

1 Regulating Conduct and Securing Optimized Outcomes

At the core of organization theory lies the exploration of a trifecta of interlinked factors on the nature of power: identifying its source, measuring its status and consequential capacity to create and maintain hegemony, and evaluating the legitimacy of its operation (Clegg, 2003). Each component is informed by ‘constrained optimization’ (Nielsen, 2003). Irrespective of theoretical underpinning, each contains an implicit normative agenda. The sustainability of any organization is dependent on ongoing public acquiescence to the corporation’s stated core purpose and management’s capacity to deliver on it. Nowhere is this more important to society than in the case of the contemporary corporation. The warning signs concerning overweening power, a lack of accountability, and capacity to distort society have animated discourse since the publication of *The Modern Corporation and Private Property* (Berle & Means, 1932) provided legitimacy for the creation of the contemporary regulatory state (Landis, 1938; O’Brien, 2014). Critical questions remain unresolved – stubbornly so. This derives from an ongoing failure to address identified practical, philosophical, and jurisprudential flaws (Mason, 1960, p. 19).

Classic accounts of scientific management position the concept of ‘purpose’ as central to organizational operations (Barnard, 1968; Chandler, 1977). Social theoretical approaches seek to explain how authority is generated, with an emphasis on identifying differing types of rationalization, and how these interact and compete for influence (Weber, 1958, 1994; Hennis, 1988; Du Guy, 2009). Far from conceiving a single universal logic, Weber (1994, p. 357) doubted whether ‘it is in fact true that any ethic in the world could establish substantively identical commandments applicable to all relationships’. An influential review examining the causes, processes, and consequences of organizational misconduct discounted the utility of philosophical explanations on the grounds that there are multiple rational reasons behind the privileging of incommensurable values (Greve, Palmer & Pozner, 2010; see also Ashforth & Anand, 2003; Moore et al, 2006). This approach occludes the primacy of politics in setting the rules of the game, which simultaneously empowers and constrains regulatory capacity and ability. Moreover, the exercise of regulatory discretion has a cascading impact on what cases reach judicial determination.

Political perspectives focus on the exercise of power accrued, with more critical theorists suggesting that consent is manufactured through a complex process of ideational framing (Gramsci, 1971; Haywood, 1994). Recent sociological explanations emphasize the dynamic interaction between rules, principles, and social norms in determining the reflexive logic of practice (Bourdieu, 1990, 1996; Somers & Block, 2014a, 2014b). These rarely link

back to how the resulting behaviour derives from preferences already enshrined in legislation (see Hanrahan, 2018). Behavioural accounts, likewise, miss the political. They tend to emphasize that organizational responses to crises are enacted rather than encountered: the result of sense-making derived from previous commitments, actual capability, and perceived expectations (Weick, 1988; Weick, Sutcliffe & Obstfeld, 2005). They suggest that social construction processes bracket behavioural cues and interpretation, transforming moments of crisis into an opportunity to explore organizational adaptability, resilience, or the collapse of authority (Weick, 2009). They do not provide a holistic account of the corporate order.

Each approach provides a fragmentary glimpse at an unresolved and unresolvable problem: how to rebuild trust in the operation and regulation of markets in distrusting times (O'Brien, 2019). It is only through their integration that the corporate order, along with its capacity to adapt to and influence the ecosystem it operates within, comes into clearer view. Mapping this gap is central to strands of regulatory theory that situate the loci of material and ideational power within distinct but overlapping social and physical geographies (Hancher & Moran, 1989; Hood, Rothstein & Baldwin, 2001; O'Brien, 2003, 2007, 2009; Porter & Ronit, 2006). If academic research is to have relevance, it must break free from the permafrost of disciplinary silos and address anew the question of purpose and the metrics by which progress is measured. In sharp contrast to the advice to jettison philosophy (Greve, Palmer & Pozner, 2010), this Element argues for a need to re-engage with it. In seeking to address the problem of the corporation and its influence on society, a speech given by Winston Churchill to the assembled ranks of the Massachusetts Institute of Technology retains potency and relevance:

No technical knowledge can outweigh the knowledge of the humanities in the gaining of which philosophy and history walk hand in hand. Our inheritance of well-founded slowly conceived codes of honour, morals and manners, the passionate convictions which so many hundreds of millions share together of the principles of freedom and justice, are far more precious to us than anything which scientific discoveries could bestow. . . . Human beings and human societies are not structures that are built or machines that are forged. They are plants that grow and must be tended as such. Life is a test and this world a place of trial. (Churchill, 1949)

We would do well to ponder this quotation before continuing. Think what it means to you as a scholar, practitioner, regulator, politician, or member of the public. Then consider to what extent your work and practice are informed by a philosophical anchor. Without it, one is navigating treacherous water without a compass.

1.1 The Point of Purpose

Purpose provides an internal strategic action plan and a normative agenda. Both are encapsulated in corporate mission statements. They signal what interests are to be privileged (or constrained) to optimize determined performance. Internal control mechanisms operate through formal codes of conduct; disciplinary procedures; and risk, governance, and compliance guidelines. These form the baseline from which to evaluate performance against external control criteria. They, in turn, include industry codes of conduct, along with listing, legal, and regulatory licencing requirements (Chiu, 2015). Agreement on a narrowly defined purpose allows for goals to be set, targets met, and return on investment measured. This framing applies to individual corporations, the networks they participate in, and the ecosystems in which they are situated (Shipolov & Gawer, 2020).

Less often accounted for is how the legal community is itself a pivotal policy entrepreneurial class. It mediates access to and control over the coercive powers of government. Increasingly, adjudication of disputes takes place in the shadow of the state. This includes voluntary acquiescence to legally binding arbitration (Porter & Ronit, 2006; Pistor, 2020). It also applies to regulatory reliance on negotiated prosecutions. Despite the high fines, critically, there is rarely an admission of liability. The settlements can privilege the ‘façade of enforcement’ (Rakoff, 2019). They may represent the triumph of symbolism over substance in the exercise of discretion (Edelman, 1964; O’Brien, 2003, 2007, 2009, 2014). As intimated in the opening paragraphs, although informed by legislation, judicial capacity to provide the precedent necessary to facilitate ‘progress’ – a critical metric of ‘performance’ – is limited if the regulator does not seek court guidance or the political establishment proves resistant to strengthening penalties or mandates. The outcome is the same: stasis.

This raises two questions: why is legislation constructed in the way that it is, and whose interests does it serve? At a time of ideological fervour, when what constitutes the truth is contested (Kakutani, 2018) and expertise is devalued (Nichols, 2017), the corporation and its advisors have become key knowledge brokers and, by extension, powerbrokers. Their disproportionate capacity to inform and influence regulatory outcomes raises profound legitimacy concerns. These centre on the interrelationship between political liberty and the corporation in matters that go far beyond the workplace (Clemens, 2009). Seen in this context, corporate power distorts both social welfare and electoral outcomes. Although somewhat colourful, a recent account evokes the dystopia associated with evasion or shuffling, of the kind canvassed by Ayn Rand (1957) – itself

the mainstream accompaniment to Hayek (1943). In sharp contrast to freedom, in the United States corporate power has

produced a kind of Bolshevik dreamland in which a few billionaire hyper-capitalists and libertarian extremists oversee a sizable cadre of professional ideologues and organizers who do the boring, technical and persistent work of radicalizing, training and rewarding, and controlling conservative legislators, policy theorists, media figures, propagandists, administrators, evangelists and judges. This produces a self-sustaining vanguard with real power, and real expertise and a ferocious dedication to victory that increasingly surpasses any allegiance to ethical and civic norms associated with modern democracy. (O'Neill, 2019, p. 91)

The progressive left in the United States has proved no match in terms of organizational power. It has privileged tactical voter mobilization drives over ongoing strategic repositioning of the terms of the debate itself (Winter, 2019). Not surprisingly, it has lost traction. One can see the reason for such pessimism in the defensive positioning of the Democratic Party. Take, for example, Joe Biden's policy address setting out his claim to take on Donald Trump in the 2020 United States presidential election:

Democracies – paralysed by hyper-partisanship, hobbled by corruption, weighed down by extreme inequality – are having a harder time delivering for their people. Trust in institutions is down. Fear of the Other is up. And the international system that the United States so carefully constructed is coming apart at the seams. (Biden, 2020)

Stating the problem does not solve it. For Biden (2020), 'combatting corruption is a core national security and democratic responsibility'. He argues for the need to establish a Commission on Federal Ethics. He advocates constitutional reform to reduce the influence of private money in steering (or distorting) electoral outcomes. Irrespective of the merit of Biden's proposal, the election was fought under the current rules. This necessitates paying considered attention to how the corporation acts, individually and through networks and ecosystems. More importantly, it necessitates an evaluation of how the rules of the game are set and interpreted through the communities of practice that act as custodians of the law. The stakes have rarely been higher in peacetime.

Declining trust in our governmental institutions reflects their incapacity to tame negative forces unleashed by the financialization of the economy (Davis, 2009; van der Zwan, 2014). The application of regulatory authority is dependent on the ability to marshal ongoing political support. This is a delicate process, as demonstrated by the enfeeblement of the Securities

and Exchange Commission (SEC) in the United States, following the passage of Sarbanes-Oxley. Sarbanes-Oxley is legislation passed in 2002 to inculcate a corporate conscience in the aftermath of the implosion of Enron and WorldCom amid a welter of scandals over the efficacy of the audit process and conflicts of interest over the provision of analyst research ratings (O'Brien, 2003, 2007).

The reliance on 'gate-keepers' failed at all levels of oversight, across myriad professions and those aspiring to professional status. Even as scholars were communicating the results of the conflict of interest scandals at the turn of the millennium (Coffee, 2006), legal engineering facilitated an expansion of the logic of financialization (O'Brien, 2009; MacNeil & O'Brien, 2010; McBarnet, 2010). The impact on the real economy were, as expected, devastating (Fligstein & Goldstein, 2015). At a broader and more pernicious level, commodification had deleterious effects on social cohesion across most of the liberal order. Short-termism became corrosive.

There is nothing unethical, for example, about securitization – the primary method for shifting the quality and quantum of risk off bank balance sheets. What is up for debate is the efficacy of internal and external controls and how risk was conceived, operationalized, and communicated to the wider market. A mechanistic reliance on disclosure allowed those in charge of product design and disclosure to abdicate responsibility for the toxic products sold into the market because the risks were cited but ignored (O'Brien, 2013). All of this was perfectly legal and informed by an ideational view of the world, which was precisely that.

The shareholder-value model of corporate law dominates the epoch of investor capitalism (Jensen & Meckling, 1976). Echoing public discourse, the law and economics tradition suggested social responsibility was, at best, a distraction (Easterbrook & Fischel, 1989). It proclaimed as late as 2001 that, for corporate law, we had reached 'the end of history' (Hansmann & Kraackman, 2001). Leaving aside the hubris (made manifest by the dot-com collapse, emerging questions on the failure to manage conflicts of interest, and the erosion of professional restraint in the accounting profession), the only certainty offered by this research program is that it was a hostage to fortune. It was only a matter of time before it would be falsified. The length of time it has taken demonstrates the ideational power of the concept, not its veracity, as the maestro of central banking was to concede in an excruciating testimony to Congress (Greenspan 2008a, 2008b).

What was presented as economically rational was, it transpired, nothing more than an ideological conceit, a problem first identified by Polanyi (1944) and given recent data-driven confirmation by Piketty (2020). Economists, it

appears, can learn – even if belatedly. The investor-capital model lost legitimacy precisely because it failed to embed restraint or constraint. A narrow focus on property rights excluded from consideration the needs of essential stakeholder interest groups, including suppliers, clients, customers, and employees. In sharp contrast to the promise of the new institutional economics (Williamson, 2000, p. 597), the ‘non-calculative social contract’ said to underpin legal and governance frameworks that guide individual transactions was unenforced and unenforceable.

1.2 Creative Destruction and Destructive Creation

Capitalism thrives through disruption, which facilitates innovation and a reallocation of capital to those nimble enough to adapt to changing contingencies. Creative destruction may well be the driving dynamic of capitalism, as Schumpeter (1943) famously suggested. These very forces can, however, unleash destructive creation. Those who unthinkingly use the aphorism to lionize innovation do well to remember the prescient warning that the ‘stock market is a poor substitute for the Holy Grail’ (Schumpeter, 1943, p. 119). The alchemy mesmerized not only economists but proponents of ‘material sociology’, who thought little of the long-term consequences, or potential consequences, of what they were observing on the production lines of Wall Street and the City of London (MacKenzie, 2009). There is little point having access if one does not understand or call out the possibilities of unethical conduct, a problem not confined to neophyte sociologists (Agius et al, 2010).

The rise of the technology sector shows similar problematic traits to banking. Shareholder activism has been powerless to stop the inexorable rise of new monopolies. These cannibalize existing industries for content on platforms for which they subsequently decry any responsibility. These same titans are governed through ownership structures that differentiate voting and economic interest shares. The violation of best-practice corporate governance guidelines is worn as a badge of honour. It also means the existing owners are impervious to effective market oversight. It is indicative that one of the most innovative products made by Apple is, arguably, its tax strategy, which through transfer pricing has significantly eroded tax revenue across the markets in which it derives its profits.

Apple is by no means alone. At the time of writing, Facebook, the world’s largest social media corporation, is fighting an Internal Revenue Service adjudication that prior to its flotation the corporation failed to book more than \$9 billion in profits owed to the United States by using a subsidiary in Ireland in a scheme that crossed the line between legal avoidance and illegal evasion

(Murphy, 2020). Facebook accepts that its systems were messy while contending, somewhat blithely, there was no guarantee that its internationalization strategy would have been successful. It sounds suspiciously like an each-way bet within a gamed casino. For both corporations, legal engineering was required to facilitate the transfer pricing model.

Meanwhile, economies of scale allow for an ever-deepening concentration of power. Innovation is often bought in through the acquisition of start-ups from entrepreneurs whose ambition is to invent, bring to market, and then sell to the oligopolies, thereby further embedding power and further distorting competitive markets (Cohen, 2017). Facebook is valued at \$640 billion; its four other major actors – Alphabet, Amazon, Apple, and Microsoft – have market capitalisations of more than \$5.6 trillion. Together, these five firms account for 20 per cent of the value of all S&P 500 shares. The total fines and penalties paid, or proposed, amount to less than 1 per cent of these corporations' market values (*The Economist*, 2020). We are asked to rely on protestations that we can trust these unelected and unaccountable titans to facilitate social change. Outsourcing the resolution to existential crises to unelected, unaccountable corporate entities with a vested interest in the outcome is not, however, advisable. If the essence of the problem is to ensure constrained optimization, then allowing a doubling down on the investment is unwise.

This is manifest in the rise and fall of WeWork, once the world's largest commercial real-estate developer (Edgecliffe-Johnson & Platt, 2020). Erroneously described as a 'start-up', WeWork's rapid expansion earned it the moniker of a 'unicorn'. Its calibrated messaging made it a faith company with an initial public offering (IPO) awaited with excitable interest because it had disrupted the real-estate market (e.g. Leclercq-Vandelannoite & Isaac, 2016; see, however, Aronoff, 2017). It was only when the company released its IPO that the hubris and governance problems showed that it was not a unicorn worth pursuing. WeWork was a classic property play, based on little more than bombast and greed.

As we enter a new epoch of industrial development in which the nature of work itself has changed (Sennett, 1998), there is renewed interest in mapping the normative determinants of 'stakeholder capitalism' (Bowie & Freeman, 1992; Freeman et al, 2018). This is not in itself uncontroversial. Constraining unchecked managerial discretion was critical to the normative foundational logic of investor capitalism in the first place (Friedman, 1970). The shareholder-value proposition had the benefit of parsimony. It gave corporations a clearly defined purpose. The problem is that in so doing, transactional imperatives replaced relational ones. Value was measured solely in short-term pecuniary terms. The skewing of compensation towards stock-market performance

created a self-reinforcing dynamic detrimental to the long-term interests of the corporation itself (Braithwaite, 2020). The problem extends far beyond the finance and technology sectors.

The crisis engulfing Boeing, for example, centres on the accusation that the corporation privileged profit over safety in the redesign of its 737 Max aircraft. Two of the redesigned aircraft crashed in 2019, forcing the grounding of the entire fleet at a huge financial and reputational cost to the corporation and devastating personal loss for the families of the bereaved (MacGillis, 2019). One of those onboard the Ethiopian Air 737 that crashed outside Addis Ababa in March 2019 was the great-niece of Ralph Nadar, the activist who in the 1970s brought attention to the social cost of the elevation of profit over safety in the automobile industry (Nadar, Green & Seligman, 1976). Now the Nadar family are asking the same questions of a sector thought immune to such forces.

How did it come to this? Financial engineering proved much more brittle than its industrial counterpart; so too was the integration of computer programming into the engineering design process, a dismal reality facing not only Boeing but breathless supporters of disruptive technologies, including artificial intelligence and machine-based learning. It is by no means certain that a moral compass can be designed and implemented through algorithms in order to integrate earnings smoothing with a 'preoccupation with failure' (Weick & Sutcliffe, 2015). These may turn out to be incommensurable activities.

The critical function of any given governance framework is to ensure that the organization, network, or ecosystem can survive and adapt to contingency (Morgan, 1986). To ensure this operates according to principles of informed consent necessitates ongoing vigilance. It is unwise to rely on a mechanistic application of process. Such an approach may offer a rich description but has little predictive power (Du Guy & Vikkelsø, 2014). Moreover, it can occlude an actual understanding of what is really taking place (Munir, 2011), as the painful story of material sociology demonstrates only too clearly. If stated purpose is no longer in alignment with actual practice, the cooperative system fractures and with it comes the potential loss of internal and external legitimacy (Greenwood & Miller, 2010). Here again is evidence of the consequences of myopia. After all, we have long known that 'if we are to improve the functioning of our organizations from within, and to gain control of them, then we must understand the power relationships that surround and infuse them' (Mintzberg, 1983, pp. 1–2).

Corporate power derives from concrete legal foundations. It is built on a regulatory system that is no longer fit for purpose (O'Brien, 2019). Complexity is built into the system through the legal coding of capital itself (Pistor, 2020; Hanrahan, 2018). Law is the unseen source of power and

domination (Weber, 1958; Lukes, 1974; Mann, 1986; Poggi, 2001). It is essential to unpack this in order to understand the power of the corporation in and over society. This task raises profound practical and theoretical questions. Curiously, these are not explicitly addressed enough in organizational theory (Clegg, 2003; Davis & Zald, 2009). As a coding device, the corporation and its interrelationship with the democratic process is also a 'wicked problem' (Rittel & Webber, 1973).

A wicked problem, by definition, is unresolved and unresolvable. The concept has been susceptible to stretching by overuse to describe problems that are difficult but not insurmountable (Peters, 2017; Termeer, Dewulf & Bresbroek, 2019; Noordegraff, 2019). In other domains, the insertion of additional restrictive criteria generate 'super-wicked' problems – namely (a) that time is running out, (b) no central authority exists to take leadership, (c) those charged with change are themselves responsible for the problem, and (d) the future is so heavily discounted that the political gains of immediate action are less valuable (Levin, Cashore & Auld, 2012). The influence of the corporation and what to do about it is a paradigmatic example of a super-wicked problem.

Corporate rights give unparalleled access to the coercive power of the state. Concomitant duties and responsibilities to society, however, remain contested and contestable. The negative impact is most pronounced within liberal democracies. Understanding and taming the corporation is critical to the future of organizational studies and its credibility as a discipline (Davis & Zald, 2009). The corporate form and its legal ordering remain critical, if under-explored. If law is the source of power, its practitioners are the conduits of change (Edelman, 2007; Edelman & Talesh, 2011). It is the empire of corporate governance and its regulation that need to be recalibrated (O'Brien, 2019). It is time to bring the corporate order into the centre of organizational analysis through a review of the substantive concerns of corporate law and securities regulation. All too often the emphasis on enabling conditions over defined purpose short-changes societal welfare, generating profit through unseen government direction (Somers & Block, 2014b).

1.3 Bringing the Corporate Order Back In

The primary goal of social science research is to confirm, modify, or falsify theory (Popper, 1959). Falsification comes from determining whether abstract theoretical premises match empirical evidence. Without developing and testing theory, we risk the confines of normal science becoming so restrictive that the knowledge generated is irrelevant. The problem with paradigms is that, once established, they can become citadels to defend (Kuhn, 1962). While often

presented as a useful framing device, a paradigm can become a prison (Fuller, 2003). This is something that those working within the confines of normal science can find a threat and threatening (Davis & Zald, 2009). It is indicative of the myopia that this generates, that Kuhn is often presented as a libertarian and Popper a rigid authoritarian defender of past practice (Fuller, 2003). This distorts Popper's warning in the closing paragraphs of his most famous work, *The Open Society and Its Enemies*:

If we think that history progresses, or that we are bound to progress, then we commit the same mistake as those who believe that history has a meaning that can be discovered in it and need not be given to it. For to progress is to move towards some kind of end, towards an end which exists for us as human beings. . . . And we shall do it much better as we become more fully aware of the fact that progress rests with us, with our watchfulness, with our efforts, with the clarity of our conception of our ends, and with the realism of their choice. Instead of posing as prophets we must become the makers of our fate. We must learn to do things as well as we can, and to look out for mistakes. And when we have dropped the idea that the history of power will be our judge, when we have given up worrying whether or not history will judge us, then one day perhaps we may succeed in getting power under control. In this way, we may even justify history, in our turn. It badly needs a justification. (Popper, 1984, pp. 279–80)

By revisiting the classics, we can identify the strength and weakness of past theoretical reflection. All too often, these canonical works are cited rather than understood. The classics serve six instrumental and strategic purposes. They are touchstones, prompt development tasks, signal theoretical foundations, and provide lineage. They also serve a routine science function, providing a framework for resolving conceptual puzzles. Finally, they provide a ritual function, meaning they provide an intellectual home (Stinchcombe, 1982). As Thornton (2009, p. 23) points out, this strategy opens productive lines of inquiry (citing Homans, 1964; Baron & Bielby, 1980; Skocpol, 1985; Friedland & Alford, 1991; Thornton, 1999). This Element focuses primarily on the fifth function. It evaluates how distinct theoretical perspectives within and beyond organizational studies address (or fail to reach) the core of the corporation problem.

Clemens (2009) has argued provocatively that it is pointless to look to the classics. She notes that neither Hayek (1943) nor Polanyi (1944) conceives of the corporation as a distinct actor, with the capacity to distort both markets and politics. She mourns the lack of a defining text, arguing that 'some of the greatest theorists of the 1930s and 1940s did not simply ignore the problem but actively marginalized it', with the result that 'the problem of the large corporation and liberalism was a classic waiting to happen' (Clemens, 2009,