

September 2011

The Dodd-Frank Corporation: More Than a Nexus-of-Contracts

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Recommended Citation

Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. Va. L. Rev. (2011).

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THE DODD-FRANK CORPORATION: MORE THAN A NEXUS-OF-CONTRACTS

*Stefan J. Padfield**

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I found a flaw in the model that I perceived is the critical functioning structure that defines how the world works. That's precisely the reason I was shocked I still do not fully understand why it happened

Alan Greenspan on the failure of his deregulatory ideology (October 23, 2008).¹

I. INTRODUCTION

My thesis is as follows: (1) despite arguments to the contrary, corporate theory still matters; and (2) the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “the Act”)² constitutes a new and important “data point” in the on-going corporate theory debate. Specifically, I argue that corporate theory—the branch of corporate law that tries to explain what corpo-

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¹ *Alan Greenspan's Congressional Testimony - Prepared Statement*, HERE IS THE CITY: BUSINESS (Oct. 24, 2008), http://news.hereisthecity.com/news/business_news/8386.cntns.

² H.R. Res. 4173, 111th Cong. (2010) (enacted).

rations are, and how best to think about them—can be broken down into two dominant strands: concession theory and nexus-of-contracts theory.³ Concession theory focuses on the state-created nature of corporations and tends to presume states have great freedom to regulate the entities they create. Nexus-of-contracts theory, on the other hand, views the state's role in corporate law as little more than to provide default rules to maximize the efficiency of the bundle of contracts that make up the legal fictions we call "corporations." I further argue that these corporate theories were relevant to the outcome of the recent blockbuster *Citizens United* case, wherein the Supreme Court held that campaign finance laws could not limit corporate political speech on the basis of corporate status alone.⁴ Finally, I argue that Dodd-Frank adds a new weight to the concession theory side of the scale by codifying too-big-to-fail ("TBTF").

The Dodd-Frank Act has been referred to as "the most sweeping change to financial regulation since the Great Depression" and a corporate governance "game changer."⁵ In this Essay, I argue that Dodd-Frank may also be a game changer in the debate over the nature of the corporation.⁶ In particular, I argue that the Act's reaffirmation of the sovereign's extensive power to regulate corporations,⁷ together with its formal recognition of TBTF,⁸ constitute significant

³ See Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 201 (2006) (noting that the two "preeminent" theories of the corporation are "contract and concession").

⁴ 130 S. Ct. 876 (2010).

⁵ *The Governance Game Changer: Dealing with Dodd-Frank*, AMERICAN BAR ASSOCIATION, <http://apps.americanbar.org/cle/dodd-frank/t1lggc1.html> (last visited Sept. 18, 2011) ("Changes in corporate governance standards and practices occur constantly. There are few real game changers, but Dodd-Frank is one."). *But cf.* Steve Bradford, *David Skeel on the Dodd-Frank Act*, BUSINESS LAW PROF BLOG (Jan. 25, 2011), http://lawprofessors.typepad.com/business_law/2011/01/david-skeel-on-the-dodd-frank-act.html (describing corporate governance provisions of Dodd-Frank as "a very minor part of the Act").

⁶ An argument may be made that Dodd-Frank is sufficiently narrowly focused on financial institutions so as to make it unwise to view it as having much to say about corporations generally. Obviously (at least for the time being), I do not hold that view. *Cf.* Erik Gerding, *Executive Compensation: Less Focus on "Executive," More Focus on "Bank,"* THE CONGLOMERATE (Jan. 21, 2011), <http://www.theconglomerate.org/2011/01/executive-compensation-less-focus-on-executive-more-focus-on-bank.html> ("Say-on-pay and other Dodd-Frank reforms . . . apply to a broad swath of non-financial firms . . ."); *Symposium, Comparative Approaches to Systemic Risk and Resolution*, BROOKLYN LAW SCHOOL, <http://www.brooklaw.edu/newsandevents/events/2011/02-25-2011.aspx?> (last visited Feb. 25, 2011) ("The 2008 financial crisis . . . focused attention on firms, financial or otherwise, that might be deemed 'Too Big to Fail.' That crisis led directly to the creation, under the recently enacted Dodd-Frank Bill, of a 'Resolution Authority' for non-bank entities whose failure might create systemic risk.").

⁷ While the difference between state and federal regulation is obviously a significant one when it comes to discussing the theory of the corporation, for purposes of this Essay I have ignored the distinction for the most part. *Cf.* *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (asserting that corporations are subject to "dual sovereignty" of state and federal government).

⁸ See Dodd-Frank Act Preamble ("An Act . . . to end 'too big to fail' . . .").

negative data points vis-à-vis the currently dominant nexus-of-contracts theory of the corporation—both from a positive and a normative perspective. Because I believe that the debate about what constitutes the “best” theory of the corporation will continue to play a significant role (either expressly or covertly) in some of the most important legislative and judicial decision-making we will encounter in the near-term, I believe this aspect of Dodd-Frank deserves our attention even though various other aspects of the Act have received far more consideration.

In Part II of this Essay, I provide a brief overview of the various theories of the corporation. Ultimately, I advance my discussion by focusing primarily on concession theory and the nexus-of-contracts theory of the firm.⁹ It is important to note, however, that I am employing “concession theory” broadly. In fact, for purposes of this Essay concession theory may be understood to include the theories of many who resist ceding the debate to contractarians, but who would also balk at being labeled endorsers of concession theory as traditionally defined.¹⁰ I leave the finer distinctions among anti-contractarians to others.

In Part III, I explain why corporate theory still matters despite assertions by some that the debate about the theory of the firm has run its course, and arguments by others that the implications of the various theories of the corporation are too imprecise to warrant detracting our attention from more useful debates. By way of example, I argue that corporate theory was de facto dispositive in *Citizens United*,¹¹ one of the most significant judicial opinions in recent memory.

In Part IV, I explain why I believe Dodd-Frank implicates corporate theory in a significant way. First, I point out that the fact of the sovereign’s power to regulate corporations as extensively as it has in Dodd-Frank constitutes an on-going thorn in the side of contractarians from a positive perspective. Second, and much more importantly, I argue that Dodd-Frank’s formal recognition of TBTF calls into question some of the most fundamental normative assertions of the nexus-of-contracts theory of the firm.

In Part V, I discuss some of the possible implications of viewing Dodd-Frank as a potential game-changer in the on-going debate about the theory of the firm. The question of how best to think about corporations will continue to be at

⁹ While there are good reasons to differentiate “theory of the firm” from “theory of the corporation,” for purposes of this Essay I will be using the phrases interchangeably except where the distinction is material. Cf. Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 8 (2011), available at <http://ssrn.com/abstract=1754242> (“The nexus of contracts theory is thus not really a theory of the firm at all, but rather a theory of agency costs within a certain type of firm.”).

¹⁰ Cf. Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 777 n.237 (1998) (describing modern day arguments that constitute “a variant on the old concession theory,” but nonetheless concluding that “[i]t has been a long time since mainstream corporate legal theory took the concession theory seriously”).

¹¹ *Citizen's United v. FEC*, 130 S. Ct. 876 (2010).

the center of many of the most significant issues confronting our courts and legislatures, and anti-contractarians should be able to point to Dodd-Frank as recent evidence of the shortcomings of the nexus-of-contracts theory of the firm.

Finally, in Part VI, I provide some concluding remarks. Primarily, I note that I am not arguing that the contractarian view of the firm has no place in discussions of corporate theory. Quite to the contrary, I believe that there are likely many issues involving corporate law that are best viewed through the contractarian lens. Nonetheless, I do believe that certain normative assertions advanced under the banner of contractarianism—particularly those advancing an “extreme” de-regulatory agenda—are facing new and serious challenges in the wake of the recent financial crisis. This Essay constitutes my attempt to highlight one of those challenges: the emergence of the Dodd-Frank Corporation.

II. A BRIEF OVERVIEW OF THEORIES OF THE CORPORATION

Corporate theory can be explained a number of different ways. One of the ways I like to present material like this to my students is to use a “problem-solution dance.”¹² In this case, we can start with the problem of encouraging economic growth in light of the fact that markets consisting solely of individuals acting independently will be limited in the growth they can produce. Enter as the solution: “firms.”¹³ Firms can produce greater economic growth than individuals acting alone by, among other things, leveraging the ability of certain individuals to deal particularly well with inherent market uncertainty by giving them control over other individuals’ productive behavior.¹⁴ This solution, however, runs into another problem: Since there is a possibility that investors in a business for profit may be deemed partners (and therefore personally liable for the debts incurred by the enterprise), the capital-raising necessary to fuel firms

¹² See, e.g., Stefan J. Padfield, *The “Problem-Solution” Dance of Corporate Law*, BUSINESS LAW PROF BLOG (July 15, 2010), http://lawprofessors.typepad.com/business_law/2010/07/the-problemsolution-dance-of-corporate-law.html. See also Stephen Bainbridge, *Did Bad Corporate Governance cause the Financial Crisis?*, PROFESSORBAINBRIDGE.COM (July 15, 2010), <http://www.professorbainbridge.com/professorbainbridgecom/2010/07/did-bad-corporate-governance-cause-the-financial-crisis.html> (describing my July 15 post as a “problem/solution dialogue”).

¹³ See CHARLES R. T. O’KELLEY, *THE THEORY OF THE FIRM: THE CORPORATION AS SOLE-PROPRIETOR SURROGATE* 14 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858936 (“The firm can then be pictured as a circle within which are the employer and the firm’s employees.”).

¹⁴ See *id.* at 8 (“[Frank] Knight’s central insight was that when uncertainty is abstracted away, there is no need for a firm . . . even when division and specialization of labor are present Knight also asserted the converse point: when uncertainty is present, the existence of . . . the firm naturally follows.” (relying on FRANK H. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* (1921))); see also *id.* at 11 (“[F]irms arise when the costs of using the price mechanism increase to the point where production can be coordinated at less expense via contracts with factors of production which give the entrepreneur, within limits, the right to direct production.” (citing Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390–92 (1937))).

will be limited.¹⁵ The solution to this problem then comes in the form of separating ownership from control, thereby allowing for ownership stakes with limited liability (i.e., the personal liability of the equity investors will be limited to the amount invested).¹⁶ The original device for separating ownership from control is the corporation.¹⁷ However, the separation of ownership and control inherent in the corporate form creates its own problems, including the agency problem of competing interests of owners and managers.¹⁸ It is at this point that we can start talking more specifically about theories of the corporation because those theories can be seen as ways of providing different solutions to the agency problem—as well as all sorts of other legal problems involving corporations—with the theories generally aligning themselves with either a pro-market or pro-regulatory approach.

Corporate theory has been described as offering “competing stories about how and why corporations originate and how they operate.”¹⁹ The theories can be presented both in positive (i.e., describing what the corporation is) and normative (i.e., describing what way of thinking about corporations leads to the most efficient results) terms.²⁰ In addition, the theories can be described in terms of their discrete labels as well as their competing themes. J.W. Verret notes that some of the most commonly discussed discrete theories of the corporation include²¹: (1) agency and contractarian thought;²² (2) shareholder prima-

¹⁵ Cf. Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1398 (1992) (stating that “unlimited liability is the popularly perceived natural state for equity owners”).

¹⁶ See Thomas C. Folsom, *Evaluating Supernatural Law: An Inquiry into the Health of Nations (The Restatement of the Obvious, Part II)*, 21 REGENT U. L. REV. 105, 148 (2008) (“Limited liability entities are based on the moral intuition of nonagency because there is separation of ownership from control.”).

¹⁷ See Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens*, 79 GEO. WASH. L. REV. 161, 170 (2010) (“The basic separation of ownership and control inherent in the corporate form enabled corporations to secure widespread public investment.”). See generally Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1009 (2010) (“Limited liability, in turn, led to a decline in the emphasis on the aggregate theory because the aggregate view of corporations tended to reduce the distinction between the corporation and its members or shareholders, which is at the heart of limited liability.”).

¹⁸ See J.W. Verret, *Treasury, Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283, 315 (2010) (“Where the providers of capital to an enterprise, the shareholder principals, and the users of that capital, the managerial agents, are both utility maximizers, there is reason to believe that the agents’ interests can conflict with their principals’ interests.” (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976))).

¹⁹ Thomas W. Joo, *Narrative, Myth, and Morality in Corporate Legal Theory*, MICH. ST. L. REV. 1091, 1091 (2009).

²⁰ Cf. HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* ix (1995) (rejecting arguments based on the sovereign’s ability to regulate corporations because “this argument is simply a statement about current law, not a normative argument about what the law ought to be”).

²¹ See Verret, *supra* note 18, at 315.

cy;²³ (3) director primacy;²⁴ (4) team-production theory;²⁵ and (5) progressive corporate law.²⁶ For purposes of this Essay, we will be focusing on contractarian thought and progressive corporate law, with a bit of director primacy thrown in. This is so because I equate progressive corporate law with concession theory broadly defined,²⁷ and these two theories—contract and concession—have been deemed by at least one scholar as the “preeminent” theories of the corporation.²⁸ Furthermore, as will be explained in more detail below, my analysis of the recent *Citizens United* decision arguably confirms that it is precisely these two theories that still take center-stage when competing visions of the corporation collide. To that end, it is worth noting that contractarian thought, “also known as the nexus-of-contracts theory of the corporation, is predicated on the notion that a corporation is a product of bargained agreements. The contractarian model of corporate law supports the use of default rules that shareholders, companies, and constituencies are free to modify by contract.”²⁹ Progressive corporate law, on the other hand, “takes issue with the very premise of the contractarian model” and relies on judges and regulators to “conform corporate law to the shifting cultural and social norms of the time.”³⁰ Director primacy, meanwhile, holds that “the maximization of shareholder wealth is the appropriate duty of directors,” but modifies the traditional shareholder primacy view (which pursues that goal by empowering shareholders) by arguing that “resting authority over corporate decisions with a self-sustaining board of directors is the best way to accomplish that objective.”³¹ The reason I am including director primacy as part of

²² *Id.* at 317.

²³ *Id.* at 318 (noting that shareholder primacy theory focuses on “designing ways to assist shareholders in exerting control through their powers, including the power to vote at annual meetings”). See also Avi-Yonah, *supra* note 17, at 1023, n.132 (citing Adolph Berle as “the prime intellect behind the shareholder primacy doctrine in the 1930s”). See generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

²⁴ Verret, *supra* note 18, at 321.

²⁵ *Id.* at 322 (noting that team production theory “relies on contractarian thinking, but abandons notions of shareholder primacy” and “is a stakeholder-focused theory that is partly aligned with the progressive corporate law view, and partly with director primacy, but is coterminous with neither”).

²⁶ *Id.* at 324–25.

²⁷ While admittedly not a perfect fit, Verret’s “progressive corporate law” provides the only home for concession theory given the options he provides. Cf. ROBERT W. HAMILTON & RICHARD A. BOOTH, *CORPORATIONS: BLACK LETTER OUTLINES* 327–32 (West, 5th ed. 2006) (citing entity theory, concession theory, contract theory, nexus of contracts theory, and process theory as the basic theoretical foundations of corporate law).

²⁸ O’Melinn, *supra* note 3.

²⁹ Verret, *supra* note 18, at 317.

³⁰ *Id.* at 324–25 (citing William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 214 (1992)).

³¹ Verret, *supra* note 18, at 321.

our focused discussion will be made clear when I discuss the aggregate and entity (real and artificial) theories of the corporation next.

The final piece of the discrete corporate theory puzzle that must be put in place before moving on involves the rhetoric of corporate theory prominent in discussions of the Supreme Court's cases involving corporations. Reuven Avi-Yonah describes the traditional breakdown as follows:

Th[e] theories are the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers.³²

One can align these theories with the corporate law theories described previously as follows: The aggregate theory is generally understood to capture the nexus-of-contracts view,³³ the artificial entity theory captures concession theory,³⁴ and the real entity theory arguably captures the director-primacy view of the corporation.³⁵ The last point, about real entity theory equaling director primacy is certainly not without controversy. For example, Stephen Bainbridge, “the leading proponent of the director primacy view,”³⁶ clearly views director primacy as a form of contractarianism:

If the corporation has a nexus, however, where is it located? The Delaware code, like the corporate law of every other state, gives us a clear answer: the corporation's “business and affairs . . . shall be managed by or under the direction of a board of directors.” Put simply, the board is the nexus.³⁷

³² Avi-Yonah, *supra* note 17, at 1001.

³³ *Id.* at 1025, n.142 (“The point that the nexus of contracts theory is a reinvention of the aggregate view has been made repeatedly.”).

³⁴ *Cf. id.* at 1042 (noting that “[t]he artificial entity theory is discussed . . . in the [*Citizens United*] dissent” when Justice Stevens asserts that “many legal scholars have long since rejected the concession theory of the corporation” (quoting *Citizens United* at 949–50, 952) (Stevens, J., concurring in part and dissenting in part))).

³⁵ *Cf. id.* at 1032 (“Why does the real entity view prevail? This is no doubt due in part to the fact that it represents the most congenial view to corporate management, because it shields management from undue interference from both shareholders and the state.”).

³⁶ Verret, *supra* note 18, at 321.

³⁷ Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 25 (2002) (quoting DEL. CODE ANN. tit. 8, § 141(a) (2001)). *Cf. Verret, supra* note 18, at 287 (describing director primacy as one of the “Cain and Abel-like warring children of the agency and nexus-of-contracts marriage,” the other being shareholder primacy).

On the other hand, precisely because the board of directors' power comes from the state, it could also be viewed as supporting a concession theory view of the corporation.³⁸ Perhaps the best view of the real entity theory of the corporation is that it simply represents a middle ground between the extremes of contract and concession, or is the most accurate from a descriptive point of view.³⁹ However, even if the real entity theory best describes the modern corporation, that fact is of limited utility here because, as just discussed, both concession and contract theories can explain how we got to the place where director primacy best describes the corporation and thus claim the normative high ground when it comes to answering questions about the regulation of corporations going forward. In essence, if one believes director primacy is best because it represents the choice of the market, then director primacy essentially boils down to contractarianism. Conversely, if one believes director primacy is best because it represents the state's best judgment as to how to regulate its creation, then one is back to concession theory. Thus, since I am here focusing on the "two preeminent theories of the corporation—contract and concession,"⁴⁰ I will leave the finer distinctions of the real entity view to others for the time being.⁴¹

In terms of competing themes (which may provide a useful "fallback" mode of analysis when the myriad discrete labels of corporate theory begin to look like so many arms of a Hindu god⁴²), David Millon has described three "dimensions" along which corporate theory has evolved⁴³: (1) corporation as separate entity versus "a mere aggregation of natural individuals without a separate existence";⁴⁴ (2) corporation as "artificial creation of state law" versus "nat-

³⁸ See *Paramount v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1989) ("[D]elaware law imposes on a board of directors the duty to manage the business and affairs of the corporation. This broad mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability.") (emphasis added); cf. *Avi-Yonah*, *supra* note 17, at 1030 (asserting that under Delaware law "a corporation is more than a 'nexus of contracts'").

³⁹ See *Avi-Yonah*, *supra* note 17, at 1017 ("The real entity view was most congruent with business realities as well as the one most suited to a corporation-state balance.").

⁴⁰ O'Melinn, *supra* note 3.

⁴¹ I do this despite the fact that others, like *Avi-Yonah*, have asserted that the real entity view is ultimately the dominant view under the Supreme Court's jurisprudence because I believe (and will attempt to show later) that, at least as far as the recent *Citizens United* decision is concerned, that view is not correct. See *Avi-Yonah*, *supra* note 17, at 1032 ("As the relationship of the corporation to the state, to society and to its members or shareholders changes, all three views of the corporation emerge, submerge and then re-emerge in slightly different but fundamentally similar forms. In the end, however, the real entity view prevails.").

⁴² See *Hinduism 101: Why do Hindu deities have so many arms?*, FULLSTOPINDIA.COM, <http://www.fullstopindia.com/2010/04/hinduism-101-why-do-hindu-deities-have-so-many-arms> (last visited Oct. 12, 2011) ("Each hand of an individual deity would hold the object or symbol that represented their various qualities.").

⁴³ See generally, David Millon, *Theories of the Corporation*, 39 DUKE L.J. 201, 201 (1990).

⁴⁴ *Id.*

ural product of private initiative”;⁴⁵ and (3) corporation as public versus private construct.⁴⁶

As just stated, while all the ways of thinking about the corporation described above can be useful, for purposes of this Essay I will be focusing on the competing theories of concession and nexus-of-contracts. As Liam O'Melinn has pointed out, while “[n]ot all theorists use the language of contract and concession,”⁴⁷ the two “preeminent” theories of the corporation are “contract and concession.”⁴⁸ However, I should note here that to the extent some would equate concession theory with the colonial special charter system of incorporation—I am employing a broader understanding of the theory.⁴⁹ While there was a time in our country’s history when corporations were difficult to characterize as anything other than a concession from the sovereign because the charters necessary to create a corporation were granted on a case-by-case basis and often to serve some specific and limited pro-social goal,⁵⁰ the fact that we have since moved to an enabling act regime⁵¹ does not change the fact that individuals remain unable to recreate the totality of the plethora of essential corporate attributes without the state’s permission.⁵² As Grant Hayden and Matthew Bodie have recently written: “One cannot contract to form a corporation The fact that th[e]

⁴⁵ *Id.*

⁴⁶ *Id.*

According to one view, corporate activity has broad social and political ramifications that justify a body of corporate law that is deliberately responsive to public interest concerns. The alternative viewpoint portrays corporate law as governing little more than the private relations between the shareholders of the corporation and management, which acts as their agents or trustees.

Id.

⁴⁷ O'Melinn, *supra* note 3, at 201 n.3.

⁴⁸ *Id.* at 201. *Cf. id.* at 258 (discussing “concession theory and . . . its nexus of contracts counterpart”).

⁴⁹ *Cf. BUTLER & RIBSTEIN, supra* note 20 (“[Concession] theory had its origins in the early history of the corporation, when corporations were, in fact, created by special charter. The theory has no relevance today, when corporations are freely formed by making a simple filing under general corporation laws.”).

⁵⁰ See Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries*, 10 *FORDHAM J. CORP. & FIN. L.* 79, 87 (2004) (“[I]n the colonial United States, the responsibility for granting charters fell to the legislature. These charters were initially granted primarily to further various public works projects and, like in England, were handed out on a case-by-case basis.”).

⁵¹ See HAMILTON & BOOTH, *supra* note 27, at 329 (“The process of incorporation today involves only ministerial acts and no significant substantive decisions are made in this process by the state or agency that issues charters to corporations.”).

⁵² *Cf. Padfield, supra* note 50, at 89 (“It is important to note here (and should be obvious upon reflection) that the State did not grant limited liability to shareholders or immortality to the corporate entity merely out of a benevolent desire solely to increase the wealth of shareholders. Rather, the State saw that its interests as sovereign, whether building specific pieces of infrastructure or promoting economic growth generally, could be furthered via the corporate form.”).

permission [to incorporate] is readily granted . . . does not change the fact that permission is required.”⁵³ Add to that the ubiquity of reserve clauses in corporate codes,⁵⁴ the existence of stakeholder statutes,⁵⁵ and relatively recent judicial pronouncements that “[c]orporations are creatures of the Legislature . . . [i]t is appropriate, therefore, that the terms and conditions of their existence be determined by that body,”⁵⁶ and I would go so far as to label the argument that concession theory is necessarily tied to our special charter era a straw man.⁵⁷

Perhaps the best way to think about the version of concession theory I am advancing here is to align it with the state-conferred benefits argument often made in order to support increased regulation of corporations. David Yosifon has noted that in the campaign finance area:

Perhaps the most commonly heard justification for why corporate political speech can be restricted is that corporations are artificial creatures of law, bestowed with favorable attributes by the state, and can therefore be subject to regulation by the governments that created them and made them powerful in the first place.⁵⁸

Yosifon posits that this is a “tempting-but-ultimately-bad” argument,⁵⁹ at least for purposes of regulating corporate political speech. It is worth address-

⁵³ Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of the “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1130 (2011) (“[E]ven at the most basic of levels, the ‘corporation as contract’ claim is simply incorrect. Corporations are not creatures of contract.”). Cf. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000) (“[T]he essential role of all forms of organizational law is to provide for the creation of a pattern of creditors’ rights—a form of ‘asset partitioning’—that could not practicably be established otherwise.”).

⁵⁴ See Ian S. Speir, *Constitutional and Statutory Reservation Clauses and Constitutional Requirements of General Laws with Respect to Corporations: The Fifty States and the District of Columbia*, available at <http://ssrn.com/abstract=1820868> (“Reservation clauses, reserving to the legislature a power to amend or repeal corporate charters, are included in the constitutions or corporation statutes of 49 states and the District of Columbia.”). Cf. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 69 (1992) (“Advocates of Contract Clause protection for shareholders are aware of the ‘reserve’ clauses resulting from *Dartmouth College*, but they appear to underestimate the full import of these powers. States have ‘reserved’ the freedom . . . to ‘impair’ the rights of shareholders . . .”).

⁵⁵ Cf. Orts, *supra* note 54, at 48 (“Although most legal commentators greet them with a loud hiss, this Part concludes that constituency statutes are legitimate, constitutional, and legally enforceable.”).

⁵⁶ *Nearly v. Miltronics Mfg. Servs., Inc.*, 534 F. Supp. 2d 227, 231 (D.N.H. 2008).

⁵⁷ See BLACK’S LAW DICTIONARY 1557 (9th ed. 2009) (defining “straw man” as “[a] tenuous and exaggerated counterargument that an advocate makes for the sole purpose of disproving it”).

⁵⁸ David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility after Citizens United*, 89 N.C. L. REV. 1197, 1219 (2011).

⁵⁹ *Id.*

ing his reasons for that conclusion here in the hope of convincing the reader that this view need not be universally accepted.

Yosifon provides three rationales for dismissing what I am here calling concession theory as a basis for regulating corporate political speech. First, Yosifon points out that concession theory “flies in the face of contemporary theories of the firm, which posit that the corporation is not an entity created by the state, but is rather a voluntary association of individuals, a nexus-of-contracts.”⁶⁰ Of course, this is correct as far as it goes. However, my argument here is precisely that the dominance of the contractarian view of the firm is ripe for challenge, that a revitalized concession theory may well be one of its prime challengers, and that Dodd-Frank provides us with a new premise upon which to base the challenge.

Second, Yosifon argues that accepting the state-conferred benefits argument would create an insurmountable slippery-slope:

[I]nheritance laws ensure that heirs of large estates will retain most of the estate's corpus, capital gains laws economically benefit successful investors, and patent laws give investors artificially created monopolies, thereby effectively providing all three groups with potential economic advantages in the expressive marketplace if they choose to exercise them No one, to our knowledge, has seriously suggested that the expressive activity of these individuals or organizations can constitutionally be curbed as a result of their potential economic advantages.⁶¹

Hopefully, it should not be too hard for the reader to come up with sound reasons for limiting the regulatory power of the state in these circumstances, while supporting regulation of corporate political speech. Particularly, the First Amendment analysis here turns on the application of strict scrutiny, “which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”⁶² Thus, at least in theory all one needs to distinguish the regulation of corporate political speech in these cases is a finding that the particular concessions granted to corporations create a unique compelling interest favoring regulation via a narrowly drawn statute. Yosifon himself arguably provides just such an interest when he asserts that corporations are unique in their ability to “capture” government regulators: “[C]orporations, in general, enjoy competitive advantages over consumers and

⁶⁰ *Id.* at 1220.

⁶¹ *Id.* (quoting Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 284–85 (1998)).

⁶² *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 464 (2007)).

workers in the competition for regulatory favor The former find it easier to organize, agree on strategies, generate resources to be deployed in joint activity, and exclude potential free-riders, than do the latter.”⁶³ A reasonable person could conclude that this competitive advantage flows directly from the state’s concessions of limited liability, immortality, etc.

Finally, Yosifon argues that the state-conferred benefits argument would also permit the regulation of media and non-profit corporations in ways that simply cannot be aligned with our understanding of the First Amendment.⁶⁴ However, the Supreme Court has already shown the ability to carve out protections for non-profits in this area⁶⁵ and, at least in *Citizens United*, not even the regulators themselves tried to reach media corporations, which on the textual level at a minimum have a special place under the First Amendment.⁶⁶

The last point to be made before moving on to the next section of this Essay is that I essentially equate nexus-of-contracts theory with a laissez-faire approach to corporate regulation. That is, I believe it is fair to characterize the majority of contractarian corporate law scholars as subscribing to the general belief that rational actors operating via the corporate form will benefit society most if they are left relatively free to compete in open markets.⁶⁷ This normative assertion has frequently been advanced by viewing the corporation as a contract that suffers primarily, if not solely, from agency problems in terms of maximiz-

⁶³ Yosifon, *supra* note 58, at 1203.

⁶⁴ *Id.* at 1221 (“It would be a very small version—an unfamiliar version—of the First Amendment that would sanction the regulation of the media and political organizations on the grounds that they enjoy the benefits of state-conferred corporate status.”).

⁶⁵ See Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1051 (2011).

In 1986, the Court held that the FEC may not subject a corporation to FECA’s restrictions if the corporation (1) was established for advocacy purposes, (2) did not have shareholders with an economic disincentive to severing ties if they disagreed with the corporation’s political views, and (3) had a policy of eschewing donations from business corporations. That exemption demonstrates that the Supreme Court does not consider the corporate form per se to create a danger of *Austin*-style corruption; rather, only the business corporation poses such risks because of its unique ability to amass capital to establish political war chests without any connection to public support for an idea or candidate.

Id. (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 259–64 (1986)).

⁶⁶ See *Citizens United*, 130 S. Ct. at 905 (“Media corporations are . . . exempt from § 441b’s ban on corporate expenditures.” (citing 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2002))); *id.* at 976, n.75 (Stevens, J., dissenting) (“If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press.”).

⁶⁷ See BUTLER & RIBSTEIN, *supra* note 20, at viii. (“This book . . . will articulate a contractual theory of the corporation Acceptance of this analysis should lead to broader constitutional protection of [corporations].”). Cf. Stefan J. Padfield, *Another Corporate “Problem-Solution” Dance*, BUSINESS LAW PROF BLOG (Jan. 9, 2011), http://lawprofessors.typepad.com/business_law/page/19/ (paraphrasing David G. Yosifon as asserting that “[a]ll thoughtful people agree corporations should serve a pro-social purpose”).

ing utility—agency problems that are best solved by elevating shareholder wealth maximization as the primary directive of corporate directors and letting shareholders and management battle it out over the terms of their contract as they see fit, subject only to default rules provided by the state for those situations where bargaining is too costly or simply overlooked. To the extent conducting business in the corporate form creates negative externalities, the regulatory response should be limited to generally applicable laws.⁶⁸

Meanwhile, I equate concession theory with a more regulatory view.⁶⁹ That is, I believe it is fair to characterize the majority of anti-contractarian corporate law scholars as subscribing to the general belief that if left unregulated, the amazing capital-accumulation device that is the corporation will amass so much power as to pose a real threat to society.⁷⁰ As I have written elsewhere, fear of the power of corporations is not new:

Almost from the time of the birth of the modern corporation there have been many voices loudly proclaiming that the accumulation of power that the corporate vehicle promised posed a threat to the people. As Timothy Kuhner notes, “[t]hose of us concerned with the problem of corporations in politics can rest assured, we are in good company.” These voices include U.S. presidents like Thomas Jefferson, who urged citizens to “crush in it’s [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country”; Abraham Lincoln, who wrote that “corporations have been enthroned and an era of corruption in high places will follow,” and predicted that “the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands, and the Republic is destroyed”; and Dwight D. Eisenhower, who warned us to “guard against the acquisition of unwarranted influence . . . by the military-industrial complex.” President Rutherford B. Hayes went

⁶⁸ Cf. Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1486 (1992) (“Some may question whether corporate law issues involve significant externalities; in particular, they may argue that non-shareholder parties are well protected by bodies of law other than corporate law or by privately adopted contractual rules.”).

⁶⁹ Cf. William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 433 (1989) (“Commentary grounded in the Nexus of contracts concept declares ‘contract or concession’ to be the political issue regarding the theory of the firm. It asserts that advocates of government regulation subscribe to a concession theory of the corporation’s origin and then draws on the nexus of contracts to rebut concession theory.”).

⁷⁰ Cf. C. T. CARR, *THE GENERAL PRINCIPALS OF THE LAW OF CORPORATIONS* 165–73 (1905) (describing the concession theory of corporate powers as a response to fears about threats of corporate power to the sovereignty of the King).

so far as to assert that “[t]his is a government of the people, by the people and for the people no longer . . . It is a government of corporations, by corporations and for corporations.” And, while perhaps not “good company” to some, Karl Marx was one of the early thinkers who “cautioned that the concentration of wealth in corporate hands would subjugate the law to private control.”⁷¹

While it is outside the scope of this Essay, it would be interesting to survey the articles that cite the various famous quotes generally associated with a fear of unbridled corporate power and see how often those quotes are cited approvingly by anti-contractarians as opposed to contractarians. My expectation is that the results would support my belief that there is a meaningful connection between anti-contractarian corporate theory and fear of corporate power.⁷²

III. WHY CORPORATE THEORY STILL MATTERS

There has been some suggestion that, at the very least, the debate about the nature of the corporation has in some sense run its course. Stephen Bainbridge has noted that in terms of the debate between contractarians and non-contractarians, “the debate . . . is over. . . . Contractarians and noncontractarians no longer have much of interest to say to one another.”⁷³ In addition, it has been suggested that the debate about the nature of the corporation may be of limited import because it is not clear that particular theories of the corporation necessarily lead to particular conclusions about how corporations should be regulated.

⁷¹ Stefan Padfield, *Finding State Action when Corporations Govern*, 82 TEMP. L. REV. 703, 726–27 (2009) (quoting Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2366 (2007)); 10 THE WRITINGS OF THOMAS JEFFERSON 68–69 (Paul Leicester Ford ed., 1899); 2 EMANUEL HERTZ, ABRAHAM LINCOLN: A NEW PORTRAIT 954–55 (1931); Dwight D. Eisenhower, Farewell Radio and Television Address to the American People (Jan. 17, 1961), in 1960–61 PUB. PAPERS 1035, 1038, available at <http://quod.lib.umich.edu/p/ppotpus/4728424.1960.001/1090> (last visited Sept. 10, 2011); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA xiv (2003); Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 269 (2001).

⁷² Anti-contractarians obviously challenge contractarian justifications of the status quo in corporate law on other grounds than the potential for destructive accumulation of power via a lightly regulated corporate form. See, e.g., Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437 (2010) (reviewing Kent Greenfield, *Corporate Law and the Rhetoric of Choice*, 24 RESEARCH IN LAW AND ECONOMICS: LAW AND ECONOMICS: TOWARD SOCIAL JUSTICE 61 (Dana L. Gold ed., 2009) (describing Greenfield as “reject[ing] contractarian justifications for existing corporate governance arrangements [because] current governance arrangements entrench existing matrices of social and economic power, thus disadvantaging corporate stakeholders who are currently excluded from the corporate decision making process”).

⁷³ STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS 31 (2002) (“[T]he debate has been played out.”).

In particular, David Millon has concluded that, “Historically, the political implications of the natural/artificial and entity/aggregate distinctions have been ambiguous, meaning different things at different times.”⁷⁴ However, Millon is arguably best understood as warning us about the complexities of corporate theory’s “legitimizing function,” as opposed to disputing that there is any such function at all.⁷⁵ Furthermore, recent events suggest corporate theory remains very much an integral part of our decision-making when it comes to determining the role of corporations in society.

In the recent case of *Citizens United v. Federal Election Commission*,⁷⁶ the Supreme Court struck down section 441(b) of the Federal Election Campaign Act of 1971⁷⁷ as unconstitutional. The statute in question limited the political speech of corporations as compared to natural persons,⁷⁸ and the 5-4 majority essentially concluded that there was nothing about corporations qua corporations that justified the statute’s identity-based restriction on speech.⁷⁹ Larry Ribstein has described the case as potentially being “one of the most important business decisions in a generation.”⁸⁰

As I have argued elsewhere, *Citizens United* can be understood as a case where corporate theory played a dispositive role—despite protestations to the

⁷⁴ Millon, *supra* note 43, at 202. See also Reuven, *supra* note 17, at 1022–23.

In 1926, John Dewey published an article in the Yale Law Journal in which he dismisses as irrelevant the debate among the aggregate, artificial entity, and real entity views of the corporation. These views, he explains, could be deployed to suit any purpose; and he uses examples relying on the cyclical nature of these theories. His conclusion is that theory should be abandoned for an examination of reality.

Id. (citing John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926)). Cf. Elizabeth Pollman, *Reconceiving Corporate Personhood*, available at <http://ssrn.com/abstract=1732910> (“[A] metaphor or philosophical conception of the corporation is not helpful for the type of functional analysis that the Court should conduct. The Court should consider the purpose of the constitutional right at issue and whether it would promote the objectives of that right to provide it . . .”).

⁷⁵ See Millon, *supra* note 43, at 241 (“[P]articular theories of the corporation are perceived to justify particular legal rules or, at a more general level, a particular approach to regulation. Although th[is] legitimation claim is a plausible interpretation . . . the connection between corporate theory and doctrinal and social developments is, in fact, a good deal more complex. We have yet to develop an adequate account of corporate theory’s legitimating function.”).

⁷⁶ 130 S. Ct. 876 (2010).

⁷⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (amending 2 U.S.C. § 441(b) (1971)).

⁷⁸ *Id.* (prohibiting corporations (and unions) from financing “electioneering communications” within 30 days of a primary election).

⁷⁹ See *Citizens United*, 130 S. Ct. at 885 (“Government may not suppress political speech on the basis of the speaker’s corporate identity.”).

⁸⁰ Larry E. Ribstein, *The Court Unleashes the Corporation*, IDEOBLOG (Jan. 22, 2010, 8:22 AM) <http://busmovie.typepad.com/ideoblog/2010/01/the-court-unleashes-the-corporation.html>.

contrary from the dissent.⁸¹ To see this, one need only look at the contrasting characterizations of the corporation by the majority and the dissent. The majority viewed the corporation as fundamentally little more than an association of citizens.⁸² The dissent, meanwhile, viewed corporations as state-created entities that: (1) “differ from natural persons in fundamental ways”;⁸³ (2) “have no consciences, no beliefs, no feelings, no thoughts, no desires”;⁸⁴ and (3) “must engage the political process in instrumental terms if they are to maximize shareholder value.”⁸⁵ Of particular note, the dissent asserted that “corporations have been ‘effectively delegated responsibility for ensuring society’s economic welfare.’”⁸⁶ As I have written previously:

By denying that there was anything more substantial to the corporation than an association of citizens, the majority could conclude that there was nothing about the corporation qua corporation that justified restricting corporate political speech solely on the basis of corporate identity. Conversely, the dissent’s view of the corporation as “differ[ing] from natural persons in fundamental ways” arguably made it much easier to conclude that the challenged limitations on speech survived strict scrutiny.⁸⁷

Avi-Yonah argues that *Citizens United* is a real entity case, with both the majority and dissenting opinions agreeing on this point while disagreeing on its implications.⁸⁸ I obviously read the opinion differently. Where Avi-Yonah

⁸¹ See Stefan J. Padfield, *Citizens United and the Nexus-Of-Contracts Presumption*, 1 HARV. BUS. L. REV. 25 (2010), available at <http://www.hblr.org/2011/01/citizens-united-and-the-nexus-of-contracts-presumption/>.

⁸² See, e.g., *Citizens United*, 130 S. Ct. at 906–07 (asserting that the Court’s prior ruling in *Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652 (1990), “permits the Government to ban the political speech of millions of associations of citizens”); *id.* at 908 (asserting that, under 2 U.S.C.A. § 441(b), “certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in . . . political speech”). Note, however, that citizenship is not required to claim the protections of the First Amendment or to incorporate. Citizenship is required, however, to claim the benefits of some of the constitutional protections corporations currently lack. See *Paul v. Virginia*, 75 U.S. 168 (1868) (holding corporations not to be “citizens” within the meaning of the Privileges and Immunities Clause). One might be forgiven for wondering whether the majority’s use of the term “citizen” portends a further expansion of corporate constitutional rights in the future.

⁸³ *Citizen’s United*, 130 S. Ct. at 971, n. 72 (Stevens, J., dissenting).

⁸⁴ *Id.* at 972.

⁸⁵ *Id.* at 965.

⁸⁶ *Id.* at 971 (quoting Milton Regan, *Corporate Speech and Civic Virtue*, in *DEBATING DEMOCRACY’S DISCONTENT* 289, 302 (A. Allen & M. Regan eds., 1998)).

⁸⁷ Padfield, *supra* note 81 (quoting *Citizens United*, 130 S. Ct. at 971, n.72 (Stevens, J., dissenting)).

⁸⁸ Avi-Yonah, *supra* note 17, at 1040 (“What is remarkable about *Citizens United* . . . is that both the majority and the dissent adopted the real entity view of the corporation, so that their only

sees coherence, I see a battle between the concession and contractarian views of the corporation.⁸⁹ To begin with, much of the language from judicial opinions that Avi-Yonah cites as examples of the aggregate (i.e., contractarian) view of the corporation emphasizes the very same corporation-as-association-of-citizens rhetoric employed by the majority in *Citizens United*.⁹⁰ Avi-Yonah tries to distinguish the use of this rhetoric in *Citizens United* (specifically, by Justice Scalia in his concurrence)⁹¹ by arguing that “this does not mean that he adopted the aggregate view, since that view, as applied to the shareholders, underlays the principal argument of the Government and was soundly rejected by the majority. Instead, what Scalia meant was presumably corporate management working together as an association of persons”⁹² However, this line of analysis fails to distinguish between the different ways a focus on shareholders can be used in terms of corporate theory. When the Government argues that the protection of shareholders justifies state regulation, it is arguably doing so on the basis of a view of the corporation much more aligned with the artificial entity view than the aggregate view—since it is the artificial entity view, rather than the aggregate view, which favors regulatory solutions. Thus, to reject the state’s argument here is to reject concession theory, not the aggregate view.⁹³ Meanwhile,

disagreement was in divergent assessments of the implications for the First Amendment.”) *But see* Larry E. Ribstein, *Citizens United v. FEC: A Roundtable Discussion*, FEDERALIST SOCIETY (Feb. 3, 2010) <http://www.fed-soc.org/debates/dbtid.38/default.asp> (“In general, Justice Kennedy’s majority opinion and Justice Stevens’ dissent represent diametrically opposed views of the corporation.”)

⁸⁹ *But cf.* Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 505 (2010) (“The majority in *Citizens United* employed both the aggregation-of-rights and entity theory of corporations to reach its conclusion that corporate political speech is to be treated the same as individual political speech.”).

⁹⁰ *See* Avi-Yonah, *supra* note 17, at 1013 (quoting *Santa Clara Cnty. v. S. Pac. R. Co.*, 18 F. 385, 402–03 (C.C.D. Cal. 1883) (“[P]rivate corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business and have succession of membership without dissolution But the members do not, because of such association, lose their right to protection, and equality of protection.”)); *id.* (quoting *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (“Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose.”)); *id.* at 1016 (quoting *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity.”)).

⁹¹ *See Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring) (“[T]he individual person’s right to speak includes the right to speak in association with other individual persons.”).

⁹² Avi-Yonah, *supra* note 17, at 1041.

⁹³ Put another way, when the state argues regulation is needed to protect the interests of shareholders in these cases, it is saying that the current procedures of corporate democracy are inadequate. *Cf. id.* at 1042 (noting dissent’s focus on “the weakness of the ‘procedures of corporate democracy’” as justifying increased regulation) (quoting *Citizens United* 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part)). This is in opposition to the aggregate view. *Cf.*

to suggest that Justice Scalia is protective of management as the relevant association of citizens appears to be belied by his dissent in *Austin*, where he seemingly equates the relevant association of citizens in the corporate context with that in many other contexts—whether governed by a discrete board of managers or not: “Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: ____.”⁹⁴ As for the dissent, suffice it to say that, as I set forth below in more detail, I am not alone in seeing an artificial entity (i.e., concession theory) view in its rhetoric.⁹⁵ Ultimately, the different views Avi-Yonah and I hold of the *Citizens United* opinion may well, if nothing else, constitute another argument for the Justices being explicit in terms of what view of the corporation they are employing.

In light of the foregoing, it may seem odd that Justice Stevens, in dissent, would expressly disavow any role for corporate theory in deciding the case. Wrote Justice Stevens: “Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model.”⁹⁶ However, there are a number of possible explanations for this seeming contradiction: (1) federalism concerns;⁹⁷ (2) a failure to appreciate the significance of corporate theory;⁹⁸ and/or (3) a desire to avoid the appearance of

Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 31 (2001) (“The [Bellotti] Court argued that ‘corporate democracy’ empowers shareholders to control a corporation’s spending on political matters. By treating corporate activity as the product of the individual agreement of its shareholders, the Court invoked the logic of the aggregation theory.”) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

⁹⁴ *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

⁹⁵ See *infra*, note 96. Compare Avi-Yonah, *supra* note 17, at 1043 (noting that “the dissent takes the view that because of the special characteristics of corporations, they have more limited First Amendment rights”), with *Citizens United*, 130 S. Ct. at 971 n.72 (Stevens, J., concurring in part and dissenting in part) (acknowledging that “*Austin* referred to the structure and the advantages of corporations as ‘state-conferred’ in several places” while trying to distance the dissent from that view).

⁹⁶ *Citizens United*, 130 S. Ct. 876, 971, n.72 (Stevens, J., dissenting) (citing FRANK EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999)).

⁹⁷ Padfield, *supra* note 87. (“As recently as 1989, the Court described corporations as ‘entities whose very existence and attributes are a product of state law.’ Would the Court now turn around and tell states what they had created? Such a pronouncement would raise issues of federalism.”) (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987)).

⁹⁸ Compare *Citizens United*, 130 S. Ct. at 971 n.72 (Stevens, J., dissenting) (“It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern.”) (citing Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 n.5 (2001)), with Joseph

imposing unconstitutional conditions on incorporation.⁹⁹ Regardless, commentators recognized the central role of corporate theory in *Citizens United* almost as soon as the opinion was issued. Stephen Bainbridge posted a blog entitled, “*Citizens United v. FEC: Stevens’ Pernicious Version of the Concession Theory*,”¹⁰⁰ and Larry Ribstein was quoted in a roundtable discussion as noting that, “In general, Justice Kennedy’s majority opinion and Justice Stevens’ dissent represent diametrically opposed views of the corporation.”¹⁰¹

Even commentators who generally support the widely held view that *Citizens United* was more about the rights of listeners than the rights of corporations, may be able to acknowledge that a reasonable basis exists for concluding that corporate theory matters to the resolution of the opinion. To wit, Kent Greenfield, in commenting on my earlier *Citizens United* piece,¹⁰² noted that Daniel Greenwood’s argument that corporations could pursue goals that no individual living human being desired (and that might in fact be harmful to human beings) because the relevant decision-makers were legally required to follow the dictates of a fictional shareholder,¹⁰³ could implicate the question of whether corporations should fall within that narrow class of speech restrictions justified on the basis of identity due to “an interest in allowing governmental entities to perform their functions.”¹⁰⁴ The *Citizens United* majority rejected any role for this doctrine by baldly asserting that, “The corporate independent expenditures

F. Morrissey, *A Contractarian Defense of Corporate Regulation*, 11 TRANSACTIONS: TENN. J. BUS. L. 135, 138 (2009) (“The most problematic portion of the nexus-of-contracts framework for me has been the normative claim that many proponents of the framework have proffered: that, because the corporation can be viewed as this bundle of privately ordered contracts, regulation is largely unnecessary and undesirable.”).

⁹⁹ See *Citizens United*, 130 S. Ct. at 905 (“It is rudimentary that the State cannot exact as the price of those special advantages [of incorporation] the forfeiture of First Amendment rights.”) (quoting *Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

¹⁰⁰ Stephen M. Bainbridge, *Citizens United v. FEC: Stevens’ Pernicious Version of the Concession Theory*, PROFESSORBRAINBRIDGE.COM (Jan. 21, 2010, 4:05 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html>.

¹⁰¹ Ribstein, *supra* note 88. To the extent that one agrees with my positive correlation of contractarianism and de-regulation, one may also add Timothy Kuhner to this list. See Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory* (Jan. 7, 2011), available at <http://ssrn.com/abstract=1736522> (arguing that the holding in *Citizens United* “flow[s] directly from neoclassical economic theory, which assumes a perfect (political) market and resists government intervention aimed at correcting power imbalances and anti-competitive behavior”). Cf. William K. Black, *Testimony Before the Financial Crisis Inquiry Commission*, (Sept. 21, 2010), available at <http://ssrn.com/abstract=1729344> (“Neoclassical theory, which dominates law & economics, is criminogenic because it assumes that control fraud cannot exist while recommending legal policies that optimize an industry for control fraud.”).

¹⁰² Email from Kent Greenfield (Nov. 9, 2010) (on file with author).

¹⁰³ See Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1093–94 (1996).

¹⁰⁴ *Citizens United*, 130 S. Ct. at 899.

at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite.”¹⁰⁵ All of the foregoing suggests corporate theory continues to have a role to play in some of the most important legal issues confronting us today.¹⁰⁶

Finally, as to the other challenge to the relevance of corporate theory raised in the introductory paragraph of Part III—that the implications of the various theories of the corporation are too imprecise to carry the weight often placed on them by various commentators¹⁰⁷—I respond first by acknowledging that I, like many other commentators, do associate nexus-of-contracts theory with de-regulation, and concession theory with a fear of the negative consequences of de-regulation.¹⁰⁸ More specifically, however, there are at least two ways that the express adoption of a particular corporate theory in these cases could be inconsequential. First, it could simply result in nothing more than another layer of debate being added, revolving around whether the theory the judge is expressly adopting is in fact consistent with his or her analysis and conclusion in a particular case. However, one could reasonably hope that bringing this debate to the surface would allow commentators and advocates to better hold judges accountable for their decisions by leaving the judges less “wiggle room” once they have expressly aligned themselves with a particular theory, even if the debate is on-going.

A second possible way corporate theory could be inconsequential is that judges could in fact be convinced to “switch sides,” yet nonetheless rule the same way in a particular case. For example, one could imagine the majority opinion in *Citizens United* expressly adopting the aggregate/nexus-of-contracts theory of the corporation, being subsequently convinced that this is not the best theory, yet nonetheless ruling against regulation in subsequent similar cases because the particular balancing of interests still favors striking down the regulation in question even when viewing the corporation as an artificial entity/state concession. Again, one answer to this criticism is that while the application of legal theories is more fact specific, and therefore arguably more imprecise, than their adoption—one would nonetheless expect the express application of a par-

¹⁰⁵ *Id.*

¹⁰⁶ While the issue of corporate personhood under the Constitution is distinguishable from questions of corporate theory, it is also worth noting that the Vermont legislature responded to the *Citizens United* opinion by considering a measure eliminating corporate personhood status. See Christopher Ketcham, *Resolution Calling to Amend the Constitution Banning Corporate Personhood Introduced in Vermont*, ALTERNET (Jan. 22, 2011), <http://www.alternet.org/news/149620>.

¹⁰⁷ See *supra* note 71 and accompanying text.

¹⁰⁸ See Joseph F. Morrissey, *A Contractarian Defense of Corporate Regulation*, 11 TRANSACTIONS: TENN. J. BUS. L. 135, 138 (2009) (“The most problematic portion of the nexus-of-contracts framework for me has been the normative claim that many proponents of the framework have proffered: that, because the corporation can be viewed as this bundle of privately ordered contracts, regulation is largely unnecessary and undesirable.”); C. CARR, THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS 165–73 (1905) (describing the concession theory of corporate powers as a response to fears about threats of corporate power to the sovereignty of the King).

ticular corporate theory to make the legal analysis more open to useful critique than were the application of particular legal theories left unexpressed.¹⁰⁹ As J.W. Verret has noted, the theories of corporate law “serve to illuminate corporate law debates and rarefy the opposing parties.”¹¹⁰

IV. HOW DODD-FRANK IMPACTS CORPORATE THEORY

In this Part, I argue that Dodd-Frank impacts corporate theory in at least two ways. First, it reaffirms yet again that as a matter of positive law the sovereign retains a tremendous amount of power to regulate corporations—certainly more than contractarians frequently believe should be the case. Second, it formally recognizes that corporations have evolved to the point where at least some of them have become literally too big to fail—a disturbing state of affairs that many concession theorists might well respond to with something along the lines of: “We told you so.”

A. *The Inconvenient Truth of Regulatory Power*

It has been said that, “theories of corporate law [must] be disputed when they . . . fail to comport with realities of corporate law”¹¹¹ And while it is also fair to say that, when it comes to the contract-concession debate, arguments pointing to the fact of state regulatory power as supportive of concession theory constitute “simply a statement about current law, not a normative argument about what the law ought to be,”¹¹² it is nonetheless hard to ignore the striking

¹⁰⁹ A further potential benefit of having judges expressly adopt particular theories of the corporation in relevant cases is that it may clarify which party has the burden of proof. For example, under the concession theory of the corporation, more of the burden would fall on those seeking to limit the state’s ability to regulate its creations. *Compare Citizens United*, 130 S. Ct. at 925 (Scalia, J., concurring) (“Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on petitioners to bring forward statements showing that they *are*”), *with id.* at 950, n.55 (Stevens, J., dissenting) (“Given that corporations were conceived of as artificial entities and do not have the technical capacity to ‘speak,’ the burden of establishing that the Framers and ratifiers understood ‘the freedom of speech’ to encompass corporate speech is, I believe, far heavier than the majority acknowledges.”).

¹¹⁰ Verret, *supra* note 18, at 315. *Cf.* Roger Martin, *Fixing the Game: The Unintended Consequences of an Economic Theory*, THE HUFFINGTON POST (Apr. 27, 2011, 2:40 PM) http://www.huffingtonpost.com/roger-martin/fixing-the-game-the-unint_b_854481.html (“The only way we can avoid increasingly frequent stock market meltdowns—and all the pain, suffering and economic dislocation they cause—is to explore the theories that underpin American capitalism.”).

¹¹¹ Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565, 1614 (1993).

¹¹² BUTLER & RIBSTEIN, *supra* note 20. *But cf.* Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of ‘Nexus of Contracts’ Theory* 3 (Dec. 10, 2010), *available at* <http://ssrn.com/abstract=1723170> (“The nexus of contracts theory has been extremely influential

reminder of state authority over corporations embodied in Dodd-Frank.¹¹³ Among other things, Dodd-Frank seeks to exert regulatory authority over some of the most cherished aspects of corporate governance (i.e., the aspect of corporate law that regulates the internal relations of shareholders and management): (1) “say on pay”; (2) reporting company compensation committee composition and authority; (3) executive compensation disclosures; (4) clawbacks of executive compensation; (5) “proxy access”; and (6) additional disclosures regarding whether the same individual holds the positions of CEO and Chairman of the Board.¹¹⁴

It is particularly interesting to note the SEC’s following statement in its release adopting its new proxy access rule:

[C]orporate governance is not merely a matter a private ordering. Rights, including shareholder rights, are artifacts of law, and in the realm of corporate governance some rights cannot be bargained away but rather are imposed by statute. There is nothing novel about mandated limitations on private ordering in corporate governance.¹¹⁵

To the extent nexus-of-contracts theory is associated with an emphasis on private ordering and de-regulation, this constitutes a fairly strong rejection of that theory emanating from Dodd-Frank.¹¹⁶

in shaping corporate law theory over the past three decades. But despite its dominance, there is still confusion over whether the theory is a descriptive model, a normative prescription, or some combination of both.”)

¹¹³ Cf. Hayden & Bodie, *supra* note 112, at 12. (“The corporation is not simply a nexus of contracts. It is an organizational form with a set of state-given benefits (primarily limited liability) along with a set of taxes and mandatory governance rules. The state plays a much larger role in the story than contractarians have ever before allowed.”).

¹¹⁴ See generally Stephen M. Bainbridge, *The Corporate Governance Provisions of Dodd-Frank* 1 (Oct. 28, 2010) (reviewing relevant sections), available at <http://ssrn.com/abstract=1698898>.

¹¹⁵ SEC Release No. 34-62764, at 17 (Aug. 25, 2010), available at <http://www.sec.gov/rules/final/2010/33-9136.pdf>.

¹¹⁶ Cf. *id.* at 22 (noting that Dodd-Frank Act Sections 971(a) and (b) “expressly provide that the Commission may issue rules permitting shareholders to use an issuer’s proxy solicitation materials for the purpose of nominating individuals to membership on the board of directors of the issuer”). Shortly before this Essay went to press, the D.C. Circuit struck down the SEC’s proxy access rule in *Business Roundtable and Chamber of Commerce v. SEC* (No. 10-1305, July 22, 2011), concluding that “the Commission acted arbitrarily and capriciously for having failed . . . adequately to assess the economic effects of a new rule.” Slip op. at 3. However, Gordon Smith noted that: “The opinion is a rather limited indictment of the proxy access proposal, relying on the lack of sufficient justification. The SEC is considering its options. While it might challenge the ruling, I suspect that the agency is more likely to produce a newly justified rule in the near future.” Gordon Smith, *Business Roundtable v. SEC, THE CONGLOMERATE* (July 22, 2011), <http://www.theconglomerate.org/2011/07/business-roundtable-v-sec.html> (last visited Oct. 17, 2011).

The executive compensation provisions of Dodd-Frank can also be seen as calling into question the “rational actor” basis of the contractarian defenses of laissez-faire corporate regulation. Christine Hurt notes in her “Regulating Compensation” article that the financial crisis can be framed as a “contracts crisis”:¹¹⁷

Though these various firms and individuals legally contracted to accept risks, these risks, at least in hindsight, were unacceptable risks, and these contracts became toxic. That the contracting parties entered into these agreements nevertheless can be ascribed to various failures: individual decisionmaking failures, captive gatekeepers, skewed incentives, complexity or just plain greed.¹¹⁸

Thus, “[o]nce proponents of executive compensation reform were able to link pay without performance concerns to systemic risk concerns . . . regulation was almost inevitable.”¹¹⁹ In other words, to at least some extent contracting failed—and it arguably failed in a very de-regulated environment.¹²⁰

None of this should be altered by the fact that Dodd-Frank may eventually be overturned or marginalized by its opponents.¹²¹ A policy shift on the issue of whether to exercise certain regulatory powers does not change the fact that the relevant power exists.¹²²

B. Too-Big-to-Fail and the Predictive Power of Concession Theory

Whatever one may think about the impact of Dodd-Frank’s regulatory scope on the contract-concession debate, the fact that Dodd-Frank has codified TBTF seems much harder to dismiss as anything other than a game changer.¹²³

¹¹⁷ Christine Hurt, *Regulating Compensation* 3 (Feb. 11, 2011), available at <http://ssrn.com/abstract=1758952>.

¹¹⁸ *Id.* at 2.

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.* (noting “decades of a more laissez-faire approach to capital markets” preceding the financial crisis).

¹²¹ See Carr, *supra* note 108.

¹²² Cf. Michael Galanis, *Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re)Balancing?* 31 OXFORD J. OF LEGAL STUDIES 327 (2011), available at <http://ssrn.com/abstract=1757763> (“[P]ower dynamics, which are inherent in the repeated bargains between stakeholders and the company, are prone to imbalance rather than balance by causing cumulative increases in the relative power of stronger parties and vicious spirals of relative power loss for weaker ones. . . . It is therefore argued that since the contractual model is inherently prone to instability, mandatory power-balancing rules are necessary.”).

¹²³ Cf. Steven Ramirez, *TBTF and the \$7 Trillion Question*, CORPORATE JUSTICE BLOG (Feb. 27, 2011, 5:23 PM) <http://corporatejusticeblog.blogspot.com/2011/02/tbtf-and-7-trillion->

As I have already noted, one does not need to read too deeply into the relevant literature to come away from the contract-concession debate with the distinct impression that one of the things the two sides fundamentally disagree upon is the threat corporations pose to modern democratic society. It may even be fair to say that contractarians often view the private corporation as a defender of democracy against the over-reaching of government. Contractarians would essentially have us believe that if we leave the corporation as unregulated as possible, the invisible hand of free market competition will ensure the maximum benefit for all. As Hayden and Bodie note: “The normative side of the nexus of contracts theory relies on an extended version of the following argument: corporations are contracts; contracts reflect Pareto improvements; Pareto improvements, by their very nature, promote the good; therefore, corporations promote the good.”¹²⁴

Concession theorists and their various cohorts, on the other hand, have long been extremely suspicious of corporations—fearing that their incredible ability to accumulate capital, together with the limited liability of their shareholders, effective insulation of insiders from personal liability, and “immortality” make them the front-running candidate to be the next Leviathan.¹²⁵ In fact, a 1905 treatise described concession theory as a response to fears about threats of corporate power to the sovereignty of the King.¹²⁶ (Of course, this debate about who is more on “our” side—corporations or government—ignores what may well become a more pressing problem: Who will be on our side if corporations and government are in fact united against us?)¹²⁷

question.html (“I have long argued that Dodd-Frank did not end TBTF, but instead institutionalized it.”).

¹²⁴ Hayden & Bodie, *supra* note 112, at 16. See BLACK'S LAW DICTIONARY 1225 (9th ed. 2009) (“Pareto optimality . . . An economic situation in which no person can be made better off without making someone else worse off. The term derives from the work of Vilfredo Pareto (1848–1923), an Italian economist and sociologist.”).

¹²⁵ Cf. Daniel J.H. Greenwood, *Essay: Telling Stories of Shareholder Supremacy*, MICH. ST. L. REV. 1049, 1072 (2009) (“The logic of traditional social-contract-based liberalism . . . suggests that these massive sources of collective power—far wealthier and far more able to negatively affect our individual lives than virtually any local government or even most Federal agencies—should be just as scary as government. . . . If Hobbes' Leviathan was a corporate body composed of the subjects of the state yet existing apart from it, then our modern corporations are surely subject to the same critiques as the Leviathan itself.”) (citing THOMAS HOBBS, *Leviathan: Or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil*, in THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY (William Molesworth, Bart. ed., London 1839)).

¹²⁶ CARR, *supra* note 108, at 165–73.

¹²⁷ See *Corporatocracy*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Corporatocracy> (last visited Sept. 9, 2011) (“Corporatocracy, in social theories that focus on conflicts and opposing interests within society, denotes a system of government that serves the interest of, and may be run by, corporations and involves ties between government and business. Where corporations, conglomerates, and/or government entities with private components, control the direction and governance of a country, including carrying out economic planning notwithstanding the ‘free market’ label.”). Obviously, I recognize that this “us vs. them” rhetoric is problematic in many ways—not least of which because both corporations and government are “us” in too many ways to count. Nonethe-

Concession theorists should not have been surprised by the arrival of corporate entities deemed too-big-to-fail after a prolonged period of de-regulation—entities that placed the entire global financial system at risk.¹²⁸ Contractarians, meanwhile, were likely “shocked.”¹²⁹ If “theories of corporate law [must] be disputed when they . . . fail to comport with realities of corporate law,”¹³⁰ then they must be even more vigorously challenged when their most cherished predictions turn out to be false.¹³¹ This is a particularly important point here because even if Dodd-Frank were to be repealed, it would be difficult to argue that the reality of TBTF that Dodd-Frank codified would be repealed along with it.¹³²

Of course, not everyone will agree that the financial crisis of 2008 was fundamentally a result of de-regulated market failure.¹³³ In fact, in anticipation

less, one need not study history long to conclude that both governments and corporations often take actions that threaten large swaths of the citizenry for the benefit of a few.

¹²⁸ See *Conclusions*, FINANCIAL CRISIS INQUIRY COMMISSION, <http://www.fcic.gov/report/conclusions> (last visited Sept. 18, 2011) (citing “widespread failures in financial regulation” as one of the causes of the financial crisis); Christine Hurt, *Regulating Compensation* 3 (Feb. 11, 2011), available at <http://ssrn.com/abstract=1758952> (noting “decades of a more laissez-faire approach to capital markets” preceding the financial crisis); Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis* 1 HARV. BUS. L. REV. 1, 3–4 (2011), available at <http://ssrn.com/abstract=1874806> (“[T]he crisis was the direct, foreseeable . . . consequence of the CFMA’s sudden and wholesale removal of centuries-old legal constraints on speculative trading in over-the-counter (“OTC”) derivatives.”). Cf. SIMON JOHNSON & JAMES KWAK, 13 BANKERS 30 (Vintage 2011) (“The 1920s were a period of significant deregulation, as Republican administrations dismantled the system of state control developed in order to fight the First World War.”).

¹²⁹ Cf. Alan Greenspan’s *Congressional Testimony - Prepared Statement*, HERE IS THE CITY: NEWS (Oct. 24, 2008), available at http://news.hereisthecity.com/news/business_news/8386.cntns (“I found a flaw in the model that I perceived is the critical functioning structure that defines how the world works. That’s precisely the reason I was shocked. . . . I still do not fully understand why it happened . . .”).

¹³⁰ Orts, *supra* note 111.

¹³¹ One of the comments I received back on an earlier version of this Essay suggested that it was “disingenuous, at best,” to argue that Dodd-Frank had anything to teach us about theories of the corporation, since it was enacted on the basis of “interest group politics” rather than any coherent theory of the corporation. However, the intent of the drafters does not change the fact that Dodd-Frank codified TBTF, and it is this fact that implicates corporate theory. The motivations underlying the Act would be relevant if the drafters in fact did not believe that there was any real systemic threat from corporations that had gotten too big to fail—but we have no evidence of that.

¹³² Cf. Catalina Camia, *GOP Moves to Repeal IRS, Wall Street Rules*, USA TODAY (Jan. 6, 2011), available at <http://content.usatoday.com/communities/onpolitics/post/2011/01/gop-moves-to-repeal-irs-bank-bailouts--/1> (“Rep. Michele Bachmann, R-Minn., is making good on a Tea Party movement vow to get rid of the new rules and regulations governing Wall Street in what is commonly known as the Dodd-Frank financial overhaul bill . . .”).

¹³³ See Keith Hennessey, *Causes of the Financial and Economic Crisis: Dissenting Statement of Commissioner* 414, available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-akin_thomas_dissent.pdf (“We . . . reject as too simplistic the hypothesis that too little regulation caused the crisis Poorly designed government

of election 2012, at least some Republicans are reportedly arguing that we need even less regulation.¹³⁴ However, the point I am making here is that the Dodd-Frank Corporation is novel and important because it adds something new to the corporate theory debate—not that it ends the debate.

V. IMPLICATIONS

If it is fair to say that Dodd-Frank’s official acknowledgement that at least some corporations have become TBTF equates to official recognition that (at least as to some points of the corporate theory debate) concession theory got it right while the contractarians got it wrong, then we should continue to see ample opportunity to remind decision-makers of this fact in upcoming cases and legislative debates. While the *Citizens United* decision cautions against expecting the corporate theory debate to take center stage automatically, the fact remains that there will be many opportunities to point out that some of our most pressing economic issues revolve at least in part around the question: “What is a corporation, and what way of thinking about corporations serves us best?”

Two immediate examples come to mind. First, there is the Supreme Court case of *AT&T v. FCC*, wherein the question presented was whether the Freedom of Information Act’s protection of “personal privacy” protects the “privacy” of corporate entities.¹³⁵ The Court decided the case solely on the basis of statutory construction: “‘Person’ is a defined term in the statute [expressly including corporations]; ‘personal’ is not. When a statute does not define a term, we typically ‘give the phrase its ordinary meaning.’ ‘Personal’ ordinarily refers to individuals.”¹³⁶ However, the fact remains that the case simply begs the question of whether corporations *should* have personal privacy rights. Wrote Stephen Bainbridge in response to the decision:

[The opinion contains t]welve pages of what purports to be legal and grammatical analysis But Chief Justice Roberts could have summed up his opinion far more succinctly: “Because at least 5 of us say so.”

housing policies distorted market outcomes and contributed to the creation of unsound Mortgages”).

¹³⁴ Susan Page, *2012 Looms as a Test of Competing Economic Theories*, USA TODAY (June 20, 2011, 5:35 AM), available at http://www.usatoday.com/news/politics/2011-06-19-GOP-Obama-economy-tax-cuts-spending-cuts-candidates_n.htm (“With the economy swamping other issues for American voters, Republican contenders have united behind a conservative template that would reduce the role of government — slashing spending, cutting taxes and reducing regulation . . .”).

¹³⁵ 131 S. Ct. 1177 (2011).

¹³⁶ *Id.* at 1182 (quoting *Johnson v. United States*, 130 S. Ct. 1265, 1267 (2010)).

The *Citizens United* decision last term attracted much criticism . . . for holding that a corporation is a person and as such has certain constitutional rights. While I agreed with the holding, I was disturbed that the Chief Justice's majority opinion for the Supreme Court so obviously lacked a coherent theory of the nature of the corporation and, as such, also lacked a coherent theory of what legal rights the corporation possesses.

The utterly specious word games that drive this opinion simply confirm that Chief Justice Roberts has failed to articulate a plausible analytical framework for this important problem.¹³⁷

The called-for “plausible analytical framework” seemingly requires the justices to expressly adopt a particular theory of the corporation. If the preferred theory ultimately turns out to be some version of the nexus-of-contracts theory, then it will be fair to demand an explanation for why that theory was favored in light of Dodd-Frank and the apparent failings of contractarianism embodied in that Act.

A second timely debate that implicates corporate theory is proxy access. Somewhat ironically, the issue arises directly out of a Dodd-Frank mandate. Larry Ribstein has argued that the best argument for those opposing proxy access may well come directly from *Citizens United*.¹³⁸ It would be circular indeed if challenges to proxy access under Dodd-Frank were resolved on the basis of pro-corporate First Amendment grounds following *Citizens United*, when *Citizens United* arguably embraced a contractarian view of the corporation—the shortcomings of which this Essay asserts gave rise to the need for Dodd-Frank in the first instance.¹³⁹

¹³⁷ Stephen Bainbridge, *Corporations have no right under FOIA to "personal privacy"*, PROFESSORBAINBRIDGE.COM (Mar. 1, 2011), <http://www.professorbainbridge.com/professorbainbridgecom/2011/03/corporations-have-no-right-under-foia-to-personal-privacy.html> (last visited Oct. 18, 2011).

¹³⁸ See Larry Ribstein, *The Securities Laws and the First Amendment*, TRUTH ON THE MARKET (Dec. 28, 2010), <http://truthonthemarket.com/2010/12/28/the-securities-laws-and-the-first-amendment/> (suggesting that after *Citizens United* the Court will be less inclined to respect distinctions that up till now have been cited to support regulation of corporate speech in areas like shareholder proposals). Cf. Larry Ribstein, *The SEC, Global Warming and the First Amendment*, IDEOBLOG (Jan. 29, 2010, 6:35 AM), <http://busmovie.typepad.com/ideoblog/2010/01/the-sec-global-warming-and-the-first-amendment.html> (making similar argument in terms of *Citizens United*'s impact on the SEC's ability to require corporate disclosures on climate change).

¹³⁹ As noted above, the SEC's most recently promulgated proxy access rule was indeed successfully challenged in the D.C. Circuit. See Bainbridge *supra* note 114. However, the basis for the rejection of the rule was the SEC's failure to conduct a proper cost-benefit analysis, not anything implicating corporate theory like *Citizens United* did. See Smith, *supra* note 116. Cf. Brett McDonnell, *Dodd-Frank @ 1: An Overall Assessment*, THE CONGLOMERATE (July 22, 2011), <http://www.theconglomerate.org/2011/07/dodd-frank-1-an-overall-assessment.html> (“[L]et me briefly lament the D.C. Circuit's vacating of the proxy access rule. . . . The SEC's documents proposing and finalizing the rule are about as extensive as I have ever seen from that agency, and

Of course, these are only two examples. Given the dominant role of corporations in our modern society, however, it should not be too hard to defend the proposition that many other cases like these—raising, either directly or indirectly, the question of how we should best define corporations—will arise with great frequency. When they do, we should not forget the message of Dodd-Frank identified herein: that both its reassertion of government authority over corporations, and its announcement of the arrival of the too-big-to-fail corporation, constitute two meaningful challenges to the dominance of contractarianism.

VI. CONCLUSION

In conclusion, I want to reiterate that it is not my intent to suggest in any way that the contractarian view of the firm is never the best way to view the corporation. In fact, I would argue the exact opposite is true. However, to the extent that the nexus-of-contracts theory is employed to support what I view as an extreme emphasis on de-regulation, I believe reports of the death of concession theory, and the concomitant unchallenged dominance of nexus-of-contracts theory, have been exaggerated. That is to say, concession theory—at least as I've broadly employed the term here—remains a viable counter-balance to some of the more pernicious (at least from my perspective) legislative and judicial pronouncements that are alleged to be natural consequences of nexus-of-contracts theory. Anecdotally, it is worth mentioning that while nexus-of-contracts theory has its roots in economics rather than law, it often appears to be the conservative legal scholars that have raised the banner of the theory in the name of de-regulation much more frequently than their fellow economists.¹⁴⁰ Be that as it may, this Essay is in no way meant to suggest that concession theory in any form should replace the nexus-of-contracts theory (as if that were even possible). Rather, the purpose of this Essay is to point out that concession theory, along with its various anti-contractarian brethren, remains viable and, more importantly, that Dodd-Frank may well have added a meaningful bit of spring to its step.

From the perspective of many, change is coming. Lynn Stout has written in a related context:

they had voluminous comments from all sides to help guide them. The D.C. Circuit cherry-picks areas where it asserts the SEC didn't do enough. It will almost always be possible to do that with any agency rulemaking. Requiring that level of deliberation could well make the task of rule-writing for Dodd-Frank more daunting still. This opinion is little more than the judges ignoring the proper judicial rule of deference to an agency involved in notice-and-comment rulemaking and asserting their own naked political preferences. Talk about judicial activism.”).

¹⁴⁰ Cf. Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW (Edward Elgar, 2011), available at <http://ssrn.com/abstract=1754242> (noting discrepancy between corporate law's marginalization of employees as mere contracting parties, and economic theories of the firm wherein “employees take on a much more central role”).

[I]n the 1970s . . . [p]rominent members of the ["Chicago School" of economists] argued that economic analysis could reveal the proper goal of corporate governance quite clearly, and that goal was to make shareholders as wealthy as possible.... [However,] the shareholder primacy view, as conventionally understood, has reached its zenith, and is poised for decline. Traditional shareholder primacy thinking is being rapidly undermined by new developments in economic and corporate theory; by striking changes in business practice; and by a flood of recent empirical studies. In its classic form, the shareholder-centered model of the corporation is on the brink of failure.¹⁴¹

Meanwhile, Charles Whitehead has opined that, "Corporate law's traditional deference to private ordering has begun to give way to a new understanding of how shareholders, directors, and officers interact."¹⁴² And Hayden and Bodie conclude that, "The nexus of contracts model does not represent the reality of the modern corporation, and it has misled us for too long."¹⁴³ As this change unfolds, we may well point to the arrival of the Dodd-Frank Corporation as the point at which nexus-of-contracts theory "jumped the shark."¹⁴⁴

¹⁴¹ Lynn A. Stout, *New Thinking on 'Shareholder Primacy'* (Feb. 21, 2011), available at <http://ssrn.com/abstract=1763944>.

¹⁴² Charles K. Whitehead, *Why Not a CEO Term Limit?* (Feb. 13, 2011), available at <http://ssrn.com/abstract=1760507>.

¹⁴³ Hayden & Bodie, *supra* note 112, at 16.

¹⁴⁴ See *Jumping the shark*, WIKIPEDIA, http://en.wikipedia.org/wiki/Jumping_the_shark (last visited Oct. 12, 2011) (internal citations omitted).

The phrase *jump the shark* comes from a scene in the fifth season premier episode of the American TV series *Happy Days* titled "Hollywood: Part 3," written by Fred Fox, Jr. and aired on September 20, 1977. In the episode, the central characters visit Los Angeles, where a water-skiing Fonzie (Henry Winkler), wearing swimming trunks and his leather jacket, jumps over a confined shark, answering a challenge to demonstrate his bravery. The series continued for nearly seven years after that, with a number of changes in cast and situations. Jon Hein explained the concept as follows: "It's a moment. A defining moment when you know that your favorite television program has reached its peak. That instant that you know from now on...it's all downhill. Some call it the climax. We call it 'Jumping the Shark.' From that moment on, the program will simply never be the same."

Id.

