

2012

Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood

Lyman P.Q. Johnson

Washington and Lee University School of Law, johnsonlp@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Lyman P.Q. Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 Seattle U. L. Rev. 1135 (2012).

This Article is brought to you for free and open access by Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood

*Lyman Johnson**

I. INTRODUCTION

This Article, the first of a multipart project, addresses the nature of corporate personhood, one area where law has played a central role in the history of corporate responsibility in the United States.¹ The treatment will be illustrative, not exhaustive. Consistent with the theme of the larger project, the Article serves to make the simple but important point that a full historical understanding of corporate responsibility requires an appreciation of the law's significant, if ultimately limited, contribution to the longstanding American quest for more responsible corporate conduct. On one hand, the spheres of law and corporate responsibility, although clearly complementary, might be seen as distinct, in both theory and practice. Law, after all, mandates—with the state's full sanctioning power behind it—compliance with specified standards of behavior. Apart from a decision to comply or disobey, there is no real exercise of discretion in choosing to abide by the law. “Responsible” conduct, on the other hand, presupposes the freedom to engage in or refrain from certain conduct. Viewed this way, corporate responsibility concerns can be seen as picking up precisely where legal strictures leave off. Consequently, a history of corporate responsibility could be written while being largely unmindful of law and legal theory.

* LeJeune Distinguished Chair in Law, University of St. Thomas (Minneapolis) School of Law; Robert O. Bentley Professor of Law, Washington and Lee University School of Law. I thank Professor Charles R. T. O'Kelley and all of the participants at the 2012 Berle Symposium, sponsored by the Seattle University School of Law, for their assistance and comments on this Article. The Frances Law Center at Washington and Lee University and the University of St. Thomas supported this project financially. Thomas McClendon provided research assistance.

1. The occasion for my larger project is the expected publication in late 2012 of a book that sweepingly and insightfully addresses the history of corporate responsibility in the United States. *CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE* (Kenneth E. Goodpaster & David H. Radbourne et al. eds., 2012). At the request of the several distinguished authors of the forthcoming book, I provided a working paper addressing certain legal aspects of corporate responsibility.

Scholarly discourse itself suggests a certain academic “siloin” of law and non-law treatments of corporate responsibility and its history. Both legal and other scholars have written quite extensively on corporate responsibility.² But despite the literatures occasionally overlapping, in recent years the academic discourses seem to be carried out more in parallel than continually and fruitfully interwoven. On the non-law side, this may stem from scholars failing to fully appreciate law’s formative role in corporate responsibility. On the law side, it may result from modern cor-

2. There is a vast literature on law and corporate social responsibility. No effort is made in this Article to cite to all of it. There are, however, a few works of scholarship that, in addition to making outstanding contributions of their own, collect a great deal of the pertinent literature. See, e.g., THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992); Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005); Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605 (2001); Aaron K. Chatterji & Barak D. Richman, *Progressive Visions of the Corporation: Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33 (2008); David L. Engel, *An Approach to Corporate Responsibility*, 32 STAN. L. REV. 1 (1979); Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT’L L. 452 (2008); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992); Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009); Symposium, *In Berle’s Footsteps—A Symposium Celebrating the Launch of the Adolf A. Berle, Jr. Center on Corporations, Law & Society*, 33 SEATTLE U. L. REV. 777 (2010) (several articles); C. A. Harwell Wells, *The Cycles of Corporate Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

Outside law, the subject of corporate responsibility typically has been addressed by those interested in corporate social responsibility and business ethics. Corporate social responsibility is often seen in the academy as a subdivision of management studies and is explored empirically using the methods of social science. Among corporate managers, corporate social responsibility is frequently seen as focused on external constituencies that include consumers, suppliers, the environment, local communities, and so on. Business ethics is often seen in the academy as a subdivision of philosophy or theology and is explored normatively using the methods of argument appropriate to those disciplines. Among corporate managers, business ethics is seen as a prescriptive discipline focused on corporate culture and governance that includes both internal constituencies (employees, managers, and investors), as well as the external constituencies noted above. I thank Professors David Radbourne and Kenneth Goodpaster at the University of St. Thomas Opus School of Business for describing the non-law academic treatments of corporate responsibility.

In this Article, the term “corporate responsibility” is used to encompass the overlapping realms of corporate social responsibility and business ethics. The non-law literature here too is vast. Besides the forthcoming book described in footnote 1, useful, illustrative works include the following: CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT (Andrew Crane et al. eds., 2007); RONALD R. SIMS, *ETHICS AND CORPORATE SOCIAL RESPONSIBILITY: WHY GIANTS FALL* (2003); R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409 (1994); Kenneth Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53 (1991); Kenneth Goodpaster, *Business Ethics: Two Moral Provisos*, 20 BUS. ETHICS Q. 741 (2010); Malcolm S. Salter, *Gaming and the Problem of Institutional Corruption in the Private Sector* (Harvard Bus. Sch. Working Paper No. 11-060, 2010).

porate law's disavowal of a full engagement with corporate responsibility, as elaborated in this Article.

The history of corporate responsibility in the United States itself, however, reveals no such neat cabining. The legal vein runs conspicuously throughout historical concerns about corporate behavior, especially as the twentieth and twenty-first centuries witnessed the full emergence of the large, multifunctional, and now global, public corporation.³ The legal thread, moreover, has two strands. First, there is that aspect seen in developments in positive law, whether legislative or judge-made, as more and more of American social life—including the corporate institution—has been subjected to regulation. Second, there is that aspect reflected in the larger legal culture of theoretical and normative discourse about corporate power and appropriate mechanisms for social control of that power and those who wield it.⁴

In addition to taking account of both facets of this legal history for a full telling of the corporate responsibility story, it is important to see that the two strands are not distinct, but intertwined. Changes in positive law mandating (or prohibiting) certain corporate conduct reflect a broader public consensus, a consensus in turn influenced by theories of corporateness and by evolving social beliefs about what comprises “responsible” corporate conduct under constantly changing conditions. Corporations—long deeply embedded in U.S. culture—pervasively affect consumers, employees, investors, creditors, media, philanthropy, scientific research, the environment, communities, and public policy. Thus, corporations powerfully influence the overall quality of life and create societal expectations of appropriate corporate conduct.⁵ Many such expectations become encoded into law and, at the same time, are accounted

3. See ALFRED D. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 36 (1977) (tracing the emergence of the large, modern corporation).

4. A good example is the annual conferences sponsored by the Berle Center at the Seattle University School of Law, where dozens of scholars gather to discuss various issues related to corporations.

5. See Allan C. Hutchinson, *Hurly-Berle—Corporate Governance, Commercial Profits, and Democratic Deficits* 21 (Osgoode CLPE Research Paper No. 11/2011, 2011), available at <http://ssrn.com/abstract=1777487> (“[Corporations have] ‘passed far beyond the realm of private enterprise . . . [and] have become more nearly social institutions.’” (quoting from the twentieth-century classic work by ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Harcourt, Brace & World, Inc. rev. ed. 1968) (1932))); see also Allen, *supra* note 2 (former Chancellor of Delaware Court of Chancery describing one conception of the corporation as a social institution). Today, this remains true, as illustrated by a recent Los Angeles Times editorial commenting on widespread public disenchantment with corporate America: “Corporations today influence their communities and society at large in ways [Milton] Friedman could not have conceived, and of which he might not have approved.” Michael Hiltzik, *Corporations Need a Social Conscience*, L.A. TIMES, Nov. 6, 2011, <http://articles.latimes.com/2011/nov/06/business/la-fi-hiltzik-20111106>.

for (or explained away) in various ways—and to greater or lesser degrees—in theoretical understandings of the firm.⁶ Conversely, by establishing new regulatory standards, positive legal change periodically ratchets up the level from which ensuing prescriptive discussions about yet additional responsible behavior will begin. In short, law and legal theory not only dynamically reflect but also shape the larger social and ethical terrain in which corporations function and in which discussions about “responsible” corporate conduct take place.

This Article discusses one of the four areas where law historically has both influenced and mirrored cultural expectations concerning corporate responsibility—the emergence of and struggle to come to grips with corporate personhood. The other three areas, to be treated in later articles, are corporate purpose, corporate regulation, and corporate governance. In addressing each of these spheres, the project’s overall aim is to highlight certain key developments in positive law, as well as critical issues in the larger theoretical and normative grappling with the phenomena of corporate power and corporate control in a democratic society characterized by both a strong private business sector heritage and an abiding expectation of responsible behavior. Any apparent legal or social accord on these core debates has always been, historically speaking, inconclusive and maddeningly provisional. History readily reveals, therefore, law’s recurrent role in coproducing, but never finishing, the story of corporate responsibility in a dynamic society.

The subject of corporate personhood is a longstanding and recurring topic that continues to vex and excite, as seen in the U.S. Supreme Court’s 1886 decision confidently asserting that corporations are legal persons for purposes of the Fourteenth Amendment⁷ and in its more splintered 5–4 decision granting corporations First Amendment free speech rights in 2010.⁸ Moreover, in the nineteenth century as the corpo-

6. See *infra* notes 114–22 and accompanying text.

7. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

8. *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Reaction to the *Citizens United* decision was swift and frequently quite critical. See, e.g., Ian S. Speir, *Corporations, the Original Understanding, and the Problem of Power* 3 (2012), available at <http://ssrn.com/abstract=1832672>; Elizabeth Pollman, *Reconceiving Corporate Personhood* 2–3 nn.1–5 (Dec. 1, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1732910>. Many proposals have been made to counter the outcome of the decision. See, e.g., Larry Ribstein, *Abolishing Corporate Personhood*, TRUTH ON THE MARKET (Nov. 6, 2011), <http://truthonthemarket.com/2011/11/06/abolishing-corporate-personhood/> (describing various proposals); see also *infra* note 18. Law review articles on *Citizens United* are proliferating at a rapid rate. See, e.g., Richard Epstein, *Citizens United v. FEC: The Constitutional Right that Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL’Y 639 (2011); Symposium, *Privacy, Democracy, and Elections*, 19 WM. & MARY BILL RTS. J. 859 (2011); Symposium, *Citizens United v. Federal Election Commission: Implications for the American Electoral Process*, 20 CORNELL J.L. & PUB. POL’Y 643 (2011); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV.

rate institution grew dramatically in significance as a source of private gain, it appeared to lose its original, explicit public-serving aspect.⁹ Although seemingly a setback for proponents of socially responsible corporate conduct, state governments never wholly relinquished lawmaking control over the make-up of corporate personhood. This confounding factor has continued to haunt full-fledged “private” accounts of firm theory.¹⁰ At the theory level, the nature of the corporation was hotly contested and has remained so, notwithstanding undoubted corporate personhood.¹¹ Even as the full contours of corporate personhood were being fleshed out in law and theory, the quest for corporate responsibility drew on and significantly benefited from the emergence of a distinctive corporate person that, as a meaningful social-legal actor in its own right, was distinguishable from its various formative constituencies. Distinctive personhood thus permitted the majority in *Citizens United* to accord corporations their own First Amendment political speech rights.¹² Concern about the adverse political and social ramifications of such corporate speech rights, however, was central to the dissent in that case.¹³

Historically then, corporate personhood has both necessitated and bolstered discussions about *corporate* responsibility, and served to fuel important twentieth-century debates about *corporate* purpose and *corporate* regulation.¹⁴ *Citizens United* is just one especially visible example of how legal acceptance of corporate personhood invites continuing debate about corporate responsibility. Recently, however, the predominant legal theory of the firm, i.e., the upgraded 1980s revival of a nexus-of-contracts theory, although not denying corporate personhood (even as it immediately disaggregates it), has served to deflect concerns over corporate responsibility away from the ambit of corporate law and into other venues.¹⁵ Thus, theoretical orthodoxy in modern legal discourse accepts corporate personhood. But by sharply separating the treatment of internal corporate governance relationships from that of a larger institutional responsibility, modern orthodoxy seeks to sidestep full engagement with the ongoing cultural quest for enhanced corporate responsibility. The

1197 (2011); Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027 (2011); Carol Herdman, Note, *Citizens United: Strengthening the First Amendment in American Elections*, 39 CAP. U. L. REV. 723 (2011).

9. See *infra* Part III.

10. *Id.*

11. *Id.*

12. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); see also *infra* Part II.

13. *Citizens United*, 130 S. Ct. 876; see also *infra* Part II.

14. See *infra* notes 28, 30.

15. See *infra* Part IV.

result is that corporate law today has little to say about a subject of great societal significance—corporate responsibility.

This Article proceeds in five parts. Part II provides a historical backdrop and describes the relationship between corporate personhood and corporate responsibility in U.S. corporations. Part III explains the historical societal concerns about corporate activity and who should address those concerns. Legal personhood for the corporation has not dampened those concerns; it has heightened them. Part IV discusses corporate personhood in the context of corporate theory and analyzes two theoretical approaches to corporate personhood—entity theory and the nexus-of-contracts theory—and discusses the consequences of the re-emergence of the nexus of contracts theory for corporate responsibility. Finally, Part V concludes that, ironically, modern legal theory trivializes the corporate institution and deflects the enduringly important topic of corporate responsibility away from corporate law and into other venues.

II. THE RELATIONSHIP BETWEEN CORPORATE PERSONHOOD AND CORPORATE RESPONSIBILITY

In 1886, the United States Supreme Court famously and tersely stated that a corporation was a legal “person for purposes of the Fourteenth Amendment.”¹⁶ Although a seemingly clear and authoritative pronouncement, the legal nature of a corporation, Professor Morton Horwitz has argued,¹⁷ was not settled by the *Santa Clara* decision; rather, it remained as hotly contested after 1886 as it had been prior to that time. In fact, the issue of what exactly is encompassed within the notion of corporate personhood continues to be pertinent to corporate responsibility in 2012, 126 years after *Santa Clara*. This relationship between corporate personhood and corporate responsibility was seen most vividly in the remarkable outcry over the Supreme Court’s 2010 *Citizens United* decision that struck down federal campaign finance laws and held that corporations (and unions) enjoyed a First Amendment right to freedom of speech, including political speech.¹⁸ If the issue of corporate person-

16. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886). For the definitive treatment of the historical aftermath of *Santa Clara*, see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 223–24 (1986). The article was revised for inclusion in Professor Horwitz’s subsequent book on American legal history. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 65–108 (1992) [hereinafter HORWITZ, TRANSFORMATION].

17. HORWITZ, TRANSFORMATION, *supra* note 16.

18. *Citizens United*, 130 S. Ct. at 913. For a description of the widespread negative response to the *Citizens United* ruling and nascent efforts to amend the U.S. Constitution to provide only humans, not corporations, with constitutional rights, see Susanna K. Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations* (Chapman Univ. Law Research Paper No. 10-37, 2010), available at

hood—and what that entails—had truly been settled in *Santa Clara*, or at some point thereafter, such a ruling should not have been unexpected or precipitated such controversy.

In seeking to reconcile conflicting lines of its own precedent, the majority in *Citizens United* ruled that the identity of the speaker, i.e., whether an individual person or a corporate body, did not constitutionally matter for freedom of speech purposes.¹⁹ But the concern in some quarters, notably Justice Stevens's lengthy dissenting opinion,²⁰ was that such a corporate right might enable wealthy business organizations to excessively influence and distort the outcome of U.S. political campaigns, a crucial element in the healthy functioning of a democratic society. Justice Stevens supported his position that corporations could constitutionally be distinguished from humans by identifying a few obvious ways in which a corporation differs from a "natural person": limited shareholder liability for corporate debts; a more durable continuity of existence, even to the point of perpetual life; separation of ownership of property and its control; and the fact that corporations have no consciences, no beliefs, no feelings, no thoughts, and no desires.²¹ These undeniable attributes of corporateness, however, made no difference to the majority's First Amendment analysis. Thus, sharp disagreement continues today over what legal rights should go along with modern understandings of corporate personhood.²² Importantly, pointed disagreement also continues today over what *responsibilities* should go along with twenty-first-century understandings of corporate personhood.

At a more fundamental level, in *Citizens United*, the justices in the majority and those in the minority seem to hold competing theoretical conceptions of corporateness, even though neither group elaborated at length on this fundamental point or sought to make it a central feature of the constitutional analysis. The majority described a corporation as an

<http://ssrn.com/abstract=1702520>. For an article placing *Citizens United* in historical context, see Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999.

19. *Citizens United*, 130 S. Ct. at 886, 892. On December 30, 2011, the Montana Supreme Court ruled that a state statute prohibiting corporations from making political contributions did not violate the First Amendment. *W. Tradition P'ship, Inc. v. Montana*, 271 P.3d 1, 13 (Mont. 2011). Two judges dissented on the grounds that *Citizens United* controlled. *Id.* at 14, 16 (Baker, J., dissenting).

20. *Citizens United*, 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part); see also Ripken, *supra* note 18.

21. *Citizens United*, 130 S. Ct. at 971. And to note an old observation, corporations also have "no bodies to kick or souls to damn." This observation was made by Edward Thurlow, Lord Chancellor of England, 1778–1792 and quoted by Terence Powderly in an article that appeared in the *Southland Times* on September 3, 1888.

22. In early 2011, for example, the Supreme Court held that the "personal privacy" exemption in the federal Freedom of Information Act did not extend to corporations. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1186 (2011).

“association of citizens,”²³ thereby suggesting that a corporation is best understood as a group of otherwise disaggregated natural persons joining together by agreement to mutually pursue a private endeavor. Such an association vision of corporateness does not by itself specifically distinguish a corporation from a partnership, a limited liability company, or any other noncorporate voluntary association but is instead a somewhat generic notion. Moreover, it does not explain how or why a corporation so viewed—with a range of constituencies likely eager to express diverse views—will easily “speak” with the singularity of a “corporate” voice.²⁴ Yet, the hierarchical governance structure of a corporation is such that a small group will decide for all others what the “corporation” will say; various individuals—including shareholders—may be offered channels to speak “within” the corporation, but they certainly have no authority to speak “for” it. This disjunction between voice “within” and voice “on behalf of” a corporation is not the same for other associations of humans where internal and external speech rights align, or even for an individual human where a range of “voices”—sometimes honest, sometimes dissembling, sometimes generous, sometimes selfish—are typically used as and when any particular individual, acting alone, so chooses.

The dissent in *Citizens United*, by contrast, asserted that corporations had been “delegated responsibility for ensuring society’s economic welfare.”²⁵ This emphasis not only highlights the ultimate source of corporate power²⁶ but it also suggests a public, not merely private, dimension to corporate personhood of a kind permitting, among other control features, retained government limits on political speech. Thus, the two sets of justices not only openly sparred over the First Amendment rights of corporations but they also seem to be animated by markedly different—if not fully articulated—visions of corporate personhood, and its public or private origins and character.

23. *Citizens United*, 130 S. Ct. at 906–07. This language is quite similar to that used in a 1906 Supreme Court decision holding that corporations have Fourth Amendment rights. *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“[A] corporation is, after all, but an association of individuals . . .”).

24. See Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech And Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 495 (2011) (noting that in the modern corporation there is “no singular corporate voice”).

25. *Citizens United*, 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part). Stevens expressly stated that his views did not specifically depend on a particular conception of corporateness because corporations differed from natural persons. *Id.* at 971 n.72. But his view that corporations possess a “delegated” economic authority makes his conception of corporateness more public-oriented in origin and character than the majority’s.

26. A widely lauded corporate law treatise made this obvious but oft-forgotten point in 1986. ROBERT C. CLARK, CORPORATE LAW 22 (1986) (“The state has power; it chooses to delegate it to the board of directors of a corporation.”).

Historically, corporate personhood has entailed an ever-expanding set of rights. It includes rights that are, like free speech, constitutional in nature, as well as the rights to own and transfer property in forms separate from the property of shareholders, to “partition” that property for firm creditors rather than shareholder creditors, to enter and enforce contracts, to initiate and defend lawsuits, and so on. The significance of modern understandings of corporate personhood goes far beyond the issue of corporate *rights*, however. Corporate personhood is immensely important to the subject of corporate *responsibility* as well. And this is true in ways going far beyond the political implications of corporate speech, as raised by those alarmed at the *Citizens United* decision.²⁷ Critics of this decision were concerned about what corporate spending might mean for political campaigns, a legitimate concern whatever one’s ultimate view on corporate personhood, and one with a long lineage in historically negative concerns about corporateness.

But the historical emergence of corporate personhood held promise as well as peril. The legal recognition of a distinctive corporate person—at least in the public corporation—represented a historically critical acknowledgment that control over an enterprise and its property and affairs had solidified in the hands of directors and managers, not stockholders or other participants in some amorphous association. Also, the interests of the business enterprise itself could not simplistically be equated with those of either investors or managers, each of whose interests might be at odds with those of the other and with broader social interests. This new legal-social actor—the corporation—may have held the power to inflict widespread harm, but it also had enormous potential to affirmatively advance societal expectations extending beyond the particular goals of capital providers and corporate managers. The capacity to inflict harm and the capacity to confer benefits are two sides of the same corporate-responsibility coin.

Concerns about the appropriate exercise of corporate power and influence eventually led to far-ranging and ongoing debates about a corporation’s overall institutional responsibilities, and specifically, about corporate *duties*, both by corporations themselves and by the business elites controlling them.²⁸ Concerns over the fiduciary duties of directors and managers inevitably raised, in turn, the baseline question of corporate *purpose*,²⁹ while a conception of corporations as distinct persons facili-

27. *See supra* notes 8, 18.

28. This subject will be addressed in the second part of this project. Lyman Johnson, *Law in the History of Corporate Responsibility: Corporate Purpose* (forthcoming).

29. *Id.*

tated wide-ranging legal *regulation* of corporations themselves,³⁰ as distinct from their human managers or other participants. Thus, the emergence of, and continued grappling with, a separate corporate personality, historically has been and still is, a significant breakthrough for corporate responsibility—legal and otherwise. Corporate responsibility has entailed negative concerns about harm-causing corporate behavior flowing from the endowing of corporate rights and more affirmative benefit-creating demands flowing from evolving expectations of corporate responsibility.

Some might decry rights for corporations and emphasize broader responsibilities, while others might celebrate corporate rights but resist corresponding responsibilities. In each case, however, the focus was on the rights and responsibilities of the corporate institution itself, not merely those of managers or investors or others associated with the corporation. This fascination with the corporation itself remained true even as the full contours of corporate legal personhood were still being fleshed out and disputed over the many decades leading up to, and now continuing after, *Citizens United*. The successful emergence of a distinct corporate person cannot be separated from, and only highlights, the deeper issues of societal expectation and societal control of the corporation.

III. THE APPARENT DESUETUDE OF PUBLIC-SERVING CORPORATENESS; UNEXERCISED PUBLIC CONTROL OVER CORPORATENESS

A. Corporateness for Private Gain

Concerns about corporate responsibility continued after the emergence of a legally distinct corporate person, but they existed long before as well. The early, pre-*Santa Clara* phase of the U.S. corporate responsibility issue reflected an ostensible dramatic shift in how society perceived the intended thrust of corporate activity. Specifically, the early-nineteenth century saw a turn toward the growing use of the corporate form to conduct business for private gain, a movement that grew dramatically throughout that century. This meant that during this period, the history of American business became entwined with the history of the corporation, and the shifting features of and attitudes toward the latter might be mistaken for those of business endeavors more generally. Prior to the nineteenth century, for example, many corporations were charged with carrying out public-serving functions,³¹ but this was not a require-

30. This subject will be addressed in the third part of this project. Lyman Johnson, *Law in the History of Corporate Responsibility: Corporate Regulation and Corporate Governance* (forthcoming).

31. HORWITZ, *TRANSFORMATION*, *supra* note 16, at 112. Justice Stevens emphasized this history in his opinion in *Citizens United v. FCC*, 130 S. Ct. 876, 949 (2010) (Stevens, J., concurring in

ment of business more generally. This public-service dimension seems not to have been an express legal prerequisite to corporate formation but instead reflected in practice a shared belief about the proper focus of corporate activity. Thus, colleges, guilds, and municipalities were often organized as corporations, as were such public-serving transportation ventures as canals or turnpikes.³² As of 1780, by contrast, colonial legislatures had chartered a mere seven business corporations.³³ By 1800, only about 335 business corporations had been chartered, and most were organized in just the last few years of the eighteenth century.³⁴ In short, the business corporation as we know it today was *not* a predominant figure in this country's early social landscape. Moreover, there appears to have been a correlating of corporateness with public-oriented service of a sort that did not exist with business activity more generally.

During this early period, corporations were created by the conferring of a special legislative charter, not via the general incorporation statutes we know today. One reason for this, emphasized by Justice Stevens in *Citizens United*, is that many persons believed corporations needed close scrutiny precisely because they were supposed to act consistent with public welfare.³⁵ Apparently, in this belief, it was not businesses as such that required close regulatory scrutiny, but only those endeavors—business or otherwise—carried out in corporate form. The charter was a useful regulatory mechanism that could impose limits on businesses conducted in corporate form that were more restrictive than those imposed on individuals doing business, such as limits on capitalization, property holdings, and duration of existence.³⁶ Thus, it was in the legal process for granting a corporate charter, not in the substantive requirements of law itself that the public-serving character of corporateness was in theory to be assured by the state. The general incorporation statutes, now familiar in every state, did not arise and spread until the early- and mid-nineteenth century.³⁷

part and dissenting in part); *see also* Speir, *supra* note 8, at 11–12 nn.47–48 (collecting references to public service aspect of early corporations). For authoritative treatments of the early American business corporation more generally, *see id.* at 3–4 n.10.

32. Speir, *supra* note 8, at 11–12 nn.47–48; *Citizens United*, 130 S. Ct. at 926. (Scalia, J., concurring).

33. HORWITZ, *TRANSFORMATION*, *supra* note 16, at 112.

34. *Citizens United*, 130 S. Ct. at 949 n.53 (Stevens, J., concurring in part and dissenting in part).

35. *Id.* at 949 (citing authority); *see also supra* note 31 and accompanying text.

36. Speir, *supra* note 8, at 42–43; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (describing restrictions).

37. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001). General incorporation statutes began with religious corporations in the late-

Special corporate charters, even if purportedly doled out to assure consistency with public welfare broadly speaking, fostered perceptions of political cronyism in gaining corporate status, a perception that led to their decline.³⁸ Thereafter, with special legislative action being unnecessary to *obtain* a corporate charter, corporate status became widely available. And there appeared to be no legal mechanism to ensure that corporations, once formed, must actually *serve* some public purpose. The early general incorporation statutes imposed strict limits on the corporation³⁹ but did not require public service as a condition to obtaining corporate status. This change in legal procedure for corporate formation therefore had potentially profound negative implications for the public-serving character of corporations, even though apparently it was not disavowal of that character of corporateness but concerns about cronyism that ended special chartering.

An illustrative statement of the early public-serving belief about corporateness can be seen in an 1809 Virginia Supreme Court opinion affirming the legislative chartering of an insurance company. Specifically, the court noted the following:

They ought never to be passed, but in consideration of services to be rendered to the public It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privileges.⁴⁰

In this passage, the court twice referred to the privileges of corporate status and twice to the element of public service. This judicial opinion exemplifies the belief that in the early-nineteenth century, there was no inherent legal right to carry on private business in the corporate form.

By the time of the 1819 Supreme Court decision in *Trustees of Dartmouth College v. Woodward*,⁴¹ this express public-service conception of corporateness was in apparent decline even as the chartering of

eighteenth century and were extended to business corporations in the early-nineteenth century. Speir, *supra* note 8, at 34–35 nn.247–50.

38. Speir, *supra* note 8, at 34–35 nn.247–50.

39. *Id.* at 42–43.

40. *Currie's Adm'rs v. Mut. Assurance Soc'y*, 14 Va. (4 Hen. & M.) 315, 437–48 (1809). Interestingly, the court referred to “associated individuals”—as did the majority in *Citizens United*—yet, the Virginia Supreme Court still insisted that such a conception of corporateness supported a public-serving function. The Virginia Bill of Rights of 1776 was explicit that “no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” Speir, *supra* note 8, at 33 n.237. This provision was applied to corporations in the 1809 decision by the Virginia Supreme Court.

41. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

business corporations was on the rise.⁴² An abiding societal concern with responsible corporate behavior by no means disappeared with the decline of public-serving corporateness but instead found fuller expression in strict regulation of corporations. Initially, this regulation took place within corporate law itself, and thereafter, through other laws⁴³ when corporate law ceased being regulatory.⁴⁴ Moreover, societal expectations also resurfaced in protracted twentieth-century debates about corporate purpose,⁴⁵ debates that periodically revived the earlier public-serving understanding of corporateness. Critically, the *Dartmouth College* case itself still emphasized the legally constructed and “unnatural” character of a corporation, preserving in this manner a powerful mechanism of social control over corporations even if it was thought to be socially beneficial to permit corporations to serve private interests during this period. The Court in *Dartmouth College* stated: “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.”⁴⁶

Although the Court acknowledged a state’s power to grant or withhold attributes upon formation of a corporation, it did not permit a state to later alter those attributes unless, as noted by Justice Story in his concurring opinion, states initially reserved that power to themselves,⁴⁷ a power easily exercised. Even prior to the *Dartmouth College* decision in 1819, the Supreme Court in its 1804 decision, *Head & Armory v. Providence Insurance Co.*,⁴⁸ had emphasized that corporations had limited powers and must strictly conform to legally prescribed modes of acting. In other words, corporations could be formed to advance private interests but—unlike natural persons—they possessed only those traits conferred by law, whether they served public *or* private interests.⁴⁹ Thus, unlike humans, corporations are not inherently “by the Laws of Nature and Na-

42. See *supra* note 31.

43. Johnson, *supra* note 30.

44. The subject of the deregulatory turn in corporate law and the rise of “external” regulation will be treated in a separate article. See *id.*

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

46. *Dartmouth Coll.*, 17 U.S. at 636.

47. *Id.* at 712 (Story, J., concurring). States already had begun inserting such “reserved powers to amend” in corporate charters before the *Dartmouth College* decision, and after that decision, this movement carried over to general corporation statutes. Today, forty-nine states and the District of Columbia have reserved powers to amend in their corporate statutes or constitutions. Speir, *supra* note 8, at n.272.

48. *Head & Armory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 169 (1804).

49. For a good recent summary of this “artificial person” theory of corporateness, see Ripken, *supra* note 2, at 106–09.

ture's God . . . endowed by their Creator with certain unalienable Rights⁵⁰

B. Public Control over Corporateness

It is important to modern theoretical understandings of corporate personhood to remember that the “artificial being” and “mere creatures of law” language from the 1819 decision in *Dartmouth College* has never been renounced. In 1987, 160 years after the *Dartmouth College* decision, the Supreme Court expressly invoked the language in a landmark decision, *CTS Corp. v. Dynamics Corp. of America*,⁵¹ upholding Indiana's antitakeover statute against constitutional attack. The Indiana statute, like many of that era, was shrewdly embedded in the Indiana corporation statute to curb rampant takeover activity of the 1980s that, rightly or wrongly, was widely thought to be socially harmful.⁵² The Supreme Court's pointed use of the *Dartmouth College* language in the *CTS* decision suggests that Professor Horwitz was premature in asserting that the “grant” theory of corporateness—i.e., that the corporation was an artificial being created by the state with limited, legally endowed powers—had eroded by the late-nineteenth century.⁵³ If it had eroded at that time, as Horwitz contends,⁵⁴ then it sprang to life again in 1987 as the Supreme Court upheld state efforts to dampen investor hopes of premium-carrying takeover bids by relying, in part, on just that basis.⁵⁵ Today's Supreme Court may not have a fully settled theory of corporate personhood, as evidenced by the dueling opinions in *Citizens United*,⁵⁶ but it has not jettisoned the position that corporations possess only those features with which they are endowed by law and that legislatures may advance the

50. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

51. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). The Court rejected both Commerce Clause and Supremacy Clause attacks on the Indiana statute. Justice Powell wrote the majority opinion in *CTS*. His earlier concurring opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), signaled to state lawmakers that there was room for state regulation of hostile takeovers. See Lyman Johnson, *Making (Corporate) Law In A Skeptical World*, 49 WASH. & LEE L. REV. 161 (1992).

52. Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989).

53. HORWITZ, TRANSFORMATION, *supra* note 16, at 72. Some other scholars also do not fully consider the *CTS* decision in their assessment. See Ripken, *supra* note 2, at 109 (“The artificial person theory of the corporation diminished in relevance over time.”). *But see* Avi-Yonah, *supra* note 18 (discussing *CTS*).

54. HORWITZ, TRANSFORMATION, *supra* note 16, at 72.

55. See *supra* note 51.

56. See *supra* notes 17–25 and accompanying text.

public welfare through corporate statutes.⁵⁷ Social control over corporations through corporate statutes may have substantially declined in the twentieth century, but it remains a potentially potent instrument.

Even if corporations eventually gained a fuller measure of *legal* personhood in the 124 years from *Santa Clara* to *Citizens United* and were permitted to advance private interests, the vein of legal thought that corporations still were not wholly “natural” has never disappeared.⁵⁸ Professor Horwitz’s analysis notwithstanding,⁵⁹ as a matter of positive law, corporations are legislatively endowed with—rather than inherently in possession of—certain traits.⁶⁰ This is true even though modern corporate statutes, such as the influential Model Business Corporation Act, broadly liken corporate powers to those of individuals and confer on corporations the “same powers as an individual to do all things necessary or convenient to carry out its business and affairs.”⁶¹ Apart from such express legislative grants of corporate powers, one wonders how else such human powers—or such obviously “unnatural” (or at least nonhuman) features as limited liability and perpetual duration—would or could arise. The legal attributes of limited liability and perpetual duration do not arise simply by an agreement of private parties to form a corporation.⁶² Rather, although such agreements are a necessary condition to forming corporations, without state action they are not themselves a sufficient condition to create or endow corporations with those unusual traits. Moreover, under the reserved power to amend corporate statutes,⁶³ states can and do amend corporate statutes in ways that some corporate participants themselves might find highly objectionable *ex post*.⁶⁴

57. Even the 1906 decision, *Hale v. Henkel*, 201 U.S. 43, 74 (1906), stated that the “corporation is a creature of the State.” In fact, *Hale* also used language suggesting a public-serving function of corporateness: A corporation “is presumed to be incorporated for the benefit of the public.” *Id.*

58. See *supra* note 51 and accompanying text.

59. See *supra* note 53 and accompanying text.

60. See Hutchinson, *supra* note 5, at 27 (noting the “neglected fact that the corporate form is a distinctly public-created institution which is brought into existence by the state and has certain conditional powers delegated to it by the state”). Recently, the editors of the market-favoring publication the *Economist* noted that “limited liability is a privilege” and “a concession—something granted by society because it has a clear purpose.” *Corporate Anonymity—Light and Wrong*, *ECONOMIST*, Jan. 21, 2012, at 16, available at <http://www.economist.com/node/21543164>.

61. MODEL BUS. CORP. ACT § 3.02 (2008).

62. See *Corporate Anonymity—Light and Wrong*, *supra* note 60 (“[T]he rest of us are giving a limited company [corporation] owner’s a perk.”).

63. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 676 (1819) (Story, J., concurring).

64. Certainly, many shareholders in potential target companies and hostile bidders themselves did not like antitakeover legislation of the kind upheld in the *CTS* decision. See Johnson & Millon, *supra* note 52.

Therefore, as a matter of widespread convention and practice, modern legislatures confer (and occasionally withdraw) very broad powers and other attributes of legal personhood on corporations—and doing so greatly facilitates doing business in the corporate form. But under the never-renounced reasoning of *Dartmouth College* and *CTS*, it is not clear that as a matter of constitutional law, they *must* do so, *Citizens United* notwithstanding. *Citizens United* presupposes a corporation with typically broad modern powers ordained by state law and holds that such a full-formed corporation enjoys First Amendment rights. It does not hold—or even address—whether states must in fact confer expansive, human-like powers on corporations in the first place. The text of the First Amendment, after all, forbids state action inhibiting existent rights and, for example, prohibits government actors from making a law “abridging” freedom of speech.⁶⁵ It does not, however, affirmatively create or confer such a right of speech on a corporation where a state chooses not to do so by refraining from even granting that power at inception. And a corporation that never possessed a capacity to speak (politically or otherwise), or that has the capacity only because it affirmatively selected such an “opt-in” feature, cannot have had such a nonexistent right “abridged” by government action.⁶⁶

Citizens United does not hold to the contrary. If it did, it would clash squarely with the enduring teachings of *Dartmouth College* and *CTS* that corporations have only those traits with which they are, by law, endowed.⁶⁷ Perhaps it is for this reason that the majority in *Citizens United* sidestepped the fundamental issue of corporateness in favor of its more amorphous association-of-citizens conception.⁶⁸ This notion permits a full-voiced corporation to engage in political speech because such a corporation is, in the majority’s eyes, just an “association of [natural] citizens.”⁶⁹ This resolves the speech rights of the typical, broadly empowered modern corporation while allowing the *Citizens United* Court to

65. U.S. CONST., amend. I.

66. Justice Scalia elsewhere stated that “the State cannot exact as the price of those special advantages the *forfeiture* of First Amendment rights.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting). But a feature never granted to a corporation is not “forfeited.” And when dissenting in an earlier corporate-speech decision, Justice Rehnquist observed that “the Fourteenth Amendment does not require a State to endow a business corporation with the power of political speech.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 826 n.6 (Rehnquist, J., dissenting).

67. *See supra* notes 41–47 and accompanying text.

68. *See supra* note 23. For a critique of *Citizens United* as not comporting with traditional corporate law principles, see Tucker, *supra* note 24.

69. *See supra* note 23.

avoid the issue⁷⁰ (not before it) of whether a state, under *Dartmouth College* and *CTS*, could constitutionally create politically “voiceless” corporations by electing not to endow them with that particular trait—or other traits thought inconsistent with the public good—in the first place.⁷¹

The critical issue then for ongoing concerns about the relationship between law and corporate responsibility is not simply the shifting substantive contours of emergent corporate personhood or the public-serving or private-serving character of corporate endeavor. Instead, the key legal issue is *who* in society determines those substantive contours and that character. Although having seemingly abandoned in the early-nineteenth century any insistence that corporations serve public welfare in some fashion, state governments today could easily reassert legal control over the structural make-up of corporations to make them more socially responsible. They could do so under an artificial-person theory of the kind last endorsed in *CTS*. That states historically have not often used their corporate statutes to control the composition of corporations formed for private gain so as to achieve public-serving outcomes (the statute upheld in *CTS* being a notable exception)⁷² does not mean they lack power to do so. We should not confuse a longstanding custom or competitive “race” among states to craft attractive, business-friendly laws with legal or historical necessity, even if those practices reach deep into the nineteenth century. Rather, for a long stretch of history, corporations have been permitted to advance private interests and corporate law itself has been deregulatory, but only because that particular approach was thought to be socially beneficial.

Thus, even today, corporate law could readily be used to modulate corporate conduct in ways thought to be more responsible and public-serving by altering one or more core attributes of corporate personhood. The example of political speech simply serves to illustrate this continu-

70. In his dissent, for example, Justice Stevens made it clear that particular theories of corporateness were of no consequence to his view that corporations differed from natural persons and could be treated differently under the First Amendment. *Citizens United v. FEC*, 130 S. Ct. 876, 971 n.72 (2010) (Stevens, J., dissenting).

71. It should be noted that the Montana statute prohibiting political contributions by corporations was not housed in the corporate statute, which broadly empowered corporations, but was in a statute regulating elections and campaign practices. See *supra* note 19. In my view, a more sound legislative strategy would be to address this issue in the corporation statute, where the formative attributes of a corporation are specified.

Ian S. Speir separately recognizes this possibility under state corporate law but is not certain such an approach would pass constitutional muster. Speir, *supra* note 8, at 60–61. For a consideration of, but ultimately a rejection of, an approach to regulating the corporate-governance processes authorizing corporate speech, see Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019 (2011).

72. See Johnson & Millon, *supra* note 52.

ing “reserved power.” Here, states concerned about corporate speech would not amplify or regulate expressive speech by corporations (or constituencies within them)⁷³ but would act by not endowing companies with the trait of political speech in the first place. This contemporary, and still contentious, subject is highlighted here only because it serves as just one illustration of a more general power. The existence of unexercised power over corporations means the fully emergent corporate “person” need not be in either rights or responsibilities legally identical to humans, and corporations likewise need not simplistically be equated to the institution of business more generally. Moreover, at the theory level, the constructed legal nature of the corporation reveals the ineradicable role of the state in specifying corporate characteristics and relations, notwithstanding a remarkably long historical period when state passivity might have legally disguised continuing social expectations of corporate responsibility.

IV. CORPORATE PERSONHOOD AND CORPORATE THEORY: DISTINCT ENTITY OR CONTRACTUAL AGGREGATION OF INDIVIDUALS

The second historical phase of the corporate personhood issue, post-*Santa Clara*, did not directly involve the earlier (and still latent) public- versus private-serving character of the corporate function but instead raised more pointedly the legal-existential question of what a corporation really “is,” and beneath that question, the issues of who controlled this institution and for what ends. Notwithstanding formal legal recognition of corporate personhood, the character of corporateness continued to be perplexing. Was it simply an aggregation of human individuals or was it a separate entity—whether “natural” or “artificial”—distinct unto itself?⁷⁴ This question, as Professor Horwitz observes,⁷⁵ was not settled by but only intensified on the heels of the 1886 decision in *Santa Clara*. Moreover, the legal and philosophical tussle over the “true” nature of corporate personhood became meaningful only in light of the dramatic growth in the number of corporations—and their rising socio-

73. Professors Lucian Bebchuk and Robert Jackson address who should have political voice in a public corporation—and they advocate shareholders and independent directors for that role—but they do not treat the more basic power and regulatory issue of state legislatures not conferring the trait of (political) speech in the first instance. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); see also David G. Yosifon, *Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders*, 21 HEALTH MATRIX 189 (2011) (proposing discourse norms for corporate speech to stakeholders).

74. See Millon, *supra* note 36; Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

75. HORWITZ, TRANSFORMATION, *supra* note 16.

economic prominence—throughout the nineteenth century and into the twentieth.

Notwithstanding the spread of general incorporation statutes and the availability of corporateness to serve purely private interests, the partnership form of business remained the standard vehicle of business enterprise until well after 1840.⁷⁶ The partnership form was used in a broad array of businesses, whether small merchants and storekeepers offering goods and services locally or wealthy merchant bankers engaged in more far-flung financial activity. Dramatic improvements in transportation technology (railroads during the 1840s) and later development of communication technology (the telegraph and telephone) permitted the dependable inflow of raw materials to, and the outflow of finished goods from, U.S. factories on an unprecedented scale.⁷⁷ Both the production and the distribution of goods could technologically take place at much higher levels than before. Thus, mass production was combined with mass distribution within a single business firm with regional and national reach. And this was true whether such a firm grew internally or by acquiring or merging with other smaller enterprises. In turn, large amounts of committed financial capital were needed, as well as a pre-arranged, centralized governance system that placed operational control in skilled managers.

Business historians attribute the epochal rise of the corporation to its remarkable capacity to support these macro-business trends.⁷⁸ But the corporate *form* of doing business has never been—and should not be—identified as equivalent to the long-existing activity of *business* itself. Rather, the corporate form is a useful arrangement through which business is conducted because it facilitates the accumulation of vast (and committed) capital due to the divisibility of investor equity into numerous “shares” of corporate stock. Eventually, unlike the case with partnerships, legal rights to a significant degree resided with (or at least were based on) the “stock” itself, not the “stockholder.”⁷⁹ Complex manufacturing enterprises also required people with specialized technical and managerial expertise, persons who very likely did not provide most of

76. CHANDLER, *supra* note 3. Today, another noncorporate form of business—the limited liability company—has once again surpassed the corporation in popularity for newly formed, closely held businesses. See Lyman Johnson, *Delaware’s Non-Waivable Duties*, 91 B.U. L. REV. 701, 704 n.12 (2011) (citing studies).

77. CHANDLER, *supra* note 3, at 76–78, 82–86.

78. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 389–94 (2003).

79. For example, within a corporation, voting rights and the right to receive distributions from a corporation are rights associated with the shares of stock—which are alienable—whereas within a partnership, voting rights are associated with the partner and typically are not alienable.

the financial capital. Thus, the provision of capital to the corporation and the management of the corporation were distinct functions, which the corporate form acknowledged. Limited liability, moreover, which developed haltingly, even into the early-twentieth century,⁸⁰ largely immunized passive investors from business liabilities, unlike nineteenth-century partnerships,⁸¹ thereby inducing their participation in ventures they did not and could not manage. Conversely, creditors of investors could not directly reach corporate assets, effectively and efficiently partitioning such assets for access by business creditors only.

These distinctive features would make far greater legal and conceptual sense—not to mention linguistic simplicity—if a corporation were considered a person or entity distinguishable from both its investors and managers.⁸² Nonetheless, before and after the turn of the twentieth century, an intense academic debate over corporate personhood ensued, with some advocating precisely such an “entity” theory of corporateness in which the corporation was viewed as legally distinct from its constituents. Others, however, urged the “aggregation” theory in which corporations were simply viewed as mere aggregations of individuals.⁸³

A. *The Rise of the Entity Theory*

Eventually, proponents of the entity theory prevailed,⁸⁴ and corporations by and large were understood as conceptually and legally distinct from investors, managers, and other participants. Thought to be central to halting the decades-long wrangling over the nature of corporateness was a 1926 essay by philosopher John Dewey, who argued that the competing theories were infinitely malleable, with each capable of limiting as well as enhancing corporate power⁸⁵—a position Morton Horwitz famously set out to refute.⁸⁶ The late-nineteenth and early-twentieth century debate

80. HORWITZ, TRANSFORMATION, *supra* note 16, at 291 n.165 (“[I]n most jurisdictions throughout the nineteenth century, the usual statutory provision made the shareholder liable for much more than—usually twice—the value of his shares.”).

81. Today, partnerships also may elect to provide general partners with limited liability, meaning they are not personally liable solely by reason of their partner status for partnership debts or obligations. *See, e.g.*, REVISED UNIF. P’SHIP ACT § 306 (1996).

82. Blair, *supra* note 78.

83. Millon, *supra* note 36.

84. *Id.* at 214; *see also* Ripkin, *supra* note 2, at 112–18 (describing natural entity theory but asserting courts have used multiple theories).

85. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). As of 1991, this article was described by one commentator as the most influential paper ever published by the *Yale Law Journal*. Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449 (1991).

86. HORWITZ, TRANSFORMATION, *supra* note 16, at 68. For a nuanced and extensive response to Horwitz’s “refutation,” see Millon, *supra* note 36.

over the nature of corporateness had taken on such urgency in the first place only because of what Horwitz described as the “crisis of legitimacy in liberal individualism arising from the recent emergence of powerful collective institutions.”⁸⁷ It was widely noted that much of our nation’s economic activity was conducted by large corporations and that those who controlled the governance of these mammoth organizations wielded vast and unprecedented social and economic power.⁸⁸ Under corporate rules as they ultimately developed, these control persons were not the stockholders, however, but a small handful of directors and managers.⁸⁹ Here, and in other ways too, the legal rules governing the corporate form of business differed from those in the partnership form, where the general partners at that time typically combined the capital-providing and management functions.⁹⁰

Thus, those large numbers of investors who provided financial capital to corporate enterprises did not and could not, at least in public corporations with dispersed investors, directly control or manage corporate affairs. As corporations grew in socioeconomic significance, those who managed them grew correspondingly in power, both in relation to investors and other groups within the enterprise itself and in external relation to society at large.⁹¹ Moreover, the corporation ushered in a new era of big businesses, businesses on a scale never seen before precisely because of the unusual corporate features noted above. As observed by Alfred Chandler, inevitably this meant that the “regulation of business became the paramount domestic issue in American politics in the early twentieth century.”⁹² Contending with the phenomenon of big business meant, necessarily, contending with the phenomenon of its handmaiden, the corporation.

The apparent triumph of an entity theory of corporateness—a triumph that took many years after the 1886 *Santa Clara* decision, which formally declared corporations legal persons⁹³—corresponded with an extensive endowing of corporations with various legal powers and rights, as partially chronicled in the several *Citizens United* opinions.⁹⁴ Importantly, however, for corporate theory, although corporations today

87. *Id.* at 72.

88. The seminal description is found in BERLE & MEANS, *supra* note 5.

89. *See, e.g.*, MODEL BUS. CORP. ACT § 8.01 (2008) (stating that the business and affairs of a corporation are to be managed by or under the direction of its board of directors).

90. *See* Blair, *supra* note 78.

91. BERLE & MEANS, *supra* note 5.

92. Alfred D. Chandler, Jr., *Government Versus Business: An American Phenomenon*, in THE ESSENTIAL ALFRED CHANDLER: ESSAYS TOWARD A HISTORICAL THEORY OF BIG BUSINESS 425 (Thomas K. McGraw ed., 1988).

93. HORWITZ, TRANSFORMATION, *supra* note 16.

94. *See supra* notes 18–26 and accompanying text.

clearly are persons, they still do not have all the constitutional powers accorded individuals; for example, they lack the Fifth Amendment protection against self-incrimination.⁹⁵ Moreover, they cannot vote or become citizens, and under corporate statutes⁹⁶ cannot serve as directors of corporations, unlike individuals. Horwitz's extended argument on the historical emergence of corporate personhood sought to demonstrate that an entity theory was far more compatible with the reality of centralized power in the corporate institution than the competing aggregation theory, and that it better legitimated such power. In this way, Horwitz seeks to offer a historical account of the ascendant reality of the corporate "group," not just the individual, as central to the growing organizational complexity of American law and society.⁹⁷ He insists, however, that it was not just any entity theory that prevailed but that it was a "natural-entity" or "real-entity" theory in particular.⁹⁸

Under this conception, a corporation is "a real and natural entity whose existence is prior to and separate from the state."⁹⁹ That position, however, is extremely hard to reconcile with the recent artificial-entity language of *CTS*,¹⁰⁰ and Horwitz does not convincingly demonstrate how the entity theory's triumph over the aggregation theory necessarily meant that the natural-entity conception theory triumphed over the artificial-entity theory.¹⁰¹ Each entity theory adequately accounts for the historical development of corporate personhood to express with singularity the distinctiveness of a corporation that was, at the same time, an organizationally complex group. To be sure, a contention that corporateness was somehow as natural as humanity itself served as a basis both for explaining why corporations existed and that they were no more inherently in need of legal regulation than were individuals. But the emergence of corporate legal personhood—whatever the corporation philosophically really "was"—coupled with the vast scale on which it permitted business to be conducted, provided a sufficient conceptual and linguistic foothold to argue that these powerful institutions *could* and *should* be regulated simply because they raised concerns quite different than those raised by

95. *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *United States v. White*, 322 U.S. 694 (1944). Moreover, the *Hale* opinion itself, being decided in the midst of the heated debate about the nature of corporateness, includes elements of both entity and aggregation theories. See *supra* notes 23, 57.

96. See, e.g., MODEL BUS. CORP. ACT § 8.02 (2008) (Directors must be individual natural persons.); see also *supra* note 22 (Corporations have no "personal privacy" exemption under Freedom of Information Act.).

97. See *supra* note 87 and accompanying text.

98. HORWITZ, TRANSFORMATION, *supra* note 16.

99. *Id.* at 101.

100. See *supra* note 51. Professor Horwitz's work, *supra* note 16, addresses legal developments only up until the year 1960. *CTS* was decided in 1987.

101. See *supra* notes 51–57 and accompanying text.

individual humans.¹⁰² Corporations as varied as Ford Motor Company,¹⁰³ ExxonMobil,¹⁰⁴ Penn State University,¹⁰⁵ the Chicago Cubs,¹⁰⁶ and numerous others are influential institutions touching interests far broader than those of a single internal constituency and raising external legal-social issues far different than those of small-scale businesses operating in a simpler pre-corporate era. And late-nineteenth and early- to mid-twentieth-century history reveals a corresponding upsurge of concern about the unprecedented business power made possible by corporateness and a resultant call for heightened legal regulation.¹⁰⁷

Perhaps what Professor Horwitz means to say is that nineteenth century and early-twentieth century American society was gradually making an uneasy peace with corporations and accepting them “as if” they were natural. After all, they were rapidly becoming a pervasive feature of the social landscape. Recognizing the need to somehow account for the undoubted socioeconomic power and make-up of the emergent corporate institution is one thing. But it is quite another to argue that society essentially abandoned one traditional approach to exercising social control over the inner make-up of that institution—the artificial-entity conception—in favor of accepting that corporate attributes at any specified time and place somehow are preexistent and natural. In both the early-nineteenth century *Dartmouth College* case and the late-twentieth century *CTS* case,¹⁰⁸ corporate attributes clearly were regarded as artificial or social in character, not natural, and therefore, they remained wholly amenable to state modification thought necessary to advance public well-being.¹⁰⁹

Of course, even natural business entities can be subjected to extensive external regulation—as happened throughout the late-nineteenth and

102. See William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377, 392 (2010) (describing the growing concern from 1872 on with the “social control of business”).

103. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (asserting without authority that corporations must be carried on primarily for stockholder profit).

104. ExxonMobil received more stockholder proposals for consideration at its annual meetings than any other U.S. company during the 2008–2010 period. It also was involved in an environmentally disastrous oil spill involving the Exxon Valdez. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). In *Exxon*, while the Court reduced the punitive damages award to a single-digit ratio, it held that a corporation should be liable in punitive damages for the acts of its managerial employees that recklessly caused environmental harm.

105. Penn State is caught up in a far-reaching scandal involving allegations of child abuse by a former football coach and inaction by others.

106. See *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968) (noting how a major league baseball team affected the surrounding neighborhood).

107. See *supra* notes 92, 102.

108. See *supra* notes 41, 51.

109. See *supra* note 51.

twentieth centuries¹¹⁰—even if states suspended their use of corporate law itself as a regulatory tool. Certainly, a natural-entity theory fully comports with expectations of responsible corporate behavior—just as society in various ways expects such behavior from all human citizens. But critically, this expectation is given legal expression through various forms of regulation of already-existent corporations—i.e., their behavior—whereas an artificial-entity theory emphasizes the antecedent power of the state to add features to, or remove features from, the very legal make-up of corporate personhood. The latter insists on continuing, even if only occasionally exercised, social control over the legal DNA of the corporation, not simply its subsequent conduct. Thus, both theories can be conducive to reviving a more public-serving conception of responsible corporate behavior even though they do so in very different ways.

The key point with respect to corporate personhood and corporate theory's relationship with the history of corporate responsibility is that all of these corporation-centered technological, legal, and intellectual currents flowing into the twentieth century set the stage for ensuing corporate responsibility discussions. At the heart of these discussions was a return to the issue of whether, to some degree, corporations should once again be regarded as public-serving or in modern parlance "socially responsible."¹¹¹ These discussions, building on a strong conception of the corporation as a distinct social-legal actor, eventually focused on the fundamental questions of corporate purpose and the appropriate role of government regulation in controlling corporate conduct.¹¹² These decades-long debates, which continue today, necessarily drew on, presupposed, and significantly benefited from the clear emergence of a distinct corporate person prominently featuring centralized control as a critical element of corporate governance. After all, it is *corporate* responsibility that emerged in the twentieth century as a topic of ongoing social concern and scholarly study.¹¹³ This required that the corporation be recognized as a meaningful social and legal actor in its own right, distinguishable from its diverse constituents.

B. The Reemergence of the Nexus-of-Contracts Theory

Theoretical acceptance of a strong entity conception of the corporation did not endure throughout the twentieth century, however, and the stunning reemergence of an aggregation-like theory of corporations in

110. See Novak, *supra* note 102, at 388, 398 (describing the broad range of business regulation arising over the period from 1872 to 1932); see also *supra* note 30.

111. See *supra* notes 25, 31; Millon, *supra* note 36.

112. See *supra* notes 28, 30.

113. See *supra* notes 1, 2.

the 1980s carries continuing implications for corporate responsibility in the twenty-first century. This was a development that Professor Horwitz, writing in the early 1990s and ending his history of corporate theory at 1960, did not address. Influenced by financial economics work in the 1970s,¹¹⁴ many corporate law theorists in the 1980s conceived the corporation in decidedly contractarian terms.¹¹⁵ The corporation, in this view and much like its nineteenth-century forerunner supposedly vanquished by an entity conception, essentially is a nexus of contracts among various private constituents.¹¹⁶ Much like the natural-entity theory, moreover, this conception had a strong deregulatory and market-oriented thrust, but unlike that theory, it also served to boldly reassert, both descriptively and prescriptively, the primacy of the individual over the group as the key analytical focus in corporate theory and activity.¹¹⁷ Ironically, at a time when individuals seem increasingly dwarfed by bureaucratic governments and other large organizations, this promised to restore the significance of the individual to the hierarchical corporation itself. Moreover, the recent resurrection of this contractarian theory suggests that although distinctive corporate legal personhood clearly had emerged in the early-twentieth century, as Horwitz argued, theoretical accounts of the corpo-

114. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Other early work in this vein is cited in Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 59 n.1 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

115. The seminal treatment is FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); see also STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 28–30 (2008). For a full description and critique of the contractarian theory, see Johnson, *supra* note 2. A recent critique emphasizing new federal legislation was leveled by Professor Stefan A. Padfield, *The Dodd-Frank Corporation: More Than a Nexus of Contracts*, 114 W. VA. L. REV. 209 (2011). See generally Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (critiquing nexus of contracts and advancing “team-production” theory). The Blair and Stout team-production theory does seek to give a more meaningful account of the corporation as a team. *Id.* Others might contend that the so-called “shareholder-primacy” or “director-primacy” perspectives are distinct models. See René Reich-Graefe, *Deconstructing Corporate Governance: Director Primacy Without Principle?*, 16 FORDHAM J. CORP. & FIN. L. 465, 468 n.10 (2011). But these are really variations of a contractarian theory. Another theory, more undeveloped, is the “stakeholder vision” of corporate relations in which various nonshareholder interests, along with shareholder well-being, are factored into corporate decision-making. See, e.g., P. M. Vasudev, *Stakeholders in the CBCA: An Appraisal and Some Proposals*, (2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1874264> and the non-law scholarly works cited in *supra* note 2; see also Brian M. McCall, *The Corporation As Imperfect Society*, 36 DEL. J. CORP. L. 509 (2011).

116. See EASTERBROOK & FISCHEL, *supra* note 115, at 14, 15, 166.

117. See Johnson, *supra* note 2, at 2219–26.

ration are not any more enduring or solidly established today than they were one hundred years ago.¹¹⁸

Yet, the reemergence of the nexus-of-contracts theory in the last quarter of the twentieth century had decided counter-ramifications for corporate responsibility in ways that are still unfolding. The theory does not—it cannot—deny the established doctrine that the corporation is a legal person distinct from its various constituencies.¹¹⁹ Thus, the theory fully accepts that the corporation has many (though not all) human-like features, including certain legal rights and specified responsibilities, in its own capacity and separate from those of its various constituencies. But at the same time, for a host of reasons, this undoubted legal person is considered to be merely a web or network of contractual relationships between and among various individuals, such as investors, managers, employees, customers, creditors, suppliers, and so on.¹²⁰ Significantly, only the interactions among investors and managers—or more accurately investors, directors, and officers—are regarded as comprising the field of corporate governance law.¹²¹ Other parties, however important their contributions to the flourishing of dynamic enterprise, are regarded as secondary, instrumental participants, and are remitted to contract law or other legal regimes dealing with creditors' rights, employees' rights, consumer protection, or environmental concerns, and so on.¹²² Thus, the corporation itself is a dense network of relationships between and among various groups, but corporate law concerns itself with only one particular strand of this rich matrix.

Several important consequences result from this recent theoretical development. First, the corporation is acknowledged but quickly recedes in importance as attention is turned to three groups within the corporation¹²³—shareholders, directors, and officers.¹²⁴ This anti-institutionalism is clearly seen in agency theory's focus on the investor-manager relation-

118. It is for this reason, and others, that Professor Ripken advocates a “multi-dimensional” approach to corporate personhood. Ripken, *supra* note 2.

119. Delaware corporate law, for example, supports an entity conception of the corporation. See Allen, *supra* note 2, at 274–76.

120. See *supra* note 115.

121. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2500 (2005).

122. Stephen M. Bainbridge, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 72 (2008); see also N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

123. See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1498–1501, 1515 (1989) (arguing that the firm is disaggregated and essentially disappears under this contractual conception).

124. Dennis Garvis and I have noted, however, that corporate law pays relatively little attention to officers. See Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties*, 64 BUS. LAW. 1105, 1106–09 (2005).

ship,¹²⁵ a focus that essentially ignores the corporation itself as a meaningful concept or person.¹²⁶ This means as well that an emphasis on the interests of the “corporation” as an enterprise, or as a legal-social institution embodying the common good of numerous constituencies,¹²⁷ is not attended to in corporate law,¹²⁸ except as a cipher or semantic stand-in for the collective shareholders’ interests.

Nor does contractarian orthodoxy come to grips with the state’s continuing (if slumbering) power to “construct” corporate personhood by adding or withdrawing such attributes of corporateness as it wishes, without regard to shareholder or manager understandings, preferences, or expectations.¹²⁹ In essence, the model seeks to “privatize” an institution that, in part, is “publicly” constituted, wrongly concluding that because historically states for a long time have not taken an overtly regulatory stance through their corporate statutes, corporations therefore must be privately ordered. Ongoing strong, and potentially even stronger, public influence over the corporation, however, would seem to stretch rather far any notion of corporate relations being fully a matter of private ordering and being entirely contractual in nature.¹³⁰ Moreover, to neglect the corporation as a whole is to lose sight of why, from the eighteenth century

125. See *supra* note 114.

126. See Johnson, *supra* note 2, at 2219–26. Of course, this is an odd turn. The etymology of the word “corporation” comes from the Latin “corpus,” which means “body,” as in a “corps” or group of people. And “company” is derived from “cum” and “panis” as in breaking bread together. I thank Professor Michael Naughton for these insights. Michael J. Naughton, *The Logic of Gift: Rethinking Business as a Community of Persons*, The Père Marquette Lecture in Theology for 2012 (Mar. 4, 2012).

127. Professor Brian McCall recently has emphasized the potential in corporate law to serve the common good. See McCall, *supra* note 115. For an earlier, excellent non-law account emphasizing the need to reclaim the notion of the “common good,” see HELEN J. ALFORD & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 70–95 (2001).

128. At the same time, this is true even though many contend that “the overall objective of corporate law—as any branch of law—is presumably to serve the interest of society as a whole.” Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1, 18 (2004).

129. Phrased in the lexicon of contractarians, the reserved power to amend (see *supra* notes 46, 61) amounts to a state-held unexpiring “option” to modify corporate traits without shareholder consent.

130. As observed by sociologist Emile Durkheim in 1893:

[I]t is not only outside of contractual relations, it is in the play of these relations themselves that social action makes itself felt. For everything in the contract is not contractual. . . . [E]very obligation which has not been mutually consented to has nothing contractual about it. But wherever a contract exists, it is submitted to regulation which is the work of society and not that of individuals, and which becomes ever more voluminous and more complicated.

EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 211 (George Simpson trans., 2d ed. 1965) (1893).

and on, corporate groupings raised concerns for civic republicanism, i.e., that persons within a corporation will, together, more effectively seek to advance group interests over the public good than can dispersed individuals acting alone.¹³¹

Second, the disaggregating of the corporate person and institution into individuals restores individuals—not the collective, corporate group—to a place of primacy in the analysis of social groups. Thus, issues are examined from the internal vantage points of shareholders, directors, and officers, respectively. The institutional focus is lost because the singular disaggregating prism of microeconomics is adopted while more communitarian, sociological accounts are ignored.¹³² Although the analysis is far more sophisticated than in pre-corporate days—when neo-classical economics posited individual market interactions—under a contractarian theory, the historic legal rise of the corporate firm still can be disregarded in favor of a similar focus on market interactions within, as well as outside, the “firm.”¹³³

Third, as an intellectual field of study, corporate governance and corporate law concerns itself only with what are considered the three key groups: shareholders, directors, and executive officers. As cogently summed up by Professor Mark Roe, “Managers and shareholders get to play; no one else does.”¹³⁴ Thus, contemporary law courses in American law schools and contemporary law school casebooks focus almost exclusively on these three groups. Students, who someday will be lawyers counseling others, are given little occasion to consider whether the narrow ambit of corporate law is or is not congruent with broader social expectations.¹³⁵ Concerns about corporate responsibility seem somewhat alien and out of place in this closed, three-party paradigm. Similarly, discussions about corporate purpose can be awkward and stillborn because contractarian theory does not regard that as a meaningful concept, apart from equating corporate with collective shareholder interests. Under a contractarian theory, the corporation is a notion to be quickly dissected in study, not understood as meaningful in its own institutional right. This truncated understanding of corporations permits the teaching and study of corporate law, like the carrying on of much corporate activity itself, to have a positive and normative focus centered on shareholder financial

131. Speir, *supra* note 8, at 42.

132. See Johnson, *supra* note 2, at 2226–35 for a description of a more organic account of corporate relationships.

133. Jensen & Meckling, *supra* note 114, at 311 (“[I]t makes little or no sense to distinguish those things that are ‘inside’ the firm . . . from those things that are ‘outside’ of it.”).

134. Roe, *supra* note 121, at 2500.

135. See Hansman & Kraakman, *supra* note 128.

well-being,¹³⁶ not some larger corporate good that encompasses but extends beyond investor welfare. And in this model the imposition of fiduciary duties on directors and officers usefully aims to subdue the pursuit of their own self-interest, but in managing the corporation itself, they are charged primarily to advance shareholder financial interests. As a result, calls for corporate responsibility necessarily do not occupy a central place in today's world of corporate law teaching and scholarship. Overall then, the historical emergence of the corporation as a meaningful legal, social, economic person and institution—however important to society at large—ends up being of little consequence to today's corporate law and theory.

The ironic result is that orthodox corporate theory currently has relatively little to say about the corporation itself and even less to say about corporate responsibility. To contractarians, as a theory matter, corporate responsibility seems incoherent. Apparently, the subject of corporate responsibility is thought best-discussed and pursued elsewhere, perhaps in business ethics courses and other non-law fields of inquiry,¹³⁷ or perhaps through what Professor Reich-Graefe calls “macro theoretical” models of the firm struggling with “whether and to what extent the corporate entity as an institution of private property and private-party ordering . . . should be subordinated to the legitimate claims of the larger society that inextricably embeds its wealth maximization exercise.”¹³⁸ Within law itself, the quest for more responsible corporate conduct is thought to be best achieved through various non-corporate law regulatory regimes.¹³⁹ This explains why, today as throughout most of the twentieth century, concerns about corporate responsibility largely find legal expression in the vast “external” regulation of the corporation, not in the deep penetration of those concerns into the very heart of corporate law theory and governance, even though governance failures rather regularly radiate outward with devastating consequences on so-called third parties.¹⁴⁰ Even here, however, with passage of the Sarbanes-Oxley Act¹⁴¹ and the Dodd-Frank

136. A July 2011 study by the Brookings Institute found that most elite law and business school curricula emphasize the goal of maximizing shareholder value. DARRELL WEST, *THE PURPOSE OF THE CORPORATION IN BUSINESS AND LAW SCHOOL CURRICULA*, GOVERNANCE STUDIES AT BROOKINGS (2011), available at http://www.brookings.edu/~media/research/files/papers/2011/7/19%20corporation%20west/0719_corporation_west.pdf.

137. See *supra* note 2 (describing where in the academy the subject of corporate responsibility is addressed outside the law).

138. See Reich-Graefe, *supra* note 115, at 487.

139. See Bainbridge, *supra* note 122.

140. See *supra* note 28; see also Lyman Johnson, *Debarring Faithless Corporate and Religious Fiduciaries in Bankruptcy*, 19 AM. BANKR. INST. L. REV. 523 (2011).

141. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002).

Act,¹⁴² partial regulatory inroads into corporate governance itself were made. Perhaps this is because the social and financial landscape has changed so dramatically from the 1980s, when the contractarian theory emerged, while corporate theory has not. Moreover, on the reliably controversial and unremittingly pivotal subject of corporate purpose, the normative claims of contractarian theory may be at stark odds with corporate law doctrine.¹⁴³

V. CONCLUSION

The subjects of corporate purpose and corporate regulation are taken up in subsequent parts of this larger project.¹⁴⁴ For now, we see that in the last quarter of the twentieth century, the fluid understandings of corporate theory have taken yet another turn, as they have throughout modern history, over how best to understand the nature of corporateness. But recognition of the corporation as a distinct legal person was never in doubt throughout most of the twentieth century, nor is it in doubt today. For many in earlier times, the emergence of separate corporate personhood both highlighted and usefully opened up the enduringly important topic of corporate responsibility. Modern legal theory, however, takes a different approach. By trivializing the corporate institution, it accepts legal personhood while making it largely unimportant, and it deflects the topic of corporate responsibility away from corporate law and into other venues.¹⁴⁵ In this way, an important and influential segment of society—those who teach and study corporate law—sidestep full engagement with important discussions about rightful societal expectations of corporate conduct in the twenty-first century.¹⁴⁶

142. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

143. See *supra* note 28.

144. *Id.*; see also *supra* note 30.

145. Other venues, for example, business schools, are promising settings for addressing corporate responsibility issues early in young persons' professional lives. See Lyman Johnson et al., Lecture on Corporate Governance as Foundational to (Catholic) Business Education at the Eight International Conference on Catholic Social Thought and Management Education, University of Dayton (June 18, 2012). But that should be in addition to, not in lieu of, the treatment that could be given to the subject by legal educators and theorists.

146. For an argument that the manner in which corporate law professors teach corporate law can influence corporate responsibility, see Lyman Johnson, *Corporate Law Professors as Gatekeepers*, 6 U. ST. THOMAS L.J. 497 (2009); Lyman Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483 (2002).