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RESEARCH ARTICLE

Corporate law as public policy

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Abstract

Corporate law is a public policy balance. The state creates the corporation and provides its legal features. 'Micro' aspects of the corporation, like separate legal personality, limited liability, and perpetual succession, were each provided by the state for public benefits rather than for their evident private benefits. Widespread utilisation of the corporation provides 'macro' public benefits. Corporations can also harm third parties, and the state should balance benefits and harms. Yet modern corporate law theory downplays the state's role. Those who focus on the state also tend to miss the state's foundational role in setting the contours of the corporation and corporate law and encouraging certain behaviour. Identifying that corporate law is, descriptively, best seen as a public policy outcome shows the state is not a benign white knight which can only restrain corporations but instead should be seen as culpable in any perceived social harms caused by corporations.

Keywords: Concession theory; corporate form; corporate law; corporate law theory

Introduction

This article reconceptualises modern corporate law by identifying the state's core role. The state sets the institutional environment of corporate law, the formal rules of the corporate game which allow for individual institutional arrangements of specific companies (Williamson, 2000).[1] Whilst industry bodies set some corporate law rules, the state sets most (Chan and Lim, 2024). All institutional arrangements (individual companies) are set up under and governed by corporate law as part of the institutional environment. Yet modern corporate law theory often misses the state. Companies cannot exist without, and obtain beneficial legal features from, the state. State provision of the corporate form is said to lower transaction costs for certain parties (Williamson, 1991). This argument usually means the state should only use corporate law to lower transaction costs (Easterbrook and Fischel, 1989). I argue the state is much more foundational than such an argumentation allows, but even on its own terms such argument must mean some business activity only occurs because state provision of the corporate form lowers transaction costs: at the margin, some otherwise unprofitable ventures become profitable due to the corporation's lower transaction costs. Even the narrowest conception of the state in corporate law, then, means that it makes such ventures viable, encourages them and others, and provides more private profit for those setting up businesses than they would have without the corporate form.

[1]I use (a) 'company' and 'corporation' and (b) 'company law' and 'corporate law' synonymously. For each, the former reflects UK usage and the latter US usage. Primarily, this article deploys UK sources to illustrate wider points.

Corporate law provides corporations and connected parties with legal benefits not available to other business forms. State rules provide companies with separate legal personality, perpetuity, and limited liability for connected parties. These features are legal deviations from background rules, bestowed by the state for particular public policy reasons. This article argues that dominant modern legal conceptualisations of the company – as purely the sum of its parts or as something autonomous created by the sum of its parts – miss the state's core role when theorising the company and corporate law, as they both focus on private notions of the company and do not cater for the state's role.

Legally, each individual feature *and* the sum (corporate law) is the outcome of a tacit public policy decision. This package provides public benefits but is also argued to cause considerable harm. Accordingly, the current terms of corporate law are, descriptively, a public policy balance. The state should set corporate law to maximise its net social benefits.

Non-legal disciplines have grappled with the state's role in corporate life (Ciepley, 2013; Singer, 2019). This article's legal analysis can be helpful to advance arguments across various disciplines. Ciepley argues that corporations transcend a public and private divide (2013). Yet the legal analysis outlined in this article demonstrates that the private aspects exist because of, and in response to, the public aspects. Turner identified that features of modern corporate law required legislative changes, which then drove economic growth (Turner, 2018), and this article's analysis helps demonstrate ongoing state decision-making in such analysis. Ireland, Grigg-Spall, and Kelly argued that the modern corporate form was driven by requirements driven by capital to further capitalism (1987). This article's analysis unveils the state's involvement in these developments.

Historical corporate law analysis used to explore the role of the state (e.g., Maitland, 1900 and 1905; Laski, 1916; Gierke, 2014, xx–xxx). This article aims to reintroduce such state-centricity into corporate law discourse. Most modern legal scholarship makes mere passing reference to the state. Micheler notes in passing that corporate law is set by the state but argues that it purely facilitates group activity (Micheler, 2021). Hart argued that law sets the background rules of the corporate game but did not unpack the state's role in setting these rules (Hart, 1953). Bruner argues that the corporation is 'technology', which the state can alter as it likes (Bruner, 2022), as the state is part of the wider corporate ecosystem (ch. 2). This implies an autonomous corporate form that the state can 'adjust' but downplays the state's role in initially shaping such a form. The state is seen as having a minor role in setting some of the 'meta-rules' of corporations (Gindis and Micheler, 2024). Even where the state is discussed in modern corporate law discourse, it is done cursorily, without focus on its foundational role.

Some legal scholars portray the state as a passive and background actor. Some emphasise the state's historical role in setting corporate law (Watson, 2022). Some argue the state bounds private decisions – Moore argued private corporate governance decisions take place in the 'shadow' of public decisions (Moore, 2013) and attacked contractarianism in a 'prelude' to a wider focus on the state in corporate law (Moore, 2014) that is still lacking. Some focus on the state effecting incorporation (Watson, 2019), most recently with Bottomley stating that by doing so, the state provides 'authorisation' for certain types of behaviour (Bottomley, 2024), arguing the state affects private decisions (Hardman, 2023). However, this article shows the state's foundational and ongoing role in corporate law. The state provides certain legal benefits to, and in respect of, the corporate form alone (Wright, 2010). Associated private benefits encourage the use of the corporate form over alternative legal vehicles. This article adds to the literature by focusing on the state's ongoing foundational role in corporate law, which is either ignored, briefly noted, or construed as something that can 'intervene' in autonomous activity.

Two implications arise from such conceptualisation. First, the state is not passively deciding whether to intervene in a private matter. If one argues that companies operate socially suboptimally, then one should see the state as culpable. The state is not a pure white knight waiting to only beneficently act. Second, this argument is limited to corporate *law*. It does not mean that the state is the dominant force within any individual company. The decision to establish a company is a voluntary one undertaken by those in business, and a real and autonomous entity can be so created. It does mean that academic lawyers should study the rules that the state provides exclusively to companies and the state's reasons for providing such rules. As corporate forms arise under, and subject to, the incentives set by corporate law, though, such arguments have knock-on effects in respect of the corporate form. The state solely sets corporate law, which in turn bounds and sets features of the corporate form, including the incentives faced by those who utilise the form, and indeed how attractive the form is for use. Features of corporate law encourage certain behaviours by incentivising certain outcomes (Hardman, 2025). As such, whilst this article focuses on corporate law, its analysis mostly equally applies to the corporation itself.

I follow usual practice and use the term 'state' broadly (Bottomley, 2024, 5) to draw attention to the public aspects of corporations, which are normally missed as corporate law discourse focuses on private aspects (Wolfe, 1993). Accordingly, two core assumptions are made about the state until slightly relaxed later. First, that it is a single, monolithic actor. The state is considerably more complex. It has multiple different parts, which adopt the state's 'mask' in different contexts (Runciman, 1997). Individuals have multiple roles (Kantorowicz, 1997). Various parts/roles may conflict. US states (not the federal government) control their individual incorporation processes, leading to tensions between states themselves and between states and the federal government (Hamill, 1999). Evident tensions arise between legislative and judicial branches: trade union rights in the UK experienced a 'pendulum' with the UK Parliament increasing rights, only for courts to discover new torts to neuter how such rights operated in practice (Wedderburn, 1986, 17). Similar dynamics are underway in Delaware in respect of restraint of controlling shareholders (Bainbridge, 2025). Both branches could conflict with the executive and administrative branches, either when the state holds shares (Lim, 2021) or with administrating central registries. The combined activities of these different bodies can exceed the sum of their parts (Pettit 2023). The article's purpose is to argue the foundational role of various parts of the state in corporate law. As such, it matters not which part of the state is present, merely that a part is present. The state can mean any or all of these different aspects; it does not matter for my argument. In the same vein, when I discuss state culpability in this article, I refer to general state culpability rather than exploring nuances between different state actors. This is because it does not matter for my purposes – it is sufficient for my purposes that any part of the state should be perceived as culpable.

Second, I assume a utilitarian state acting for the public benefit (or at least its perception of such benefit). Yet different state organs are open to capture by interested groups, or regulatory capture (Stigler, 1971; Slayton and Clark-Ginsberg, 2018; Veldman and Willmott, 2020). Similarly, some corrupt officials aim for personal benefit rather than carrying out their functions for the purposes provided (Andriosopoulos and Loncan, 2025). Yet for this article, the key is that state organs can and do decide corporate law. If state actors use powers for improper purposes, then accountability should be demanded. This does not change that the state *does* control such aspects. How policy balance is concluded by state organs is beyond my scope and different from my core argument – which is that descriptively all corporate law, and by extension the corporate form, arises from a public policy balance, however tacit it may be and however skewed such balance may be by improper interests. Pulling these two assumptions together, then, lets us assume that the state acts singly and deliberately and does what it is meant to.

The rest of this article proceeds as follows. The next part explores the state's role in corporate law, and the part after that how this is missed in modern corporate legal theory. The following part explores potential social benefits and harms, and that corporate law's policy balance arises from a balance of the two, however tacit it may be. The final part outlines implications.

Micro corporate legal deviations

First, then, the corporate form, and those who benefit from it, receive individual legal advantages from the state not available elsewhere. Each is a deviation from the background rules (von Mehren, 1990) which would otherwise apply. Whilst most corporate law rules are longstanding, they also are deviations from the usual legal position, representing a series of legal exceptions created for, and in respect of, corporations. Private law provides rules that govern interactions between persons, and corporate law is a series of deviations from these rules. Such basic rules applied to initial stock market

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interactions (Banner, 1998, ch. 1). These rules, though, frequently were sub-par, which resulted in the market being regulated by rules which deviated from these background rules (Mahoney, 1999). For example, most private purchases operate on the basis of 'caveat emptor', or buyer beware (Buchanan, 1970). Yet in *Derry v Peek* ((1889) 14 App. Cas. 337) such background rules were held to mean that shareholders could not receive damages from directors who made false statements in prospectuses which were only negligent but not fraudulent (Lobban 1996; Edelman, 2010). The Directors Liability Act 1890 was passed the following year to change this position, and still today officers are held liable for any misleading statements on share issues which are negligent (Gullifer and Payne, 2020, ch 10), a legal deviation from the background rule. I call each particular *part* of corporate law a 'micro' deviation, contrasting with the corporation as a whole (the 'macro' discussed later). I focus on three foundational aspects of the corporation – separate legal personality, limited liability (Hansmann and Kraakman, 2000), and perpetuity. Each is a deviation from background rules, providing private benefits for corporate insiders. However, the UK state provided each for specific overt public policy reasons rather than because of the individual private benefits.

First, the legal nature of separate legal personality is uncertain (Macgregor, 2020) and can risk circularity – at times the company claims separate legal personality because it can sue, and at times claims it can sue because it has separate legal personality (Cohen, 1935). Modern analysis sees it as a 'convenient heuristic formula' for the right to sue, be sued, hold property and contract, and not academically interesting (Kraakman *et al.*, 2017, 2). Yet, it is important – to treat a company as a person puts it, legally, on the spectrum of law's array of persons (Naffine, 2003). As such, discourse on whether other non-humans, like animals, should have legal personality inevitably discusses corporate legal personality (Kurki, 2022). Conferring legal personality is a gateway to enjoying other rights, which can amplify private benefits of shareholders. If a company can hold property, that property must be transferred to the company away from, say, a shareholder (a rivalrous right). However, legal personality introduces the possibility of 'duplicative' rights which exist *in addition to* shareholders' personal rights (Thompson, 2024), which causes considerable conceptual uncertainty in respect of corporate constitutional rights (Gindis and Singer, 2022). Giving legal personhood to non-humans causes conceptual difficulties (Buocz and Eisenberger, 2023) and transcends law – other social sciences need to conceptualise it (Geldart, 1911; Ripken, 2019).

Law rarely provides legal personality to non-humans: many social groupings, for example, unincorporated sports clubs, do not receive it (Laski, 1916), despite having a more 'real claim' to a social identity than most corporate forms (MacCormick, 2007). Groups *not* receiving separate legal personality is the background rule, and corporate law provides a deviation for the corporate form. The state decided to facilitate general incorporation of business corporations with legal personality (Watson, 2019; Bottomley, 2024). In England, this was so they could be sued: partnership (the then-dominant legal vehicle) law provided that on every 'joint stock company' partner change, any litigation against the partnership lapsed and needed to be restarted (Bellenden Ker, 1837; Gladstone *et al.*, 1844). This obviously caused problems for third parties and was open to opportunistic abuse. It also complicated the administration of the business (Freeman, Pearson, and Taylor, 2007) and adjudicating internal disputes (Televantos, 2020, 26–31). Granting corporate separate legal personality and mandating its use for larger business vehicles resolved these issues. Corporate legal personality provided private benefits – like rendering shareholder exit irrelevant, thus allowing continuity of form (with advantages of this discussed below) (Ayotte and Hansmann, 2015). It was, though, justified for English companies due to specific public benefits (the ability to sue larger businesses). It remains bestowed by the state through the state-provided and state-run process of incorporation (Watson, 2019).

So is, second, shareholder limited liability, which is quite controversial. Technically, it is a feature of shareholding rather than the corporation itself, but most texts treat it as foundational to the corporation (Kraakman *et al.*, 2017, ch. 1). Most people have limited liability in respect of each other's interactions (Easterbrook and Fischel, 1985), but it is not possible in other UK business forms for every connected party to be able to limit their liability when seeking a good profit (Hardman, 2025). Limited liability brings many benefits – making shares fungible and priced solely on business performance,

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allowing accurate capital market pricing (Halpern *et al.*, 1980; Grundfest, 1992; Woodward, 1985; Blankenberg *et al.*, 2010). Conversely, limited liability arguably encourages shareholders to push risk onto third parties (Hansmann and Kraakman, 1991; Goodhart and Lastra, 2020). Such concerns predate the statutory introduction of limited liability (Saville, 1956). Sometimes, creditors can simply adjust the price of their debt to internalise any increased risk, like any higher risk caused by limited liability (Jackson and Kronman, 1979). However, involuntary creditors cannot change their 'price' (Hansmann and Kraakman, 1991). Many voluntary creditors also cannot change the 'price' of their 'debt', including those without sufficient bargaining power and those lacking knowledge of precise organisational form and/or associated legal risks – such as most customers, suppliers, consumers and employees (Bebchuk and Fried, 1996). This provides a broad category of constituents who cannot charge more to reflect higher risk. Whether these (and others) harms are outweighed by the benefits of limited liability is purely a question of public policy.

Some features of limited liability could be constructed before provision by the state (Getzler and MacNair, 2006), but not all (Harris, 2020a). Whilst English courts upheld limited liability provisions in express contracts (e.g., *Halket v Merchant Traders'* (1849) 13 QB 960), they held unilateral statements 'nugatory as to strangers' who had not voluntarily agreed to such limited liability (*Walburn v Ingilby* (1833) 39 ER 604, 609). The UK state needed to legislate to provide a legal deviation to enable corporate limited liability, which came in 1855, 11 years after general incorporation.

Justifications for such an introduction abound, each of which ultimately argues political pressure drove the legislative change. A push came from accumulated savings in the UK's affluent Home Counties needing somewhere to invest as an outsider (Cottrell, 1980, 45). Frustrations with the Crimean War led to a disaffected middle class, who also wanted to financially advance through the same means (Mackie, 2011). Social desire to provide such advantages to lower socio-economic groupings encouraged the change (Loftus, 2002). Christian Socialists encouraged it as an avenue for working-class savings (McQueen, 2016, ch. 3). Lawyers encouraged limited liability to maximise their income (Smith, 2020). It was also seen as a general lever to advance economic growth (Griffin, 2004). All of which are strong public policy reasons to provide limited liability to shareholders. Each such reason facilitates private benefit from the corporate form, but for a wider social/political purpose. Private benefits were encouraged *because they served a public purpose*. Each such argument is predicated upon wider public policy considerations, not because enabling private benefit at all costs is axiomatically corporate law's role.

Third, companies are perpetual (Schwartz, 2012). We do not provide perpetuity for other forms of business vehicle. UK law has long restricted perpetuity for trusts (Gallanis, 2000), as do parts of the US (Horowitz and Sitkoff, 2014). This prohibition arose from fear of previous generations' 'dead hand' restricting activity tomorrow – a clear policy reason to regulate private ordering (Simes, 1955; Haskins, 1977). Similarly, and as noted above, partnerships end (and restart) on partner change (Hurt, 2019). Corporate perpetuity provides a private benefit by avoiding taxable events occurring on transfer of business assets (conveyance from 'old' to 'new' vehicle will be taxed). Yet the perpetuity of companies was introduced for the public benefit, namely to facilitate economic growth (Dari-Mattiacci *et al.*, 2017).

The above rules are Anglo-American. Islamic states were reticent to provide corporate legal personality (Kuran, 2005; Anello, Arafa, and Gramitto Ricci, 2021). The US and the UK differ in the precise detail of certain corporate legal features (Harris and Lamoreaux, 2019; Gower, 1956). Such differences reinforce my argument – different states provide (or do not) different corporate legal deviations for different policy reasons at different times.

Corporate law consists of a series of further deviations from normal background law which provide private benefits for wider public policy reasons. Shareholders cannot withdraw capital, facilitating investment in illiquid assets (Blair, 2003), but the UK rule originated to let third parties rely on a company's publicly disclosed capital (*Trevor v Whitworth* (1887) 12 App Cas 409). Throughout the history of company law, we see private advantages provided to those who use the corporate form, and the form itself, because of the public advantages perceived by the state. The features were provided *because of* their public advantage, not because they brought private benefits to corporate insiders.

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Policy considerations transcend individual 'micro' corporate features and include state provision of the corporation (the 'macro'). New York introduced general incorporation in 1811 for specific industries to encourage investment (Seavoy, 1972), balanced against the state's advantages as an investor in existing corporations with limited competition (Sylla, Legler, and Wallis, 1987), and indeed corruption of officials (Bodenhorn, 2006). It was 'an extremely political matter' (Sylla, 1985, 112), not purely to facilitate private ordering. General incorporation was traditionally viewed to diminish the state's role (Butler, 1986; Bainbridge and Henderson, 2016, 68-69), implying a one-way ratchet in which the state provides such legal deviations but can never vary or remove them. This is not the way that states or legislative processes work (Jensen and Meckling, 1978). General incorporation contributed to the corporation's enduring popularity (Grandy, 1989) but still relies on state administration (Watson, 2019). The state's role transcends incorporation, as it continues to provide these legal deviations with private benefits for utilising companies. These features were imbued for public purposes. Should the state ascertain, then, that these features no longer serve such purposes, the state can and should change corporate law and vary/remove them or require companies to provide a greater public benefit. Such legal deviations continuing show the result of an ongoing tacit policy balance.

Corporate law's missing state

Modern corporate law scholarship ignores this tacit policy balance, as historic baggage emphasises particular argumentation structures/tropes. Around 100 years ago, the nature of the company was a 'virtual obsession' amongst corporate law academics (Horwitz, 1992, 101): whether the company was a concession from the state (Koessler, 1949), something real (Maitland, 1900; Pollock, 1911), or merely the aggregate of its parts (Morawetz, 1886, 1-2). Concerns that this nature was merely whatever law said it was (Dewey, 1926) and that the truth was more nuanced (Radin, 1932) ended the debate (Cheffins, 2004, 39), and it was dismissed as irrelevant and 'dead' (Hart, 1953, 17). A famous Dutch professor requested a moratorium on any publications on the topic without evident and clear practical utility (Bouckaert, 1991, 156). For overviews of this debate, see Gindis (2009), Mark (1987), and Hager (1989).

Aggregate approaches (like Easterbrook and Fischel, 1989) dominate modern Anglo-American scholarship (Gubler, 2024). Alternatives, though, remain (Claassen, 2023). A perennial concern is that the corporation benefits few but damages many (Fairfax, 2006; Ireland, 2010), particularly the environment (Sjåfjell *et al.*, 2015). Corporate social impact discourse increasingly focuses on law (Mayer, 2017) and easily connects to this ancient historical debate. Some utilise 'real entity' approaches (Micheler, 2021; Micheler, 2024; Gindis and Micheler, 2024), arguing the corporation is more than the sum of its parts: 'n' people forming the company makes 'n + 1' (Maitland, 1905). Traditional contractarian analysis downplays the legal form's importance, focusing instead on the individuals behind it (Klein, 1982), whilst real entity approaches foreground the corporation's autonomy (Gindis, 2020). Real entity approaches identify collective choice mechanisms that establish how decisions form an autonomous entity (Micheler, 2021). Both emphasise private aspects of the company and, therefore, corporate law. Neither foregrounds the state. For each, the state's role is secondary or purely maximises relevant private benefits (Hardman, 2023).

Concession theory was the school of thought which engaged historically with the state. Conventional wisdom, though, is that this approach has been superseded and is no longer relevant. Historically, the state chartered individual companies, evidencing the state's dominance over the corporate form (Patterson and Reiffen, 1990). General incorporation statutes (Butler, 1986) ended such individual chartering, which is perceived to make concession approaches irrelevant (Millon, 1990; Bratton, 1989a). Bainbridge and Henderson argued '[i]t has been over half-a-century since corporate legal theory, of any political or economic stripe, took the concession theory seriously' (Bainbridge and Henderson, 2016, 68-69). Nevertheless, concessionist argumentation tropes (White, 1974) remain relevant. I demonstrated above the need for state intervention to provide core corporate features.

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Missing the state therefore misses a core part of corporate law. Overt modern concession argumentation tropes fall into three categories. First, they sometimes call for the concession theory's return generally, without specificity (Padfield, 2014; Hardman, 2024). Second, they sometimes identify the state's specific role in one aspect of corporate life, mostly incorporation (Watson, 2019; Bottomley, 2024).

Third, they sometimes argue that the state should engage more with corporate life. Bottomley (2024) argues that state provision of the corporation *authorises* certain activity, and so state *intervention* is *justified* in certain circumstances (also Moore, 2014). These words are too passive. Corporate law actively encourages certain behaviours. Corporations cause harm generated by otherwise good people (Feldman *et al*., 2021). I noted above that limited liability was argued to actively incentivise certain opportunistic behaviour. Such external incentives can, over time, alter intrinsic motivations (Frey, 1994; Bénabou and Tirole, 2003; Kreps, 1997). Corporate law filters those corporate participants into defined capacities (e.g., 'shareholder' or 'director'), with each containing embedded expectations about behaviour (DiMaggio and Powell, 1983), which combine to lower any individual actor's agency when taking decisions (Heugens and Lander, 2009). Law's constitutive role transcends allowing certain activity – it actively incentivises certain behaviours. Accordingly, the state cannot 'intervene' in the corporation but sets the status quo. The legal form provided by the state is the 'glue' that holds the business form together (Deakin *et al*., 2017). Features of such legal forms shape behaviour through setting incentives and allowing those incentives to manifest (Hardman, 2023).

There is nothing natural, inherent, or automatic about any corporate feature. Each element of corporate law that deviates from the usual background law is artificial and created by the state. Such artificiality still has a real effect (Machen, 1910, 257). Each corporate law component that differs from usual private law rules needs state activity. Even the most fundamental corporate component requires state action. Take a corporate 'share', the core unit that connects companies and shareholders. It is incredibly flexible: it may provide a dividend, a vote, or a return on a winding up – but in each case it may not (Pennington 1989; Lalafaryan, 2024). Such flexibility causes conceptual vagueness in understanding a 'share' (Ireland, 1999). The UK's definition is statutory, in the Companies Act 2006 section 540, with the nature of the share provided for in section 541. The state creates and sets the notion of a share through its setting of corporate law. Yet the nature of a share is core to corporate law theory, as it connects (Wolfson, 1980; Cheffins, 2021) to the 'residual claim' (Alchian and Demestz, 1972; Grossman and Hart, 1986). Such a connection often justifies shareholders taking major corporate decisions (Easterbrook and Fischel, 1983) and being the ultimate beneficiaries of directors' fiduciary duties (Macey, 1999). From here, analysis focuses on maximising shareholder needs – whether shareholders should take maximal decisions themselves (Bebchuk, 2005) or delegate to others (Bainbridge, 2006). Should law *not* provide shares the full residual claim, these argumentation structures all change, too (Kelly and Parkinson, 2000). The power to decide whether or not the law does so is held by the state as it sets corporate law.

These changes are above debates between contractarians and real entity theorists. Each makes descriptive claims – that their approach accurately describes corporate law – then extrapolates normative implications (Claassen, 2023). Descriptive accuracy derives from corporate law, which the state sets. The state can, then, adjust comparative strengths of the theories unilaterally. Whether the corporate form seems a mere aggregate, an autonomous actor, or something else entirely is dictated *by the state*. On a meta-level, then, the state sets argumentation strengths – including whether the company is a state concession. It is artificial to separate these two planes. Private corporate decisions occur because the state allows them (Grantham, 1998), and the state can restrict those decisions. Consider an extreme situation whereby the state provides a company with rights it announces are unchangeable (Romano, 1984). At any point, the state can subsequently change such rights – however inviolable corporate rights may appear, they can be changed by the state changing corporate law.

Non-state forces argued to drive corporate law development – like the corporate governance 'machine' that shapes corporate practice (Lund and Pollman, 2021), or corporate political power (Winkler, 2018) – only do so within state-set boundaries: the state has allowed/encouraged such

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activity (deliberately or tacitly). If corporate law presents as an evolution (Deakin, 2019), follows path dependence (Bebchuk and Roe, 1999), and produces autonomous corporate social actors (Veldman and Willmott, 2022), it is because of state action or inaction. State action could change any of these. Indeed, as Jensen and Meckling argued (1978), the core of state activity is to change pre-existing rights. The decision to *not* change a deviation, however tacit it may be, therefore is as important as an initial grant of such deviation. There are reasons, noted below, why states may be reticent to do so. Yet an unwillingness to utilise a power is conceptually different from the power's existence. As corporate legal features arose from public policy, their ongoing provision is equally a public policy concern. Should any feature fail to meet public policy requirements, it can be revoked/withdrawn/amended/kept in exchange for another public policy benefit. Of course, this reflects a wider point. Market mechanics require the state to set and enforce rules (Singer, 2019). Accordingly, even ostensibly organic matters like differences in market economies (such as 'varieties of capitalism' – Hancké 2009; Feldmann, 2019) are, in fact, reliant on state action/inaction.

Corporate law's macro public policy considerations

State power to redesign corporate rules, though, differs from the willingness to utilise such power. Concession theory only focuses on the state's *freedom* to change corporate law. It misses that the state must choose whether to. Above, I argued that legal scholarship misses that the state provided specific core corporate features due to perceived public policy needs and can change those features. Now I outline potential, non-exhaustive public policy considerations for states when evaluating whether to change corporate law, ultimately when balancing corporate law's public benefits against social harms attributable to individual features or their aggregation. Whether individual decision-makers actually evaluate decisions on these grounds is irrelevant – the state sets and can change the rules, and decision-makers should legitimately balance various factors in deciding whether to change corporate law.

Widespread use of the corporation, arising under corporate law, provides numerous public benefits. I utilise the vague term 'public benefit' over the more precise term 'public good' to avoid any debate about whether public goods exist (Coase, 1974; van Zandt, 1993). By 'benefits', I mean that society generally benefits from corporate law and corporations constituted thereunder. Legal deviations provided to, and in respect of, the corporate form do not provide private benefits to corporate insiders axiomatically because that is what corporate law should inherently do, but they follow the perception of a public benefit in providing such rights. Widespread use of corporations (for private benefit) provides, too, a series of public benefits.

There are four categories of potential public benefits. First, corporations directly fund the state. Corporate profit is taxed, in addition to shareholders paying income tax on dividends. The same income is, ultimately, taxed twice (Bank, 2010). Corporation taxes were introduced for political purposes (Mehrotra, 2010). Partnership vehicles are 'tax transparent', meaning that the entity itself pays no tax on profit, thus avoiding such double taxation (Berry, 2019). Corporation taxes provide material state income – in 23/24, they contributed £85,282 million to the UK state, 9.72% of total tax receipts.[2] The state directly benefits, then, from participants utilising corporations for private benefits provided by legal deviations. Yet this is not the only form of public benefit that the corporation provides the state – indeed, Australia provides tax credits to shareholders if corporation tax has been paid (Brown, Lim and Evans, 2020), to encourage other corporate social benefits (Antioch, 2001).

Second, corporate activities can meet and further states' aims (Gatti, 2023) or otherwise benefit society (Stout and Gramitto, 2018). For example, as of 2023, 1,142,100 UK companies had more than 2 employees, and 20,100 exceeded 100.[3] The data is banded (e.g., 2–4 employees), but at a minimum, companies employed at least 10,788,800 UK employees, roughly one-third of UK employees.[4]

[2] https://www.gov.uk/government/statistics/hmrc-tax-and-nics-receipts-for-the-uk.
[3] https://www.gov.uk/government/statistics/business-population-estimates-2023.
[4] https://researchbriefings.files.parliament.uk/documents/CBP-9366/CBP-9366.pdf.

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Employment provides social benefits (Wolfe *et al.*, 2022), so the state encouraging use of corporations through provision of private benefits furthers public benefits. This is not to argue causation – had companies never existed, then similar employment levels may have occurred. Yet correlation exists – companies are major employers, bringing social benefits. This affects corporate law reform – uncertainty harms employment (Den Haan, Freund and Rendahl, 2021), including legal uncertainty (MacNeil, 2009). Accordingly, protecting (or increasing) such corporate employment matters for law reform. Similarly, most countries utilise private pensions to provide retirement income to their populations (Ireland, 2011). Most private pensions invest in equity securities (Roe, 1993). Corporate successes therefore boost retirement funds, in turn furthering state aims. Corporate aggregation of economic power facilitates greater activity than otherwise possible (Morgan and Tumlinson, 2019) and complements state efforts elsewhere (Kim, Macey and Underhill, 2023).

Third, in some areas, it has been argued that the state retreats from certain public benefits, hoping the corporation fills the gap (Macey, 2022). Arguably, the Anglo-American environmental, social and governance (ESG) movement arose from state failure to regulate adequately. Similar arguments exist for ESG's precursor, corporate social responsibility (CSR) (Johnston, 2011). The state outsources activities to corporations. Encouraging corporations by their private benefits can help further these goals. The state need not deliberately outsource. It is not inevitable that corporations fill such gaps. The state can still regulate (Kim, Macey, and Underhill, 2023). However, corporations can provide public benefits should the state not do so, which should be factored into state decision-making. Fourth, some corporate law features mitigate others that risk social harms. Capital lock-in was introduced to protect third parties, directly mitigating concerns about corporate law encouraging risk externalisation (Goodhart and Lastra, 2020). Some corporate law rules, then, protect against harms arising from private benefits provided to encourage other public benefits. Individual corporate legal deviations create public benefits but also direct private benefits to corporate insiders, which disproportionately sit with society's richest (Ireland, 2005). There is a risk that maximising private benefits for indirect social benefits can cause social harms. Any public benefit arising from corporate profit maximisation (e.g., through maximising corporation tax take) will be undermined if generating such profit causes considerable social harms (Hart and Zingales, 2022) that require mitigation. Some corporate law rules provide public benefits by mitigating public risks arising from maximising private benefits.

Yet in addition to corporate law rules providing social benefits, they can also encourage social harms. Limited liability encourages risk externalisation to third parties (Hansmann and Kraakman, 1991), above the equilibrium amount (Goodhart and Lastra, 2020). Individual features of corporate law, and its totality, can cause social harms by incentivising certain behaviours by corporate insiders. Corporate law has long (Tillman, 1974) facilitated aggregation of economic power (Parkinson, 1993; Neocleous, 2003). This power can benefit a few insiders but harm wider society (Galanis, 2020). Corporate law features, set by the state, encourage such harm. Thus, any harm arising from the corporation's *use*, incentivised by corporate law rules, relates to state decisions. Corporations materially contribute to environmental harm (Sjåfjell *et al.*, 2015), with corporate law requiring a major revamp to avoid global catastrophe (Bruner, 2020). Dissatisfaction with corporate social effects is widespread (e.g., Mayer, 2017). Any dissatisfaction arises from state action/inaction and should be factored into future public policy equations.

Unpacking this policy balance reveals limitations in corporate law reform to mitigate corporate social harms. Two key restraints may preclude dramatic changes to corporate law. First, major changes could undermine the above benefits: legal changes to restrict private corporate benefits may lower other public benefits. Corporate investment is predicated upon states not frequently changing corporate terms. States *can* easily fundamentally change the rules, including expropriating corporate assets (Stehr, 2023), but commitment to not do so contributed to the Anglo-Dutch corporate form becoming successful (Zhang and Morley, 2023; Harris, 2020b). Financial instruments are valued by factoring in how likely the state is to change the financial entitlements attached to them (Jensen and Meckling, 1978). So, it is perfectly rational for the state to identify a corporate social harm (itself predicated upon state in/action), but not remedy it to maintain other benefits. Second, international competition means

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dramatically changing corporate law rules could cause outbound corporate migration jurisdictionally (Hansmann and Kraakman, 2001) or into non-corporate forms (McCahery and Vermeulen, 2001). Most large entities trade globally (Morgan and Kristensen, 2006), and global markets have relatively homogenised expectations (Veldman and Willmott, 2020). This means that a state making a major deviation from corporate laws in place elsewhere risks losing public benefits. Any dramatic change to corporate law could sacrifice current public benefits, but the same problematic activity could still occur elsewhere in another legal form.

Overall, current corporate law yields a range of social benefits. It can also yield social harms, and the state should balance harms and benefits. The state may legitimately decide to not remedy incentivisation social harm because (a) corresponding public benefits outweigh it, (b) the damage to public benefits caused by the remedy outweighs the benefits of the remedy (Bennett and Claassen, 2022), or (c) other policy tools, like taxation (Collins, Ruane and Sinfield, 2020) or regulation of sector/behaviour rather than entity (Sundaram and Inkpen, 2004), are more attractive despite ultimately treating symptoms, not causes (Hardman, 2023).

Implications of corporate law as public policy

Two main implications arise from seeing corporate law as public policy. First, the state is currently active in corporations and so should be seen as culpable for perceived corporate social harms. Second, this analysis is inherently and exclusively legal.

First, different conceptual approaches to corporate law view the state's locus to regulate corporate affairs differently (Bratton, 1989b). Any approach allows extremely egregious behaviour to be externally regulated (e.g., environmental laws can mitigate environmental harms), but only concession approaches encourage direct state engagement in internal corporate dynamics (Hardman, 2023). If corporations are merely the sum of their parts, or real, then the state is inherently external, and so requires more to justify 'intervention'. Concession theory normally argues that the state is 'justified' in 'intervening' in corporations (Bottomley, 2024). This connotes a beneficent state poised to rescue society from corporate excesses.

Viewing corporate law as public policy – however tacit – changes this. The state is actively involved in corporations and should be seen as equally culpable for any social harms that are perceived to be caused by them. The state may decide to leave corporate harms unremedied because it deems public benefits worth it. This can be viewed in the inverse – if the state has not remedied a perceived social harm, then either it has tacitly decided that the harm is outweighed by its other public benefits (by not devoting enough state resources for evaluation) or not realised it should. There is an inherent balancing of harms and benefits, but (as with Kaldor-Hicks efficiency) harms and benefits will be uneven. Net social benefit calculus could cause the same constituents repeated harm and others repeated benefits. Law's allocations of rights are inherently distributive (Hale, 1943).

The result is akin to the Epicurean trilemma that because suffering exists in the world, God can only be any two of all-powerful, all-knowing, and all-good (Capitan, 1966), and not all three. If corporate activity is seen as socially harmful, then, as corporate law is an ongoing public policy balance, the state can only be two out of competent, all-knowing, and acting in the public benefit. Either the state is incompetent, ignorant, or not acting in the overall public benefit. Those who analyse the state's role in corporate law tend to request more state activity (Ripken, 2010). Viewing corporate law and the corporate form as public policy demonstrates this is misguided – the state causes and is unlikely to be able or willing to resolve perceived issues. Regulatory capture (Slayton and Clark-Ginsberg, 2018) means the state may benefit particular constituents – those most powerful already (Ireland, 2005). For example, even should employee ownership (Dow, 2022) prove socially optimal, the state may not change corporate law if subject to regulatory capture from existing shareholders.

Second, this analysis is limited to corporate law. The state can deploy other tools to encourage or discourage corporate behaviour – like taxes and subsidies. Corporate law is, though, inherently linked to the state. This is a very corporate legal analysis (Hardman, 2024). It therefore helps delineate

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corporate law analysis from complementary disciplines on two fronts. First, from the study of individual business vehicles. Individual companies are voluntarily formed and can be autonomous entities (Vinogradoff, 1924). The state sets the corporate landscape, though, and features of the corporation incentivise certain behaviours through its setting of corporate law. These state-set features, and only these features, should fall within the remit of corporate law scholarship. Second, the criteria that the state must use in striking this public policy balance are extrinsic to corporate law. Descriptively identifying that corporations and corporate law are the results of public policy balances, however unintentional, and suggesting some potential considerations does not definitively identify how states *should* balance policy considerations. Many categories of public benefits and harms are unquantifiable, and I provide no claim for which benefits the state should maximise or which harms it should avoid. It is arguable that the state should focus on ensuring strong public markets (Cheffins and Reddy, 2023), or protecting investors from agency costs (Bebchuk, Cohen and Ferrell, 2009), or minimising environmental harm (Sjåfjell *et al.*, 2015), each as a way to maximise public benefits. Moving to considering such evaluative criteria, rather than arguing about whether the state *can* engage if willing, takes corporate law a step closer to playing the role that it should in a wider, interdisciplinary understanding of the company (Hodgson, 2022).

This article argues for the need to conceptualise the state's role in corporate law and corporations. Features of both are provided by the state, for deliberate or tacit public policy reasons. Modern corporate law theory traditionally misses the importance of the state in the corporate form and corporate law. Public policy, however, underpins corporate law and the corporate form. In turn, each aspect of corporate law and each feature of the corporation should exist only and to the extent that public policy continues to justify it. There may well be strong restraints on the state's willingness to dramatically exercise its powers, but that remains conceptually different from the presence of such powers.

It may be that corporate law as currently constituted, the corporate form that it establishes and the incentives for behaviour that it creates are optimal for society. Equally, it may not be. In either event, understanding the optimality of the status quo and options to change it requires a proper understanding of that status quo. Backgrounding the role of the state does not provide such clarity. Implications that the corporate form is solely private and that features provided to its constituents arise naturally or inherently miss the ongoing role that the state plays in setting corporate law and the rules of the game for corporations. So, too, does talk of the state 'allowing' certain behaviours and concepts such as state 'intervention' requiring 'justification'. The state is heavily implicit in the status quo, for good and for bad. This means that the state is more involved in the corporate form than modern corporate law theory allows. It also means that a benign state is not in and of itself the answer to corporate ills as a white knight ready to free us from corporate excesses. Whatever your normative take on what the corporate form and corporate law *should* do, encourage, or facilitate, understanding that the state is at the heart of such a normative vision is key.

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