Introduction

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In 2011, Starbucks CEO Howard Schultz declared that it was "no longer enough" for companies to serve shareholders, but that companies have a responsibility, even a duty, "to serve the communities where we do business by helping to improve" aspects of citizens' daily lives.[1] Shortly thereafter, in 2012, it was revealed that Starbucks had paid only £8.6m in taxes in the United Kingdom on £3bn of sales since 1998, a practice that its UK CEO said "didn't bother [him] at all."[2]

The dichotomy of the Starbucks example serves to highlight the lack of understanding surrounding what a company is and what its purpose should be. Is a company, as Schultz opines, duty bound to improve aspects of citizens' lives or is it, as his UK colleague suggests, an entity that can – and perhaps should – minimize or even circumvent tax obligations, as a means of improving its bottom line, with a clear conscience?

Indeed, the struggle to define the company is not new. Since its origin in medieval times as vehicles by which governments could grant institutional status to universities to their modern incarnation as transnational bodies that traverse nations, the company remains an important, yet highly misunderstood entity. Understanding the company (or, as it is commonly referred to in US parlance, *corporation*),[3] what its rights and duties are, and to whom it should be accountable – as the Starbucks example serves to remind – remains a persistent and enduring debate.

[1] Howard Schultz, "Invest in Communities to Advance Capitalism," *Harvard Business Review* (October 17, 2011), available at https://hbr.org/2011/10/ceos-should-invest-in-communit.

[2] "We won't pay normal UK tax until 2017 – Starbucks CEO," *Financial Director*, (December 4, 2014), available at www.financialdirector.co.uk/financial-director/news/2384484/-we-won-t-pay-normal-uk-tax-until-2017-starbucks-ceo.

[3] In this book, the terms "company" and "corporation" will normally be used interchangeably and we did not edit the chapters to achieve uniformity in this regard. References to the "company" or "corporation" thus do not necessarily mean that an author refers to a specific jurisdiction.

However, with society operating increasingly under the dominance of businesses and businesses being exposed to increasingly dense regulation, it has become more imperative than ever to understand the modern company and its function and place in society. In recent years, the hazards of defining companies and their purpose too narrowly have become apparent. Thus, the view of the company as primarily an economic vehicle is thought to have contributed to short-termism and excessive risk-taking, which contributed to the rise of the last financial crisis. At the same time, an understanding of the company as a public body has, in some instances, stifled the entrepreneurial spirit and competition necessary for economic growth. Even an attempt to reach a compromised view on defining the company, such as in section 172 of the UK's 2006 Companies Act, has raised more questions than it answered.[4]

A failure to understand what the company is has further impacted contemporary rules on corporate liability.[5] This is because courts have been unable to disentangle themselves from the lingering effects of ancient theoretical notions that a company is an aggregate, a real person, a fiction or something else entirely. Longstanding discussions and struggles in this area have also complicated fundamental questions of corporate and corporate governance law, which remain unsettled and in flux.

Understanding the company, therefore, continues to be a modern mystery and a question in need of an answer. This book tackles important aspects of this question by engaging in three main research questions. First, it aims to discover what a company is by employing a historical review of the development of corporate theories as well as by exploring modern corporate theories. Corporate theories can help elucidate the nature of the company as they define the company's roles and functions. This can then provide a basis by which to consider related issues, such as those considered in the further research questions.

Second, it examines what types of rights and duties companies have and should have. Having better understood the nature, role and function of a company, it becomes easier to ascertain whether this nature or role gives rise to certain rights for the company as well as any obligations.

Finally, it explores the means and ends of corporate governance. Thus, it examines the structure of corporate decision-making and seeks to clarify the corporation's beneficiaries.

[4] See, e.g., A. Keay, "Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model" (2008) 71:5 *Modern Law Review* 663.

[5] See, e.g., *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

What Is the Nature of the Company?

Despite the persistent debate over the nature of a company, attempts to define the "firm" are longstanding. Since Roman and medieval times, scholars have attempted to capture the nature or characteristics of what today are companies and other legal or business entities. In the nineteenth century the discussion gained intensity and, with some periods of relative "calm" in this regard, flared up again in recent years. In some jurisdictions, including the United Kingdom and Continental European civil law countries, scholars and courts have largely given up on trying to define the "nature of the firm." Still, the law in this regard remains often shaped by historical oddities but – apart from occasional complications, including the difficulties in holding companies criminally liable – there is now a stable and pragmatic arrangement with the status quo.

Conversely, in the United States, the Supreme Court's 2010 decision in *Citizens United*[6] and its 2014 decision in *Hobby Lobby*[7] have sparked a new wave of controversy and academic explorations in this regard. Although the Supreme Court had no intention of – and indeed tried to avoid – shaping the theory of the firm, these decisions, nevertheless, re-ignited the debate through their support of corporate rights and the court's varying perceptions of the corporation. In some ways, it is curious that corporate theory came to the forefront in the above-mentioned cases, which were mainly concerned with constitutional law and related statutory rights. But what is even more striking is that the US Supreme Court decided the cases based on antiquated corporate theories, suggesting the need for clarification and progress in this area.[8]

Two Schools of Thought

Today, discussions on the nature of the firm tend to begin based on one of two schools of thought: the nexus of contracts model or the stakeholder model. Both these theoretical perspectives, and those that derive from them, provide a lens through which the company can be viewed and therefore may provide answers on related issues such as corporate purpose and the role of a company.

[6] *Citizens United*, above n 5.
[7] *Hobby Lobby*, above n 5.
[8] See Martin Petrin's contribution in this book, "A Balancing Approach to Corporate Rights and Duties." See also E. Pollman, "Corporate Law and Theory in Hobby Lobby" in M. Schwartzman, C. Flanders, and Z. Robinson *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016) p. 149.

The first of these competing theories, the nexus of contracts model, describes the corporation as a bundle of formal and informal "contractual" relationships between various constituencies, which act together to produce goods and services and thus form a "firm."[9] Far from being a "new" invention,[10] the nexus of contracts theory has, in many academic circles, become a dominant approach by which to conceptualize today's corporations.[11]

Intertwined with law and economics approaches to corporate law, the nexus of contracts view of the firm emphasizes the private nature of corporations and corporate regulation. It sees corporate law primarily as a tool by which to provide "contracting" parties with a set of off-the-rack terms, thereby saving or reducing the cost of negotiating and contracting individually. On a normative level, the model suggests that the parties involved should also be able to change the default provisions as they see fit. Of course, this means that mandatory legal rules that govern corporations or the relationships within the "nexus" are difficult to reconcile with the model, despite the fact that such rules have grown heavily in the past years and decades. In addition, the nexus of contracts theory is traditionally associated with shareholder primacy and shareholder value maximization – the notion that shareholder interests take precedence over other stakeholders' interests – as well as the view that corporations do not bear any social or moral duties. At the same time, however, the contractarian view accepts that the role of shareholders in the modern corporation is a relatively passive one, which is seen as justified from a cost–benefit perspective.

Conversely, stakeholder theory focuses on the idea that companies owe duties, not only to shareholders but also to a variety of other corporate constituents as additional stakeholders. The reasons for this conclusion are varied, and unlike the nexus of contracts theory model do not draw from a unified theory.

Some possibilities for the justification of companies having to take into account the interests of stakeholder are by viewing it as a social or

[9] The director primacy theory elegantly extends this idea stating that the guiding idea is not that the firm *is* a nexus of contracts, but that it *has* a central nexus, the board of directors. S.M. Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 *Northwestern University Law Review* 547 at 554–60.

[10] The theory, which can be traced to Ronald Coase and other economists, emerged around the 1970s.

[11] An outline of the theory can be found, for example, in F.H. Easterbrook and D.R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) p. 12.

public institution,[12] for reasons of morality,[13] due to the need to maximize social welfare,[14] because otherwise shareholders could inflict harms on stakeholders,[15] or because the "legal, economic, political and moral challenges" to the current nexus of contracts view of the firm require it.[16]

Despite the lack of a unified underlying theory, stakeholder theorists generally arrive at three conclusions. First, that there is a need for a company to consider the interests of stakeholders; second, that wealth maximization should not be an overriding concern guiding corporate decision-making;[17] and third, that corporate decision-making should balance the interests of all stakeholders, including shareholders, against each other.[18]

Of course, not all corporate theories neatly fit into either of these two categories. For instance, the enlightened shareholder value paradigm, which underlies contemporary UK company law, derives from stakeholder theory, but introduces the prioritization of shareholder interests over stakeholder interests, a practice not found in stakeholder theory.[19] Similarly, the well-known "Team Production" theory is a modification of the "nexus of contracts" view of companies but one that deviates from a contractarian view by introducing the notion that corporate managers should consider the interests of all stakeholders who have made firm-specific investments.[20]

[12] A.A. Berle, Jr. and G.C. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World, Inc., 2nd ed. 1968) p. 46; T.L. Hazen, "The Corporate Persona, Contract (and Market) Failure, and Moral Value" (1991) 69 *North Carolina Law Review* 273 at 309; D.K. Millon, "New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law" (1993) 50 *Washington and Lee Law Review* 1373 at 1379.

[13] W. Bradford, "Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights" (2012) 26 *Notre Dame Journal of Law, Ethics and Public Policy* 141, 148.

[14] K. Greenfield, "Defending Stakeholder Governance" (2008) 58 *Case Western Reserve Law Review* 1043 at 1055.

[15] R.M. Green, "Shareholders as Stakeholders, Changing Metaphors of Corporate Governance" (1993) 50 *Washington and Lee Law Review* 1409, 1417.

[16] R.E. Freeman, "A Stakeholder Theory of the Modern Corporation" in T.L. Beauchamp and N.E. Bowie (eds.), *Ethical Theory & Business* (Upper Saddle River: Prentice Hall College Division, 6th ed., 2000) p. 39.

[17] J. Kaler, "Differentiating Stakeholder Theories" (2003) 46 *Journal of Business Ethics* 71.

[18] M.M. Blair and L.A. Stout, "A Team Production Theory of Corporate Law" (1999) 85 *Virginia Law Review* 247 at 281; Freeman, above n 16 at 44; Bradford, above n 13 at 149.

[19] P. Davies, K.J. Hopt, R.G.J. Nowak, and G. van Solinge, "Boards in Law and Practice: A Cross-Country Analysis in Europe" in P. Davies, *et al.* (eds.), *Corporate Boards in European Law: A Comparative Analysis* (Oxford University Press, 2013) p. 93; P. Davies, "Corporate Boards in the United Kingdom" in P. Davies (ed.), *Corporate Boards in European Law: A Comparative Analysis* (Oxford University Press, 2013) p. 753.

[20] Blair and Stout reformulate the nexus of contracts theory to argue that a corporation is a "nexus of firm-specific investments." See Blair and Stout, above n 18 at 275, 285, 286.

The Influence of Corporate Theories

As the US Supreme Court's reliance on old corporate theories to decide contemporary constitutional rights for companies has highlighted, the impact of these theories – old and new – remains considerable. Corporate theories influence the way we define the role and function of companies; the extent to which they should be subject to governmental intervention and control; corporate rights and duties; the question of how to balance and allocate corporate power and decision-making; and others. If we revisit the Starbucks case study described at the outset of this chapter, we see that the nexus of contracts theory suggests that the UK CEO of Starbucks is correct in his views insofar as Starbucks' tax strategies benefit its shareholders, while the stakeholder theory supports the assertions of Howard Schultz. Corporate theory, therefore, has the potential to help define the role of twenty-first century-companies and guide those that are in control of them. Still, there is growing skepticism regarding the validity and usefulness of existing corporate theories and orthodox descriptions of the corporation and its governing framework. Of course, if we reject corporate theory, as it stands today or perhaps even altogether, the next question to arise is what should fill the resulting void. This book reflects on and contributes to aspects of this discussion.

Corporate Rights and Duties

A second focus of this book is on the rights and duties of companies, an area that flows naturally from the earlier discussion on the nature and theory of the company. One field of study within this area is the development, reasoning, and potential reform in the allocation of constitutional and (sometimes related) statutory rights for the benefit of corporate entities. The US Supreme Court's jurisprudence in this regard is particularly rich and multi-faceted. Although future developments of this jurisprudence, which continues to evolve, are uncertain, we can make some predictions – and recommendations – based on an analysis of historical patterns. Although, as discussed in the preceding section, the US Supreme Court now tends to brush aside the importance of corporate theory in adjudicating corporate constitutional rights, in reality corporate law and corporate law scholars play an important role in helping develop appropriate frameworks that can provide guidance.

Furthermore, the questions of how, to what extent, and based on what justification corporate entities can or should be held liable in tort and criminal law continue to preoccupy courts, legislatures, and scholars alike. Again, this is an area that remains – depending on the jurisdiction and type of liability involved – influenced by corporate theories. Traditionally, but with effects lasting today, the fiction theory stood in the way of holding legal entities such as corporations criminally responsible since purely fictitious beings could not have the necessary state of mind required to commit a crime. The real entity theory partially changed this position and, at least in some jurisdictions, became prevalent in instances of corporate tortious and criminal liability that imposed responsibility on companies via its "directing minds" or "managing agents" – the metaphoric "hands and mouth" of the company.[21]

Conversely, the contemporary nexus of contracts theory has little to say about corporate rights and duties in relation to third parties. However, it has been interpreted to suggest that companies as fictional connection points for various contracts are incapable of owing obligations that are social or moral in nature. For proponents of corporate social responsibility and related obligations, the idea of the nexus of contracts is therefore particularly problematic. Moreover, if we were to apply the nexus of contracts theory to constitutional, tort, and criminal law, the result would necessarily be that neither corporate rights nor liabilities could be convincingly explained.

While this is understandable (the nexus of contracts theory is not geared towards answering such questions), it shows the need for different or complementary theories. Indeed, stakeholder theory may be better suited to defining corporate rights and duties and, in this regard, is particularly relied upon by those who favor the notion of corporations bearing social obligations. Yet, stakeholder theory also suffers from limitations, including the problem that it fails to define which of the many stakeholder interests companies and their boards should be obliged to protect, particularly when there are conflicts between these interests.[22]

The prevailing views on how to conceptualize companies by relying on corporate theories can thus be usefully contrasted with alternative approaches. For example, examining corporate rights and duties through the lens of externalities and cost internalization, non-legal social and

[21] This is how one of the major proponents of the Germanic real entity or "organic" theory explained its attribution mechanism. See O. von Gierke, *Die Genossenschaftstheorie und die Deutsche Rechtsprechung* (Berlin: Weidmann, 1887) p. 603–10.

[22] For an overview of these limitations, see B. Choudhury, "Aligning Corporate and Community Interests: From Abominable to Symbiotic" (2014) 2013:3 *Brigham Young University Law Review* 101.

moral signals, or the notion of balancing the negative effects of businesses on society with enlarged societal obligations, can offer useful impulses for future changes in policies and law. Modern corporate theories focus mostly on governance questions that arise between directors, managers, and shareholders, but are not typically concerned with rights and duties based on constitutional and other non-corporate laws. This leaves a lacuna to be filled by future scholarship.

Means and Ends

Finally, this book focuses on the notion of what can be called the "means and ends" of corporate governance.[23] This refers to two central questions: First, who should have the ultimate decision-making power in the corporate structure? Second, for whose benefit should corporations primarily operate?

The first question – which often represents the struggle between board/managerial powers and shareholder empowerment – can be usefully rephrased as "how should different stakeholder powers be balanced?" or, relatedly, "how can different stakeholders act as a system of checks and balances within the corporation, with different constituents sharing or allocating amongst them at least some powers?" The second question can be extended by adding the inquiry as to whom the company (or its board of directors) should be accountable. The company's beneficiaries may well be identical to those to whom the company is accountable, such as in a traditional shareholder primacy model. However, this is not necessarily the case as can be seen in models where, for example, the company is said to be running for the benefit of "itself" and accountability is owed to a separate body within the company,[24] or in stakeholder-oriented models where the beneficiaries are a wider group of individuals than simply shareholders.[25]

Defining corporate powers, objectives and accountability has far-reaching consequences. For instance, an overly narrow focus on shareholders (and shareholder powers) and shorter-term profitability may contribute to scenarios such as what was encountered during the last financial crisis, while defining the corporate role too widely can impair its ability to contribute to wealth creation and economic growth. Recognizing this gravity, shareholder powers

[23] See Bainbridge, above n 9.
[24] This is proposed by Andrew Keay in his contribution to this book, "Board Accountability and the Entity Maximization and Sustainability Approach."
[25] See, e.g., the discussion of labor-oriented models in Martin Gelter's chapter of this book, "Comparative Corporate Governance: Old and New."

and the corporate objective have long been the subject of intense academic discussion as well as regulatory activities. In terms of the latter, recent years have seen an international trend towards enhanced "shareholder democracy," with shareholders' "say on pay" as a prominent example, and – in the United Kingdom – the introduction of new statutory language on corporate goals.[26]

While strongly shareholder-oriented approaches remain dominant, it should be noted that commentators from across the ideological spectrum have begun to express doubt as to whether the prevalent preference for shareholder primacy and shareholder wealth maximization,[27] as promulgated by the nexus of contracts model, is in fact beneficial for shareholders. As one prominent scholar has observed, a number of strong shareholder value advocates have backed away from a commitment to shareholder value maximization as the exclusive goal of corporate governance.[28] Following the financial crisis, the EU Commission – normally a proponent of shareholder empowerment – has also stated that the "confidence in the model of the shareholder-owner who contributes to the company's long-term viability has been severely shaken."[29] In sum, it appears as though the means and ends of corporate governance are in need of a re-calibration.

The Contributions

Against this background, this book seeks to elucidate depth and breadth to the question of what the company is and what its role in society should be, specifically by drawing from the three research questions outlined above. The contributions to this book are organized into four parts.

Part I

Part I begins with an exploration of the company from comparative and historical perspectives. In "The Four Transformations of the Corporate Form," Reuven Avi-Yonah describes the evolution of the corporate entity,

[26] See Companies Act 2006, s. 172.
[27] Note that these two terms are not synonymous.
[28] See M.M. Blair, "Corporate Law and the Team Production Problem" in C.A. Hill and B.H. McDonnell (eds.), *Research Handbook on the Economics of Corporate Law* (Cheltenham: Edward Elgar, 2012) p. 33.
[29] *Commission Green Paper on Corporate Governance and Remuneration Policies for Financial Institutions*, COM (2010) 284 (June 2, 2010). Although in the case of the EU Commission the conclusion was that more – not fewer – shareholders powers would provide the adequate cure to the malaise.

tracing the history from its Roman law origins until today. He shows how this evolution progressed through four major transformations during which the corporation was first recognized as a separate legal entity and given some of its other typical "corporate" attributes and then shifted from a non-profit to a for-profit entity. This shift was followed by the corporate form's development from closely held to widely held, publicly traded entities before finally emerging – and continuing to evolve – as multinational enterprises. As Avi-Yonah demonstrates, three major corporate theories provided the backdrop to these transformations: the aggregate theory, the artificial entity theory, and the real entity theory. Nevertheless, for reasons that the chapter explores in detail, the real entity theory prevailed each time.

Martin Gelter's chapter, "Comparative Corporate Governance: Old and New," moves Part I from the development of the company from a strictly historical perspective to a comparative perspective, focusing on the differences in the development of companies between the United States and Continental Europe, especially Germany. His focus is on the interaction between corporate ownership structures – concentrated versus dispersed – and employees or labor as potential corporate constituencies. Gelter describes an emerging "new" or at least "modified" corporate governance in which shareholders – led by institutional investors – are gaining powers, which results in a shifting equilibrium between the traditional power balance of managers, shareholders, and labor. He concludes that although the basic structures of corporate governance systems in the United States and Continental Europe persist even in the age of "new" governance, they have become more complex through the ongoing changes caused by increasing influence of strong outside investors.

Part I concludes with another comparative perspective on the development of company law, this time with a focus on US–UK law. In "The Corporation's Intrinsic Attributes," Christopher Bruner takes a closer look at the attributes commonly regarded as being "intrinsic" to the corporation or essential for its economic utility. Using historical and comparative perspectives, however, he questions the static nature of these attributes, particularly as they are thought to give rise to the optimal division of power between boards and shareholders, the degree of regard for shareholder interests, and/or degree of liability exposure for boards and shareholders. Instead, he argues that issues of power, purpose, and risk-taking may not be best resolved by reference to purported "typical" or core corporate characteristics and paradigms. Using three examples – shareholder bylaw authority, board discretion to consider non-shareholder interests,