

WHY CORPORATE LAW IS PRIVATE LAW

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ABSTRACT

Corporate law is again taking center stage in practice, policymaking, and scholarship. Despite this, commentators have yet to adequately answer a very preliminary question: is corporate law part of private law, or is it public law? This distinction has far-reaching implications for ongoing policy discussions, including the debate between shareholder and stakeholder conceptions of the firm, epitomized by a series of recent high-profile legislative proposals and scholarly works.

As this Article demonstrates, corporate law is indeed private law. Relying on broader legal and economic theory, together with insights from

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the new private law (NPL) literature, this Article responds to the four main types of arguments raised by public theorists of corporate law: that the corporation's affairs are dictated by its state-issued charter; that the requirement of registration with a state agency makes the corporation a "creature of the state"; that the mandatory, structural features of corporate law make it public law; and that corporations are required to take into account the interests of a broad array of stakeholders. Each claim is based on real-world observations, but as this Article illustrates, in every case, those facts actually point to corporate law being part and parcel of private law—just as much as contract, property, or tort law.

At the same time, this Article also explains how corporate law advances broader rule of law considerations. Corporate law is far from being the contractarian regime envisioned by some scholars since the 1980s. Instead, corporate law—like contract, property, and tort, albeit even more systemically—requires strict compliance with positive law (both public and private), and strongly upholds values of interpersonal justice and fairness. This Article expands on these points in a highly nuanced manner, not previously recognized in scholarship, or in the wider public debate about corporations in society.

INTRODUCTION

Corporate law is again center stage. Two decades after Professors Hansmann and Kraakman proclaimed "the end of history for corporate law,"¹ this area is making headlines on a constant basis, with topics ranging from "meme" corporate governance² to the renewed debate between shareholder and stakeholder conceptions of the firm, manifesting in such proposals as Senator Elizabeth Warren's Accountable Capitalism Act³ and the Business Roundtable's statement on the purpose of the corporation.⁴

Against this backdrop, it is surprising to find that legal scholars have

1. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

2. See, e.g., Dhruv Aggarwal, Albert H. Choi & Yoon-Ho Alex Lee, *Meme Corporate Governance* (Eur. Corp. Governance Inst., Working Paper No. 681, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347885 [https://perma.cc/9AP5-BGJH].

3. Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

4. *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/T5CX-VV KH].

yet to grapple with a more primordial question: does corporate law belong in the realm of private law, or is it part of public law? Although legal realism seemingly taught us that such categories are superfluous,⁵ in practice, this taxonomic question has far-reaching implications. Among other things, if corporate law is public law, this might provide strong support for the stakeholderist argument: the state creates corporations, and it can tell them what to do, including promoting “general public benefit.”⁶ On the other hand, if corporate law is private law, a more nuanced mechanism is required to bring public interests into the corporate law calculus.⁷ While corporate law is different than contract, property, or tort law, these private law areas serve the same *purpose*: they all “address the ways in which we live and interact in the world as people, rather than as citizens.”⁸

As importantly, private law scholarship itself is in a transformative period.⁹ Under the banner of new private law (NPL),¹⁰ scholars seek to “illuminate private law with theory without thereby reducing law to some other subject or discipline,”¹¹ while at the same time “considering both internal and external points of view in analyzing the law”¹²—such external perspectives including economics, psychology, and history, among others. Thus, NPL offers a welcome alternative to both the traditional form of legal realism,¹³ and the more hermetic positions embraced by some authors.¹⁴ A core insight of NPL is that the law provides a certain structure—not subject

5. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (comparing legal classification to using a “hair-splitting machine”).

6. S. 3348 § 5.

7. See *infra* Section II.B.

8. Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 177, 177 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2021).

9. See, e.g., Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175, 175 (2021) (“Private law is resurgent in the United States. A growing group of scholars . . . are providing new theoretical perspectives on tort, property, contract, fiduciary law and other subjects under the banner of the New Private Law.”).

10. See, e.g., *id.*; John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1651–63 (2012) (discussing “the core elements of the new thinking in private law,” in a part titled “The New Private Law”).

11. Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith, *Introduction*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 8, at xv, xv.

12. *Id.*

13. See, e.g., Cohen, *supra* note 5.

14. See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 5 (1995) (“If we *must* express [private law’s] intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.”).

to other forms of human action (contracting) or discourse (economics)—but that structure, in turn, also gives rise to a variety of extra-legal benefits.

Unfortunately, corporate law has largely been left out of this burgeoning literature, as “work in private law theory has tended to focus on tort, contract, property, and unjust enrichment.”¹⁵ Although important first steps in the opposite direction have recently been taken by Professors Paul Miller and Andrew Gold,¹⁶ most court decisions and scholarly works do not sufficiently delve into this question. They either include corporate law under the umbrella of other areas—namely, contract¹⁷—or resort to a “concession” theory of corporate law, where corporations are “creatures of the state,”¹⁸ or corporate law simply is public law.¹⁹ Somewhat puzzlingly, a common argument made by public-law theorists²⁰ relies on a United States Supreme Court decision from 1819,²¹ paying insufficient regard to major developments that have since taken place, such as the rise of general

15. Gold et al., *supra* note 11, at xvi.

16. Paul B. Miller, *Corporations*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 8, at 341; Paul B. Miller & Andrew S. Gold, *The Corporation as a Category in Private Law*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 429 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020). For a similar effort, in the Harvard Law School New Private Law Blog, see Andrew Verstein, *Wells – The Personification of the Partnership*, NEW PRIV. L. (Aug. 17, 2021), <https://blogs.harvard.edu/nplblog/2021/08/17/wells-the-personification-of-the-partnership> [<https://perma.cc/28M9-KN5Z>] (“New Private Law scholars have largely hewed to tort, property, contract, or fiduciary law. Comparatively little attention has been devoted to business entities such as corporations and partnerships. Yet without the NPL label, there is fascinating work underway that is well worth the attention of this blog’s readers.”).

17. See *infra* notes 24–27 and accompanying text.

18. Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 469. For a recent high-profile judicial decision sounding a similar tone, see *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578, at *4–5 (Del. Ch. Dec. 19, 2018) (“When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign act of creating a ‘body corporate’—a legally separate entity.”), *rev’d on other grounds*, 227 A.3d 102 (Del. 2020).

19. See Marc T. Moore, *Is Corporate Law ‘Private’ (and Why Does it Matter)?* 30 (Working Paper, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192163 [<https://perma.cc/Y8ZP-A7MS>] (“Anglo-American corporate governance law is, at root, an undeniably ‘public’ or regulatory phenomenon.”).

20. See, e.g., Margaret M. Blair, *How Trustees of Dartmouth College v. Woodward Clarified Corporate Law* (Vand. L. Rsch. Paper No. 21-19, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830603 [<https://perma.cc/WE4Q-2G3L>].

21. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 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 . . .”).

incorporation.²²

At the same time, contractarian law and economics scholars²³ tend toward a “reductionist-realist[.]”²⁴ approach,²⁵ minimizing several of corporate law’s defining building blocks, such as corporate personhood²⁶ and fiduciary duties.²⁷ Most significantly, both law-and-economists and public-law theorists agree that corporate law is meant to promote public, society-wide values, whether efficiency (for the former)²⁸ or communitarian and distributional concerns (for the latter). Together, these approaches may be labeled the “public utility vision” of corporate law.

This Article provides a counter-narrative. It is equally addressed to those embracing the public utility vision, and to those private law scholars who, so far, have focused on the “traditional” areas²⁹ to the exclusion of corporate law. As this Article explains, corporate law is part of private law, primarily because it upholds the same *telos*: the promotion of interpersonal justice and individual self-determination, as opposed to public objectives.

22. For detailed discussion of that development, see, for example, Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1634–40 (1988).

23. The emphasis here is on “contractarian.” Many law and economics scholars do pay attention to legal structure, and devote considerable effort to assessing the correct balance between mandatory and enabling legal rules. See, e.g., Eyal Zamir (featuring Ian Ayres), *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283 (2020). Where the term “law and economics” is used in this Article, the reference is primarily to contractarian law and economics, simply because that specific branch calls for a more thorough response within the argument made here. No generalization is intended toward less-contractarian law and economics scholars.

24. Avihay Dorfman, *On Trust and Transubstantiation*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 339, 355 (Andrew S. Gold & Paul B. Miller eds., 2014).

25. On the link between legal realism and law and economics, see Hanoeh Dagan & Benjamin C. Zipursky, *Introduction: The Distinction Between Private Law and Public Law*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 16, at 1, 7–9; Henry E. Smith, *Complexity and the Cathedral: Making Law and Economics More Calabresian*, 48 EUR. J.L. & ECON. 43, 46–48 (2019).

26. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991) (“The ‘personhood’ of a corporation is a matter of convenience rather than reality . . .”).

27. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993) (arguing that fiduciary duties are the result of contractual processes). In contrast, for discussion of the structural, unwaivable role of both personhood and fiduciary duty within corporate law, see Miller, *supra* note 16, at 351, 355, 357–58; Miller & Gold, *supra* note 16, at 433–34, 435–36; Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 539–48, 563–66 (2020).

28. See Dagan & Zipursky, *supra* note 25, at 9 (“[I]n private law theory, . . . the judicial pursuit of *public welfare goals* of a sort [has been] greatly invigorated with the increasing dominance of law-and-economics scholarship.” (emphasis added)).

29. See *supra* note 15 and accompanying text.

This it shares with other areas of private law—including contract, property, and tort—all of which treat their subjects as private “people,” not public “citizens.”³⁰

In fact, corporate law often steers away from the promotion of efficiency, or other “public welfare” values, instead prioritizing the viewpoint of the individual corporate entity or shareholder.³¹ As Professors Marcel Kahan and Edward Rock recently observed, “corporate law, as it currently exists, has a strong ‘single firm focus’ . . . that stands in sharp contrast to the potential ‘multi-firm focus’”³² of the kind prevalent in public-utilitarian writing. Put simply, corporate law is private law just as much as contract, property, or tort. Given its distinctive structure,³³ which does not emulate or emanate from any other framework, it resides at the same taxonomic step as these fields; corporate law is an upper-level category in the hierarchy of private law.³⁴

Building upon these observations, this Article proceeds as follows. Part I lays the groundwork for the questions discussed in this Article, by examining the general distinction between private and public law. It explains how we can determine if a legal norm is private or public—and, as importantly, why these categories matter in practice.

Part II develops this reasoning with specific focus on corporate law, by responding in detail to the four main types of arguments made by public-utility theorists. The first three of those are discussed in Section II.A. First, the *Dartmouth College*³⁵ decision is, to a large degree, no longer an authoritative source of law. Following the rise of general incorporation, business entities today can perform “any lawful act or activity,”³⁶ and essentially bear none of the public characteristics that were the backdrop to the *Dartmouth College* case, and which some scholars still seem to emphasize.

Second, in terms of how corporations come into existence, the corporation is not a “creature of the state.” Instead, it is a creature of law—specifically, private law. When the Secretary of State signs a “certificate of

30. Dagan, *supra* note 8, at 177.

31. *See infra* Part III.

32. Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs* 3 (N.Y.U. L. & Econ. Rsch. Paper No. 22-01, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974697 [<https://perma.cc/Z9RS-XZKF>].

33. *See infra* text accompanying notes 120–34.

34. *See* Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 226 (2021).

35. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

36. DEL. CODE ANN. tit. 8, § 102(a) (2023).

incorporation,” this does not make the state the creator of that corporation. Rather, this is similar to the state’s role in other private law areas, for example, when it operates as a registrar of property deeds, or probate.

Third, the large body of mandatory rules and principles in corporate law—the fact that corporate law has unwaivable *structure*—also does not turn corporate law into public law. Other areas of private law, including the “core” areas of contract, property, and tort, have some mandatory structure as well. The “enabling” parts of contract law are simply one, specific segment within private law. Corporate law has a legislatively and judicially-prescribed structure,³⁷ but that structure exists to benefit private individuals and entities, as opposed to the state or the economy at large.

Fourth, as discussed in Section II.B, corporate law does account for broader social considerations and rule of law principles, but it does so in a different manner than public-utility theorists suggest. Corporate law is neither an efficiency-maximizing “default contract,” nor does it create an extra-legal obligation of “corporate social responsibility.” Instead, corporate law imposes a strict duty of legal obedience. The corporation must follow positive law; its fiduciaries may be penalized if they cause it to act otherwise; and shareholders can only lawfully receive what is left after the corporation meets all of its other obligations. If we wish to make corporations behave better, *in a legally enforceable way*, we must (and frequently do) improve the laws that constrain them. Recognizing this fact can help us chart a more accurate way between the prevailing shareholderist and stakeholderist conceptions—the most important faultline in modern corporate law.

Finally, Part III discusses two examples of corporate law’s character as a promoter of individual interests, rather than public-utility ones: the manner in which fiduciary duties flow within the corporate relationship, and the equitable, quasi-proprietary nature of shareholders’ rights.

In sum, this Article injects a much-needed dose of nuance into the debate over the corporation’s nature as a private or public entity, as a creature of the state or of private action, and as a mandatory or enabling phenomenon. The arguments made by public-utility theorists often emanate from real-world observations about corporate law, but as this Article demonstrates, those observations in fact point to corporate law being part and parcel of private law.

37. See, e.g., Raz, *supra* note 27, at 531–66 (discussing the mandatory building blocks of corporate law, including purpose, personhood, legal obedience, equity, and fiduciary duty).

I. HOW WE CAN DISTINGUISH PRIVATE FROM PUBLIC LAW, AND WHY THIS MATTERS

Before this Article goes into the debate between the private and public law conceptions of corporate law, the current Part engages with a more fundamental, and preliminary, question: how do we tell if something is private law or public law, and what practical purposes does this distinction serve?

Most people would intuitively agree that areas such as constitutional, administrative, and criminal law are instances of public law, whereas contract, property, and tort law are within the realm of private law.³⁸ Yet, on a more methodical level, there ought to be certain criteria—of at least general applicability—that can tell us to what extent a given legal norm is private or public law.

One possible test looks to the identity of the *parties* involved in the legal case or situation at issue. Under the scheme of legal relations offered by Professor Wesley Hohfeld in 1913,³⁹ which has become a touchstone of modern legal thought,⁴⁰ it is *people* who bear rights and duties toward one another.⁴¹ In other words, you can only have rights or duties toward someone else; you cannot have a legal right against a contract (which itself is a legal *norm*, creating rights and duties), or toward other rights and duties. This point is practically salient, as it serves to clarify—and often to reject—many common ways of thinking: for example, no one can have a legal right to get something from “society” as a whole. Nor is it feasible to speak of the

38. See, e.g., Dagan & Zipursky, *supra* note 25, at 1 (“[O]ne could list subjects such as contracts, tort, and property as exemplars of private law and subjects such as constitutional law, administrative law, and immigration as exemplars of public law . . .”); Gold et al., *supra* note 11, at xvi (mentioning “contract, property, tort, unjust enrichment, [and] fiduciary law” as examples of “established private law categories”).

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

40. See, e.g., Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1320 & n.1 (2017) (stating that “our legal system is organized around the concepts of rights and duties,” and that Hohfeld’s work provides “a classic account of this organization”).

41. 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.”); Alex Stein, *Second-Personal Evidence*, in PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 96, 96 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) (“Hohfeld’s scheme of jural opposites and correlatives unfolded analytical proof that every legal entitlement ultimately transforms into a person’s right, or lack thereof . . .”).

corporation as a “nexus of contracts,”⁴² given the many legal relationships (for example, owning property,⁴³ or suing and being sued in court⁴⁴) which corporations are involved in as legal persons.

The Hohfeldian test for distinguishing private from public law asks whether *the state* is a party—a right-and-duty bearing actor—within the legal relationship. In constitutional, administrative, and criminal law, this classification is clear: the state is (mostly) the defendant in constitutional and administrative cases, and it is the prosecuting party in criminal ones. The state itself, as a legal person or entity,⁴⁵ directly holds rights (for example, collecting fines for unlawful driving) and duties (for example, respecting the First Amendment).

That is *not* the case in contract, property, and tort law, among other private law areas. These frameworks are concerned with creating “institutions and procedures that enable individuals and entities to define their relationships and to assert and demand the resolution of claims against others.”⁴⁶ For example, if a person walking down the street is hit by an object falling from the window of a nearby building, the state is not a character in this story. The newly-created tort law relationship connects two Hohfeldian parties: the injured person and the tortfeasor (the building’s tenant or owner).

In a limited sense, the state *is* involved in this situation—but not as a right-and-duty bearer. Instead, the state “makes available [(to the private parties)] [the] institutions and procedures”⁴⁷ mentioned in the previous quote. Essentially, “[p]rivate law is law, so government is involved, *albeit in a*

42. See, e.g., William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); David Gibbs-Kneller, David Gindis & Derek Whayman, *Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms*, 23 EUR. BUS. ORG. L. REV. 573 (2022).

43. See, e.g., DEL. CODE ANN. tit. 8, § 122 (2023) (“Every corporation created under this chapter shall have power to: . . . Purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property . . .”).

44. See, e.g., *infra* Section II.B.

45. Many public law cases or situations might not directly involve the state, at least not at the highest level (say, the “United States” or “California”), but rather some instrumentality of the state, such as the attorney general, a municipality, a county, a governmental corporation, and so on. The main point is that these people are, indeed, instrumentalities or extensions of the state; they are legally authorized to operate as state-affiliated public law actors. See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1371–74 (2020) (discussing the manner in which state law generates and shapes the legal power of local governments).

46. Goldberg, *supra* note 10, at 1640.

47. *Id.*

*particular way.*⁴⁸ This particular way is as a *legislative* and *adjudicative* actor, not as a party to the private law relationship.⁴⁹ Few people would perceive that the judge helping them resolve a contract dispute, or the legislative body that enacted the Uniform Commercial Code⁵⁰ in their state, are “parties” to that private dispute.

At this point, it is important to note that private law, as created by the state (whether legislatively or judicially), can be fairly extensive, and often mandatory and non-contractual in nature—for example, in the case of fiduciary duties,⁵¹ or the *numerus clausus* principle in property law.⁵² The “enabling” parts of contract law, where “parties to a contract are free to be as whimsical or fanciful as they like in describing the promise to be performed,”⁵³ are simply one area within private law; they do not define private law as a whole. This fact does not make private law any less private, and does not turn the state itself into a party to the legal relationship. Individuals and entities are those who utilize these legal institutions, to create and enforce their rights *toward one another*.

Where mandatory norms exist in private law, it is most often because certain difficulties arise between private parties, and those difficulties need to be addressed in order to achieve justice and fairness. Fiduciary duties are a clear example: because of “asymmetries due to unobservable and unverifiable information”—think of a trustee who holds assets that are inaccessible to the beneficiary—“a compelling justification [arises] for a

48. *Id.* (emphasis added).

49. In the domain of public law, the state plays both roles: it creates and enforces the laws (pertaining to its own actions, rights, and duties), and performs those actions, enjoys those rights, and bears those duties. Where substantive rule of law prevails, the separation of powers principle assigns different branches of the state to carry out these functions in respect to a given case or situation. In the domain of private law, the state only plays the first role. *See, e.g.,* Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429 *passim* (2021) (discussing the distinction between “public rights” and “private rights,” and the manner in which the separation of powers principle grants more power to the executive branch to shape or limit the former, while endowing the judicial branch with greater authority in regard to the latter).

50. U.C.C. (AM. L. INST. & UNIF. L. COMM’N 2012) (Uniform Commercial Code, enacted into law in whole or in part by all U.S. states).

51. *See, e.g.,* *Sample v. Morgan*, 914 A.2d 647, 664 (Del. Ch. 2007) (“Stockholders can entrust directors with broad legal authority precisely because they know that that authority *must* be exercised consistently with equitable principles of fiduciary duty.” (emphasis added)).

52. *See, e.g.,* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (discussing the *numerus clausus* principle in property law, which limits the number of available forms of property rights, and forbids creating new forms through contract).

53. *Id.* at 3.

strict, full-disclosure-based [fiduciary] accountability regime.”⁵⁴ Again, the state is not a character in this story, except in its role as law-maker and law-enforcer.

This Hohfeldian inquiry—is the state a party?—provides a helpful baseline for the distinction between private and public law. Such analysis, however, does not explain *why* the state should be party to some legal relationships and not others. What deeper values are promoted by the divide between private and public law? Indeed, why should we concern ourselves with such distinctions, especially in the wake of the more extreme legal realists’ well-known disdain for categories and concepts?⁵⁵

In a recent article,⁵⁶ Professors Hanoch Dagan and Benjamin Zipursky offer some answers. They begin by asking: “Is there a tenable theoretical distinction between private law and public law?”⁵⁷ To address this question, they analyze two dichotomies relevant to the discussion here. First is the distinction “between different subject areas within the overall domain of law. . . . Private law subjects relate to the transactions and rights of private parties with respect to one another; public law subjects relate more closely to the relationship between states and individuals, including the rights of individuals against states.”⁵⁸ This first dichotomy largely overlaps with the Hohfeldian analysis presented above. The test revolves around whether the state is party to the legal relationship (as in public law), or only plays a law-making and law-enforcing role (as in private law).

More fundamentally, however, Dagan and Zipursky also discuss the distinction “between the private sphere and the public sphere.”⁵⁹ Put simply, there are things that lie outside the realm of the state or the public at large.

54. 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). For a similar view, recognizing that mandatory structure in private law is fully compatible with liberal and market-oriented values, see Robert J. Rhee, *A Liberal Theory of Fiduciary Law*, 25 U. PA. J. BUS. L. 451, 503 (2023) (“In a liberal society and a market system, we should respect autonomy and human agency in dealings. . . . This policy is the animating force of libertarians and contractarians who seek to diminish fiduciary law. Yet . . . [s]ome interests are so important that the law does and should intervene in otherwise private affairs to protect them. . . . Fiduciary law protects these critical interests only when we cannot presume the capacity for equal footing because autonomy and agency have been negated.”).

55. See, e.g., Cohen, *supra* note 5, at 809, 820 (comparing legal classification to using “a hair-splitting machine” and stating that “[a legal] proposition . . . would be scientifically useful if [the legal concepts it uses] were defined in non-legal terms”).

56. Dagan & Zipursky, *supra* note 25.

57. *Id.* at 1.

58. *Id.* at 3.

59. *Id.* at 4.

For example, the concept of “family” is not the same as “family law”: the latter limits what spouses and parents can do, but beyond that lies a wide range where law simply says nothing—neither positive nor negative—about how to be a good spouse or parent.⁶⁰ In Dagan and Zipursky’s account of “the relational justice theory of private law,”⁶¹ “[p]rivate law . . . [undertakes] the most fundamental liberal commitments to autonomy (or self-determination).”⁶² The core distinction is between the “capacities of law’s subjects . . . as co-citizens who are subjects of a state *or* as individuals. . . . [L]aw’s orientation toward us is qualitatively salient: It makes a difference whether we are addressed as parts of a comprehensive unit of joint responsibility or as persons with projects.”⁶³ As a result, “[p]ublic law and private law are meaningful legal categories because the types of considerations that supply the justifications of their substantive norms are distinctive. . . . Private law is actually committed to enhancing a capacious vision of autonomy.”⁶⁴

At this stage, one point needs to be strongly emphasized: the existence of private law, with its autonomy-enhancing nature, does not negate or diminish any *other* law. The opposite is true: from the outset, private law operates within the bounds of legal obedience and compliance. The creation, conduct, and enforcement of contracts, property interests, trusts, agency relationships—and perhaps most distinctly, corporations—does not give anyone a license to violate any law, whether private or public. Clearly, no one is allowed to commit a civil or criminal violation even on one’s private property. Likewise, contract law does not uphold unlawful contracts,⁶⁵ and trust law denies effect to a “provision of the trust that . . . is invalid because the provision is unlawful or contrary to public policy.”⁶⁶ As Section II.B below demonstrates, corporate law provides the most extensive set of legal

60. For a similar example, see *id.*

61. *Id.* at 12. The relational justice theory was introduced in Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

62. Dagan & Zipursky, *supra* note 25, at 12.

63. *Id.*

64. *Id.* at 12–14.

65. See, e.g., RESTATEMENT (SECOND) OF CONTS. § 179 (AM. L. INST. 1981) (“A public policy against the enforcement of promises or other terms may be derived by the court from . . . legislation relevant to such a policy[.]”); Steven W. Feldman, *Statutes and Rules of Law as Implied Contract Terms: The Divergent Approaches and a Proposed Solution*, 19 U. PA. J. BUS. L. 809, 810, 850–51 (2017) (stating that “[t]he great majority of state and federal courts accept the general common law rule that courts in construing contracts shall incorporate relevant, unmentioned laws as implied contract terms,” and discussing sources that support an “immutable rule” in this regard).

66. RESTATEMENT (THIRD) OF TRUSTS § 72 (AM. L. INST. 2003).

compliance doctrines within private law. The range of laws that exist in our society—such as those dealing with competition, employment, consumer protection, financial regulation, privacy, and the environment—are supported by the compliance norm, which is a structural element of private law. This important limit—the requirement of lawfulness—co-exists with the fact that it *is* possible to comply with the law; and beyond that lies a broad universe of actions that are the subject of personal choice, not law.

Crucially, private law facilitates precisely this *extra-legal* choice: people can draft contracts to bind themselves to promises of their own devise, nowhere prescribed by law; they can own property, with the help of which they conduct their lives according to their own beliefs and preferences; they can be compensated in tort if their bodily integrity, or economic or other interests, have been impaired; and, as the remainder of this Article illustrates, they can even create new legal persons—corporations—that engage in open-ended adventures, not specified in any law.⁶⁷ In a sense, public law can be described as “self-contained,” in that it is about imposing and enforcing norms as to what people (including the state itself) can or cannot do. In contrast, private law is a “vessel” through which other choices are made possible—choices that are not necessarily derived from, or pertaining to, any law. At the most fundamental level, therefore, private law achieves a singular feat: it empowers people to write their own life stories.

The remainder of this Article applies the conceptual framework established in this Part to a specific area—corporate law—that, until now, has consistently evaded this discussion, both in terms of its classification as private law, and in respect to most other nuances considered above.

II. THE PUBLIC UTILITY VISION OF CORPORATE LAW AND WHAT IT MISSES

In characteristically brilliant prose, Professor Ann Lipton recently contrasted what she calls the “Doylist” and “Watsonian” perspectives in the legal debate about corporations.⁶⁸ Borrowing the terminology of literary discourse, Lipton asked: “Are [we] looking at things from *outside* the corporation [(the Doylist perspective)], in terms of structuring our overall legal and societal institutions? Or are [we] looking at things from *inside* the

67. See *infra* text accompanying notes 120–34.

68. Ann Lipton, *Doyle, Watson, and the Purpose of the Corporation*, BUS. L. PROF BLOG (Sept. 17, 2020), https://lawprofessors.typepad.com/business_law/2020/09/doyle-watson-and-the-purpose-of-the-corporation.html [<https://perma.cc/X9G5-TCKV>].

corporation [(the Watsonian perspective)], in terms of how corporate managers should understand their jobs and their own roles?”⁶⁹

This Part argues that corporate law scholars have long espoused the external—indeed, the Doylist—approach. That perspective is shared by the two prominent schools of thought within corporate law scholarship: both law and economics, or “shareholderist,” and communitarian, or “stakeholderist,” academic literature.⁷⁰ As the following two Sections explain, scholars have had two seemingly good reasons to argue that corporate law supports this public utility vision:⁷¹ the fact that the state (across its legislative and judicial branches) plays *some* role in the creation and regulation of corporations; and the fact that corporations are (descriptively) required to, and (normatively) should, take into account the interests of a broad set of actors, including shareholders, employees, consumers, financial lenders, and other stakeholders.

At the same time, despite correctly identifying these facts, public-utility theorists of corporate law have largely overlooked the precise manner in which they operate. In truth, corporate law is a private law framework. Just as in contract, property, or tort law, the state’s role is a *legislative* and *adjudicative* one; the state creates and enforces (much of) the law that governs relations between private individuals and entities,⁷² but the state itself does not create corporations, nor does it have direct rights and duties against them, nor can it tell them what to do, except through law.

This connects with the second fact: whatever regulation that is imposed on corporations—often to achieve non-private, society-wide goals—must, by definition, be imposed through *law* for it to be enforceable by legal institutions. Because corporate law mandates that corporations are legal

69. *Id.*

70. *See, e.g.,* Raz, *supra* note 27 (characterizing in detail, and offering an alternative to, these two approaches).

71. The term “public utility vision,” as opposed to “public law vision,” is used here to encompass both the shareholderist and stakeholderist conceptions of corporate law. Contractarian scholars, in the vein of Easterbrook and Fischel, can hardly be said to support a “public law” approach. Yet, in many respects, their views are surprisingly similar to those of stakeholderist, public-law theorists. *See* Dagan & Zipursky, *supra* note 25, at 9 (“[I]n private law theory, . . . the judicial pursuit of *public welfare goals* of a sort [has been] greatly invigorated with the increasing dominance of law-and-economics scholarship.” (emphasis added)). The analysis offered in this Article provides an alternative to both sides of the public utility vision.

72. *See, e.g.,* Goldberg, *supra* note 10, at 1640 (“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)).

persons,⁷³ they are required to obey any and all laws, whether public or private. Furthermore, corporate law itself contains several important mechanisms designed to maximize the corporation's legal compliance.⁷⁴ This particular facet of corporate law is somewhat similar to, say, contract law's prohibition on illegal contracts.⁷⁵ This is where the external, Doylist perspective shines most brightly, and desirably so.

Yet, this does not turn corporate (or, for that matter, contract) law itself into public law. While actors in society are required to act lawfully vis-à-vis one another, they also have actions and relationships that go beyond this requirement. When SpaceX—a Delaware corporation⁷⁶—produces a heavy-lift space launch system, this has nothing to do with its legal liabilities to the state; it had to meet those in the process, but the “residual” act of creating the rocket—which is not compelled by public law, but by SpaceX's own choice and volition—is made possible by the autonomy-enhancing role of private law in a liberal society.⁷⁷ Corporate law, like the rest of private law, indeed embraces the internal—or Watsonian—point of view. To fully demonstrate this, the following Sections dissect the countervailing arguments in order.

A. *Clarifying the Role of the State in Respect to the Corporation*

We may start with the view that “corporations are creatures of the state.”⁷⁸ In a somewhat lighter formulation, “a corporation's charter and bylaws are . . . hybrid legal structures that provide a mechanism for collective choice in the context of substantial state regulation and straddle

73. 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, 818–35 (1989); Miller, *supra* note 16, at 351, 355; Miller & Gold, *supra* note 16, at 433–34; Raz, *supra* note 27, at 539–48.

74. See *infra* text accompanying notes 163–79.

75. See, e.g., *supra* note 65.

76. See *Division of Corporations - Filing*, DELAWARE.GOV, <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx> [<https://perma.cc/YK9V-CTZS>] (search for entity name “Space Exploration Technologies Corp.” or file number 3500808).

77. See *supra* text accompanying notes 59–67.

78. Macey & Strine, *supra* note 18, at 469. For a recent work making this type of argument even more strongly, see Saule T. Omarova, *The “Franchise” View of the Corporation: Purpose, Personality, Public Policy*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 201 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

the public-private divide.”⁷⁹ In the U.S., scholars advocating this approach⁸⁰ often cite the Supreme Court’s decision in *Trustees of Dartmouth College v. Woodward*,⁸¹ which stated that “[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.”⁸² This view is also known as the concession theory, or artificial entity theory, of corporate law.⁸³

This approach also assigns much weight to the fact that, in order to come into existence, corporations must undergo an act of registration with a state agency: in the U.S., the Department of State (of the several states),⁸⁴ and in the U.K., for example, the “registrar of companies” as directed by the Companies Act 2006.⁸⁵ Finally, scholars espousing the public utility vision note that corporate law has a very substantial mandatory *structure*, including such concepts as unwaivable fiduciary duties, which cannot be contracted around, or replaced by creating new types of entities beyond those prescribed by law. This is what is referred to, in this context, as “substantial state regulation.”⁸⁶

Each of these facts, in itself, is true, but their interpretation by those advocating the public utility vision of corporate law is partial at best. First, the above-quoted passage from the *Dartmouth College* decision is, to a large extent, no longer good law. Written in 1819, Chief Justice Marshall’s opinion described a world in which states created corporations by special acts of incorporation—separate enactments passed by the legislature to affect the

79. Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts”*, 93 WASH. L. REV. 265, 268 (2018). A related branch of literature deals with the “political economy” perspective on corporate law, where the main “story” is the competition among state jurisdictions for attracting a higher number of incorporations. *See, e.g.*, Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001). That perspective has been countered in DAVID KERSHAW, *THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW* (2018).

80. *See, e.g.*, Blair, *supra* note 20.

81. 17 U.S. 518 (1819).

82. *Id.* at 636.

83. *See, e.g.*, Coates, *supra* note 73, at 810–15.

84. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(a) (2023) (stating that a corporation may be organized “by filing with the Division of Corporations in the Department of State a certificate of incorporation which shall be . . . in accordance with . . . this title”).

85. *See* Companies Act 2006, c. 46 § 15(1) (UK) (“On the registration of a company, the registrar of companies shall give a certificate that the company is incorporated.”).

86. Hershkoff & Kahan, *supra* note 79, at 268. Similarly, critics of these unwaivable norms also tend to use the word “regulation” to describe them. *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”).

formation of each entity. Corporations were created to pursue relatively narrow, pre-defined goals, such as the construction of bridges, railroads, universities, or other public infrastructure and services.⁸⁷

Beginning in the mid-nineteenth century, an important reform took place on both sides of the Atlantic: the rise of general incorporation.⁸⁸ Under general incorporation, which today is the prevailing mode of corporate law, “any person”⁸⁹ may organize a corporation—not just the state.⁹⁰ Moreover, the corporation can “engage in any lawful act or activity,”⁹¹ as opposed to being limited to a pre-defined goal. As Section II.B below explains, the “lawful” part is highly consequential, since it entails that the corporation—like any other private person—must obey all laws applicable to it, whether private or public law.

The words “any act or activity” are equally meaningful, however: they entail that the corporation—like any other private person—is permitted, and capable of, pursuing its own, self-defined trajectory of actions and voluntary relationships. SpaceX can make rockets, and a small pastry shop can make pastries, not because they are legally pre-committed to doing either thing, but because they *choose* to do so, as autonomous people in a liberal society.⁹²

Next, public theorists of corporate law often point to the requirement of registration with a state agency, which is a precondition for the existence of a corporation.⁹³ They view it as proof that the state “creates” corporations,

87. See, e.g., Hovenkamp, *supra* note 22, at 1609.

88. See, e.g., *id.* at 1634–40; Henry N. Butler, *General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes*, 6 INT’L REV. L. & ECON. 169, 169 (1986) (“The English Companies Acts of the mid-nineteenth century—England’s general incorporation laws—were the culmination of an evolutionary process through which Parliament relinquished its strict control over the availability of the corporate form of business association.”); see also *BTI 2014 LLC v. Sequana S.A.* [2019] EWCA (Civ) 112, [151] (Eng.) (“[T]he right to form and register a company under the Companies Act is, in no sense, a privilege.”).

89. Tit. 8, § 101(a) (emphasis added). The U.K. statute similarly provides that “[a] company is formed under this Act by one or more persons . . . subscribing their names to a memorandum of association.” Companies Act 2006, c. 46 § 7(1) (UK).

90. As Professors Miller and Gold correctly point out, “[s]ome corporations—for example, governmental corporations—are still incorporated by special act.” Miller & Gold, *supra* note 16, at 430. This *lex specialis*, while affecting those corporations and some of the people having legal contact with them, does not modify the *lex generalis* of general incorporation, as discussed here.

91. Tit. 8, § 102(a). The U.K. statute similarly provides that “[a] company may not be . . . formed for an unlawful purpose,” Companies Act 2006, c. 46 § 7(2) (UK), and that “[u]nless a company’s articles specifically restrict the objects of the company, its objects are unrestricted,” *id.* § 31(1).

92. See *supra* text accompanying notes 59–67.

93. See *supra* notes 84–85 and accompanying text.

and by implication, should play a substantial role in their ongoing affairs.⁹⁴ This understanding, however, is inaccurate. The registration requirement does not make the state the creator of corporations. Instead, the corporation is created by the people who form it (its “incorporators”⁹⁵), as private law actors, bound by a private law framework that attaches Hohfeldian rights and duties⁹⁶ to the newly-formed entity, its shareholders, and its fiduciaries.⁹⁷ The act of registering a new corporation—which today is often achieved by filing several documents online, paying a fee, and having the documents approved by a state employee as a matter of course—does not involve any truly substantive discretion or decision-making on the part of the state, of the kind that *is* found in constitutional, administrative, and other public law settings.

Essentially, the state’s role as a registrar of corporations is similar to its function as a registrar of property deeds,⁹⁸ or probate:⁹⁹ in all cases, the state provides a service to private people, where the state’s assistance is required for the proper functioning of a private law regime.¹⁰⁰ The state, however, does not “create” the subject matter of that service (the corporation, parcel of land, or property being inherited), nor is itself a party to the private law relationship. It does not control the corporation, own the land, or inherit the

94. *See, e.g.*, *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578, at *4–5 (Del. Ch. Dec. 19, 2018) (“When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign act of creating a ‘body corporate’—a legally separate entity. The State of Delaware is an ever-present party to the resulting corporate contract . . .”), *rev’d on other grounds*, 227 A.3d 102 (Del. 2020).

95. *E.g.*, tit. 8, § 101 (section titled “Incorporators; how corporation formed; purposes” and stating that “[a]ny person . . . may incorporate or organize a corporation under this chapter by filing with the Division of Corporations in the Department of State a certificate of incorporation”). Indeed, even according to the statute’s plain language, it is the “person” (the incorporator), not the state, who incorporates the corporation.

96. *See* Hohfeld, *supra* note 39 (developing a fundamental theory of rights and duties, today broadly accepted in legal scholarship).

97. *See, e.g.*, *Raz*, *supra* note 27, at 539, 557, 563 (explaining that these three types of actors exist whenever a corporation is formed).

98. *See, e.g.*, DEL. CODE ANN. tit. 25, § 151 (2023) (“A deed . . . concerning lands or tenements . . . shall . . . be recorded in the recorder’s office for the county wherein such lands or tenements or any part thereof are situated, when lodged in such office at any time after the sealing and delivery of such deed . . . ; and the record or an office copy thereof shall be sufficient evidence.”).

99. *See, e.g.*, UNIF. PROB. CODE § 3-102 (UNIF. LAW COMM’N 2010) (“[T]o be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the court.”).

100. There is an even more well-known type of institution that fulfills this function: a court. *See, e.g., id.*

heirlooms.¹⁰¹ Private people do.

Perhaps the most substantial part of the public conception of corporate law is its emphasis on what it terms “regulation,”¹⁰² and in fact refers to the unwaivable *structure* of corporate law. All corporations—across time, jurisdiction, and economic and political developments—exist on the basis of a certain legal structure, which involves, at a minimum, five distinct building blocks: the corporation’s purpose, personhood, duty of legal obedience, equitable obligations toward residual claimants, and fiduciary duties owed to the corporation.¹⁰³ This stands in conflict, most clearly, with the contractarian strand of law and economics.¹⁰⁴ Indeed, corporate law’s structure “is not subject to ‘private ordering’; it is the foundation *upon which* contracting occurs.”¹⁰⁵ This fact is highly consequential, but even it does not suffice to make corporate law into public law.

To understand why, we should turn to an important insight from the new private law movement. In contrast to some of the legal realists¹⁰⁶ (a foundational influence for law and economics),¹⁰⁷ NPL insists on the significance of *classification*: “NPL scholarship . . . starts from the premise that distinctions among established private law categories . . . are intelligible and pragmatically warranted. There is accordingly great value in scholarship that aims to identify their respective domains.”¹⁰⁸

As relevant to the discussion here, private law has many sub-categories, and contract is just one of them. Corporate law is not the only private law framework having mandatory structure: so do property,¹⁰⁹ tort,¹¹⁰ and trust

101. In some cases, the state does own land, control corporations, or inherit property, but this is not directly related to its legislative and judicial role as an arbiter of other people’s rights and duties, in the more usual cases—those where the state is *not* involved as a direct actor. *Cf. supra* note 90.

102. *E.g.*, Hershkoff & Kahan, *supra* note 79 *passim*; Moore, *supra* note 19, at 30 (stating, following a discussion of several legally-prescribed features of corporate law, that “Anglo-American corporate governance law is, at root, an undeniably ‘public’ or regulatory phenomenon”).

103. *See* Raz, *supra* note 27, at 531–66.

104. *See supra* notes 26–27 and accompanying text.

105. Raz, *supra* note 27, at 530.

106. *See, e.g.*, Cohen, *supra* note 5, at 809 (comparing legal classification to using a “hair-splitting machine”).

107. *See* sources cited *supra* note 25.

108. Gold et al., *supra* note 11, at xvi.

109. *See, e.g.*, Merrill & Smith, *supra* note 52 (discussing the *numerus clausus* principle in property law, which limits the number of available forms of property rights, and forbids creating new forms through contract).

110. *See, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

law,¹¹¹ for example. In fact, even contract law itself has some unwaivable structure, such as the requirement of definiteness¹¹²—a logical necessity, since otherwise we could not tell whether a “contract” came into existence in the first place (and only then started binding the parties).¹¹³

Yet, we never think of a court resolving a contract or property dispute as engaging in governmental “regulation.” Similarly, in a well-publicized case,¹¹⁴ recently decided by the United States Court of Appeals for the Second Circuit,¹¹⁵ no one was suggesting that the mere existence of unjust enrichment law¹¹⁶ makes the State of New York a party to the case, or that it involves what we normally refer to as “regulation.” Instead, the court is enforcing the norms of private law. It is an arbiter of Hohfeldian rights and duties that run between individuals and entities—not between them and the state, the entire economy, or the court itself.¹¹⁷ The exact same applies to corporate law. Each category has its own defining structure,¹¹⁸ but all of these categories are private law.

Why, then, does corporate law have so much mandatory structure? After all, like the rest of private law, corporate law exists not to promote public objectives—efficiency, distributive justice, or otherwise—but private

111. See, e.g., John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004).

112. See, e.g., James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 279 n.91 (2015) (“[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.”).

113. See, e.g., Raz, *supra* note 34, at 228 n.20.

114. See, e.g., Stacy Cowley, *Citi Loses Its Bid to Reclaim Cash from a \$900 Million Mistake*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/business/citibank-revlon-loan.html> [<https://perma.cc/6RMF-9ZKU>].

115. *Citibank, N.A. v. Brigade Cap. Mgmt., LP*, 49 F.4th 42 (2d Cir. 2022) (case involving the mistaken wire transfer, by a bank, of approximately \$900 million, in a unique factual setting where some of the transferees—several private investment fund managing entities—have argued that they have a legal right to keep the funds). For useful discussions of the case (written prior to the final appellate decision), see Elisabeth de Fontenay, *The \$900 Million Mistake: In re Citibank August 11, 2020 Wire Transfers* (SDNY 16 February 2021), 16 CAP. MKTS. L.J. 307 (2021); Maytal Gilboa & Yotam Kaplan, *The Costs of Mistakes*, 122 COLUM. L. REV. F. 61 (2022); Eric Talley, *Discharging the Discharge-for-Value Defense*, 18 N.Y.U. J.L. & BUS. 147 (2021).

116. This area is also known as restitution law, and has recently seen renewed attention in scholarship. See, e.g., *Developments in the Law—Unjust Enrichment*, 133 HARV. L. REV. 2062 (2020).

117. See *supra* notes 46–50 and accompanying text.

118. See, e.g., Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241 (2015).

ones, of justice among individuals and entities, aimed at enabling people to lawfully advance their own life purposes.¹¹⁹ Accordingly, there is an *internal* justification for corporate law’s unwaivable building blocks, designed to protect the rights and expectations of those very actors. Corporate law’s mandatory features stem from the fact that it is organized around a unique principle of open-endedness.¹²⁰ Corporate law creates entities, permits them to engage in *any* lawful activity,¹²¹ and tops this off with additional legal devices (again, unique to corporate law), such as the business judgment rule and perpetual existence.¹²²

By doing this, corporate law shifts the normative calculus to the *ex post* dimension. In near-opposition to contract law, corporate law provides very little information about involved parties’ rights and duties before-the-fact.¹²³ It sends corporations off on unpredictable trajectories (think, for example, of companies in the computing or space industries), endowing them with human-like freedom of action.¹²⁴ As a result, “[m]any adventures, or misadventures, can transpire.”¹²⁵ To deal with problems of “expropriation”¹²⁶ and “opportunism”¹²⁷ that might naturally arise in this situation, corporate law relies on the inherently *ex post* concepts¹²⁸ of equity and fiduciary

119. See *supra* text accompanying notes 59–67.

120. See Raz, *supra* note 34, at 267–77.

121. See *supra* note 91 and accompanying text.

122. See Raz, *supra* note 34, at 270–71. On the business judgment rule being a distinctive feature of corporate law, see, for example, Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 41, 41 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (“[T]he trust law duty of care . . . is not softened by a business judgment rule.”); Julian Velasco, *Fiduciary Judgment Rules*, 62 WM. & MARY L. REV. 1397, 1414–15 (2021) (“Perhaps the most obvious way in which corporate law differs from other applications of fiduciary law is in the business judgment rule. . . . [T]he business judgment rule actually serves the purposes of fiduciary law in corporate law’s special circumstances.”).

123. See, e.g., Raz, *supra* note 34, at 268–69 (“Importantly, this open-endedness principle also makes corporate law very different—in fact, almost the opposite—from another legal framework: contract law. In a way that is more familiar to economic scholars, contract law is built around a principle of *ex ante* consent.” (footnote omitted)).

124. See *id.* at 269–72.

125. *Id.* at 270 (footnotes omitted).

126. E.g. Hanoch Dagan, Avihay Dorfman, Roy Kreitner & Daniel Markovits, *The Law of the Market*, 83 LAW & CONTEMP. PROBS. i, i (2020).

127. E.g. Henry E. Smith, *Equity as Meta-Law*, 131 YALE L.J. 1050 *passim* (2021).

128. See, e.g., Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 24, at 209.

duty.¹²⁹ As stated by a prominent Delaware jurist, the state’s law “provides corporate managers with the flexibility to do practically any lawful act, subject to judicial review focused on whether the managers were properly motivated and not irrational.”¹³⁰

These aspects of corporate law are also *unwaivable*, because by definition, they relate to things residing in the unknowable future, and thus not subject to contracting, which is an *ex ante* legal undertaking. Contract cannot possibly regulate behavior that occurs on an entirely “to be determined” basis—certainly not in the presence of such a comprehensive open-endedness principle as provided by corporate law. In the corporate context, to allow the *ex ante* waiver of equitable or fiduciary obligations would be circular; it “would reinstate the mischief which the [law] was enacted to prevent.”¹³¹

Importantly, and directly related to NPL’s mission of bridging the internal and external perspectives on private law,¹³² this elaborate legal structure also achieves a set of economic and social benefits, as opposed to purely legal ones. That is because corporate law’s facilitation of open-ended activities encourages innovation, entrepreneurship, and lawful risk-taking.¹³³ Other areas of private law—including property, tort, and certainly contract—are concerned with binding parties to *ex ante* rights and duties, much more strongly than corporate law ever does. The unique *ex post* character of corporate activity thus promotes unpredictable, and often immensely beneficial, adventures, better than any other legal framework. The corporation—as a creature of *law*—is a major catalyst for the long-term progress of our society, economy, and technology.¹³⁴

It should be emphasized, once again, that the mandatory, unwaivable

129. See Raz, *supra* note 34, at 272–74. Importantly, even neighboring areas—most notably, trust law—do not feature the same phenomenon of open-endedness as corporate law. Although both trust and corporate law involve equity and fiduciary duties, each does so in a different manner and as part of a different broader structure. See, e.g., Raz, *supra* note 27, at 548 n.129.

130. Leo E. Strine, Jr., *Delaware’s Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar’s Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1275 (2001).

131. *Uber BV v. Aslam* [2021] UKSC 5, [76] (appeal taken from Eng.). On the circularity problem inherent to a “waiver” of fiduciary duties, see Raz, *supra* note 34, at 275 & n.336.

132. See *supra* note 12 and accompanying text.

133. See Raz, *supra* note 34, at 269–72.

134. See, e.g., Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003); Lynn A. Stout, *The Corporation As a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015).

features of corporate law do not make it public law, and do not stem from corporations being creatures of the state. Instead, they are simply the result of private law's mission to protect individuals' and entities' legitimate interests, as people who live and interact with one another.¹³⁵ Thus, for example, when courts or legislatures allow for the "waiver" of fiduciary duties,¹³⁶ this neither expands nor restricts the state's role in corporate law. Rather, it amounts to a transfer of value *between two private people*—the corporation and the fiduciary—where the fiduciary acquires a "free hand" to expropriate wealth from the corporation, while abusing the fiduciary's position of superior power and information.¹³⁷

Applying all this to a recent case (which received extensive scholarly attention),¹³⁸ the Delaware Court of Chancery partly misspoke when saying that "[t]he State of Delaware is an ever-present party to the . . . corporate contract, and the terms of the corporate contract incorporate the provisions of the [Delaware General Corporation Law (DGCL)]. Various sections of the DGCL specify what the contract must contain, may contain, and cannot contain."¹³⁹ The existence of a private law statute, like the DGCL, does not make the state party to the private relationship—not any more than the existence of the Uniform Commercial Code¹⁴⁰ makes the state party to every sales contract.

In context, the *Salzberg* Chancery opinion was correctly trying to convey that corporate law has a certain structure, and that, in fact, the "corporate contract" is not a contract at all.¹⁴¹ Law does indeed have the power to specify what contracts—and corporate charters, and property deeds, and acts of tort, and wills—can or cannot contain, or lead to. Yet, "law" is not the same as "the state," and there was no real need to invoke the latter concept in this case, or more broadly in the debate over corporate law's character as mandatory or enabling. The law can *do things*; it can create

135. See *supra* text accompanying notes 59–67.

136. See, e.g., Raz, *supra* note 27, at 573–81 (discussing and criticizing the concept of "waiving" all fiduciary duties owed to a limited liability company (LLC)).

137. See, e.g., Licht, *supra* note 54, at 179 ("[A]symmetries due to unobservable and unverifiable information . . . provide a compelling justification for a strict, full-disclosure-based [fiduciary] accountability regime.").

138. See Raz, *supra* note 34, at 227 n.17 (citing a wide range of scholarly works dealing with the *Salzberg* case).

139. *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578, at *5 (Del. Ch. Dec. 19, 2018), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020).

140. See U.C.C. § 2 (AM. L. INST. & UNIF. L. COMM'N 2012) (Uniform Commercial Code, enacted into law in whole or in part by all U.S. states; this UCC article providing legal norms governing the rights and duties of parties to sales contracts).

141. See Raz, *supra* note 34, at 277–83.

numerous devices, from contracts to fiduciary duties to legal persons, none of which would be possible without law.¹⁴² It can also make some of those devices mandatory. For some reason, in present legal and economic discourse (particularly in the U.S.), we find a common, yet entirely mistaken idea: that if something is not a contract, it belongs in the domain of public law, or it necessarily involves “the state” engaging in “regulation.” In fact, the power of law is no less sweeping when it is private law.

Summarizing so far, this Section has focused on the internal perspective, which is the viewpoint embraced by private law generally, and by corporate law specifically. It has addressed three common types of claims made by public-utility theorists of corporate law: the *Dartmouth College* argument,¹⁴³ the registration argument,¹⁴⁴ and the mandatory structure argument.¹⁴⁵ In each case, this Section has shown that the evidence underlying such claims, when examined closely, points in the opposite direction: corporate law is, in fact, part and parcel of private law. Part III below further illustrates this classification, using several real-world examples.

Corporate law, however, also demands strict legal compliance—especially with regard to the categories that lie *outside* of corporate law itself. This fact responds to those concerned with the external perspective, among them policymakers and scholars who advocate the stakeholderist conception of corporate law.¹⁴⁶ The following Section is devoted to the corporation’s duty, as a creature of private law, to obey *all* laws—and the implications of that duty for several high-currency policy debates.

B. *Clarifying the Role of Non-Corporate Law in Respect to the Corporation*

By this point, it is clear that this Article provides “a happy *raison d’être*”¹⁴⁷ for corporate law. It observes that corporations are a net benefit to

142. See, e.g., Dagan et al., *supra* note 126, at i (“[M]arkets arise out of and operate through law—not just through public regulation but also through private law regimes . . . that create entitlements, enforce market exchanges, and limit expropriation.”).

143. See *supra* text accompanying notes 87–92.

144. See *supra* text accompanying notes 93–101.

145. See *supra* text accompanying notes 102–37.

146. See, e.g., *supra* notes 3–4 and accompanying text.

147. Hanoch Dagan & Irit Samet, *Express Trust: The Dark Horse of the Liberal Property Regime*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EXPRESS TRUSTS* (Simone Degeling, Jessica Hudson & Irit Samet eds., forthcoming 2023) (manuscript at 56), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753282 [https://perma.cc/8TS8-EK9A].

society, and that corporate law's unique *legal* structure produces a better, more innovative and entrepreneurial human experience. This beneficial posture, however, does not arise in empty space. Just like flesh-and-blood humans (with whom corporations share their legal personhood), corporations are subject to the law. This fact might sound simple, bordering on obvious, but it forms part of the bedrock for private law's—including corporate law's—legitimate operation.¹⁴⁸ Put simply, general, non-corporate law applies to corporations just as much (and often more strongly) as it applies to humans. Corporations are required to meet all of their legal obligations, whether arising in private or public law. Moreover, as this Section explains in detail, even *within* corporate law we find a set of devices designed to maximize the corporation's compliance with its legal duties.¹⁴⁹

At the teleological level, corporate law dictates that the corporation's purpose—even a for-profit corporation—is not merely the pursuit of profit, but “the *lawful* pursuit of profit.”¹⁵⁰ The “lawful” part is equally as meaningful as the words “pursuit of profit.” It is no coincidence that corporate statutes, such as the Delaware General Corporation Law, state that corporations may only engage in “any *lawful* act or activity.”¹⁵¹ Indeed, “[t]he modern practice of allowing corporations to broadly state their purpose as pursuing ‘any lawful activity’ still reflects a public-regarding limit on corporate activity.”¹⁵² This statement is entirely accurate; yet, it is crucial to remember that “public-regarding” is not the same as “public law,” and does not mean that the “state” is directly involved in corporate affairs—not any more than contract law's prohibition on unlawful provisions turns contract law to public law, or makes the state party to every contract.¹⁵³

As a general matter, every corporate entity is subject to the law—meaning *all* legal fields and categories—just as it binds other people in society. Consider a recent, well-known case: the civil litigation arising from

148. See *supra* text accompanying notes 65–66.

149. For an extended discussion of the ideas presented in this Section, see Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933 (2022).

150. Raz, *supra* note 27 *passim* (emphasis added). Note that the same equally applies to corporations with a different purpose: a charity or a nonprofit corporation is also required to operate in full accordance with law, not just toward its charity beneficiaries, but also toward its employees, financial creditors, and so forth.

151. DEL. CODE ANN. tit. 8, § 102(a)(3) (2023) (emphasis added).

152. Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1452 (2021).

153. See, e.g., *supra* text accompanying notes 65, 135–42.

the opioid epidemic in the United States.¹⁵⁴ The case has two main features relevant to the discussion here. First, the vast majority of defendants are corporate entities, rather than humans.¹⁵⁵ As its personhood implies, the corporation itself is bound by the full range of laws that apply to private people, natural or otherwise. Second, the case has very little to do with *corporate* law, as “the plaintiffs seek remedies arising in such areas as tort law and unjust enrichment.”¹⁵⁶ These same characteristics were also present in the recent *Uber* case, where the United Kingdom Supreme Court imposed liability on Uber BV—a corporate entity—for violating the norms of employment law.¹⁵⁷

Moreover, while tort, unjust enrichment, and (to a large extent)¹⁵⁸ employment law are all categories within private law, the corporation is equally subject to public law. The corporation has obligations, and is required to meet them, under criminal¹⁵⁹ and tax law,¹⁶⁰ among others.

At this preliminary level, legal duties attach to the corporation because it is a legal person.¹⁶¹ If corporate law only said this, it might have been enough to bind every corporation to the full range of laws in a given jurisdiction.¹⁶² Crucially, however, corporate law does *not* stop there: it adds a plethora of corporate-specific devices, arising within corporate law itself, enforced by corporate law courts, utilizing corporate law tools of equity and fiduciary duty—and geared toward ensuring the corporation’s legal compliance.

Perhaps the most well-known, and recently high-profile, of these devices is corporate directors’ oversight duties: under Delaware’s

154. This complex case has generated many judicial opinions, an especially relevant one being the decision to deny defendants’ motions to dismiss, *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).

155. See Raz, *supra* note 27, at 554 n.163 and accompanying text.

156. *Id.* at 554.

157. *Uber BV v. Aslam* [2021] UKSC 5 (appeal taken from Eng.).

158. See Aditi Bagchi, *The Employment Relationship as an Object of Employment Law*, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW*, *supra* note 8, at 361.

159. See, e.g., Mihailis Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018).

160. See, e.g., ADAM WINKLER, *WE THE CORPORATIONS* 101–02 (2018).

161. See, e.g., sources cited *supra* note 73.

162. See, e.g., Sean J. Griffith, *Agency, Authority, and Compliance*, in *THE CAMBRIDGE HANDBOOK OF COMPLIANCE* 673, 673 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (“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.” (emphasis added)).

*Caremark*¹⁶³ doctrine, directors are duty-bound to implement and monitor a system of controls over the corporation's legal compliance.¹⁶⁴ If they fail to do so, they may be liable for violating their duty of good faith—and hence, their duty of loyalty to the corporation—with concomitant remedies.¹⁶⁵ Recent cases where *Caremark* claims have been upheld involve companies in the dining,¹⁶⁶ pharmaceutical,¹⁶⁷ and aviation¹⁶⁸ industries, among others.

The *Caremark* doctrine is one manifestation of the principle that corporations are only allowed to engage in lawful activities.¹⁶⁹ The following passage comes from the Delaware Court of Chancery, but it can equally be read into any jurisdiction organized around the rule of law:

Delaware law allows corporations to pursue diverse means to make a profit, subject to . . . 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.¹⁷⁰

Contrary to a common claim (or criticism) about corporate law—that it promotes a norm of “shareholder primacy”¹⁷¹—when we look at what corporate law actually does, a very different picture emerges: corporate law imposes an unconditional duty of legal obedience on its subjects, and enforces it through powerful concepts of equity and fiduciary duty. The legal claims of those actors who are *internal* to corporate law—namely, shareholders—only gain economic value after the corporation has met (or as

163. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

164. For discussion of recent cases where the *Caremark* doctrine has been applied, see, for example, Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019); Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021).

165. See *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (“[T]he requirement to act in good faith ‘is a subsidiary element[,]’ i.e., a condition, ‘of the fundamental duty of loyalty.’” (quoting *In re Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

166. See *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

167. See *In re Clovis Oncology, Inc. Derivative Litig.*, Consol. C.A. No. 2017-0222-JRS, 2019 Del. Ch. LEXIS 1293 (Del. Ch. Oct. 1, 2019).

168. See *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 Del. Ch. LEXIS 197 (Del. Ch. Sept. 7, 2021).

169. See *supra* note 91 and accompanying text.

170. *In re Massey Energy Co. Derivative & Class Action Litig.*, C.A. No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at *73–74 (Del. Ch. May 31, 2011) (footnote omitted).

171. E.g., Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 *passim* (2021).

long as it can meet) *all* of its other, non-corporate legal obligations.¹⁷²

The *Caremark* and *Massey Energy* doctrines, discussed above, are only the tip of the corporate compliance sphere. An additional device of this kind is the mandatory restrictions on the corporation's ability to distribute dividends, or perform share buybacks, in a manner that might leave it empty-pocketed, thus harming its non-shareholder creditors (say, when the time comes to repay a bank loan, or redeem a series of publicly-traded bonds).¹⁷³ The duty to avoid such distributions is imposed on the corporation's directors,¹⁷⁴ who face monetary liability—not subject to fiduciary-protective devices¹⁷⁵—if an unlawful distribution occurs.

Another doctrine that embodies the compliance norm in corporate law is the change in a corporation's purpose as it nears or enters insolvency, from an “entrepreneurial” to a “custodial” purpose.¹⁷⁶ This, once again, is meant to preserve and protect the legally-defined interests of the corporation's various stakeholders. We can point to several additional legal devices in this vein, including the seniority of preferred shareholders, to the extent they have a contractual or other non-corporate law claim toward the corporation,¹⁷⁷ and the judicial dissolution of law-breaking corporations.¹⁷⁸ Indeed, corporate law—with its construction of the corporation as a separate,

172. See, e.g., Asaf Raz, *Share Law: Toward a New Understanding of Corporate Law*, 40 U. PA. J. INT'L L. 255, 274 n.77 (2018).

173. See, e.g., DEL. CODE ANN. tit. 8, §§ 160(a), 170–174 (2023); Companies Act 2006, c. 46 §§ 830, 847 (UK).

174. See, e.g., tit. 8, § 174(a) (“In case of any willful or negligent violation of § 160 or § 173 of this title, the directors under whose administration the same may happen shall be jointly and severally liable . . . to the corporation, and to its creditors in the event of its dissolution or insolvency, to the full amount of the dividend unlawfully paid, or to the full amount unlawfully paid for the purchase or redemption of the corporation's stock . . .”).

175. See, e.g., tit. 8, § 102(b)(7) (stating that the corporation's certificate of incorporation may include “[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty,” but such a provision “shall not eliminate or limit the liability . . . under § 174 of this title”).

176. Amir N. Licht, *My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency*, 98 WASH. U. L. REV. 1731 *passim* (2021).

177. See, e.g., *LC Cap. Master Fund, Ltd. v. James*, 990 A.2d 435, 452 (Del. Ch. 2010) (“[I]t is the duty of directors to pursue the best interests of the corporation and its common stockholders, *if that can be done faithfully with the contractual promises* owed to the preferred . . .” (emphasis added)); Leo E. Strine, Jr., Response, *Poor Pitiful or Potently Powerful Preferred?*, 161 U. PA. L. REV. 2025, 2040 (2013) (“To the extent the preferred get a contract right, they are preferred. To the extent they do not, they are subject to the same risks as other stockholders and entitled to no extra value or rights.”).

178. See, e.g., tit. 8, § 284(a) (“Upon motion by the Attorney General, the Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises.”).

duty-bound entity, and its powerful doctrines of legal compliance—is far from being the contractarian, no-rules haven envisioned by some scholars over the last several decades.¹⁷⁹

In any event, for these doctrines to kick in, there needs to be a legal norm that is being violated. To the extent the corporation—like any other private person—*does* comply with its legal obligations, it is entitled to keep the fruits of its efforts, to employ them in whatever manner it wishes, and to embark on its own trajectory of open-ended endeavors. Corporate law, similar to the rest of private law, is constantly vigilant and respectful of what other legal areas say,¹⁸⁰ but once those are honored, it leaves broad latitude for individual choice.

Relatedly, the stakeholderist push toward a vaguely defined obligation of “corporate social responsibility”¹⁸¹ looks under the wrong lamppost. By definition, positive law is the only way to impose legally enforceable duties on corporations (or any other person).¹⁸² Engaging in legal reform—as opposed to endowing directors with a free-ranging, practically unenforceable duty toward whichever stakeholders they prefer¹⁸³—clarifies who actually has what rights, and can bolster both the enforcement of those stakeholder protections, and the quality of public debate about them.

To summarize this Part, corporate law exemplifies private law’s mission of ensuring “autonomy” and “self-determination”¹⁸⁴ for private people. It does so by creating and enforcing rights that subsist between those people, as opposed to the state or the economy at large. In the corporate context, these mainly include the corporation’s fiduciary claims toward its managers, and shareholders’ equitable claims toward the corporate entity.¹⁸⁵ At the same time, corporate law exists within a broader structure, which entails the corporation’s duty to obey any and all laws, whether corporate or non-corporate, private or public (from contract, through employment and environmental, to criminal law).

Corporate law thus adopts the internal perspective, while maintaining

179. Cf. EASTERBROOK & FISCHER, *supra* note 26.

180. See *supra* text accompanying notes 65–66.

181. See, e.g., Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167 *passim* (2018) (calling for greater reliance on “CSR,” and criticizing reliance on positive law as a mechanism to constrain corporate behavior).

182. See, e.g., Griffith, *supra* note 162, at 673.

183. 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.”).

184. E.g. Dagan, *supra* note 8, at 177.

185. See *infra* Part III.

constant *reference* to the external viewpoint, concerned with the corporation's place within the broader legal system, and indeed the public, the economy, and society. This is the precise manner in which other areas of private law—including contract, property, and tort law—operate in their respective domains. Corporate law also involves the state in a similar role: not as a “regulator,” but as a formulator and enforcer of rights and duties that run between private people. Because corporate law uniquely operates in the *ex post* dimension, strongly facilitating open-ended behavior, it gives rise to more mandatory structure (including equity and fiduciary duties), meant to deal with the difficulties that might accompany such behavior. In any event, those who reside within this structure are private individuals and entities.

III. HOW CORPORATE LAW'S PRIVATE PERSPECTIVE OPERATES IN PRACTICE

This Part utilizes several examples to demonstrate how corporate law concerns itself, first and foremost, with the creation and enforcement of individual rights and duties.¹⁸⁶ Even when those entitlements clash with, or otherwise do not maximize, overall efficiency (or other “public” values), corporate law defends them.¹⁸⁷ This perspective is shared by other areas of private law. In property law, for example, the owner of a car may leave it standing for years, undriven, in a garage; for all its inefficiency, this choice is perfectly protected by law. No person has the right to take the public welfare-increasing action of entering the car and using it in some economically productive way. The government can, hypothetically, pass a law saying that cars have to be used periodically; if such law is validly made, the owner will be required to obey it, as Section II.B above emphasizes. Yet, within the internal domain of property law, the concept of ownership excludes even efficiency-enhancing interlopers.¹⁸⁸

Similarly, the actors who are internal to corporate law—corporate entities, shareholders, and fiduciaries—have rights and duties *vis-à-vis one another*. While these people are also required to obey general, non-corporate

186. See, e.g., Dagan et al., *supra* note 126, at i (“[M]arkets arise out of and operate through law—not just through public regulation but also through private law regimes . . . that create entitlements, enforce market exchanges, and limit expropriation.”).

187. As described *supra* Section II.B, if such society-wide values are protected by positive law, corporate law does strongly defend them. The argument here pertains to claims that are not grounded in law, but rather, in wishes to increase overall efficiency, or other extra-legal public concerns.

188. See generally Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055 (2015) (discussing the concept of exclusion in property law).

law, the rights and duties generated *within* corporate law (which are limited *by*, but not limited *to*, the legal obedience requirement) are not toward the public, the state, or the economy as a whole. As Professors Kahan and Rock recently described this point, “corporate law . . . has a strong ‘single firm focus’ . . . that stands in sharp contrast to [a] potential ‘multi-firm focus.’”¹⁸⁹ The following Sections provide two practical examples: the manner in which corporate law imposes fiduciary duties to the benefit of the corporation alone; and the equitable, quasi-proprietary nature of shareholders’ rights.

A. *The Corporate Entity as the Beneficiary of Fiduciary Duties*

It is well-established that corporate directors are fiduciaries¹⁹⁰—in fact, one of the most readily recognized categories of actors on whom such duties are imposed.¹⁹¹ The same applies to the corporation’s officers¹⁹² and its controlling shareholders,¹⁹³ among others.¹⁹⁴ Indeed, “[o]f all concepts central to the corporate form, corporate fiduciary duties have attracted the most extensive treatment.”¹⁹⁵

Yet, to quote Justice Frankfurter’s well-known statement, the previous paragraph “only begins analysis; it gives direction to further inquiry. [Among other questions,] [t]o whom is [the fiduciary] a fiduciary?”¹⁹⁶ In

189. Kahan & Rock, *supra* note 32, at 3.

190. *See, e.g.*, *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (“Delaware law confers the management of the corporate enterprise to the stockholders’ duly elected board representatives[, who have] [t]he fiduciary duty to manage [the] corporate enterprise . . .” (citation omitted)).

191. *See, e.g.*, Andrew S. Gold & Paul B. Miller, *Introduction*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 24, at 1, 1 (“[Fiduciary duties] structure a wide variety of commercial relationships, including those between . . . director and corporation.”).

192. *See, e.g.*, *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (“[O]fficers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and . . . the fiduciary duties of officers are the same as those of directors.”).

193. *See, e.g.*, Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, 72 *VAND. L. REV.* 1977 (2019) (surveying case law and recent developments in this area).

194. For example, non-controlling activist shareholders should also be treated as fiduciaries, to the extent they direct some part of the corporation’s activities. *See Raz, supra* note 27, at 567–70.

195. Miller, *supra* note 16, at 357.

196. *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 86 (1943).

Delaware¹⁹⁷ and many other jurisdictions around the world,¹⁹⁸ corporate law provides a clear answer: fiduciaries owe their duties to the corporation itself. This is significant, because it means fiduciaries are *not* obliged to act in the interests of shareholders, stakeholders, or the public as a whole; they are under no legal duty to take the most efficient, or public welfare-enhancing, course of action. They are, in other words, private law actors, tied by an obligation of loyalty to another, specific *person*.

To those studying private law, and its interaction with broader norms, the structure of corporate fiduciary law is interesting for several reasons. First, from the foundational viewpoint¹⁹⁹ of Hohfeldian analysis,²⁰⁰ rights and duties can only subsist between persons (as opposed to between contracts, or other rights and duties).²⁰¹ The fact that fiduciary duties are owed to the corporation, therefore, implies that the corporation is a person; that is so not merely because it is owed such duties, but because corporate *law*, as a structured framework, makes the corporation into a legal person.²⁰² The phenomenon of corporate personhood—a unique creation of corporate law—sheds light on the complexity and richness that private law can achieve.

Second, within general fiduciary law, a long-running debate concerns the precise nature of the obligation imposed by the fiduciary relationship: is it what Professor George Fletcher called “minimal loyalty,”²⁰³ where the fiduciary is required merely to avoid conflicts of interest—or is it “maximum loyalty,”²⁰⁴ where the fiduciary is required to actively and whole-heartedly

197. See, e.g., *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) (“[D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests . . .”); Raz, *supra* note 149, at 947 nn.74–78 and accompanying text, 1001.

198. See, e.g., Companies Act 2006, c. 46 § 170(1) (UK) (“The general duties specified in sections 171 to 177 are owed by a director of a company to the company.”); Klaus J. Hopt, *Directors’ Duties to Shareholders, Employees, and Other Creditors: A View from the Continent*, in *COMMERCIAL ASPECTS OF TRUSTS AND FIDUCIARY OBLIGATIONS* 115, 116 (Ewan McKendrick ed., 1992) (“The general rule in most European countries is that directors have direct duties and liabilities only to their company.”).

199. See, e.g., Parchomovsky & Stein, *supra* note 40, at 1320 & n.1 (stating that “our legal system is organized around the concepts of rights and duties,” and that Hohfeld’s work provides “a classic account of this organization”).

200. See Hohfeld, *supra* note 39.

201. See, e.g., Nyquist, *supra* note 41, at 239–40 (“[Hohfeld] argues that a legal relation is always between two persons . . . [I]f someone has a Hohfeldian right, another person has a duty.”).

202. See, e.g., sources cited *supra* note 73.

203. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 41 (paperback ed. 1995).

204. *Id.* at 61.

operate to advance the beneficiary's interests? The latter concept similarly appears in Professor Arthur Laby's work on loyalty as the adoption of ends.²⁰⁵ Here, it makes sense to adopt Professor Andrew Gold's view that, as a general matter, fiduciary law can accommodate both options—either one can apply, depending on the type of relationship.²⁰⁶

In any event, within corporate law (unlike, say, trust law, characterized by more passive custodianship of assets),²⁰⁷ a clear choice is made in favor of the latter, affirmative devotion view.²⁰⁸ This is consistent with the broader structure of corporate law and its open-endedness principle. The corporation, a purposeful person, can only operate in the world through other people (its fiduciaries); because of that, fiduciaries are legally obliged to actively and continuously advance the corporation's purpose.²⁰⁹ This occurs within a private law relationship, shaped by private law concepts (here, fiduciary duty), and geared toward resolving the difficulties that arise between a private duty-holder (the fiduciary) and a private right-holder (the corporation).

Third, and perhaps most closely related to private law's individual perspective, corporate fiduciary law provides a clear response to the debate between "monistic" and "pluralistic"²¹⁰ conceptions of the fiduciary obligation. Given the fact that fiduciary duties are imposed to the corporation's sole interest, both shareholders²¹¹ and stakeholders are excluded from fiduciary benefit. Their rights are legally grounded in their

205. Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFFALO L. REV. 99 (2008).

206. See Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 24, at 176, 190.

207. See, e.g., Licht, *supra* note 176, at 1745–49. Trust law is an important ancestor in corporate law's historical lineage, but they have grown highly divergent—which, again, points to private law's depth and pluralism.

208. See, e.g., *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36–37 (Del. Ch. 2013) (“[Directors’ decisions should] benefit the corporation [T]he duty of loyalty . . . mandates that directors maximize the value of the corporation over the long-term”); Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 636 (2010) (“[T]he director’s job demands affirmative action—to protect and to better the position of the corporation.”)

209. See, e.g., Raz, *supra* note 27, at 563.

210. E.g., Amir N. Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 78, at 387, 389.

211. With the relatively narrow exception of “Revlon mode,” or a few other situations where fiduciaries’ duties are directly channeled, ad hoc, to shareholders. See, e.g., Raz, *supra* note 172, at 298–300.

equitable relationship with the corporation, in the case of shareholders;²¹² or in non-corporate law, in the case of stakeholders.²¹³

Even more abstract concepts—such as the economy as a whole, or all the corporations in a given industry—are not at the center of corporate law, and may not be considered as an object of fiduciaries’ duties (especially not when they conflict, in any way, with the corporation’s benefit). Consider, for example, certain law and economics scholars (an important constituency within the public utility vision of corporate law),²¹⁴ who emphasize the economic concept of “diversification,”²¹⁵ pointing out that shareholders can invest in securities issued by hundreds or thousands of different corporations; as a result, the fate of any single corporation should not matter much to them.

This brand of scholarship, however, starts from the wrong assumption. It overlooks the fact that shareholders are not the recipients of fiduciary duties; the corporation is. Hypothetically, even if every shareholder owned the shares of one thousand different corporations, each of those would still be owed duties, specific to itself, by its fiduciaries. In fact, this is exactly the point of Kahan and Rock’s recent article, dealing with the highly salient problem of “common ownership.”²¹⁶ In that context, the question is whether institutional investors—who often serve as fiduciaries *for the corporations in which they invest*, in addition to their own investors²¹⁷—can “sacrifice”²¹⁸ certain companies in their portfolio, presumably to achieve an increase in the value of the entire portfolio. As Kahan and Rock correctly find, the answer is no.²¹⁹ While Kahan and Rock’s article does not explicitly rely on the concept of private law, their logic and conclusions are fully compatible with the analysis provided in this Article.

Attempting to ignore corporate law’s single firm focus, as many public-utility theorists suggest, amounts to missing the trees for the forest: if no corporation was owed enforceable fiduciary duties, not even the *entire set* of corporations in the economy (or in a specific industry) could enjoy the services of loyal managers, who promoted their value—and, among other effects, caused their share prices to increase over time. Just as a lawyer or a doctor operate within a private law framework, where their duties run to

212. *See id. passim.*

213. *See supra* Section II.B.

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

215. *E.g.*, John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 *passim* (1986).

216. Kahan & Rock, *supra* note 32.

217. *See, e.g.*, Raz, *supra* note 27, at 567–70.

218. Kahan & Rock, *supra* note 32 *passim.*

219. *See id.* at 35–37.

specific people—and not to public or society-wide concerns²²⁰—so do corporate directors, officers, and other fiduciaries.

B. The Equitable Nature of Shareholders' Rights

An earlier article²²¹ discusses a curious private law case decided in 2017, *General Guardian v. Co-Op Blue Square Services Cooperative Ltd. (In Liquidation)*.²²² The case involved a non-publicly-traded corporation that went into liquidation proceedings; after satisfying all obligations to stakeholders, it maintained a large positive net worth (also known as shareholders' equity). Accordingly, this amount had to be distributed to its shareholders. There was just one problem: the corporation was over seventy years old, and most shareholders joined many decades ago; in fact, about 10% of shareholders could simply not be located, because they changed their address or for other reasons ("the unknown shareholders"). During liquidation, all of the known shareholders received their dividend, as did some previously unknown shareholders, who continue to show up in a slow trickle, owing to various newspaper and online announcements.

At some point, however, the liquidator felt the proceedings have been dragging on for too long, and petitioned the lower court to (essentially) distribute *all* the remaining funds among the *currently known* shareholders, thus irrevocably forfeiting the unknown shareholders' claims. The lower court granted this motion, in a fairly brief opinion, sharing the liquidator's sense of practical urgency.²²³ On appeal, the decision has been reversed.²²⁴ The court held that the unknown shareholders have a non-time-barred right to get their liquidating dividend; the corresponding amount—about \$15 million—was ordered to be deposited in trust, for each shareholder to receive whenever they appear.²²⁵ The court thus adopted an equitable, perhaps even a "quasi-proprietary,"²²⁶ view of the nature of shareholders' rights.

For a scholar embracing the public utility vision of corporate law—

220. Similar to the argument made *supra* Section II.B, lawyers and physicians are subject to a broad array of laws, some of which are not primarily concerned with the client's or patient's benefit. See, e.g., W. Bradley Wendel, *Should Lawyers Be Loyal To Clients, the Law, or Both?*, 65 AM. J. JURIS. 19 (2020). Yet, after complying with those external laws, the lawyer or physician is left with fiduciary discretion, which must be applied in the beneficiary's sole interest.

221. Raz, *supra* note 172.

222. CA 238/16 (Isr. Sept. 10, 2017).

223. See Raz, *supra* note 172, at 265 n.31 and accompanying text.

224. See *id.* at 266–69.

225. See *id.*

226. *Id.* at 306.

whether a law-and-economist, or a public-law theorist—this decision might be hard to fathom. After all, if the funds had been distributed among the known shareholders—presently visible economic actors—it is likely that the property would be used in a more *efficient* manner, compared to it being near-frozen in the hands of a single trustee. Similarly, from a public law perspective, distributing the funds at present might have served society better than withholding them and waiting for each claimant to appear in some unknown future.

Yet, the decision makes perfect sense once we recognize that corporate law is private law. It is consistent with Professor Hanoch Dagan’s observation that private law “address[es] the ways in which we live and interact in the world as people, rather than as citizens.”²²⁷ Although the unknown shareholders cannot currently be *located*, they undoubtedly *exist* and are *people*, having their own Hohfeldian claims vis-à-vis the corporation (and, following the court’s decision, the trustee). Like other private law rights, even when the public or the economy at large seem to demand so, those claims cannot be made to disappear into thin air.

Clearly, the unknown shareholders might share some degree of fault in not appearing earlier to get their money. Private law can handle this by, for example, deducting from the trust corpus the amounts it took to litigate the matter, as well as the trustee’s fees. What private law cannot, and was never designed to do, is make all-or-nothing determinations²²⁸ in the name of external (economic, political, or other) factors, with respect to rights and duties that subsist between private individuals and entities.

CONCLUSION

Corporate law is again in the spotlight, with a range of high-profile debates—first and foremost, the question of corporate purpose, and the role corporations should play in broader society. Policymakers and scholars, however, have yet to answer a preliminary question: is corporate law part of private law, or is it public law? Far from being a mere exercise in taxonomy, correctly locating corporate law among these traditions can aid us in discerning the corporation’s social function, and the manner in which it ought to be regulated by the state.

Moreover, untangling the private-vs.-public distinction can breathe fresh air into corporate law scholarship, exposing it to insights from the

227. Dagan, *supra* note 8, at 177.

228. This is also consistent with the equitable maxim that “equity abhors a forfeiture.” MICHAEL LEVENSTEIN, *MAXIMS OF EQUITY* 77 (2014).

rapidly developing new private law (NPL), with its mission of bridging internal and external perspectives on the law, and its emphasis on notions of structure and classification, signaling a welcome alternative across the spectrum of existing approaches, from legal realism to more hermetic conceptions of law. Yet, when scholars today discuss private law, they mostly focus on the “core” areas of contract, property, and tort, to the exclusion of corporate law. This historical division, which manifests strongly even in institutional terms (academic centers, teaching positions, publications, and events usually cover either private *or* corporate law), should come to an end.

As this Article has demonstrated, corporate law is part and parcel of private law. In this regard, it can be viewed as equally traditional as contract, property, or tort law. In the hierarchy of private law, corporate law resides on the same level as these categories. Having its own, highly distinctive structure, it does not emulate or emanate from any other framework. Corporate law’s structure integrates several concepts—corporate purpose, corporate personhood, legal obedience, equity, and fiduciary duty—the first two fully internal to corporate law, and the latter three, while shared by other private law categories, employed in a highly specialized manner in the corporate context.

While unique, corporate law also shares the characteristics of other private law areas, discussed in Part I, in most important respects: its *telos* is the enhancement of individual autonomy and mutual respect for people’s ability to lawfully determine their life paths; the actors on the playing field are private ones—corporate entities, shareholders, and fiduciaries; and the viewpoint of the individual is often prioritized over considerations of efficiency, or other society-wide claims.

Part II has addressed four common arguments made by scholars and judges who—contrary to this understanding—espouse a “public utility vision” of corporate law (including contractarian law-and-economists and public-law theorists, together comprising the two main schools of thought in modern corporate scholarship). First, the present-day reliance on nineteenth-century precedent is misplaced, since corporate law has undergone thorough change, today making the state’s role in it indistinguishable from its role in other private law frameworks. The state *legislates* and *adjudicates* corporate law (just like contract, property, and tort law), but is not itself a right-and-duty bearing actor on the corporate law playing field.

Second, the fact that corporations are required to register with a state agency, as condition to their existence, does not make corporations “creatures of the state”; rather, it is similar to the state’s function as a registrar, or as information provider, in other private law areas, including

property and inheritance law.

Third, the large body of mandatory rules and principles in corporate law—the fact that it has unwaivable structure—also does not turn corporate law into public law. Other private law areas, such as property, tort, and trust law (and to some degree, even contract law itself), have mandatory structure as well. Corporate law’s structure, particularly its emphasis on equity and fiduciary duties, is meant to protect the legitimate interests of private actors—the corporate entity, its shareholders, and its fiduciaries—vis-à-vis one another.

Fourth, and especially important to current policy debates, corporate law—like the rest of private law—*does* often demand of its actors to operate in an other-regarding fashion. Because corporate law dictates that corporations are legal persons, they are subject to the full plethora of legal obligations imposed on people in society, both private (for example, meeting their duties as contract parties or trustees) and public (for example, obeying criminal law). Furthermore, corporate law presents several internal mechanisms designed to ensure the corporation’s compliance with general law. Whatever profit the corporation makes (and, occasionally, distributes to its shareholders), it can lawfully make only after meeting those obligations. Contrary to common arguments, corporate law does not, and never did, espouse a norm of “shareholder primacy”; rather, it is about the allocation, and enforcement, of rights and duties according to law.

Finally, Part III has discussed two practical examples of corporate law’s character as private law, adopting the individual’s point of view, rather than that of the public or the economy at large: the manner in which fiduciary duties flow within the corporate relationship—which means, with few exceptions, they run to the corporation alone; and the equitable, quasi-proprietary nature of shareholders’ rights.

Corporate law is a paramount achievement of private law. Through its unique structure, it facilitates both individual enterprise and legal obedience; both open-ended autonomy and, as derived from that, promotion of economy-wide efficiency and innovation. In a period of intense change for both private law itself, and law and society more globally, it is time to take a closer, nuanced look at what corporate law achieves, and how it does so: as a core component of private law.