The End of the Corporation

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Abstract

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What is interesting is that the corporate governance discussions haven't really changed that much. The focus is still on reducing managerial misbehavior and maximizing the value of shareholders (the stakeholders who are taking the most significant risk). And the mechanisms for achieving this are more transparency and more supervision.

But framing corporate governance primarily in terms of shareholder value is incomplete and potentially misleading. It encourages box-ticking and conformity. Managers are often motivated to project an image of compliance, while continuing as before.

More significantly, digital technologies are now turning the world upside down. It is a fascinating, but challenging, time for business. Industry boundaries are disappearing. Platform companies operate across multiple industries (transportation, finance, healthcare, food, etc.) and use networks to deliver new business models and disrupt incumbents. Social media empowers all the stakeholders and has transformed the meaning of transparency.

We cannot think in terms of traditional corporate structures anymore. Their boundaries have become more fluid and porous. Traditional corporate organizations with their departments, business divisions, and hierarchical relationships between the different groups of stakeholders are changing as companies adapt to the digital environment. Companies are not static hierarchies anymore, but complex, dynamic ecosystems comprising diverse, interacting elements.

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JEL Classifications: D22, D23, D26, F23, G20, G34, K22, L14, L21, L25, L26, M13, M14

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The End of the Corporation

Mark Fenwick and Erik P.M. Vermeulen

We are witnessing a quiet but quick transformation in corporate governance. The rise of digital technologies and social media are forcing companies to reconsider existing business models, but also how they organize themselves and structure firm governance. In this paper, we introduce the main features of the modern corporation and corporate governance, outline how digital technologies are disrupting this business form, and describe the new business "ecosystems" that are emerging to replace the modern corporation.

Our conclusion? In a networked age, all businesses need to "go digital." Companies need to become innovation machines, and this means that every firm needs to become a "tech" company and a "media" company. If they do not, younger and more agile competitors better attuned to the realities of the new digital world will replace them. For incumbents, the risks are existential. Established firms must adapt to the new digital environment by embracing the ecosystem model, or they will die.

Compounding the challenge for incumbents, existing regulatory approaches are failing business organizations. In short, many corporate governance rules and regulations are programming institutions to be dysfunctional. There is an ever-widening gap or disconnect between regulatory strategies and the business needs of companies operating in fast-moving, technology-driven markets. Consequently, many businesses and other organizations are ill-equipped to meet the challenges of today's digital world. Instead, we need to design regulations that incentivize firms to establish the organizational structures and practices that will allow them to succeed. A new corporate governance focused on supporting a firm's capacity to innovate — as well as promoting compliance and risk management — needs to be developed.

Corporations & Corporate Governance

Corporations have dominated the global economy for at least the last 150 years, and there are good reasons to claim that the corporation is the most important institution in the world over this period.[1] After all, corporations have provided the basis for sustained economic growth and prosperity and have played a vital role in developing and disseminating new technologies and improving people's lives.

A modern corporation can be defined as a business organization characterized by a combination of three features.[2]

First, a corporation is a creature of the law – it is formed by an act of incorporation – and, as such, the company exists separately from its owner-shareholders, directors, executives, managers, and employees. As an independent entity, a company can issue tradeable shares to investors, limit shareholder liability, and conduct business in its own name.

Second, a corporation is organized as a closed, hierarchical institution with a clear chain of authority flowing "downwards" from the owner-shareholders to the employees. A company uses authority-based management structures and is not governed by consensus.

Finally, corporations traditionally adopt a "linear" business model whereby the company gathers together various "inputs" (raw materials, components, or knowledge/information), which are then

[1] Joel Bakan, *The Corporation* (Free Press 2001) 5 ("Over the last 150 years the corporation has risen from relative obscurity to become the world's dominant economic institution"); John Micklethwait & Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (Weidenfeld 2005) 1 ("The most important institution in the world is the company; the basis of the prosperity of the West and the best hoped for the future of the rest of world").

[2] A note on terminology. In this paper, the term 'corporation' is used to refer to limited liability joint stock companies, both publicly traded corporations and private ('closely held') companies. As such, single proprietorships and partnerships are excluded from our definition of a corporation. The definition used here, therefore, differs from a broader, more everyday definition of a company as any organization that engages in business.

combined, thus adding value, before being sold as either a standardized product or service to a "customer," either another business (in B2B transactions) or a consumer (in a B2C transaction).

Understood in this way, the rise of the modern corporation is a relatively recent phenomenon, at least from a historical perspective.[3] The corporation did not emerge fully formed but rather developed over time as a series of contingent adaptations to changes in the social and economic environment. It was only in the latter part of the nineteenth century that these various elements combined.[4] Any consideration of this history of the corporation reveals, on the one hand, a series of controversies, scandals, and setbacks, but, on the other hand, a gradual expansion in the availability of the corporate form as a means of conducting business and an increase in its influence over the economy.

In early modern Europe, trade was conducted by loose networks of traders. These relationships developed slowly into "self-protective organizations," backed by money-lenders (the origins of modern banks) who financed these business operations.[5] The first European joint-stock companies were created by Royal Charters that granted a monopoly in a specific territory for specified activities for a specific period.[6] Joint-stock companies emerged in the sixteenth century — fifteen were operating in England by 1690 — however, none had more than a few hundred members.[7] Moreover, there was no strong conception of corporate legal personality — rather, a corporation was seen as a creation of the sovereign and an instrument of government policy.

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[3] See Tom Hadden, *Company Law and Capitalism* (Weidenfeld & Nicolson 1972) 14; Harwell Wells (ed) *Research Handbook on the History of Corporate and Company Law* (Edward Elgar 2018).

[4] Simon Deakin, 'Corporate Governance and Financial Crisis in the Long Run' in Cynthia A. Williams & Peer Zumbansen (eds) *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (Cambridge University Press 2011) 22.

[5] John Micklethwait & Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea*, (Weidenfeld 2005) chp.1.

[6] See Colin A. Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press 1950); Stephen R. Brown, *Merchant Kings: When Companies Ruled the World, 1600–1900* (Macmillan 2010); Oscar Gelderblom, *Cities of Commerce: The Institutional Foundations of International Trade in the Low Countries, 1250–1650* (Princeton University Press 2013).

[7] *The Corporation* (n 1) 9.

It was in the seventeenth century that this new business attracted greater interest, initially as a vehicle for financing European colonial enterprises. In this way, the earliest corporations were established as instruments of foreign policy and geopolitics, as much as business enterprises. The British East India Company and its Dutch rival, the Dutch East India Company (the VOC), fought over the right to trade with India and were supported by private armies in territories where they operated.[8]

Take the VOC, for example. Over time, the VOC evolved into something like the current corporate form in that investors were issued shares, which could be publicly traded on the Amsterdam Stock Exchange.[9] This combination of corporate shareholders and publicly traded stock is the basis of the claim that the VOC was the first public company. The primary advantage of this new corporate form was the ability to combine the economic power of a potentially unlimited number of investors. Traditional business forms, such as partnerships, which combined the economic power of a small number of people, who then ran the business together, were not suited to the more risky, large scale projects of the kind envisaged by the Dutch government and the VOC.

Nevertheless, the early history of the VOC was mired in controversy. Investors often expressed their dissatisfaction and frustration with dividend policies, the murkiness of the company's accounts, and the lack of disclosure and transparency.[10] Other problems for investors were the limited involvement of the main board of directors — the Board of Seventeen Lords (De Heren XVII) — which convened only a few times a year and directly reported to the Dutch government rather than to investors.

As such, the institutional design of the early VOC made this arrangement prone to fraud and deception, particularly regarding the state of finances and governance.[11] In response to these

[8] See Philip J. Stern, 'The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations' (2016) 39 *Seattle University Law Review* 423.
[9] See Charles River, *The Dutch East India Company: The History of the World's First Multinational Corporation* (Createspace 2017).
[10] See W. Ph. Coolhaas, (ed) *Generate Missiven van Gouverneurs-Generaal en Raden aan Heren XVII der Verenigde Oostindische Compagnie*, 8 vols. (Gelderblom 1960-85).
[11] Joseph A. McCahery & Erik P. M. Vermeulen, *Corporate Governance of Non-Listed Companies* (Oxford University Press 2009) 17-8.

shortcomings, the government obliged full and open disclosure of the VOC's accounts in 1622. Subsequently, the committee of nine and audit committee, an early form of a supervisory board consisting of "chief participants," was introduced in 1623 to advise management and were charged with inspecting the financial information of the VOC. One might say that, with these changes, the first "corporate governance" movement was born. The government forced information disclosure in order to bolster the control of investors. Nevertheless, such reforms could not solve the problems surrounding the complex and cumbersome management structure inherent to the VOC arrangement.

The success of the corporate form meant that by the early decades of the twentieth century, companies had become the key institution in the economy. Moreover, deep connections had developed between industry-driven economic growth and newly emerging welfare politics.[12] Corporations were seen as (and saw themselves as) public institutions that had an obligation to assist the state in mitigating the inherent inequalities that resulted from a capitalist market economy. As a result, large companies were actively involved in their local communities, not only as a source of employment and economic growth, but as provider of housing, of welfare assistance and as a source of entertainment for workers and the larger community (many European football clubs were founded by large companies, for example, PSV Eindhoven (Philips) or VfL Wolfsburg (Volkswagen)).

Around the 1920s, however, differences began to develop between the United States and Europe. Whereas in the US, the role of finance became increasingly important in the organization and state regulation of companies, in Western Europe, "the company was embedded in a tightly regulated system of the company, employment, and social welfare law."[13] However, such differences should not be overstated. Even in the United States, the social obligation of companies was never completely extinguished. Peter Drucker's account of GM, for example, emphasized the social

[12] Peer Zumbansen, 'The New Embeddedness of the Corporation' in Cynthia A. Williams & Peer Zumbansen (eds) *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (Cambridge University Press 2011) 123.
[13] Ibid.

responsibilities of US corporations in the 1950s, and a striking feature of this work, when read today, is that there is no discussion of shareholders or the company as an investment opportunity.[14]

By the 1960s, however, critiques of this social model of the company had started to emerge, particularly in the US. J. K. Galbraith's *The New Industrial State* argued that the corporation controlled its environment to such an extent that it transcended the traditional sources of "countervailing power."[15] The result was a shift from the corporation as a social institution to what John Kay refers to as the "empty corporation."[16] From the 1970s and 80s, the firm came to be seen as an investment vehicle, and the success of a firm was no longer judged by its broader role as a social institution and whether it was fulfilling diverse societal responsibilities. Instead, the success of a firm was now judged purely in terms of the return on investment delivered to investors. Various financial innovations, notably to securitization, accelerated this process as did the easing of restrictions on cross-border capital movements. There was a shift in the function of the financial industry from a source of capital to one in which such firms "serve themselves."[17]

The dominance of this financially driven view of the corporation resulted in a reconfiguration in regulatory models. In particular, it resulted in a renewed and myopic emphasis on the principal-agent problem. If the goal of the firm was shareholder primacy, ensuring that the firm (and, most importantly, its managers) acted in the best interests of shareholders. This logic has driven contemporary debates in corporate governance.

Following the logic of shareholder primacy, the primary goal of corporate governance today is to protect the interests of the shareholder/investor/owners of a company.[18] In practice, this has meant

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[14] Peter Drucker, *The Concept of the Corporation* (John Day 1946).
[15] John K. Galbraith, *The New Industrial State* (Houghton Mifflin 1967).
[16] The term 'empty corporation' is taken from John Kay, 'The Concept of the Corporation' (2019) *Business History* <10.1080/00076791.2018.1509956> (accessed 20 August 2019).
[17] Lawrence A. Mitchell, 'Financialism: A (Very) Brief History' in Cynthia A. Williams & Peer Zumbansen (eds) *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (Cambridge University Press 2011) 50.
[18] See Adolf Berle & Gardiner Means, *The Modern Corporation & Private Property* (Transaction Press 1932); Michael C. Jenson & William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Finance & Economics* 305.

adopting regulatory measures that aim to ensure that *all* of the other actors within a firm act "as if" they were shareholder-investors. By better aligning the incentives of the various actors, firm performance — as measured by the share price — is improved, benefiting "all" of the stakeholders in a firm, as well as the public who (ultimately) benefit from the goods and services that a successful firm provides.

According to this view, executives, managers, and other employees are understood as being motivated by self-interest and of having an unhealthy disregard for the negative consequences of their actions on investors (and society). Increasing shareholder control over other actors within the firm – becomes the primary goal of corporate governance rules.

Several requirements are imposed on corporations. Investor confidence depends in large part on the existence of an accurate and useful corporate governance framework. Such an organizational framework traditionally focuses on four issues: (1) an accountable board and management, (2) internal control and monitoring processes, (3) transparent information disclosure about the financial position of the company, and (4) responsibility for the interests of minority shareholders.[19]

The takeaway? Corporate governance discussions have not really changed that much. The focus is still (as with the VOC) on reducing managerial misbehavior and maximizing the value of shareholders (the stakeholders who are taking the most significant risk). Moreover, the mechanisms for achieving this are more transparency and more supervision. However, framing corporate governance primarily in terms of shareholder value and agency-costs is incomplete and potentially misleading. It encourages box-ticking and an empty conformity. Managers are motivated to project an image of compliance while continuing as before.

Finally, it doesn't do anything to address the real needs of companies today, namely the challenge of navigating the digital revolution.

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[19] See Stephen M. Bainbridge, *The New Corporate Governance in Theory & Practice* (Oxford University Press 2008).

#Digital

Digital technologies are now turning the world upside down. Over the last three decades, an on-going series of technological developments have transformed economic and social life.[20] Consider the following:

- The shrinking size, increased power, and diverse applications of personal computers and, more recently, smartphones.
- The global reach of communication networks and the new forms of social interaction and economic exchange that these networks have made possible.
- The availability of cloud databases containing vast amounts of information that can be processed by software algorithms for use across multiple social and economic settings.

The scale and impact of these technological changes justify talk of a "digital transformation." The result? #Digital is amongst the most pressing issues of our times. It is a fascinating but challenging time for business.[21] Industry boundaries are disappearing. New platform companies have emerged which operate across multiple industries (retail, transport, finance, healthcare, food, etc.) and use global communication networks to deliver new business models and disrupt incumbents. Social media empowers everyone and has transformed the meaning of communication and mass media.[22]

We cannot think in terms of traditional corporate structures anymore, as their boundaries have become more fluid and porous. Traditional corporate organizations with their departments, business divisions, and hierarchical relationships between the different groups of stakeholders are changing as companies adapt to this environment.

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[20] See Kevin Kelly Alec Ross, *Understanding the 12 Technological Forces that Will Shape Our Future* (Penguin 2017); *The Industries of the Future* (Simon & Schuster 2017).

[21] See, generally, Mark Fenwick and Erik P. M. Vermeulen 'The Digital Future of Corporate Governance' *International Corporate Governance Network Yearbook 2018,* p. 11; Mark Fenwick and Erik P. M. Vermeulen, 'Technology & Corporate Governance' 48(1) *The Texas Journal of Business Law*, 1 (2019); Mark Fenwick and Erik P. M. Vermeulen, 'The Unmediated and Technology-Driven Corporate Governance of Today's Winning Companies' *New York University Journal of Law and Business* (2020).

[22] See Mark Fenwick & Erik P. M. Vermeulen, 'Technology & Corporate Governance' (2018) available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3263222> (accessed 20 August 2019).

Business leaders understand that a new world needs a different approach. On August 19, 2019, the Business Roundtable, an association of chief executive officers of leading companies in the United States, clearly stated that "CEOs endeavor every day to create value for all our stakeholders, whose long-term interests are inseparable." This emphasis on "*all* our stakeholders" is significant. It reflects the emerging view that companies are not static hierarchies focused on the "primacy" of shareholders, but complex, dynamic ecosystems comprising diverse, interacting elements.

Think about it. Digital technologies have changed consumer behavior. Consumers do not appreciate mass production anymore, and brand loyalty is increasingly fragile. Digital technologies have made consumers way more knowledgeable and sophisticated.[23] They will only stay if "products" offer them a meaningful and personalized experience. They expect data and data analytics to deliver these more sophisticated services, and "user feedback" and social media give them the "voice" to express their views and educate themselves about a company's performance.

The same can be said about employees. People are no longer satisfied with the prospects of becoming anonymous cogs in a hierarchical corporate machine.[24] They are looking to maximize their personal potential by building a lifestyle and a sense of identity that revolves around doing things that they care passionately about. The digital transformation has created an unprecedented degree of choice. There are endless possibilities. Employees do not stay because it is hard to walk away. They stay if an "ecosystem" offers them the opportunity to engage in a meaningful life project through "work."

Finally, digital technologies are empowering investors in the ecosystems of the future, as well. Artificial intelligence tools that analyze website traffic and social media engagement offer institutional and other professional investors a better understanding of a company's growth

[23] See Timothy Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (Vintage 2016).
[24] See Reid Hoffman, Ben Casnocha & Chris Yeh, *The Alliance: Managing Talent in a Networked Age* (Harvard Business Review 2014); Steve West, 'Meeting Millennial Expectations in Four Areas of Technology' *Forbes* (June 28, 2018) <https://www.forbes.com/sites/forbestechcouncil/2018/06/28/meeting-millennial-expectations-in-these-four-areas-of-technology/#3e7c9b244ffc> (accessed 20 August 2019).

opportunities and prospects.[25] A smart analysis of earnings transcripts helps investors capture and assess management sentiment.

Blockchain technology has the potential to substantially reduce the cost for companies to access capital markets, providing more investment opportunities and global liquidity to investors.[26] Smart contracts, computer program code, or protocol that automates the verification, execution, and enforcement of specific terms and conditions, will ensure the necessary compliance and security.[27]

The result? A 21st-century company needs to cultivate and maintain one or more active and healthy ecosystems to engage with all stakeholders in order to stay relevant and competitive. This requires all companies to keep up with the latest technological trends. Of course, digital technology plays a significant role here in gathering feedback from stakeholders.[28] However, the quickest way to get instantaneous and consequential input is to encourage an open and inclusive dialogue with stakeholders, using different digital and social media platforms. The companies themselves have to step in and take a much more proactive role in creating such an environment in which all stakeholders feel valued.

Here are some concrete examples of this trend. Dutch multinational, Philips, has shifted its annual report into an interactive content experience for the company's broader stakeholder community, using various strategies and online platforms. Microsoft has appointed a Chief Storyteller to help stakeholders (including society) understand who they are, what they do, and why they exist. The move certainly helped Microsoft rediscovering its "soul." Other examples that increased stakeholder engagement and offered companies a window into different stakeholders' perspectives are: Jeff Bezos' yearly letter to the shareholders; "Millennial" representation on the board of

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[25] McKinsey Global Institute, 'Artificial Intelligence: The Next Digital Frontier?' (2017) <https://www.mckinsey.com/~/media/McKinsey/Industries/Advanced%20Electronics/Our%20Insights/How%20artificial%20intelligence%20can%20deliver%20real%20value%20to%20companies/MGI-Artificial-Intelligence-Discussion-paper.ashx> (accessed August 20, 2019).

[26] See Primavera De Filippi & Aaron Wright, *Blockchain & the Law* (Harvard University Press 2018).

[27] See Marcelo Corrales, Mark Fenwick & Helena Haapio (eds), *Legal Tech, Smart Contracts & Blockchai*n (Springer 2019).

[28] See Mark Fenwick, Joseph A. McCahery & Erik P. M. Vermeulen, The End of 'Corporate' Governance: Hello Platform Governance' (2019) 20(1) *European Business Organization Law Review* 171.

Starbucks; the appointment of a social media influencer on the board of AirAsia to make the board more susceptible to the new generation stakeholders; and the use of Twitter as a business/communication tool by Anand Mahindra, executive chairman of Mahindra and Mahindra.

In the twenty first century, the rise of digital technology is transforming the world of corporate governance — but there is no "one-size-fits-all" approach. Artificial intelligence, blockchain technology, and social media can create unique ecosystems with different groups of stakeholders. How to use these technologies wisely is one of the most critical questions facing both companies and policymakers today.

One thing is for sure, companies need more digitally savvy corporate governance experts, and governments need to move beyond ideas and debates inherited from the seventeenth century. The pace and range of digital innovations, as well as the increased pace of innovation cycles, make it much more difficult for bigger, traditionally organized corporations to survive and flourish. Moreover, this sort of environment is not going to deliver a stable and fulfilling workplace, making it increasingly difficult for such corporate "dinosaurs" to attract the best talent needed to turn things around. The challenge for larger corporations is to transform themselves from corporations to something better suited to the challenge of "going digital."[29]

It is in this context that we should consider the rise of the so-called platform business model, as the most significant adaptation to the new possibilities of a networked age. Here, we are talking about companies that operate a "social" platform (Facebook, Instagram), an "exchange" platform (Amazon, Airbnb), a "content" platform (YouTube, Medium), a "software" platform (GE's Predix, Microsoft's GitHub), or even a "blockchain" platform (Ethereum, EOS). Platforms come in diverse forms, but what is common to all platforms is that they make connections between "creators" and "extractors" of value and the platform generates a profit from making these connections, either by taking a commission or advertising.[30]

[29] See Mark Fenwick & Erik P. M. Vermeulen, 'The 'New Firm: Staying Relevant, Unique & Competitive' (2015) 16 *European Business Organization Law Review* 595.

[30] For more on platforms, see Mark Fenwick, Joseph A. McCahery & Erik P. M. Vermeuelen, The End of 'Corporate' Governance: Hello Platform Governance' (2019) 20(1) *European Business Organization Law Review* 171; Geoffrey G Parker, Marshall W. Van Alsyne & Shandgeet Paul Choudry, *Platform Revolution:*

At first, these new platform firms promised a more decentralized, efficient, and less formal style of business. However, as these tech businesses scaled into some of the largest businesses in history (so-called "super-platforms"), they have become shrouded in controversy and are now widely seen as problematic.[31] After all, remaining a sustainable and socially responsible platform can be difficult. As platforms scale — and particularly when they "go global" — they came to rely on hierarchical organizational structures associated with corporations. Furthermore, to sustain their growth, many went public, exposing them to the short term (quarterly) financial pressures associated with a publicly listed corporation.

Such structures make much sense as a strategy for managing the complexities of size. The problem is that a hierarchical organization can easily result in the bureaucratization of the platform, i.e., they can become closed, hierarchical, and overly bureaucratic. This type of organization worked well in an era of mass-production but is less suited to the dynamic business realities of today, particularly for platforms. A tension can emerge between the organization of a platform and what made it successful in the first place. The effect of this tension is that established platforms are unable to react effectively or quickly enough to the challenges created by fast-paced changes in markets, consumers, and technologies. The recent struggles of Facebook, as well as the image problems experienced by other large, well-known platforms (Amazon, Google, Uber, Wework), illustrate this risk of "devolving" into a more corporate style of organization.

While recognizing the validity of such criticisms, we must also acknowledge the innovation that platforms have delivered both to diverse stakeholders (most obviously, consumers and employees) and the global economy, more generally. After all, platforms have made an essential contribution to the creation of our new digital world. This is not surprising. The emergence of these new platforms and services has been one of the major economic developments of the last two decades. Perhaps, there is a more important lesson to be learned from the success of such companies.

How Networked Markets are Transforming the Economy and How to Make them Work for You (Penguin 2016); Alex Moazed & Nicholas J. Johnson, *Modern Monopolies: What it Takes to Dominate the Twenty First Century Economy* (St. Martin's Press 2016).

[31] See Scott Galloway, *The Four: The Hidden DNA of Amazon, Apple, Facebook & Google* (Random House 2017).

At their best, what platform companies all have in common is that they empower and facilitate experimentation, collaboration, and co-creation amongst multiple stakeholders. These stakeholders include employees and investors, but also consumers, developers, content creators, other companies (both large and small), non-profits, educational institutions, governments, etc. As such, they point us towards a more fundamental shift in how the most innovative businesses organize themselves and structure governance, namely the emergence of what we describe here as "ecosystems."

Ecosystems

A business "ecosystem" – or ecosystem company - combines the following features:

- It leverages the unique opportunities of new digital technologies (i.e., software, big data, cloud-based databases, the Internet, social media, etc.) to deliver a meaningful experience to end-users.
- It adopts a flatter, fluid, and more inclusive style of organization involving collaboration with multiple partners built around a network of unbundled, high-performance teams focused on co-creation.
- It embraces a more open and transparent approach to communication and information management.
- It implements a new style of digital leadership that focuses on creating an environment that fosters and facilitates creativity, rather than supervising compliance and managing legal risk.

Together, these are the distinctive features of an ecosystem and distinguish it from the modern corporation.[32] In an age of hyper-competitive technology-driven markets, every company needs to consider reinventing itself as an ecosystem. Let's consider each of these features in turn.

Technology in the Service of Delivering a Unique End-User Experience

A technology-driven ecosystem is not simply a "company that uses technology." A technology-driven ecosystem adopts a business model that is characterized by economies of scale and network effects, deriving from the centrality of software in all of its operations.[33] This allows (and requires) an ecosystem to collect user-generated data on a continued and systematic basis — which enables it to constantly improve performance and the end user experience. As such, in an ecosystem, the end-user is vitally important, and, in some sense, employees are "paid by the user" and not by the organization. The main strategic goal of a technology-driven ecosystem is to provide its users with a meaningful experience, as this is the only way to inspire trust and retain those users that are so essential for sustaining revenues.

To create value of this kind requires employees to maintain "zero distance" from the end-user / consumer.[34] This can be contrasted with the world of corporations and mass production. We are moving from a world of mass-market to personalization via interaction and interactivity in which mass-produced, one-size-fits-all manufactured solutions are replaced in favor of systems that able to produce a tailored niche experience.

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[32] A brief note on methodology. The concept of an ecosystem developed here is based on the empirical study of the most successful technology firms today. As such, it represents an "ideal type" or composite of how a business needs to organize its operations and governance in a networked, digital age. References to specific companies in the following are not meant as blanket endorsements of those companies, but an acknowledgment that on the specific point cited that company has identified an interesting approach. In this respect, we hope to move beyond the "all or nothing" attitude that currently characterizes discussion of the most successful tech-firms.

[33] See John Hagel, 'The Big Shift in Business Models' (16 May 2016) *The Marketing Journal* <http://www.marketingjournal.org/the-big-shift-in-business-models-john-hagel/> (accessed 20 October 2019).

[34] See Dennis Campbell, Marshall Meyer, Shelley Xin Li, and Kristin Stack, 'Haier: Zero Distance to the Customer,' *Harvard Business School Case Study* 115-006 (2015) < https://www.hbs.edu/faculty/Pages/item.aspx?num=49076> (accessed 20 October 2019).

Designing clear reputation systems, that help consumers navigate towards the best and right service providers. In a world of diminishing brand loyalty and where the costs of migrating to a new brand are so low, user engagement takes on an unprecedented meaning. *This* is the real lesson to be taken from the success of the most successful technology ecosystems. For instance, Airbnb or Amazon relies on the "wisdom of the crowd" — as established via an online platform and user reviews — to help consumers make decisions. A combination of software rating algorithms and consumer reviews have become more important than brand loyalty in establishing trust and shaping consumer choice in a digital age.

An additional advantage of this approach is that it reduces the need for traditional advertising and marketing. Instead, successful ecosystems rely on distribution generating "pull" dynamics (attracting more users via the delivery of a meaningful experience) rather than industrial "push" marketing, which relied on the skill of external actors, most obviously advertising agencies and marketing consultants.

A new attitude towards emerging technologies, such as artificial intelligence, sensors, and blockchain, is also important. Such technologies will further facilitate the organization of more and different types of ecosystem. For instance, in an Internet of Things environment, the user experience will be more and more dependent on technology and how it will increase smart connectivity between devices and convenience. Most discussions about ecosystems now revolves around the uses and possibilities of emerging technologies. This makes sense because smart technology is necessary to adequately coordinate people and assets and manage businesses.

Technology-driven ecosystems, therefore, need to exist in a constant state of high alert regarding technological change. And this requires a focus on emerging technologies that may not have any obvious or immediate connection to existing products or services. It is no longer enough to focus on incremental changes that are directly connected to existing operations. A much more open and broader perspective is required. Successful ecosystems do this by recognizing the value of *all* stakeholders in the value chain, treating them all as key participants in a constantly evolving value creation process, that connects them with developments across multiple technologies to provide innovative and contextualized solutions.

However, developing the right attitude towards technology and acknowledging the centrality of end-users is not enough. The success of an "ecosystem" depends on several other elements.

A Flat, Fluid, Inclusive Organization & Culture

Crucially in an ecosystem, there is a blurring of the borders between the inside and outside of the business (erasing the traditional separation between corporation and market) and the internal vertical divisions and horizontal layers of the corporation (erasing the traditional separation between the production department, marketing department, legal department etc., as well as the different layers of manager, employee, etc.). "Inside" the corporation traditional roles and identities (the manager, the employee, the user) are disrupted. In this way, the hierarchical and static structures of the modern corporation are unbundled, and we see the emergence of more fluid, dynamic identities and roles.

Within this flatter and more fluid organizational structure a crucial role is played by maintaining a network of unbundled high performance, entrepreneurial teams focused on collaboration and co-creation. Decentralized, high-performance teams are driven by a culture of entrepreneurship, and tech-driven innovation is the locus of this style of organization and innovation is situated in a set of loosely coupled, independent units (a network of microenterprises). This style of organization constitutes a network, in the sense that these teams are "small pieces, loosely joined." (to quote futurologist David Weinberger).[35]

These teams become a site of creativity in which personal expression through responsibility and freedom is encouraged. The key idea is that it has become impossible to engineer a complex, innovative system from the top down. Settled identities of employee, user and companies are obsolete. The transformation of the organization and culture of a business is based on

[35] David Weinber, *Small Pieces, Loosely Joined: A Unified Theory of the Web* (Basic Books 2003).

acknowledging that units, teams, and employees are expected to become permanently entrepreneurial. However, more than that, they must also become self-sufficient.

On this account, the true realization of the potential of employees is only be achieved through personal expression, responsibility, and autonomy. This occurs through process of imagination, experimentation, and learning. This also provides a more fulfilling employee experience than that associated with the routinized processes and procedures of a bureaucratized corporation.

Internal competition between these teams is also encouraged within the most successful ecosystems. Chinese company Haier is often cited in this context.[36] Haier has divided itself into more than 4,000 microenterprises, most of which have less then fifteen employees. Procedures and processes replaced by innovation, creativity, and risk. In the twentieth century, low risk meant minimizing mistakes. In the twenty-first century, errors are embraced as they deliver learning opportunities, and learning is of key importance.

In a flatter and fluid environment, organizational culture becomes crucial. A “best-idea-wins-culture” needs to be embedded in the “DNA” of an ecosystem.[37] This means embracing the centrality of agility — the ability to move quickly and not spend too much time on any one thing and to retain ability to pivot fast and iterate. It means embracing luck and serendipity.[38] Here, the thought is that if you plan everything you cannot be lucky. Too much focus on one direction can become a hindrance. Smart disobedience takes precedence over compliance — you do not get success by doing what you are told. A new “anti-disciplinarity” and relentless commitment to excellence is required — “if you can do this elsewhere, you do not belong here.” In short, we are in the world of “compasses over maps” and a successful ecosystem will understand this and adopt such an attitude in all aspects of its organization and culture.[39]

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[36] See Gary Hamel and Michele Zanini, ‘The End of Bureaucracy’ *Harvard Business Review* (November-December 2018) < https://hbr.org/2018/11/the-end-of-bureaucracy> (accessed 20 October 2019).

[37] See Mark Fenwick & Erik P. M. Vermeulen, ‘The ‘New Firm: Staying Relevant, Unique & Competitive’ (2015) 16 *European Business Organization Law Review* 595.

[38] On the centrality of serendipity in innovation, see Victor W. Hwang and Greg Horowitt, *The Rainforest: The Secret to Building the Next Silicon Valley* (Regenweld 2012).

[39] The principle of “compasses over maps” is most associated with the MIT Media Lab, see < http://blog.media.mit.edu/2012/07/compasses-over-maps.html> (accessed 20 October 2019).

A company that is often cited as having been successful in creating this kind of organization and culture is Netflix.[40] In 2009, its founder Reed Hastings pointed out that too many companies have "nice-sounding" value statements, such as integrity, communication, respect, and excellence. However, he understood that these "values" are often not what is really valued within a company and, all too often, are just empty window dressing.

In a 124-page slide deck, Reed Hastings (and Netflix) outlined that the dynamic of this employer-employee relationship needs to be changed.[41] Moreover, the quality of the working experience and environment now matters so much more. Of particular importance are opportunities for learning and capacity building. As was stated in the slide deck: The actual company values, as opposed to the nice-sounding values, are shown by who gets rewarded, promoted, or let go. This forward-thinking approach to culture helps to attract talented people as it offers them a much greater degree of freedom and responsibility. In the absence of this type of culture, the best young talent will leave. Inside Netflix, it is all about context, not control. The result is that every Netflix employee is treated as an entrepreneur. That the open culture is in the DNA of Netflix is also shown by its ability to attract creators. They are attracted by the creative (and financial) freedom offered by the Netflix platform.

In this way, ecosystems are built around the idea of delivering constant innovation via an open and inclusive process of co-creation. By "organizing-for-innovation" in this way, such ecosystems are radically different from the clearly defined, static roles and fixed hierarchies of traditional organizations.

[40] See Marc Randolph, *That Will Never Work: The Birth of Netflix and the Amazing Life of an Idea* (Little, Brown and Company 2019).
[41] See Andrew Heather, 'Is this Netlix Presentation Silicon Valley's Most Important Document?' *Mindtools* (2017) < https://www.mindtools.com/blog/netflix-presentation/> (accessed 20 October 2019).

Open Communication and Information Management

Many problems arise when a business fails to communicate properly with all stakeholders. For instance, YouTube's recurrent difficulties with its content creators have tended to be the result of poor communication. The best ecosystems understand that communication is not a one-way process of information disclosure but, instead, a more engaged, responsive, and open process that dialogue.

In a digital age, many alternative means can now be used for communicating. For instance, business leaders can interact with a company's stakeholders via an "annual letter." Such letters seem to work best when written in a personalized and honest style. A well-documented example of a company that has adopted this type of approach is Amazon. Jeff Bezos' annual letters to investors are considered a "must-read" for anyone with interest in Amazon (and ecosystem companies).[42] What is perhaps most interesting is that these letters not only provide investors and other stakeholders with last year's performance and future developments and growth prospects but also include business advice and insights. It is not surprising that these letters attract enormous attention on social media. They have created significant hype, which makes communication even more personalized, open, and effective.

Genuine engagement, rather than information control, is the most effective approach. Social media and other online media (such as blogs) are becoming more and more important as a forum for disclosing information about a company, both internally and externally. There are many new opportunities and possibilities for more creative forms of information dissemination and sharing.

[42] See Tricia Gregg and Boris Groysberg, 'Amazon Over the Years, Based on Jeff Bezos's Letters to Shareholders,' *Harvard Business Review* (May 2019) <https://hbr.org/2019/05/amazons-priorities-over-the-years-based-on-jeff-bezoss-letters-to-shareholders> (accessed 20 October 2019).

Digital Leadership

Finally, there is the question of leadership in a digital age. A key issue here the changing role of the board of directors.[43] More specifically, a board is expected to perform a more complex range of functions in a successful ecosystem and not be overly focused on monitoring and compliance functions. Of course, compliance remains important, but a board today needs to perform several additional tasks aimed at supporting executives and managers and helping to create an environment for key figures in the ecosystem to make better strategic decisions about the overall direction of the business.[44] These new function are difficult, not least because of the uncertainties regarding the future direction of technology. So, boards need to become much more experimental in their composition. A more diverse expertise becomes importance, for example, relating to consumers, technology, and the Millennial generation, as well as individuals capable of playing "rebellious" roles such as influencer, disruptor, and storyteller.

To successfully transform into a well-functioning ecosystem, leadership is, of course essential. Business leaders should be visionary, entrepreneurial, and innovation minded. They should understand the "platform dynamics." Take Netflix again. When Reed Hastings "let go" of his Head of Communications for repeated use of a racial slur, he showed the importance of leadership. In a memo to Netflix staff, the founder CEO wrote:

> I should have done more to use [a first incident] as a learning moment for everyone at Netflix about how painful and ugly that word is, and that it should not be used. I realize that my privilege has made me intellectualize or otherwise minimize race issues like this. I need to set a better example by learning and listening more so I can be the leader we need.

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[43] See Mark Fenwick and Erik P. M. Vermeulen, 'Evaluating the Board of Directors' *European Corporate Governance Institute Law Working Paper* No. 425/2018.

[44] On the challenge of managing legal risk and compliance in today's world, see Mark Fenwick, 'The New Corporate Criminal Law & Transnational Legal Risk,' in *Flexibility in Modern Business Law: A Comparative Assessment,* edited by M. Fenwick *et al*. (Springer 2016) pp. 149.

A company’s success in becoming an ecosystem is dependent on its leadership and their ability to listen and engage. Business leaders should have a thorough understanding of the ingredients that make a company a successful and ecosystem company.

Ecosystems are not static. The world is constantly changing, and digital technologies are developing exponentially. Successful “ecosystems” can easily lose their appeal in a relatively short period. Also, traditional and social media are quick to portray platforms in a bad light. Particularly, the dominant and more centralized platforms attract much attention. Think Amazon and its treatment of employees, Facebook and the way it deals with privacy, etc.

Nevertheless, businesses that operate as ecosystems are still topping the most attractive employer rankings. Also, other businesses want to become part of such ecosystems. For instance, corporate executives increasingly refer to ecosystems in earning calls.

Moreover, more and more startups realize that by becoming part of an ecosystem company their growth potential and strategic possibilities will be greater than if they remain independent.[45]

To make this work, it is necessary for the ecosystem to take a different kind of leadership role. Leadership, in this context, means allows the startup to preserve its own identity and culture, whilst enjoying the benefits of being associated with a larger and more established firm (i.e., growing faster, exploiting synergies with other departments or businesses within the “ecosystem.” Crucially, this opens the possibility of the startup influencing the culture and practices of the acquiring ecosystem. As illustrated by this possibility, ecosystem leadership involves maintaining a continued openness to change.

These then are the four crucial elements of any successful ecosystem. It should be noted that there is no “one-size-fits-all” model in this context. Ecosystems can take multiple forms ranging from slightly “tweaked” versions of traditional (hierarchical and closed) companies through to the (flat

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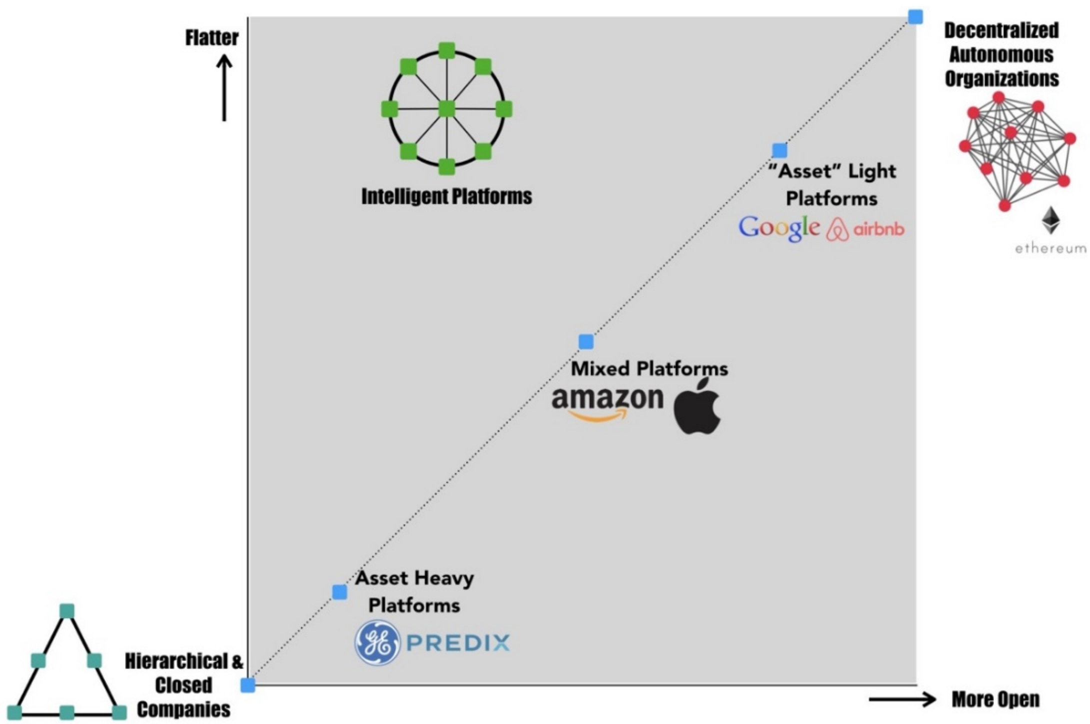
[45] Mark Fenwick and Erik P. M. Vermeulen, ‘Seven Corporate Venturing Strategies to Foster *Innovation’ TILEC Discussion Paper* No. 2016/23 (2016) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823008> (accessed 20 October 2019).

and open) blockchain-based "decentralized autonomous organizations (see *Figure 1*)." The "best" approach depends on the individualized circumstances of a business or organization.

But, this idea of a spectrum of possibilities connects to a final point on ecosystem organization, namely the constant danger of transforming (back) into, a company. Remaining a sustainable ecosystem can be difficult. As ecosystems scale – and particularly when they "go global" – they inevitably come to rely on hierarchical organizational structures. Such structures make a lot of sense as a strategy for managing the complexities of size. The problem is that a hierarchical organization can easily result in the bureaucratization of the platform, i.e., becoming closed, hierarchical and overly bureaucratic. This type of organization worked well in an era of mass-production but is less suited to the dynamic business realities of today. Constant vigilance is required in sustaining the ecosystem model, particularly in larger organizations that operate transnationally.

Figure 1: The Corporate Evolution



Conclusion

Unfortunately, however, many regulatory structures today are not fit for purpose. At least, if the purpose of regulation is understood as facilitating ecosystems and not preserving the corporation. Too much regulation incentivizes the wrong kind of organizational structures, culture, and behavior, and makes leveraging new technologies unnecessarily costly. As described in the first section, company law, including corporate governance, for example, has over recent decades embraced an "agency-cost" frame derived from the work of Berle and Means, and Jenson and Meckling.[46] Regulation has been designed with the goal of maximizing shareholder value and enhancing shareholder-owner control over the firm.

However, this approach does little to address a firm's need to organize for innovation and operate as a sustainable and socially responsible eco-system. Instead, most regulation creates a strong incentive for manager-agents to engage in formalistic compliance and adopt a short-term focus on financial metrics aimed at appeasing shareholders. The current regulatory framework distracts firms from doing what they should be doing to succeed in a networked age. Corporate governance results in costly bureaucratic and legalistic procedures that function as a drain on a firm's resources.

As such, current regulatory approaches and trends are failing business organizations. In short, too much corporate governance is programming institutions to be dysfunctional. There is an ever-widening gap or disconnect between regulatory strategies and the business needs of companies operating in fast-moving global markets. The result? Many businesses and other organizations are ill-equipped to meet the challenges of today's world. Instead, we need to design regulations that incentivize firms to establish the organizational structures and practices that will allow them to succeed. A new paradigm of corporate governance focused on supporting a firm's capacity to innovate – as well as compliance and risk management – needs to be developed.

[46] See Adolf Berle & Gardiner Means, *The Modern Corporation & Private Property* (Transaction Press 1932); Michael C. Jenson & William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Finance & Economics* 305.

There is currently an enormous amount of interest in emerging technologies and what it means for business and business regulation. However, the various stakeholders in the corporate governance space are moving at different speeds and in different directions. Everyone is aware that something important is happening, but there is much less agreement on what the digital transformation means for the future of business and business regulation. This is a crucial issue, as those jurisdictions that "get corporate governance law right" stand to benefit enormously.

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