course, different than a formal legal statement of purpose in a charter. They do not restrict a corporation’s activities or create legally binding governance commitments. Their value depends on the ongoing actions and contributions of corporate managers and employees.<sup>103</sup> Yet, brands could nonetheless attach to an

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*Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 940 (2017) (highlighting that academics, lawyers, and judges have taken various views of the shareholder wealth maximization norm, characterizing it as nonexistent, oversimplified, or a simple fact).

100. Blair, *supra* note 11, at 810.

101. *Id.* at 811 (“In a market of individual producers and shops, customers trust the quality of the meat, bread, and candles because they trust the competence and honesty of the individual butchers, bakers, and candlestick makers.”).

102. *Id.*

103. *Id.* at 813.

identifiable corporate persona and form a basis around which stakeholders and shareholders could coordinate their activity.<sup>104</sup>

The corporation as a public–private collaboration also continued, but this too increasingly appeared outside the four corners of the corporate charter. Corporations, and the business magnates who became wealthy from them, began to engage in social initiatives, philanthropy, and other activities that eventually became known as corporate social responsibility.<sup>105</sup> Starting in the Industrial Revolution, and with the emergence of large factory systems, a welfare movement concerned with employee well-being pushed some companies to create hospital clinics, recreational facilities, and profit-sharing programs.<sup>106</sup> Business leaders and so-called robber barons, such as Cornelius Vanderbilt and John D. Rockefeller, were generous patrons of the arts, endowers of educational institutions, and supporters of various community projects.<sup>107</sup> Many of these endeavors were in their individual capacities, but the connection to their business empires raised one of the major issues of the day—whether limited charter powers and a conception of managers as trustees of shareholders’ property could create a legal basis for *corporate* philanthropy.<sup>108</sup> Some companies, such as the R. H. Macy Company in New York, had already begun rendering assistance to social agencies in the community by the 1870s.<sup>109</sup>

The emergent classification of the “non-profit” sector also appeared in the late nineteenth century and, despite the splintering of categories, maintained connections to its for-profit parallel.<sup>110</sup> Andrew Carnegie and John D. Rockefeller, for example, created non-profit corporations through which they pursued various philanthropic and social endeavors.<sup>111</sup> The

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104. *See id.* at 812–13 (noting that brand can attach to the corporate entity and create value that can extend “across time and space” for numerous employees and customers who identify with the firm, its products, and with each other).

105. *See* Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 20, 20–23 (Andrew Crane et al. eds., 2008) (describing social initiatives originating in the Industrial Revolution and corporate philanthropy beginning in the mid-to-late 1800s).

106. *Id.* at 21.

107. *Id.*

108. *Id.*

109. *Id.* at 22. Other examples include the YMCA movement that began in the 1840s and spread to the United States, and subsequently the “community chest movement.” *Id.* at 22–23.

110. Levy, *supra* note 28, at 217; Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600–2000*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 32, 37 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006); Jonathan Levy, *Altruism and the Origins of Nonprofit Philanthropy*, in *PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES* 19, 22 (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016); Stanley N. Katz, Barry Sullivan & C. Paul Beach, *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777–1893*, 3 *L. & HIST. REV.* 51, 51 (1985).

111. Levy, *supra* note 28, at 219.

Rockefeller Foundation's 1913 charter articulated its purpose as promoting "the well-being of mankind throughout the world."<sup>112</sup> As reflected in this example, the purposes of some non-profits became increasingly open-ended, culminating in the "general purpose foundation."<sup>113</sup> This development not only paralleled the evolution to the open-ended for-profit purpose clause, but in many instances these foundations also represented the philanthropic arm of a business corporation or its founder. Whereas during the early American period, the quasi-public purpose of the business corporation could be found in its charter, during the late-nineteenth and early-twentieth centuries this began to be found in the charters of related non-profits.

A closer analogue to the charter's purpose clause also emerged later with the advent of corporate mission statements. The term "mission" was reportedly first used by Jesuit monks, and subsequently in other religious settings and the military, before finding its way into the business lexicon in the mid-twentieth century.<sup>114</sup> A "mission statement" became understood as expressing "the fundamental purpose specific to an organisation."<sup>115</sup> By 1973, Peter Drucker wrote: "A business is not defined by its name, statutes, or articles of incorporation. It is defined by the business mission. Only a clear definition of the mission and purpose of the organization makes possible clear and realistic business objectives."<sup>116</sup>

By the 1980s, mission statements became widely used in corporations as part of the strategic management process.<sup>117</sup> Philosophies on how they should be formulated and used started to blossom, and business research on their role and impact on employees, stakeholders, and firm performance grew steadily.<sup>118</sup> Some models for developing mission statements involved

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112. *Id.*

113. *Id.*

114. Aurel Brudan, *Mission Statements as Strategic Management Tools—A Brief History*, PERFORMANCE MAGAZINE (June 26, 2010), <https://www.performancemagazine.org/mission-statements-as-strategic-management-tools-%E2%80%93-a-brief-history/> [<https://perma.cc/XBE3-YMWF>].

115. *Id.*

116. Fred R. David, *How Companies Define Their Mission*, 22 LONG RANGE PLAN. 90, 90 (1989) (quoting Peter Drucker).

117. Inés Alegre, Jasmina Berbegal-Mirabent, Adrián Guerrero & Marta Mas-Machuca, *The Real Mission of the Mission Statement: A Systematic Review of the Literature*, 24 J. MGMT. & ORG. 456, 461 (2018); Brudan, *supra* note 114.

118. *See, e.g.*, Mohammad Taghi Alavi & Azhdar Karami, *Managers of Small and Medium Enterprises: Mission Statement and Enhanced Organisational Performance*, 28 J. MGMT. DEV. 555, 561 (2009) (finding that there is "a significant and positive correlation" between firm performance and having a written mission statement); Christopher Kenneth Bart & Mark C. Baetz, *The Relationship Between Mission Statements and Firm Performance: An Exploratory Study*, 35 J. MGMT. STUD. 823, 827 (1998) (explaining that commonly mentioned performance benefits associated with mission statements include: (1) better staff and managerial motivation toward achieving a common purpose, and (2) a more focused use of corporate resources); Jerome H. Want,

multiple components, including identification of the corporation's target customers, principal offering, geographic markets, core technologies, self-concept, commitment to survival, growth, and profitability, and concern for public image and employees.<sup>119</sup>

Harkening back to the connection between the self-governance and purpose provisions in early corporate charters, the rise of mission statements suggests there is an operational need for an articulated purpose around which corporate participants can coordinate their activity. It is also possible that corporations have multiple purposes or objectives and mission statements comfortably fit a managerial need or intuition to focus strategy on the company's "essential subsystems."<sup>120</sup> Researchers have found, however, that the publicly available mission statements of U.S. public companies tend to be "platitudes" and "rife with clichés."<sup>121</sup> They often lack specific, measurable goals and fail to provide direction for the corporation's efforts or differentiation from competitors.<sup>122</sup>

Some companies have nonetheless become widely known for their missions that closely align with their corporate brand. One of the best-known examples is Ben & Jerry's, incorporated in 1977 by its two eponymous founders. Early on, the ice-cream makers adopted a social mission to pursue the "double bottom line" and prioritize not only profits but also communities, employees, and the environment.<sup>123</sup> The purpose clause in the company's charter did not refer to this social mission, stating that its purpose was:

[t]o engage in the production, manufacture, and distribution, at both wholesale and retail, of ice cream . . . together with other food and beverages . . . [and] carry on any other lawful business whatsoever in connection with any of the foregoing or which is calculated directly or indirectly to promote the interests of the Corporation . . . .<sup>124</sup>

Years later, in 2000, when the multinational conglomerate Unilever acquired Ben & Jerry's, the company amended its charter to include an even more streamlined, standard purpose clause: "The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be

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*Corporate Mission*, 75 MGMT. REV. 46, 47 (1986) (emphasizing the importance of mission development to effective firm performance).

119. John A. Pearce II & Fred David, *Corporate Mission Statements: The Bottom Line*, 1 ACAD. MGMT. EXECUTIVE 109, 109 (1987); David, *supra* note 116, at 192.

120. Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 610, 619–20 (2018).

121. Lance Leuthesser & Chiranjeev Kohli, *Corporate Identity: The Role of Mission Statements*, 40 BUS. HORIZONS 59, 61, 65 (1997).

122. *Id.* at 65.

123. George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1377; Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 219–21 (2010).

124. Mocsary, *supra* note 123, at 1377–78.



organized under the Vermont Business Corporation Act.”<sup>125</sup> Notably, Ben & Jerry’s simultaneously adopted a lengthy mission statement, which provided in part: “We have a progressive, nonpartisan social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our day-to-day business activities. Our focus is on children and families, the environment, and sustainable agriculture on family farms.”<sup>126</sup> Despite criticism at times for some changes in its practices, the company, run as a subsidiary of Unilever, has continued to engage in a wide range of activities reflecting this social mission.<sup>127</sup>

Another example of a company known for its mission is Hobby Lobby, a closely held corporation that operates a nationwide chain of arts and crafts stores. Hobby Lobby’s stock is co-owned by five family members.<sup>128</sup> Its charter includes a seventeen-paragraph purpose clause that extensively recites various types of business in which the corporation could engage and language authorizing the pursuit of “any . . . lawful business . . . calculated directly or indirectly to promote the interest of the Corporation or to enhance the value of its property.”<sup>129</sup> The charter does not refer to religion or a religious purpose.<sup>130</sup> Instead, the company has publicized a separate, non-binding “statement of purpose” providing that “the *Board of Directors* is committed to . . . [h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.”<sup>131</sup> It provides several other points, including the “commit[ment] to . . . [p]roviding a return on the owners’ investment, sharing the Lord’s blessings with our employees, and investing in our community.”<sup>132</sup> Hobby Lobby takes other actions, also outside of its formal corporate documents, to communicate this mission, such as buying full-page newspaper ads that invite people to “know Jesus as Lord and Savior.”<sup>133</sup>

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The changing practices for corporate purpose clauses reflected, and helped shape, the great transformation of U.S. business corporations in the nineteenth century. Pressed by powerful business interests and driven by desires to combat political corruption, promote economic growth, and reduce

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125. *Id.* at 1378 n.313.

126. *Id.* at 1378.

127. Page & Katz, *supra* note 123, at 242–48.

128. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 702–03 (2014).

129. Mocsary, *supra* note 123, at 1379–80.

130. *Id.* at 1380.

131. *Id.* (emphasis added); *Hobby Lobby*, 573 U.S. at 703.

132. Mocsary, *supra* note 123, at 1380.

133. *Hobby Lobby*, 573 U.S. at 703.

administrative burdens, states adopted waves of legislation shifting the system from special chartering to general incorporation.

With these changes emerged new practices as corporations found novel ways of communicating with stakeholders and shareholders about their values, purposes, and missions. Notions of corporate purpose as a matter of business and law proliferated, untethered to legal expression through the corporate charter. Ultimately, as purpose clauses lost their specificity, fiduciary duty doctrine also evolved, as courts asked not whether the corporate fiduciary was faithfully pursuing the articulated purpose but instead whether they pursued the interests of the corporation and its shareholders.<sup>134</sup> Subsequently, the twentieth-century debate about “corporate purpose” centered on these emerging themes of the fiduciary duties owed by directors to shareholders and the developing issues of corporate philanthropy and social responsibility.<sup>135</sup>

### III. The Modern Revival of the Purpose Clause

Amidst the great changes discussed in the previous Part, the purpose clause of the corporate charter became a subject of diminished interest. As a measure of perceived irrelevance, since the turn of the twentieth century, only a small number of law review articles have focused on the topic of purpose clauses in U.S. business corporation charters—one of the most recent is several decades old and argues for abolishing their compulsory inclusion.<sup>136</sup>

Yet, as this Article aims to show, the purpose clause has enduring relevance even as the debate on corporate purpose shifts because it remains a tool for coordinating long-term ventures and associations, and it still

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134. See Ciepley, *supra* note 4, at 73–74 (describing the shift from corporate directors as purpose fiduciaries to shareholder primacy); Miller & Gold, *supra* note 25, at 536–38 (describing how business corporations can be understood to implicate “fiduciary governance,” in which duties are owed to fulfilling the corporation’s purpose, or “service governance,” in which duties are owed to shareholder beneficiaries); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 279 (1998) (describing how the shareholder primacy norm was first used by courts to resolve disputes among majority and minority shareholders).

135. See *supra* note 1.

136. Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN’S L. REV. 476, 477 (1984). For a perspective on the purpose clause in Chinese charters, see generally Li-Wen Lin, *Say on Purpose: Lessons from Chinese Corporate Charters*, 19 J. CORP. L. STUDIES 251 (2019). Scholarly and practice-oriented literature reflects enduring use and focus on purpose clauses in nonprofit corporation charters, LLCs, and partnerships. See, e.g., Johnny Rex Buckles, *Curbing (or Not) Foreign Influence on U.S. Politics and Policies Through Federal Taxation of Charities*, 79 MD. L. REV. 590, 622–23 (2020) (describing norms of obedience to corporate purpose in nonprofit charters); Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections?*, 42 J. CORP. L. 503, 542 (2017) (finding that over half of Delaware and New York operating agreements in a sample study narrowed the LLC’s business purpose); Thomas E. Rutledge, *Purpose: If You Do Not Know Where You Are Going, How Will You Know If You Have Arrived*, 20 J. PASSTHROUGH ENTITIES 37, 37–39 (2017) (discussing the practice of narrowing purpose clauses in LLC and partnership organic documents).

reflects the public–private collaboration that is at the heart of the corporate enterprise. This final Part examines two contemporary illustrations of these points—the duty of good faith and the benefit corporation form.

A. *Rediscovering the Public Aims of the Purpose Clause through the Duty of Good Faith*

As a result of the general incorporation movement, states enabled chartering a for-profit corporation without specification as to its activity, subject to the requirement that it be for a lawful purpose.<sup>137</sup> Delaware’s General Corporation Law provides, for example: “A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.”<sup>138</sup> The vast majority of corporations have adopted broad, boilerplate purpose clauses, or use the “any lawful purpose” language.<sup>139</sup>

As noted, scholars and commentators sometimes take this allowance for great freedom of operation without specification as a sign that the clause is meaningless.<sup>140</sup> Although states got rid of the requirement of listing specific corporate powers and purposes, they did not, however, dispense with the clause entirely or the requirement that the corporation’s purpose be “lawful.”<sup>141</sup> As Kent Greenfield has recounted, even the strongest proponents for ending the ultra vires doctrine assumed that corporations would be chartered only for lawful purposes and would not have authority to commit acts “repugnant to law.”<sup>142</sup> There is a long history of understanding that corporations may not act contrary to the charter or the law of the land.<sup>143</sup> And, as I have pointed out elsewhere, although the statutes typically refer to the

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137. Some variation in statutory language exists across states. Schaeftler, *supra* note 136, at 476 n.1.

138. DEL. CODE ANN. tit. 8, § 101(b) (2019–2020).

139. Schaeftler, *supra* note 136, at 483.

140. *See, e.g., id.* at 481 (“Since the demise of the ultra vires doctrine, the purpose clause ostensibly now serves to define the scope of management’s authority rather than corporate capacity. Nevertheless, the relationship between corporate management’s desire to discern the extent of its authority and the existence of a publicly filed purpose clause is tenuous at best.”).

141. Greenfield, *supra* note 48, at 1316; Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 710, 719–20 (2019).

142. Greenfield, *supra* note 48, at 1316 (quoting Professor Robert Stevens’s proposal in 1927 for a uniform act that would discontinue the ultra vires doctrine).

143. *See, e.g., Bilder, supra* note 5, at 508–09 (discussing “the colonial American practice of bounded legislation under a repugnancy standard” and arguing that the “Founding generation presumed a practice of constitutional judicial review as an outgrowth of the experience of constraining corporate and colonial legislation by the laws of the nation”); Bowie, *supra* note 5, at 1417–18 (noting the Massachusetts Bay Company charter prohibited the corporation from imposing laws or punishments “contrarie or repugnant to the lawes and statut[e]s of this our realme of England” and entitled Britons living under the corporation’s jurisdiction to “all liberties and immunities of free and natural subjects...within the realme of England”).

granting of charters for a lawful purpose, courts and commentators have interpreted the language to broadly refer to an ongoing obligation of lawful business operation.<sup>144</sup> Unlawful acts become subject to the enforcement powers of corporate law in addition to governmental or private entities charged with enforcing the underlying law.<sup>145</sup>

Stemming from this statutory language regarding chartering corporations for a lawful purpose, courts have held corporate fiduciaries to the dual requirements of legal obedience and oversight as part of their duty of good faith.<sup>146</sup> These obligations serve a public function.<sup>147</sup> Directors may not, consistent with their fiduciary obligations, choose to violate the law even if they believe it will benefit the corporation or its shareholders.<sup>148</sup> The requirement of fidelity to the law aims to protect society's interests and, in that way, echoes early American corporate charters that used specific articulations of corporate purpose to direct businesses' energies toward quasi-public purposes.

Recent developments in the corporate oversight doctrine further reflect this understanding of public expectations on corporate directors. Under current law, a failure to make a good faith effort to put in place a board-level system of monitoring and reporting for legal compliance constitutes a breach of the duty of loyalty.<sup>149</sup> This obligation has spurred corporations and their boards of directors to develop compliance programs that aim to monitor and prevent activity outside the bounds of lawfully permissible activity.<sup>150</sup> And Delaware courts have finally started to show that their jurisprudence on oversight liability—known as the *Caremark* doctrine—actually has some bite. From recent cases involving food safety regulations to clinical trial protocols for drug development, courts have displayed a critical eye in

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144. Pollman, *supra* note 141, at 721.

145. Greenfield, *supra* note 48, at 1281–82.

146. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006); *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006). *See also* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2044–45 (2019) (examining the body of Delaware law concerning the oversight and obedience aspects of the duty of good faith).

147. Pollman, *supra* note 146, at 2026.

148. *Id.*

149. *In re Caremark Intl. Inc.*, 698 A.2d 959, 967, 969–70 (Del. Ch. 1996); *Stone*, 911 A.2d at 370; *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019).

150. Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMPLE L. REV. 727, 728 (2013) (“Since [*Caremark*], compliance has grown in size, scope, and stature at nearly all large corporations.”). *See also* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 967 (2009) (“[L]awyers and compliance providers responded to *Caremark* by expanding the level of services available to help directors ensure that proper systems were in place to prevent and detect criminal violations.”); Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 681 (2018) (arguing *Caremark* has been “extremely influential” in getting corporations to “spend considerable amounts of time and money ‘complying’ with what are now called *Caremark* duties”).

reviewing claims that directors have consciously failed to carry out their public-regarding responsibility.<sup>151</sup>

*B. Redesigning the Purpose Clause for Benefit Corporations*

Another reflection of the enduring relevance of the purpose clause has arrived with the new social enterprise forms of the twenty-first century, most notably the benefit corporation. Social entrepreneurs have catalyzed state legislatures across the country to offer the specialized legal form that enables the dual pursuit of profit and social purpose.<sup>152</sup>

The key distinctive feature of the benefit corporation is that it must have a corporate purpose stated in its charter that incorporates the specific type of benefits listed in the statute.<sup>153</sup> Central to the design of benefit corporations is thus an embrace of using the purpose clause to express specific values and objectives, somewhat akin to historical practices, yet without the concerns about inefficiency and corruption that led to reform of special chartering.

Many states have adopted model legislation drafted by the non-profit proponent of the benefit corporation form, B Lab, which requires creating a “general public benefit,” defined as a “material positive impact on society and the environment, taken as a whole.”<sup>154</sup> The model legislation also permits a benefit corporation to additionally have a “specific public benefit” and gives examples such as “improving human health,” “promoting economic opportunities for individuals or communities beyond the creation of jobs,” and “promoting the arts, sciences, or advancement of knowledge.”<sup>155</sup>

Delaware has adopted its own public benefit corporation statute, which requires identifying in the charter “one or more specific public benefits to be promoted by the corporation” in addition to the general public benefit purpose.<sup>156</sup> It defines “public benefit” to mean “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities

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151. *Marchand*, 212 A.3d at 821–23; *In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 WL 4850188, at \*10 (Del. Ch. Oct. 1, 2019). For a discussion of how boards can integrate employee, environmental, social, and governance factors into their corporate compliance responsibilities, see 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*, IOWA L. REV. (forthcoming) (manuscript at 2–4), [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=3664021](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3664021) [<https://perma.cc/SN85-CARH>].

152. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 683 (2013).

153. See Heminway, *supra* note 99, at 965 (noting benefit corporation statutes only cover firms with a corporate purpose that meets statutory requirements).

154. MODEL BENEFIT CORPORATION LEGISLATION §§ 102, 201 (B LAB 2017), <https://benefitcorp.net/attorneys/model-legislation> [<https://perma.cc/RX6G-DTW5>].

155. *Id.* § 102.

156. DEL. CODE ANN. tit. 8, § 362(a)(1) (2021).

or interests (other than stockholders in their capacities as stockholders).”<sup>157</sup> The requirement of stating a specific public benefit was seemingly intended to provide a focus for the board—a “counterweight to the strong pull of shareholder primacy”—and to give investors notice of, and some control over, the public purposes that the corporation serves.<sup>158</sup>

Although approaches to purpose taken by these statutes may be broad and vague,<sup>159</sup> and benefit corporations have followed in turn by adopting clauses that suffer from the same flaws,<sup>160</sup> the underlying effort to revive corporations expressly serving public and private aims is clear. Corporate purpose is central to the benefit corporation model across various states’ approaches—and specifically the use of express statements in the corporate charter.<sup>161</sup>

However imperfect the result, it is notable that the purpose clause was the tool that social entrepreneurs wanted to use to try to create credible commitments around which investors, employees, and customers could coordinate their activity.<sup>162</sup> Although charters can be changed, they have legal import, and their amendment requires formal action by the board of directors and the shareholders—thus leading benefit corporation advocates to view purpose clauses as a means of encoding social aims into the DNA of the company. Mission statements might similarly reflect values beyond the pursuit of profits, but they do not convey the weight of a legal commitment in the manner achieved by expressing such purpose in the constitutional document of the corporation. Likewise, corporate philanthropy can provide important support for social aims, but it is a discretionary expense that may be easily altered in contrast to an ongoing obligation embedded in the charter to operate the business in pursuit of specified public benefits.

157. *Id.* § 362(b).

158. Frederick H. Alexander, *Putting Benefit Corporation Statutes into Context by Putting Context into the Statutes*, 76 *BUS. LAW.* 109, 139 & n.126 (2020).

159. See John Tyler et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 *QUINNIPIAC L. REV.* 235, 288 (2015) (arguing that “approaches to purpose taken by corporate hybrid forms are extraordinarily broad, and vague, about how purposes relate to each other, and thus susceptible to financial profit motives overtaking or at least being on par with social purposes”).

160. See Jill E. Fisch & Steven Davidoff Solomon, *The “Value” of a Public Benefit Corporation*, in *RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD* (Elizabeth Pollman & Robert B. Thompson eds.) (forthcoming 2021) (manuscript at 2) (examining a sample of the most economically significant PBCs and finding that their purposes statements are “in most cases, too vague and aspirational to be legally significant, or even to serve as a reliable tool for evaluating whether corporate decisionmakers are adhering to the PBC’s social mission”).

161. Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 *SEATTLE U. L. REV.* 611, 619–21 (2017).

162. COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* 29–30 (2013); Bart Houlahan, Andrew Kassoy & Jay Coen Gilbert, *Benefit Corporations and the Firm Commitment Universe*, 40 *SEATTLE U. L. REV.* 299, 300 (2017).

History suggests that the purpose clause in the benefit corporation will continue to be the basis of experimentation and evolution. The inherent tension between creating commitments and protecting flexibility runs from the time of special chartering corporations with a quasi-public purpose and the era of the ultra vires doctrine to general incorporation and the flourishing of intangible brands and mission statements. The greater specificity of commitment, the greater potential for focus and accountability; however, this may come at the expense of flexibility, as we see from the history of corporations in the nineteenth century that pushed against the constraints of their charters. Corporations often embraced the freedom to state their purposes with generality, particularly as the prevalence of consumer cooperative-like business corporations declined and as manufacturing and industrial corporations sought to provide products and services across greater expanses. Whether benefit corporations can achieve a balance in their purpose clauses between meaningful commitment and productive flexibility remains to be seen in the modern era, as does the success of the broader experiment of this form of social enterprise.

#### Conclusion

Throughout corporate history, charters have contained purpose clauses. Early corporate charters often included provisions for self-governance and specific expressions of corporate purpose that served as a coordinating mechanism for participants. The expression of purpose in early corporate charters often additionally reflected collaboration between what we now think of as public and private spheres. Corporations were vehicles for entrepreneurial action that often served broader social aims and engendered heated public debate. Although corporate chartering practices have evolved in significant ways over the past two centuries, corporate purpose clauses have remained an important reflection of public-private collaboration.

The modern practice of allowing corporations to broadly state their purpose as pursuing “any lawful activity” still reflects a public-regarding limit on corporate activity, as contemporary case law on the fiduciary duty of good faith recognizes. Further, the longstanding requirement of stating a purpose in the corporate charter has laid the groundwork for a contemporary revival in its use by corporations as a mechanism for creating and coordinating commitments to pursue public benefits. The purpose clause has enduring relevance even as new practices and understandings of corporate purpose have emerged in business and law.