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LEGAL STUDIES RESEARCH PAPER SERIES

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[Journal Citation ___ Law Review ___ (2011)]

Akron Research Paper No. [11-x]

Available at SSRN: [http://ssrn.com/abstract= PAPER NUMBER]

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The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases

Stefan J. Padfield*

Abstract

This project builds on two previous pieces I have written: (1) "Citizens United and the Nexus-of-Contracts Presumption," and (2) "The Dodd-Frank Corporation: More Than a Nexus of Contracts." In "Citizens United and the Nexus-of-Contracts Presumption" I argue that corporate theory—particularly the debate between contractarians and non-contractarians—played a dispositive role in Citizens United (despite express disavowal thereof by the dissent) and that the majority adopted a nexus-of-contracts view of the corporation, albeit without expressly saying so. In "The Dodd-Frank Corporation: More Than a Nexus of Contracts" I argue that the debate about the nature of the corporation continues to be an important one, and that the passage of Dodd-Frank represents a new data point in that debate by "officially" announcing the arrival of the too-big-to-fail corporation. I go on to argue that the arrival of the too-big-to-fail corporation represents a significant new challenge to contractarians, who frequently align their theory with normative proclamations about the benefits of unregulated markets. This conclusion implicates Citizens United because it suggests that to the extent the majority in that case relied on a nexus-of-contracts view of the corporation, that justification is now subject to greater criticism. In this project I plan to examine the key Supreme Court decisions leading up to Citizens United to see if a similar silent corporate theory debate is present in those cases. If so, I plan to argue that in future cases involving the rights of corporations the justices should make their views regarding the proper theory of the corporation express, thereby allowing for a more meaningful discussion of the merits of those decisions.

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I. INTRODUCTION

[Please Note: This is a very rough draft, relying on large excerpts from previous writings and a simple table format to lay out the structure of the proposed project.]

Professor Stephen Bainbridge, William D. Warren Distinguished Professor of Law at UCLA, recently expressed his frustration with the Supreme Court's failure to set forth a coherent theory of the corporation to support its various pronouncements about the rights and duties of corporations:

> I … agree with [the] concern that US law confers personhood on the corporation without a coherent theory of why it does so or where the boundaries of that legal fiction are to be located. As I complained after the recent [Supreme Court] AT&T decision [denying corporations the right to claim "personal privacy" under FOIA]: Chief Justice Roberts could have summed up his opinion far more succinctly: "Because at least 5 of us say so." The Citizens United decision last term [also] attracted much criticism … for holding that a corporation is a person and as such has certain constitutional rights. While I agreed with the holding, I was disturbed that the Chief Justice's majority opinion for the Supreme Court so obviously lacked a coherent theory of the nature of the corporation and, as such, also lacked a coherent theory of what legal rights the corporation possesses. The utterly specious word games that drive this opinion simply confirm that Chief Justice Roberts has failed to articulate a plausible analytical framework for this important problem.[1]

I share Prof. Bainbridge's concern about the Supreme Court's silence on the issue, as I have discussed previously in a piece I published in the Harvard Business Law Review Online,

[1] Stephen Bainbridge, Schumpeter on Corporate Personhood, PROFESSORBAINBRIDGE.COM (Mar. 26, 2011), available at http://www.professorbainbridge.com/professorbainbridgecom/2011/03/schumpeter-on-corporate-personhood.html (last visited April 9, 2011).

Citizens United and the Nexus-Of-Contracts Presumption.[2] What follows is an excerpt from that piece, which I believe does a good job of laying the foundation for the project that I am discussing here.

> In Citizens United, the Supreme Court of the United States invalidated section 441(b) of the Federal Election Campaign Act of 1971 as unconstitutional. That section prohibited corporations (and unions) from financing "electioneering communications" (speech that expressly advocates the election or defeat of a candidate) within 30 days of a primary election. The five Justices in the majority rested their holding on the assertion that "Government may not suppress political speech on the basis of the speaker's corporate identity." In reaching this conclusion, the majority relied on a view of the corporation fundamentally as an "association of citizens."
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> Meanwhile, the view of the corporation advanced by Justice Stevens in dissent differed markedly from that of the majority. Where the majority saw an association of citizens, the dissent saw state-created entities that: (1) "differ from natural persons in fundamental ways"; (2) "have no consciences, no beliefs, no feelings, no thoughts, no desires"; and (3) "must engage the political process in instrumental terms if they are to maximize shareholder value." Of particular note, the dissent asserted that "corporations have been 'effectively delegated responsibility for ensuring society's economic welfare.'"
>
> These competing visions of the corporation roughly align with two divergent theories of the corporation: nexus-of-contracts theory for the majority and concession theory for the dissent. It is worth considering that adoption of these competing theories of the firm was in some meaningful way dispositive. By denying that there was anything more substantial to the corporation than an association of citizens, the majority could conclude that there was nothing about the corporation qua corporation that justified restricting corporate political speech solely on the basis of corporate identity. Conversely, the dissent's view of the corporation as "differ[ing] from natural persons in fundamental ways" arguably made it much easier to conclude that the challenged limitations on speech survived strict scrutiny.
>
> If the foregoing is correct, then it becomes quite puzzling that the majority remained silent as to the role of corporate theory and the dissent expressly disavowed any connection. Wrote Justice Stevens: "Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model." What might explain such apparent incongruence?
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> ….
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> I suggest [that it] may well be that corporate theory was dispositive in Citizens United, but that acknowledging such a role for corporate theory would have raised serious questions about the propriety of the Supreme Court

[2] HARVARD BUSINESS LAW REVIEW ONLINE (Jan. 18, 2011), available at http://www.hblr.org/2011/01/citizens-united-and-the-nexus-of-contracts-presumption/.

> proclaiming what the "true" nature of the corporation might be…. Rather, one might view the majority's effective adoption of the nexus-of-contracts theory as the adoption of a sort of presumption …. [B]y merely adopting a presumption, the Court was able to employ the benefits of the widely accepted theory without having to confront difficult questions of having exceeded its expertise by determining whether the theory was in fact correct.

Having identified a silent role for corporate theory in the Citizens United case, I now aim to review the key campaign finance cases leading up to Citizens United to see whether the same sort of divide as to the theory of the corporation can be gleaned from the relevant majority and dissenting opinions.

In Part II, I give a brief overview of the main theories of the corporation. In Part III, I provide a table setting forth some of the key campaign finance cases leading up to Citizens United, along with specific quotes from the various opinions therein that are at least suggestive of competing corporate theories. In Part IV, I discuss potential criticisms of the view I advance in this paper. In Part V, I provide concluding remarks.

II. A BRIEF OVERVIEW OF THEORIES OF THE CORPORATION[3]

Corporate theory has been described as offering "competing stories about how and why corporations originate and how they operate."[4] The theories can be presented both in positive (i.e., describing what the corporation is) and normative (i.e., describing what way of thinking about corporations leads to the most efficient results) terms.[5] In addition, the theories can be described in terms of their discrete labels as well as their competing themes. The most

[3] All of Part II is excerpted from *The Dodd-Frank Corporation: More Than a Nexus of Contracts*, 114 West Virginia L. Rev. ___ (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773662 .
[4] Thomas W. Joo, Narrative, Myth, and Morality in Corporate Legal Theory, 2009 MICH. ST. L. REV. 1091, 1091 (2009).
[5] Cf. Butler & Ribstein, THE CORPORATION AND THE CONSTITUTION ix (AEI) (rejecting arguments based on the sovereign's ability to regulate corporations because "this argument is simply a statement about current law, not a normative argument about what the law ought to be").

commonly discussed discrete theories of the corporation include:[6] (1) entity theory;[7] (2) concession theory;[8] (3) contract theory;[9] (4) nexus of contracts theory;[10] and, (5) process theory.[11] In terms of competing themes, David Millon has described three "dimensions" along which corporate theory has evolved:[12] (1) corporation as separate entity versus "a mere aggregation of natural individuals without a separate existence";[13] (2) corporation as "artificial creation of state law" versus "natural product of private initiative";[14] and, (3) corporation as public versus private construct.[15]

While all the ways of thinking about the corporation described above can be useful, for purposes of this Essay I will be focusing on the competing theories of concession and nexus-of-contracts. As Liam O'Melinn has pointed out, while "[n]ot all theorists use the language of contract and concession,"[16] the two "preeminent" theories of the corporation are "contract and concession."[17] However, I should note here that to the extent some would equate concession

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[6] See generally, Robert W. Hamilton & Richard A. Booth, CORPORATIONS: BLACK LETTER OUTLINES 327-32 (5th ed. West) (setting forth the theoretical foundations of corporate law).

[7] Id. at 327 ("A corporation may be most readily envisioned as an entity created for the purpose of conducting a business.").

[8] Id. at 328 ("A second theory is that a corporation is a grant or concession from the state.").

[9] Id. at 329 ("A third theory is that the charter of a corporation represents a contract (a) between the state and the corporation, or (b) between the corporation and its stockholders, or (c) among the stockholders.").

[10] Id. at 330 ("The nexus of contracts theory assumes that corporate managers obtain the requirements of the corporation for capital, labor, materials, and services through a series of contractual relationships.") (emphasis in original).

[11] Id. at 332 ("Scholars have also suggested that a corporation may be viewed as a process by which various inputs of capital, services, and raw materials are combined to produce desirable products.").

[12] See generally, David Millon, Theories of the Corporation, 1990 DUKE L.J. 201, 201.

[13] Id.

[14] Id.

[15] Id.

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

Id.

[16] Liam Seamus O'Melinn, Neither Contract nor Concession: The Public Personality of the Corporation, 74 Geo. Wash. L. Rev. 201, 201 n.3 (2006).

[17] Liam Seamus O'Melinn, Neither Contract nor Concession: The Public Personality of the Corporation, 74 Geo. Wash. L. Rev. 201, 201 (2006). Cf. id. at 258 (discussing "concession theory and . . . its nexus of contracts counterpart").

theory with the colonial special charter system of incorporation—I am employing a broader understanding of the theory.[18] While there was a time in our country's history when corporations were difficult to characterize as anything other than a concession from the sovereign because the charters necessary to create a corporation were granted on a case-by-case basis and often to serve some specific and limited pro-social goal,[19] the fact that we have since moved to an enabling act regime[20] does not change the fact that individuals remain unable to recreate the totality of the plethora of essential corporate attributes without the state's permission.[21] As Grant Hayden and Matthew Bodie have recently written: "One cannot contract to form a corporation…. The fact that th[e] permission [to incorporate] is readily granted … does not change the fact that permission is required."[22] Add to that the ubiquity of reserve clauses in corporate codes,[23] the existence of stakeholder statutes,[24] and relatively recent judicial pronouncements that "[c]orporations are creatures of the Legislature…. [i]t is appropriate, therefore, that the terms and

[18] Cf. Butler & Ribstein, THE CORPORATION AND THE CONSTITUTION ix (AEI) ("[Concession] theory had its origins in the early history of the corporation, when corporations were, in fact, created by special charter. The theory has no relevance today, when corporations are freely formed by making a simple filing under general corporation laws.").
[19] See Stefan J. Padfield, In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries, 10 FORDHAM J. CORP. & FIN. L. 79, 87 (2004) ("[I]n the colonial United States, the responsibility for granting charters fell to the legislature. These charters were initially granted primarily to further various public works projects and, like in England, were handed out on a case-by-case basis.").
[20] See, Hamilton & Booth, CORPORATIONS 329 ("The process of incorporation today involves only ministerial acts and no significant substantive decisions are made in this process by the state or agency that issues charters to corporations.").
[21] Cf. Padfield, Higher Standard, at 89 ("It is important to note here (and should be obvious upon reflection) that the State did not grant limited liability to shareholders or immortality to the corporate entity merely out of a benevolent desire solely to increase the wealth of shareholders. Rather, the State saw that its interests as sovereign, whether building specific pieces of infrastructure or promoting economic growth generally, could be furthered via the corporate form.").
[22] Hayden & Bodie, Unraveling of 'Nexus of Contracts' Theory at 4. Cf. id. ("[E]ven at the most basic of levels, the 'corporation as contract' claim is simply incorrect. Corporations are not creatures of contract.").
[23] Cf. Eric W. Orts, Beyond Shareholders: Interpreting Corporate Constituency Statutes, 61 GEO. WASH. L. REV. 14, 69 (1992). ("Advocates of Contract Clause protection for shareholders are aware of the 'reserve' clauses resulting from Dartmouth College, but they appear to underestimate the full import of these powers. States have 'reserved' the freedom … to 'impair' the rights of shareholders ….").
[24] Cf. id. at 48 ("Although most legal commentators greet them with a loud hiss, this Part concludes that constituency statutes are legitimate, constitutional, and legally enforceable.").

conditions of their existence be determined by that body,"[25] 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.[26]

Finally, I should note that I essentially equate nexus-of-contracts theory with a laissez-faire approach to corporate regulation. That is, I believe it is fair to characterize the majority of contractarian corporate law scholars as subscribing to the general belief that rational actors operating via the corporate form will benefit society most if they are left relatively free to compete in open markets.[27] This normative assertion has frequently been advanced by viewing the corporation as a contract that suffers primarily, if not solely, from agency problems in terms of maximizing utility—agency problem that are best solved by elevating shareholder wealth maximization as the primary directive of corporate directors. As Lynn Stout has recently written:

> Nobel-prize winner Milton Friedman (1970) argued in the pages of the New York Times Sunday magazine that because shareholders "own" the corporation, the only "social responsibility of business is to increase its profits." In more academic writings, Michael Jensen and William Meckling (1976) published their influential paper on the theory of firm, describing shareholders in a corporation as principals who hire corporate officers and directors to act as their agents. According to this thesis, corporate managers' only job was to maximize the wealth of the shareholders (the firm's so-called 'residual claimants') by every means possible short of violating the law. Directors and officers who pursued any other goal only reduced social wealth by increasing "agency costs."[28]

[25] Neary v. Miltronics Mfg. Services, Inc., 534 F. Supp. 2d 227, 231 (D.N.H. 2008).

[26] See BLACK'S LAW DICTIONARY (9th ed. 2009) ("straw man . . . A tenuous and exaggerated counterargument that an advocate makes for the sole purpose of disproving it.").

[27] Cf. Stefan J. Padfield, Another Corporate "Problem-Solution" Dance, BUSINESS LAW PROF BLOG (Jan. 9, 2011) (paraphrasing David G. Yosifon as asserting that "[a]ll thoughtful people agree corporations should serve a pro-social purpose").

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[28] Stout, Lynn A., New Thinking on 'Shareholder Primacy' 3 (February 18, 2011) (citing Friedman, Milton (1970), 'The Social Responsibility of Business Is to Increase Its Profits', New York Times Sunday Magazine, 13 September 1970, 32-33 and 122-26; Jensen, Michael C. and William H. Meckling (1976), 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure', Journal of Financial Economics 3 (4), 305-360)), available at http://ssrn.com/abstract=1763944 .

Meanwhile, I equate concession theory with a more regulatory view.[29] That is, I believe it is fair to characterize the majority of anti-contractarian corporate law scholars as subscribing to the general belief that if left unregulated, the amazing capital-accumulation device that is the corporation will amass so much power as to pose a real threat to society.[30] As I have written elsewhere, fear of the power of corporations is not new:

> Almost from the time of the birth of the modern corporation there have been many voices loudly proclaiming that the accumulation of power that the corporate vehicle promised posed a threat to the people. As Timothy Kuhner notes, "[t]hose of us concerned with the problem of corporations in politics can rest assured, we are in good company." These voices include U.S. presidents like Thomas Jefferson, who urged citizens to "crush in it's [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country"; Abraham Lincoln, who wrote that "corporations have been enthroned and an era of corruption in high places will follow," and predicted that "the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands, and the Republic is destroyed"; and Dwight D. Eisenhower, who warned us to "guard against the acquisition of unwarranted influence . . . by the military-industrial complex." President Rutherford B. Hayes went so far as to assert that "'[t]his is a government of the people, by the people and for the people no longer . . . It is a government of corporations, by corporations and for corporations.'" And, while perhaps not "good company" to some, Karl Marx was one of the early thinkers who "cautioned that the concentration of wealth in corporate hands would subjugate the law to private control."[31]

While I do not do so here, I believe it would be interesting to survey the articles that cite the various famous quotes generally associated with a fear of unbridled corporate power and see how often those quotes are cited approvingly by anti-contractarians as opposed to contractarians. My

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

[30] Cf. C. CARR, THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS 165-73 (1905) (describing the concession theory of corporate powers as a response to fears about threats of corporate power to the sovereignty of the King).

[31] Stefan Padfield, Finding State Action when Corporations Govern, 82 TEMP. L. REV. 703, 726-27 (2009) (citing [INSERT]).

expectation is that the results would support my belief that there is a meaningful connection between anti-contractarian corporate theory and fear of corporate power. [32]

III. THE ROLE OF CORPORATE THEORY IN THE SUPREME COURT'S CAMPAIGN FINANCE CASES

The tables that follow set forth language from the various opinions found in the primary cases relied upon by the Citizens United court.

Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876 (2010) (striking down regulation of corporate political speech).	
Nexus-of-Contracts Language	The majority relied on a view of the corporation fundamentally as an "association of citizens." See, e.g., Citizens United at 906–07 (asserting that the Court's prior ruling in Austin "permits the Government to ban the political speech of millions of associations of citizens"); id. at 908 (asserting that under § 441(b) "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in . . . political speech").
Concession Language	Where the majority saw an association of citizens, the dissent saw state-created entities that: (1) "differ from natural persons in fundamental ways"; (2) "have no consciences, no beliefs, no feelings, no thoughts, no desires"; and (3) "must engage the political process in instrumental terms if they are to maximize shareholder value." Of particular note, the dissent asserted that "corporations have been 'effectively delegated responsibility for ensuring society's economic welfare.'"

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

McConnell v. Federal Election Com'n, 540 U.S. 93 (2003) (upholding regulation of corporate political speech).	
Nexus-of-Contracts Language	Dissent: "In Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986), we held unconstitutional a state effort to compel corporate speech. 'The identity of the speaker,' we said, 'is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.'"
Concession Language	Majority: "[W]hether the state interest is compelling—is easily answered by our prior decisions regarding campaign finance regulation, which 'represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.''"

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (upholding regulation of corporate political speech).	
Nexus-of-Contracts Language	Dissent: "Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: _____."
Concession Language	Majority: "State law grants corporations special advantages-such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets-that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"

Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (MCFL) (striking down regulation of corporate political speech).	
Nexus-of-Contracts Language	Majority: • "Regulation of corporate political activity … has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." • "Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form."
Concession Language	Dissent: • "In light of the 'special advantages that the State confers on the corporate form,' we have considered these [anti-corruption and shareholder protection] dangers sufficient to justify restrictions on corporate political activity." • "NCPAC accordingly continued to recognize what had been, until today, an acceptable distinction, grounded in the judgment of the political branch, between political activity by corporate actors and that by organizations not benefiting from 'the corporate shield which the State [has] granted to corporations as a form of quid pro quo' for various regulations."

Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982) (NRWC) (upholding regulation of corporate political speech).	
Nexus-of-Contracts Language	n/a
Concession Language	Court: • "The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions. The second purpose … is to protect the individuals who have paid money into a corporation …. We agree … that these purposes are sufficient to justify the regulation at issue." • "In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." • "[T]he 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" • "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals."

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down regulation of corporate political speech).	
Nexus-of-Contracts Language	Majority: • "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." • "The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies, or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment." • "We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property." • "We know of no documentation of the notion that corporations are likely to share a monolithic view on an issue such as the adoption of a graduated personal income tax. Corporations, like individuals or groups, are not homogeneous. They range from great multi-national enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family."
Concession Language	Dissent: • "Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process." • "The State need not permit its own creation to consume it." • "Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate

	acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas." • "No basis whatsoever is offered by the Court for rejecting the conclusion reached by the court below in dismissing appellants' equal protection challenge that the state legislature could permissibly find on the basis of experience, which this Court lacks, that other activities and forms of association do not present problems of the same type or the same dimension." • "To find evidence of hostility toward corporations on the basis of a decision of a legislature to clarify its intent following judicial rulings interpreting the scope of a statute is to elevate corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." • "Corporations, as previously noted, are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society's resources are to be put." • "The common law was generally interpreted as prohibiting corporate political participation." • "The Court explicitly states that corporations may not enjoy all the political liberties of natural persons, although it fails to articulate the basis of its suggested distinction." • "Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law: '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 creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.'" • "A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere."

IV. CRITICISMS

1. Is it fair to equate "association of citizens" with the nexus-of-contracts theory of the corporation?

2. Would "forcing" the justices to expressly state their views as to the correct theory of the corporation make any difference in opinions like Citizens United?

V. CONCLUSION

[INSERT]