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## A Purpose-Based Theory of Corporate Law

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A PURPOSE-BASED THEORY OF CORPORATE LAW

ASAF RAZ\*

ABSTRACT

Modern corporate law scholarship focuses on flexible, dynamic questions: should multiple-class shares be permitted? To what extent should staggered boards be implemented? Even when making the more structural inquiry—what is a corporation, and what is its purpose?—corporate jurists tend toward generalizations: perceiving corporate law as either contract law, property law, or public law, and being either shareholderists (“shareholder primacy” advocates) or stakeholderists (“corporate social responsibility” advocates). In these accounts, fiduciary duties presumably run directly to shareholders or stakeholders. However, as this Article demonstrates, careful examination of corporate law (in Delaware and many other jurisdictions) reveals that all of these prevailing conceptions are, positively and normatively, inaccurate.

This Article offers a new paradigm through which to examine corporate law. It provides an integrative theory, fully congruent with both existing law and policy analysis, showing that corporate law is not any other field, but has its own structure, with uniquely beneficial economic and practical implications. At the heart of corporate law’s anatomy is a simple, yet profound, fact: the corporation is a person with a purpose. The corporation itself has Hohfeldian relationships with its stakeholders, shareholders, and fiduciaries. The benefit of both stakeholders and shareholders is derived from the degree to which the corporation attains its purpose (for example, the lawful pursuit of profit). Directors and other fiduciaries, in turn, have an obligation to cause the corporation to achieve its purpose.

While corporate purpose, personhood, stakeholders, shareholders, and fiduciaries are all subjects of heated discussion, this Article is the first to tie them together, providing a fully self-explanatory picture of their mutual interactions. Doing away with both the “contract/property” and “shareholder/stakeholder” dichotomies, this Article applies the theory to several high-currency topics, including shareholder activism, corporations’ constitutional rights, the rise of LLCs and other “alternative” corporations, mandatory arbitration, and Senator Warren’s Accountable Capitalism Act. At each turn, the purpose-based theory of corporate law produces more refined conclusions, and charts a way forward—from conceptions devised in the 1980s, to a nuanced framework, capable of providing better answers to the many issues corporate law faces in its current state of flux.

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CONTENTS

INTRODUCTION .....	525
I. THE TRUE ANATOMY OF CORPORATE LAW .....	531
A. <i>The Corporation's Purpose</i> .....	533
B. <i>The Corporation's Personhood</i> .....	539
C. <i>The Corporation's Stakeholders</i> .....	548
D. <i>The Corporation's Residual Claimants</i> .....	557
E. <i>The Corporation's Fiduciaries</i> .....	563
II. APPLYING THE PURPOSE APPROACH TO THREE CONTEMPORARY ISSUES .....	566
A. <i>Shareholder Activism</i> .....	567
B. <i>Corporations' Constitutional Rights</i> .....	570
C. <i>Alternative Corporations</i> .....	573
CONCLUSION .....	581

## INTRODUCTION

CORPORATE law<sup>1</sup> is in an identity crisis. Its two most fundamental questions—“what is a corporation?” and “what is the corporation’s purpose?”<sup>2</sup>—are either answered very differently by different commentators, or (more often) not addressed at all. In the latter case, judges, lawyers, and scholars tend to focus on less structural and more modifiable issues, such as topics in corporate governance (from staggered boards, through shareholder activism, to dual-class shares), and treat them as if they *are* the entirety of corporate law.<sup>3</sup> The first two questions operate in the background, usually unspoken and “taken for granted.” As a result,

1. In this Article, the terms “corporate law” and “corporation” are used in a broad sense, corresponding to what is often known as “business associations law” (an unsatisfactory phrase by itself, since some corporations have a non-business purpose). Other terms, such as “organizational law” (tying together both corporations and non-corporate organizations), are also inadequate. Corporations include more than the type of entity known as “corporation” in Delaware and similar jurisdictions, *see* Delaware General Corporation Law, DEL. CODE ANN. tit. 8, ch. 1 (2020). Rather, corporations encompass all entities that have the set of characteristics discussed in this Article. *See infra* Part I. These entity types include the Delaware “corporation,” in addition to the company, cooperative, voluntary association, some partnerships, and others, as far as the range of corporate laws in a given jurisdiction allows. They include both for-profit and other-purpose corporations. *See* Asaf Raz, *Share Law: Toward a New Understanding of Corporate Law*, 40 U. PA. J. INT’L L. 255, 258 n.1 (2018) (utilizing the same approach). This is more than a linguistic issue: it is crucial for this Article’s thesis, recognizing that all corporations have certain unifying traits, even if they differ in some details (such as the corporation’s purpose, the title of its governing statute, or its internal governance rules). For similar statements, see VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 7 (2019) (“I use ‘corporation’ in the British sense, meaning ‘artificial person’[, not the] American sense of ‘large for-profit company.’”); Elisabeth de Fontenay, *Individual Autonomy in Corporate Law*, 8 HARV. BUS. L. REV. 183, 191 (2018) (“The ‘corporation’ . . . may be viewed as a compendium of different forms of organization, rather than as a single form. While these different forms comprise many overlapping terms and judicial doctrine, each has a core of distinct terms, supplied both by statute and by the common law.”). If a reader so wishes, it is possible to substitute the term “entity” for “corporation” (while noting that, in the common usage of the word, many things besides corporations are entities). This Article distinguishes “corporations” in the narrow sense—mainly by referring to them in quote marks, for example, “Delaware corporation”—from corporations in the more general sense.

2. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992) (“[T]he most basic questions [are:] What is a corporation? What purpose does it serve?”); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 183 (2013) (“[The law of corporate purpose] is the most important issue in corporate law, and one of the most important questions in contemporary social organization.”).

3. *See, e.g.*, John C. Coates IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 806 (1989) (“When people refer to ‘corporate theory,’ they are generally talking about one of three things. Most often, they are arguing about corporate governance and corporate behavior. Less often, they are raising the more abstract topic of corporate purpose . . . . Rarely, however, do they raise the most abstract issue of all: what is a corporation?” (footnotes omitted)).

the participants in the corporate law sphere are not speaking the same language;<sup>4</sup> each is “pulling the blanket” in a different direction, generating fragmented, ineffective discourse.<sup>5</sup>

Yet, these questions are more than theoretical. Diverging answers can lead to massively different outcomes for real-life problems. In fact, a proper understanding of corporate law’s *structure*—the set of phenomena directly resulting from the concept of a “corporation,”<sup>6</sup> and attaching to *every* such entity—delineates the *boundaries* of the debate on each of the lower-level, dynamic choices. Interdisciplinary approaches, such as law and economics or law and society, are useful in determining whether, when, and how staggered boards or multiple-class shares (among many other debates) should be implemented. However, such discourse must exist within a certain framework, making clear *whose* welfare we are maximizing, who are the actors on the playing field, and who owes what kind of obligations to whom.

Today, the foundations of corporate law appear to be in flux, and not for the first time. The current landscape is largely reminiscent of the 1980s, when the “hostile takeover” wave ignited a wide-ranging debate on the fundamental nature of the corporation and its purpose.<sup>7</sup> A well-re-

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4. Corporate law suffers from strong divergence even in regard to the *words* used by different judges, lawyers, scholars, and other participants. Consider the following: “agency costs,” “business judgment rule,” “company” and “corporation,” “corporate” and “unincorporated,” “corporate governance,” “corporate social responsibility,” “entrepreneurship,” “equity,” “fiduciary,” “firm,” “internal affairs,” “nexus of contracts,” “personhood” and “entity,” “private ordering,” “property” and “investor ownership,” “separation of ownership and control,” “shareholder primacy.” Which of these terms do you use in your opinions, memoranda, or articles? In contrast, which appear redundant or unimportant? Rest assured, some think that *those* should be at the center of corporate law discourse. In fact, they might be discussing the very same issue, using different phrases. This miscommunication comes at an enormous cost to the corporate law community, since each participant must guess which terms the current audience is familiar with, and risk losing listeners’ comprehension if different expressions are used. This Article offers a complete structural theory of corporate law, which enables all participants to correctly handle each of the concepts above (and many others), based on just five building blocks. See *infra* Part I.

5. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1072 (2002) (“[T]he major participants in the debate seem to be talking past each other. . . . [T]heir basic conceptions are . . . fundamentally at odds . . .”).

6. In this regard, corporate law is similar to any other legal area. For example, contract law, at its core, is about the unmodifiable concepts attaching to the idea of a “contract.” The contract itself cannot change what a contract is. On the distinction between higher-level, “structural” and lower-level, “dynamic” meanings, see *infra* notes 32–33 and accompanying text.

7. The roots of that controversy can be traced to the 1932 debate between Merrick Dodd and Adolf Berle. See E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (advocating for a stakeholderist approach); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (defending a more shareholderist approach). However, for many following decades, the core questions of corporate theory did not

garded<sup>8</sup> article<sup>9</sup> by Chancellor William Allen—also one of the most important judicial figures of that period—delves into these questions, concluding there are just two possible answers. Allen calls them the “property” and “entity” conceptions.<sup>10</sup> In this Article they are referred to as *shareholderism* and *stakeholderism*, respectively. Consistent with Allen’s dichotomy, modern corporate discourse generally perceives them as the only options, and most corporate jurists find themselves in one of these camps. By and large, shareholderism is associated with the law and economics movement,<sup>11</sup> while stakeholderism is advocated by those espousing more communitarian views.

According to shareholderists, the corporation is property—specifically, the property of its shareholders—or, at most, an aggregate (“nexus”) of contracts, and its purpose is to increase shareholders’ wealth.<sup>12</sup> A present-day illustration of this approach is the phenomenon of shareholder activism, particularly by hedge fund managers.<sup>13</sup> According to stakeholderists, the corporation is a person, or entity, separate from its shareholders; yet, unlike natural persons, the corporation is not free to lawfully pursue its own benefit—rather, it must promote the open-ended interests of various stakeholders (such as employees and consumers), beyond the rights they already have under non-corporate law.<sup>14</sup> A recent demonstration of this approach is Senator Elizabeth Warren’s proposal to impose a legal duty on corporations to promote “general public bene-

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enjoy much salience—which the 1980s takeover wave changed. *See* Allen, *supra* note 2, at 263 (“The 1980s were turbulent years for corporation law. Twenty years earlier it had seemed that every interesting question in corporation law had been completely answered . . .”); Coates, *supra* note 3, at 807 (stating, in a 1989 article, that “arguments over the nature of the corporation died several decades ago,” but “[t]he legal concept of the corporation is currently in flux”).

8. *See, e.g.*, Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 773 (2015) (calling Allen’s article “a wonderful essay that all corporate law students should read, [in which] Chancellor Allen dilated on the two major traditions in American corporate law”).

9. Allen, *supra* note 2.

10. *Id.* at 264.

11. This association is not exclusive. *See, e.g.*, K.J. Martijn Cremers, Scott B. Guernsey & Simone M. Sepe, *Stakeholder Orientation and Firm Value* (Dec. 27, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3299889](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299889) [<https://perma.cc/SF9Y-66LN>] (using empirical economic analysis to argue for stronger stakeholder orientation); Joel Edan Friedlander, *Corporation and Kulturkampf: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31, 61–114 (1996) (using historical, cultural, and theoretical analysis to argue for stronger shareholder rights).

12. *See, e.g.*, Allen, *supra* note 2, at 264–65, 266–70.

13. *See infra* Section II.A; *see also* William W. Bratton, *Hedge Fund Activism, Poison Pills, and the Jurisprudence of Threat*, in *THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP?* 156, 156 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (“Hedge fund activism is to corporate law’s early twenty-first century what the hostile takeover was to its late twentieth century.”).

14. *See, e.g.*, Allen, *supra* note 2, at 265, 270–72.

fit.”<sup>15</sup> Neither conception ever won over the other;<sup>16</sup> shareholder activism and Senator Warren’s proposal are two examples among many ongoing debates. As new battles unfold, the mysteriously repetitive pronouncements of corporate law’s demise<sup>17</sup> will continue to turn out flatly mistaken. As Chancellor Allen proclaimed at the previous round, “[e]verything old became new again.”<sup>18</sup>

The 1980s left us with two ways of thinking, and they divide the corporate law community to this day. It is time to ask: do we really have only these two to choose from? Are the underlying motivations of shareholderists and stakeholderists—economic and communitarian, respectively—actually served by what they say about corporate law?<sup>19</sup> As this Article reveals, corporate law itself—both positive law and normative analysis, in both Delaware and other U.S. and international jurisdictions—does not

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15. Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018). Another recent stakeholderist proposal, garnering much scholarly and media attention, was the 2019 Business Roundtable statement. See *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/S2LS-DSYN>]. However, the Business Roundtable members (several corporations’ fiduciaries) do not have any legal right or power to single-handedly “redefine” any corporation’s purpose. That purpose is dictated by law, and can only be changed through law. By definition, just as corporations cannot lawfully breach the law, see *infra* Section I.C, and shareholders cannot lawfully receive more than what is left after the corporation meets all of its other obligations, see *infra* Section I.D, so are corporations legally required to act toward their purpose, see *infra* Section I.A, and their fiduciaries are legally required to cause them to do so, see *infra* Section I.E. Accordingly, this Article expands upon attempted legal reforms in the stakeholderist direction, not unilateral statements expressing subjective wishes that the law was different.

16. See, e.g., Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002) (“[T]he debate over the social role of the corporation remains unresolved.”).

17. See, e.g., Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) (“[C]orporation law, as a field of intellectual effort, is dead in the United States. . . . We have nothing left but our great empty corporation statutes . . . . [These are] shivering skeletons.”); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 789 (2017) (“Today’s corporate legal theory centers on a small-scale policy discussion . . . . If anything, the scope of corporate legal theory will narrow even more. . . . [C]orporate law will look more and more like the rest of private law . . . .”); Zohar Goshen & Sharon Hanes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263 (2019).

18. Allen, *supra* note 2, at 264.

19. For the (negative) answer, see *infra* Section I.B (explaining how corporate personhood, and the overall structure of corporate law—which differs from contract or property law—promote the long-term, large-scale creation of economic value); *infra* text accompanying notes 151–52 (explaining how employees, consumers, and other stakeholders are always less well-protected by corporate law than by non-corporate law).

(and likely never did)<sup>20</sup> support *either* the shareholderist *or* the stakeholderist conception. Each view is correct on some issues, and errs on others.

This Article’s account of corporate law is centered around a simple, yet profound, idea: the corporation is a person with a purpose. This statement has far-reaching implications. Contrary to both prevailing approaches, fiduciaries (such as directors and officers) owe their duties neither to shareholders, nor to stakeholders. In fact, their loyalty runs (and, under fiduciary law principles, *must* run) to one person: the corporation. Fiduciaries’ mission is to cause the corporation to achieve its purpose—which might be the lawful pursuit of profit (in the case of for-profit corporations),<sup>21</sup> or any other lawful purpose (such as those of benefit and nonprofit corporations).<sup>22</sup>

In turn, *the corporation* owes various obligations to others, both stakeholders and shareholders. The protection of stakeholders<sup>23</sup> is embedded in the mandatory requirement that the corporation act lawfully, that is, meet all obligations under positive law<sup>24</sup> (which is mainly non-corporate

20. See, e.g., *infra* text accompanying note 317 (quoting the 1847 case of *Smith v. Hurd*, fully conforming with the theory presented in this Article).

21. Indeed, being an entity does not necessarily entail being a “social” entity. Cf. Allen, *supra* note 2, at 271 (“[The] social entity conception sees the purpose of the corporation as not individual but social.”).

22. Uniquely, corporate law provides no dictate as to *how* to achieve this; the corporation can do whatever it wishes to pursue this open-ended imperative, and possibly even fail in doing so, without facing legal sanction. See, e.g., DEL. CODE ANN. tit. 8, § 102(a)(3) (2020) (stating that the corporation’s goals might be “to engage in any lawful act or activity”); *infra* text accompanying notes 128–29, 151. This challenges the reliance, typical in corporate law and economics, on *ex ante*, “contract”-based planning. Corporate law might exhibit contract-like traits in *some* situations, but its main normative underpinning is equity. See *infra* Sections I.D (discussing equity-based share law), I.E (discussing corporate fiduciary law). Accordingly, *ex post* determinations and adjudication are necessary and beneficial; they are inherent to the corporate framework. Any attempt to operate on a fully “contractual” worldview ignores what corporate law is, resulting in both inefficiency (smaller pie) and unfairness (transfers of the pie to those who are not supposed to get it—usually, the stronger party, such as a corporation’s fiduciaries).

23. The term “stakeholder” most broadly refers to *any* person having a relationship with the corporation, including non-residual claimants, residual claimants (mostly known as “shareholders”), and fiduciaries. See R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984) (“A stakeholder in an organization is (by definition) any group or individual who can affect or is affected by the achievement of the organization’s objectives.”). However, this Article employs a narrower definition, where “stakeholder” is any person with Hohfeldian claims vis-à-vis the corporation, *except* for residual claimants and fiduciaries. That is because the latter two categories involve unique issues, which only corporations give rise to, and which are treated within corporate law itself. Therefore, each of the three categories is considered in a separate section of this Article. See *infra* Sections I.C, I.D, I.E. In common usage, “stakeholder” typically denotes the first category only. It also seems preferable to “creditor” (used in the same sense in an earlier article, see Raz, *supra* note 1) or “non-residual claimant.”

24. In this Article, “positive law” denotes the entire set of binding norms, as opposed to *wishes* on what corporations might owe to certain people, or not owe to



law—such as contract, employment, or environmental law). The rights of residual claimants (or shareholders) derive from the open-ended part of the corporation’s purpose—for example, “the pursuit of profit.” Since that purpose must always be pursued lawfully, shareholders have the most *subordinated* claim toward the corporation; the phrase “shareholder primacy” is counterfactual. Shareholders’ rights are not proprietary or fiduciary, but also not merely contractual. They are a unique product of corporate law itself.

Therefore, corporate law consists of five building blocks: purpose, personhood, stakeholders, residual claimants, and fiduciaries. These, and their mutual interactions, form the structure of corporate law. This structure is unique to corporate law: a natural person can have neither directors, nor shareholders. Modifying the *content* of one pillar does not alter its very presence, nor the other elements. A nonprofit corporation has a different purpose than a for-profit corporation; yet, both are legal persons, both are required to meet all of their legal obligations, both have residual claimants with equitable rights, and both are entitled to have their fiduciaries loyally promote the corporation’s purpose. A corporation’s managing body may be staggered or not, comprised of inside or outside directors, or be called a board of “managers” or “trustees” rather than “directors”; in any case, its members owe *fiduciary* duties *to the corporation*—direct results of the structure of corporate law.<sup>25</sup> An identical set of economic, practical, and legal questions arise with respect to *any* corporation. The theory holds across time and jurisdictional boundaries, and is not subject to “private ordering”; it is the foundation *upon which* contracting occurs. Nor can it be legislated around: if a statute truly eliminated one of the building blocks, the resulting phenomenon would not be a corporation.

This Article proceeds as follows: in Part I, the purpose-based theory of corporate law is presented in five sections, corresponding to the building blocks of corporate law (purpose, personhood, stakeholders, residual claimants, and fiduciaries). Because present-day corporate law is mainly split between shareholderist and stakeholderist views, as described above, care is taken to introduce the new theory in terms of how it diverges from, or builds upon, our existing conceptions. Part II applies the theory to

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others, or what the law “ought” to be. See, e.g., Strine, *supra* note 8, at 790 (“For those who decry [certain behaviors by corporations], the solution must come from . . . bodies of positive law that constrain corporate behavior . . . and cannot rationally rest on calls for corporate directors to ‘be patriotic.’”). Positive law encompasses a very broad set of norms. It includes equity, see *infra* note 308, and it may even include disobedience, when certain “laws” are unjust (or plainly unlawful) according to some other normative source (such as human rights, or simple reason). For a discussion of situations where disobedience might be lawful in some sense, see Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 731–48 (2019).

25. See *infra* text accompanying notes 212–17 (discussing the fact that, due to the corporation being an artificial person, it must always have a natural person acting on its behalf and for its benefit).

three high-stakes policy issues: shareholder activism, the *Citizens United v. FEC*<sup>26</sup> and *Burwell v. Hobby Lobby Stores, Inc.*<sup>27</sup> decisions, and the rise of LLCs and other alternative corporations. In each case, the purpose-based theory leads to more refined, often pointed, conclusions.

Not only is corporate law not “dead,”<sup>28</sup> it is more important than ever. Yet, modern corporate law “seems to be in insoluble theoretic disarray, with scholars scrambling to assemble a giant puzzle of ill-fitting pieces.”<sup>29</sup> This Article assembles the puzzle of corporate law.

### I. THE TRUE ANATOMY OF CORPORATE LAW

Questions of structure and anatomy serve an important function in any legal discipline. These structural inquiries attempt to discern what is common to *all* members of a certain group, and how these phenomena interact with one another. In legal terms, this primarily gives rise to questions such as: what types of Hohfeldian rights and duties does a given actor have, and toward whom?<sup>30</sup> Which legal “toolboxes”—sets of rules, principles, and doctrines—govern each actor or situation?

Structural inquiries exist on a higher hierarchical level than the various resolutions made *within* each toolbox, which are dynamic and changeable, as opposed to the structure itself. For example, even if the rules of “capital lock-in” (which restrict shareholders’ ability to withdraw assets from the corporation at will) are different among jurisdictions,<sup>31</sup> at least two building blocks are constantly present: “shareholder” and “corporation.” Professors Balganesch and Parchomovsky describe this as the distinction between “structural” (or “jural”) and “normative,” dynamic meanings.<sup>32</sup> While “[t]he jural meaning refers to the structural core undergirding a legal concept,” “[t]he normative meaning refers to the meaning that . . . [the] concept . . . come[s] to be cloaked in as a result of

26. 558 U.S. 310 (2010).

27. 573 U.S. 682 (2014).

28. See *supra* note 17 and accompanying text.

29. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533–34 (2005).

30. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

31. See Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 COLUM. J. TRANSNAT’L L. 1, 9–19 (2019) (describing a trend in Brazilian courts of allowing shareholders, under certain circumstances, to redeem their shares, even when the corporation is not in liquidation proceedings; also viewing this as a divergence from normal “corporate law”). As the discussion here demonstrates, even if some *dynamic* choices in Brazil’s corporate law are unique, it is still corporate law, and the entities it governs are corporations.

32. Shyamkrishna Balganesch & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241 (2015). In that context, the term “dynamic” is substituted here for “normative,” simply because legal theorists mostly use “normative” as the opposite of “positive,” which differs from Balganesch and Parchomovsky’s usage.

external interpretive influences, which may in turn be drawn from a variety of situational goals.”<sup>33</sup> Applying this to our example, the fixed *structure* (“shareholder” and “corporation”) is required for us to discuss the *dynamic* question (“when should a shareholder be allowed to withdraw assets from the corporation?”).

Within corporate law, the leading work in this area is Professor Reinier Kraakman and co-authors’ *The Anatomy of Corporate Law*.<sup>34</sup> As that book argues, every corporation presumably has five “defining characteristics”:<sup>35</sup> legal personality, limited liability, transferable shares, delegated management with a board structure, and investor ownership.<sup>36</sup> One may ask, however, why *these* five? Indeed, “*The Anatomy of Corporate Law* does not offer any general theory as to how the various elements of its typology fit together.”<sup>37</sup>

This Part of the Article fills that gap. It reveals that only one of the five characteristics—corporate personhood—is a necessary feature of *all* corporations.<sup>38</sup> Other characteristics can be contracted around or otherwise modified. A corporation might feature non-limited liability;<sup>39</sup> non-transferable shares;<sup>40</sup> non-delegated management;<sup>41</sup> and a non-financial investor (say, an employee) as its residual claimant.<sup>42</sup> All these do not make the entity any less of a corporation. In other words, the latter four characteristics are modifiable, *dynamic* choices; they do not define any of the invariable, *structural* issues generated by the concept of the corporation.

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33. *Id.* at 1244.

34. REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (3d ed. 2017).

35. *Id.* at 31.

36. *Id.* at 5–15.

37. David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 *YALE L.J.* 1519, 1540 (2004) (book review).

38. The authors of *The Anatomy of Corporate Law* make a similar statement. See KRAAKMAN ET AL., *supra* note 34, at 31 (“[O]f the five defining characteristics of the corporate form, only one—legal personality—clearly requires special rules of law. The other characteristics could, in principle, be adopted by contract . . . .” (footnote omitted)).

39. See, e.g., Companies Act 2006, c. 46 § 3(4) (UK) (allowing for a company with “no limit on the liability of its members”).

40. See, e.g., MODEL BUS. CORP. ACT § 6.27(a) (AM. BAR ASS’N 2016) (“The articles of incorporation, the bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation.”).

41. See, e.g., DEL. CODE ANN. tit. 6, § 18-402 (2020) (“Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members . . . .”). Even in regard to a narrow-sense “Delaware corporation,” the same person can be both shareholder and fiduciary. See, e.g., *infra* Section II.A. In a private corporation, there might be no delegation of management at all.

42. See, e.g., tit. 8, § 152 (“The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof.”).

This Part provides a new, more refined account of corporate law's anatomy, which applies to *every* corporation. This inclusivity is possible because the theory relies on a set of highly fundamental notions (for instance, the concept of equity, or Hohfeldian rights and duties), which cannot be contracted or legislated away. As explained below, the five building blocks of corporate law are purpose,<sup>43</sup> personhood,<sup>44</sup> stakeholders,<sup>45</sup> residual claimants,<sup>46</sup> and fiduciaries.<sup>47</sup> They are structurally related to one another, and particularly to the first building block—the corporation's purpose.

This account resolves the “blanket pulling” problem described at the beginning of this Article,<sup>48</sup> as it provides a *complete* map of corporate law's structure. For example, a commentator might recognize corporate personhood, yet believe that shareholders have purely “contractual” rights, or that the corporation is a creature of public law;<sup>49</sup> the structure presented here confirms the first and corrects the latter two. Consistent with this objective, much of the discussion in this Part directly addresses, and corrects, various misconceptions encountered in the corporate law community. Among other contributions, this more precise anatomy provides an alternative to the shareholderist–stakeholderist dichotomy. It also responds to other inaccurate, seemingly exclusive choices, such as between “contract” and “property” theories of the firm. Moreover, as Part II below illustrates, this theory allows us to better understand and address a wide range of current policy issues.

#### A. *The Corporation's Purpose*

Every corporation has a purpose. Corporations, which are legal persons,<sup>50</sup> are similar in this regard to natural persons (humans), also operating to achieve a certain life purpose. A human may have a mix of life purposes, and easily change them by simple choice. One may wish to live for the pursuit of economic profit one day, and move to a communal village the next. This fundamentally arises from the fact that a human being is an end in oneself, with complete freedom to pursue happiness, within the bounds of law.

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43. See *infra* Section I.A.

44. See *infra* Section I.B.

45. See *infra* Section I.C.

46. See *infra* Section I.D.

47. See *infra* Section I.E.

48. See *supra* text accompanying notes 3–5.

49. See Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 458–77, 483–85. For an example of “blanket pulling” in the opposite direction, see Robert Anderson IV, *A Property Theory of Corporate Law* (July 17, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3421009](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421009) [<https://perma.cc/AM7G-LR2V>] (correctly noting that shareholders are unique claimants and have more than contractual rights, but incorrectly viewing shareholders' claims toward the corporation or its assets as property rights).

50. See *infra* Section I.B.

In contrast, a corporation cannot feel happiness, at least not in the human sense. It is a legal person, whose existence is meant to increase human well-being,<sup>51</sup> albeit only through the concept of corporate personhood and the overall structure of corporate law. Also, lacking its own physical faculties, the corporation's purpose *must* be determined by *other* people—initially, its founders.<sup>52</sup>

The most important difference between corporations and humans is that the former have a specific, non-easily-modifiable purpose.<sup>53</sup> As Professor Adam Winkler notes, “corporations are not truly ‘free’ in the way that individuals can be. A [natural] person can choose her own values, preferring to prioritize personal wealth, social welfare, the environment, or law and order. A [for-profit] corporation, however, is legally obligated to prioritize profit, at least in the long term.”<sup>54</sup>

Over the last few years, growing attention is being paid to the idea that the core concept of corporate law—the building block around which all others, including personhood, fiduciaries' duties, and stakeholders' and shareholders' rights, are arranged—is purpose (rather than “contract,” “property,” or “fiduciary law”). Corporate purpose, and its place in the matrix of corporate law, is the subject of rapidly expanding scholarship.<sup>55</sup> Recent papers by Professors Paul Miller and Andrew Gold discuss purpose within a broader inquiry of corporate law's structure; similarly to this Article, these texts (part of the New Private Law movement) employ an integrative approach, demonstrating that corporate law is not any other field, but has its unique identity, combining numerous legal concepts and traditions.<sup>56</sup> Many of these works, however, are written from a

51. See, e.g., Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1663 (“[W]e owe no allegiance to corporations . . . without reference to the idea that people are involved.”).

52. See Raz, *supra* note 1, at 273–74 (discussing founders' role in setting the corporation's purpose), 275 (“[D]ue to the limits of the corporation's physical nature, there is simply no way it *could* determine its own purpose and goals without other people, and the choices they make.”).

53. In some cases, that purpose might not be easily determined *ex ante*. This Section argues that at least in the most ubiquitous type of corporation—the for-profit corporation (as well as many types of nonprofit corporations)—it can.

54. ADAM WINKLER, *WE THE CORPORATIONS* 388 (2018).

55. See, e.g., Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881 (2017); Lyman P.Q. Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 260 (D. Gordon Smith & Andrew S. Gold eds., 2018); David Ciepley, *Corporate Directors as Purpose Fiduciaries: Reclaiming the Corporate Law We Need* (July 29, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3426747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426747) [<https://perma.cc/7C4Y-JFSP>].

56. See Paul B. Miller, *Corporations*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily L. Sherwin & Henry E. Smith eds., forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3432033](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432033) [<https://perma.cc/4KXQ-XYV6>]; Paul B. Miller & Andrew S. Gold, *The Corporation as a Category in Private Law*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORIES (Hanoch Dagan & Benjamin Zipursky eds., forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3453744](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453744) [<https://perma.cc/J6XN-RXNA>].

stakeholderist perspective—essentially contrasting a “purpose” approach with “shareholder primacy”—or choose not to elaborate on what *is* the corporation’s purpose, instead only stating (correctly) that, whatever it is, it shapes fiduciaries’ duties.

This Article takes the next steps: first, in the remainder of this Section, it expands on the term “purpose” in corporate law, and provides a positive and normative overview of the purpose of for-profit and other corporations. It then relates purpose to the other four building blocks of corporate law, all arranged around the corporation’s purpose: personhood allows the corporation to achieve its purpose better than through any non-corporate framework;<sup>57</sup> stakeholders enjoy the requirement to obey positive law, embedded in the corporation’s purpose (hence, there is nothing wrong, and certainly not legally actionable, with a lawful profit-seeking purpose);<sup>58</sup> the rights of residual claimants are derived from, and related via equity to, the corporation’s pursuit of its purpose;<sup>59</sup> and fiduciaries’ duty is to act so that the corporation achieves its purpose.<sup>60</sup> This Article does not aim to discuss every question pertaining to corporate purpose, of which there are many.<sup>61</sup> Rather, it provides a theory of corporate law as a whole, with purpose at its center.

The term “purpose” itself requires elaboration. The corporation’s ends are determined on two different levels. The higher is what this Article calls “purpose,” which is a somewhat more general statement—for example, “the lawful pursuit of profit”—provided by law, and attaching to a certain *form* of corporation. The lower level is what may be called the corporation’s “goals”—for example, “to engage in construction” or “any lawful activity”—which are flexible choices, appearing in the corporation’s constitutional documents, and possibly changing from one corporation to another, even if both are of the same form. Some corporate statutes, including Delaware’s, refer to the corporation’s goals as its “purpose,”<sup>62</sup> but the difference is legally and practically significant.<sup>63</sup>

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57. *See infra* Section I.B.

58. *See infra* Section I.C.

59. *See infra* Section I.D.

60. *See infra* Section I.E.

61. Such questions include, among others: who should be able to set the corporation’s purpose? Who should decide whether or not the corporation is acting toward its purpose (shareholders, fiduciaries, courts, or someone else)? How can corporations’ purpose be encapsulated in one sentence (such as “the lawful pursuit of profit”), a much more compact purpose compared to that of human beings? How and to what extent can purpose be contractually determined or modified? While the answers are often quite clear under positive law, they leave much room for policy debate.

62. DEL. CODE ANN. tit. 8, § 102(a) (2020) (“The certificate of incorporation shall set forth: . . . The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state . . . that the purpose of the corporation is to engage in any lawful act or activity . . .”).

63. *See* George A. Mocsary, *Freedom of Corporate Purpose*, 2016 B.Y.U. L. REV. 1319, 1364–68 (discussing the difference between “strategic” and “tactical” cor-

As suggested by the very existence of distinct terms, such as “non-profit corporation,” “cooperative,” “voluntary association,” and “for-profit corporation,” these different forms have different purposes, and in the case of the latter, it is the pursuit of profit (which, as shown here, invariably means the *lawful* pursuit of profit). From a legal standpoint, there is nothing wrong with a person lawfully pursuing its own benefit: as Section I.C below explains, no legal sanction can be imposed on a corporation that acts in full accordance with law; this also means that the corporation is free to pursue profit, as long it does not harm anyone else in any legally sanctionable manner. Indeed, a promoter establishing a new for-profit corporation buys a “prepackaged product,”<sup>64</sup> at least in part, and one of its provisions is the corporation’s purpose. A change of corporate form (and purpose) is possible, but it must be done in a manner assuring that the corporation still complies with all of its legal and equitable obligations.<sup>65</sup>

This simple statement—that the first part of the corporation’s purpose (“lawful”) encompasses, by definition, all the protection stakeholders are legally entitled to, and the second part (such as “pursuit of profit,” or any other, once it is determined) can therefore not be subject to legal challenge—provides a strong normative justification for corporations’ license to pursue their own benefit. How do we know that, under positive law, the for-profit corporation’s purpose truly is the lawful pursuit of profit? In Delaware, no section of the main corporate statute<sup>66</sup> explicitly says so. This fact, however, can be clearly inferred from a variety of case law and other sources, including formative cases of Delaware law.

For instance, 1989’s *Paramount Communications, Inc. v. Time Inc.*<sup>67</sup> decision is generally regarded as a victory for the stakeholderist side. In that case, shareholder-plaintiffs failed to prevent a corporation, through its board of directors, from implementing defensive measures meant to block a high-premium, hostile tender offer. The decision itself, however, reveals a more nuanced picture. The court discusses *the corporation’s* purpose—as distinct from those of both its shareholders and stakeholders—and concludes it is the pursuit of profit:

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porate purpose, similar to the distinction made here between “purpose” and “goals”).

64. See, e.g., Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 846–47 (2008) (“[M]andatory terms guarantee that certain core qualities are associated with the particular ‘brand’ of business entity called a ‘Delaware corporation.’ The existence of that brand benefits all Delaware corporations by saving the expense investors would otherwise incur to investigate whether a particular entity had or lacked any of those core qualities.” (footnote omitted)).

65. This requires the consent of those who have the authority to determine the corporation’s purpose—initially, its founders, and later the corporation’s residual claimants, to whom the founders’ authority passed, see Raz, *supra* note 1, at 273 n.75. For detailed discussion of this point, see *infra* note 209 and accompanying text.

66. Delaware General Corporation Law, tit. 8, ch. 1.

67. 571 A.2d 1140 (Del. 1989).

Delaware law imposes on a board of directors the duty to manage the business and affairs *of the corporation*. This broad mandate includes a conferred authority to set a *corporate* course of action . . . *designed to enhance corporate profitability*. . . . [D]irectors, generally, are obliged to charter a course for a corporation which is in *its best interest* . . . .<sup>68</sup>

The *Paramount v. Time* court does not elaborate much on where the profit-enhancing mandate comes from. Yet, even in a case shareholders *lost*, the nature of the corporation's own purpose seemed indisputable to the court.

In the well-known footnote 55 to his *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*<sup>69</sup> decision, Chancellor Allen presents, in great arithmetic detail, a situation where the corporation's economic interests diverge from those of *any* natural person—both shareholders and stakeholders. As the Chancellor then remarks,

[The optimal] result will not be reached by a director who thinks he owes duties directly to shareholders only. It will be reached by directors who are capable of conceiving of the corporation as a legal and economic entity. . . . [C]ircumstances may arise when the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholders (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act.<sup>70</sup>

*Credit Lyonnais* directly invokes two of corporate law's building blocks—personhood and fiduciaries—and correctly concludes that directors' duties run to the corporate person. Although Chancellor Allen does

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68. *Id.* at 1150 (citation omitted) (emphases added).

69. No. 12150, 1991 Del. Ch. LEXIS 215 (Del. Ch. Dec. 30, 1991).

70. *Id.* at \*108 n.55. Chancellor Allen writes that directors' duties run to the entity "[a]t least where a corporation is operating in the vicinity of insolvency," *id.* at \*108, but not much in his substantive analysis turns on this; whether solvent, close to insolvency, or insolvent, the corporation is supposed to act to increase (or, at a minimum, protect) its net worth. The words "at least" in the Chancellor's opinion are meaningful, given the many other Delaware cases surveyed throughout this Article (including landmark cases such as *Paramount v. Time*), which discuss fiduciary duties to the corporation itself, yet did not arise in vicinity to insolvency. For detailed discussion of this point, see *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 792 (Del. Ch. 2004) (clarifying, among other things, that "the fact of insolvency does not change the primary object of the director's duties, which is the firm itself"). The leading Delaware authority stating this position (while extensively citing *Production Resources*) is *North American Catholic Education Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92, 101–03 (Del. 2007) ("It is well settled that directors owe fiduciary duties to the corporation [either when it is solvent or insolvent]. . . . [D]irectors . . . have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation.").



not explicitly mention “purpose,” his economic analysis (preceding the above quote) makes clear that, in the first place, the corporation is there to pursue a certain purpose—the maximization of its own economic value—and, in turn, directors’ role is to cause the corporation to do precisely that.

Moving into the computer age, 2010’s *eBay Domestic Holdings, Inc. v. Newmark*<sup>71</sup> decision proceeds similarly to *Paramount v. Time* and *Credit Lyonnais*: it does not engage in deep-level analysis of the normative justifications for the lawful pursuit of profit, yet, it states that this purpose does attach to the for-profit corporation. As the court plainly remarks, “I cannot accept as valid . . . a corporate policy that . . . seeks *not* to maximize the economic value of a for-profit Delaware corporation.”<sup>72</sup> In another case involving a technology company, 2013’s *In re Trados Inc. Shareholder Litigation*<sup>73</sup> decision states as follows:

[Directors’ decisions should] benefit the corporation as a whole . . . by *increasing the value of the corporation* . . . . [T]he duty of loyalty therefore mandates that directors *maximize the value of the corporation* over the long-term . . . . [R]esidual claimants [are] the *ultimate* beneficiaries of *the firm’s* value . . . .<sup>74</sup>

As Section I.E below also discusses, *Trados* makes clear both that the corporation’s purpose is the lawful pursuit of *its* profit (or “value”), and that this is separate from the effect on shareholders, who only ultimately and conditionally—through the structure of corporate law—gain any benefit from the corporation’s success.

Indeed, both *Paramount v. Time* and *Trados* are cases in which *shareholders* lost, but *the corporation’s* purpose was determined to be the lawful pursuit of profit. This clarifies the difference between the purpose-based theory, presented here, and so-called “shareholder primacy,” or shareholderism generally. Shareholders, who are fully distinct from the corporation, might not see any direct blessing in the corporation’s profits. A for-profit corporation might, for example, engage in building space launch systems (as a certain well-known Delaware corporation does),<sup>75</sup> undoubtedly a long-term, large-scale, capital-intensive mission. Corporate law mandates that the corporation’s profits and assets are its own—not its shareholders’—and any access to them by shareholders is constrained by the facts of corporate law (for example, the corporation’s discretion as to whether or not to distribute a dividend, or its ability to deploy defensive measures against a takeover). Thus, even over an extremely long period,

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71. 16 A.3d 1 (Del. Ch. 2010).

72. *Id.* at 34.

73. 73 A.3d 17 (Del. Ch. 2013).

74. *Id.* at 36–41 (emphases added).

75. See Raz, *supra* note 1, at 288 n.130 and accompanying text (discussing Space Exploration Technologies Corp., also known as SpaceX, in a similar context).

the corporation's profit-seeking purpose can benefit the corporation, and allow it to continue developing and expanding its operations—but not, in any immediate or tangible way, its shareholders. The latter have an equitable, more-than-contractual claim toward the corporation, and are entitled to its profits when it either decides to distribute them, or dissolves.<sup>76</sup> That claim, however, does not result in anything that can be called “shareholder primacy.” It exists within a framework—corporate law—that promotes the corporation's pursuit of its own purpose.

### B. *The Corporation's Personhood*

Every corporation is a person.<sup>77</sup> This says a lot about what the corporation is *not*: while others have suggested that the corporation might be “property,”<sup>78</sup> an “aggregate” of other people,<sup>79</sup> a “nexus” of contracts,<sup>80</sup> a “concession” from the state,<sup>81</sup> or a “mediating hierarchy,”<sup>82</sup> none of these models fully cohere with the corporation's true nature. In short, the cor-

76. See *infra* Section I.D.

77. See, e.g., KRAAKMAN ET AL., *supra* note 34, at 5–8 (discussing “[l]egal personality” as a “core structural characteristic[ ]” of the corporation); Raz, *supra* note 1, at 286 n.120 (citing a broad range of statutory, case law, and scholarly sources to that effect); *infra* text accompanying note 317.

78. See, e.g., Allen, *supra* note 2, at 264–65 (“In the first conception, the corporation is seen as the private property of its stockholder-owners.”); Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 592 (1999) (“[W]hat does a corporate shareholder own? The corporation, of course. It is the corporation itself as a ‘thing’ that a corporate shareholder legally owns.”). For a refutation of the property model, see, for example, Raz, *supra* note 1, at 285–87.

79. See, e.g., VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 2 (1882) (“[T]he rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.”), quoted in Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1458 (1987). The “aggregate” and “property” views, see *supra* note 78, although not identical, are closely related. See, e.g., Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 42 (2000) (“The aggregate or partnership model of the corporation, which was prevalent in the 19th century, assumed [a role as the ‘owners’ of the corporate enterprise] for shareholders . . . .” (footnote omitted)).

80. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302 (1983) (“An organization is the nexus of contracts, written and unwritten, among owners of factors of production and customers.”); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (“The private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships . . . .*”).

81. See, e.g., Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . .”); see also Coates, *supra* note 3, at 810–15 (discussing the artificial entity theory in detail), 831 (explaining how the artificial entity theory lost valence in modern reality).

82. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 276–87 (1999).

poration is not a collection of anything—people, assets, contracts, or rights. Every corporation is one, single entity. Other people can make contracts with, or have rights toward (not “in”) the corporation, which owns its assets, and itself is unownable.<sup>83</sup> Each of the other views can have some intuitive appeal, in some situations, but only this simple statement—the corporation is a person—*consistently* adheres to law and day-to-day reality. A nexus of contracts cannot own property or make new contracts, only a person can;<sup>84</sup> the concession theory has nothing to do with the way corporations come into existence today;<sup>85</sup> the mediating hierarchy concept might explain how the corporation’s fiduciaries ought to make decisions, but does not describe the nature of the corporation itself; and so on.

The unifying motive behind the various inaccurate models of the corporation, mentioned above, might be very simple: to some, the sentence “the corporation is a person” sounds plain strange. After all, humans are persons, and other things are not, correct? Not exactly. The corporation is a product of a certain field of law, administered by humans. The same is true of any other legal concept, including “right,” “duty,” “property,” “contract” and “person.” The corporation is a *legal* person, not a human.<sup>86</sup> As a rule, the corporation has the *legal* capacity of a human.<sup>87</sup> Assuming that the law’s overarching aim of promoting human well-being is pursued, law is capable of making a certain phenomenon into a person, or “right-and-duty-bearing unit.”<sup>88</sup> The corporate person is no more a “fiction” than law itself is a fiction.

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83. See, e.g., Raz, *supra* note 1, at 286 (“Shareholders do not own the corporation; they own shares. While it is meaningful to discuss the ownership of a *right toward* a corporation, it is unclear what might it mean . . . to ‘own’ a corporation—another person, with interests and volition of its own.” (footnote omitted)).

84. See, e.g., *id.* at 284; *infra* note 221 and accompanying text.

85. See *infra* note 283 and accompanying text.

86. This differs, for example, from Otto von Gierke’s more extreme views. See, e.g., Friedlander, *supra* note 11, at 40 (“In the late nineteenth century, the eminent German legal historian Otto Gierke theorized that when individuals unite, spiritually and psychologically, for a common purpose they create a separate, living person that has a will of its own.” (footnote omitted)), 76–83 (discussing in detail Gierke’s “Theory of the Corporation as Group-Person” and its spiritual and collectivist allusions).

87. Some corporate statutes say so explicitly. See, e.g., 15 PA. CONS. STAT. § 1501 (2020) (“[A] business corporation shall have the legal capacity of natural persons to act.”). There are things humans can do and corporations cannot—some, because allowing them contradicts our understanding of other legal and social institutions (for example, voting in the general election); and some, because the corporation inherently lacks certain traits, see, e.g., *In re Dole Food Co.*, 110 A.3d 1257 (Del. Ch. 2015) (preventing a corporation from serving as an expert witness). These are exceptions; the rule is that a corporation has the legal capacity of a natural person. This fact is supported by other parts of corporate law’s structure, namely, the existence of fiduciaries—humans through whom the corporation operates in the physical world. See *infra* Section I.E.

88. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 *passim* (1926).

To those for whom corporate personhood seems morally appalling, three responses may be offered: first, corporate personhood has been devised by humans, is ultimately meant to benefit them, and in fact does so, as evidenced by The New York Times Company not going out of business every time one of its shareholders dies. Second, by their own communitarian standard, these objectors do not offer a compelling alternative; would it be better if the corporation was “owned” by its shareholders? Third, the objectors’ true discontent seems to be with the things *some* corporations do—for instance, funnel excessive amounts of money to support political candidates<sup>89</sup>—and not with corporations’ ability to do *anything* at all, while bearing their own rights and duties (including the duty to obey the law<sup>90</sup>).

The question, then, is *why* must every corporation be a person? Why cannot at least some corporations, on the basis of either state law or private ordering, be something else, say, an aggregate of shareholders? The answer lies at the most definitional level. What distinguishes *corporate* law is the existence of a *corpus*, or “body”—the corporate person.<sup>91</sup> Far more than a linguistic matter, the presence of a distinct legal person, bearing its own rights and duties, allows corporate law to produce a unique set of doctrinal, economic, and practical benefits.<sup>92</sup> In turn, corporate law’s unique benefits enable the corporation to achieve its purpose (for example, the lawful pursuit of profit) better than any mechanism provided by other legal frameworks. Therefore, the law of corporate personhood can be viewed as a means to an end—the promotion of the corporation’s purpose. Corporate personhood, like corporate law’s other building blocks, revolves around corporate purpose.

Although a group of individuals can act toward a common purpose, we are then not in the realm of corporate law; at most, we are dealing with non-corporate partnership law,<sup>93</sup> contract law, or trust law. Each of these come with their own doctrines, economic implications, and practices, distinct from those of corporate law. For example, the human actors (or at least one of them) can never enjoy full limited liability: lacking a separate person to which duties attach, the individuals themselves bear those duties.

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89. See *infra* Section II.B.

90. See *infra* Section I.C.

91. See Macey & Strine, *supra* note 49, at 478 (“The very term ‘corporation’ derives from the Latin word *corpus* which translates into English as the word ‘body,’ which presents an entity that is authorized by the state to act as an individual.”).

92. See, e.g., *id.* at 526 (“Unless such a separate entity is created . . . the basic objective of the corporation, which is to create an economic framework for amassing capital to be deployed in economic activity, cannot be reached.”); de Fontenay, *supra* note 1, at 201 (“Recognizing the corporation as the owner of [its] assets . . . is one of the defining features of the corporation and the key to its success in fostering economic growth precisely because it prevents individual shareholders from removing productive business assets at will.”).

93. See *infra* note 272.

On the flip side, just as shareholders are offered limited liability, the existence of a separate person—having its own characteristics and rights (in addition to duties)—means that other individuals' wishes and purposes are *not* those of the corporation,<sup>94</sup> and that fiduciary duties run to the corporation, not to shareholders or stakeholders.<sup>95</sup> Indeed, one of the main justifications for having corporate law in the first place, *as opposed to* contract, property, trust, or general fiduciary law, is that unlike these frameworks, corporate law serves to *limit* each individual's freedom of action,<sup>96</sup> thus promoting a purpose that is not fully congruent with, or under the control of, any of the involved human actors.

It is therefore puzzling to see many scholars, particularly on the shareholderist, or law and economics side, write about corporate law as if it was concerned with an agency problem between only two actors, managers and shareholders.<sup>97</sup> This kind of scholarship inexplicably ignores the one person at the heart of corporate law: the corporation. The amelioration of agency costs is the focus of much of corporate law; yet, these agency problems are mainly between *the corporation* and its fiduciaries. Crucially, the corporate person also does not have identity of *interests* with its shareholders: multiple “agency problems,” as well as legitimately differing interests, exist *between shareholders and the corporation*, distinct from the agency problems between the corporation and its fiduciaries.<sup>98</sup> Put simply, “the corporation’s fortunes might *not* translate into those of its share-

94. See *supra* Section I.A.

95. See *infra* Section I.E.

96. See de Fontenay, *supra* note 1, at 195 (“[A] core goal of corporate law is to . . . constrain individual behavior. For this reason, it is a comparatively poor choice of regime in which to expand individual rights.” (emphasis added)), 197 (“[C]orporate law serves to quash individual voices and actions *by design* . . .”). Of course, the *ultimate* aim of corporations (and corporate law) is to enhance human well-being. See, e.g., Pollman, *supra* note 51, at 1663. Precisely to this end, corporate legal mechanisms constrain involved actors’ behavior (as *all* law does; corporate law more structurally and evenhandedly so).

97. See, e.g., KRAAKMAN ET AL., *supra* note 34, at 29–30 (“The first [agency problem] involves the conflict between the firm’s owners and its hired managers. . . . The problem lies in assuring that the managers are responsive to the owners’ interests . . .”); Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 686–87 (2009) (presenting the main debate in corporate law as relating to conflicts between “managers” and “investors”); Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 775 (2017) (“The subject of most corporate law scholarship is the conflict of interests between managers . . . and shareholders.”).

98. For detailed discussion of conflicts or disparities between shareholders and the corporation, see Raz, *supra* note 1, at 272, 276–78, 282–85, 291 n.145, 293–95, 304–05, 311–19. These issues are addressed in the field of share law, see *infra* Section I.D, which is distinct from corporate fiduciary law, and is based on non-fiduciary equity. A clear example of share law is the law of appraisal: “Directors can satisfy their fiduciary duties even when a sales process is insufficient to achieve the stock’s fair value under [DGCL] Section 262.” Brief of Law, Economics and Corporate Finance Professors as Amici Curiae in Support of Petitioners-Appellees and Affirmance at 6, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*,

holders, or part of them.”<sup>99</sup> Both law-and-economists and Delaware jurists, generally mindful of corporate personhood,<sup>100</sup> are likely glossing over this very point when they use inaccurate, practically impossible phrases such as “fiduciary duties to the corporation and its shareholders.”<sup>101</sup>

As it turns out, law and economics scholarship itself attaches the highest import to the concept of corporate personhood (despite often not calling it that, instead using terms such as “entity” and “firm,” all pointing to the same phenomenon<sup>102</sup>). Hovenkamp,<sup>103</sup> Macey, and Strine<sup>104</sup> provide useful summaries of the major works in this area.

For example, it is one of the greatest law-and-economists of all time, Ronald Coase, who in 1937’s *The Nature of the Firm*<sup>105</sup> does not mention the word “shareholder” or “stockholder” even once. Rather, the “firm” is the central actor. It is the firm that decides, based on transaction costs, whether to produce goods and services itself, or outsource certain tasks. The firm as such acts, owns its property, and reaps the gains, or bears the costs, of its activities. The firm is *the opposite* of an aggregate of people contracting with one another, what Coase refers to as the “price mechanism.”<sup>106</sup> Clearly, the firm—the corporation—is a distinct legal person. To a large degree, *The Nature of the Firm* is a seminal text about the economic meaning of corporate personhood.

Following a discussion of Coase’s article and its relation to modern law and economics, Professor Jason Scott Johnston concludes that “the role of corporate law is both more varied and more creative than either Berle and Means or Easterbrook and Fischel presume, [as it is] a fundamental determinant of strategic bargaining over the terms of the corporate contract.”<sup>107</sup> The fundamental, unwaivable *structure* of corporate law

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172 A.3d 346 (Del. 2017) (No. 518, 2016), <http://www.chancerydaily.com.objects-us-east-1.dream.io/upload/589a4ed825b0e.pdf> [<https://perma.cc/Z3W2-VVM8>].

99. Raz, *supra* note 1, at 260.

100. See, e.g., *supra* notes 49, 68, 70, 74 and accompanying text; *infra* note 220 and accompanying text.

101. See *infra* text accompanying notes 206–07.

102. On the linguistic difficulties plaguing the corporate law community, see *supra* note 4.

103. HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW 172–83* (2014) (discussing, in a chapter titled “The Separation of Ownership and Control,” works by, among others, Berle and Means, Marshall, Coase, Fisher, and Fama and Miller, and explaining how they relate to the differentiation between corporations and their shareholders).

104. Macey & Strine, *supra* note 49, at 463–77 (discussing important law and economics works, mainly within the “nexus of contracts” and “separation of ownership and control” theories, and explaining how they relate to corporate personhood).

105. R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

106. *Id. passim*.

107. Jason Scott Johnston, *The Influence of The Nature of the Firm on the Theory of Corporate Law*, 18 *J. CORP. L.* 213, 244 (1993). Johnston makes this observation while discussing constrained rationality, which is one way to examine the central

determines, among other things, the boundaries of “private ordering.” In another important conceptual work, Professors Rock and Wachter, expanding on Coase’s article, remark that “firms [are] islands of conscious power. These islands [are] surrounded by seas, . . . namely markets.”<sup>108</sup> The person bearing that consciousness (with the help of its human representatives)<sup>109</sup> is the corporation.

In modern law and economics, corporate personhood remains as salient. Professors Hansmann and Kraakman, in their well-regarded 2000 article,<sup>110</sup> explore the economic benefits achieved through “asset partitioning”—simply, the fact that the corporation’s assets and obligations are its own, not its shareholders’ (and vice versa). Asset partitioning allows the corporation and its stakeholders to deal with one another far more cheaply and conveniently, as they need not inquire into each shareholder’s financial or legal situation. This economic wizardry is made possible through a specialized *legal* framework—corporate law: “In the absence of organizational law, it would be effectively impossible to create the affirmative asset partitioning that is the core characteristic of a legal entity.”<sup>111</sup>

Recently, law and economics scholar Marcel Kahan co-wrote: “What is a corporation, and why does it matter? . . . [H]ow courts characterize the corporation significantly affects legal doctrines that impact not only the corporation, but also *third parties such as shareholders*,”<sup>112</sup> affirming both the importance and the very existence of corporate personhood. In essence, the human-welfare-increasing function of the corporation is channeled through the law of corporate purpose—“the lawful pursuit of profit”—and is not dependent upon the individual, diverging, largely unascertainable, and changing wishes of shareholders.<sup>113</sup>

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phenomenon corporate law is meant to both facilitate and deal with: open-endedness. Due to this, involved actors’ rationality, or ability to assess what is going to happen and act accordingly, is inherently constrained, and unique mechanisms (namely, corporate fiduciary law and equity-based share law) are mandatorily required.

108. Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1697 (2001).

109. See *infra* Section I.E.

110. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

111. *Id.* at 406. For criticisms of that argument, and a refutation of those criticisms, see *infra* notes 124–30 and accompanying text.

112. Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts”*, 93 WASH. L. REV. 265, 266–67 (2018) (emphasis added).

113. See, e.g., Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 159–218 (2019) (“[S]tartups involve heterogeneous shareholders in overlapping governance roles that give rise to vertical and horizontal tensions between founders, investors, executives, and employees. . . . The value of the corporation itself . . . best reflects the sum of the participants’ interests and it is to the corporation that the fiduciary duty should be owed.”); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 903 (2016) (“[I]t [is] not credible to equate

The fact that corporations are wholly separate persons, distinct from their shareholders and anyone else, is far from merely an academic issue. It is highly practical, having profound implications at every turn of legal life. Many are discussed throughout this Article,<sup>114</sup> but to give a taste of how numerous the consequences of corporate personhood are, consider the salient example of mandatory arbitration clauses in corporate charters and bylaws.

In recent years, mandatory arbitration has become the most significant barrier for the enforcement of private law rights in the U.S.<sup>115</sup> In essence, the arbitration clause has become the only truly binding part of many consumer and employment contracts.<sup>116</sup> A somewhat different question, however, is what happens when such clauses are inserted into a corporation's constitutional documents. Provisions of this kind would mandate that all corporate law or "internal affairs" disputes (namely, lawsuits against the corporation's fiduciaries, or by shareholders against the corporation) shall be arbitrated, rather than litigated as a direct or derivative action in court. Should they be valid and enforceable? At least presumptively, no.

The reason is that corporate constitutional documents are simply not contracts. Rather, they are equity documents, meant to accomplish a unique feat, possible only through a structured legal framework: the creation of a corporate person, and the pursuit of its purpose through loyal fiduciaries, while meeting its obligations to both stakeholders and residual

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the views of the corporation to those of its diverse and changing stockholders."). This point also bears on the "shareholders are stakeholders" argument, *see infra* notes 170–74 and accompanying text.

114. For an additional example, in one case, corporate personhood led to a \$246 million greater award of attorneys' fees. *See* *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1252, 1263, 1265 (Del. 2012) (noting that, although 81% of the derivatively-represented corporation's outstanding shares were held by defendant itself, "the corporation was harmed and the total recovery is awarded to the corporation . . . —not 'nominally' but actually," so the \$304 million fee award is based on the entire amount of recovery).

115. Boilerplate arbitration clauses, at least in the U.S., usually mean that one party's rights are not truly channeled to alternative dispute resolution, but practically become unenforceable. Among other reasons, that is because non-arbitration methods, such as the class action, are the only effective way to resolve certain disputes, or even have them litigated in the first place. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 322–31 (2013); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

116. For a detailed and troubling account of the practice of "deleting" rights (including those presumably granted in the contract itself) through standard form contracts, while asserting that such provisions truly arise from each party's consent, or have the power to completely override other sources of law, see MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).



claimants. As a series of articles by leading corporate law scholars<sup>117</sup> has recently shown, corporate constitutional documents have, at most, certain contract-like traits, in *some* situations. Primarily, these instruments are meant to deal with the distinctive issues that arise in the corporate environment. Because the corporation itself is party to its constitutional documents,<sup>118</sup> these are not merely agreements between shareholders and managers; instead, they are a mechanism that must serve to promote, rather than obstruct, the reason for the corporation's existence in the first place.<sup>119</sup>

The most pertinent problem, in this regard, is the absolute power and information asymmetries between the corporation and its fiduciaries.<sup>120</sup> For one, fiduciaries can amend the corporation's constitutional documents in a practically one-sided manner (pointing to their non-consent-based, non-contractual nature).<sup>121</sup> Further, given the low observability of fiduciaries' conduct, and the unique, court-based enforcement mechanisms of corporate law (namely, the derivative action), mandatory arbitration would in many cases rob the corporation of any meaningful way to vindicate its rights. It also would eliminate the information-revealing and deterrence-generating effects of litigation in open court.<sup>122</sup> When courts face this issue, they must remain mindful of these fundamental facts—or the enforceability of corporate law's norms, governing some of the most important institutions in our society, would be in existential danger.<sup>123</sup>

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117. James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257 (2015); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373 (2018); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016). Particularly, see Lipton, *supra*, at 587 (“[C]orporate governance arrangements are not contractual. Contract law is organized around a theory of consent . . . . Corporations, by contrast, are organized around principles more akin to trust law . . . .”).

118. See, e.g., Macey & Strine, *supra* note 49, at 466 (“[T]he various constituents to the corporation must, of course, have counter-parties. This counterparty is an entity, namely the corporation itself.”); Raz, *supra* note 1, at 258 n.4, 272 n.72 (citing statutory and case law demonstrating that the corporation is party to its constitutional documents).

119. On the impossibility of *shareholders* waiving *the corporation's* rights, see Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 722–23 (2011).

120. See *infra* Sections I.E, II.C.

121. See, e.g., sources cited *supra* note 117.

122. See, e.g., Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873 (2019) (exploring the “reputational deterrence” generated by litigation, and not by arbitration, in the information-asymmetrical environment typical of corporate and securities law).

123. In the U.S., this topic is currently in flux. See, e.g., Cydney Posner, *Mandatory Arbitration Shareholder Proposal Goes to Court—As Chair Clayton Suggested*, COOLEY PUBCO (Mar. 25, 2019), <https://cooleypubco.com/2019/03/25/mandatory-arbitration-shareholder-proposal-complaint> [https://perma.cc/PT2R-CVfV]. The issue in the *Johnson & Johnson* case, discussed *id.*, is the arbitration of federal securities claims, but very similar rationales (i.e., power and information asymmetries precluding actual “consent,” and the unique suitability of court-based

Finally, recent scholarship has turned to the topic of alternatives to corporations, including common law trusts,<sup>124</sup> reciprocal insurance exchanges,<sup>125</sup> and security interests.<sup>126</sup> These works confront a basic question: why “corporate law” and not trust law, contract law, or property law, respectively? Why cannot *natural* persons enter into highly complex, multilateral legal relationships, with help from non-corporate law concepts, such as “constructive notice” and “agency?”

The answer is that they can, but it would be so costly and inconvenient that a relationship with an entity—a corporation—is vastly preferable. Each of the frameworks discussed in these articles offer *some* advantages, making them more useful than corporate law in *some* situations. Yet, neither trusts, nor reciprocal contracts, nor security interests offer *all* the benefits of a corporation, or do so in the *very wide, flexible range of situations* which the corporation is fit to address.

For example, Verstein’s discussion of reciprocal insurance makes clear that such arrangements are highly *repetitive*: the “attorney-in-fact”—the natural person who signs new contracts, receives premium payments, and distributes insurance benefits to a large number of subscribers<sup>127</sup>—basically does that, and not much else. The attorney-in-fact is bound by the terms of the contracts with each insured party. These are insurance, not trade, manufacturing, or anything-else contracts. Attorneys-in-fact cannot, in their role as such, enter into new activities, as they have far less than the general, unlimited legal capacity of a corporation. The same is true of *any* contract: the agreement has some *terms* and *boundaries*; it does not say “do whatever you wish.”<sup>128</sup>

Yet, one type of legal instrument—corporations’ constitutional documents—says precisely that, and is predicated on the corporation’s general capacity to act as a person. Put simply, can anyone imagine Google oper-

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procedures for resolving corporate law disputes) apply in regard to internal affairs, state law claims.

124. See John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145 (2016).

125. See Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247 (2017).

126. See Ofer Eldar & Andrew Verstein, *The Enduring Distinction Between Business Entities and Security Interests*, 92 S. CAL. L. REV. 213 (2019).

127. For a description of reciprocal insurance exchanges’ basic structure, see Verstein, *supra* note 125, at 264–66.

128. See, e.g., Cox, *supra* note 117, at 279 n.91 (“[T]he requirement of definiteness is not a matter that the parties can waive if they are to have a contract. Indeed, it is tautological to argue that the parties can agree to an indefinite level of performance, since there cannot be an agreement if parties do not know to what they have agreed.”). Some contracts might seem to be saying something similar to “do whatever you wish”—for example, a lawyer’s retainer agreement or a physician’s medical care agreement—but even they are constrained by certain positive law frameworks: legal ethics and medical ethics, respectively, along with general fiduciary law. In contrast, the corporation is not necessarily anyone’s fiduciary; it is constrained only by corporate law’s imperative to pursue its purpose.

ating not as a corporate entity, but as a web of reciprocal contracts among *billions* of consumers, employees, managers and others? Quite clearly not. The existence of a central party, having its own rights, duties, identity and traits, and surviving the death (or other disability, or just change of mind) of any natural person, enables something special to happen. Google, like most corporations, engages in a host of dynamic acts and relationships, undefined—and to a large extent, *unimaginable*—by anyone in advance. This can only be achieved through corporate law, with its concept of personhood and its open-ended, equity-based dictates.<sup>129</sup>

It is no surprise, then, that Eldar and Verstein describe business entities as “enduring” in their article title, and conclude, “the species of entity . . . will survive long after [other categories in private law have] dissolved.”<sup>130</sup>

### C. *The Corporation’s Stakeholders*

Theoretically, it is possible for a corporation not to have non-residual claimants (in this Article referred to as “stakeholders”<sup>131</sup>). A corporation might be established, with its shareholders conveying to it some property; beyond that, the corporation would engage in no other contract or relationship. However, such a scenario, if it occurs at all, is exceedingly rare. Practically, almost every corporation has stakeholders. Corporations are usually meant to carry out activities more complex than individuals can effectively achieve; in turn, this gives rise to relationships with various stakeholders, such as employees, consumers, financial creditors, and many others. Therefore, a complete theory of corporate law should have some-

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129. Even the common law of trusts, *see* Morley, *supra* note 124, while grounded in equity, offers less than corporate law’s combination of flexibility and certainty. For instance, “[t]rust law had always allowed a trust to persist after the death, disappearance, or change of a beneficiary,” *id.* at 2194, but what about the death or disappearance of a *trustee*? Even if trust law did try to resolve these various conundrums, the litigation and uncertainty costs surrounding them would be much higher than those afforded by the widespread understanding of the corporation’s nature as a separate and enduring person. Furthermore, trust law does not provide the same open-ended, “any lawful act or activity” imperative as corporate law, *see supra* note 22. Instead, a trust relationship has an *ex ante* information “anchor” in the form of trust property, for the loss of which the trustee is subject to legal sanction. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS §§ 2 cmt. i (AM. LAW INST. 2003) (“A trust cannot be created unless there is trust property in existence . . . .”), 5 cmt. a(2) (“In any event, and often crucial in determining the character of a relationship, there can be no trust without identifiable trust property.”), 100 (“A trustee who commits a breach of trust is chargeable with . . . the amount required to restore the values of the trust estate . . . or . . . the amount of any benefit to the trustee personally as a result of the breach.”). Consequently, trust law cannot facilitate the same range of unpredictable adventures as corporate law. The trustee’s actions are more constrained before-the-fact, compared to those of a corporation; as a result, corporate law generates a much wider potential for both risk and reward.

130. Eldar & Verstein, *supra* note 126, at 269.

131. *See supra* note 23.

thing to say about stakeholders: what kind of rights and duties do they have? Which areas of law provide the tools to resolve the questions pertaining to them?

As is typical in the present-day dichotomy of corporate law, shareholderists and stakeholderists have different answers. To start with, many shareholderists follow a mode of thinking, quite common in the U.S., which can be summarized as: “If it’s not happening in the headlines, it’s not happening.”<sup>132</sup> Accordingly, they concentrate on one term—“contract”—to describe the innumerable diverse set of relationships a corporation might have with its stakeholders. For example, in a 2009 article, Judge Easterbrook broadly posits that “[i]n all of this there are no third-party effects. Competition and contracts promote efficiency . . . . Strangers to the finance and governance bargain, such as debt investors and labor, arrange their affairs by their own contracts. . . . [F]ree contracting in a competitive system just has to promote everyone’s welfare.”<sup>133</sup> This sort of “headline” writing ignores the wide array of frameworks that comprise positive law (such as employment law, torts, environmental law, trusts, fiduciary law, unjust enrichment, general equity, and so on, alongside contract law), which binds every person, including corporations, and which often has very little to do with “contract,” or any *ex ante*, bargained-for set of choices.

In reality, there *are* “third-party effects,” power and information asymmetries, and need for equity and nuance. An employment relationship is different than that between lender and borrower in the LIBOR market.<sup>134</sup> The law pierces many veils; yet, we can never pierce law itself. Thus, a more accurate choice of words than “contract” would be “positive law.” By definition, no one is allowed to commit an unlawful act.<sup>135</sup> Equally, it is

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132. Chris William Sanchirico, *Win or Lose on Amazon, Philly Needs to Get Smart About Attracting New Businesses*, PHILA. INQUIRER (Oct. 25, 2017), <https://www.inquirer.com/philly/opinion/commentary/amazon-hq2-philadelphia-business-kenney-20171025.html> [<https://perma.cc/PGV9-YJGG>].

133. Easterbrook, *supra* note 97, at 690.

134. Indeed, employment relationships generally form a large part of people’s lives and identity, and give rise to many troubling issues. *See, e.g.*, Milja Milenkovic, *42 Worrying Workplace Stress Statistics*, AM. INST. OF STRESS (Sept. 23, 2019), <https://www.stress.org/42-worrying-workplace-stress-statistics> [<https://perma.cc/9W3Z-Q5FE>] (citing studies showing, among other things, that “[o]ver a third of people said their job was a regular source of stress in 2018,” and that this stress can often be attributed to specific, employer-dependent causes, such as “poor communication practices by . . . employers” and “a heavy workload”).

135. *See, e.g.*, Sean J. Griffith, *Agency, Authority, and Compliance*, in *THE CAMBRIDGE HANDBOOK OF COMPLIANCE* (D. Daniel Sokol & Benjamin van Rooij eds., forthcoming 2021) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3462638](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462638) [<https://perma.cc/QM8X-GM3H>] (“Law is what you must do—the rules and regulations originating from the sovereign, transgression of which may lead to deprivation of property or, in some cases, liberty.”). Additionally, within corporate law, many cases establish that a corporation is never permitted to act unlawfully (even to achieve profit), and its fiduciaries violate their duties if they cause it to do so. *See, e.g.*, *In re Caremark Int’l Inc. Derivative Litig.*, 698

not possible to impose a legal sanction for a lawful act. Law is imperfect, but it can be reformed—which requires going through the democratic, judicial, or regulatory process, and cannot consist of someone subjectively “declaring” that a certain behavior is right or wrong.<sup>136</sup> It is not always easy to ascertain what positive law says, but it does say *something*, and does not say *anything* anyone might wish for.<sup>137</sup>

Furthermore, the corporation’s relationships with its stakeholders are such that a natural person might also enter (albeit often on a different scale). Both a corporation and a human can borrow money, have employees, or purchase goods and services. As a result, it is *general, non-corporate law* that provides the vast majority of norms governing corporations (and anyone else). The corporation’s obligations toward its employees or financial creditors are external to corporate law. Legal or contractual changes to those relationships do not modify corporate law. Rather, those obligations are subsumed, as a whole, into the definitional requirement that the corporation act lawfully. Anything that happens *within* corporate law—including the rights of residual claimants—happens only after that requirement is satisfied.<sup>138</sup>

This fact—that non-corporate law regulates the corporation’s relationships with its stakeholders—has been firmly established in U.S. law since at least 1877, when the Supreme Court decided *Munn v. Illinois*.<sup>139</sup> There, an “unincorporated” company (a corporation<sup>140</sup> not “chartered” by the state) challenged a price regulation on the grounds that, lacking a state-issued charter, the state has no power to tell the company how to run an aspect of its business. Rejecting this argument, Chief Justice Waite found that *any* business “affected with a public interest”<sup>141</sup> may be publicly regulated. In other words, regulation of corporations’ effect on the public

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A.2d 959 (Del. Ch. 1996) (foundational Delaware case on the issue); *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222-JRS, 2019 Del. Ch. LEXIS 1293 (Del. Ch. Oct. 1, 2019); *In re Massey Energy Co. Derivative & Class Action Litig.*, No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at \*73–74 (Del. Ch. May 31, 2011) (“Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue ‘lawful business’ by ‘lawful acts.’ As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.” (footnote omitted)); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2017 (2019) (“Delaware courts have prioritized giving directors broad latitude to take business risk by *drawing a line at legal risk* . . . .” (emphasis added)).

136. See, e.g., Strine, *supra* note 8, at 790.

137. See *supra* note 24 (discussing the meaning of positive law).

138. See Raz, *supra* note 1, at 275–76 (“[T]he residual interests . . . [are] those left after all corporate obligations, of any kind, to all non-residual claimants are satisfied, in practice or in capacity.”); see also *id.* at 274 n.77 (explaining how both corporate and non-corporate law operationalize this ever-present requirement).

139. 94 U.S. 113 (1877).

140. On the broad meaning of “corporation” as used in this Article, see *supra* note 1.

141. *Munn*, 94 U.S. at 130.

is not within the realm of corporate law; it does not flow from the corporation's constitutional documents. Rather, it is part of general law, which applies to both corporations and natural persons.<sup>142</sup>

More recently, a leading figure of global corporate law went on to express the same idea: according to Chief Justice Strine, “[a] corporate law case is not a case about all laws, but about a law. We are not environment protection law, labor law or antitrust law—you stay in your lane.”<sup>143</sup> Strine advocates the same theme in a long series of scholarly articles,<sup>144</sup> making clear that protecting stakeholders against externalities, while certainly lacking in the U.S. and around the world, is not part of *corporate* law. Strine specifically concludes that “if interests such as the environment, workers, and consumers are to be protected, then what is required is a revival of effective externality regulation that gives these interests more effective and timely protection,”<sup>145</sup> contrasting “externality regulation” with norms “within corporation law itself.”<sup>146</sup> Other scholars have made this point in various contexts,<sup>147</sup> and a recent article by Professor Mariana Pargendler “raises the possibility that the promise of corporate governance may have been overrated, . . . [as it] may crowd out potentially more effective responses to the problems at hand.”<sup>148</sup>

The *inherent* difference, in structural terms, between corporate and non-corporate law is the result of at least two factors. First, corporate law involves different *actors*. The terms “corporation,” “shareholder,” and “director” result exclusively from the corporate framework. There can be no

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142. See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1628–32 (1988) (discussing *Munn* and the other *Granger* cases; noting that “*Munn* had been selected for a full opinion on state power to regulate prices because the company was unincorporated,” that the Court in these cases “[upheld] rate regulation of natural persons provided the regulated *market* was ‘affected with the public interest,’” and that “*Munn* . . . made corporate status irrelevant to the states’ power to regulate rates”).

143. Rita K. Farrell, *At Top of Delaware Chancery Court, Adherence to Tradition*, N.Y. TIMES (July 6, 2011), <https://dealbook.nytimes.com/2011/07/06/at-top-of-delaware-chancery-court-adherence-to-tradition> [<https://perma.cc/7V5Z-4TT7>] (interviewing then-Chancellor Strine).

144. See, e.g., Leo E. Strine, Jr., *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL’Y 176, 177 (2017) [hereinafter Strine, *Corporate Power is Corporate Purpose*]; Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 145–46, 171–72 (2012); Strine, *supra* note 8, at 768, 786–93.

145. Strine, *supra* note 8, at 793.

146. *Id.* at 768.

147. See, e.g., Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 328 (2001) (“Laws offering models for business organizations . . . cover *relationships between the interested parties within the organizations* . . . . None of these laws, however, regulates the *businesses in which the organizations engage*. Those . . . businesses are regulated by other laws, unrelated to [their] organizational structures . . . .”); Larry E. Ribstein, *The Important Role of Non-Organization Law*, 40 WAKE FOREST L. REV. 751 (2005).

148. Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 402 (2016).

director for a natural person; and, while a natural person does in some sense have “residual claimants”—the person’s presumptive heirs<sup>149</sup>—they have no legal standing during the person’s life, in terms of setting a purpose, appointing fiduciaries, or any of the rights granted to shareholders. Thus, special norms<sup>150</sup> are required to regulate the relationships generated by the corporate framework, but not other relationships, which equally attach to natural and corporate persons.

Second, corporate law differs from non-corporate law in the *information content* of the legal norms. Every legal field provides some set of imperatives. The command might be detailed (“pay \$100 to the bondholder on July 1”) or undetailed (“act equitably with the trust property”), but it exists. Corporate law, in contrast, provides the most undetailed guidance of all: it simply tells the corporation to “do whatever.” A corporation can literally act however it wishes, subject to only one imperative: “lawfully pursue profit” (or any other purpose, depending on the type of corporation).<sup>151</sup> Among other issues, this makes corporate law entirely unsuitable to govern the substantive rights and duties of anyone other than the actors affected by the open-ended part (“pursue profit”)—that is, the corporation, its residual claimants, and its fiduciaries—as opposed to those affected by the close-ended part (“lawfully”), that is, stakeholders.

Crucially, attempting to set stakeholders’ rights within corporate law would actually place stakeholders in an *inferior* position, compared to what they have today. That is because non-corporate law, with its more specific and information-rich content, provides both better rights and better enforcement. Legal actors need information to know (and act on) their rights and duties. Trying to enforce stakeholders’ rights within corporate law would generate an extreme information asymmetry, between the *wished-for*, subjective demands—nowhere found in positive law—of various stakeholders, and what the corporation can *know* it is obliged to do, ascertainable through law.<sup>152</sup> This asymmetry is absolute and inevitable. Even

149. See Raz, *supra* note 1, at 274–75.

150. Moreover, special mechanisms are required to *enforce* those norms, such as the derivative action, which is a unique creature of corporate law. The distinction between derivative and direct actions has far-reaching implications. See, e.g., *id.* at 295 n.159.

151. See *supra* Section I.A; *supra* note 22. This point is embodied in the fact that the corporation’s goals might be “to engage in any lawful act or activity.” DEL. CODE ANN. tit. 8, § 102(a)(3) (2020).

152. The same holds true if the “do whatever (in the lawful pursuit of profit)” imperative is augmented with seemingly more specific language, which actually does nothing to resolve the asymmetry described here. One example is saying that the corporation must promote “general public benefit.” Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018). By design, *law* cannot provide any guide or imperative to operationalize this abstract requirement. Imposing such a “duty” assumes law away, replacing it with after-the-fact, subjective determination of whether the corporation acted “right” or “wrong.” Among other issues, this kind of legislation might violate the constitutional vagueness doctrine. See, e.g., Eugene Volokh, *The Void for Vagueness / Fair Notice Doctrine and Civil Cases*, VOLOKH CONSPIRACY (June 21, 2012, 12:19 PM), <http://volokh.com/2012/06/21/the-void-for->

if the corporation could somehow read stakeholders' minds, there would still be no logical way to say that the lawful is unlawful. The *only* way to align the corporation's duties with stakeholders' interests, in a legally enforceable way, is to change the law. That happens all the time, in legislatures, courts, regulatory agencies, and private agreements. Still, if existing law sets the minimum wage at  $x$ , it simply is not  $2x$ , or  $0.5x$ , unless the law is changed. Working to improve non-corporate law would be more fruitful in both achieving desired societal goals, and not disturbing the equity-based structure of corporate law.

Accordingly, statements that corporate law should promote "the aggregate welfare of all who are affected by a firm's activities,"<sup>153</sup> "overall social welfare,"<sup>154</sup> or "cooperative economic activity"<sup>155</sup> must be understood in context. They are not a recipe for arbitrariness. Promotion of social welfare does not entail creating "rights" (at cost to others) out of whole cloth. Rather, it means maximizing involved actors' welfare, so that claims are initially allocated in a just and efficient manner, and each of the actors then receive their full legal claim.

Consistent with the purpose-based structure of corporate law, it is also true that stakeholders' interests, beyond their current positive law claims, may be considered by the corporation, to the extent such consideration advances the corporation's purpose. Among other cases,<sup>156</sup> *Paramount v. Time* provides a perfect example. Time's "journalistic integrity"<sup>157</sup> is a value it voluntarily adopted, under no legal obligation to do so. None of Time's stakeholders have a legal claim to the preservation of "Time Culture."<sup>158</sup> Non-corporate law, including the First Amendment,<sup>159</sup> permits

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vagueness-fair-notice-doctrine-and-civil-cases [https://perma.cc/2AQ5-PXRQ] (surveying case law applying the constitutional vagueness doctrine in administrative law and other civil contexts; noting that the doctrine "is applicable to cases that involve civil penalties and not just criminal liability").

153. KRAAKMAN ET AL., *supra* note 34, at 22.

154. *Id.* at 23.

155. WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 343 (5th ed. 2016). For a similar statement, see William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. CORP. L. 713, 714 (2014) ("[B]usiness corporations exist to create wealth . . ."). To complete this kind of argument, one should ask: *whose* wealth does a corporation create? The corporation's (similar to natural persons, entitled to the fruit of their efforts, subject to meeting all legal obligations). How do we know what legal claims other people have toward the corporation? Through law.

156. *See, e.g., Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (refusing to interfere in a corporation's decision not to install lights in a stadium, an expansion which allegedly would have led to higher revenue from nighttime games; reasoning that the decision, which considered "the effect on the surrounding neighborhood," might promote the "long run [economic] interest" of the corporation).

157. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1144 (Del. 1989).

158. *Id. passim.*

159. U.S. CONST. amend. I.



anyone to engage in publishing that lacks integrity.<sup>160</sup> Yet, in the face of a hostile takeover attempt, Time was allowed to defend this value, *because it promoted the corporation's purpose*—the lawful pursuit of profit.<sup>161</sup>

The legal response to an extremely significant national crisis—the opioid epidemic—provides a perfect illustration of the framework discussed here. In December 2018, the United States District Court for the Northern District of Ohio denied pharmaceutical defendants' motions to dismiss the consolidated civil action filed against them.<sup>162</sup> As the decision shows, the defendants are *the pharmaceutical corporations* themselves, as separate legal persons—not their shareholders, employees, or fiduciaries.<sup>163</sup> It is the corporation, having the same capacity as a natural person, that dealt with the victims, and should pay for their injuries. Furthermore, none of the causes of action have anything to do with corporate law: the plaintiffs seek remedies arising in such areas as tort law and unjust enrichment; they were injured not as a corporation or shareholders, but as patients, consumers, family members, and public service providers. If a natural person committed the same acts the corporations are being sued for, the case would look no different.

Moreover, if we somehow tried to apply corporate law in this case, it would provide “null results”: nothing within corporate law tells the pharmaceutical corporations whether their opioid marketing practices are legally permissible. Attempting to rely on corporate law, or even a more “socialized” version thereof, would yield *worse* outcomes for the victims: the corporations could simply claim that they acted in furtherance of “general public benefit,”<sup>164</sup> and any court proceeding would focus on interpreting that ambiguous phrase, rather than utilize the much more specific, information-rich tools of tort law and the other causes of action, developed over centuries of jurisprudence.

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160. Again, within the bounds of positive law. Defamation, for example, is prohibited. Yet, there are many kinds of lawful publishing that lack integrity—see your closest tabloid.

161. *See Paramount v. Time*, 571 A.2d at 1150 (“[Directors’] broad mandate includes a conferred authority to set a corporate course of action . . . designed to enhance corporate profitability.”); *Paramount Commc’ns, Inc. v. Time Inc.*, Nos. 10866, 10670, 10935 (Consol.), 1989 Del. Ch. LEXIS 77, at \*22–86 (Del. Ch. July 14, 1989) (“[T]here is insufficient basis to suppose at this juncture that such concerns [for the ‘Time culture’] have caused the directors to sacrifice or ignore their duty to seek to maximize in the long run financial returns to the corporation . . . . [W]here the board . . . continues to manage the corporation for long-term profit . . . , the corporation has a legally cognizable interest in achieving that plan.”), *aff’d*, 571 A.2d 1140 (Del. 1989).

162. *County of Summit v. Purdue Pharma L.P. (In re Nat’l Prescription Opiate Litig.)*, No. 1:17-md-2804, 2018 U.S. Dist. LEXIS 213657 (N.D. Ohio Dec. 19, 2018).

163. *See id.* at \*1–55 (listing the parties in the case; indicating that the vast majority of defendants are corporations, while the few natural persons listed as defendants are, according to a separate web search, physicians and pharmacists, not related to a corporate defendant).

164. Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018).

Despite all this, many stakeholderists do not believe that a corporation meeting all of its legal obligations has done enough; they argue it should still potentially be subject to legal sanction. Aiming to somehow import stakeholders' claims into *corporate* law, they wish to transform the corporation's purpose from the lawful pursuit of its own benefit to an altruistic endeavor. The final paragraphs of this Section consider several important arguments to that effect.

At the outset, we sometimes encounter foggy metaphors, such as referring to stakeholders as if they are "constituent parts" of the corporation.<sup>165</sup> Such physiological allusions are without merit, since the corporation is a person—one entity, not "composed" of anyone else.<sup>166</sup> Corporations are no more made up of shareholders and stakeholders than natural persons are composed of the bank that holds their account and the college to which they pay tuition. Moreover, placing the corporation's *fiduciaries* in the center, and expecting them to divide their loyalties among multiple stakeholders, shifts the focus away from where it is due: the corporation itself, which is the beneficiary of its fiduciaries' duties, and the person serving as stakeholders' counterparty. As has been correctly argued,<sup>167</sup> such pluralization of fiduciaries' duties only amounts to a grant of unchecked power to fiduciaries, while producing little, or negative, benefits for both the corporation, stakeholders, and shareholders. In reality, as described in this Section, what corporations have with their stakeholders is an array of *legal relationships*, governed by *legal norms*.

Even when recognizing this, stakeholderists often fail to locate the correct sphere in which to pursue desirable reforms: non-corporate law. Rather, they call for ambiguous "corporate social responsibility" (CSR), overlooking the central questions: how does the corporation—or anyone else—objectively *know* what is socially responsible? Even assuming that "socially responsible" represents some better standard of conduct than

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165. See, e.g., ALLEN & KRAAKMAN, *supra* note 155, at 284 ("To whom do directors owe loyalty? The short answer is that they owe their duty to the corporation as a legal entity. Yet . . . [t]he 'corporation' has multiple constituencies with conflicting interests, including stockholders, creditors, employees, suppliers, and customers. To say that directors owe loyalty to the corporation masks conflicts among these constituencies." (footnote omitted)). However, that is not the "short" answer but the accurate one; the corporation should not be placed in quote marks; stakeholders do not "constitute" the corporation, but exist separately from it and from one another; and their mutual conflicts (or, more commonly, their conflicts with the corporation) should be resolved according to law (as opposed to directors' guesswork), just like other disputes among people.

166. See, e.g., Raz, *supra* note 1, at 285–87 (explaining why "aggregate" theories of the corporation are incorrect); *supra* Section I.B.

167. See, e.g., *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 42 n.16 (Del. Ch. 2013) ("[A] multivariate fiduciary calculus quickly devolves into the equitable equivalent of a constituency statute with a concomitant decline in accountability."); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991) ("[A] manager told to serve two masters . . . has been freed of both and is answerable to neither.").

“lawful,” how can *legal* institutions enforce that standard, when *by definition*, no legal sanction can be imposed for lawful behavior?

Recent scholarship<sup>168</sup> has gone so far as to *condemn* governments for doing precisely the right thing: regulating corporations through stronger, clearer statements of positive law. Instead, that article mysteriously demands an overriding reliance on “CSR.”<sup>169</sup> Proposals of this kind effectively seek to turn corporations and their fiduciaries into omnipotent private lawmakers, arbitrarily creating and enforcing their own rules as to what is “responsible.” The concept of law does not work this way.

Another line of argument is that, in essence, shareholders *are* stakeholders. Greenwood,<sup>170</sup> Hart and Zingales,<sup>171</sup> and Strine,<sup>172</sup> to cite three leading examples, correctly note that shareholders, in addition to the relationship they have with the corporation under share law, might often be employees, consumers, or people otherwise affected by corporate actions. Presumably, even under a “shareholder-oriented” view, corporate law should therefore tend to the stakeholderist side.

This argument, however, looks under the wrong lamppost. To begin with, as this Article proves extensively, corporate law is not, cannot, and should not be about shareholder primacy; rather, the corporation—separate from its shareholders, and not meant to serve any of them individually<sup>173</sup>—is at the heart of corporate law, which aims to facilitate the pursuit of the corporation’s own purpose.

Second, and more fundamentally, people engage in a variety of *different* relationships with one another. A dentist might also be a psychologist, but a patient coming for a root canal does not expect marriage advice, and vice versa. Even if some patient did receive both treatments, each is governed by a separate contract or legal framework, and requires the doctor to engage in a separate decision-making process (and, hopefully, not perform both at the same time). Similarly, a shareholder might also be an

168. Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167 (2018).

169. *Id. passim*.

170. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996).

171. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017).

172. Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870 (2017).

173. This is important in the context of the “shareholders are stakeholders” argument, since different shareholders have diverging interests, both as shareholders and, certainly, as stakeholders. One shareholder is an employee, but another is not. Even two shareholder-employees might experience different outcomes from the same corporate action. The fine-grained treatment offered by separate fields—corporate law and non-corporate employment law—is far more capable of handling the fine-grained distinctions between different people in varying situations.

employee and a consumer, but these are three distinct relationships, each handled within a different toolbox, or set of legal norms (corporate law, employment law and consumer protection law). In fact, because shares are *residual* claims, that shareholder is *first and foremost* an employee and a consumer. The corporation must meet all of its obligations under non-corporate law before the shareholder as such can see any benefit. Thus, the “shareholders are stakeholders” argument does not add much to the *corporate* law debate, since stakeholders are already as protected as possible under non-corporate law.<sup>174</sup>

In summary, stakeholderists raise many valid arguments regarding the shortcomings of existing law. Very often, the protections afforded to employees, consumers, lenders, or the environment might be suboptimal. Within the legal sphere, there is one way to deal with that: going through the *legal* process to refine positive, binding law. We ought to fix the law where such reforms would be effective; we should not throw simplistic statements into a toolbox incapable of handling them,<sup>175</sup> hoping that corporate directors (of all people)<sup>176</sup> would somehow save the day. As Professor Kent Greenfield observes, “corporations are people too (and they should act like it).”<sup>177</sup> This also means that no extra-legal, subjective “norms,” conveyed in whichever three-letter acronym favored by a given commentator,<sup>178</sup> somehow bind corporations and not others. The correct three letters are “law.”

#### D. *The Corporation’s Residual Claimants*

Every corporation, at any given moment, has at least one residual claimant. As a previous article explains, “[t]he underlying reason for this is that a corporation’s life can end . . . . When that happens, the corporation’s interests . . . do not disappear. . . . [O]nly rarely, if ever, do a corporation’s interests precisely equal its liabilities. . . . [The] person entitled to receive the difference, or ‘residual[,]’ . . . is the residual claimant.”<sup>179</sup> Ad-

174. See *supra* text accompanying notes 151–52.

175. See, e.g., Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018) (requiring that corporations act to further “general public benefit”).

176. See Strine, *Corporate Power is Corporate Purpose*, *supra* note 144, at 177 (“Pre-tending that corporate boards—an odd recourse for ordinary people anyway—are to be looked at as a source of protection and solace for workers, the environment, and consumers dilutes the focus that is actually needed, which is on the protections from externalities that other constituencies deserve.”).

177. KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018).

178. See, e.g., Martin Lipton, *Corporate Purpose: ESG, CSR, PRI and Sustainable Long-Term Investment*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 4, 2018), <https://corpgov.law.harvard.edu/2018/05/04/corporate-purpose-esg-csr-pri-and-sustainable-long-term-investment> [https://perma.cc/RFC7-YSNM].

179. Raz, *supra* note 1, at 272–73. As a result, even nonprofit corporations have residual claimants. The question “who would be entitled to receive the corporation’s residual?” might sometimes be decided *ex post* (in the case of nonprofit corporations, this would usually entail dedicating the residual to similar goals as

ditionally, residual claimants play a crucial role at the opposite end of the corporation's life cycle: by default, they are the people who *establish* the corporation, providing corporate law with entities to govern in the first place.<sup>180</sup> The question, then, is what *is* a residual claim? What kind of rights does a shareholder (or "member," or "partner") have, toward whom, and governed by which legal framework?

A well-liked children's toy consists of a box with an internal array of mirrors, into which coins can be inserted. When the user opens the top of the box, the coin is nowhere to be found. Only by following a certain process, which requires accessing a hidden compartment, can the user retrieve the economic value stored in the box. The structure of corporate law places shareholders in a similar position. The coin (shareholders' equitable claim) always exists, but so does the box (the corporation). Only by going through the process (corporate law, and none else) may the shareholder see any benefit.

What makes shares and shareholders' rights so special is that they cannot be explained by any legal framework *other* than corporate law; and even within corporate law, nuances apply. Allen and Kraakman put it simply: "[Shareholders] have no right to any periodic payment, nor can they demand the return of their investment from the corporation. Nor . . . can they typically tell the firm's managers what to do."<sup>181</sup> Thus, neither contract law nor agency law govern shares. From many additional aspects, shareholders are not mere contractual parties.<sup>182</sup> Other common "metaphors" are also misguided: as this Article demonstrates, the corporation is an unownable person; and the corporation—not shareholders—is the owner of its property. Shareholders only own their shares (which are bundles of rights *toward*, not "in" the corporation); the "property" or "investor ownership" metaphors are empty vessels.<sup>183</sup> Furthermore, shareholders are not trust beneficiaries,<sup>184</sup> or (the view most common in the U.S.) direct beneficiaries of the corporation's directors and officers under fiduciary law.<sup>185</sup> As a rule, fiduciaries' duties run to the corporate person, not to shareholders (or anyone else). Moreover, the corporation's interests might diverge from those of shareholders, or part of them.<sup>186</sup> Thus, even within corporate law, share law is distinct from corporate fiduciary law. The former deals primarily with the corporation's obligations to shareholders, and the latter—with fiduciaries' obligations to the corporation.

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those of the dissolving corporation), but in any case, *some* person would receive the residual assets.

180. *See id.* at 273.

181. ALLEN & KRAAKMAN, *supra* note 155, at 143.

182. *See Raz, supra* note 1, at 282–85.

183. *See id.* at 285–87.

184. *See id.* at 287–90.

185. *See id.* at 290–301.

186. *See supra* note 98 and accompanying text.

As a result, the law of shares is not founded on concepts of contract, agency, property, trust, or fiduciary law. Rather, the basis of shareholders' rights—quite simply, the answer to the question “why do shares have value?”—resides in a concept of equity.<sup>187</sup> The various “agency problems” between the corporation and its shareholders are resolved with equitable (but mostly non-fiduciary) tools, such as the law of share dilution, dividends and buybacks, appraisal rights, shareholder voting, books and records inspection, shareholder litigation, and other mechanisms.<sup>188</sup>

Nuance is key here: shareholders have lesser standing than fiduciary law principals, and do not own the corporation or its property. Yet, this does not mean they are “merely owners of . . . certain contractual claims.”<sup>189</sup> The residual nature of shares makes them *anything but* certain.<sup>190</sup> Shareholders' “contract” with the corporation (its constitutional documents) might, at most, *resemble* a contract, for specific purposes and in *some* cases. In fact, corporate charters and bylaws can better be described as equity documents. They rely on unwaivable legal and equitable constructs, meant to respond to the problems generated by corporate law's power- and information-asymmetric nature.<sup>191</sup>

Importantly, the non-fiduciary nature of shareholders' rights has an exception. Most of the time, whatever effect fiduciaries have on shareholders is channeled through the corporation. Yet, in *some* situations, shareholders might gain a direct claim toward the corporation's fiduciaries. This exception only occurs in “a limited set of circumstances,”<sup>192</sup> when the channeling principle is violated, and the fiduciary action at issue does not materially affect the corporation itself. That happens, for example, in *Revlon* mode,<sup>193</sup> when fiduciaries directly control the fate of shareholders' investment, while the corporation, nearing a “breakup,”<sup>194</sup> has

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187. See Raz, *supra* note 1, at 302–11. Note that fiduciary law and equity are not the same. Fiduciary law is one branch of equity. A person (such as a shareholder) can have equitable rights, while not being owed fiduciary duties. See *id.* at 294–95, 303–05; *supra* note 98. For a detailed illustration of equity as a distinct concept from fiduciary law, and share law as grounded in non-fiduciary equity, see Paul B. Miller, *Equity, Majoritarian Governance, and the Oppression Remedy*, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby & Jacob Hale Russell eds., forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3483563](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483563) [<https://perma.cc/5FB9-HW94>].

188. See Raz, *supra* note 1, at 311–19.

189. Macey & Strine, *supra* note 49, at 483.

190. See Raz, *supra* note 1, at 276–78, 282–85, 308–09.

191. See *supra* text accompanying notes 117–23.

192. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

193. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“[Once the company was for sale,] [t]he duty of the board had . . . changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. . . . The directors' role[, before the company was for sale, was to serve as] defenders of the corporate bastion . . .”).

194. *Paramount v. Time*, 571 A.2d at 1150.

no skin in the game. Other violations of the channeling principle can occur.<sup>195</sup> Again, these are special cases—particularly considering that most corporations, most of the time, are a “going concern,” not in *Revlon* mode, and not at the end of their lives.

Today, both shareholderists and stakeholderists tend to characterize all corporate law in terms of fiduciary duties (to shareholders or others), thus overlooking either the corporation’s personhood, or the principles of fiduciary law, which require “single-minded” dedication to the beneficiary (the corporation).<sup>196</sup> The mischaracterization of all corporate law as fiduciary law, and of shareholders as fiduciary law beneficiaries, generates subtle faults with many practical consequences. For example, while discussing the case of *Smith v. Atlantic Properties, Inc.*,<sup>197</sup> Professor Mark Ramseyer comments that “[t]he opinion makes no sense . . . . If the one [shareholder] owed the three [other shareholders] a fiduciary duty, the three owed the one the same.”<sup>198</sup> In fact, the opinion makes a lot of sense, once we recognize that neither shareholder owed the others a “fiduciary” duty; rather, as controlling shareholders, they owed their duties to the corporation.<sup>199</sup> Despite using less-than-optimal language, the court correctly held the one dissenting shareholder, who prevented a distribution and thereby caused the corporation to pay higher taxes, to have breached his fiduciary obligations.

On the flip side, a more recent Massachusetts case illustrates the grave outcomes a misreading of corporate law’s structure and nuances can bring for shareholders as such. Initially, 2017’s *International Brotherhood of Electrical Workers Local No. 129 Benefit Fund v. Tucci*<sup>200</sup> decision seems to cohere with the framework presented in this Article: as the court says, “the general rule of Massachusetts corporate law is that a director of a Massachusetts corporation owes a fiduciary duty to the corporation itself, and not its shareholders.”<sup>201</sup> So far, so good, but in this case, the exception discussed above applies; a channeling principle issue arose. The facts in this case are akin to *Revlon* mode: the question was whether directors acted to maximize the value of *shareholders’* shares—not *the corporation’s* assets—when

195. See Raz, *supra* note 1, at 299 n.168.

196. See, e.g., Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989) (“[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. . . . [A] fiduciary . . . is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed . . . .” (citation omitted)); Bristol & W. Bldg. Soc’y v. Mothew [1996] EWCA (Civ) 533, [1998] Ch 1, 18 (appeal taken from Eng.) (a globally cited case on fiduciary law principles, stating that “[t]he principal is entitled to the single-minded loyalty of his fiduciary”).

197. 422 N.E.2d 798 (Mass. App. Ct. 1981).

198. J. Mark Ramseyer, *Introduction*, in CORPORATE LAW STORIES 1, 1 (J. Mark Ramseyer ed., 2009).

199. See, e.g., Raz, *supra* note 1, at 297 n.164; *infra* Section II.A.

200. 70 N.E.3d 918 (Mass. 2017).

201. *Id.* at 926.

they carried out a merger that forfeited those shares from their owners. In this scenario, as Delaware law correctly and equitably recognizes, directors become ad hoc fiduciaries for shareholders.

The *Tucci* court, however, chose to forego a substantive, structural (and economic) inquiry of corporate law, instead formalistically focusing on two exceptions found in case law, neither of which apply here.<sup>202</sup> The court says that “undervaluing [the corporation] to secure the merger . . . qualifies as a direct injury to the corporation”<sup>203</sup>—but how, exactly? None of the corporation’s assets changed hands; only shareholders’ stake was affected. The corporation is also not the sum of its shareholders. *Tucci* begins with a correct statement of corporate personhood and fiduciary law, but then essentially devolves into an “aggregate” view of the corporation. The court affirms the dismissal of the case, reasoning that it should have been filed as a derivative, rather than direct, action.<sup>204</sup> *Tucci* is one example, among many in this Article, of an under-recognition of corporate law’s anatomy, possibly leading to large-scale wealth transfers (in this case, from public shareholders to an acquiring party), with no economic or legal justification.<sup>205</sup>

Some jurisdictions, particularly Delaware, tend to use phrases such as “fiduciary duties to the corporation and its shareholders.”<sup>206</sup> If that expression is to be harmonized with the mass of other sources—including from Delaware itself—surveyed throughout this Article, it can only be construed as “duties to the corporation, which in turn owes equitable duties to shareholders.”<sup>207</sup> Delaware’s dualistic language might best be understood as a form of *reminder*: not about fiduciary duties (which run solely to the corporation), but about the corporation’s *purpose*, which is the lawful pursuit of profit. That profit—ultimately (meaning a potentially unlimited time), and only through the facts of corporate law (such as the corporation’s power to decide whether or not it distributes a dividend or makes a share buyback; its fiduciaries’ ability to enact defensive tactics against a tender offer; and shareholders’ own diverging interests and time horizons)—benefits shareholders.

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202. *See id.*

203. *Id.*

204. *See id.* at 928. Note that precisely because plaintiffs’ shares were taken from them in the merger, they can no longer file a derivative action.

205. “Dell agreed to acquire all of EMC for approximately \$67 billion.” *Id.* at 921–22. If the case was not dismissed at the pleading stage, the parties would have had the chance to prove whether or not that amount is adequate.

206. *See, e.g.,* *Cede & Co. v. Technicolor*, 634 A.2d 345, 360 (Del. 1993) (“[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.”); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 979 (Del. Ch. 2000) (“Directors have an unyielding fiduciary duty to protect the interests of the corporation and the stockholders alike.”).

207. *See Raz, supra* note 1, at 293–95. This point is also supported by Delaware’s *Trados* case. *See infra* notes 219–23 and accompanying text.



There is also a deeper relation between share law and the law of corporate purpose. If an attempt was made to change a corporation's purpose without the due consent of its residual claimants,<sup>208</sup> those claimants' rights would be fundamentally affected, if not completely eliminated. The residual claim inherently depends on a certain assumption as to the corporation's purpose; the pursuit of that purpose, by the corporation, is what generates the value of the residual claim (albeit only ultimately and indirectly). When a for-profit corporation is required to cease lawfully pursuing profit, or to distribute its current assets to stakeholders, irrespective of their pre-existing positive law rights, this clearly negates the very content of shareholders' residual claim. Therefore, in addition to the corporation itself, residual claimants might have standing to challenge such attempts. In other words, residual claimants have, as part of their equitable claim, a right to have the corporation's purpose remain what it is.<sup>209</sup> Since the corporation's purpose must always be lawful,<sup>210</sup> this does not impinge upon the rights of anyone else. By definition, the pursuit of profit, or any other purpose, may not be subject to legal incursion, if it is made in full accordance with law.

In summary, the structure of corporate law entails that residual claimants—shareholders, members, or any other moniker attached to those whose claim toward the corporation is defined solely by the phrase “what is left after all obligations to other stakeholders are met”—do not “own” the corporate person or its assets; are not directly owed duties by its fiduciaries; and have interests that might diverge from those of the corporation, and from each other's. Yet, the *residual* nature of their claim, negating any attempt to fully rely on ex ante, “contract”-based planning, also means

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208. Senator Warren's proposed Accountable Capitalism Act represents such an attempt. See Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018).

209. Residual claimants might agree to a change of the corporation's purpose (which, in the case of such a uniquely fundamental change, might justify a requirement for the informed consent of *all* shareholders). Alternatively, in some cases, it might be possible for a corporation to change its purpose, if its residual claimants receive other substantial, equitable remedy, such as appropriate compensation. This point differs from the view that “power is purpose within the corporate polity,” Strine, *Corporate Power is Corporate Purpose*, *supra* note 144, at 180. That view assumes that solely because shareholders are granted the authority to elect directors, or similar corporate powers, they are the ones who benefit from the corporation's pursuit of its purpose. In fact, first, both stakeholders and shareholders have this benefit (as the corporation's purpose must be lawful). Second, shareholders have rights not because they have power; rather, they have some power because that is generally assumed to be a good way to protect their rights, and those of the corporation. Even if a lawmaker eliminated or modified shareholders' power to elect directors, this would not alter directors' duty to advance the corporation's purpose; and, as explained here, if an attempt was made to change the purpose itself, shareholders' rights would be protected by equity. Note that this applies regardless of the corporation's specific purpose: if a nonprofit corporation ignored its purpose and started pursuing profit, its residual claimants (for example, charity beneficiaries) would have an enforceable claim against the corporation.

210. See *supra* Section I.C.

they are not just another group of creditors in a “nexus of contracts.” Their rights are less than fiduciary or proprietary, but more than contractual. In fact, residual claimants are unique creatures of corporate law itself. Specifically, their rights arise in the equity-based portion of corporate law. The total value of shares publicly traded on the world’s exchanges, in 2019, was more than \$60 trillion.<sup>211</sup> Understanding and respecting the nature of residual claimants’ rights—which is equitable; no more, no less—is of the highest importance.

#### E. *The Corporation’s Fiduciaries*

Every corporation, at any given moment, has at least one fiduciary—another person, owing fiduciary duties to the corporation. This fact is a direct result of corporate law’s other building blocks: “A corporation is a person, but not a natural person. It does not have eyes and hands, or any other bodily and cognitive capacities, entirely of its own. Therefore, it always has to operate through someone else (the fiduciary), whom by design it entrusts with acting in its benefit.”<sup>212</sup> In other words, if the corporation had no fiduciaries, it could simply not operate in the physical world. In turn, furthering the corporation’s benefit means acting to cause it to achieve its purpose.<sup>213</sup>

The order of sections in this Part of the Article—beginning with the corporation’s own purpose and personhood, moving to stakeholders, followed by residual claimants, and ending with fiduciaries—is not accidental. The corporation itself is at the center of corporate law, which aims to create a legal environment enabling the pursuit of the corporation’s purpose. Without the corporate person, there would be no corporate law to speak of. The corporation must meet all of its positive law obligations to stakeholders, who enjoy full seniority in claims for its assets. Only then may residual claimants see any benefit. In contrast, the final group—fiduciaries—are not claimants, but obligors. Fiduciary law applies in a wide variety of relationships, where inherent power and information asymmetries make one party (the beneficiary) wholly dependent upon the actions of another (the fiduciary). These include, for example, the lawyer–client, doctor–patient, guardian–ward, and trustee–beneficiary relationships.<sup>214</sup> In this situation, concepts of “contract” are inadequate: by definition, the beneficiary cannot *possibly* know what actions the fiduciary might undertake; any *ex ante* attempts to “plan” the relationship are doomed to fail-

211. See *Stocks Traded, Total Value (Current US\$)*, WORLD BANK, <https://data.worldbank.org/indicator/CM.MKT.TRAD.CD> [<https://perma.cc/PFF5-MKRC>] (last visited June 30, 2020). This should be considered in addition to the value of shares issued by private, or non-publicly-traded, corporations.

212. Raz, *supra* note 1, at 270.

213. See *supra* Section I.A.

214. For additional examples of fiduciary relationships, see Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 994 n.1 (2017).

ure, because the fiduciary might opportunistically use its superior power and information to upset the beneficiary's rights and expectations (including *would-be* rights and expectations).<sup>215</sup>

It is clear, then, why a corporation—which is an artificial person, *wholly* dependent upon other people for everything it does—has to be owed fiduciary duties by those people (and cannot solely rely on some other framework, such as contract). The corporation is compelled to blindly trust its fiduciaries to act in its benefit.<sup>216</sup> Fiduciary rights arise whenever certain conditions, primarily related to power and information asymmetries, combined with an assumption of “trust and confidence,”<sup>217</sup> are met. By design, such conditions occur every time a new corporation is formed, and continue throughout the entity's existence.

In current discourse, much of corporate law is formulated in terms of this last prong: corporate *fiduciary* law. The corporation's fiduciaries are presumably meant to act either “for shareholders” or “for all stakeholders.”<sup>218</sup> This formulation is misguided. Fiduciaries' obligation is fixed: to advance the corporation's purpose. That obligation, of course, is owed to the corporation. The true Archimedean point is the law of corporate purpose, and the way it interacts with the other building blocks discussed in this Article.

2013's *Trados* decision<sup>219</sup> summarizes this web of relationships rather neatly. As the Delaware Court of Chancery wrote,

[Directors' decisions should] benefit *the corporation* as a whole, and by increasing the value *of the corporation*, the directors increase the share of value available for the residual claimants. . . . [The “duties to the corporation and its shareholders”] formulation captures the foundational relationship in which directors owe duties *to the corporation* for the *ultimate* benefit of the entity's residual claimants. . . . [T]he duty of loyalty therefore mandates that directors maximize the value *of the corporation* over the *long-term* . . . . [R]esidual claimants [are] the *ultimate* beneficiaries of *the firm's* value . . . .<sup>220</sup>

215. See Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* (Harvard Pub. Law Working Paper No. 15-13, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2617413](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413) [<https://perma.cc/ZL95-VNLZ>].

216. See Raz, *supra* note 1, at 270.

217. *Bristol & W. Bldg. Soc'y v. Mothew* [1996] EWCA (Civ) 533, [1998] Ch 1, 18 (appeal taken from Eng.).

218. See, e.g., Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 105–06 (1979) (attempting to prove that *directors* should entertain a broad range of concerns, while discussing several legal norms that constrain *the corporation*). Of course, the corporation must obey the law. See *supra* Section I.C. Yet, this has nothing to do with broadening directors' concerns, beyond their duty to the corporation: to further the corporation's lawful purpose.

219. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013).

220. *Id.* at 36–41 (emphases added).

Read carefully, *Trados* is exceptionally accurate in its analysis of corporate law's anatomy. First, the corporation's purpose is the long-term pursuit of *its* profit ("increased value"). Second, the corporation is a person, as it must be to be owed duties by anyone.<sup>221</sup> Third, the corporation is required to meet all of its legal obligations (those discussed in *Trados* were mainly toward preferred shareholders, or "contractual claimants"<sup>222</sup>). Fourth, the corporation's residual claimants have claims toward the corporation (or "entity" or "firm"), not toward directors; and their benefit is only "ultimate," meaning that it is channeled not through instant-gratification concepts of "property" or "fiduciary law," but through the freedom-limiting, yet equitable, framework of Delaware share law. Finally, the corporation's fiduciaries (namely, its directors) owe their duties *to the corporation*, to further *its* value-increasing purpose. They are not "constituency directors,"<sup>223</sup> but corporate directors, subject to the structure of corporate law. Indeed, *Trados* gets right all five building blocks of corporate law.

As Section II.C below also discusses, attempts to ignore fiduciary law, or entirely replace it with inaccurate conceptions of contract, ultimately result in wealth transfers and outsized gains for fiduciaries (who remain fiduciaries, even when surface-level reading of the law seems to indicate otherwise). Contract absolutists, claiming that "regulation" (actually, *law*—just like any contract requires law)<sup>224</sup> is imperfect, practically ignore the fact that "contract" or pure "private ordering" is also far from perfect, certainly in a field (corporate law) which is *precisely about* strong and weak parties, open-endedness, and information asymmetries, requiring a certain core structure of the law, and negating any possibility of exclusive reliance on *ex ante* bargaining. As Professor Melvin Eisenberg succinctly put it, "just because mandatory rules are imperfect does not mean that markets would be better. Commentators who stress the Nirvana Fallacy are almost invariably themselves guilty of a mirror-image mistake which might be called the Heavenly Market Fallacy."<sup>225</sup>

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221. See, e.g., Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 239–40 (2002) ("[Hohfeld] argues that a legal relation is always between two persons . . . . [I]f someone has a Hohfeldian right, another person has a duty.").

222. *Trados*, 73 A.3d at 41. Of course, the same applies not just for "contractual" claims, but those arising under any field of positive law. In *Trados*, the preferred shareholders indeed had a contractual, non-corporate law mechanism to determine their legal claim. See *id.* at 21–24, 38–39. However, "preferred shares" encompass a broad range of securities, with varying properties; a preferred shareholder's claim *might* be residual (at least in part), and therefore, determined within corporate share law. See Raz, *supra* note 1, at 281.

223. On the idea of constituency directors, owing fiduciary duties directly to certain shareholders or stakeholders (and therefore, necessarily not to the corporation), and the rejection of that idea both positively and normatively, see *Trados*, 73 A.3d at 42 n.16.

224. See *infra* note 285.

225. Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1525 (1989).

Despite these repeated attacks at the hands of contract absolutists, fiduciary law remains salient. Experience in fields besides corporate law—for example, financial regulation—demonstrates the same: a recent paper finds that “fiduciary duty leads broker-dealers to sell higher quality products,”<sup>226</sup> characterized by lower fees and better returns. As always, the economic analysis must rest on a structural legal framework, telling us *whose* benefit the law is there to maximize. Broker-dealers, just like corporate directors, might feel consternation at the restrictions imposed by fiduciary law.<sup>227</sup> Such feelings cannot modify the basic tenets of the relationship (which fiduciaries enter voluntarily): the beneficiary’s welfare is at the center, and the fiduciary must wholeheartedly act to this sole end. In corporate law, the beneficiary-corporation’s welfare equals the achievement of its purpose. Fiduciary law is the only toolbox designed for, and capable of, resolving the unique problems arising in a situation of absolute power and information asymmetries between multiple actors, one of whom is meant to promote the other’s interests. Since the corporation is a person, but can only operate through others, on whom it utterly depends, corporate fiduciary law is a structural, unwaivable building block of corporate law.

## II. APPLYING THE PURPOSE APPROACH TO THREE CONTEMPORARY ISSUES

In a 1993 article, Professor Lyman Johnson remarks, “if discourse in corporate law does not reflect matters of deep *personal* significance—that is, if it is not carried on with our moral voice—I wonder if that discourse will be important in the larger *collective* sphere.”<sup>228</sup> Previous sections of this Article touch upon issues such as the opioid crisis<sup>229</sup> and forced arbitration.<sup>230</sup> This Part explores three topics in greater detail: shareholder activism, corporations’ constitutional rights, and the rise of LLCs and other “alternative” corporations. These issues lie at the intersection of corporate law and broader social life, deeply affecting both. This Article’s theory produces new, fundamental insights on each of these high-currency topics.

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226. Vivek Bhattacharya, Gastón Illanes & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice* 45 (Nov. 8, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3281345](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281345) [<https://perma.cc/ZT62-9P8Z>].

227. *See, e.g.*, de Fontenay, *supra* note 1, at 224 (“Corporate law cannot be everything to everyone. While individuals may chafe at various prohibitions, isolated cases need not detract from the merits of an efficient regulatory design.”). Note that the use of the term “regulatory” to describe fiduciary law is inaccurate. *See infra* note 285.

228. Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1713 (1993).

229. *See supra* text accompanying notes 162–64.

230. *See supra* text accompanying notes 115–23.

A. *Shareholder Activism*

Shareholder activism is the most important phenomenon in U.S. corporate law over the last two decades.<sup>231</sup> The basic concept gives rise to many strands of debate and scholarship, largely depending on the type of activist (or not-activist-enough),<sup>232</sup> or a certain outcome of its operations, such as index funds,<sup>233</sup> the “problem of twelve,”<sup>234</sup> “wolf pack” hedge funds,<sup>235</sup> and “common ownership.”<sup>236</sup> This Section places shareholder activism within the structure of corporate law, outlined in this Article. It then considers a common scenario—an institutional shareholder owing fiduciary duties to both its own investors and a corporation toward which it is active—to show how this Article’s theory can aid in resolving an oft-encountered, high-stakes situation.

In the structure of corporate law, shareholders and fiduciaries are two distinct actors. Each occupies a separate, almost polar, role in respect to the corporation: shareholders are residual *claimants*, equitably entitled to a residual value that fluctuates with the corporation’s fortunes (that is, the degree to which it attains its purpose).<sup>237</sup> The corporation’s fiduciaries, on the other hand, mainly have *obligations*—specifically, a fiduciary duty to loyally and devotedly cause the corporation to achieve its purpose.<sup>238</sup> Unless fiduciaries also own shares (which they often do), nothing entitles them to enjoy the corporation’s residual value. Equally, as a rule, shareholders are not fiduciaries for the corporation.<sup>239</sup>

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231. See, e.g., Bratton, *supra* note 13, at 156 (“Hedge fund activism is to corporate law’s early twenty-first century what the hostile takeover was to its late twentieth century.”).

232. See, e.g., Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019) (arguing that index fund managers should play a greater role in corporate governance).

233. See, e.g., *id.*

234. See John C. Coates, IV, *The Future of Corporate Governance Part I: The Problem of Twelve 2* (Harvard Pub. Law Working Paper No. 19-07, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3247337](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337) [<https://perma.cc/4YEB-FABV>] (discussing the possibility that “control of most public companies . . . will soon be concentrated in the hands of a dozen or fewer people”).

235. See, e.g., Strine, *supra* note 172 (discussing the detrimental effects of some hedge fund activists on the long-term performance of some public corporations).

236. See, e.g., Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects* (NYU Law & Econ. Research Paper No. 18-40, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3296488](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296488) [<https://perma.cc/Y8LV-HVQN>] (discussing the intersection of corporate law and competition law, as resulting from large institutional shareholders owning shares of multiple corporations operating in the same industry).

237. See *supra* Section I.D.

238. See *supra* Section I.E.

239. See, e.g., Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 47–48 (2017) (“Shareholders do not act as fiduciaries when they exercise their voting rights, and they are under no obligation to vote their shares in the best interests of the corporation.” (footnote omitted)).

The rule has an exception. Some shareholders are *also* fiduciaries. That duty can be imposed on a variety of shareholders—such as a controlling shareholder, or a plaintiff in a derivative action—but the principle is this: “[W]hen a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of the corporation.”<sup>240</sup> The principle coheres with the overall structure of corporate law: the corporation is an artificial person, wholly dependent on others, through whom it acts in the world. Normally, those others are called “directors” or “managers,” but nothing precludes additional people—such as a shareholder with a large enough voting stake—from directing the corporation’s actions, at least in part (or in concert with others, as in the “wolf pack” scenario).

Here lies the key to understanding and handling the shareholder activism phenomenon: activism is not about shareholders *as such*. The structure of corporate law gives individual shareholders no right to direct the corporation’s actions, but only to (ultimately) reap their fruits. An activist is a shareholder who willfully became a fiduciary for the corporation. The quantitative inquiry policymakers and scholars should make is not whether share prices rose as a result of an activist campaign, but whether the corporation now better achieves its purpose—the lawful pursuit of *its* profit. The two metrics very often align. A fiduciary-shareholder can see a rise in share value (within the time horizon favored by the shareholder), *and* meet all duties toward the corporation. When they do not,<sup>241</sup> corporate law mandates that the latter override the former.

Reality presents further complications. In the common scenario, the activist is not an individual acting in one’s own benefit,<sup>242</sup> but is itself a fiduciary for other people down the line, such as pension savers or private equity investors. There might be a very definite time horizon over which

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240. *Cinerama, Inc. v. Technicolor, Inc.*, No. 8358, 1991 Del. Ch. LEXIS 105, at \*63 (Del. Ch. June 21, 1991). For an article applying a similar principle specifically to activist shareholders, see Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008).

241. For discussion of such situations, see Raz, *supra* note 1, at 272, 276–78, 282–85, 291 n.145, 293–95, 304–05, 311–19 (discussing various conflicts or disparities between the corporation and all or part of its shareholders); Strine, *supra* note 172. At the macroeconomic level, it is possible that shareholder activism, including by hedge fund managers, has a neutral or positive effect. *See, e.g.*, Mark J. Roe, *Stock Market Short-Termism’s Impact*, 167 U. PA. L. REV. 71 (2018). This Article focuses on the firm level, where specific instances of activism can have varying effects.

242. There are exceptions. *See, e.g.*, Frank Partnoy & Steven Davidoff Solomon, *Frank and Steven’s Excellent Corporate-Raiding Adventure*, ATLANTIC (May 2017), <https://www.theatlantic.com/magazine/archive/2017/05/frank-and-stevens-excellent-corporate-raiding-adventure/521436> [<https://perma.cc/TD2P-PW3W>].

the fiduciary has to maximize its investors' stake, such as ten years for some hedge funds.<sup>243</sup>

Assume the following hypothetical: a hedge fund has been set up for a ten-year period, after which it has to liquidate, distributing all assets to its investors. Nine years have elapsed; the hedge fund manager has one more year to maximize returns. It now contemplates initiating an activist campaign at the largest corporation in its portfolio, which would lead the target to sell its central asset (say, a research and development division). According to ample information, that move is likely to result in a 10% increase in share price over the next year. If, however, the asset is *not* sold, equally robust predictions indicate that the target corporation would see a 6% annual increase in profits, and a similar (anyway, less than 10%) annual increase in share price, over a twenty-year period. At the end of that period, the corporation's residual value would be higher, in net present value terms, than if the main asset is now sold. How can the two fiduciary duties owed by the activist—one to its own investors; the other to the corporation whose actions it partly “direct[s]”<sup>244</sup>—be settled?

This requires addressing an “egg and chicken” problem. What came first: the corporation itself, its shares, and the rights and duties they confer, or the hedge fund manager's ownership of those shares? The answer is easy: at any moment of its existence as the target corporation's shareholder, the hedge fund manager held something that existed beforehand (the share, or its corporate law-derived nature). When share ownership, or certain activities it enables, also make someone a fiduciary for the target corporation, that duty precedes *other* fiduciary duties, which the activist could never have had if corporations and shares did not exist in the first place.<sup>245</sup>

The analysis so far does not *conclusively* entail that the hedge fund manager should forego the activist campaign. Corporate law does not explicitly set the corporation's time horizon at twenty years, rather than one year, or any other number. Yet, corporate law does provide certain defaults, or presumptions, in this regard. For example, in its 2013 *Trados* decision, the Delaware Court of Chancery states that “[a] Delaware corporation, by default, has a perpetual existence. . . . [T]he duty of loyalty . . .

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243. See, e.g., Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 811 (2012).

244. *Cinerama*, 1991 Del. Ch. LEXIS 105, at \*63.

245. Put differently, any person, including hedge fund managers, is required to act lawfully. This Article expands on that requirement as it applies to *all* corporations. See *supra* Section I.C. In regard to hedge fund managers, the lawfulness requirement includes meeting all fiduciary obligations toward the corporations in which they invest. A hedge fund manager and its investors know what they are getting into when the manager adopts an active investment strategy; they must accept corporate law, and the rights and duties it imposes, as a given. Corporate law, on the other hand, is not required (and is informationally unable) to change itself according to one fiduciary or another's obligations to third parties.



mandates that directors maximize the value of the corporation over the long-term.”<sup>246</sup>

On a deeper level, the very concept of the corporation—indeed having perpetual existence, as well as its own identity and traits—suggests that a corporation’s time horizon should tend to the longer term. Professor Lynn Stout’s 2015 article<sup>247</sup> compares the corporation to a “time machine,” suggesting that “corporate entities can be understood as institutions designed to transfer wealth forward from earlier time periods to later time periods,”<sup>248</sup> and concluding, “if we do not continue to have thriving corporations . . . future generations will be left worse off than they could, or should, be.”<sup>249</sup>

This accords with the theory presented here: nothing makes the corporation’s present state more important than its future state; just as a natural person may expend less today to live better tomorrow, so can a corporation. If it can be shown that a given action would improve the corporation’s prospects, that action ought to be taken, even if present-day shareholders (or stakeholders) do not instantly receive what they might wish for. From this perspective, many activist campaigns are beneficial, and should be encouraged. Others are less so. In any case, shareholders who materially influence the affairs of a corporation may not operate for their own benefit (although it may well accrue to them, as derived from the corporation’s). Activists, like directors, CEOs, and anyone else in corporate law, operate within the bounds of a structure.

#### B. Corporations’ Constitutional Rights

The two most famous corporate law cases of this century, *Citizens United*<sup>250</sup> and *Hobby Lobby*,<sup>251</sup> are not, in fact, cases about corporate law. More precisely, it plays a *part* in both cases, but their disposition mainly lies in other fields: constitutional law, along with election, health, and employment law. This Section proceeds in three steps: first, it criticizes the misapplication of corporate law by the Court in both cases (namely, the erroneous utilization of a nineteenth-century-like “aggregate” model); it then shows how, even when we apply *correct* corporate theory, the outcomes in both cases could have been reached; finally, it explains, in similar fashion to Section I.C above, that these cases—and their possible future undoing—do not (and should not) have much to do with corporate law.

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246. *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013).

247. Lynn A. Stout, *The Corporation As a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015).

248. *Id.* at 686.

249. *Id.* at 722.

250. *Citizens United v. FEC*, 558 U.S. 310 (2010).

251. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

In both *Citizens United* and *Hobby Lobby*, the Supreme Court effectively ignores one of corporate law's building blocks: the fact that the corporation is a person, with rights and duties separate from, and possibly conflicting with, those of any other person, including its shareholders.<sup>252</sup> Instead, the Court relies on a theory "which was prevalent in the 19th century"<sup>253</sup>—the "aggregate" model of the corporation, according to which a corporation is merely a grouping of other individuals. In *Citizens United*, Justice Kennedy describes the corporation as "an association that has taken on the corporate form."<sup>254</sup> Similarly, in *Hobby Lobby*, Justice Alito calls corporate personhood a "fiction"<sup>255</sup> and surmises that "[w]hen rights . . . are extended to corporations, the purpose is to protect the rights of [the] people [associated with the corporation]."<sup>256</sup> Adding insult to misunderstanding, he implies that corporations are "own[ed]"<sup>257</sup> by their shareholders.

Indeed, "[c]orporate personhood . . . is entirely missing from the [*Citizens United*] opinion. . . . [T]he *Citizens United* decision obscured the corporate entity and emphasized the rights of others, like shareholders and listeners."<sup>258</sup> The same holds true for *Hobby Lobby*. As this Article demonstrates extensively, the Court's assertions have little to do with actual corporate law. In fact, they even clash with case law from the Supreme Court itself.<sup>259</sup> What might have led the Court to embark on this deconstructive enterprise? Very plausibly, the Court simply tried to find an explanation for how for-profit corporations, supposedly meant to pursue "business-related" activities, can also engage in political activity and have religious beliefs. Such explanation, however, does not require an "aggregate" model of the corporation.

The outcomes in both cases *could* be achieved with correct corporate law. As a rule, corporations have the same legal capacity as natural persons.<sup>260</sup> Accordingly, a corporation should enjoy the same rights—and bear the same duties—as a natural person with similar traits, in constitutional law as in any other field. Within *corporate* law, the corporation's ac-

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252. See *supra* Section I.B.

253. Hill, *supra* note 79, at 42.

254. *Citizens United*, 558 U.S. at 349.

255. *Hobby Lobby*, 573 U.S. at 706.

256. *Id.* at 706–07.

257. *Id.* at 707.

258. WINKLER, *supra* note 54, at 364.

259. See Macey & Strine, *supra* note 49, at 485–95 (surveying "The Supreme Court's Treatment of the Corporate Entity in Other Areas of Law").

260. See *supra* note 87 and accompanying text. The Pennsylvania statute—under which Conestoga Wood Specialties Corporation, one of the plaintiffs in *Hobby Lobby*, is incorporated—says so explicitly. See 15 PA. CONS. STAT. § 1501 (2020) ("[A] business corporation shall have the legal capacity of natural persons to act."); see also Macey & Strine, *supra* note 49, at 530 ("[C]orporations are creatures of state law, and therefore state law rules should guide our understanding about the essential nature of these entities.").

tions are subject to an ever-looming restriction: the law of corporate purpose.<sup>261</sup> If having political or religious beliefs, either at all or specific ones, steers a certain corporation away from its purpose, then holding and exercising such beliefs violates corporate law. The corporation (and possibly its fiduciaries, who breached their duty to further the corporation's purpose)<sup>262</sup> should then face appropriate sanction.<sup>263</sup> Yet, neither *Citizens United* nor *Hobby Lobby* suggest that these were the facts of the case. For some corporations, exercising such beliefs might *advance* the corporation's purpose—for example, if the corporation operates in a community of like-minded people, who are therefore more likely to purchase its products and services.

Does the above necessarily mean that *Citizens United* and *Hobby Lobby*, if only we corrected their corporate law mistakes, are good decisions that should be reaffirmed in the future? Of course not. Consistent with this Article's distinction between corporate law and general, non-corporate law (the latter governing the corporation's relationships with its various stakeholders),<sup>264</sup> *Citizens United* and *Hobby Lobby* are not primarily corporate law cases. They are cases in constitutional law—specifically, the First Amendment.<sup>265</sup> The real question behind these cases is not whether *corporations* should be able to exercise their First Amendment rights in a certain way, but whether rich, influential *people* (human or corporate) should be able to do so.<sup>266</sup> If a natural person was engaged in political financing to the same extent as *Citizens United*, or had the same number of employees as *Hobby Lobby Stores, Inc.*, that would give rise to precisely the same questions: how should the law balance the constitutional and human interest in a functional, representative democracy with political freedom of speech? How should the law balance employment and reproductive rights with religious ones? A small-scale corporation is less likely to provoke these questions, although it is fully a corporation, presenting all the issues (or building blocks) inherent to corporate law.

Constitutional law is largely about determining when the state may treat different people in different ways, including on account of their wealth, or their ability to affect others' lives (say, through political influence). Quite possibly, the Court got the answers wrong. Yet, as Justice Stevens notes in his *Citizens United* dissent, “[n]othing in this analysis turns

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261. See *supra* Section I.A.

262. See *supra* Section I.E.

263. It is at this point that much of the corporate law scholarship about *Citizens United* and *Hobby Lobby* comes into the picture. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (suggesting a framework for corporate decision-making on *whether* and *how* to engage in political speech, while presupposing that corporations *can* engage in such speech).

264. See *supra* Section I.C.

265. U.S. CONST. amend. I.

266. This is supported by case law from the Supreme Court, particularly the *Munn v. Illinois* decision. See *supra* note 142 and accompanying text.

on whether the corporation is conceptualized as a grantee of a state concession, a nexus of . . . contracts, a mediated hierarchy . . . , or any other recognized model.”<sup>267</sup> Justice Stevens does not mention the one correct answer—“a legal person”—but his main point is clear: *Citizens United* is a case about influence on the political process, and the constitutional limitations it should face. That issue is separate from the corporate law question.<sup>268</sup> If the cases are overturned by a future Court, this would detract nothing from the structure of corporate law (if anything, it would be an opportunity to *reinforce* the correct roles of corporate purpose, personhood, and shareholders within that structure).<sup>269</sup> Save for the useful mistake they make, as described in this Section, *Citizens United* and *Hobby Lobby* do not—and are not supposed to—tell us much about corporate law.

### C. *Alternative Corporations*

In the United States, specifically Delaware, a person wishing to start a corporation<sup>270</sup> can choose among a wide variety of forms: besides the entity type which the statute calls a “corporation,”<sup>271</sup> it is possible to establish a partnership,<sup>272</sup> statutory trust,<sup>273</sup> or limited liability company.<sup>274</sup>

267. *Citizens United v. FEC*, 558 U.S. 310, 465 n.72 (2010) (Stevens, J., dissenting) (citations omitted).

268. See, e.g., Macey & Strine, *supra* note 49, at 530 (“[W]hatever one might say about *Citizens United* from a constitutional law perspective, the case is bad corporate law.”).

269. See, e.g., Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 326 (2015) (“One can support campaign finance regulation . . . and still acknowledge corporate personhood and corporate constitutional rights as well.”).

270. On the broad meaning of “corporation” as used in this Article, see *supra* note 1. The distinction made there is particularly important in the context of this Section.

271. See Delaware General Corporation Law, DEL. CODE ANN. tit. 8, ch. 1 (2020).

272. See Delaware Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6, ch. 15 (2020); Delaware Revised Uniform Limited Partnership Act, tit. 6, ch. 17. It is possible for a general (non-limited) partnership not to be a corporation, if the partners specifically agree so. See § 15-201(a) (“A partnership is a separate legal entity which is an entity distinct from its partners unless otherwise provided in a statement of partnership existence or a statement of qualification and in a partnership agreement.”). Yet, by default, a partnership is a corporation, presenting all of corporate law’s building blocks, see *supra* Part I: purpose (see, e.g., § 15-202(a) (“[An association to carry on] a business for profit forms a partnership . . . and [an association] to carry on any purpose or activity not for profit [may form] a partnership . . . .”)); personhood (see §§ 15-201(a), 17-201(b) (“A limited partnership formed under this chapter shall be a separate legal entity . . . .”)); stakeholders (see, e.g., § 15-305 (stating that a partnership may be “liable for loss or injury caused to a person”)); residual claimants (see §§ 15-101(6), 17-101(13) (defining a partner’s economic interest as “partner’s share of the profits and losses” of a partnership)); and fiduciaries (see §§ 15-401(f) (“Each partner has equal rights [(i.e., powers)] in the management and conduct of the partnership business and affairs.”), 17-101(9) (stating that every limited partnership must have “1 or more general partners”)),

The latter form—the limited liability company (LLC)—is today the most prevalent type of corporation in Delaware and across the U.S., vastly outnumbering narrow-sense “corporations.”<sup>275</sup> In daily life, it becomes increasingly common to see the letters “LLC”—not “Inc.”—appended to the name of the corporation one works for, supplies goods to, or gets products and services from. LLCs permeate all levels of economic, financial, and personal life: in fact, the New York Stock Exchange, which runs the world’s largest and most important securities marketplace, *is itself* an LLC.<sup>276</sup> So is Google.<sup>277</sup> Many LLCs have their shares (or “limited liabil-

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17-403(c) (discussing “the general partner’s . . . powers and duties to manage and control the business and affairs of the limited partnership”). In the case of general partnerships, residual claimants and fiduciaries are the same people.

273. *See* Delaware Statutory Trust Act, tit. 12, ch. 38. It is possible for a statutory trust not to be a corporation, if the parties to its governing instrument specifically agree so. *See* § 3801(g) (“Any . . . statutory trust . . . , unless otherwise provided in its certificate of trust and in its governing instrument, [shall be] a separate legal entity.”). Yet, by default, a statutory trust is a corporation, presenting all of corporate law’s building blocks, *see supra* Part I: purpose (*see* § 3801(g)(1)); personhood (*see* §§ 3801(g), 3810(a)(2), 3812(f)); stakeholders (*see, e.g.*, § 3804(a) (discussing “debts and other obligations or liabilities” for which the trust may be sued)); residual claimants (*see* §§ 3801(a), 3801(g), 3805 (discussing the trust’s beneficial owners and the nature of their rights, known as “beneficial interests”); *see also* Raz, *supra* note 1, at 272–75 (explaining that every legal person always has residual claimants)); and fiduciaries, *see* § 3807(a). Apparently, unless the creation of a separate entity has been avoided according to § 3801(g), the trust itself is the person serving as trustee for the beneficial owners (which also accords with the common law of trusts, since the trust—not the “trustee”—legally owns the trust property), while the “trustees” are fiduciaries for the trust (with few channeling principle exceptions, *see supra* text accompanying notes 192–95). To illustrate this distinction, consider a situation where a beneficial owner would benefit from a distribution of the trust’s assets, while the trust itself would be harmed: to whom do the trustees owe their duties? Clearly, to the trust, considering first principles. *See supra* Sections I.B, I.E; *see also, e.g.*, *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096 *passim* (Del. Ch. 2008) (discussing fiduciary duties owed “to the trust” and finding possible breaches of those duties). Note that, as with other corporations (such as mutual insurance companies, *see* Raz, *supra* note 1, at 275 & n.79), the beneficial owners of a statutory trust have a dual relationship with the corporation: by default, along with their equitable rights under share law, they have rights as trust law beneficiaries. *See* § 3809 (“Except to the extent otherwise provided in the governing instrument of a statutory trust or in this subchapter, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts . . .”).

274. *See* Delaware Limited Liability Company Act, tit. 6, ch. 18.

275. *See, e.g.*, Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391, 393 n.5 (2018) (citing data showing that as of Dec. 31, 2016, there were 827,611 Delaware LLCs and 298,025 “Delaware corporations” in existence).

276. *See* EDGAR Search Results for New York Stock Exchange LLC, EDGAR, <https://www.sec.gov/cgi-bin/browse-edgar?CIK=0000876661> [<https://perma.cc/T7TB-8B8X>] (last visited June 30, 2020).

277. *See* Certificate of Conversion of Google Inc. (a Delaware corporation) to Google LLC (a Delaware limited liability company) (Sept. 29, 2017), <http://assignments.uspto.gov/assignments/assignment-tm-6178-0319.pdf> [<https://perma.cc/G2ZY-7ZS4>].

ity company interests”<sup>278</sup>) publicly traded.<sup>279</sup> In short, LLCs operate in the world, get their incentives, and affect the lives of others, in *precisely the same way* as any other corporation.<sup>280</sup> Given the small, bordering on non-existent, *practical* difference between a narrow-sense “corporation” and an LLC, we might wake up in the not-too-distant future in an LLC-dominated world. To sustain meaningful discourse in this area, it is time to clarify the actual *legal* difference between LLCs and other corporations.

An oft-repeated statement is that LLCs are “unincorporated” entities, or “uncorporations.”<sup>281</sup> That is an incident of historical terminology: the constitutional documents of narrow-sense “corporations” are known as “charters” or “certificates of incorporation,” and the act of “granting” a charter is known as “chartering” or “incorporation.” This evokes an aroma of government involvement, of the kind prevalent before the rise of general incorporation.<sup>282</sup>

Today, however, the process of establishing both types of corporations—a narrow-sense “corporation” and an LLC—requires the same, minimal level of government action: in both cases, certain documents have to be filed with the Secretary of State, often through the internet; if those documents are properly formatted and a fee is paid, a new corporation is created.<sup>283</sup> No *substantive* government act—that is, no choice be-

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278. See tit. 6, §§ 18-101(10) (defining “[l]imited liability company interest” as “a member’s share of the profits and losses of a limited liability company and a member’s right to receive distributions of the limited liability company’s assets”), 18-701 (“A limited liability company interest is personal property. A member has no interest in specific limited liability company property.”). Cf. Raz, *supra* note 1, at 272–76, 285–87 (discussing characteristics of corporate shares, identical to those of LLC interests). Thus, we may speak of “LLC share law” (as with other corporations, discussed *id.*). It is possible to be an LLC member without acquiring an LLC interest (also often known as “LLC unit”). See § 18-301(d). Yet, assuming that *every* member has *some* claim toward the LLC (otherwise, what is the meaning of “membership?”), those legal claims (even if not “packaged” as LLC interests, or shares) have to be governed by some legal framework, that is, LLC share law. More generally, “share law” and “residual claimancy law” can be regarded as synonymous.

279. See, e.g., *New Fortress Energy LLC Class A Shares Representing Limited Liability Company Interests (NFE)*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/nfe> [<https://perma.cc/WEU5-VHCR>] (last visited June 30, 2020) (providing information on a public LLC with market capitalization of approximately \$2.2 billion).

280. See, e.g., Jeffrey M. Lipshaw, *Trust v. Law (in a Box): Do Organizational Forms Really Make a Difference?*, 2014 U. ILL. L. REV. 1795, 1798 (“Virtues like trust and their counterpart vices—greed, fear, panic—seem to me as likely to kick in after the fact whether we are talking about partnerships, limited partnerships, LLCs, [or] corporations . . .”).

281. See LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION* (2010) (discussing the increased popularity and legal theories relating to LLCs and other alternative entities).

282. For a discussion of chartering by special legislation in the nineteenth century, and the transition to general incorporation, see, for example, Hovenkamp, *supra* note 142, at 1634–40.

283. See, e.g., Coates, *supra* note 3, at 831 n.164 (“Most state statutes impose only pro forma requirements for incorporation, which typically include the filing

tween competing alternatives, made by a public official—is involved in the creation of either a narrow-sense “corporation” or an LLC. The state is not party to the “corporate contract” in any meaningful way. The state does legislate and adjudicate corporate law, which—although highly structured and partly unwaivable, as this Article explains—is simply a legal field governing relations between private actors. These actors, not the state, create the corporation.<sup>284</sup> In this regard, contract law is the same: the existence of a contract statute<sup>285</sup> does not mean that the state is party to every contract. Therefore, the “unincorporated” terminology is as non-dispositive as the use of the word “charter,” rather than “operating agreement,” or any other moniker, for the corporation’s constitutional documents. Even on these linguistic grounds, there is no actual difference between an LLC and any other corporation.

More importantly, LLCs are corporations, just like narrow-sense, “Delaware corporations,” because they have precisely the same anatomy, and give rise to the same set of problems. Going back to the distinction between “structural” and “dynamic” meanings,<sup>286</sup> there certainly are *dynamic*

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of a certificate of incorporation, signed by an ‘incorporator,’ who may be almost anyone, and a payment of a fee. The most regulated part of this process is the choosing of the corporate name.”). The creation of an LLC identically requires only the filing of a certificate of formation and payment of filing fees. See tit. 6, §§ 18-201(a), 18-206(a).

284. For recent sources expressing a view that “the state” has a significant relationship with every corporation, including as the corporation’s creator, see, for example, *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578 (Del. Ch. Dec. 19, 2018), *rev’d*, 227 A.3d 102 (Del. 2020); Hershkoff & Kahan, *supra* note 112; Macey & Strine, *supra* note 49. However, none of these sources cite a concrete example of any substantive role the state plays within corporate law, in terms of bearing rights and duties. In context, it seems each of these sources simply aim to argue, correctly, that corporate law differs from a pure “private ordering” regime. It is true that *law* is required for any corporation to exist; yet, the same is also true of any contract and any property. Corporate law is part of private law, which is established (at least partly) by the state, but generally does not give the state itself a role within the various relationships it enables. See John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012) (“Private law is law, so government is involved, *albeit in a particular way*. Typically, it makes available institutions and procedures that enable individuals and entities to define their relationships and to assert and demand the resolution of claims against others.” (emphasis added)).

285. See U.C.C. (AM. LAW INST. & UNIF. LAW COMM’N 2012) (Uniform Commercial Code, adopted in whole or part by all U.S. states, and providing legal norms governing various types of contracts). Contract law, just like corporate law, has unwaivable structure—for example, the rule that a contract legally binds the parties to it. Otherwise, it is not a contract at all. See *infra* note 306. This point also bears on the mistaken view that fiduciary law, or anything other than “private ordering,” is a form of “regulation,” see, e.g., Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 562 (2001) (implying that fiduciary law is “[m]andatory regulation that forces people to attend to others’ interests”). However, precisely as in a contract case, a court adjudicating a breach of fiduciary duty does not engage in governmental “regulation,” but merely resolves a dispute between private parties, arising within a private (albeit asymmetric) relationship.

286. See *supra* notes 32–33 and accompanying text.

differences between LLCs and narrow-sense “corporations”—for example, in regard to members’ or shareholders’ rights to receive a distribution of the corporation’s assets,<sup>287</sup> the transferability of shares,<sup>288</sup> or issues outside corporate law, such as tax treatment (itself related to the corporate dynamic choices; the greater ease of withdrawing assets from an LLC, compared to a narrow-sense “corporation,” might motivate different tax rules).

Yet, on the more fundamental, structural level,<sup>289</sup> LLCs and other corporations are exactly the same. Does an LLC have a purpose? Yes.<sup>290</sup> Is it a person, with general capacity to act and bear rights and duties? Yes.<sup>291</sup> Does it have stakeholders? Yes.<sup>292</sup> Does it have residual claimants? Yes; they are called “members.”<sup>293</sup> Does it have fiduciaries? Yes; they might be the members, or “managers.”<sup>294</sup> We can modify the rules of capital lock-in, transferability of shares, ability to contract around certain legislative or common law provisions, and many other dynamic topics, but we are still dealing with a corporation. This Article’s discussion of corporate law’s structure, and the issues it *inherently* gives rise to, equally applies to LLCs. The insistence on making some deep-seated distinction between

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287. *See, e.g.*, Robert L. Symonds, Jr. & Matthew J. O’Toole, SYMONDS & O’TOOLE ON DELAWARE LIMITED LIABILITY COMPANIES § 7.02[B] (2d ed. 2018) (“[T]he statute provides significant latitude to fashion . . . distribution rights . . . . Limited liability company interests may carry distinctly tailored rights pertaining to . . . distributions.”). Such pre-agreed distribution (dividend or buyback, including share redemption) can also be made by a narrow-sense “corporation,” if it does not breach the mandatory rules governing distributions. *See Raz, supra* note 1, at 274 n.77. Yet, pre-agreed distributions are more prevalent in alternative corporations.

288. *See, e.g.*, tit. 6, § 18-702(b)(1) (“An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member[.]”).

289. *See supra* Part I (discussing the building blocks of corporate law).

290. *See* tit. 6, § 18-106(a) (“A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit . . .”).

291. *See* § 18-201(b) (“A limited liability company formed under this chapter shall be a separate legal entity . . .”); *see also* Manesh, *supra* note 275, at 415–16 (discussing “separate legal existence” as a defining, unwaivable, and practically important characteristic of every LLC).

292. *See* §§ 18-303 (“[T]he debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company . . .”), 18-607 (discussing the “liabilities of the limited liability company”).

293. *See* § 18-101(8) (“‘Limited liability company’ . . . means a limited liability company formed under the laws of the State of Delaware and having 1 or more members.”); *supra* note 278 (discussing the nature of LLC members’ rights, the same as those of other corporations’ residual claimants).

294. *See* §§ 18-402 (“Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members . . . ; provided however, that if a limited liability company agreement provides for the management . . . of a limited liability company by a manager, the management . . . shall be vested in the manager . . .”), 18-1104 (“In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties . . . , shall govern.”).



LLCs and other corporations is all language and no substance.<sup>295</sup> This rather obvious fact has been recognized by scholars<sup>296</sup> and leaders of Delaware law.<sup>297</sup>

In one important area, however, LLC law *purports* to break with corporate law. That area is the fifth building block discussed above: corporate fiduciary law.<sup>298</sup> LLC statutes in many places,<sup>299</sup> including Delaware, presumably give parties to the LLC agreement the option to eliminate all fiduciary duties owed by the corporation's managers or other fiduciaries.<sup>300</sup> The only correct answer to this trend is: "not so fast."

As explained above, *every* corporation *must* be the beneficiary of fiduciary duties, at any given moment.<sup>301</sup> The corporation *cannot* "waive" all of its fiduciary law protections, because even in purely contractual terms, such offer and acceptance cannot occur. Given the open-ended, extremely asymmetric nature of these relationships, the beneficiary is entitled to a protective mechanism that transcends purported "consent" to entirely unknowable future scenarios.<sup>302</sup>

Indeed, the belief that fiduciary duties can be "eliminated" counters the most fundamental notion of what a director or manager is meant to

295. See, e.g., Joshua Fershee, Posts in the Category "LLCs", BUS. L. PROF. BLOG, [https://lawprofessors.typepad.com/business\\_law/llcs](https://lawprofessors.typepad.com/business_law/llcs) [https://perma.cc/F8J2-N9HT] (last visited June 30, 2020) (criticizing, in dozens of blog posts since 2013, courts and others who use phrases such as "limited liability corporation"). Professor Fershee is entirely correct that an LLC is not a narrow-sense "corporation," as the term is used in most U.S. law. Yet, the substantive question is whether LLCs omit any of the legal and economic issues inherent to all corporations (broadly defined, see *supra* note 1), which they do not.

296. See, e.g., Stout, *supra* note 247, at 689 n.7 ("[S]ome LLCs are the functional equivalents of close corporations . . . [A]n LLC whose shares are listed for trading on a recognized exchange . . . becom[es] a public corporation in all but name."). For another criticism of alternative corporation exceptionalism (in the very similar context of statutory trusts, see *supra* note 273), see Anne Tucker, *Justice Scalia's Final Mark on Corporate Law May Be One of Form over Substance*, BUS. L. PROF. BLOG (Feb. 17, 2016), [https://lawprofessors.typepad.com/business\\_law/2016/02/justice-scalias-final-mark-on-corporate-law-form-over-substance.html](https://lawprofessors.typepad.com/business_law/2016/02/justice-scalias-final-mark-on-corporate-law-form-over-substance.html) [https://perma.cc/5ZVK-7C3N].

297. See Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11, 14–17 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (noting that LLCs and narrow-sense "corporations" have the same characteristics, except for tax treatment, which is not part of corporate law).

298. See *supra* Section I.E.

299. See Manesh, *supra* note 275, at 394 n.6 (listing state LLC statutes that presumably allow for waiver of fiduciary duties).

300. See DEL. CODE ANN. tit. 6, §§ 18-1101(c), 18-1101(e) (2020).

301. See *supra* text accompanying notes 212–17.

302. See, e.g., Amir N. Licht, *Motivation, Information, Negotiation: Why Fiduciary Accountability Cannot Be Negotiable*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 159, 179 (D. Gordon Smith & Andrew S. Gold eds., 2018) ("These asymmetries [due to unobservable and unverifiable information] provide a compelling justification for a strict, full-disclosure-based accountability regime. . . . Fiduciary law thus preserves an irreducible core of accountability to ensure fiduciary loyalty.").

do: act for the benefit of the corporation, because no one else is there to do so.<sup>303</sup> *Truly* eliminating fiduciary duties means abolishing the concept of directors and managers, period. That, in turn, entails disposing of corporations altogether, since they could *do* nothing: there would be no one to operate on their behalf. The act of “eliminating” all fiduciary duties “by contract” is impossible, as it negates the entity itself. Contract is not a license to make stuff up.<sup>304</sup>

Thus, when courts fail to enforce one party’s fiduciary obligation to another, they are *not* “giv[ing] the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”<sup>305</sup> They are doing the exact opposite: by overlooking the norms and enforcement mechanisms that make this unique type of document operative, they essentially turn these instruments into something akin to an illusory contract.<sup>306</sup>

As importantly, LLC statutes *never had the power* to allow for the elimination of fiduciary duties. Those duties arise in equity, not “created” by any legislative act.<sup>307</sup> Equity cannot be contracted around or legislated away. It is precisely the concept of equity to protect rights even when, for some reason, contractual and legislative “law” purports to negate them. In Delaware, as anywhere else, directors and managers of *all* corporations (including alternative ones) *are* fiduciaries, and never stopped being.

When a legislature creates “law” that simply makes no sense, on the most *definitional* level—for example, saying “any contract may be breached without remedy” or “a corporation can exist without fiduciaries”—this is not the final word. Equity is always part of the law.<sup>308</sup> Courts are always

303. See, e.g., de Fontenay, *supra* note 1, at 219 (“If managers are not acting with the corporation’s interests in mind, what is their conceivable purpose or role?”).

304. Cf. Ravenswood Inv. Co., L.P. v. Estate of Winmill, Nos. 3730-VCS, 7048-VCS (Consol.), 2018 Del. Ch. LEXIS 96, at \*4 (Del. Ch. Mar. 21, 2018) (“Equity is not a license to make stuff up.”).

305. § 18-1101(b).

306. See 17A AM. JUR. 2D *Contracts* § 125 (“A contract which is not mutually enforceable is illusory. An ‘illusory promise’ is one which . . . by its terms makes performance optional or entirely discretionary on the part of the promisor. In other words, a promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance.” (footnotes omitted)). Cf. McNeil v. McNeil, 798 A.2d 503, 509 (Del. 2002) (“Courts . . . flatly refuse to enforce provisions relieving a trustee of all liability. A trust in which there is no legally binding obligation on a trustee is a trust in name only . . . .” (citation omitted)).

307. See, e.g., J D Heydon, *Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?*, in *EQUITY IN COMMERCIAL LAW* 185, 234 (Simone Degeling & James Edelman eds., 2005) (“It cannot be said that equity does not lay down prescriptive rules and leaves it to ‘company law’ to do so: the prescriptive duty to act in the best interests of the company is imposed on directors because of equity, not because of some aspect of ‘company law’ which is outside equity.”).

308. In this Article, “equity” is used not in a historical sense, of a normative system distinct from “law,” but in a broader substantive sense, see, e.g., Manesh, *supra* note 275, at 425 (“[E]quity [is also referred to here] in the broader sense, meaning the power vested in all courts ‘to do right and justice’ by exercising judi-

vested with equitable power, which includes the duty to apply the law correctly, even if contrary to a simplistic reading of statutory text. At the federal level, the U.S. Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity.”<sup>309</sup> At the state level, particularly in Delaware, equitable jurisdiction enjoys similar constitutional protections.<sup>310</sup> Even if no *text* said that every court is required to do justice—and that every person is entitled to justice—this fact is self-evident. It is therefore an invalid, empty defense to simply mention that LLC statutes allow for the waiver of fiduciary duties. Reading the *whole* statute, and understanding what an LLC—or any other corporation—actually *is*, clarifies that at least a “core”<sup>311</sup> of fiduciary obligation always persists.

So, what *is* the practical meaning of the “elimination” of fiduciary duties owed to Delaware alternative corporations, or anyone else in like position? It means that certain actors, bound by certain duties, are better positioned to breach those duties with impunity. Most fiduciaries do not act unlawfully. Yet, certain legislative acts and court decisions afford them the “opportunity” to do so, if only they wanted, far more conveniently. To a large extent, some LLC managers can harm the corporation in multiple ways, and simply not be held accountable. For some fiduciaries, there *is* free lunch—which is not free at all, but comes at the expense of those in the position of most abject vulnerability.<sup>312</sup> This deviation of enforceable

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cial discretion in how the law is interpreted and applied.”); Smith, *supra* note 215 (analyzing equity from a modern law and economics perspective).

309. U.S. CONST. art. III, § 2, cl. 1. Federal case law also supports an expansive view of equity. *See, e.g.*, Johnson, *supra* note 119, at 709 n.41 (citing Supreme Court cases to that effect).

310. *See* DEL. CONST. art. IV, § 10 (“This court shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery.”); Du Pont v. Du Pont, 85 A.2d 724, 727–29 (Del. 1951) (“[T]he general equity jurisdiction of the Court of Chancery . . . is defined as all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies . . . . [The Delaware Constitution] intended to establish . . . a tribunal to administer the remedies and principles of equity. . . . Its result is to establish by the Judiciary Article of the Constitution the irreducible minimum of the judiciary. It secures for the protection of the people an adequate judicial system and removes it from the vagaries of legislative whim.”); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (stating, four years after the passage of Delaware’s new General Corporation Law, that “inequitable action does not become permissible simply because it is legally possible”); *In re Carlisle Etcetera LLC*, 114 A.3d 592, 603–05 (Del. Ch. 2015) (“I cannot accept the contention that . . . LLCs . . . fall outside the domain of equity. . . . [W]hen . . . an entity [has] attributes that contracting parties cannot grant themselves by agreement, the entity is not purely contractual.”); Johnson, *supra* note 119, at 702 (“The argument made here . . . contends that the Delaware General Assembly is constitutionally prohibited from preventing the judges of the Delaware Court of Chancery from applying fiduciary duties as those judges think best—whether or not a private agreement purports to eliminate such duties.”).

311. Licht, *supra* note 302, at 179.

312. *See, e.g.*, de Fontenay, *supra* note 1, at 223 (“What precisely does it mean for a director to have no duty of loyalty whatsoever to shareholders or to the corporation? Taken literally, it would suggest that directors could simply gamble away

law from actual law (including equity) is not even economically efficient.<sup>313</sup>

In summary, certain areas of U.S. corporate law—which, in the substantive sense of the word, includes alternative corporations, such as LLCs—are now in a state similar to the late Middle Ages in England, as we find in Maitland’s vivid tale of the development of equity.<sup>314</sup> It is unlikely that human nature is about to change;<sup>315</sup> corporate fiduciary law is an inherent, unwaivable part of the structure governing *all* corporations, however flexible they might otherwise be.

#### CONCLUSION

Participants in the corporate law community—judges, lawyers, businesspeople, scholars, and many others—grapple with a set of recurring questions. The ones about which corporate jurists think most often are those pertaining to modifiable, *dynamic* choices: “should multiple-class shares be permitted?” and “does a staggered board promote or weaken managers’ compliance with their duties?” are common examples. At a more fundamental, *structural* level, the questions are “what is a corporation?” and “what is the corporation’s purpose?” As this Article suggests, the most overarching question might be: “what is corporate law?”

As to the latter, modern scholars mainly attempt to frame corporate law in terms of *other* concepts or legal fields. The best example, of course, is the proclamation that corporate law is contract law, hallmark of the law and economics movement and its “nexus of contracts” theory. Others have countered by stating that corporate law “is property law, not contract law.”<sup>316</sup> What *all* of these scholars have failed to consider is one possibility: corporate law is corporate law. Its unique structure, presenting its own set of practical issues, doctrines, and actors (“corporation,” “shareholder,”

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the corporation’s money, or use corporate property to advance the director’s private business interests. Absent a duty of loyalty, charlatans could abuse the corporate form . . .”).

313. *See id.* (“[W]hile the law may nominally permit waivers of the duty of loyalty . . . , the courts are likely to intervene through other doctrines . . . . [T]his . . . would create substantial legal uncertainty in the interim, which, as we are so often told, is bad for business.”).

314. F. W. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 4–6 (1909) (“Very often the petitioner . . . complains that for some reason or another he can not get a remedy in the ordinary course of justice and yet he is entitled to a remedy. He is poor, . . . his adversary is rich and powerful, . . . or has by some trick or some accident acquired an advantage of which the ordinary courts with their formal procedure will not deprive him. . . . [O]wing to one thing and another such wrongs are not always redressed by courts of law.”).

315. *See, e.g.,* *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (“A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty . . .”).

316. Hansmann & Kraakman, *supra* note 110, at 440.

“director”), is capable of generating highly beneficial economic and social outcomes, not achievable through any other framework.

This Article provides a first-of-its-kind, nuanced, and fully self-explanatory account of corporate law’s structure and normative underpinnings. Corporate law brings to the table at least two concepts we find in no other field: the first, discussed in Section I.A above, is *corporate purpose*. Every corporation exists in order to achieve a certain purpose, which might be the lawful pursuit of profit, or any other, such as those of nonprofit corporations. The second concept, discussed in Section I.B above, is *corporate personhood*. Every corporation is a legal person, bearing its own rights, duties, identity, and characteristics, separate from any other entity, and (with few exceptions) possessing the same legal capacity as a natural person.

These two concepts, in turn, necessarily give rise to three additional groups of actors: stakeholders, residual claimants, and fiduciaries. As Section I.C above describes, stakeholders, or non-residual claimants, enjoy a superior normative framework upon which their claims rest: general, non-corporate law. Thanks to its inherently higher *information content*, general law provides far more specific and easily enforceable imperatives than corporate law, with its wide-open command to the corporation: “do whatever (to achieve your purpose).” Therefore, “corporate social responsibility” advocates should seek reform in general, not corporate, law. The corporation, like any other person, is required to meet all obligations under positive law. It cannot be subject to legal sanction for lawful behavior, even when some might view that behavior as subjectively undesirable.

Residual claimants (often known as “shareholders”), discussed in Section I.D above, in fact have *the opposite* of “primacy”: their legal claim is fully a product of corporate law, and is completely subordinated to all stakeholders’ claims. While residual claimants do not “own” the corporation or its assets, and are not directly owed duties by its fiduciaries, their unique situation makes their claims more than contractual. Share law is grounded in equity—no more, no less.

Those usually occupying the center stage of corporate law adjudication and scholarship—the corporation’s fiduciaries, discussed in Section I.E above—do not owe direct duties either to shareholders or to stakeholders. Their duties run to the corporate person. By necessity, due to the extreme and unavoidable power and information asymmetries between the artificial person and its human representatives, the latter owe *fiduciary* duties to the corporation—nothing short of that. Fiduciaries are duty-bound to act in order to make the corporation achieve its purpose.

Finally, Part II above discusses three high-currency topics pervading today’s corporate law: shareholder activism, corporations’ constitutional rights in light of the *Citizens United* and *Hobby Lobby* decisions, and the rise of LLCs and other alternative corporations. In each case, the fundamental, unwaivable structure of corporate law provides a new, more well-grounded viewpoint from which to examine these issues.

As this Article proves, the present-day dichotomy of corporate law—the great debate between shareholderists and stakeholderists, each seeking to promote external values (economic and communitarian, respectively) within corporate law itself—does not, in fact, cohere with either positive law or normative analysis. It is possible for a corporation to act for profit without offending anyone else in any legally proscribed way. If the corporation *does* breach its obligations, positive law provides ample responses. At the same time, the corporation—an entirely separate person, with its own rights, duties, and traits—is not meant to operate “for” shareholders, and is not obliged to follow their desires. The rights shareholders and stakeholders possess are gained through (corporate or non-corporate) *law*.

One early case, touching upon four of the five building blocks discussed in this Article, paints a remarkably precise diagram of corporate law’s structure:

There is no legal privity, relation, or immediate connexion, between the holders of shares . . . and the directors . . . . The bank is a corporation and body politic, having a separate existence as a distinct person in law . . . . The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps . . . the utter impracticability, of such a number of persons acting together in their individual capacities. . . . [T]he directors are the appointees of the corporation, not of the individuals. . . . [Stockholders] are not the legal owners of the property . . . . Their rights and their powers are limited . . . . They are members of an organized body, and exercise such powers as the organization of the institution gives them. . . . [O]nly after [the corporation’s] debts were paid . . . the stockholders would be entitled to receive any thing. . . . [S]hares . . . [are] a qualified and equitable interest . . . .<sup>317</sup>

The one building block not discussed in *Smith v. Hurd*<sup>318</sup> is that around which all the others may be arranged: the corporation’s purpose. Yet, there is no reason to suggest that the court saw the for-profit corporation’s purpose as altruistic; its remark on the corporation’s “debts” implies that those obligations can be ascertained through positive law, and are not an open-ended guess. Furthermore, the court’s mention of shareholders’ “equitable” rights, in a decision which might otherwise seem critical of them, points to the nuanced structure of corporate law, and the importance of being attentive to *each* of its elements.

More than 170 years have passed since *Smith v. Hurd* was decided, but many members of the corporate law community still perpetuate the same

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317. *Smith v. Hurd*, 53 Mass. (12 Met.) 371, 384–86 (1847).

318. *Id.*

misconceptions that opinion had elaborately rejected. The structure of corporate law allows us to achieve what would otherwise be “utterly impracticable.” It is time to take corporate law seriously.