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## Rehabilitating Concession Theory

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## REHABILITATING CONCESSION THEORY

STEFAN J. PADFIELD\*

### *Abstract*

*In Citizens United v. FEC, a 5-4 majority of the Supreme Court ruled that “the Government cannot restrict political speech based on the speaker’s corporate identity.” The decision remains controversial, with many arguing that the Court effectively overturned more than 100 years of precedent. I have previously argued that this decision turned on competing conceptions of the corporation, with the majority adopting a contractarian view while the dissent advanced a state concession view. However, the majority opinion was silent on the issue of corporate theory, and the dissent went so far as to expressly disavow any role for corporate theory at all. At least as far as the dissent is concerned, this avoidance of corporate theory may have been motivated at least in part by the marginalization of concession theory. In fact, concession theory’s marginalization has become so extreme that advocating for it exposes one to mockery by some of the most esteemed experts in corporate law. For example, one highly regarded commentator criticized the dissent by saying: “It has been over half-a-century since corporate legal theory, of any political or economic stripe, took the concession theory seriously.” In this Essay I consider whether this marginalization of concession theory is justified. I conclude that the reports of concession theory’s demise have been greatly exaggerated and that there remains a serious role for the theory in discussions concerning the place of corporations in society. This is important because without a vibrant concession theory we are left primarily with aggregate theory and real entity theory, two theories of the corporation that both defer to private ordering over government regulation.*

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*I. Introduction*

What is a corporation? It seems necessary to answer that question before concluding, as the Supreme Court did in *Citizens United*, that “the Government cannot restrict political speech based on the speaker’s corporate identity.”<sup>1</sup> This is true even if one understands the *Citizens United* opinion to be fundamentally based on listeners’ rights theory, which justifies First Amendment protection by focusing not on the rights of speakers but rather on the need for citizens in a democracy to be fully informed.<sup>2</sup> Even then the question remains whether there is something about corporations that justifies including them in the line of cases carving out First Amendment exceptions for particular identity-based restrictions on speech.<sup>3</sup>

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1. *Citizens United v. FEC*, 558 U.S. 310, 346 (2010).

2. See Jessica A. Levinson, *We the Corporations? The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United*, 46 U.S.F. L. REV. 307, 339 (2011) (“Justice Kennedy’s focus on the importance of unrestricted corporate electoral speech to self-government hinges on his belief that such communications provide important information for voters.”).

3. See *Citizens United*, 558 U.S. at 420 (Stevens, J., dissenting) (“[I]n a variety of contexts, we have held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms.”).

This Essay discusses a particular aspect of what I have previously referred to as the “silent corporate theory debate” running through many of the Court’s campaign finance cases.<sup>4</sup> Specifically, I want to “rehabilitate”<sup>5</sup> concession theory, which views the corporation as fundamentally a creature of the state and thus presumptively subject to broad state regulation.<sup>6</sup> I believe this is an important project because (1) of the three traditional theories of the corporation under constitutional law (concession theory,<sup>7</sup> real entity theory,<sup>8</sup> and aggregate theory<sup>9</sup>) concession theory is the only one that legitimizes presumptive deference to state regulation, and (2) commentators have unduly marginalized concession theory in recent years.<sup>10</sup> These two factors combine to tilt the playing field in favor of private ordering and deregulation in a way that does not comport either with the relative strengths of the respective theories or with the recent vivid examples of market failure.<sup>11</sup> Thus, rehabilitating concession theory will

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4. See Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 831 (2013); cf. ERIC SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* 2-3 (2012) (“[B]ecause judges are governmental officials who exercise coercive power, it is important that they explain their legal decisions with honesty and transparency.”).

5. Somewhat ironically, I drew my inspiration for the title of this Essay from DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

6. It is important to understand that the version of concession theory I am advancing here creates a presumption in favor of state regulation, as opposed to giving state regulators unbridled powers. See *infra* note 29. But see Reza Dibadj, *(Mis)Conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 733 (2013) (“My thesis is simple: a corporation, as a legislative creature, should only enjoy those rights bestowed upon it by its creator.”).

7. Concession theory is also sometimes referred to as artificial entity theory. See *infra* Part II.A.

8. Real entity theory is also sometimes referred to as natural entity theory. See *infra* Part II.C.

9. Aggregate theory is also sometimes referred to as associational or partnership theory, and is frequently equated with nexus-of-contracts theory or contractarianism. See *infra* Part II.B.

10. See, e.g., Stephen M. Bainbridge, *Citizens United v. FEC: Stevens’ Pernicious Version of the Concession Theory*, PROFESSORBAINBRIDGE.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> (“It has been over half-a-century since corporate legal theory, of any political or economic stripe, took the concession theory seriously.”).

11. Cf. Stephen Foley, *Greenspan Says Crisis Left Him in ‘Shocked Disbelief’*, INDEPENDENT (Oct. 24, 2008), available at <http://www.independent.co.uk/news/business/news/greenspan-says-crisis-left-him-in-shocked-disbelief-971609.html#> (“Alan Greenspan,

restore some much-needed balance to the current debate about the proper role of corporations in our society.<sup>12</sup>

Following this Introduction, Part II provides a brief overview of the primary theories of the corporation, presenting the theories in the order that they gained prominence historically in the United States. From at least one perspective, the story here is one of repeated attempts to free corporations from the perceived regulatory shackles of concession theory. While it is fair to say that these attempts were in large part successful in application, they are arguably less successful in terms of theoretical coherence, leaving the door open for a resurgence of concession theory. Part III will then seek to demonstrate why concession theory remains viable by rebutting some of the primary arguments against its relevance in cases like *Citizens United*. These arguments include the excessive malleability of corporate theory, the incompatibility of concession theory with the modern enabling-act structure of corporate law, the irrelevance of concession theory in light of the triumph of listeners' rights, and the difficulties inherent in applying concession theory in light of the unconstitutional conditions doctrine. While these arguments all make valid points, I explain why they are ultimately unable to carry the weight their proponents seek to place on them. Finally, I provide some concluding remarks in Part IV.

## II. An Overview of the Theories of the Corporation

Constitutional law and corporate law present different theories of the corporation. The three traditional theories under constitutional law are (1) artificial entity theory, (2) real entity theory, and (3) aggregate theory.<sup>13</sup> The primary theories under corporate law are (1) concession theory, (2) director-primacy and team-production theory, and (3) nexus-of-contracts

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the former chairman of the US Federal Reserve, has dramatically repudiated large parts of his laissez-faire ideology and joined the chorus of voices saying that the credit crisis reveals a need for more regulation of the finance industry.”).

12. See Fenner L. Stewart, Jr., *Indeterminacy and Balance: A Path to a Wholesome Corporate Law*, 9 RUTGERS BUS. L. REV. 81, 86 (2012) (“When . . . a balance between theories exists, a robust debate can occur where no ideas are raised to the status of ‘truth’ while other theories are off the table before the debate begins. This would lead to . . . more complexity than presently exists within corporate legal discourse, helping to immunize the law from the sort of oversimplifications that might offer ‘ease of comprehension’ at the risk of ‘positive error.’”) (citations omitted).

13. See Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN ST. L. REV. (forthcoming 2014) (manuscript at 3), available at <http://ssrn.com/abstract=2225447> (tracing “historical approaches to the nature of legal entities, which have focused on whether a firm is real, a fiction, or an aggregate”).

theory (contractarianism).<sup>14</sup> While one should be careful not to overstate the overlap between conceptualizations of the corporation for purposes of constitutional and corporate governance analysis, artificial entity theory is typically equated with concession theory,<sup>15</sup> while aggregate theory is typically equated with contractarianism.<sup>16</sup> In addition, I have previously aligned real entity theory with the director-primacy and team-production theories.<sup>17</sup> I will detail the important aspects of these theories in the sub-parts that follow.

*A. In the Beginning: Artificial Entity / Concession Theory*

In 1819, in the case of *Trustees of Dartmouth College v. Woodward*, Justice Marshall famously stated:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. . . . The objects for which a corporation is created

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14. See ROBERT W. HAMILTON & RICHARD A. BOOTH, BLACK LETTER OUTLINES: CORPORATIONS 327-32 (5th ed. 2006) (citing concession theory, nexus-of-contracts theory, and “process” theory). As I will explain below, my decision to treat the director-primacy and team-production theories separately, as opposed to lumping them in with contractarianism, is somewhat controversial. See *infra* note 17.

15. See Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765, 807 (2013) (discussing “the state entity theory (also known as the artificial entity theory or the concession theory)”). But see John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 667 (1926).

It is clear that there is nothing essentially in common between the fiction and concession theories, although they both aimed toward the same general consequence, as far as limitation of power of corporate bodies is concerned. The fiction theory is ultimately a philosophical theory that the corporate body is but a name, a thing of the intellect; the concession theory may be indifferent as to the question of the reality of a corporate body; what it *must* insist upon is that its legal power is derived.

*Id.*

16. See Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1025 n.142 (“The point that the nexus of contracts theory is a reinvention of the aggregate view has been made repeatedly.”) (citations omitted).

17. This decision is controversial at the very least because Stephen Bainbridge, the scholar most commonly associated with director-primacy theory, rejects the characterization. See Padfield, *supra* note 4, at 843 n.41 (citing “our multi-blog post discussion of the issue”). But see *id.* (“On the other hand, Lynn Stout [one of the scholars most commonly associated with team-production theory] responded . . . with an e-mail asserting that my description of the issue was ‘as well put as I’ve seen it.’”).

are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant.<sup>18</sup>

This formulation has been understood to represent the concession theory of the corporation, which views the corporation as a tremendous capital accumulation device that was only made possible by the state conveying certain privileges to incorporators for which they could not otherwise privately contract.<sup>19</sup> The rationale for granting these privileges was that the state could thereby achieve goals that might otherwise fail for lack of funding.<sup>20</sup>

As an aside, *Dartmouth College* also supports the contract view of the corporation.<sup>21</sup> This contract view of the corporation should be contrasted with the aggregate view of the corporation as a nexus-of-contracts, which will be discussed in more detail below. Despite their similar nomenclature, these theories are readily distinguishable. The contract theory identifies the state as one of the key contracting parties, while aggregate nexus-of-contracts theory views the state as merely providing default rules to facilitate private ordering among other parties via the corporate form.<sup>22</sup> Regardless, *Dartmouth College* remains primarily associated with concession theory.

*Black's Law Dictionary* defines "concession" as "[a] government grant for specific privileges."<sup>23</sup> In the case of corporations, the grant consists of a bundle of rights including "immortality," free transferability of ownership rights, and limited liability.<sup>24</sup> Of these, limited liability is perhaps the most

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18. 17 U.S. (4 Wheat.) 518, 636-37 (1819).

19. See Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 68 (1992) (noting "the 'concession theory' of the corporation attributable to *Dartmouth College* . . . [is] the idea that corporations are created and empowered as a 'concession' from the state political authority").

20. See, e.g., JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 43 (2003) ("The early American states used chartered corporations, endowed with special monopoly rights, to build some of the vital infrastructure of the new country . . .").

21. See *Dartmouth Coll.*, 17 U.S. at 650 ("The opinion of the Court, after mature deliberation, is, that this [charter] is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States.").

22. See Padfield, *supra* note 4, at 835 (setting forth a table distinguishing the theories).

23. BLACK'S LAW DICTIONARY 328 (9th ed. 2009).

24. See REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 5 (2d ed. 2009) (describing five basic

important.<sup>25</sup> In fact, “[i]n 1911, the President of Columbia University, Nicholas Murray Butler, stated that the invention of the ‘limited liability corporation’ was ‘the greatest single discovery of modern times.’”<sup>26</sup> Furthermore, Larry Ribstein has argued that state-conferred corporate limited liability is the biggest obstacle in the way of nexus-of-contracts theory gaining unquestioned dominance.<sup>27</sup>

Under concession theory, the state retains significant presumptive authority to regulate the corporate entity in exchange for granting this bundle of rights to incorporators.<sup>28</sup> However, it is important to note here that I am using “concession theory” to denote a theory of the corporation that gives deference to government regulation, as opposed to removing all limits on the state’s right to regulate corporations.<sup>29</sup> Thus, as opposed to the

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characteristics of corporations as “(1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a board structure, and (5) shared ownership by contributors of capital”).

25. Cf. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1634 n.27 (“In the nineteenth century, there was some variation as limited liability gained acceptance.”).

26. Stephen B. Presser, *The Bogalusa Explosion, “Single Business Enterprise,” “Alter Ego,” and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary “Abuse” Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 409 (2006).

27. Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 82, 83 (1991) (rejecting “the conception of limited liability as a state-conferred privilege” and explaining that this is important because “recognition of limited liability as the product of private ordering compels acceptance of the contract theory of the corporation”).

28. See Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 208 (2004) (“This state-creation characterization effectively sets a presumption in favor of regulating corporations that does not apply to other business associations or contracts.”).

29. The distinction between these versions of concession theory may require more fleshing out in the future. For example, one could contrast what may be called “presumptive” and “directive” concession theory. Presumptive concession theory would support granting a type of rebuttable presumption in favor of state regulation of corporations, while directive concession theory would support recognizing an essentially unlimited right on the part of the state to determine corporate rights and responsibilities. For now, I am content to simply note that I use “concession theory” broadly, as set forth in the remainder of this section, leaving room for limiting the state’s ability to regulate corporations where the presumption in favor of state regulation is properly rebutted. Thus, while an application of concession theory as I envision it would have precluded the *Citizens United* majority from proclaiming (1) that corporations and individuals are indistinguishable for purposes of First Amendment analyses, or (2) that the burden of proof regarding the Framers’ view of corporations should have been on those claiming the right to restrict corporate political spending, the majority might still have been able to overturn the relevant statute by, for

“extreme” view of concession theory that advocates that “corporations, as creatures of the State, have *only* those rights granted them by the State,”<sup>30</sup> the better view might be as then-Justice Rehnquist set forth in his dissent in *First National Bank of Boston v. Bellotti*: “Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, our inquiry must seek to determine which constitutional protections are ‘incidental to its very existence.’”<sup>31</sup> Thus, while it may be true that “a corporation’s right of commercial speech . . . might be considered necessarily incidental to the business of a commercial corporation[, i]t cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes.”<sup>32</sup>

This deference might play out in application by, for example, placing the burden of proof in a particular case on the party seeking to avoid government regulation of corporations. For example, in *Citizens United*, both Justice Scalia and Justice Stevens believed the other had the burden of proving their preferred interpretation of the Framers’ attitude toward corporations and the implications thereof for interpreting the scope of the First Amendment. Wrote Justice Scalia:

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 appellant to bring forward statements showing that they *are*.<sup>33</sup>

Justice Stevens, meanwhile, argued: “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.”<sup>34</sup> Similarly, the concession

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example, identifying relevant studies proving that the regulation caused sufficient harm to the marketplace of ideas. Put another way, I am arguing that the proper application of concession theory translates into the same sort of deference given the regulation of prisoner or federal employee speech. See *infra* Part III.C.

30. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (emphasis added).

31. *Id.* at 824 (Rehnquist, J., dissenting) (quoting *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)) (citations omitted).

32. *Id.* at 825 (Rehnquist, J., dissenting).

33. *Citizens United v. FEC*, 558 U.S. 310, 380 (2010) (Scalia, J., concurring).

34. *Id.* at 428 n.55 (Stevens, J., dissenting).

theory for which I advocate would favor placing the burden here on Justice Scalia, but it would not deny him the opportunity to carry that burden.<sup>35</sup>

*B. Freeing the Corporation: Aggregate / Nexus-of-Contracts Theory*

Perhaps precisely because concession theory justified state regulation, there soon arose an effort to free corporations from regulatory restrictions by replacing concession theory with another corporate theory that provided more protection for corporate interests.<sup>36</sup> Of course, concession theory was also being undermined by changes in the structure of corporate law, including the end of the special charter era of incorporation.<sup>37</sup> In addition, some calls for a new theory were the result of actually wanting to hold corporations more accountable.<sup>38</sup> Nonetheless, there is ample support for the view that real entity theory and aggregate theory emerged primarily in response to the perceived excessive regulatory power of the state.<sup>39</sup>

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35. Cf. Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 918 (2011) (noting that “remnants of artificial entity theory manifest as balancing tests”).

36. The aggregate view that arose to challenge concession theory has arguably been around as long as concession theory. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) (looking to the individuals composing a bank corporation to determine whether the corporation had a right to sue in federal court under diversity jurisdiction). However, its rise to prominence is likely best viewed as coming after the dominant period of concession theory. See Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 54-55 (2009) (“The artificial entity theory dominated the first part of the 1800s. . . . The aggregate entity theory of corporate personhood was also invoked beginning in the 1800s, and it reached prominence in the latter half of the century.”).

37. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 73 (1992) (“The problem faced by legal thinkers during the late nineteenth century was how to re-conceptualize the corporation after the demise of the grant theory.”).

38. Petrin, *supra* note 13, at 10 (“At the turn of the twentieth century, the increasing importance and prevalence of corporations led to growing dissatisfaction with the fiction theory’s effects, including its hostility toward liability of legal entities.”).

39. See Dibadj, *supra* note 6, at 759 (“I argue that anti-regulatory fervor, coupled with a desire to elevate the managerial class in society, best explain why artificial entity theory has fallen out of favor. Instrumental reasons explain the rise of the associational and natural entity theories more than logic might.”); David Millon, *The Ambiguous Significance of Corporate Personhood* 4 (Washington & Lee Pub. L. & Legal Theory Research Paper Ser., Working Paper No. 01-6, 2001), available at <http://ssrn.com/abstract=264141> (“Opponents of governmental regulation of the corporation relied on the aggregate characterization.”); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 221 (1985) (“The main effect of the natural entity theory of the business

Aggregate theory arguably achieved this end by highlighting the falsity of viewing corporations as independent “creatures” of the state, when in fact there was ultimately nothing more substantial to corporations than the individuals who comprised them. Under this analysis, the individuals at the top of this food chain were the shareholders who were understood to own the corporation.<sup>40</sup> Thus, when the state tried to regulate corporations, it was in fact regulating individual shareholders—and these shareholders could assert their natural rights as citizens against the perceived overreaching of the state.<sup>41</sup>

Morton Horwitz has convincingly argued that the Supreme Court’s famous 1886 decision in *Santa Clara County v. Southern Pacific Railroad Co.*<sup>42</sup> represented a shift to the aggregate view of the corporation. In that case, the Court baldly asserted:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.<sup>43</sup>

While Horwitz acknowledges that many have characterized *Santa Clara* as a real entity case, he goes on to demonstrate that “a ‘natural entity’ or ‘real entity’ theory of the corporation that the *Santa Clara* case is supposed to have adopted was nowhere to be found in American legal thought when the case was decided.”<sup>44</sup> Furthermore, Horwitz notes that “those who argued for the corporation [particularly, John Norton Pomeroy] as well as Supreme Court Justice Stephen Field, who decided in favor of the corporation in two elaborate circuit court opinions presented below, clearly had no conception

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corporation was to legitimate large scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state.”).

40. Cf. William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 467, n.44 (2007) (“[S]hareholders do not own the corporation in the traditional sense of the word. Instead they own the residual claim to the corporation’s income and assets.”); Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 925 (“[C]ommunitarians . . . agree with contractarians that shareholders do not own the corporation.”).

41. Cf. Miller, *supra* note 35, at 944 (“[W]ith aggregation theory, the regulatory function of the government seems to be on surer footing when the corporate structure attempts to externalize costs onto noncontracting parties, such as the public.”).

42. 118 U.S. 394 (1886).

43. *Id.* at 396.

44. HORWITZ, *supra* note 37, at 67.

of a natural entity theory of the corporation.”<sup>45</sup> Finally, Horwitz makes clear that “when the natural entity theory emerged about a decade later, it was only then gradually absorbed into the *Santa Clara* precedent to establish dramatically new constitutional protections for corporations.”<sup>46</sup> Thus, at the time of *Santa Clara*, “[a]n ‘aggregate’ or ‘partnership’ or ‘contractual’ vision of the corporation . . . was sufficient to focus the conceptual emphasis on the property rights of shareholders.”<sup>47</sup> Modern nexus-of-contracts theory is understood by many to carry on this aggregate theory tradition.<sup>48</sup>

*C. Seeking the Best of Both Worlds: Real / Natural Entity Theory*

The problem with aggregate theory, however, is that the primary theoretical justification for limited liability is the separation of ownership from control by way of the statutorily designated overseers of corporate activity—the board of directors.<sup>49</sup> If one ignores this separation and boils the corporation down to its shareholder owners, then one is essentially back to a form of general partnership where all the owners are personally liable for the debts of the business.<sup>50</sup> Thus, the need arose for another theory, and real/natural entity theory filled that need by aligning the corporation with the board of directors.<sup>51</sup> This allowed for the maintenance of limited liability for shareholders, while still limiting state regulation. The individual directors, after all, were not some sort of state creation, but rather a group of individual citizens.

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45. *Id.*

46. *Id.*

47. Horwitz, *supra* note 39, at 223.

48. See Avi-Yonah, *supra* note 16, at 1025 n.142 (“The point that the nexus of contracts theory is a reinvention of the aggregate view has been made repeatedly.”).

49. 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.”).

50. See Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1470 (2006) (“When corporations are equated with their shareholders, there is no justification for limiting the access of creditors to the private property of these shareholders.”).

51. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 560 (2003) (“[T]o the limited extent to which the corporation is properly understood as a real entity, it is the board of directors that personifies the corporate entity.”).

Morton Horwitz argues that the Supreme Court first recognized real entity theory in the 1906 case *Hale v. Henkel*,<sup>52</sup> wherein it extended Fourth Amendment protection to corporations.<sup>53</sup> Ron Harris has similarly noted that *Hale* is “considered the first U.S. Supreme Court case to apply real entity theory.”<sup>54</sup> Harris notes further that the decision was novel in that “the Court protected corporations under the Bill of Rights, rather than the Fourteenth Amendment . . . it did so on its own initiative; and . . . [it] protect[ed] big business from . . . the Sherman Act, the proclaimed purpose of which was to check further growth of big business.”<sup>55</sup>

*D. The Struggle Continues: From Real Entity Back to Aggregate*

*1. The Problems with Real Entity Theory*

So, why not just stop with real entity theory and adopt it as the leading theory? One might answer that question by analyzing the three versions of real entity theory that Horwitz identified in his *Transformation of American Law, 1870-1960*: the organic view, the representative view, and the pragmatic view.<sup>56</sup>

According to Horwitz, the organic view traces its roots to German legal theorists, including Otto Gierke, who “insist that the distinctiveness of the corporate personality is as real as the individuality of a physical person.”<sup>57</sup> This view is problematic because it is arguably too metaphysical for the typically “practical-minded and anti-metaphysical American bar.”<sup>58</sup> As Stephen Bainbridge put it, “I just can’t wrap my head around the

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52. HORWITZ, *supra* note 37, at 73.

53. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). The Court, however, refused to extend the Fifth Amendment privilege against self-incrimination to corporations. *Id.* at 70 (“The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.”).

54. Harris, *supra* note 50, at 1472.

55. *Id.* at 1473. I have argued elsewhere that real entity theory (also known as natural entity theory) is fairly associated with the more modern theories of director-primacy and team-production. See Padfield, *supra* note 4, at 835 (arguing that “director-primacy/team-production theory and ‘real entity’ theory are synonymous”); Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus of Contracts*, 114 W. VA. L. REV. 209, 215 (2011) (“[T]he real entity theory arguably captures the director-primacy view of the corporation”).

56. HORWITZ, *supra* note 37, at 101-05.

57. *Id.* at 102.

58. *Id.* at 101.

metaphysical abstractions required to think of the corporation as an entity--real or otherwise--rather than as an aggregate.”<sup>59</sup>

The representative view alternatively posits the corporation as “a representative democracy governed by majority rule.”<sup>60</sup> This conception runs into the problem of illusory shareholder democracy, particularly in light of the power of the statutorily endowed, and judicially protected, board of directors.<sup>61</sup> If the state allocates and defends the power distribution within the corporate group, then how can real entity theory justify limiting the state’s power to regulate corporations on the basis of corporations being a real entity reflective of private group dynamics?<sup>62</sup> As Marc Moore put it: “In spite of their *prima facie* endogenous and privately-determined character, the rich contractual dimensions of corporate law in the US and UK are ultimately dependent for their effective functioning on an underpinning body of laws that . . . are both *irremovable* and—in large part—*inadaptable* in nature.”<sup>63</sup> Thus, “[i]t can therefore reasonably be concluded that Anglo-American corporate governance law is, at root, an undeniably ‘public’ or regulatory phenomenon.”<sup>64</sup>

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59. Stephen Bainbridge, *Is the Corporation an Entity? With Application to the SCOTUS*, PROFESSORBAINBRIDGE.COM (Apr. 4, 2012, 11:05 AM), <http://www.professorbainbridge.com/professorbainbridgecom/2012/04/is-the-corporation-a-entity.html>.

60. HORWITZ, *supra* note 37, at 102.

61. See Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 58 (2009), <http://www.yalelawjournal.org/2009/10/15/pollman.html> (“[T]he longstanding concern about the lack of stockholder assent to corporate political speech is more compelling than ever.”); Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/?p=15469> (“[T]alk of shareholder democracy is largely illusory.”).

62. Cf. Federico M. Mucciarelli, *The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU*, 20 TUL. J. INT’L & COMP. L. 421, 423 (2012) (“While some scholars hold that the regulatory competition among U.S. states to attract incorporations has positive effects upon shareholders’ value (‘race to the top’ theory), others hold that such competition ultimately leads to a ‘race to the bottom’ or to protection of the board’s interest at the expense of shareholders and creditors.”). Compare William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (suggesting that state competition for corporate charters has led to a deterioration of standards), with Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003) (arguing that Delaware is attractive not because of a lenient regulatory framework but, among other things, an efficient and knowledgeable judiciary).

63. Marc T. Moore, *Is Corporate Law ‘Private’ (and Why Does It Matter)?*, 30 (Dec. 20, 2012), available at <http://ssrn.com/abstract=2192163>.

64. *Id.*

Finally, the pragmatic view simply posits that real entity theory is the proper theory of the corporation by default because there are problems with aggregate and concession theory in terms of encouraging economic growth (e.g., too much liability and regulation) that are solved by real entity theory.<sup>65</sup> This formulation views the corporate entity as a purely social construct. However, this arguably should empower, rather than limit, legislatures. This conclusion is supported by the fact that Progressives apparently embraced the pragmatic/realist version of real entity theory as a way of combating the ability of courts to restrict New Deal legislation on the basis of arguments rooted in natural rights theory.<sup>66</sup>

The sum of all of this may be that real entity theory suffers from too many unanswered questions regarding the fundamental battle between those who view corporations as essentially private entities and those who view them as endowed with sufficient “publicness” to warrant meaningful regulation.<sup>67</sup> The failure of real entity theorists to resolve this tension eventually leads us back to concession versus contract, or at the very least simply aligns real entity theory with aggregate theory for purposes of this analysis.<sup>68</sup>

## 2. *The Contractarian Response*

Some notable landmarks in the modern contract vs. concession “war” include the emergence of the law and economics movement in corporate

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65. HORWITZ, *supra* note 37, at 105.

66. *Id.* at 105; see also J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 774 (1971) (“The progressive realists and their successors in the 1930’s and 1940’s, while accepting legal reason as a justification for judicial interpretation of the Constitution, believed that its scope was severely limited . . . . They viewed the proper role of the courts as extremely circumscribed and subordinate to the political branches.”).

67. *Cf.* Padfield, *supra* note 55, at 210-11 (“Dodd-Frank may also be a game changer in the debate over the nature of the corporation. . . . The Act’s reaffirmation of the sovereign’s extensive power to regulate corporations, together with its formal recognition of [too-big-to-fail], constitute significant negative data points vis-à-vis the currently dominant nexus-of-contracts theory of the corporation.”); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1032-33 (2013) (“Private ordering was always a privilege and that privilege is subject to erosion. Government was there from the beginning, allowing private ordering to exist. But what is given can be taken away; Sarbanes-Oxley and Dodd-Frank both prove that point.”).

68. *Cf.* Pollman, *supra* note 25, at 1663 (“[T]he real entity theory is incomplete in that it fails to illuminate why the entity should receive constitutional protection as a person and what the scope of that protection should be.”).

law in the 1970s,<sup>69</sup> which reinvigorated contractarians;<sup>70</sup> the application of aggregate/contractarian principles in *Buckley v. Valeo* in 1976,<sup>71</sup> wherein “the Court relied on aggregate theory and refused to restrict corporate political speech, finding that such restrictions would affect the freedom of association of the individuals that form a corporation”;<sup>72</sup> and the successful resistance of that movement in *Austin v. Michigan Chamber of Commerce* in 1990,<sup>73</sup> followed by the movement’s arguable triumphant ascendance in *Citizens United*.<sup>74</sup> Given that the Court’s current composition leaves little hope for concession theory’s resurrection on the judicial front in the near future, the relevant combatants have turned their attention to the legislative front.<sup>75</sup>

To the extent that conceptualizing corporations as associations of individuals undermines limited liability, modern contractarian analysis

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69. See Petrin, *supra* note 13, at 13 n.64 (“Roughly between the late 1920s and 1970s, scholars were reluctant to resolve practical legal questions by deducing solutions from corporate theories. Yet, the debate revived with the rise of modern economic theories of the firm.”) (citations omitted).

70. Cf. Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 136, 153-54 (2008) (“The prevailing economic theories of tort law and bargaining are linked by a common analysis and intellectual history. Both theories came to prominence in the early 1970s with influential articles by leading law-and-economics scholars, and they aspire to efficiency through cost minimization. . . . The corporation, which in the law-and-economics canon is not an entity so much as a ‘nexus of contracts,’ exists to allow investors to diversify business risk and participate in the broader economy, which must include the activities that yield accidents.”) (citations omitted).

71. 424 U.S. 1 (1976).

72. Petrin, *supra* note 13, at 15 (citing *Buckley*, 424 U.S. at 22).

73. 494 U.S. 652 (1990); see Morrissey, *supra* note 15, at 807 (noting that in *Citizens United*, “Justice Stevens pointed out that the *Austin* case . . . described the firm as a grantee of concessions from the state”).

74. *Citizens United v. FEC*, 558 U.S. 310 (2010); see Padfield, *supra* note 55, at 224 (“The [*Citizens United*] majority viewed the corporation as fundamentally little more than an association of citizens.”). But see Avi-Yonah, *supra* note 16, 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 disagreement was in divergent assessments of the implications for the First Amendment.”); 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 (2011) (“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.”).

75. See Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 25 n.180 (2012) (“[S]ome in Congress have pushed for legislation that would purportedly circumvent *Citizens United*, and some have even called for a constitutional amendment to reverse the decision.”).

arguably solves this problem in at least two ways. First, it simply denies the importance of limited liability as a statutorily bestowed benefit of corporateness.<sup>76</sup> In terms of case precedent, one might here cite the 1976 Supreme Court case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>77</sup> for the proposition that the arrival of a listeners' rights justification for striking down regulation of corporate speech furthered this aspect of the contractarian agenda by shifting our attention away from the corporation entirely.<sup>78</sup> Second, modern contractarian analysis advances the normative conclusion that states should do that which maximizes economic growth and efficiency.<sup>79</sup> Thus, because granting limited liability to business associations furthers those goals, the presence or absence of viable theoretical justifications for limited liability is irrelevant.<sup>80</sup>

Having thus traced the course of corporate theory to demonstrate how we got to the point where, post-*Citizens United*, concession theory has been marginalized at best, the next section of this Essay attempts to explain why we nonetheless should take concession theory seriously.

### *III. Demonstrating the Viability of Concession Theory by Responding to the Arguments Against It*

This Part addresses four arguments frequently advanced to undermine concession theory: (1) that corporate theory is excessively malleable; (2) that concession theory died along with special charters; (3) that listeners'

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76. See Ribstein, *supra* note 27, at 82, 83 (rejecting “the conception of limited liability as a state-conferred privilege” and explaining that this is important because “recognition of limited liability as the product of private ordering compels acceptance of the contract theory of the corporation”).

77. 425 U.S. 748 (1976).

78. See TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* 18 (2012) (noting that *Virginia Pharmacy*, which created the commercial speech doctrine, “was also novel because it focused on the listeners' (consumers') rights to hear rather than on the speakers' (pharmacies') right to speak”).

79. Cf. Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 *TEX. L. REV.* 877, 925 (2006) (“[A] number of economists, including Richard Posner, have argued that adopting a fundamentally contractarian decision procedure will, in fact, result in a standard that requires us to maximize efficiency . . .”).

80. Nonetheless, just as the *Citizens United* dissent may have been incentivized to avoid expressly adopting concession theory due to the disdain with which that theory is regarded by at least some meaningful population of the relevant experts, the majority may have been incentivized to avoid expressly adopting aggregate theory due to the implications for limited liability discussed above.

rights trump corporate theory; and (4) that the unconstitutional conditions doctrine trumps concession theory. I hope to show that none of these arguments creates an insurmountable obstacle for the application of concession theory.

*A. The Argument That Corporate Theory Is Excessively Malleable*

One criticism of my proposal to rehabilitate concession theory is that examination of all corporate theories is futile because they lack meaningful predictive power. For example,

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.<sup>81</sup>

However, in 1992 Morton Horwitz responded to this criticism with the following:

I wish to dispute Dewey's conclusion that particular conceptions of corporate personality were used just as easily to limit as to enhance corporate power. I hope to show that, for example, the rise of a natural entity theory of the corporation was a major factor in legitimating big business and that none of the other theoretical alternatives could provide as much sustenance to newly organized, concentrated enterprise.<sup>82</sup>

To the extent Horwitz achieved his goal,<sup>83</sup> it may well be the better view that while corporate theory may not be able to precisely predict outcomes in all cases, it is nonetheless meaningful in terms of eliminating certain conclusions and allocating burdens.

Another aspect of this argument against the utility of corporate theory is the assertion that a functional approach is better. For example, Horwitz noted that “[t]he Legal Realists, in general, succeeded in persuading legal

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81. Avi-Yonah, *supra* note 16, at 1022-23 (citing John Dewey, *The Historical Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 673 (1926)).

82. HORWITZ, *supra* note 37, at 68.

83. *Cf.* Harris, *supra* note 50, at 1469 (“Morton Horwitz convincingly contended that *Santa Clara v. Southern Pacific Railroad Co.* was a grand application of contract theory . . .”).

thinkers that highly abstract and general legal conceptions were simply part of what Felix Cohen, quoting Von Jehring, derisively called ‘the heaven of legal concepts.’ Only more concrete statements of functional relations, Cohen argued, were useful in deciding legal questions.’<sup>84</sup> This challenge continues to resonate with scholars to the present day. For example, Martin Petrin recently posted a paper on SSRN<sup>85</sup> wherein he argues:

[A] legal entity should be viewed simply as a tool by which the legislature has chosen to enable individuals to pursue certain collective (or, in the case of a one-man-company, individual) goals in a more effective and convenient manner. Beyond this definition, law—in contrast perhaps to sociology or philosophy—does not need to assess the nature of the firm. Viewed this way, legal entities have those rights and duties which legislators and courts find it to have. In turn, these rights and duties should flow from what the firm is meant to achieve and how it affects society.<sup>86</sup>

However, while it seems perfectly reasonable to include a functional analysis when making determinations about corporate rights and responsibilities, this does not necessarily translate into corporate theory being irrelevant. This can be demonstrated by examining Petrin’s application of the functional approach. Petrin argues:

[I]f, as some scholars now convincingly argue, asset partitioning and limited liability are the firm’s core function, attempts and concepts to weaken them should be carefully scrutinized in light of their potential benefits. Hence, veil piercing and proposals to introduce certain forms of “unlimited” shareholder liability tend

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84. HORWITZ, *supra* note 37, at 68 (quoting Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935)).

85. “[The] Social Science Research Network (SSRN) is a world wide collaborative of over 233,000 authors and more than 1.7 million users that is devoted to the rapid worldwide dissemination of social science research.” *Frequently Asked Questions*, SOC. SCI. RES. NETWORK, [http://www.ssrn.com/update/general/ssrn\\_faq.html#what\\_is](http://www.ssrn.com/update/general/ssrn_faq.html#what_is) (last visited Oct. 14, 2013).

86. Petrin, *supra* note 13, at 43; *see also* Pollman, *supra* note 25, at 1631 (“[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 to the corporation--and thereby to the people underlying the corporation.”).

to be difficult to reconcile with a functional view of corporations.<sup>87</sup>

This analysis, however, seems to beg the question whether a corporation's core function can be sufficiently defined without some reference to its nature.

If the core function is a result of legislative fiat, as concession theory would posit, then veil piercing and unlimited shareholder liability may be consistent with that function if the state has some greater overarching purpose that is satisfied via those mechanisms. For example, the legislature may conclude that encouraging lenders to extend credit efficiently may require granting lenders some meaningful ability to hold shareholders directly liable for corporate debts. Deference to this conclusion would be consistent with concession theory but not with aggregate theory, because aggregate theory would arguably posit the core function as resulting from private agreement and limit the government's ability to interfere with those arrangements.

Given the relevance of corporate theory in the foregoing analysis, one may also question whether a purely functional analysis is preferable if it fails to advance the discussion meaningfully beyond where corporate theory has already brought us. Here again, one may examine Petrin's functional analysis:

Second, *prima facie*, a legal entity's *rights* (constitutional, statutory, and common law) should reflect its core economic function and purpose. For instance, it is justifiable to protect corporate commercial speech—although there may be limits—in order to increase sales of products. Beyond this obvious case, a legal entity may also be given other rights, including rights to privacy, political speech, and even religious rights, albeit on the preliminary condition that there is a sufficiently strong link to its economic goals.<sup>88</sup>

This analysis bears a striking resemblance to then-Justice Rehnquist's theory of the corporation in *Bellotti*, which I have previously aligned with concession theory:

Justice Rehnquist's stand-alone dissent in *Bellotti* provides arguably the sole example in these opinions of a Justice

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87. Petrin, *supra* note 13, at 44 (citations omitted).

88. *Id.* at 44-45.

affirmatively adopting a theory of the corporation for purposes of determining the constitutional rights of corporations--though not via the express adoption of one of the traditionally recognized theories. Specifically, Justice Rehnquist relied on Justice Marshall's *Dartmouth College* opinion to conclude that: "Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons . . . our inquiry must seek to determine which constitutional protections are 'incidental to its very existence.'" Thus, while it may be true that "a corporation's right of commercial speech . . . might be considered necessarily incidental to the business of a commercial corporation[, i]t cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes."<sup>89</sup>

Given that a purely functional analysis may either be incomplete without corporate theory or merely overlap with corporate theory, it seems difficult to conclude that the availability of a functional analysis, whatever its utility, should translate into a complete avoidance of corporate theory when conducting legal analysis.

#### *B. The Argument That Concession Theory Died Along with Special Charters*

The story of the evolution of corporate theory set forth in Part II is incomplete. It was not enough for the proponents of corporate growth to simply posit new theories to justify limiting state oversight of corporations. Rather, concession theory itself had to be undermined. The argument goes roughly as follows.

As we moved from a special charter system of incorporation to a system based upon enabling acts, which required little more than a simple filing for practically any person who desired to incorporate to do so, the notion that some special grant was being conveyed lost some of its luster.<sup>90</sup> In addition, doctrines that allowed states to keep a tight grip on their

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89. Padfield, *supra* note 4, at 853 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 824-25 (1978) (Rehnquist, J., dissenting)).

90. See Dibadj, *supra* note 6, at 757 ("The conventional wisdom is that '[v]iewing the corporation as a concession from the state is a relic of a time before incorporating became a mere administrative formality'--after all, the move from special incorporation statutes to general incorporation statutes seems to minimize the state's role.") (quoting Pollman, *supra* note 25, at 1630).

corporations began to crumble, including the *ultra vires* doctrine and doctrines related to the regulation of foreign (out-of-state) corporations.<sup>91</sup> However, as I have stated elsewhere, Grant Hayden and Matthew Bodie offer a superior analysis by arguing that the fact that government permission is required to incorporate supports the legitimacy of state regulation, regardless of how freely such permission is granted.<sup>92</sup> While not universally accepted,<sup>93</sup> this essential concept that corporations cannot be created solely via private contracting has been espoused by some of the most highly-regarded scholars in corporate law, including Henry Hansmann and Reinier Kraakman,<sup>94</sup> as well as Margaret Blair<sup>95</sup>—to name just a few.<sup>96</sup> Add to this “the ubiquity of reserve clauses in corporate codes, the existence of stakeholder statutes, and relatively recent judicial pronouncements that ‘[c]orporations are creatures of the Legislature,’”<sup>97</sup>—

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91. See Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 893 (2012) (“By the late 1800s, New Jersey, and later other states, began to enact general incorporation statutes that facilitated the growth of for-profit corporations. In time, the removal of many of the public welfare limits from state corporate codes and the ultimate decline of the *ultra vires* doctrine rendered the concession view largely obsolete.”).

92. See Padfield, *supra* note 4, at 841-42 (citing Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1130 (2011)).

93. See, e.g., Ribstein, *supra* note 27, at 82-83 (rejecting “the conception of limited liability as a state-conferred privilege” and explaining that this is important because “recognition of limited liability as the product of private ordering compels acceptance of the contract theory of the corporation”).

94. See 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.”).

95. Margaret M. Blair, *The Four Functions of Corporate Personhood*, 4 (Vanderbilt Univ. Law Sch. Pub. L. & Legal Theory, Working Paper No. 12-15, 2012), available at <http://ssrn.com/abstract=2037356> (“The four functions that legal entity status serve would be very difficult, if not impossible, to accomplish using only transactional contracts.”).

96. See, e.g., Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico Perotti, *The Emergence of the Corporate Form* (1 Amsterdam Ctr. for L. & Econ., Working Paper No. 2013-02, 2013), available at <http://ssrn.com/abstract=2223905> (analyzing “the emergence of the legal innovations that generated the . . . corporate form” and concluding, among other things, that “the creation of legal personality for private business required an active role for the legislator”).

97. Padfield, *supra* note 55, at 218. In *Neary v. Miltronics Mfg. Servs., Inc.*, the district court wrote: “Corporations are creatures of the Legislature. It is from this body that they derive their life, as well as the terms and conditions of their existence. It is appropriate, therefore, that the terms and conditions of their existence be determined by that body.” 534

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.”<sup>98</sup>

Furthermore, as Lyman Johnson notes, “It is important to modern theoretical understandings of corporate personhood to remember that the ‘artificial being’ and ‘mere creatures of law’ language from the 1819 decision in *Dartmouth College* has never been renounced.”<sup>99</sup> Specifically, Johnson points out that “[i]n 1987, 160 years after the *Dartmouth College* decision, the Supreme Court expressly invoked the language in a landmark decision, *CTS Corp. v. Dynamics Corp. of America*, upholding Indiana’s antitakeover statute against constitutional attack.”<sup>100</sup> Based on the foregoing, Johnson concludes: “The Supreme Court’s pointed use of the *Dartmouth College* language in the *CTS* decision suggests that Professor Horwitz was premature in asserting that the ‘grant’ theory of corporateness . . . had eroded by the late-nineteenth century.”<sup>101</sup>

Thus, it seems fair to say that the legislative choice to move away from special charters and loosen other restrictions on corporations should not be equated with the demise of concession theory. As Hillary Sale has noted, “Private ordering was always a privilege and that privilege is subject to erosion. Government was there from the beginning, allowing private ordering to exist. But what is given can be taken away . . . .”<sup>102</sup>

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F. Supp. 2d 227, 231 (D.N.H. 2008) (quoting *Alkire v. Interstate Theatres Corp.*, 379 F. Supp. 1210, 1214 (D. Mass. 1974)).

98. *Id.*

99. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1148 (2012).

100. *Id.* (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987)). “The Indiana statute, like many of that era, was shrewdly embedded in the Indiana corporation statute to curb rampant takeover activity of the 1980s that, rightly or wrongly, was widely thought to be socially harmful.” *Id.*

101. *Id.* (citing HORWITZ, *supra* note 37, at 72).

102. Sale, *supra* note 67, at 1032-33; *cf.* D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 127 n.12 (2011) (“Consistent with the most common usage in corporate law scholarship, we use the term ‘private ordering’ as a near synonym for ‘contracting’ or ‘transacting.’ Some legal scholars use ‘private ordering’ to connote a ‘delegation of regulatory authority to private actors.’”) (citations omitted).

C. *The Argument That Listeners' Rights Trump Corporate Theory*

Many commentators have concluded that *Citizens United* was decided on the basis of a listeners' rights rationale.<sup>103</sup> The listeners' rights rationale provides an alternative basis for protecting speech under the First Amendment. Particularly relevant to our discussion here, it shifts the focus of the analysis away from the speaker and onto the listeners.<sup>104</sup> The idea is that one of the First Amendment's purposes is to protect the marketplace of ideas, which is particularly relevant to the proper functioning of a democracy when political speech is at issue.<sup>105</sup> Of course, the notion that markets function best when left unregulated has been seriously challenged in recent years.<sup>106</sup>

However, even if one understands the *Citizens United* opinion to be fundamentally about listeners' rights, there remains the question whether there is something about corporations that would justify including them in the line of cases carving out exceptions for particular identity-based restrictions on speech.<sup>107</sup> For example, in *United States Civil Service Commission v. National Ass'n of Letter Carriers*, the Supreme Court upheld

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103. See, e.g., Levinson, *supra* note 2, at 339 ("Justice Kennedy's focus on the importance of unrestricted corporate electoral speech to self-government hinges on his belief that such communications provide important information for voters.").

104. Cf. PIETY, *supra* note 78, at 18 (noting that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which created the commercial speech doctrine, "was also novel because it focused on the listeners' (consumers') rights to hear rather than on the speakers' (pharmacies') right to speak").

105. See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (stating that "[p]olitical speech is 'indispensable to decisionmaking in a democracy'" (citations omitted)).

106. See Miriam A. Cherry, *Morality and Markets: A Comment on Predicting Crime*, 52 ARIZ. L. REV. 73, 74 (2010) ("[T]he worldwide financial crisis has made faith in the rationality of unregulated markets seem rather naïve."); see also Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1619 (2009) ("Modern financial regulation emerged from the recognition that financial crises are inevitable in an unregulated market . . ."). Cf. Robert L. Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority About Other People's Money*, 9 FIRST AMENDMENT L. REV. 211, 226 (2010) ("In rejecting *Austin's* structural mechanism for preventing deployment of 'resources amassed in the economic marketplace' through state-created benefits of the corporate form to obtain 'an unfair advantage in the political marketplace,' *Citizens United* advances an understanding of a laissez-faire marketplace of ideas. The *Citizens United* majority, however, . . . diverged from an understanding of marketplace freedom that Adam Smith would endorse . . .").

107. Cf. Moore, *supra* note 63, at 3 ("In short—in law as in elsewhere—ought judgements are ultimately dependent to a large extent on *is* judgements, because in order to be able to critically evaluate a subject we must first of all understand its key attributes and qualities.").

a federal statute that prohibited federal employees from taking “an active part in political management or in political campaigns.”<sup>108</sup> The Court upheld the statute despite the fact that its prohibitions clearly infringed upon the federal employees’ “right to speak, to propose, to publish, to petition Government, to assemble.”<sup>109</sup>

The Supreme Court’s justifications for the identity-based restriction on speech in *Letter Carriers* included (1) preserving “the impartial execution of the laws” by making it illegal for federal employees “to play substantial roles in partisan political campaigns, and . . . run for office on partisan political tickets,” (2) avoiding the appearance of “political justice,” which must be avoided “if confidence in the system of representative Government is not to be eroded to a disastrous extent,” (3) ensuring that “the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine,” and (4) furthering “the goal that employment and advancement in the Government service not depend on political performance.”<sup>110</sup> Anyone with even a passing familiarity with the *Citizens United* decision will likely recognize these justifications as surprisingly similar to those rejected as a basis for regulating corporate speech in that case.<sup>111</sup>

Nor is *Letter Carriers* the only case wherein the Court has upheld identity-based restrictions on speech based on justifications so deferential to legislative determinations. In *Parker v. Levy*, the Supreme Court upheld restrictions on the speech of military personnel because, among other things, failure to do so could “directly affect the capacity of the

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108. 413 U.S. 548, 550 (1973) (quoting § 9(a) of the Hatch Act (then codified at 5 U.S.C. § 7324(a)(2))).

109. *Id.* at 597 (Douglas, J., dissenting); *see also id.* at 579 (“The section of the regulations which purports to state the partisan acts that are proscribed . . . forbids . . . the endorsement of ‘a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material,’ and . . . prohibits ‘[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office.’”) (citing 5 C.F.R. § 733.112).

110. *Id.* at 565-66.

111. *See Citizens United v. FEC*, 558 U.S. 310, 448 (2010) (Stevens, J., dissenting) (“[T]he majority’s apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs—and which amply supported Congress’ determination to target a limited set of especially destructive practices.”).

Government to discharge its responsibilities.”<sup>112</sup> Furthermore, in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, the Court upheld identity-based restrictions on the speech rights of prisoners because, among other things, “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”<sup>113</sup> The Court went on to explain that “[j]udicial recognition of that fact reflects no more than a healthy sense of realism.”<sup>114</sup> Finally, in *Bethel School District No. 403 v. Fraser*, the Court upheld identity-based restrictions on otherwise protected speech by high school students in recognition of, among other things, “the objectives of public education as the ‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.’”<sup>115</sup>

The *Citizens United* majority was well aware of this line of cases upholding identity-based speech restrictions, but dismissed them as irrelevant by simply asserting that “[t]he corporate independent expenditures at issue in this case . . . would not interfere with governmental functions, so these cases are inapposite. These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech.”<sup>116</sup> The dissent, however, retorted that:

The majority's creative suggestion that these cases stand only for that one proposition is quite implausible. In any event, the proposition lies at the heart of this case, as Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation

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112. 417 U.S. 733, 759 (1974) (quoting *United States v. Priest*, 21 C.M.A. 564, 570 (1972)).

113. 433 U.S. 119, 126 (1977) (quoting *Procurier v. Martinez*, 416 U.S. 396, 405 (1974)).

114. *Id.* (quoting *Procurier*, 416 U.S. at 405); *cf. id.* at 128 (“[T]he burden was not on appellants to show affirmatively that the Union would be ‘detrimental to proper penological objectives’ or would constitute a ‘present danger to security and order.’ Rather, ‘[s]uch considerations are peculiarly within the province and professional expertise of corrections officials . . . .’”) (quoting *N.C. Prisoners’ Labor Union v. Jones*, 409 F. Supp. 937, 944-45 (E.D.N.C. 1976), and *Pell v. Procurier*, 417 U.S. 817, 827 (1974)).

115. 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)); *cf. id.* at 686 (“I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.”) (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

116. *Citizens United v. FEC*, 558 U.S. 310, 341 (2010).

cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.<sup>117</sup>

However, in spite of the majority's awareness of these cases and the dissent's at least partial reliance on them, and despite the apparent difficulty of determining the applicability of these cases without expressly concluding what corporations are, the *Citizens United* majority avoided any express discussion of corporate theory and the dissent expressly disavowed any role therefore.<sup>118</sup>

Nonetheless, commentators quickly identified an important role for corporate theory in the decision,<sup>119</sup> and I have previously written about how this failure to expressly discuss corporate theory in relevant cases creates a legitimacy problem for the Court.<sup>120</sup> Accordingly, the mere existence of a listeners' rights rationale for cases like *Citizens United* does not preclude a role for corporate theory in general, or concession theory in particular.<sup>121</sup> In fact, its viability as any sort of a trump card arguably requires an analysis of what corporations are.<sup>122</sup> As Darrell Miller notes:

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117. *Id.* at 421 n.46 (Stevens, J., dissenting); *cf.* *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting) (“[A]n examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not.”).

118. *Id.* at 465-66 n.72 (Stevens, J., dissenting) (“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.”) (citations omitted).

119. *See, e.g.*, Bainbridge, *supra* note 10.

120. *See* Padfield, *supra* note 4.

121. *Cf.* Padfield, *supra* note 55, at 227 (“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, 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.’”) (citing Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1093-94 (1996)); Hersh Shefrin, *Building on Kahneman's Insights in the Development of Behavioral Finance*, 44 LOY. U. CHI. L.J. 1401, 1404 (2013) (“Economic theory . . . tells us that the representative investor resulting from the market mix might not look anything like a real person.”).

122. There are, however, other means of overcoming the listeners' rights rationale for limiting regulation of speech. For example, the Court itself noted that national security interests could provide the necessary compelling interest to limit the speech of foreign corporations. *See Citizens United*, 558 U.S. at 362 (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or

[O]ne must consider the consequences of the Court's attempt to dodge corporate personhood, by focusing, *Citizens United*-style, on the scope of the right, rather than on the party asserting it. . . . [A]ttempting to sidestep the corporate form by focusing on the right simply assumes the equivalence of the corporate person and the natural person.<sup>123</sup>

In other words, the Court cannot avoid corporate theory, because by its very rulings it adopts one theory or another. The only question is whether it will continue to deny this reality or discuss the issue openly.<sup>124</sup>

*D. The Argument That the Unconstitutional Conditions Doctrine Trumps Concession Theory*

One of the challenges the *Citizens United* majority posed to those who would base regulation of corporate political speech on the unique state-granted privileges of corporate status, is the doctrine of unconstitutional conditions.<sup>125</sup> Kathleen Sullivan describes the doctrine, which was introduced by the *Lochner* court,<sup>126</sup> as follows:

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to

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associations from influencing our Nation's political process. Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.”) (citations omitted).

123. Miller, *supra* note 35, at 943.

124. *Cf.* SEGALL, *supra* note 4, at 2-3 (“[B]ecause judges are governmental officials who exercise coercive power, it is important that they explain their legal decisions with honesty and transparency.”).

125. *See Citizens United*, 558 U.S. at 351 (“It is rudimentary that the State cannot exact as the price of those special advantages [of corporate status] the forfeiture of First Amendment rights.”) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

126. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989) (“The *Lochner* Court first fashioned the doctrine.”).

deny a benefit includes the lesser power to impose a condition on its receipt.<sup>127</sup>

In light of the foregoing, the *Citizens United* Court said the following in the course of rejecting *Austin*:

Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” This does not suffice, however, to allow laws prohibiting speech. “It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”<sup>128</sup>

Given the lack of additional analysis, it is unclear whether we should view this statement as constituting binding precedent on the issue. And even if one reads the passage as carrying such weight, the change in the composition of the Court since *Citizens United* suggests the issue remains up for grabs. After all, the principal formulation of the rule set forth above is taken from Justice Scalia’s dissent in *Austin*.<sup>129</sup>

Were the Court to directly confront the issue, there are at least five good reasons to conclude that the unconstitutional conditions doctrine would not constitute an insurmountable obstacle to the viability of concession theory. First, the unconstitutional conditions doctrine’s scope and applicability remains ill-defined. For example, Philip Hamburger has stated: “Unconstitutional conditions are a conundrum . . . a sort of Gordian knot.”<sup>130</sup> And Derek E. Bambauer has noted that “unconstitutional conditions cases are a nearly impenetrable murk--scholarly analysis

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127. *Id.* at 1415; *cf.* Miller, *supra* note 35, at 920-21 (“In sum, the artificial entity theory is enervated, but it is not extinct. It is a doctrinal device that the Court uses to justify regulation of corporations to a degree different than individuals. Because a corporation could not exist but for state law, the state may burden its activity to a greater degree than it could an individual human being. This ‘greater includes the lesser’ rationale is neither ironclad nor uncontroversial, but it exists.”) (citing RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 113-15 (1993)).

128. *Citizens United*, 558 U.S. at 350-51 (citations omitted) (quoting *Austin*, 494 U.S. at 658-59; *id.* at 680 (Scalia, J., dissenting)).

129. *Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

130. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 479, 480 (2012).

struggles to reconcile conflicting precedent and tends to surrender descriptive analysis in favor of prescriptive recommendations for future development.”<sup>131</sup> Thus, while it is certainly possible that the Court would interpret the unconstitutional conditions doctrine to essentially undermine concession theory, it is by no means certain that it will.

Second, it is unclear what exactly would be added to the relevant analysis by applying the unconstitutional conditions doctrine because, like the Free Speech Clause of the First Amendment itself, it does not actually constitute a complete bar to government action, but rather requires the government to satisfy some form of heightened scrutiny.<sup>132</sup> Thus, the analysis could proceed as follows:

(1) The government’s restriction of corporate political speech is subject to strict scrutiny;

(2) The government can satisfy strict scrutiny in part because under concession theory corporations are deemed to be state-created entities granted unique privileges designed to benefit society as a whole, but also subject to unique potential for abuse. This combination of state-conferred benefits and potential for abuse supports restricting the ability of corporations to influence the political process by spending shareholders’ money on political speech;

(3) However, justifying the limitation of corporate political speech on the basis of concession theory essentially constitutes conditioning the benefit of operating in the corporate form on the surrender of free speech rights. This implicates the unconstitutional conditions doctrine and thus subjects the regulation to strict scrutiny,<sup>133</sup>

(4) Return to (1) above.

Third, even if applying the unconstitutional conditions doctrine warrants a distinct analysis, once the corporation is characterized as a state-granted concession one is much closer to the facts of *Regan v. Taxation with Representation of Washington (TWR)*.<sup>134</sup> In *TWR*, the Court held that

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131. Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 914 (2012).

132. Cf. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1678 (2009) (“The unconstitutional conditions doctrine has been criticized for being inconsistent and incoherent, but it clearly reflects that even ‘consensual’ waivers of constitutional rights can threaten the First Amendment and trigger heightened scrutiny.”).

133. See *Austin*, 494 U.S. at 680 (Scalia, J., dissenting) (“It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”).

134. 461 U.S. 540 (1983).

conditioning the benefits of 501(c)(3) tax-status on the beneficiary corporation limiting its lobbying activities to separate entities was allowable because “Congress has merely refused to pay for [TWR’s] lobbying.”<sup>135</sup> As Ellen Aprill explains: “In the view of the Court, such a selective subsidy did not impose an unconstitutional condition on the exercise of First Amendment rights.”<sup>136</sup>

Following the logic of *TWR*, one could argue that the size of a corporation’s cash vault is a function of the special privileges granted by the state. In other words, there is little economic difference between the government (a) directly giving the corporation \$100, (b) reducing the corporation’s tax bill by \$100, and (c) allowing the corporation to raise \$100 from shareholders, because those shareholders would never have invested the \$100 were it not for the limited liability, free transferability of shares, centralized management, entity immortality, etc., granted to the corporation by the state. Thus, one could argue that the justification that allows the government to restrict the political speech of 501(c)(3) corporations could justify restricting the political speech of all corporations.

Of course, the leap from examples (a) and (b) to (c) above is not insignificant, and there are certainly good reasons not to make it. In addition, the viability of *TWR* itself has been called into question by *Citizens United*, because at least part of the rationale for allowing the condition in *TWR* was the availability of other entities, such as political action committees (PACs), which could serve as conduits for the organization’s political speech—a rationale that *Citizens United* expressly rejected.<sup>137</sup> However, Ellen Aprill has concluded that “*Citizens United* has not *sub silentio* overturned *TWR*,”<sup>138</sup> and in light of the overall uncertainty

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135. *Id.* at 545.

136. Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 365 (2011).

137. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“A PAC is a separate association from the corporation. So the PAC exemption from § 441b’s expenditure ban . . . does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”).

138. Aprill, *supra* note 136, at 365; *see also* *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328-29 (2013) (citing *TWR* approvingly for the proposition that the availability of a “dual structure” to permit lobbying saved statute from running afoul of the unconstitutional conditions doctrine). *But see id.* at 2334 (Scalia, J., dissenting) (“[T]hat fact . . . was entirely nonessential to the Court’s holding.”).

surrounding the unconstitutional conditions doctrine the corporation-as-subsidy argument is at least worth considering.<sup>139</sup>

Fourth, the unconstitutional conditions analysis can turn on the germaneness of the condition to the purpose of the regulation.<sup>140</sup> For example, in *Nollan v. California Coastal Commission*, Justice Scalia, writing for the majority, concluded that California could not condition a building permit on the conveyance of an easement:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation . . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”<sup>141</sup>

However, in our case the requirement of germaneness may not be that difficult to satisfy. Once we take concession theory as our starting point (as we must if we are analyzing the unconstitutional conditions doctrine as a form of rebuttal to concession theory) we can view the purpose of conditioning corporate status on limited corporate political speech as having an “essential nexus” to the conceptualization of the corporation as a state concession. After all, that conceptualization has seemingly from the beginning included a fear of undue political influence.<sup>142</sup>

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139. *Open Society*, *supra* note 138, was issued shortly before this Essay was to be published. The implications of the Court’s apparent flip-flopping on the issue of whether the availability of speech by an alternative entity alleviates First Amendment concerns in the *TWR*, *Citizens United*, and *Open Society* cases certainly warrants further examination.

140. *But see Open Soc’y*, 133 S. Ct. at 2328 (“In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. . . . The dissent thinks that can only be true when the condition is not relevant to the objectives of the program . . . or when the condition is actually coercive . . . . Our precedents, however, are not so limited.”).

141. 483 U.S. 825, 837 (1987) (quoting *J. E. D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

142. *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 459 n.272 (2006) (“[C]oncession theory originated as a theory of the firm that was used to limit corporate powers out of fear.”).

It is interesting to note that shifting the focus to unconstitutional conditions may actually require courts to focus on the nature of the corporate speaker. Michael Boardman noted in a related context that:

Framing the case of government contractors in the unconstitutional conditions doctrine rather than traditional First Amendment analysis might also better address some of the fundamental disagreements the Court has over First Amendment application. As Justice Stevens points out in his *Citizens United* dissent, corporations should not necessarily be given the same First Amendment protections as humans since they have no conscience, no feelings, and no motivation other than economic gain. These principles are incontrovertible, but in framing the restrictions through the First Amendment rights of the listener, the Court is able to elide them. If the focus is shifted to whether the corporation is speaking toward its own financial interest in public funds rather than determining the value of the speech to the political marketplace, the Court will be forced to identify the source of the speaker.<sup>143</sup>

It may well be that this fact alone will keep certain judges from advancing the unconstitutional conditions doctrine as a serious challenge to concession theory.

Finally, and perhaps most importantly, it is not even clear that an unconstitutional conditions analysis is applicable to cases involving the direct restriction of political speech. Certainly, the analysis would be applicable if a state government were to require incorporators to refrain from corporate political speech as a condition of incorporating in the state. However, it is less clear that using concession theory to justify the direct regulation of corporate political speech by the federal government similarly implicates the doctrine. What benefit is the federal government conditioning on the waiver of First Amendment rights? If the answer is “none,” then we are simply back to the question whether understanding the corporation as a state concession, as opposed to merely an association of individuals, improves the ability of the federal government to satisfy its strict-scrutiny burden. In other words, if the primary purpose of the unconstitutional conditions doctrine is to limit the ability of the government to do indirectly (via the conditioning of benefits) what it cannot do directly,

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143. Michael Boardman, *Constitutional Conditions: Regulating Independent Political Expenditures by Government Contractors After Citizens United*, 10 FLA. ST. U. BUS. REV. 25, 45-46 (2011).

then the doctrine is inapplicable here because the government is in fact directly regulating speech.<sup>144</sup>

#### IV. Conclusion

Following *Citizens United*, many people asked how we got to the place where corporations are endowed with the same First Amendment rights as individuals, money is deemed speech, and courts can deny states the power to regulate the political influence of their own corporate creations.<sup>145</sup> While I have not addressed the issue of money as speech,<sup>146</sup> and only indirectly addressed the issue of corporate personhood,<sup>147</sup> this Essay does tell an important story about how we got here. Starting with *Dartmouth College* and its adoption of concession theory, a fight has been raging to free corporations from the shackles of state regulation. The individuals advancing corporate rights gained victories at the Supreme Court level in

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144. Cf. *Open Soc'y*, 133 S. Ct. at 2327 (“Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.”); Michael Boardman, *supra* note 143, at 46-47 (“[T]he unconstitutional conditions doctrine may not apply in the campaign finance context at all. . . . Deciding whether a government policy permitting individuals to display only American flags on highway overpasses constituted impermissible viewpoint discrimination, the court in *Brown* continued, “[w]e decline to extend the government-funding cases to a situation in which the government has not appropriated any funds toward achieving a policy goal for which it is accountable to the electorate.”) (quoting *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1224 (9th Cir. 2003)).

145. See, e.g., Robert Tracy, *Corporations Are People? Money Is Speech? How Did That Happen!?*, DEMOCRATIC PARTY OF DUPAGE COUNTY, ILL. (May 14, 2012, 9:56 AM), <http://dupagedems.blogspot.com/2012/05/corporations-are-people-money-is-speech.html>.

As corporations are granted greater rights, one may also question where the off-setting responsibility and accountability comes from, in light of the fact that one of the primary tools of accountability is unavailable. Cf. Erik Luna, *The Curious Case of Corporate Criminality*, 46 AM. CRIM. L. REV. 1507, 1507 (2009) (“[C]orporate criminality remains a curious concept. As artificial creatures of the law, corporations . . . have no emotions or culpable mental states. Nor are they subject to incarceration, the primary mode of punishment in America. To use the hoary phrase, there is ‘no soul to damn, no body to kick.’”).

146. See generally Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881 (2013); Deborah Hellman, *Money Talks but Isn't Speech*, 95 MINN. L. REV. 953 (2011); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

147. Regardless of what theory of the corporation one adopts, corporations will likely need to be treated as persons under the law for at least some purposes in order for corporations to function effectively at all.

*Santa Clara* (1886) (adopting aggregate view), *Hale v. Henkel* (1905) (adopting real entity view), and *Virginia Pharmacy* (1976) (adopting listeners' rights defense). Finally, in *Citizens United* (2010), a majority of conservative justices, perhaps emboldened by the law and economics revolution in corporate law,<sup>148</sup> relied on a revitalized aggregate/contractarian theory of the corporation to not only further advance this march in favor of corporations, but also to potentially further the aggregation of wealth into the hands of a few via this particular expansion of corporate power.<sup>149</sup>

To many, this ever-increasing expansion of corporate power is troubling. Perhaps concession theory, rehabilitated as I have recommended, can help restore a more balanced allocation of power among corporations, the state, and individual citizens. Of course, those who view corporations as standing firmly on the private side of the public-private divide will see all this as nothing more than an attempt to further statist interests at the expense of individual liberty. The debate between these two sides may be irreconcilable—to say nothing of the view that this debate is a sham and that the real problem is one of “corporatocracy.”<sup>150</sup> Interestingly, the intransigence of the combatants may actually serve as its own basis for deferring to legislatures. As Morton Horwitz recounts:

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148. See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

149. See Pat Garofalo, *MIT Economist: Income Inequality In The U.S. Is Crushing the Middle Class' Political Power*, THINKPROGRESS.ORG (Mar 23, 2012, 5:55 PM), <http://thinkprogress.org/economy/2012/03/23/451166/acemoglu-income-inequality-political-power> (“Today, ThinkProgress spoke with MIT economist Daron Acemoglu, whose new book, *Why Nations Fail* (co-written by James Robinson), looks at the effect politics and policy have on economic growth and prosperity. Acemoglu said that he believes the most ‘pernicious’ effect of income inequality is that it drains political power from lower- and middle-class Americans and allows the richest to then begin ‘changing the rules in their favor.’ . . . Acemoglu added that the Supreme Court’s decision in *Citizens United* and the growth in Super PAC spending are only going to make this problem worse by increasing the importance of money in politics.”).

150. Priti Nemani, *Globalization Versus Normative Policy: A Case Study on the Failure of the Barbie Doll in the Indian Market*, 13 ASIAN-PAC. L. & POL’Y J. 96, 99-100 (2011) (“Journalist John Perkins describes the advancement of the global empire as a result of the omnipotent ‘corporatocracy,’ a tripartite financial and political power relationship between multinational corporations (‘MNCs’), international banks, and governments. The corporatocracy works to guarantee the unwavering support and belief of its constituents—schools, business, and the media—in the ‘fallacious concept’ of growing global consumer culture. Members of the corporatocracy promote common values and goals through an unceasing effort ‘to perpetuate and continually expand and strengthen the system’ of the current global culture.”) (quoting JOHN PERKINS, *CONFESSIONS OF AN ECONOMIC HIT MAN* 26-28 (2005)).

Turning his back on his own quest in *The Common Law*, [Justice] Holmes regarded it as “theoretically wrong” to believe, for example, that the conflict between strict liability and negligence is capable of logical solution . . . . [J]udicial restraint follows from the collapse of his search for immanent rationality in customary law. If law is merely politics, then the legislature should in fact decide.<sup>151</sup>

Given that there appears to be a growing perception that the rulings of the Supreme Court are more about politics than law,<sup>152</sup> the foregoing suggests more deference to the judgment of legislatures is warranted in cases like *Citizens United*. A rehabilitated concession theory can help support this movement and provide a more balanced approach to corporate power.

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151. HORWITZ, *supra* note 37, at 130, 142.

152. Press Release, Alliance for Justice, Alliance for Justice [sic] Poll Shows Americans Concerned About Pro-Corporate Bias and Politicization on the Supreme Court (June 14, 2012), <http://www.highbeam.com/doc/1G1-293140608.html> (“Fifty-seven percent of voters say they are extremely concerned that the Supreme Court makes decisions based on a political agenda instead of the law. Only 11% say they have a great deal of confidence that the Supreme Court puts politics aside and makes decisions based on the law.”).